SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 28, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, McGuire, Acosta, JJ.

4931 Nussbaum Diamonds, LLC, Index 604038/06
Plaintiff-Appellant,

-against-

The Hanover Insurance Company,
Defendant-Respondent.

Clayman & Rosenberg, New York (Paul S. Hugel of counsel), for appellant.

Clausen Miller, P.C., New York (Don R. Sampen, of the State of Illinois Bar, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 13, 2008, which, insofar as appealed from, denied plaintiff's motion for summary judgment for full coverage under the subject insurance policy, affirmed, with costs.

Isaac Nussbaum, the principal of plaintiff Nussbaum Diamonds, LLC (Nussbaum), had a jeweler's block insurance policy issued by defendant The Hanover Insurance Company (Hanover), which he purchased on September 30, 1995. The policy covered Nussbaum's company against "all risks" of loss or damage to its merchandise for up to $4 million while in his store, subject to certain exclusions. Effective November 14, 2005, the parties

amended the policy to add an endorsement providing coverage for up to $500,000, subject to a $10,000 deductible, for merchandise carried out of the office by a jewelry salesman named Yoel Grun. The "Insuring Conditions" section of the amended Policy contains a number of exclusions, including the following:

> "(5) THIS POLICY INSURES AGAINST ALL RISKS OF LOSS OF OR DAMAGE TO THE ABOVE DESCRIBED PROPERTY ARISING FROM ANY CAUSE WHATSOEVER EXCEPT . . .:
>
> (M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory . . ."

On October 25, 2005, the condition (5)(M) exclusion was amended as follows:

> "It is understood and agreed that the Policy is extended to cover Mysterious Disappearance up to a limit of $250,000."

On the evening of November 28, 2005, Yoel Grun and Blair Grossbard left on a trip to sell diamonds for their employer, nonparty Espeka Fancy Diamonds (EFD). The two planned to make sales calls to EFD customers in Rochester, New York, and West Hartford, Connecticut. Grun rented a car and met Grossbard at EFD's offices. Grossbard collected the jewelry and separated it into two blue bags, one for each salesperson. These bags and Grun's computer bag were all placed in the back seat of the car.

Although Grun worked for EFD, he occasionally sold Nussbaum's diamonds while on EFD trips. Grun was paid commissions for sales of Nussbaum's merchandise. Prior to this trip, Grun told Nussbaum about his sales meetings in Rochester

and West Hartford, and he agreed to take some of Nussbaum's diamonds with him.

After leaving EFD's offices on the evening of November 28, Grun picked up a diamond ring and four loose diamonds from Nussbaum's office, signed for them, and placed them in a 6½ inch leather pouch. He clipped the pouch inside the waistband of his pants.

Grun and Grossbard then drove to Grossbard's apartment on the Upper East Side. On the way, Grun felt uncomfortable with the pouch in his waistband. He removed it and asked Grossbard to put it in his computer bag in the back seat. She refused, telling Grun that she was nauseous and did not want to turn around in a moving car. She handed the pouch back to Grun. He thought he remembered placing the pouch in the front right pocket of his pants.[1]

Between Nussbaum's offices and Rochester, Grun got out of the car four times. First, he pulled over on 82nd Street and Third Avenue, near Grossbard's apartment. While Grossbard went to get her things, Grun got out of the car and went into a nearby 7-11 store. He carried the two EFD bags with him, made a cup of coffee and bought some sandwiches. A surveillance video in the

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[1]A month after the trip, Grun testified that he remembered placing the pouch in his front right pants pocket. However, about five months later, he gave a more equivocal account. He testified that he *believed* that he put the pouch in his front right pocket, but he was not sure.

store showed that Grun left the EFD bags on the floor in front of the cash register and walked away on two occasions, once for approximately seven seconds and again for approximately ten seconds. After paying with a credit card that he put into his right pants pocket, Grun returned to the car. Grossbard then came downstairs with her husband. Grun got of the car again to greet Mr. Grossbard and they placed Mrs. Grossbard's luggage in the trunk of the car. Grun exited the car on two other occasions before reaching Rochester: once to change drivers several hours into the trip and a second time to use the bathroom and buy some items at a Fastrac gas station.

At about 3:00 a.m., Grun and Grossbard arrived at the Homeward Suites hotel. The two didn't like the way the hotel looked, and without getting out of the car they proceeded to a Hyatt in downtown Rochester. When Grun parked in the Hyatt parking lot, he realized that he was not carrying the Nussbaum diamonds. He got out of the car, checked his pockets, and asked Grossbard if she had seen the jewels. She said no, and Grun searched the car, checked all of his bags in the car and in the trunk, and asked Grossbard to do the same. Grun thought it likely that he had misplaced the diamonds when he stopped at the 7-11 in Manhattan, and Grossbard called the store to see if a leather pouch had been recovered. He also asked Grossbard to call her husband to ask him to look around their apartment and on

Third Avenue, where the car had been parked, to see if there was a leather pouch on the ground.

The two drove to a parking area near the Hyatt and discussed retracing their steps back to New York City. They also discussed possible locations where the diamonds could have been lost. They eventually decided that they were too exhausted to drive back to the city. They checked into the Hyatt, went to a room, and searched their bags again inside the hotel. It was now approximately 5:00 a.m.

At Grossbard's urging, Grun tried to get some sleep. At 9:00 a.m. on November 29th, Grun called Nussbaum and told him that he had lost the diamonds. Nussbaum instructed him to call the police and get a report. Grun attempted to do so. However, the Rochester police refused to issue a report because the pouch containing the jewelry had last been seen in New York City. The New York City police also refused to issue a report, contending that Rochester had jurisdiction.

On November 29, 2005, Nussbaum contacted Hanover about the lost diamonds. Hanover's claims adjuster conducted an investigation and determined that there was coverage under the policy, but that because the loss qualified as a "mysterious disappearance," the amount of the loss in excess of $250,000 was excluded. The adjuster also noted discrepancies between Grun's and Grossbard's accounts of the events. When Hanover failed to

pay, Nussbaum commenced this action, seeking $490,000 (the $500,000 policy limit less the $10,000 deductible), plus interest. Hanover answered, denied liability, and asserted nine affirmative defenses. Nussbaum then brought a motion for summary judgment for (1) the $240,000 defendant conceded was owed and (2) payment of the remaining $250,000. While the motion was pending, Hanover paid the $240,000, without interest, but opposed that portion of Nussbaum's motion that sought summary judgment for the additional $250,000. The motion court granted Nussbaum partial summary judgment for the $240,000, but denied the remainder of its motion, finding issues of fact as to how the loss occurred.

On appeal, Nussbaum argues that because it had an "all risks policy," upon a showing of a loss of covered property, it was Hanover's duty to establish that the loss constituted a "mysterious disappearance." Hanover counters that it met its burden on the motion, that it paid $250,000 less the $10,000 deductible, and that the "mysterious disappearance" exclusion bars recovery of any greater sum.

To obtain summary judgment, Nussbaum was required to demonstrate (1) the existence of a valid "all risks" policy; (2) an insurable interest in the subject of the policy; and (3) the fortuitous loss of covered property, i.e., the diamond ring and the four loose diamonds (*International Multifoods Corp. v Commercial Union Ins. Co.*, 309 F3d 76, 83 [2d Cir 2002]).

Nussbaum was not required to establish the cause of the loss of the jewelry in support of its claim (*Great N. Ins. Co. v Dayco Corp.*, 637 F Supp 765, 777 [SD NY 1986]; *see also In re Balfour MacLaine Int'l Ltd.*, 85 F3d 68, 77-78 [2d Cir 1996]; *Atlantic Lines Ltd. v American Motorists Ins. Co.*, 547 F2d 11, 13 [2d Cir 1976]).

The burden then shifted to Hanover to negate coverage based upon an enumerated exclusion in the policy, here, the "mysterious disappearance" exclusion. Hanover was required to establish "that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in [this] case" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]; *see Neuwirth v Blue Cross & Blue Shield of Greater N.Y., Blue Cross Assn.*, 62 NY2d 718 [1984]). Accordingly, to show that the "mysterious disappearance" exclusion applies in this case, Hanover was required to show that there was no plausible explanation for the loss of Nussbaum's diamonds. Factual issues regarding the events preceding the loss preclude such a finding at this stage in the litigation.

In *Maurice Goldman & Sons v Hanover Ins Co.*, (80 NY2d 986 [1992], *affg* 179 AD2d 388 [1992]) the Court of Appeals first addressed the application of the same "mysterious disappearance" exclusion invoked by Hanover here. The plaintiff in that case was on a business trip when he realized that a bag containing his

company's jewelry was missing. He filed a claim under an "all risks" policy with an identical "mysterious disappearance" exclusion, which was denied. Plaintiff brought an action, and the insurer moved for summary judgment. The motion was granted. On appeal, plaintiff argued that the "mysterious disappearance" clause was ambiguous, because it was susceptible to the interpretation of excluding only a loss discovered on taking inventory. Both this Court and the Court of Appeals disagreed, finding that each of the three enumerated casualties under the exclusion - unexplained loss, mysterious disappearance, or loss or shortage disclosed on taking inventory - constituted an independent basis for exclusion. However, in direct contrast to this case, the plaintiff in *Goldman conceded*, and the appellate courts held, that the loss was "mysterious," and thus outside the ambit of coverage based upon the exclusion (*id.* at 988).

A case with facts more similar to those presented here is *S. Bellara Diamond Corp. v First Specialty Ins. Corp.* (287 AD2d 368 [2001]). In *S. Bellara*, a package of diamonds disappeared from a jeweler's desk. The "all risks" insurer denied coverage, on the ground that the loss constituted a "mysterious disappearance." In opposition to the insurer's motion for summary judgment, the jeweler could only "surmise" that as the diamonds were wrapped in paper, he may have accidentally thrown them into the waste basket as he hurriedly cleaned off his desk before leaving for lunch.

This Court affirmed the denial of the insurer's motion for summary judgment, stating that the jeweler's explanation, "if believed by the trier of fact, could reasonably support an inference that the diamonds were accidentally thrown away" (*id.* at 369).

Similarly, in *Gurfein Bros v Hanover Ins. Co.* (248 AD2d 227 [1998]), plaintiff's diamonds disappeared from the trunk of a salesman's car sometime during a two day road trip from Memphis, Tennessee to Jackson, Mississippi. The salesman surmised that the diamonds could have been stolen from the trunk of his car when he pulled over on the highway to change a flat tire (*id.* at 227). However, the salesman did not see or hear anyone near his car as he was fixing the flat, and there was no direct evidence of theft. The motion court granted the insurer summary judgment based upon the "mysterious disappearance" exclusion, and this Court reversed. We held that circumstantial evidence of a theft was not "so illogical, implausible or speculative as to warrant summary judgment for the insurer" based upon the mysterious disappearance exclusion, and we reinstated the complaint (*id.* at 231).

Finally, in *Stella Jewelry Mfg., Inc. v Naviga Belgamar* (885 F Supp 84 [SD NY 1995]), the president of a jewelry company was collecting two bags of jewelry from a friend's house. He parked his car in the circular driveway, and placed the bag next to his

foot while he made room for it in the car's trunk. Approximately 10 seconds elapsed, during which time the man did not see or hear anything. He then bent down to pick up the bag, but it was gone. He made a claim with his insurer, under an "all risks" policy with a "mysterious disappearance" exclusion. The insurer invoked the exclusion on the ground that the loss was a "mystery" because the man did not see or hear anything during the 10 second interval in which the bag disappeared (*id.* at 85). The District Court granted the insured's motion for summary judgment, finding the exclusion inapplicable as a matter of law. It stated:

> "The facts as testified to by the only witness, Plaintiff's president, bespeak only of theft, albeit a mysterious theft with no evidence of a thief . . . There is no evidence from which one could deduce that the nylon bag had blown away or been lost in any other manner than by theft. Under those circumstances no reasonable jury could reach the conclusion that the loss occurred otherwise" (*id.* at 86).

In contrast to *Stella Jewelry*, here, as in *S. Bellara* and *Gurfein Bros*, there are issues of fact precluding a determination, at this juncture, whether the "mysterious disappearance exclusion" is applicable. There are a number of explanations proffered by plaintiff for the disappearance of the small leather pouch of diamonds. The trip took over six hours, and Grun got out of the car at least four times between Nussbaum's office and Rochester. It is uncontested that while he was in the car, Grun removed the jewels from his waistband, where they were clipped as he left Nussbaum's office. Grun believes

that he was carrying the jewels in his right pants pocket, which is also where cameras showed him putting the credit card used to purchase items at the 7-11. When Grun discovered that the diamonds were missing, his initial thought was that he might have misplaced them at the 7-11. While the surveillance cameras at the 7-11 do not specifically show the pouch falling from Grun's pocket, they do show that Grun was careless with the bags of EFD diamonds entrusted to him. The cameras show Grun leaving the EFD bags unattended on two occasions while in that store. It is also possible that the pouch somehow was stolen between New York City and Rochester, or that it fell to the ground when Grun and Grossbard switched drivers, or at the Fastrac bathroom or convenience store. Because questions as to the plausibility of plaintiff's explanations cannot be resolved on the existing record, we affirm the determination of the motion court to deny plaintiff's motion for summary judgment.

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

McGUIRE, J. (concurring)

I agree that Supreme Court correctly denied Nussbaum's motion for summary judgment, but my reasoning differs from the majority's.

Unlike *Stella Jewelry Mfg., Inc. v Naviga Belgamar* (885 F Supp 84, 86 [SD NY 1995]), this is not a case in which the facts asserted by the insured "bespeak only of theft, albeit a mysterious theft with no evidence of a thief." Although Grun got out of the car at least four times between Nussbaum's office and Rochester, there was no testimony that he in fact was in physical possession of the diamonds when he got out of the car. If Grun was not in physical possession of them, their disappearance would be "mysterious," especially given the evidence that he and Grossbard conducted a thorough search of the car and the bags in the car, and that Grun searched his pockets. With respect to the possibility that Grun had been in physical possession of the diamonds on these occasions, Grun surmised that they may have fallen out of his right pants pocket. His earlier statement that he "remembered" putting the diamonds in his pocket was undercut by his later, equivocal testimony. But even assuming that the diamonds were in his pocket, no plausible explanation was provided bearing on how they got out of his pocket. To be sure, the security cameras at the 7-11 showed him putting into his right pants pocket the credit card he used to purchase items. On

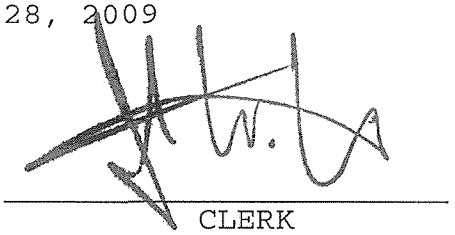
this record, however, it cannot be said that a reasonable jury could only conclude that the pouch fell out of his pocket when he took out his credit card, even putting aside that it is not clear that he put the credit card back in the same pocket from which he removed it. Moreover, although the security cameras show that Grun was not careful with the bags of jewels, the video certainly does not dispel the mystery as it does not show anyone touching the bags during the brief periods when Grun walked away from them. Although it is possible that the pouch somehow was stolen or somehow fell to the ground somewhere, these are mere speculative possibilities.

This is an odd case. Putting aside a theft by Grun himself, which would trigger a separate exclusion, one that Hanover did not rely on, it appears that there are only two possibilities: the diamonds were stolen from Grun or they fell from his pocket (or otherwise were lost). Although Nussbaum would be entitled to full indemnification if either of these two possibilities caused the loss, the uncertainties on this record regarding precisely what happened to them (i.e., whether they were so stolen or lost) preclude full indemnification. Rather, these uncertainties raise

a material issue of fact that precludes the conclusion that the "mysterious disappearance" exclusion is not applicable. A contrary conclusion would read that exclusion out of the policy.

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

ENTERED: JULY 28, 2009



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Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

167 1725 York Venture, Index 570327/06
Petitioner-Appellant,

-against-

Michael Block, et al.,
Respondents-Respondents.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant.

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel), for respondents.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered May 8, 2008, which reversed a judgment of the Civil Court, New York County (Peter M. Wendt, J.), entered on or about May 26, 2006, awarding possession of the subject apartment to petitioner landlord upon a finding that respondent tenants breached the parties' lease by harboring a dog without petitioner's written permission, and remanded the matter to Civil Court for further proceedings on the issue of the dog's vicious propensities, unanimously affirmed, without costs.

Petitioner owns unsold shares pertaining to 12 of the approximately 230 apartments in the subject residential cooperative building, including the shares to the apartment occupied by respondents as rent-stabilized tenants since 1977. Prior to the building's conversion to cooperative status in 1982, the staff was employed by ERT Management, Inc. (ERT). After the

conversion, the cooperative corporation retained Gumley-Haft, Inc. to manage the building and staff on its behalf. ERT remains the managing agent for the unsold sponsor units, although it no longer employs any building staff; Gumley-Haft bills ERT for the maintenance due on petitioner's apartments. An ERT employee testified that her company sometimes calls upon building staff to make repairs to its apartments and other times uses outside contractors. The same employee also admitted that petitioner "relies on building staff employed by Gumley Haft to provide information concerning what's going on in the building on occasion."

Respondents' lease incorporates by reference a provision prohibiting pets without the written permission of petitioner. Nevertheless, without petitioner's permission, respondents owned a Staffordshire terrier from 1995 until its death in April 2005. On June 20, 2005, respondents adopted a mixed breed pit bull, but did not request petitioner's permission. The doormen observed respondent Michael Block take the new dog out for a walk two or three times per day.

On October 8, 2005, the dog leapt at and clawed a tenant shareholder, causing a slight puncture wound to the arm. The tenant shareholder informed the doorman on duty as well as Gumley-Haft, which forwarded the message to ERT. On October 17, 2005, petitioner sent respondents a 10-day notice to cure,

followed by a 10-day notice of termination on November 2, and commenced the instant holdover proceeding on November 18. Thereafter, in December 2005, respondents' dog lunged at another tenant shareholder's dog, frightening two children, who jumped on a couch and began screaming.

Petitioner's failure to enforce the lease's "no-pet" clause with respect to respondents' first dog did not constitute a waiver of the provision as to their current pet (*see Park Holding Co. v Emicke*, 168 Misc 2d 133 [1996]).

Administrative Code of the City of New York § 27-2009.1(b), the "Pet Law," states:

> "Where a tenant . . . openly and notoriously for a period of three months . . . harbors . . . a household pet . . . and the owner or his or her agent has knowledge of this fact, and such owner fails within this three month period to commence a summary proceeding or action to enforce a lease provision prohibiting the keeping of such household pets, such lease provision shall be deemed waived."

In *Seward Park Hous. Corp. v Cohen* (287 AD2d 157 [2001]), this Court held that the subject building's maintenance personnel and porters, employees of the managing agent, and the security guards, employees of a company retained by the managing agent, were "agents" of the landlord and managing agent for purposes of the imputation of knowledge under the Pet Law statute. We rejected the landlord's narrow interpretation of the term "agent" and the landlord's reliance on the fact that neither it nor the

managing agent required the building personnel to report animals, which would have allowed landlord to turn a "blind eye" to a tenant's open and notorious harboring of a pet and would have thwarted the statute's remedial purposes (*see id.* at 165-168).

With respect to this appeal, it is undisputed that the doormen learned that respondents possessed a dog more than three months before petitioner commenced the holdover proceeding. Nevertheless, petitioner asserts that the doormen should not be deemed its "agents" because they are not employees of ERT, petitioner's managing agent, but rather are employees of Gumley-Haft, the cooperative's managing agent. However, pursuant to General Business Law § 352-eeee(3):

> "All dwelling units occupied by non-purchasing tenants shall be managed by the same managing agent who manages all other dwelling units in the building . . . Such managing agent shall provide to non-purchasing tenants all services and facilities required by law on a non-discriminatory basis."

In conformity with that statute, and the most efficient manner of running a building, one managing agent was designated to operate the entire building and oversee the staff, without discrimination toward the non-purchasing tenants.[1] The building employees serve

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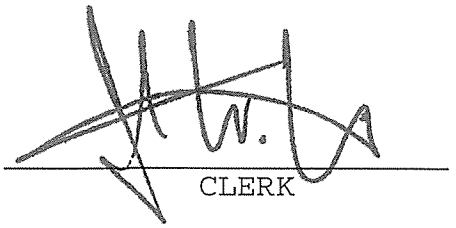
[1]The fact that petitioner chooses to also utilize a managing agent with respect to issues solely concerning the units it owns does not relieve the cooperative's managing agent of its obligations. As petitioner points out, the General Business Law does not preclude individual shareholders from hiring anyone to attend to matters within their own apartments.

all the residents, not only the shareholders. Even though petitioner does not directly employ the doormen, porters, and superintendent, those personnel serve the non-purchasing residents, just as they do the shareholder tenants. There is no evidence that the building employees or Gumley-Haft refuse to communicate with petitioner. On the contrary, an ERT employee conceded that petitioner relies on building staff for some information, and when the tenant who was attacked by respondents' dog made a complaint to the doormen and Gumley-Haft, that report was immediately forwarded to ERT. Thus, as in *Seward Park*, the building employees were the ones best situated to acquire knowledge of whether a tenant was harboring a pet, and petitioner should not be able to defeat the remedial purposes of the Pet Law by pointing to its own failure to instruct or request the employees to report the presence of animals.

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

ENTERED: JULY 28, 2009



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Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

169 In re The State of New York, Index 30028/08
Petitioner-Appellant,

-against-

F. E.,
Respondent-Respondent.

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

Marvin Bernstein, New York (Diane Goldstein Temkin of counsel), for respondent.

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about November 17, 2008, which granted respondent's motion to dismiss the State's petition for civil management under Mental Hygiene Law article 10, unanimously affirmed, without costs.

Respondent pleaded guilty to sexual abuse in the first degree (Penal Law § 130.65) and was sentenced to a negotiated determinate term of five years' imprisonment. Because the court failed to impose a period of postrelease supervision (PRS) as required by Penal Law § 70.45, the Department of Correctional Services (DOCS), while respondent was incarcerated, administratively added five years of PRS to the judicially pronounced sentence. Respondent served his five-year term and

was released from prison, but subsequently pleaded guilty to failing to register and verify his address as a sex offender, a violation of Correction Law § 168-f and a class A misdemeanor, and was sentenced to 90 days in jail. Because of that conviction and sentence, respondent's PRS was revoked and he was returned to prison for two years. On the conditional release date of this two-year sentence, rather than being released, respondent was placed in the custody of the New York State Office of Mental Health (OMH) and admitted to a OMH facility pursuant to a commitment procedure in Mental Hygiene Law article 9 that, at or about the same time, was found to be improper by the Court of Appeals (*see State of N.Y. ex rel. Harkavy v Consilvio*, 7 NY3d 607 [2006]). Thereafter, pursuant to Mental Hygiene Law article 10 (Sex Offender Management and Treatment Act, L 2007, ch 7), enacted shortly after respondent's November 2006 transfer to OMH (*see generally State of N.Y. ex rel. Harkavy v Consilvio*, 8 NY3d 645 [2007]), the State filed a sex offender civil management petition against respondent alleging, inter alia, that respondent was a "detained sex offender" under section 10.03(g)(5), in that he had been in the custody of an "agency with jurisdiction," namely OMH, with respect to a sex offense of which he had been convicted, and was, after September 1, 2005, a patient in a hospital operated by OMH who had been admitted directly to that hospital pursuant to article 9. Under section 10.03(a), an

"agency with jurisdiction" is defined as "that agency which, during the period in question, would be the agency responsible for supervising or releasing [a] person." While it is true that respondent falls within the literal definition of a "detained sex offender" under section 10.03(g)(5), we reject petitioner's argument that section 10.03(g)(5) applies to all sex offenders improperly committed under article 9 no matter the nature of any other irregularity or unlawfulness involved in the commitment, including those, like respondent, who had been improperly detained by virtue of an unlawful, administratively imposed period of PRS. The proceeding was properly dismissed because, DOCS' administrative imposition of PRS having been outside its jurisdiction and therefore null from its inception (*cf. Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358, 362 [2008]), respondent was not in DOCS' lawful custody at the time of his transfer to OMH, and thus could not be lawfully transferred by DOCS to OMH. OMH, therefore, was not an "agency with jurisdiction" "during [any] period in question." Under the statutory scheme, given no "agency with jurisdiction," there can be no "detained sex offender" status (*see People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 59 AD3d

921 [2009]; *Matter of State of New York v Randy M.*, 57 AD3d 1157, 1159 [2008], *lv denied* 11 NY3d 921 [2009]).

M-1167 - *In re State of New York v F.E.*

Motion seeking to amend caption granted.

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

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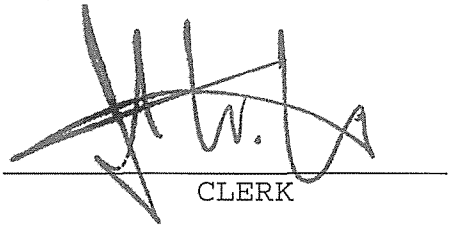

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Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

173 Darrell Felix, Index 24031/05
Plaintiff-Appellant,

-against-

Sears, Roebuck and Co.,
Defendant-Respondent.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for appellant.

Lynch Rowin LLP, New York (Patrick J. Comerford of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about January 10, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

This personal injury action arises from a slip and fall that occurred in defendant's store on July 7, 2005 at about 6:00 P.M. Plaintiff testified at his deposition that he and his wife were shopping in the housewares department when he slipped on what he described as an "oily" substance that "had like a detergent smell in it." He recounted that the substance was "clear . . . like a water solution." After he fell, he noticed a "wet floor sign" on the ground, about eight or nine feet from where he landed.

Plaintiff's wife gave consistent deposition testimony about the substance on which her husband slipped, saying that it "looked like grease, oil, some kind of oil with a [strong

detergent] smell . . . and also water around" it. She remembered seeing two signs on the floor, both warning that the floor was wet. She also testified that a cashier came to her husband's assistance after he fell and that the cashier gave him her contact information, but he inadvertently threw it away.

Defendant moved for summary judgment, arguing that there was no evidence that it created, or had actual or constructive notice of, a hazardous condition at the location of plaintiff's accident at the date and time in question. Defendant pointed to the absence of evidence as to how long the alleged hazardous substance had been on the ground or where it originated. The defense produced deposition testimony and an affidavit by Shawn Sexton, the Sears loss prevention manger at the White Plains store where plaintiff fell, and an affidavit from Jamal Evans, the district loss prevention manager for several Sears locations, including the White Plains store. Both explained that three janitors regularly cleaned the floors each morning at 7:00 A.M., using a professional floor cleaner that did not leave any residue. However, defendant's loss prevention manager admitted that it was store policy to put warning signs at the site of any spill.

In the circumstances, the presence of at least one warning sign, and possibly two, was sufficient evidence to raise an issue of fact whether defendant had actual notice of the hazardous

condition that caused plaintiff to fall (*Hilsman v Sarwil Assoc. L.P.*, 13 AD3d 692, 695 [2004]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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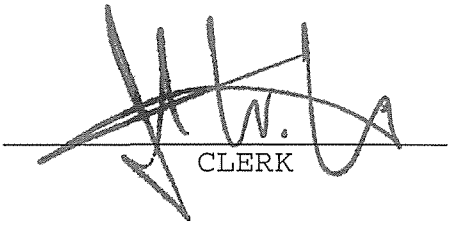

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Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4469 Juan D. Reyes, M.D., Index 24634/03
Plaintiff-Respondent,

-against-

Rafael Sequeira, M.D., et al.,
Defendants-Appellants,

424 East 138th Street LLC,
Defendant.

Mark S. Friedlander, New York, for appellants.

Davidoff Malito & Hutcher LLP, New York (Ricardo E. Oquendo of counsel), for respondent.

Appeal from order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered on or about April 17, 2008, which determined the market value of two properties and directed closings thereon, dismissed, without costs.

In 1971 plaintiff Juan Reyes, M.D., defendant Rafael Sequeira, M.D., and a nonparty physician formed a closely held corporation, SAR. The following year SAR purchased a parcel of land in the Bronx. Plaintiff and defendant then bought out the nonparty's one-third interest in SAR, giving plaintiff and defendant each a 50% interest in it. In 1976 plaintiff and defendant formed another closely held corporation, 91 Graham Avenue Realty Corporation, which purchased a parcel of land in Brooklyn. In 1977 the New York State Department of State dissolved SAR because it had failed to pay franchise taxes; 91

Graham was dissolved in 1980 for the same reason.

In September 2003 plaintiff commenced this action against defendant and the two dissolved corporations asserting causes of action to recover damages for fraud, breach of fiduciary duty and under Business Corporation Law § 720. Plaintiff also seeks an accounting from defendant regarding the corporations' assets and access to the corporations' records. The gravamen of the action is that defendant attempted to sell both the Bronx and Brooklyn parcels without plaintiff's knowledge or consent; defendant transferred 91 Graham's checking and savings accounts to a different bank and removed plaintiff's name as an authorized signatory on transactions involving those accounts; defendant refused to provide plaintiff with the corporations' records; and defendant formed a new corporate entity in 2003, SAR 2003, without consulting plaintiff. Defendant answered the action and asserted counterclaims seeking (1) damages for breach of fiduciary duty and under Business Corporation Law §§ 722, 723 and 724, (2) declarations that defendant owned two thirds of the shares of SAR because plaintiff agreed to transfer one sixth of his interest in that corporation to defendant if he managed the Bronx parcel, and that a contract of sale defendant executed on behalf of SAR regarding the Bronx parcel was valid, and (3) judicial supervision of the winding up of the affairs of SAR pursuant to Business Corporation Law § 1008.

In March 2004 defendant commenced a proceeding pursuant to article 10 of the Business Corporation Law in Supreme Court, Kings County, to wind up the affairs of 91 Graham. Defendant sought permission to sell the Brooklyn parcel and a declaration that he owns two thirds of the shares of 91 Graham and is entitled to two thirds of the net proceeds of the sale of the parcel. Defendant also sought damages against plaintiff for breach of fiduciary duty and under Business Corporation Law § 720. This proceeding was later consolidated with the Bronx action by an order of Supreme Court, Bronx County.

On January 29, 2007, plaintiff and defendant entered into a stipulation of settlement on the record before Supreme Court. Pursuant to the stipulation

> "2. The parties agree that *two court order[ed]* appraisals are to be conducted to determine the present fair market value of each property[,] the Bronx property and the Brooklyn property.
>
> "The parties further agree that the value of the combined properties for purposes of settling this matter[] shall be determined by the Court *based upon an average of the two appraisals* performed on each of the properties.
>
> . . .
>
> "4. Upon the Court's determination of the settlement value of both p[roperties], the parties agree that the defendant shall be entitled to 55% net of the appraised value of both properties. The plaintiff shall be entitled to 45% of the appraised value of both properties.
>
> . . .

> "9. The parties agree that a more formal written stipulation of settlement incorporating the settlement entered into this Court today shall be made within 10 days of the return of the report[s] of the two appraisers. The objective being settling all other collateral issues that are the subject of this matter before the Court.
>
> . . .
>
> "It is further understood and agreed by and between the above captioned parties and the respective counsels that the formal stipulation referred to above[] shall in no way modify or alter or amend the stipulation which is presently being dictated on the record for the Court on this date" (emphasis added).

The stipulation of settlement also contained provisions requiring plaintiff to assume all of the outstanding liabilities concerning the parcels. The parties apparently intended that plaintiff would pay defendant 55% of the net appraised value of both parcels and, in consideration for that payment and plaintiff's assumption of responsibility for the outstanding liabilities concerning the parcels, defendant would assign his interest in the parcels to plaintiff, giving plaintiff sole ownership of both parcels. However, no provision requiring defendant to assign his interest in the parcels to plaintiff was included in the stipulation of settlement.

Supreme Court requested appraisals for both parcels from Skyline Appraisals Inc. and East Coast Appraisals, and the appraisals were performed. While neither party objected to the appraisals performed by Skyline, defendant sent a letter to Supreme Court objecting to the appraisal performed by East Coast.

Defendant was concerned that the East Coast appraisal was inaccurate and greatly undervalued the parcels. Defendant requested a conference between the parties and the court to "resolve" issues relating to the East Coast appraisal; no motion was made by either party for any relief.

On August 7, 2007, Supreme Court held a conference with the parties to discuss the appraisals. After the matter was discussed off the record, the court went on the record, stating:

> "We came together sometime ago and the parties stipulated to an agreement to resolve this matter, and pursuant to the stipulation, the Court would find two appraisers who would do appraisals of both the Bronx and Brooklyn properties.
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> "The appraisals have been done, but at least one of the parties is unhappy with the result of the appraisal done by . . . East Coast Appraisals, and the Court will give the benefit of the doubt based on the arguments made, and I'll select another appraiser from Brooklyn to again appraise the property in both boroughs.
>
> "I'm going to call the administrative judge in Brooklyn and get the names of two Brooklyn judges who handle cases where appraisals might be used and ask for each of them to give me the names of an appraiser, and I'll randomly select one of the appraisers to do another appraisal.
>
> "The parties will be responsible for paying, again, for the cost of the appraisers. I want the parties to know, both parties, but in particular, defendants, and I say this because the plaintiff[] [is] willing to accept the average as is. The agreement in the stipulation is to accept an average of the appraisals.
>
> "So I want to point out to defendants . . . that if after I seek another appraiser, if the amount of the appraisal comes out at or near what the East Coast

> appraiser came up with, then you'll be bound by that appraisal, everybody will be bound, but I can't continue to go over and over and over getting appraiser after appraiser.
>
> "I'll get one appraiser again and it will be the last time, and whatever the amount comes up with [*sic*], all parties will be bound by it, okay?
>
> "Is there anything else?
>
> "[Plaintiff's counsel]: No, your honor.
>
> "[Defendant's counsel]: No, your honor."

Although, as the court noted, plaintiff was willing to accept the East Coast appraisal, it also is clear that plaintiff did not object to the selection of a third appraiser. To the contrary, plaintiff acquiesced in defendant's request that another appraisal be performed.

Following the August 7 conference, the court requested that the third appraisal be performed by Jacob Gold Realty. The Jacob Gold Realty appraisal valued both the Bronx and Brooklyn parcels higher than the appraisals from Skyline and East Coast. Plaintiff viewed the Jacob Gold appraisal as unreasonably high, but sought no relief from the court with respect to it.

Without the prompting of a motion, Supreme Court determined the value of the parcels. The court noted that, based on the three appraisals, it had

> "three possible methods of determining the market value of each property. One option is to average out the three appraised market values of each property. The second option is to discard the lowest appraised market value for each property, as provided by East Coast

> . . ., and to then average out the two remaining appraised market values for each property as provided by Skyline . . . and Jacob Gold . . . The third option is to discard both the lowest appraised market values, as provided by East Coast . . ., and the highest appraised market values, as provided by Jacob Gold . . ., and thus to rely exclusively upon the middle appraised market values for each property, as provided by Skyline."

The court determined that it would average the values of all three appraisals for both parcels. The court stated that

> "while defendant has qualms about the relatively low assessment market values provided by East Coast . . . viz-a-viz those provided by Skyline . . ., the Court, in good conscience, cannot summarily jettison East Coast's appraisals. Indeed, the appraised evaluations were supported by more than East Coast's bald expression of values and East Coast provided the supporting data as to the method by which it arrived at its conclusion and the factors which entered into its judgment. The preponderance of its comparable properties were located in immediate areas and were representative of the same residential market as the property in question, both in size and usage. Under the circumstances, East Coast's assessments are credible and entitled to be given probative weight equal to the other two appraisals of the Bronx and Brooklyn properties."

The court did not discuss the terms of the stipulation of settlement that required the court to determine the value of the properties by averaging *two* appraisals, and did not explain how its decision to average the three appraisals was consonant with the terms of stipulation of settlement. Nor did the court explain why it believed that one of the valuation methods was to discard the lowest and highest appraisals, a method that would entail no averaging. This appeal by defendant ensued.

Prior to oral argument on this appeal, defendant moved to vacate the stipulations of settlement -- both defendant and the court that heard and decided that motion treated the court's August 7, 2007 on-the-record statements as a stipulation; plaintiff, however, asserts that the court gave directives to which the parties did not stipulate. After oral argument of the appeal, Supreme Court granted the motion to vacate. The court concluded that no binding stipulations existed, and stated that the parties were free to conduct disclosure and file a note of issue when the matter was ready for trial. Thus, although the order appears not to have expressly vacated the order on appeal determining the value of the properties, it implicitly does so (*see generally Banker v Banker*, 56 AD3d 1105, 1107 [2008]; *Savino v "ABC Corp.,"* 44 AD3d 1026, 1027 [2007]; *Matter of Jefferson County Dept. of Social Servs. v Mark L.O.*, 12 AD3d 1037, 1037-1038 [2004], *lv denied* 4 NY3d 794 [2005]). Moreover, of course, the order on appeal depends entirely on the existence and validity of the stipulations.

Regardless of whether Supreme Court correctly vacated the stipulations that are the subject of this appeal, the stipulations have been vacated and this appeal is moot because the rights of the parties cannot be affected by a determination of this appeal (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; *see Matter of Feustel v Rosenblum*, 6 NY3d 885 [2006]

["Appeal taken as of right from the Appellate Division judgment . . . and motion for leave to appeal from said judgment . . . dismissed as moot upon the ground that the judgment of the Appellate Division has been vacated by a subsequent order of that Court"]; *Matter of Rodriguez v Johnson*, 45 AD3d 279 [2007], *lv denied* 10 NY3d 705 [2008] ["Petitioner's appeal is moot because Supreme Court vacated the judgment on appeal"]; *Fidata Trust Co. Mass. v Leahy Bus. Archives*, 187 AD2d 270, 271 [1992] ["The order on appeal was subsequently vacated and thus rendered moot"]; *see also Perez v Morse Diesel Intl.*, 10 AD3d 497 [2004]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5517:1, at 208 [1995] ["If the disposition of [a] motion [to reargue, renew or vacate an order] does substantially affect the original order . . . it may have some impact on the appeal. If it alters the order in such a way as to remove the grievance that accounts for the appeal, it should abate the appeal"]). Because the appeal has been rendered moot we cannot and do not pass on the issues presented (*see Hearst Corp.*, 50 NY2d at 713-714 ["It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal. This 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"]).

The dissent asserts that "by ruling that the intervening order 'implicitly' vacates the order on appeal, [we] thereby pass[] on a substantive issue" and "render[] an advisory opinion construing both the status of the order appealed from and [the] effect of an order not even before us." As is obvious from our decision, we pass on no substantive issues relating to the rights of the parties. Equally as obvious, we are not "rendering an advisory opinion construing both the status of the order appealed from and [the] effect of an order not even before us." Rather, we simply conclude that the order on appeal is moot (and, as discussed below, nonappealable) and therefore the appeal must be dismissed. Of course, we first conclude that the order vacating the stipulations implicitly vacates the order on appeal. But that conclusion merely reflects the exercise of our jurisdiction to determine our jurisdiction (*see United States v Mine Workers*, 330 US 258, 291 [1947]).

The dissent states that by moving to vacate the stipulations, defendants "unilaterally prevent[ed] this Court

from deciding whether the motion court erred in vacating what appears to be a valid agreement between the parties." In the first place, however, defendants took no "unilateral" action. Defendants made a motion on notice to vacate the stipulations, a motion Supreme Court granted. Second, this Court is not precluded from determining whether the stipulations are valid. To the contrary, we may determine that precise issue should plaintiff perfect his appeal from the order vacating the stipulations.

The dissent posits that

> "vacating the stipulation[s] does not invalidate the order on appeal, which is not dependent on the parties' agreement but rests on an independent statutory basis.
>
> "The setting of a fair price under Business Corporation Law § 623 is a matter entrusted to Supreme Court's discretion, which encompasses the acceptance or rejection of expert opinions. Thus, Supreme Court's decision to regard all three appraisals as reasonable assessments of the value of the properties, based on the value of comparable properties in the vicinity of similar size and usage, and to give probative weight to each was well within the exercise of judicial discretion. In short, the validity of the parties' agreement is immaterial to the court's power to determine the value of the subject properties under the Business Corporation Law" (internal citations omitted).

Neither of the parties cited (let alone discussed) Business Corporation Law § 623, and neither party argued that "the validity of the parties' agreement is immaterial to the court's power to determine the value of the subject properties." To the contrary, both parties regard the validity and interpretation of

the "agreement," i.e., the January 29, 2007 stipulation, as essential to the determination of their rights. The dissent does not discuss how its reliance on Business Corporation Law § 623 is consistent with "orderly appellate procedure" or its recognition that "[p]arties are normally permitted to chart their own procedural course before the courts."

The appeal should be dismissed for another reason -- it is from a sua sponte order from which no appeal lies (*see Sholes v Meagher*, 100 NY2d 333 [2003]; *Person v Einhorn*, 44 AD3d 363 [2007]; *Unanue v Rennert*, 39 AD3d 289 [2007]; *Diaz v New York Mercantile Exch.*, 1 AD3d 242 [2003]). In *Sholes* the Court of Appeals addressed the issue of the appealability of sua sponte orders. There, an attorney was sanctioned by Supreme Court for engaging in frivolous conduct in the course of a personal injury case. From the bench the trial court gave the parties a briefing schedule, requiring the attorney to submit an affidavit explaining why she should not be sanctioned for her conduct and directing her adversary to submit an affidavit detailing his costs and expenditures at trial. After both sides submitted papers, the trial court ordered the attorney to pay her adversary approximately $14,000. The attorney appealed to the Second Department, which dismissed the appeal because the order imposing sanctions did not decide a motion made on notice (295 AD2d 593 [2002]).

The Court of Appeals granted leave and concluded that the Second Department had correctly dismissed the appeal. The Court of Appeals stated that, "[w]ith limited exceptions, an appeal may be taken to the Appellate Division as of right from an order deciding a motion made upon notice when -- among other possibilities -- the order affects a substantial right. There is, however, no right of appeal from an ex parte order, including an order entered sua sponte" (100 NY2d at 335 [internal citations omitted]). The Court also stated "[t]hat an order made sua sponte is not an order deciding a motion on notice is apparent from various CPLR provisions, including the definition of motion (*see* CPLR 2211) and the provision for dismissal for failure to prosecute, which distinguishes between a 'court initiative' and a party's 'motion' (*see* CPLR 3216)" (*id.* at 335 n 2). While the trial court had created a procedure to ensure that the parties had an opportunity to be heard before the court acted, the Court stressed that

> "the submissions ordered sua sponte by the trial court were not made pursuant to a motion on notice as contemplated by CPLR 5701(a)(2). While the procedure in this particular case may well have produced a record sufficient for appellate review, there is no guarantee that the same would be true in the next case. Moreover, the amount of notice will vary from case to case, and its sufficiency may often be open to debate. Adherence to the procedure specified by CPLR 5701(a) uniformly provides for certainty, while at the same time affording the parties a right of review by the Appellate Division. We are therefore unwilling to overwrite that statute" (*id.* at 336).

As is evident from the briefs, the record and the attorneys' statements at oral argument, the order determining the value of the parcels was not the product of a motion made on notice. Rather, that order was issued sua sponte and therefore is not appealable as of right (*id.*; *Person*, *supra*; *Unanue*, *supra*; *Diaz*, *supra*).

Defendant's letter to the court requesting a telephone conference to resolve issues related to the East Coast appraisal was not a motion to value the properties. It is beyond cavil that a motion is a request for an order (CPLR 2211) and defendant's letter contained no request for an order. Thus, the letter plainly could not serve as a notice of motion. Additionally, and unsurprisingly since defendant was not seeking an order but rather a telephone conference, the letter did not specify a return date and was not accompanied by any supporting papers (CPLR 2214[a] ["A notice of motion *shall* specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor"] [emphasis added]). Because the letter neither contained a request for an order nor complied with CPLR 2214, it could not have served as a notice of motion (*see Rosen v Rosen*, 38 AD2d 881 [1972]). The absence of a motion is not a technical defect that can be overlooked; under *Sholes* a motion is required to generate an order that is appealable as of right.

Neither of the parties has argued that this action should be treated as a summary proceeding under Business Corporation Law § 1008. Although defendant asserted a counterclaim in this action for judicial supervision of the winding up of the affairs of SAR pursuant to Business Corporation Law § 1008, plaintiff asserted causes of against defendant to recover damages for fraud, breach of fiduciary duty and under Business Corporation Law § 720, claims that need to be adjudicated in a plenary action, and both parties have litigated this matter as a plenary action, not a special proceeding. Nonetheless, despite the absence of a motion requesting the court to do so, the dissent would treat the action as a special proceeding and sanction Supreme Court's determination of the parties' substantive rights. Here, too, the dissent does not explain how its reliance on Business Corporation Law § 1008 is consistent with "orderly appellate procedure" or its recognition that "[p]arties are normally permitted to chart their own procedural course before the courts."

We note that the dissent assumes erroneously that "both parties were afforded notice and opportunity to be heard on the use to be made of the disputed appraisal." To the contrary, the parties had no opportunity to make arguments or submit evidence regarding either the valuation of the properties or the validity of the stipulations before Supreme Court valued the properties. Thus, although we have the power to grant leave to appeal from an

order that is not appealable as of right (CPLR 5701[c]), we decline to do so.

Although Supreme Court's order vacating the stipulations is not before us and the parties have not addressed its validity, the dissent nonetheless writes that the order is "of highly questionable validity," and that there is a "distinct probability that the . . . order is a nullity." Thus, the dissent writes "[a]s to the merits of Justice Wright's order, merely because a stipulation incorporating the essential terms of the parties' agreement recites that it contemplates the execution of a more formal document does not thereby render the agreement unenforceable unless it expresses the parties' clear intent not to be bound until the contemplated formal document has been executed." Given these statements, we think it prudent to underscore that we express *no* opinion on the subject. The dissent assumes that (1) an appeal from the order vacating the stipulations will be perfected, (2) this Court will vacate the order and (3) vacatur of the order will revive the moot order

that is now before us.[1] Even if all these assumptions were made, the order before us would still be a sua sponte order from which no appeal lies.

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

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[1]Although the dissent asserts that it is "confin[ing] [its] discussion to the grounds for dismissal propounded by the majority," it nonetheless goes on to address the validity of the order vacating the stipulations.

TOM, J.P. (dissenting)

Based on a postargument order of highly questionable validity, the majority purports to dismiss this appeal on the ground that it is moot. Disregarded is the distinct probability that the intervening order is a nullity because (1) it conflicts with the order appealed from, which remains extant, (2) it was rendered while the instant appeal, involving identical issues, was pending before this Court without any motion by defendants to withdraw their appeal and (3) there does not appear to have been any procedural basis for entertaining a motion affecting the order on appeal. As an additional basis for dismissal, the majority holds that defendants have sought review of a nonappealable order.

While I perceive no deficiency in the order appealed from and would be inclined to simply affirm it, extensive discourse on considerations of comity and orderly appellate procedure appropriately awaits plaintiff's appeal from the intervening order. Thus, I confine my discussion to the grounds for dismissal propounded by the majority. I observe only that the intervening order provides an insubstantial basis for depriving respondent plaintiff of the resolution of this long-standing conflict provided by the order appealed from. Even assuming that the intervening order is ultimately found to be valid, issues raised by defendants' appeal remain to be resolved. Accordingly,

I dissent and would hold this appeal in abeyance for consolidation with plaintiff's appeal from the intervening order.

This action involves the winding up of two corporations formed to hold title to two properties from which the individual parties conducted a medical practice. Defendant S.A.R. Bookkeeping and Billing Corporation is the owner of the premises known as 424 East 138th Street in Bronx County, and defendant 91 Graham Avenue Realty Corporation is the owner of 91 Graham Avenue in Kings County. Both corporations were dissolved for failure to pay franchise taxes.

Defendant Sequeira entered into a contract to transfer the Bronx property to defendant 424 East 138th Street LLC, prompting plaintiff to obtain an injunction barring its sale. Defendants thereupon brought a petition seeking dissolution of 91 Graham Avenue Realty Corporation under Business Corporation Law § 1008. Because plaintiff did not consent to the sale of the corporate asset, he has "the right to receive payment for his shares" by way of a Business Corporation Law § 623 proceeding (Business Corporation Law § 1005[a][3][A]; *e.g. Matter of Cawley v SCM Corp.*, 72 NY2d 465, 470-471 [1988]). In the order on appeal, Supreme Court (Dianne T. Renwick, J.) held that a stipulation entered into by the parties, and subsequently modified by them, governs the valuation and ownership of the

properties.[1] Although the parties had originally stipulated that the value would be determined by averaging two appraisals, when defendants objected to the outcome, the parties agreed that a third appraisal would be obtained. The court then used the average of all three appraisals to set the value of the properties and directed the parties to consummate the agreed-upon transfer of ownership.

Defendants brought this appeal contending, as they did before Supreme Court, that because the stipulation originally provided for the averaging of only two appraisals, the court erred in averaging all three appraisals. Thus, presented for this Court's review are whether the stipulation (as modified) is binding, whether the averaging of the three appraisals comports with the parties' agreement and, if not, whether the determination of the value of the subject properties was nevertheless a valid exercise of the powers conferred by Business Corporation Law § 1008.

While their appeal from the order was pending and in the absence of any application to withdraw it, defendants moved in Supreme Court to vacate the stipulation. Because Justice Renwick had been elevated to this Court, the matter was assigned to another justice (CPLR 2221[a]). Notice of defendants' motion and

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[1] Shortly after issuing the order, Justice Renwick was appointed to this Court.

the ensuing order was received by this Court approximately one month after the appeal was argued in the form of a letter from defendants' attorney, who informed us that "upon an application in the underlying action to the trial court after the instant appeal was filed, the trial court issued a decision and order vacating the two stipulations." The letter noted that plaintiff had filed a notice of appeal from that order.

The short form order sheet, enclosed with the letter, is dated several weeks after the appeal was argued and annotated "motion vacate order." The enclosed decision and order (Geoffrey D. Wright, J.) does not vacate the order on appeal, but instead provides that "the motion to set aside the failed stipulation is granted" on the ground that "there was an agreement to agree, rather than an agreement."

The majority's position that this order moots the instant appeal does not withstand scrutiny. As this Court has noted, "it is well settled that unless there is an infirmity of jurisdiction of the subject matter so as to render it void, an order or judgment of a court is binding on all persons subject to its mandate until vacated or set aside on appeal" (*Matter of Murray v Goord*, 298 AD2d 94, 97 [2002], *affd* 1 NY3d 29 [2003]). Justice Wright's order does not purport to vacate the order under review but merely sets aside what is characterized as "the failed stipulation." Meanwhile, the justices in the majority correctly

state that because they deem the appeal to be moot, "we cannot and do not pass on the issues presented." They then abrogate this stricture by ruling that the intervening order "implicitly" vacates the order on appeal, thereby passing on a substantive issue they purport not to reach and rendering an advisory opinion construing both the status of the order appealed from and the scope and effect of an order not even before us. Moreover, merely vacating the stipulation does not invalidate the order on appeal, which is not dependent on the parties' agreement but rests on an independent statutory basis.

The setting of a fair price under Business Corporation Law § 623 is a matter entrusted to Supreme Court's discretion (*Matter of Cawley*, 72 NY2d at 470), which encompasses the acceptance or rejection of expert opinions (*Matter of American Premier Underwriters, Inc. v Abelow*, 54 AD3d 638 [2008]). Thus, Supreme Court's decision to regard all three appraisals as reasonable assessments of the value of the properties, based on the value of comparable properties in the vicinity of similar size and usage, and to give probative weight to each was well within the exercise of judicial discretion. In short, the validity of the parties' agreement is immaterial to the court's power to determine the value of the subject properties under the Business Corporation Law based on the evidence before it.

In any event, defendants lacked any procedural basis to seek

vacatur of the order on appeal. A court's traditional power to amend its own order or judgment is circumscribed by statutory grounds (CPLR 5015[a], 5019[a]) and equitable considerations (*see Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739, 741-742 [1984]), which limit amendment to the correction of ministerial and clerical errors, not judicial errors (*see Mansfield State Bank v Cohn*, 88 AD2d 837, 837-838 [1982], *affd on other grounds* 58 NY2d 179 [1983]; *Tilley v Coykendall*, 69 App Div 92, 102 [1902], *affd* 172 NY 587 [1902]). While Supreme Court identified defendants' postargument application as a motion to vacate, none of the grounds enumerated in CPLR 5015(a) are applicable. The obvious procedural basis for revisiting an order issued by the same court is CPLR 2221, denominated "Motion affecting prior order," which requires either a motion to reargue or a motion to renew (CPLR 2221[d], [e]). However, there is no indication that defendants' application was accompanied by any new evidence so as to support renewal (CPLR 2221[e][2]); nor is there any indication that it was timely brought so as to warrant reargument (CPLR 2221[d][3]). As to the merits of Justice Wright's order, merely because a stipulation incorporating the essential terms of the parties' agreement recites that it contemplates the execution of a more formal document does not thereby render the agreement unenforceable unless it expresses the parties' clear intent not to be bound

until the contemplated formal document has been executed (*see Brause v Goldman*, 10 AD2d 328, 332 [1960], *affd* 9 NY2d 620 [1961]).

As a matter of appellate practice, defendants should not be permitted to unilaterally prevent this Court from deciding whether the motion court erred in enforcing what appears to be a valid agreement between the parties. Defendants' contention on the present appeal is that Justice Renwick's methodology for appraising the properties exceeded the parties' agreement. Thus, defendants' appellate position is that the stipulation between the parties is valid and enforceable. At some point during the pendency of the appeal, however, defendants assumed a contrary position by moving in Supreme Court to vacate the stipulation. In the absence of plaintiff's consent, this Court should not permit defendants, having chosen to proceed by way of appeal, to avoid an appellate disposition of the issues raised therein by resort to obtaining a subsequent order from Supreme Court and merely disregarding the pending appeal (*see Zion v New York Hosp.*, 183 AD2d 386, 388 [1992] [motion to withdraw, made before appeal was heard, denied]). Any other policy would be an open invitation to forum shopping.

As an additional ground for dismissal, the majority advances, sua sponte, the proposition that the order appealed from is not reviewable as of right (CPLR 5701[a][2]). It

postulates that because Supreme Court entertained defendants' objections to the disputed third appraisal in response to their letter (a copy of which was sent to plaintiff), not as a result of a formal motion, no motion on notice was pending before the court, which thus issued "a sua sponte order from which no appeal lies" (*citing Sholes v Meagher*, 100 NY2d 333, 335 [2003]; *Person v Einhorn*, 44 AD3d 363 [2007]; *Unanue v Rennert*, 39 AD3d 289 [2007]; *Diaz v New York Mercantile Exch.*, 1 AD3d 242 [2003]).

The order appealed from is not one from which appeal is barred on the ground that it was entered either sua sponte, as the majority contends, or ex parte, to which the same proscription applies (CPLR 5701[a]; *see e.g. Household Fin. Realty Corp. of N.Y. v Winn*, 19 AD3d 545 [2005]). "Sua sponte" means "on its own motion; without prompting" (Garner, A Dictionary of Modern Legal Usage, at 838 [2d ed]). The order on appeal, however, was the immediate result of defendants' request (on letter notice to plaintiff) for a conference to resolve issues that, they maintained, were raised by the report submitted by East Coast Appraisals. The disputed appraisal report was discussed by the parties at length at a conference held on August 7, 2007, resulting in the parties' agreement, on the record, that a third appraisal report would be obtained.

Likewise, the circumstances under which the order was issued do not comport with the meaning of "ex parte": "Done or made at

the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested" (Black's Law Dictionary 616 [8th ed]). Since both parties were afforded notice and opportunity to be heard on the use to be made of the disputed appraisal, the order does not raise any question of appealability, either due to the lack of opportunity to be heard or the inadequacy of the record (*see Unanue*, 39 AD3d at 290; *Diaz*, 1 AD3d at 243).

The circumstances under which the order on appeal was issued are distinguishable from those of the *Sholes* case, on which the majority relies. There, the court, after declaring a mistrial and without any request from opposing counsel, imposed sanctions against an attorney for engaging in frivolous conduct. The trial court merely directed the attorney to submit an affidavit as to why she should not be sanctioned and directed opposing counsel to submit an affidavit of costs incurred at trial. It thereupon issued an award of $13,558.44 against the offending attorney and her law firm, both of which appealed from the ruling.

As the Court of Appeals held, "There is . . . no right of appeal from an ex parte order, including an order entered sua sponte" (*Sholes*, 100 NY2d at 335). This rule is to designed to ensure that the parties are afforded an opportunity to be heard and that appellate review will be conducted upon a suitable record (*id.*). What should not be overlooked, however, is that

the nature of the hearing required to be conducted is very much dependent on the context.

In contrast to the nonparties to the action before the Court in *Sholes*, the litigants at bar are parties to a special proceeding pursuant to Business Corporation Law § 1008 (*see Sunwest Enters. v Tilani Enters.*, 282 AD2d 236, 239 [2001]) subject to "summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR 409[b]). The hearing contemplated "is equivalent to the hearing of a motion for summary judgment and makes a formal motion for same unnecessary" (*Matter of Battaglia v Schuler*, 60 AD2d 759, 759-760 [1977]). The court is vested with the discretion to "make all such orders as it may deem proper in all matters in connection with the dissolution or winding up of the affairs of the corporation" (Business Corporation Law § 1008[a]). With exceptions not pertinent herein, "[o]rders under this section may be entered ex parte . . . Notice shall be given to such other persons interested, and in such manner, as the court may deem proper, of any hearings and of the entry of any orders on such matters as the court shall deem proper" (Business Corporation Law § 1008[b]).

The majority's assertion that this dispute must be resolved in a plenary action misapprehends the substance and procedural history of the case. When defendant Sequeira attempted to sell

the Bronx property, plaintiff commenced this action, naming Sequeira and the subject corporations as defendants, and obtained a preliminary injunction barring the transfer. The complaint alleges, inter alia, violation of plaintiff's right, as a 50% owner of the corporations, to access corporate books and records (Business Corporation Law § 624) and seeks relief from the unlawful conveyance of corporate property, including the Bronx property and bank accounts maintained by the corporations (Business Corporation Law § 720). Sequeira thereupon brought a petition seeking dissolution of 91 Graham Avenue Corporation under Business Corporation Law § 1008 in Supreme Court, Kings County, which proceeding was consolidated with this action a few months later. Thereafter, defendants filed both an amended answer and an amended petition in support of their claims for declaratory and related relief under Business Corporation Law § 1008.

The proceedings culminated in the disputed stipulation, in which the parties agreed to a global settlement to wind up the affairs of the two corporations and dispose of their respective properties. The issue raised by defendants on appeal is the propriety of Supreme Court's use of the various appraisals of the properties to determine their value. The majority's position notwithstanding, article 10 of the Business Corporation Law provides the exclusive means of judicially winding up the affairs

of a dissolved corporation, and the supervisory authority of Supreme Court under Business Corporation Law § 1008 has been expressly and necessarily invoked. Business Corporation Law § 1008[b] provides that "[o]rders under this section may be entered ex parte." Because the court is vested with broad discretion to determine the value of assets and to enter orders ex parte pursuant to Business Corporation Law § 1008, neither the lack of agreement as to the methodology of valuation nor the absence of a formal notice of motion affect the validity of the order on appeal.

The majority's ruling that the subject order is not appealable because it was purportedly entered "sua sponte" is inconsistent with the Business Corporation Law, which explicitly grants Supreme Court authority to enter orders ex parte and to give the parties notice of any hearings in such manner as the court deems appropriate (Business Corporation Law § 1008[b]). The considerable discretion conferred upon a court conducting a special proceeding to supervise the dissolution of a corporation renders untenable the majority's suggestion that any order must be predicated upon a formal notice of motion. Moreover, the provision for ex parte entry cannot be presumed to reflect a legislative intent to exempt such orders from appellate review. The effect of the majority's ruling is to deprive any party aggrieved by an order entered in a proceeding under Business

Corporation Law article 10 of the right to appeal unless the order happens to have been entered as a result of a motion made on notice, a procedural requirement not imposed by Business Corporation Law article 10 or by the CPLR for a hearing held in the course of a special proceeding (CPLR 409).

Even ignoring the considerable discretion conferred upon a court conducting a special proceeding to supervise the dissolution of a corporation, parties are normally permitted to chart their own procedural course before the courts (*see Stevenson v News Syndicate Co.*, 302 NY 81, 87 [1950]; *Katz v Robinson Silverman Pearce Aronsohn & Berman*, 277 AD2d 70, 73 [2000]), and the courts are vested with discretion to disregard defects in form (CPLR 2101[f]). While the correspondence from defendants' counsel to the court did not precisely conform to the prescribed method for making a motion (CPLR 2212[a]), it had the same effect of bringing on a hearing before the court, at which the parties were afforded the opportunity to be heard on the merits. Significantly, no party was deprived of due process (*cf. Matter of Gonia v Gonia*, 231 AD2d 718 [1996]; *Rosen v Rosen*, 38 AD2d 881 [1972]). Plaintiff did not reject the letter notice or raise any objection to the procedural defects in defendants' application perceived by the majority. Supreme Court was within the exercise of its discretion to entertain defendants' letter application, disregarding any defects in form (CPLR 2101[f]).

The resulting order determined defendants' application, disposed of the issues raised in the proceeding and was duly entered (CPLR 2220), thereby comprising an appealable paper (CPLR 5512[a]) reviewable by this Court (CPLR 5701[a][2][iv]).

In view of the outstanding pivotal issues, it defies logic to dismiss this appeal as moot. Plaintiff has filed a notice of appeal from the intervening order of Justice Wright. If the instant appeal is dismissed, should the order of Justice Wright subsequently be reversed and Justice Renwick's order reinstated, the parties will have to negotiate the appeals process all over again on the same issues presently before us — an unnecessarily timely and expensive ordeal. Because the issues involved in this appeal and the forthcoming appeal from the intervening order are inextricably intertwined and a decision in one may obviate the other, they should be heard together.

Accordingly, this matter should be held in abeyance for consolidation with the appeal from Justice Wright's order.

Motion 4473 ***Juan Reyes, M.D. v Rafael Sequeira, M.D., et al.***

Motion seeking leave to strike record denied.

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

ENTERED: JULY 28, 2009

CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5231 Robin R. Owens, Index 14294/05
Plaintiff,

-against-

Stevenson Commons Associates, L.P., et al.,
Defendants-Appellants-Respondents,

Mainco Elevator & Electrical Corp.,
Defendant-Respondent-Appellant,

Cambridge Security Services Corp.,
Defendant-Respondent.

Gannon, Rosenfarb & Moskowitz, New York (Peter J. Gannon of counsel), for appellants-respondents.

Babchik & Young, LLP, White Plains (Ephraim J. Fink of counsel), for respondent-appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Mark J. Volpi of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered November 1, 2007, which, to the extent appealed from, denied defendant Mainco's summary judgment motion for dismissal of the complaint and all cross claims against it, contractual indemnification on Mainco's cross claims against defendants Stevenson Commons and Grenadier Realty (collectively "Stevenson"), and common-law indemnification from defendant Cambridge Security, and denied Stevenson's summary judgment cross motion for dismissal of the complaint against it and on its cross claims against Mainco and Cambridge, affirmed, without costs.

This action stems from injuries allegedly sustained by plaintiff on July 6, 2004, while being removed by two Cambridge security guards from a disabled elevator in a building owned and managed by Stevenson. The elevator was regularly maintained by Mainco pursuant to a contract between it and Stevenson.

Mainco's substantial control over maintenance of the elevator was sufficient to support an inference of negligence on its part (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 561 [1973]).

Stevenson's liability under Multiple Dwelling Law § 78 likewise militates against summary dismissal of the complaint against it (*see Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d 200, 201 [1998]).

Although the record indicates that plaintiff was removed from the elevator in a non-emergent situation by persons not trained in elevator evacuation procedures, there is also evidence that Mainco supplied Cambridge with the elevator keys and instructions on how to open the doors in case of emergency. The record also indicates that Cambridge sometimes removed trapped passengers from elevators in buildings owned by Stevenson. Questions of fact as to the foreseeability of Cambridge's actions in removing plaintiff from the elevator preclude summary dismissal of the complaint as against Mainco and Stevenson (*see Devoy v 1110/1130 Stadium Owners Corp.*, 270 AD2d 131 [2000]; *cf. Egan v A.J. Constr. Corp.*, 94 NY2d 839 [1999]; *Antonik v New York City Hous. Auth.*, 235 AD2d 248 [1997], *lv denied* 89 NY2d 813 [1997]).

The existence of issues of fact as to the parties' negligence precludes granting summary judgment to Mainco and Stevenson on their indemnity cross claims (*see Rogers*, 32 NY2d at 563). We have considered the remaining contentions for affirmative relief and find them unavailing.

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

McGUIRE, J. (dissenting in part)

Plaintiff was injured when, assisted by employees of defendant Cambridge Security Services Corp., she fell to the eighth floor as she was exiting an elevator that had been stuck between the eighth and ninth floors of the building in which she resided. The building's elevators were maintained by defendant Mainco Elevator & Electrical Corp. pursuant to a contract between it and defendant Stevenson Commons Associates, L.P., the owner of the building. As it is undisputed that plaintiff was not faced with an emergency situation, her conduct in exiting the elevator and Cambridge's conduct in assisting her constituted a superseding cause of her injuries severing any causal link between her injuries and the alleged negligence of Mainco (*see Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999] [in non-emergency situation, "[a]s a matter of law, plaintiff's act of jumping out of a stalled elevator six feet above the lobby floor after the elevator's doors had been opened manually was not foreseeable in the normal course of events resulting from . . . [the] alleged negligence" of construction contractors and elevator manufacturer]; *Jennings v 1704 Realty, L.L.C.*, 39 AD3d 392, 393 [2007] [in non-emergency situation, "plaintiff's act of manually opening the elevator door and jumping out was not a foreseeable consequence of . . . alleged negligence" of building owner and elevator maintenance company]).

The Cambridge employees did open the elevator door using a key provided by Mainco and they had been instructed by Mainco on how to open the elevator doors. But it is undisputed that the key and the training were provided in the event of an *emergency*. Because Mainco acted responsibly in foreseeing and providing for the possibility of an emergency, it does not follow that the actions of plaintiff and the Cambridge employees in a non-emergency situation were foreseeable. Under the majority's analysis, Mainco exposed itself to liability in non-emergency situations when it acted to avoid liability in emergency situations by providing Cambridge employees with a key to the elevator doors and instructions on to how to open the doors.

Given Stevenson's nondelegable duty under Multiple Dwelling Law § 78 to maintain the dwelling, including the elevator, in a reasonably safe condition and the evidence from which a jury could find that Cambridge was negligent, Stevenson's motion for summary judgment dismissing plaintiff's complaint was properly denied (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 687 [1990] ["The owner of a multiple dwelling owes a duty to persons on its premises to maintain them in a reasonably safe condition (Multiple Dwelling Law § 78). This duty is nondelegable and a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has

been transferred to another"]; *Rogers v Dorchester Assoc.*, 32 NY2d 553, 563 [1973] [Multiple Dwelling Law § 78 "had the effect of imputing to (the building owner and manager) the negligence of any delegate insofar as plaintiff's rights to recover were concerned"]; *Franco v P & M Mgt. Realty Corp.*, 41 AD3d 244, 244 [2007] ["Pursuant to Multiple Dwelling Law § 78, defendant had a nondelegable duty to maintain plaintiff's apartment in good repair, and may be vicariously liable for negligence on the part of the independent contractor"]).[1]

Accordingly, I would grant Mainco's motion for summary judgment dismissing plaintiff's complaint and all cross claims against it, and would accordingly dismiss as moot Mainco's appeal from the denial of its motion for summary judgment on its claims against Cambridge and Stevenson for indemnification. I note, too, that Stevenson's cross claim against Mainco for contractual indemnification fails for an independent reason: although the contract obligates Stevenson to indemnify Mainco under specified

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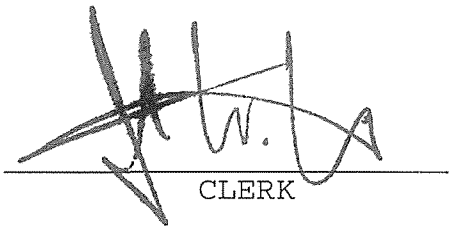
[1]Stevenson asserted claims against Cambridge for contribution or indemnification and sought summary judgment on the indemnification claim. Supreme Court, among other things, denied that aspect of Stevenson's cross motion that sought summary judgment on its claim for indemnification against Cambridge, but Stevenson does not challenge that ruling in its brief.

conditions, Mainco is not obligated to indemnify Stevenson. I otherwise agree with the majority's disposition of the appeal and cross appeal.

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

ENTERED: JULY 28, 2009



CLERK

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

5405 John Arbuiso, Index 112632/07
Petitioner-Appellant,

-against-

New York City Department of Buildings,
Respondent-Respondent.

Gregory Chillino, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered February 19, 2008, which denied the petition seeking to annul respondent's determination denying petitioner's application for reinstatement of his master plumber's license and dismissed the proceeding, affirmed, without costs.

On June 14, 1999, petitioner's master plumber license expired. Seven years later, on August 11, 2006, petitioner submitted a written request for reinstatement of the license to the New York City Department of Buildings (hereinafter referred to as the "DOB"). In the letter, he notified the DOB that he had inadvertently allowed his license, which he received in June 1995, to lapse.[1] In support of his reinstatement, petitioner submitted his resume which stated that he had worked as a plumber

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[1]Although petitioner stated that he had "inadvertently" allowed his license to lapse, the record indicates that he voluntarily relinquished his license.

at the following positions: Manhattan Plumbing and Heating from February 1997 through April 1998, specializing in "all aspects of commercial plumbing"; Sheraton Hotels from April 1998 to February 2000, specializing in "all areas of plumbing, heating and engine rooms for the hotel complex"; the Riverdale Country School from February 2000 to April 2005, overseeing "all areas of plumbing/heating/gas"; and for Turner Construction Co. from April 2005 to the date of his application, "[o]verseeing all aspects of construction."

On September 15, 2006, by letter, the DOB informed petitioner that it had denied his application. In the letter, the DOB requested that petitioner demonstrate active and legal engagement in the plumbing trade during the period in which his license was expired.

Subsequently, petitioner submitted an undated letter to the DOB detailing his work experience. The letter stated that, while at Sheraton Hotels, petitioner was the "head plumber" working on "all areas of plumbing and heating." Petitioner further explained that during his time at the Riverdale Country School, he worked as the "in-house plumber" working in "all areas of plumbing" including, inter alia, "all the boilers and heating systems" and "[a]ll water and waste piping."

On January 19, 2007, the DOB notified petitioner that he had failed to demonstrate that he had been "actively and legally

engaged in the plumbing trade" since the expiration of his license. The DOB directed petitioner to submit a list of the licensed master plumbers under whom he had worked along with their license numbers.

On February 28, 2007, petitioner sent a letter to DOB clarifying his work experience. The letter stated that, while he was working for Sheraton, he performed "maintenance to all plumbing systems as well as preventative work" and "[w]hen [he] uncovered plumbing work that required a filing with the [DOB], it was contracted out by Sheraton to licensed plumbing companies." The letter continued that, when he worked for Riverdale Country School, he oversaw maintenance and repair of the plumbing systems. He further asserted that his responsibilities included "identifying that work which required a filing with the [DOB] and notifying management to retain a licensed plumbing contractor to perform said work."

On April 13, 2007, the DOB notified petitioner that, according to the Administrative Code, an applicant for a master plumber's license must demonstrate "retained proficiency in the trade." The DOB explained that an applicant cannot obtain the experience unlawfully by performing plumbing work while unsupervised by a licensee. The DOB, referring to petitioner's February 28, 2007 correspondence, then asked the petitioner to provide proof that he contracted out jobs requiring a license.

On June 27, 2007, after petitioner failed to come forward with this information, DOB notified petitioner that his application for reinstatement of his master plumber's license had been denied. In the letter, the DOB explained that it was:

> "satisfied that [petitioner] performed consulting work in the trade through Turner Construction and that this experience since 2005 demonstrates retained proficiency in the trade as required by Section 26-150(d) of the [Administrative] Code. However, the record is devoid of evidence that the remaining work [petitioner] performed since the lapse of his license was legal work. [Petitioner] failed to provide such evidence prior to his February 28th submission and that letter represented a departure from his previous statements in that it suggested that the work that [petitioner] performed did not require supervision by a licensee."

The letter concluded that, given the failure to clarify or address the legality of some of the work performed following the lapse of his license, petitioner's application was denied.

Petitioner then commenced the instant article 78 proceeding. The Supreme Court dismissed the petition since petitioner did not show that DOB's refusal to reinstate his license was arbitrary and capricious.

On appeal, petitioner argues that the DOB arbitrarily and capriciously denied his application since he submitted sufficient proof of retained proficiency in the design and installation of plumbing systems. Petitioner asserts that the DOB had no legal basis for the denial of his application, since the DOB had not

identified a single allegation that petitioner had performed illegal work. The DOB maintains that its decision to deny petitioner's application was rational, since petitioner himself provided descriptions of performing work after the expiration of his master plumber's license, which included tasks that required such a license or supervision by a licensed master plumber.

It is well settled that the standard for judicial review of an administrative determination pursuant to CPLR article 78 is limited to inquiry into whether the agency acted arbitrarily or capriciously (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 Town of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Once it has been determined that an agency's conclusion has a sound basis in reason, the judicial function is at an end (*see Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 [1997]).

Section 26-150(d) of the Administrative Code of the City of New York states that an applicant for reinstatement of a master plumber's license must demonstrate, among other things, "retained proficiency" in the trade. However, in accordance with section 26-142 of the Administrative Code, the applicant cannot obtain that experience unlawfully by performing plumbing work while unsupervised by a licensee. Section 26-142(a)(1)(a) of the Administrative Code, states, in pertinent part that:

"a. It shall be unlawful for any person:

> "1. (a) to install, maintain, repair, modify, extend or alter a plumbing, standpipe where a sprinkler is not or is not now being connected, domestic water, connections to the domestic water, combination domestic water and standpipe supply tank, up to and including the roof tank check valve, gas piping or any piping system referred to in subchapter sixteen of chapter one of title twenty-seven of the code and in reference standard RS-16 and up to twenty sprinkler heads off the domestic water in any one building, in the city of New York unless such person is a licensed master plumber, partnership, corporation or other business association as permitted by this code and unless such work is performed *under the direct and continuing supervision of a licensed master plumber.*" (emphasis added).

In *Matter of Reingold v Koch* (111 AD2d 688 [1985], *affd* 66 NY2d 994 [1985]), we held that there was a rational basis for the denial of the petitioner's application for a master plumber's license, under the precursor to Administrative Code §§ 26-142 and 26-146, where the petitioner did not show that he had the required amount of experience through work that was performed legally (*id.* at 690). We concluded that the DOB's interpretation of the experience requirement, and its refusal to credit petitioner for unsupervised work, was "consonant with respondents' duty to guard against licensure of incompetent and unfit individuals" and supported by public policy considerations (*id.*).

Similarly, in the instant appeal, the DOB interpreted the

Administrative Code to require unlicensed plumbers who remained in the plumbing trade after their licenses expired to demonstrate legally performed "retained proficiency." We find that such an interpretation is rationally based and entitled to great deference.

The dissent correctly asserts that the DOB found that the petitioner demonstrated "retained proficiency" in the trade through his work with Turner Construction. However, the dissent fails to acknowledge that petitioner did not present any evidence demonstrating that the remainder of his unlicensed work in the plumbing trade was legal as required by the Administrative Code and DOB policy.

Indeed, it was petitioner's initial characterizations of his unlicensed work, his subsequent conflicting account, and his failure to provide any supporting documentation to demonstrate the legality of his work for Riverdale or Sheraton which formed the basis for DOB's rejection of his reinstatement application. Because DOB could not verify that petitioner met the qualifications for licensure, DOB's rejection of his application for reinstatement is rational.

Moreover, petitioner's claim that DOB erroneously relied upon "Policy and Procedure Notice #4/87," for its denial of his application, is unavailing. Section 26-150 of the Administrative Code sets forth the statutory requirements for reinstatement

decisions, which decisions are also guided by "Policy and Procedure Notice #4/87." To the extent that the Policy and Procedure Notice requires that an applicant must establish his or her qualifications through plumbing work that was performed legally, such interpretation does not conflict nor go beyond the statutory licensing standards of Administrative Code § 26-150 (*see Reingold*, 111 AD2d at 690).

In *Matter of Auringer v Department of Citywide Admin. Servs. of City of N.Y.* (28 AD3d 381 [2006]), we construed an analogous provision of the Administrative Code which required "at least five years practical experience in the hoisting and rigging business" in order to obtain a master rigger's license. The issue was whether the requirement that an applicant show that his or her experience was acquired under the supervision of a licensed master rigger was arbitrary. Relying on Administrative Code § 26-176 which makes it unlawful to hoist or lower material outside a building unless that work was performed by or under the supervision of a licensed rigger, we found, citing *Reingold v Koch*, that such a requirement was rationally based.

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

ACOSTA, J. (dissenting)

Respondent Department of Buildings's determination to deny petitioner's application for reinstatement of his master plumber's license was inconsistent with the Administrative Code and was "without sound basis in reason and [was] . . . taken without regards to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Respondent's actions were therefore, tantamount to conduct that is arbitrary and capricious. Accordingly, I respectfully dissent.

Petitioner John Arbuiso applied for and received a master plumber's license in 1995. Petitioner conducted a plumbing business under that license until June 1999, when he voluntarily "shelved" said license.[1] Since shelving his license, petitioner has continued to work in the plumbing field; at Manhattan Plumbing & Heating from February 1997 to April 1998; at Sheraton Hotels from April 1998 to February 2000; at the Riverdale Country School, Bronx, New York, from February 2000 to April 2005; and as a construction manager for Turner Construction Co. from April 2005 to date.

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[1] Pursuant to Administrative Code of the City of New York § 26-148, a licensee obtains a plate (or sign) and seal (for stamping applications from DOB), both of which bear his license number. A licensee must return his plate and seal to DOB's commissioner upon retirement or voluntary cessation of business under one's own license. This is commonly referred to as "shelving."

On August 11, 2006, petitioner submitted a written request to DOB for reinstatement of his master plumber's license, along with his resume. Thereafter, by letter dated June 27, 2007, DOB denied petitioner's application, stating that "[his] experience since 2005 demonstrates retained proficiency in the trade as required by Section 26-150(d) of the [Administrative] Code. However, the record is devoid of evidence that the remaining work [petitioner] performed since the lapse of his license was legal work."

Respondent found that petitioner's work at Turner Construction demonstrated the requisite "retained proficiency," yet confoundingly exceeded the requirements of the Administrative Code by requiring petitioner to affirmatively establish that all the work he had performed prior to working at Turner Construction while his license was lapsed was legal work. This ground for denial of petitioner's application is found nowhere in the statute delegating authority to the commissioner of DOB for the issuance of a master plumber's license. As such, respondent's determination had no basis in fact or law. The legality of petitioner's work is only relevant in the context of establishing whether petitioner has "retained proficiency," which respondent explicitly found he did. That is, it was paradoxical for respondent to find that petitioner had "retained proficiency" and at the same time deny his application for failing to prove that

he had not performed illegal work. Once respondent found that petitioner had the requisite "retained proficiency," he should have been issued his license, and respondent's failure to do so was arbitrary and capricious.

Also troubling is that while respondent placed on petitioner a burden found nowhere in the Administrative Code, respondent did not have any concrete allegations of illegal plumbing done by petitioner. Indeed, notwithstanding petitioner's repeated demands that he be confronted with any specific allegations or evidence of such illegal work, DOB failed to do so.

This Court has previously held that it was error for the DOB to nullify a master plumber's license by reading into the Administrative Code additional requirements that were not present (*Matter of Kreitzer v New York City Dept. of Bldgs.*, 24 AD3d 374 [2005], *lv denied* 6 NY3d 715 [2006]). We have further held that "'[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute'" (*Matter of New York City Pedicab Owners' Assn., Inc. v New York City Dept. of Consumer Affairs*, 61 AD3d 558, 559 [2009] quoting *Matter of Jones v Berman*, 37 NY2d 42, 53 [1975]). However, the majority obfuscates that rule here in affirming Supreme Court's order.

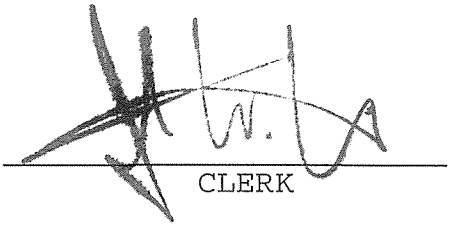
Nor does *Matter of Reingold v Koch* (111 AD2d 688 [1985], *affd* 66 NY2d 994 [1985]), which the majority relies on, support DOB's denial. In *Reingold*, this Court held that there was a rational basis for the denial of the petitioner's application for a master plumber's license under the precursor of the Administrative Code, where the petitioner did not show that he had the required amount of experience (seven years) in plumbing systems design and/or installation. This Court found that respondent had a rational basis in determining that the petitioner did not establish his affirmative obligation of having seven years' experience because he failed to show that he was under the supervision of master plumbers for the requisite time period. Here, DOB specifically found that "[petitioner] performed consulting work in the trade through Turner Construction and that this *experience* since 2005 demonstrates retained proficiency" (emphasis added). The only requirement, "retained proficiency," was met by petitioner.

Reingold is further distinguishable. In *Reingold*, the petitioner did in fact engage in illegal work; i.e. working on buildings in which lofts were illegally converted into

residential ones. Here, there is not even a single allegation of illegal work performed by petitioner.

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

ENTERED: JULY 28, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

819 Ilir Topalli, Index 22503/06
Plaintiff-Respondent,

-against-

Albert Einstein College of Medicine
of Yeshiva University, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about September 25, 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 22, 2009,

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

ENTERED: JULY 28, 2009

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Rolando Acosta
Dianne T. Renwick, JJ.

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Index 101127/07

_____x

Deborah Phillips,
Plaintiff-Appellant,

-against-

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

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Carol Robinson Edmead, J.), entered October 15, 2007, which, to the extent appealed from, granted defendants' motion to dismiss the complaint alleging employment discrimination based on a disability in violation of Executive Law § 296 and the Administrative Code of the City of New York § 8-107.

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

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch, Stephen J. McGrath and Jamie M. Zinaman of counsel), for respondents.

ACOSTA, J.

This case requires us to examine the "reasonable accommodation" provisions of the New York State and City Human Rights Laws (HRLs) in the context of a CPLR 3211 motion. We begin with the recognition of the New York City Council's mandate that courts should be sensitive to the distinctive language, purposes and liberal construction analysis required by the City HRL under *Williams v New York City Hous. Auth.* (61 AD3d 62, 65 [2009]).

I. Background

Plaintiff was hired by defendant Department of Homeless Services (DHS) in a noncompetitive civil service title in 1988. After 18 years of satisfactory employment, she was granted an approved medical leave extending from about July 26 to October 30, 2006, due to a serious medical condition - breast cancer. By letter dated August 11, 2006, plaintiff requested leave for one full year, beginning that date. DHS denied this request in a letter dated October 16, informing plaintiff that her 12-week medical leave was granted pursuant to the Family and Medical Leave Act, and that as an "employee in a non-competitive title," she was ineligible for additional unpaid medical leave, which is "only granted to permanent civil service employees, per the Rules and Regulations for Employees Covered under the Career & Salary Plan." DHS informed plaintiff that if she failed to return to work by her already agreed upon return date of October 30, 2006,

she would be "subject to disciplinary action." In a separate letter dated October 27, DHS advised plaintiff that if she did not return to work by October 30, she would be subject to discharge from her employment.

On or about that same date, plaintiff modified her request for leave, asking a DHS employee in the Medical Assistance Unit if she could obtain *any* further extension of her medical leave. The City employee denied this request, telling plaintiff that if she failed to return to work as scheduled, her employment and medical benefits would be terminated.

Plaintiff did not return to work on October 30, 2006, and was terminated thereafter.[1] In this action against the City and DHS, plaintiff alleged that (1) she is a disabled person within the meaning of the State and City HRLs, (2) her request for an extension of medical leave sought a reasonable accommodation under those statutes, and (3) defendants violated the statutes by denying her request and terminating her employment. She further alleged that at the time of her termination she was "unable to return to work for the respondent DHS because of her medical condition of breast cancer," a condition that still existed on the date the complaint was verified. Plaintiff further asserted that as a result of her loss of medical benefits following

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[1]Plaintiff claims that she was terminated on November 1, 2006, while the City claims the termination date was January 5, 2007.

termination, she had to delay her scheduled cancer surgery, adversely affecting her medical condition, which was diagnosed as stage III breast cancer. Plaintiff sought reinstatement to her former position at DHS with full back pay retroactive to November 1, 2006, the date she was allegedly terminated, with prejudgment interest thereon, as well as compensatory and punitive damages.

Defendants moved to convert the complaint to an Article 78 proceeding,[2] and for judgment of dismissal on the ground that the denial of plaintiff's request for accommodation was reasonable and lawful. In support, they submitted their Career and Salary Plan, which provided that the two-year limit on leave without pay applies only to "permanent employees," and not those in "non-competitive" titles. In addition, defendants argued that plaintiff was not disabled within the meaning of the State and City HRLs since (1) she could not perform her job functions either with or without a reasonable accommodation, and (2) the "year long" leave of absence she requested was not a reasonable accommodation.

In opposition, plaintiff argued that the extended leave of absence she sought *was* a reasonable accommodation, and denial of

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[2]Defendants argued that plaintiff's complaint lies in the nature of mandamus to review an administrative determination denying her unpaid medical leave, which should have been brought under CPLR 7803. The court granted defendants' request "to the extent that the Court will treat the Complaint as a hybrid action in law and as a proceeding pursuant to Article 78." Plaintiff does not challenge this aspect of the court's decision.

her request and her subsequent termination because of her disability violated the State and City HRLs.

II. The Motion Court's Decision

With respect to plaintiff's causes of action for disability discrimination, the court found she had failed to allege "facts demonstrating that her cancer condition falls within the definition of the term 'disability' as contemplated" by the State and City HRLs. The court also determined that plaintiff "failed to set forth in her Complaint factual allegations sufficient to show that, upon the provision of reasonable accommodations, she could perform the essential functions of her job." In particular, the court found that there was no allegation that plaintiff intended to return to work at the end of the requested leave or that she would be able to perform the essential functions of her job at the end of that period. The complaint, it said, "sets forth only the untenable claim that DHS was required to accommodate plaintiff by holding her job open indefinitely," and this was insufficient under the State HRL and its "equivalent," the City HRL. In addition, the court found that there were "no allegations in the Complaint indicating that the decisions made by DHS were based on any factor other tha[n] plaintiff's noncompetitive title." Since the court found that plaintiff's discrimination claims were "insufficiently stated, and that DHS's determinations were based on its leave policies applicable to non-competitive titles," the court dismissed the

claim for compensatory and punitive damages arising from DHS's denial of plaintiff's request for leave and her termination.

Plaintiff argues on appeal that in dismissing her complaint, the court failed to address whether defendants had violated the State and City HRLs by denying her request for an extension of unpaid medical leave based on a uniform policy denying such leave to noncompetitive employees, without considering the feasibility of her request for a reasonable accommodation. We agree with plaintiff.

III. Discussion

In considering a CPLR 3211 motion to dismiss, the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference, and must determine whether "the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]), in this case, violations of the State and City HRLs.

For the reasons set forth herein, we find that defendants have failed to engage in the required individualized process when considering plaintiff's request for extended medical leave, i.e., for reasonable accommodations. We further find that plaintiff has stated causes of action for violations of the State and City HRLs with respect to defendants' alleged failure to reasonably accommodate plaintiff.

A. The Need for an Individualized Process

The need for individualized inquiry when making a determination of reasonable accommodation is deeply embedded in the fabric of disability rights law (*see School Bd. of Nassau County, Fla. v Arline*, 480 US 273, 287 [1987]). Rather than operating on generalizations about people with disabilities, employers (and courts) must make a clear, fact-specific inquiry about each individual's circumstance.

As explained in *Barnett v U.S. Air* (228 F3d 1105, 1116 [9th Cir. 2000] [en banc], *vacated on other grounds* 535 US 391 [2002]), when confronted with a disabled employee's request for reasonable accommodation, the employer is required to engage in a good faith interactive process whereby employer and employee clarify the individual needs of the employee and the business, and identify the appropriate reasonable accommodation. This good faith process is "the key mechanism for facilitating the integration of disabled employees into the workplace" (228 F3d at 1116). Without it,

> many employees will be unable to identify effective reasonable accommodations. Without the possibility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations. The result would be less accommodation and more litigation, as lawsuits become the only alternative for disabled employees seeking accommodation. This is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the ADA intended. Therefore, summary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith (*id.*).

The State HRL provides protections broader than the Americans With Disabilities Act (ADA);[3] and the City HRL is broader still (*see Williams*, 61 AD3d at 65). As *Barnett* advises, summary judgment is not available where there is a genuine dispute as to whether the employer has engaged in a good faith interactive process.

Similarly, dismissal would not be available in the CPLR 3211 context, particularly where, as here, we are not faced with a dispute as to *whether* there was an "interactive process," but rather a record that makes clear that there *was no* interactive process.

Accordingly, we hold that under the broader protections afforded by the State and City HRLs, the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached.

The intended purpose of the State HRL cannot be achieved without requiring that employers, in every case, *consider* the requested accommodations by engaging in an individualized, interactive process (*see generally* Executive Law § 300). A

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[3]For example, unlike the ADA, the State HRL definition of disability has no requirement that a physical or mental impairment must substantially limit one or more major life activities of an individual (*compare* 42 USC § 12102[2] *with* Executive Law § 292[21]).

failure to consider the accommodation, therefore, is a violation of Executive Law § 296(3)(a), since the "employer has the responsibility to investigate an employee's request for accommodation and determine its feasibility" (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 149 [2006], *lv denied* 7 NY3d 707 [2006]; *cf Parker v Columbia Pictures Indus.*, 204 F3d 326, 338 [2d Cir 2000], an ADA case in which the court ruled that "[a]t the very least . . . an employee who proposes an accommodation while still on short-term leave . . . triggers a responsibility on the employer's part to investigate that request and determine its feasibility. An employer who fails to do so, and instead terminates the employee based on exhaustion of leave, has discriminated 'because of' disability within the meaning of the ADA").

An individualized interactive process is also required by the more protective City HRL, and its absence represents a violation of New York City Administrative Code § 8-107(15)(a). The City HRL's goal of preventing discrimination (which includes failures to accommodate) "from playing any role in actions relating to employment, public accommodations, and housing and other real estate" (Administrative Code § 8-101) would otherwise be undermined.[4] This conclusion is bolstered by the fact that

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[4] *See also Matter of United Veterans Mut. Hous. No. 2 Corp. v New York City Comm. on Human Rights* (NYLJ, March 2, 1992, 35:3, at col 4 [Sup Ct Queens County] [upholding the Commission's "determination that [the housing provider's] outright refusal to contemplate the provision of any reasonable accommodation

the 1991 amendments to the City HRL strove in a multitude of ways to maximize protection of people with disabilities.[5]

The relief available to a plaintiff for an employer's failure to engage in the interactive process will depend on whether the process could have yielded a substantive accommodation that was reasonable.[6] Defendants cannot avoid

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irrespective of costs was not consistent with the provisions of the Administrative Code"], *affd* 207 AD2d 551 [1994] [noting that the State Supreme Court had denied the housing provider's petition to annul the Commission's determination as academic "because, while the petition was pending, *the City Council amended the Administrative Code to explicitly adopt the Commissioner's interpretation thereof*"] [emphasis added]).

[5] By way of illustration only, the Fair Housing Amendment Act of 1988 required housing providers to *permit* persons with disabilities to make reasonable modifications of dwellings *at that person's own expense* (42 USC § 3604[f][3][A]); the City HRL, which uses the term "accommodation" to encompass "modifications," requires the housing provider to *make* the change, and does not shift the cost to the person with a disability (unless the housing provider demonstrates undue hardship) (Administrative Code §§ 8-107[15][a]; 8-102[18]). Under the ADA, damages, including actual damages, shall not be awarded against a covered entity that, in connection with a request for accommodation, has in good faith engaged in an interactive process with the requester of the accommodation (42 USC § 1981a[a][3]); the City Council, acting the year after passage of the ADA, did not impose any "good faith" safe harbor against actual damages. The obligation to make reasonable accommodation arises not only when a covered entity "knows" of a person's disability, but when the disability "should have been known" by the covered entity (Administrative Code § 8-107[15][a]).

[6] If so, full remedies under the respective statutes are available. If not, remedies are available under the City HRL only, and are limited to those designed to respond only to the failure to engage in the interactive process. The precise contours of the limitations on relief are best left to be determined in a case where, unlike the instant matter, a substantive accommodation has been shown not to be a reasonable accommodation.

engaging in the interactive process contemplated by both statutes by citing their policy that employees in a "non-competitive" title, such as plaintiff, are not allowed medical leave beyond the original 12-week medical leave granted pursuant to the Family and Medical Leave Act. An employer simply cannot abrogate the requirements of the HRLs by carving out a category of employees who are not subject to an interactive process. Accordingly, defendants' policy of entertaining requests for extended medical leaves only for permanent civil service employees, pursuant to the Rules and Regulations for Employees Covered Under the Career & Salary Plan, is in direct violation of both statutes. Plaintiff sufficiently alleged violations of both statutes, and it was error to dismiss the complaint at this stage.

IV. Plaintiff's Allegations under the State & City HRL

Separate and apart from the City's failure to engage in an individualized interactive process in evaluating plaintiff's request for accommodation, plaintiff has sufficiently pleaded causes of actions for disability discrimination under both statutes.

A. The State HRL

Under the State HRL, "[a] complainant states a prima facie case of discrimination if the individual suffers from a disability and the disability caused the behavior for which the individual was terminated" (*Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]). Here, giving plaintiff the benefit of every

possible favorable inference, it is clear that she has stated a cause of action.

The State HRL defines "disability" as "a physical, mental or medical impairment . . . which, upon the provision of reasonable accommodations [such as a leave of absence], do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held" (Executive Law § 292[21]).

In determining whether plaintiff properly alleged that she could perform her job given a reasonable accommodation, the motion court focused exclusively on plaintiff's initial request for a one-year leave of absence, even though defendants also denied plaintiff's modified request for "any" additional medical leave. This fact alone requires remand because the IAS court's decision was premised on the incorrect assumption that the only leave request at issue was effectively "open-ended," i.e., longer than one year or indefinitely. However, according all inferences to plaintiff, we fail to see how she was not asking for an extension of leave for up to one year, and why the City could not reasonably accommodate that request.

Even had plaintiff's request been only for a one-year extension of her leave, however, it was error under the circumstances to dismiss the case on the basis that she failed to allege that she could reasonably perform the job with a reasonable accommodation of extended leave. Plaintiff alleged

that she had cancer surgery scheduled, which was delayed by the termination of plaintiff's job and associated medical benefits. She also alleged that she was a person with a "disability" whose impairment, upon the provision of reasonable accommodation, would not prevent her "from performing in a reasonable manner the activities involved in the job or occupation sought or held."

From these allegations, it can reasonably be inferred that plaintiff needed the requested leave to be able to have and recover from cancer surgery, after which time she anticipated that she would be able to return to work. Accordingly, the IAS court's conclusions that the request was for open-ended leave - and that there was no basis on which to believe that plaintiff, with her impairment ameliorated by surgery, might then be able to return to work - were incorrect.

While we recognize that in a great many cases a request for a one-year leave will not turn out to be a "reasonable accommodation" as contemplated by the State HRL, we specifically decline to hold, as a matter of law, that such a request cannot be a reasonable accommodation.[7] It is true that under the State

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[7] The Equal Employment Opportunity Commission's guidance on these issues sets forth no "red line" beyond which leave time is automatically unreasonable (*see e.g.* EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act. In particular, item 17 provides that an employer may not apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period, unless there is another effective accommodation or the granting of the additional leave would cause an undue hardship. "Modifying workplace

HRL, the concept of "reasonable accommodation" has contained within it the issues of whether the accommodation will be effective and whether the accommodation would cause the employer an undue hardship.[8] The resolution of these issues is, however, singularly case-specific, further illustrating the need for an individualized, interactive fact-specific process.

There are, after all, a great variety of medical conditions (with a great variety of prognoses), just as there are a great variety of covered employers (some very large, others very small). Likewise, there are a great variety of jobs that are held by employees (some whose services cannot be dispensed with for an extended period, and others who can easily be replaced for longer periods). Without a specific evidentiary record, it cannot be said that DHS would have suffered undue hardship from a

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policies, including leave policies, is a form of reasonable accommodation." Item 44 indicates that providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation, unless an employer is able to show that the lack of a fixed return date causes an undue hardship.

[8] Under the State HRL, "reasonable accommodation" means "actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested" (Executive Law § 292[21-e]). The very different conception and statutory architecture of "reasonable accommodation" under the City HRL is discussed *infra*.

one-year absence of this employee. Nor can it be said on this record that the provision of the accommodation would not have enabled plaintiff to return to work after a period of recuperation.[9]

B. Plaintiff's Claim under the City HRL

Plaintiff also sufficiently stated a discrimination claim pursuant to the City HRL. We separate the analysis because the disability provisions of the City HRL and State HRL are not "equivalent," and require distinct analyses.[10]

The very different conception and statutory architecture of "reasonable accommodation" under the City HRL, as set forth in

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[9] The motion court's focus on the statement in the complaint that plaintiff "remains" unable to return to work is misplaced for two reasons. First, the lawfulness of a request for reasonable accommodation is measured at the time the request is acted upon (or not acted upon). By definition, *any* accommodation leave for the purpose of having surgery involves some period of time during which the person with a disability is not available or able to work. Second, even from a retrospective point of view, the statement shows only that plaintiff was not ready to return to work three months after the rejection of accommodation (when the complaint was verified), not that a one-year leave would not have been useful. The import of the statement would need to be developed as part of a fuller factual record.

[10] By means of the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 [2005] of City of NY), the City Council rejected an approach that treated the City HRL as equivalent to its State and federal counterparts (*see Williams*, 61 AD3d at 67-68 ["the Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes, and (c) cases that had failed to respect these differences were being legislatively overruled"]).

Administrative Code § 8-107(15)(a), and is equally applicable to employment, housing, and public accommodations:

> Requirement to make reasonable accommodation to the needs of persons with disabilities. Except as provided in paragraph (b), any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.

We note first that no exemption from this affirmative and mandatory requirement has been granted to the City in its role as employer.[11]

Unlike the State HRL, the issue of the ability to perform essential requisites of a job is not bound up in the definitions of disability or reasonable accommodation. The City HRL defines "disability" purely in terms of impairments: "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Administrative Code § 8-102[16][a]). These include:

> an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological

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[11] This point is not contested by the City on appeal. The fact that plaintiff's requests for accommodation were *automatically* rejected because Citywide regulations treat the civil service classes differently does show that defendants were not acting *randomly,* but were nonetheless acting in violation of the obligation to engage in an interactive process with a person with a disability whose need for an accommodation had become apparent, regardless of her employment status.

> systems; the skin; and the endocrine system (Administrative Code § 8-102[16][b][1]).

There is no subset of persons with disabilities not included among the persons referenced in the affirmative obligation set out in § 8-107(15)(a).

The City HRL definition of "reasonable accommodation" (§ 8-102[18])is itself unique:

> such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship.[12]

Here again, there are important differences from the State HRL (as well as the ADA). First, there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation. And unlike the ADA, there are no accommodations that may be "unreasonable" if they do not cause undue hardship.[13]

In light of the New York City Council's legislative policy choice to deem all accommodations reasonable except for those a defendant proves constitute an undue hardship, general principles

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[12] "Accommodation," as distinct from "reasonable accommodation," is not a defined term, but from its use in both §§ 8-102(18) and 8-107(15), it is clear that the term is intended to connote any action, modification or forbearance that helps ameliorate *at least to some extent* a need created by a disability.

[13]Under the ADA, there can be accommodations that, despite not causing undue hardship, will be "unreasonable" in the ordinary run of cases (*see US Airways v Barnett*, 535 US 391 [2002]).

of statutory interpretation preclude the judicial importation of other exceptions. "When one or more exceptions are expressly made in a statute, it is a fair inference that the Legislature intended that no other exceptions should be attached to the act by implication, that is, an exception in a statute amounts to an affirmation of the application of its provisions to all other cases which are not excepted" (McKinney's Statutes § 213, at 373).[14]

The accommodations sought by plaintiff here were not excluded by the definition of reasonable accommodation, and were accommodations that "can" be made, i.e., actions that - independent of any question of hardship - are capable of being made. At this stage of the proceeding, where plaintiff is entitled to every favorable inference and in the absence of any factual record to show undue hardship, the conclusions of the IAS court were erroneous in respect to an evaluation of plaintiff's pleading.

The City Council dealt explicitly with the question of whether an employee, with reasonable accommodation, would be able to perform the essential requisites of the job by placing the burden of proof not on the plaintiff, but squarely on the defendant. The Administrative Code provides only one exception to the reasonable accommodation rule, in § 8-107(15)(b):

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[14] This principle takes on even more force in light of the City Council's passage of the Restoration Act.

> Affirmative defense in disability cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

The plain language of the text could not be clearer: it is defendants who had the obligation to prove that plaintiff could not, with reasonable accommodation, "satisfy the essential requisites" of the job. As such, the pleading obligation in relation to this element was on defendants, not plaintiff.[15] Defendants have neither pleaded nor produced any evidence that plaintiff could not, with reasonable accommodation, satisfy the essential requisites of the job.

V. The Dissent

The dissent is fundamentally mistaken in two crucial areas: (a) it treats the City HRL as a carbon copy of its State and

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[15] There is a reference in *Pimentel* (29 AD3d at 149) to the effect that the plaintiff seeking reassignment as an accommodation had the burden of showing "that she could perform a particular job." While the plaintiff there had brought both State and City HRL claims, it is clear from the decision that the Court was only discussing State HRL claims, and we read the case as opining only on State HRL standards. That this Court did not there engage in an independent analysis is not surprising in view of the fact that the case was briefed prior to passage of the Restoration Act, at a time when State and City HRL equivalence was often assumed. As *Williams* later made clear, all provisions of the City HRL must be viewed independently of their federal and State counterparts, in light of the specific and distinctive language of the City HRL, and in view of the City HRL's uniquely broad and remedial purposes.

federal counterparts, and (b) it construes the right to reasonable accommodation in an unreasonably narrow manner.

Initially and contrary to the dissent's repeated assertions, the action below was not simply converted to an Article 78 proceeding. Defendants' request to convert was granted only "to the extent that the Court will treat the Complaint *as a hybrid action in law and* as a proceeding pursuant to Article 78" (emphasis added). Consistent with the existence of causes of action in law for failure to reasonably accommodate the plaintiff, defendants' brief on appeal has not simply argued the Article 78 "arbitrary and capricious" standard, but has also addressed the violations of the State and City HRLs. The question of how to interpret the various disability provisions of those laws is properly before us on this appeal. Moreover, even assuming the action was converted exclusively to an Article 78 proceeding, it is clear that the trial court "affected an error of law" in its application of the State and City HRLs, warranting our review.

Most striking about the dissent is its refusal to examine the text of the City HRL.[16] The dissent, for example, refers with approval to the lower court's finding that "the fact that

[16] This, unfortunately, was the only way our colleague could remain unconvinced that "the reasonable accommodation required by Administrative Code § 8-107(15)(a). . . is, in any meaningful way, different from the reasonable accommodation requirement of Executive Law § 292(21-e)."

one suffers from breast cancer, in and of itself, does not establish that [one] has a 'disability'" under the City HRL. The statement itself is incorrect as a matter of law. Unlike Executive Law § 292(21), the existence of a "disability" for City HRL purposes is fully and conclusively established by nothing more than the existence of "any physical, medical, mental or psychological impairment" (Administrative Code § 8-102[16][a], which includes "an impairment of any system of the body" (§ 8-102[16][a][1]). Contrary to the dissent's extended discussion about the federal concept of substantial limitations on major life activities, the "New York State Executive Law and the New York City Administrative Code have a broader definition of 'disability' than does the ADA; neither statute requires any showing that the disability substantially limits any major life activity" (*Reilly v Revlon Inc.*, 2009 US Dist LEXIS 45611, *36-37, 2009 WL 1391258, *14 [SD NY], citing *Giordano v City of New York*, 274 F3d 740, 753 [2d Cir 2001]).

When the dissent turns to whether plaintiff could, with reasonable accommodation, perform the essential requisites of her job, it fails to acknowledge or discuss the provision of the City HRL that deals specifically with this question, namely Administrative Code § 8-107(15)(b). As previously noted, this provision places squarely on the shoulders of a defendant the burden of persuasion to prove, *as an affirmative defense,* that

even with reasonable accommodation, a plaintiff could not perform the essential requisites of a job.

When the dissent discusses the nature of what constitutes reasonable accommodation, it fails to include the fact that "reasonable accommodation" is defined differently under the ADA than it is under the City HRL. Under the ADA, reasonable accommodation (42 USC § 12111[9]) is defined only by illustration, and is a different question from whether the accommodation would cause an employer "undue hardship" (§ 12112[b][5][A]). Under the City HRL, by contrast, the concepts of "reasonable accommodation" and "undue hardship" are inextricably intertwined. An accommodation under Administrative Code § 8-102(18) cannot be considered unreasonable unless the covered entity proves that the accommodation would cause undue hardship.[17]

Notwithstanding these and other differences between the City HRL and its State and federal counterparts, and ignoring even the EEOC Guidance on the ADA itself, referenced above in footnote 7, the dissent elects to try to narrow the available accommodation for workers with disabilities more than the Supreme Court has

[17] It is clear from the factors that are enumerated in the statute among those that may be considered as bearing on undue hardship in the employment context, that the inquiry required to determine undue hardship is precisely the type of case-by-case inquiry with which the dissent would prefer to dispense. *See* Admin. Code §§ 8-102(18)(a)-(d) (setting forth factors including size of workforce, financial resources of covered entity, and the impact that making the accommodation would have on the entity).

done in interpreting the ADA, and more than urged by defendants in their briefing to this Court.

According to the dissent, the provision of additional leave time as an accommodation is *per se* unreasonable where civil service rules and regulations already set forth a leave scheme. The scope of the proposition is breathtaking. As pointed out by the Supreme Court in *US Airways v Barnett* (535 US at 397-398), a reasonable accommodation provision cannot fulfill its function of expanding workplace opportunities for persons with disabilities if it is trumped by "disability-neutral" rules. For example, "[n]eutral 'break-from-work' rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits" (*id.* at 398). In the same fashion, the dissent's draconian proposal would allow "neutral" civil service rules to prevent the provision of *any* additional leave as a reasonable accommodation, *regardless* of whether such leave imposed any hardship on an employer.[18] The dissent, in other words, would render the reasonable accommodation provisions of both the State and City HRLs

[18] The dissent's attempt to analogize to the seniority provisions at issue in *Barnett* is entirely inapposite. *Barnett* explained that any accommodation that would conflict with seniority provisions could "undermine the employees' expectations of consistent, uniform treatment -- expectations upon which the seniority system's benefits depend" (535 US at 404). Here, of course, the provision of additional leave time as an accommodation requires nothing to be "taken away" from any other employee.

powerless to give the added "preferential treatment" necessary to level the playing field for persons with disabilities. Such a result is inconsistent with the remedial purposes of the State HRL and the uniquely broad and remedial purposes of the City HRL.

Most curious about the dissent is its attempt to reopen issues recently decided by *Williams*. Contrary to the dissent's assertion, the Court's decision in that case *necessarily* required consideration of the purpose and intent of both the 1991 amendments to the City Human Rights Law and the 2005 Local Civil Rights Restoration Act. The various statements in *Williams* about those enactments - including but not limited to those concerning the enhanced liberal construction requirements of the City Human Rights Law - represented holdings of the Court, and cannot and should not be trivialized as "dicta."[19]

The dissent would prefer to ignore the Restoration Act, and to continue to have courts give weight to decisions that failed to respect the differences between the City's HRL and its State and federal counterparts. Studiously avoiding the fact that the Restoration Act had at its core *revisions to the text of Administrative Code § 8-130*, and ignoring that the import of that provision and of the Restoration Act of 2005 was to reject unequivocally the practice of construing City HRL provisions in

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[19] We note in this connection that our dissenting colleague has failed to point out, either in this case or in his concurrence in *Williams, any* way that the Court misconstrued either the 1991 Amendments or the Restoration Act (or their purpose or intent).

tandem with their State and federal counterparts (*see Williams*, 61 AD3d at 66-67), the dissent asserts that the City Council lacked the authority to effect its will through clarifying legislation.

That pronouncement would have come as a surprise to this Court, to our State's Court of Appeals, and to Congress.

This Court was the first to recognize (15 years ago) that the City Council had the authority to create a private right of action, even one that went beyond the remedies granted by the State HRL (*Bracker v Cohen*, 204 AD2d 115 [1994]).

The Court of Appeals has also recognized the City Council's authority to prohibit discrimination beyond that prohibited by the State HRL or by federal civil rights law (*see e.g. Levin v Yeshiva Univ.*, 96 NY2d 484, 493 [2001] [recognizing the City HRL's distinctly disparate impact and sexual orientation protections]; *see also McGrath v Toys "R" Us*, 3 NY3d 421, 433 [2004] ["The City Council has not hesitated in other circumstances to amend the New York City Human Rights Law to clarify its disagreement with evolving Supreme Court precedent"]).[20]

[20] As noted in *Williams* (61 AD3d at 73), *McGrath* had assumed that, in general, the purposes of the City Human Rights Law were identical to its State and federal counterparts. "If the City Council had wanted to depart from a federal doctrine, *McGrath* stated, it should have amended the law to rebut that doctrine specifically. The City Council responded to the premise set forth in *McGrath*, legislatively overruling *McGrath* by amending the construction provision of Administrative Code § 8-130, and putting to an end this view of the City HRL as simply mimicking

Congress expects federal enactments to serve as a floor of rights below which states and localities may not fall, not a ceiling above which states and localities may not rise. This principle is contained in Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-7) and in the Fair Housing Act (42 USC § 3615). The ADA explicitly makes this point as well:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or *political subdivision of any State or jurisdiction* that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter (42 USC § 12201[b], emphasis added).

In short, despite the dissent's skepticism about the City Council's authority to legislate independently in the field of civil rights, that authority clearly exists. The professed alarm about the City Council taking actions to nullify Supreme Court precedent ignores the distinction between the judicial and legislative roles. The United States Supreme Court interprets *federal* civil rights laws whereas the City Council enacts *local* law. The City Council has not and could not purport to have authority with respect to the former; a Supreme Court pronouncement as to federal law has no necessary bearing on what the City Human Rights Law says or is intended to mean.[21]

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its federal and state counterparts" (61 AD3d at 73-74 [citation omitted]).

[21] *Cf.* Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489, 502 (1977) (state court judges should not automatically adopt federal constitutional decisions as dispositive of the scope of state

Likewise, the City Council has the authority to legislatively overrule court interpretations of its laws with which it disagrees by amending or clarifying those laws. One crucial legislative function is to clarify the meaning and purpose of the legislature's enactments;[22] it is the essence of the judicial function to honor legislative intent.[23]

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constitutional guarantees, "for only if [those federal decisions] are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees").

[22] Congress has recently done precisely that in order to overcome Supreme Court decisions construing the ADA narrowly *(see* ADA Amendments Act of 2008 (P.L. 110-325, § 2[b]). Among the purposes of that Act was legislatively overruling the Supreme Court's decision in *Toyota Motor Mfg., Ky. v Williams* (534 US 184 [2002]), a case inexplicably referred to by the dissent in the course of a discussion of "substantial impairment" of a "major life activity," concepts not part of the definition of disability under either State or City Human Rights Law).

[23] "The Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law" (McKinneys's Statutes § 193). "The courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy" (*id.* at 95). The dissent states that the majority may not refer to the preamble of the Restoration Act, arguing that reference to the language of a statutory preamble is permissible only where the body of the act is not free from ambiguity, citing *id.*, § 122. The dissent is mistaken.

The City HRL's overarching substantive provision - Administrative Code § 8-130 - demands that the rest of the law's provisions be interpreted in a way to accomplish the uniquely broad and remedial purposes of the statute. The preamble to its enactment, as well as other legislative history, is relevant to those determinations. Indeed, the very section of McKinney's Statutes cited by the dissent states that a preamble "is said to be the key which opens the mind of the lawmakers as to the

The dissent is correct insofar as it asserts that the *State* HRL does require plaintiff ultimately to show that, with reasonable accommodation, she could perform the essential requisites of a job. But the dissent proposes that this Court do exactly the opposite of what we are required to do in reviewing the grant of a motion to dismiss. Instead of drawing all inferences in favor of the *non-moving* party, as required, the dissent would have us draw all inferences in favor of the *moving* party. Contrary to the dissent, a request for accommodation need not take a specific form,[24] and the allegation in the complaint that plaintiff followed up her initial request for leave by asking if *any* additional leave could be made available to her is plausibly understood as a request for *some* leave, not necessarily "a request for reconsideration of her original request."[25] Similarly, it is no conclusory "jump" to infer that plaintiff was claiming she would have been able to return to work where the complaint alleged that she, (a) had cancer, (b) was seeking surgical treatment, and (c) was someone who, with the requested

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mischiefs which are intended to be remedied by the statute" (§ 122, at 244).

[24] *See e.g.* EEOC Enforcement Guidance, items 1 and 3 (requests for accommodation may be in plain English, need not mention the statute or the term "reasonable accommodation," and need not be in writing).

[25] Note that the City HRL states explicitly that the affirmative obligation to accommodate arises when the disability "is known or should have been known by the covered entity" Administrative Code § 8-107[15][a].

accommodation, could perform the essential requisites of the job.[26]

Insofar as the dissent objects to the proposition that reasonable accommodation under the State and City HRLs requires an employer to engage in an interactive process, we refer to *Pimentel*, where the employee's request for an alternative position was met with the take-it-or-leave-it option of returning to her old job or being terminated. There, our colleague conceded that the employer's position "cannot be deemed, as a matter of law, to be the interactive process envisioned by both state and federal disability discrimination statutes and is insufficient to satisfy [its] statutory obligation to provide 'reasonable accommodation'" (29 AD3d at 152 [Andrias, J., dissenting]).

The dissent resorts to disparaging the majority opinion as reflecting "judicial activism." It does no such thing. Our task is to actually read the statutes and respect the decisions that

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[26] The dissent complains that the last of the allegations was in the form of a "conclusory allegation" reciting that she was "a person with a disability as defined in Executive Law § 292(21)." In so doing, the dissent fails to appreciate that CPLR 3013 requires only that statements in a pleading be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." The complaint did so (*cf. Swierkiewicz v Sorema N.A.*, 534 US 506 [2002] [Title VII employment discrimination complaint need not set forth specific facts establishing a prima facie case under the *McDonnell Douglas* framework]).

have been made by relevant legislative bodies, not to substitute our own opinion. As such, we must be faithful to the language and intent of the statutes we are interpreting, even when others, like the dissent, still construe the provisions of the Human Rights Laws "too narrowly to ensure protection of the civil rights of all persons covered by the law" (from the statement of purpose for the Restoration Act, Local Law 85, § 1).

Finally, contrary to the dissent, it is our responsibility to resolve pure questions of law for the parties and the Bar. Doing so does not require us to go beyond the record, but only to interpret the record in light of the applicable statutes.

Accordingly, the order of Supreme Court, New York County (Carol Robinson Edmead, J.), entered October 15, 2007, which, to the extent appealed from, granted defendants' motion to dismiss the complaint alleging employment discrimination based on a disability in violation of Executive Law § 296 and the Administrative Code of the City of New York § 8-107, should be reversed, on the law, without costs, and plaintiff's claims pursuant to the State and City HRLs, as alleged in the first and second causes of action, reinstated.

All concur except Andrias, J.P. who dissents in an Opinion.

ANDRIAS, J.P. (dissenting)

Because the majority's examination of the "reasonable accommodation" provisions of the State and City Human Rights Laws ignores binding precedent in this and numerous other courts, including the Court of Appeals and the United States Supreme Court, and relies instead upon dicta in this Court's majority opinion in *Williams v New York City Hous. Auth.* (61 AD3d 62 [2009]), I dissent and would affirm the dismissal of petitioner's Article 78 proceeding.

The facts are fairly stated by the majority and are not in dispute. Briefly, the record establishes that petitioner[1] was employed by the City's Department of Homeless Services (DHS) since 1988 in noncompetitive civil service positions, most recently as a Community Assistant at the Powers Path Family Facility in the Bronx. At some point, petitioner was diagnosed with breast cancer and requested a three-month unpaid medical leave of absence under the Family & Medical Leave Act (FMLA) (29 USC § 2601 *et seq.)*, which was approved for the period July 31 to October 27, 2006. By letter dated August 11, 2006, plaintiff requested an additional year of medical leave under FMLA for the period through August 11, 2007. By letter dated October 16, 2006, petitioner was informed:

[1] Although this proceeding was originally commenced as a plenary action, it was converted to an Article 78 proceeding. Thus the verified complaint became the petition and plaintiff and defendants became petitioner and respondents.

> {Y]our request cannot be granted at this time because FMLA is for a maximum period of 12 weeks (approved for 7/31/06 - 10/27/06) and you are not eligible for a Medical Leave of Absence.
>
> An unpaid Medical Leave of Absence is not an option available to you because it is only granted to permanent civil service employees, per the Rules and Regulations for Employees Covered under the Career & Salary Plan. You are an employee in a non-competitive title and therefore you are not eligible for a Medical Leave of Absence.
>
> Your anticipated return to work date is October 30, 2006. Please contact your Personnel Liaison . . . to facilitate your return to work. If you fail to comply with the directives of this letter you will be subject to disciplinary action.

Petitioner was thereafter notified in a letter dated October 27 that if she did not return to work by October 30 she would be subject to discharge. She then telephoned one of DHS's leave and retirement benefits analysts and asked if she could obtain any further extension of her medical leave of absence due to her breast cancer condition. Respondents' representative replied in the negative and informed petitioner that she had to return to work as scheduled or be subject to discharge. According to petitioner, after she failed to return to work on the appointed date, she was discharged on or about November 1, 2006. For purposes of this proceeding, respondents agree that the date of petitioner's scheduled return was October 30, 2006; however, they contend that taking petitioner's use of all available leave time into consideration, the date of her scheduled return was actually

January 5, 2007, and she was not officially terminated until after she failed to return on that date.

Petitioner then commenced this proceeding as a plenary action on January 25, 2007, alleging that DHS, in denying her request for additional medical leave and discharging her because she was unable to report to work, discriminated against her because of her disability and her race. As pertinent to this appeal, petitioner's first cause of action alleges that by denying her "August 11, 2006 request for an approved medical leave of absence through August 11, 2007," and by discharging her, respondents discriminated against her in violation of the State Human Rights Law (Executive Law § 296[1][a], 3[a]). Her second cause of action alleges that her request was actually for "a reasonable accommodation under Title 8, Chapter 1, § 8-102(18)" of the City's Human Rights Law (Title 8 of the NYC Administrative Code) and that respondents' denial of that request and her discharge discriminated against her in violation of § 8-107(1)(a) and (15) of that law.

In support of their motion to convert petitioner's action to an Article 78 proceeding and to dismiss it for failure to state a cause of action, respondents argued that they could not lawfully offer any more leave time, and when petitioner failed to return to work, they were left without any choice but to terminate her employment. They further contended that DHS cannot be called irrational for acting in accordance with a long-standing Citywide

regulation that treats the civil service classes differently. Nor, it was argued, could DHS be called irrational because it refused to unilaterally amend the federal FMLA to provide for a one-year leave of absence rather than the 12-week leave authorized by the statute. Therefore, respondents argued, where petitioner was only entitled to a 12-week unpaid leave of absence pursuant to FMLA, which guarantees eligible employees 12 weeks of leave in a one-year period following certain events (in this case a health problem), terminating an employee who did not return to work and who was ineligible for additional leave was entirely rational and must be upheld.

In opposition, petitioner argued that, contrary to respondents' argument that she was not a person with a disability within the meaning of the State and City Human Rights Laws, she states a claim that by denying her request for an unpaid medical leave of absence without even considering the feasibility of her request, based solely on its policy of denying any such leave to noncompetitive employees, and then discharging her based upon her inability to report to work, respondents discriminated against her in violation of the State and City Human Rights Laws.

Supreme Court granted respondents' motion pursuant to CPLR 103(c)and 3211(a)(7), converted the plenary action to an Article 78 proceeding, and dismissed the "complaint" for failure to state a cause of action.

In so ruling, the court, after an extensive and persuasive

analysis of the applicable law, found that petitioner failed to allege facts demonstrating that her breast cancer falls within the definition of the term "disability" in that the fact that one suffers from breast cancer, in and of itself, does not establish that she has a "disability" under the State and City Human Rights Laws, and that a physical condition that prevents an employee from reporting to work and requires her to miss an unacceptably high number of workdays is not a disability within the meaning of Executive Law § 292(21). The court further found that petitioner's complaint indicated she was unable to work at the time of discharge, failed to allege she would have been capable of performing the functions of her job in a reasonable manner upon provision of reasonable accommodations, and failed to set forth factual allegations sufficient to show that upon the provision of reasonable accommodations, she could perform the essential functions of her job.

Instead, the court found, the complaint contained only conclusory assertions without factual support in that there is no allegation that respondents had any way of knowing whether petitioner would ever report to work in the future. In fact, the court found, petitioner alleged that she "was then, and remains, unable to return to work for the respondent DHS because of her medical condition of breast cancer." Therefore, the court held, although a leave of absence may be held to constitute reasonable accommodation, petitioner failed to allege any of the factors

that would support such a conclusion in this case and set forth only the untenable claim that DHS was required to accommodate her by holding her job open indefinitely, which is insufficient under both the State and City Human Rights Laws.

Finally, the court held that since it is uncontested that petitioner held a noncompetitive title at the relevant times, and since there were no allegations that DHS's determinations were based on any factor other than her noncompetitive title, her discrimination claims were insufficiently pleaded. Since DHS's determinations were based on its leave policies applicable to noncompetitive titles, the court held that petitioner failed to support a claim that respondents acted arbitrarily, capriciously, or in violation of lawful procedure.

Petitioner now appeals and, relying solely upon *Parker v Columbia Pictures Indus.* (204 F3d 326 [2d Cir 2000]) and District Court decisions such as *McFarlane v Chao* (2007 US Dist LEXIS 23446 [SD NY]), *Picinich v United Parcel Serv.* (321 F Supp 2d 485, 516 [ND NY 2004]), *Rogers v New York Univ.* (250 F Supp 2d 310, 316 [SD NY 2002]), and *Powers v Polygram Holding, Inc.* (40 F Supp 2d 195, 199 [SD NY 1999]), argues as she did below that respondents violated the State and City Human Rights Laws because DHS made no individualized assessment of the feasibility of her request for accommodation and simply applied its uniform policy based upon her noncompetitive Civil Service classification in denying her an additional leave of absence, which would have

resulted in her receiving a total of approximately 13 months of unpaid medical leave to which she was otherwise not entitled.

The majority mentions *Parker*, but only in support of its conclusion that employers in every case are required to consider requested accommodations by engaging in an individualized interactive process, a requirement no one questions. It fails to mention any of the other cases relied upon by petitioner, but instead chooses, as the *Williams* majority did, to decide this appeal not on the arguments made by the parties in their briefs, but on arguments it thinks should have been presented. As I noted in my concurrence in *Williams* (61 AD3d at 82-83), this tendency to decide appeals on the basis of arguments not raised by the parties has recently become a recurring issue in this Court and is so unfair to the parties as to implicate due process concerns. The Court of Appeals has recently had occasion to voice similar sentiments, equally binding on this Court, when it stated: "For us now to decide this appeal on a distinct ground that we winkled out wholly on our own would pose an obvious problem of fair play. We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made" (*Misicki v Caradonna*, __ NY3d __, 2009 NY Slip Op 3764, *6). While appellate judges do not "sit as automatons" (*id.*, citing the dissenting Judge Smith's reference to Karger, Powers of the New York Court of Appeals § 17.1, at 591 [3d ed rev]),

neither are they "freelance lawyers" (*Misicki*, at *6). As Karger points out, "This general restriction against the raising of new questions on appeal is also binding on the Appellate Division."

The majority simply ignores this admonition to decide only those issues presented by the parties in their appellate briefs. However, given the longstanding requirement of preservation of issues for appellate review, the majority's insistence on considering issues not raised by the parties and then deciding this appeal on the basis of new arguments of its own making is just plain wrong. While there are exceptions to any rule, those exceptions are very rare, and this case, as was *Williams*, is not one. On her appeal to this Court, the plaintiff in *Williams* totally abandoned any arguable claim she may have had under the City Human Rights Law. That law and its application to the facts of that case was simply never presented to this Court for review.

In any event, the majority continues to treat this Article 78 proceeding as a plenary action and seemingly anticipates further proceedings on remand to develop "a fuller factual record." However, inasmuch as petitioner does not challenge Supreme Court's conversion of this action to an Article 78 proceeding, which is summary in nature, our review is limited to whether respondents' determinations were arbitrary and capricious, an abuse of discretion, or affected by an error of law (CPLR 7803[3]), i.e., whether such determinations had a rational basis (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 231

[1974]). Despite the majority's suggestion that we are not limited to that standard of review because Supreme Court treated petitioner's claims "*as a hybrid action in law and* as a proceeding pursuant to Article 78," the only two claims pursued by petitioner, both in Supreme Court and on appeal, allege violations of the State and City Human Rights Laws and seek reinstatement to her former position with back pay. Thus, no matter how Supreme Court characterized this proceeding, it is well settled that an Article 78 proceeding is the only remedy by which a dismissed public employee may seek reinstatement and back pay (*see Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430 [1959]). Therefore, in challenging respondents' actions, it is incumbent on petitioner to present a sufficient factual basis to establish her prima facie entitlement to relief. Given that standard, Supreme Court properly determined that petitioner failed to set forth in her complaint factual allegations sufficient to show that, upon the provision of reasonable accommodations, she could perform the essential functions of her job (*McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677 [2006]). She also failed to allege sufficient facts indicating that her request for approximately 13 months of medical leave due to her breast cancer condition was reasonable (*see e.g. Powers*, 40 F Supp 2d at 201; *Micari v Trans World Airlines, Inc.*, 43 F Supp 2d 275, 282 [ED NY 1999], *affd* 205 F3d 1323 [2d Cir 1999]).

It is well settled that a complaint, or in this case a

petition, states a prima facie case of discrimination due to a disability under both the State and City Human Rights Laws if the individual demonstrates that he or she suffered from a disability and that the disability caused the behavior for which he or she was terminated (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [2006], *lv denied* 7 NY3d 707 [2006]. The term "disability" is defined as "a physical, mental or medical impairment which, upon the provision of reasonable accommodations, do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job . . . held" (Executive Law § 292[21]; *see also Umansky v Masterpieces Intl.*, 276 AD2d 691, 692 [2000]). Supreme Court correctly found that petitioner not only failed to allege sufficient facts to establish prima facie that she suffers from a disability as defined by law, but also failed to set forth factual allegations sufficient to show that upon the provision of reasonable accommodations, she could perform the essential functions of her job (*McKenzie*, 35 AD3d at 677). In fact, petitioner failed even to specify what the essential functions of her position as a Community Assistant entailed, and which functions she was unable to perform, with or without reasonable accommodations.

Nevertheless, the majority holds that under the supposedly broader protections afforded by the State and City Human Rights Laws, the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the

reasonableness of the accommodation requested. However, it offers no compelling reason for deviating from well established principles regarding discrimination suits. In determining whether an individual has alleged a cause of action for discrimination based upon disability, it would seem that the first step for this Court would be to determine whether the complainant has alleged sufficient facts to establish prima facie that he or she has a disability within the meaning of the State and City Human Rights Laws.

It is also well settled that in any claim of discrimination, whether based upon race, sex, or in this case disability, the complainant must carry the initial burden of establishing a prima facie case (*McDonnell Douglas Corp. v Green*, 411 US 792, 802 [1973]). The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for its employment action, in this case respondents' denial of a further leave of absence under FMLA and the termination of petitioner's employment after she failed to return to work at the end of her sick leave. Once the employer meets this burden, the presumption of intentional discrimination disappears, and the burden again shifts to the complainant to demonstrate that the employer relied upon impermissible considerations in coming to its decision *Koester v New York Blood Ctr.*, 55 AD3d 447, 448 [2008]).

In reversing and reinstating petitioner's causes of action, the majority finds that she stated causes of action for

discrimination arising from respondents' failure to engage in an individualized process when considering her request for extended medical leave and their failure to reasonably accommodate her. However, not only does the majority ignore the fact that the original plenary action was converted to an Article 78 proceeding, which by its very nature is intended to be summary in nature, but it fails to deal with the threshold issue of whether petitioner has pleaded sufficient facts to establish that she is disabled within the meaning of the State and City Human Rights Laws. As previously noted, Supreme Court found that petitioner failed to allege facts demonstrating her breast cancer fell within the definition of the term "disability" in that the fact that one suffers from cancer, in and of itself, does not establish that one has a "disability" under the State and City Human Rights Laws, and a physical condition that prevents an employee from reporting to work and requires an employee to miss an unacceptably high number of workdays is not a disability within the meaning of Executive Law § 292(21).

Nevertheless, the majority, starting with petitioner's allegation that she was forced to delay her scheduled cancer surgery as a result of the termination of her health benefits and her allegation that she is a "person with a disability as defined in Executive Law § 292(21)," jumps to the conclusion that "it can reasonably be inferred that plaintiff needed the requested leave to be able to have and to recover from cancer

surgery, after which time she anticipated that she would be able to return to work." The majority also faults Supreme Court for focusing exclusively on petitioner's request for a one-year leave of absence, even though respondents also denied petitioner's "modified request for 'any' additional medical leave," and finds that this fact alone requires remand because the court's decision was premised on the incorrect assumption that the only leave request was effectively "open-ended": "[A]ccording all inferences to [petitioner], [the majority] fail[s] to see how she was not asking for an extension of up to one year, and why the City could not reasonably accommodate that request."

While the foregoing are interesting conclusions, unfortunately they are not urged by petitioner on appeal and lack any support in the record. As to the majority's first conclusion, that petitioner anticipated she would be able to return to work after a reasonable period of recovery from her scheduled cancer surgery, as Supreme Court correctly found, her only allegation is that she "was then, and remains, unable to return to work . . . because of her medical condition of breast cancer." Nowhere in the record does petitioner ever allege that she anticipated returning to work or, if so, when. The majority's second conclusion, that petitioner modified her request for an additional one-year leave of absence, is likewise belied by petitioner's brief, which makes no such claim of a modified request, but simply argues that, "[i]n applying such

uniform policy and denying her request for an additional leave of absence which would have resulted in a total unpaid medical leave of absence of approximately 13 months for her, without making inquiry and analysis of the specific circumstances of plaintiff's request and its feasibility . . . defendants violated plaintiff's rights under the state and city human rights laws." There is simply no basis in the record for the majority's conclusion, which again is not urged by petitioner, that after her formal request for additional leave was denied, her subsequent phone call to DHS's benefits specialist was a "modified" request for "any" additional medical leave. At most, it was a request for reconsideration of her original request.

This Court has recently held that federal and state disability discrimination statutes envisage an employer and employee engaged in an interactive process in arriving at a reasonable accommodation for a disabled employee; however, it is incumbent upon the disabled employee to specify the accommodations sought and to show that he or she can perform the particular job with such accommodation (*see Pimentel*, 29 AD3d at 149). It is self evident that before reaching the question of a reasonable accommodation and an interactive process to achieve such result, there must first be a prima facie showing that the complainant is disabled within the meaning of the applicable statutes.

Adopting the majority's approach, petitioner assumes that

she suffers from a disability and, citing the 2007 Southern District decision in *McFarlane v Chao* (*supra*), proceeds to the next step, arguing that requests for a leave of absence for a medical reason can constitute a request for a reasonable accommodation under the State and City Human Rights Laws, including situations where, as here, the employee is unable to work because of the effects of illness. However, *McFarlane*, a case brought pursuant to the Americans with Disabilities Act of 1990 (ADA) (42 USC § 12101 *et seq.*) and the Rehabilitation Act of 1973 (29 USC § 701 *et seq.*), does not help petitioner.

In *McFarlane*, the district court found that the plaintiff, who had been appointed to a temporary position that expired September 30, 2000 unless otherwise extended, failed to sustain her minimum burden of establishing a prima facie case of discrimination. Unlike petitioner, McFarlane had already undergone surgery to remove a tumor from her right breast. Thereafter, she requested a three-month leave without pay under the FMLA. In support of her August 24, 2001 request, she attached letters from her oncologist and psychologist stating she was unable to work at that time and required total rest, relaxation and therapy. By letter dated August 28, 2001, McFarlane's request was granted retroactively from August 7 through termination of her appointment on September 30, 2001. In dismissing McFarlane's subsequent suit charging discrimination based upon refusal to provide reasonable accommodation, the

district court found that while the burden of establishing a prima facie case under the ADA or the Rehabilitation Act is not a heavy one (indeed, it has been characterized as "minimal" and "de minimis"), in order for her to demonstrate she had a disability as defined by the Rehabilitation Act, she had to "(1) show that she suffered from a physical . . . impairment, (2) identify the activity that she claimed to be impaired and establish that it constitutes a major life activity, and (3) show that the impairment substantially limited the major life activity previously identified" (from the Report and Recommendation of Magistrate Pitman, 2007 WL 1017604, *14).

Citing federal case law holding that in order to constitute a substantial impairment, the impact of the impairment must be "permanent or long term" (quoting *Toyota Motor Mfg., Ky., v Williams*, 534 US 184, 198 [2002]), and that "temporary conditions do not constitute disabilities under the ADA and other statutes" (quoting *Stephens v Thomas Publ. Co.*, 279 F Supp 2d 279, 283 [SD NY 2003]), the Magistrate reported (2007 WL 1017604, *14-15) that while the record established the maximum period of McFarlane's claimed inability to work was seven months, an inability to work for seven months is simply not sufficiently lengthy to constitute a substantial limitation (citing *Colwell v Suffolk County Police Dept.*, 158 F3d 635, 646 [2d Cir 1998], *cert denied* 526 US 1018 [1999]). Accordingly, plaintiff McFarlane did not present sufficient evidence to show that her ability to perform her

particular job functions was substantially limited, let alone her ability to perform a broad range of jobs.

In the case at bar, the majority claims that the lower court's statement that cancer, in and of itself, does not establish that one has a disability within the meaning of the City Human Rights Law is incorrect as a matter of law because a "disability" is fully and conclusively established by nothing more than "an impairment of any system of the body" (Administrative Code § 8-102[16][b][1]). As previously noted, it also does not mention *McFarlane* or four of the other five cases relied upon by petitioner in her brief, but quibbles instead with my reference to *Toyota*, a case it mistakenly dismisses as irrelevant because, in its opinion, "substantial impairment" of a "major life activity" is a concept that is not part of the definition of disability under either the State or City Human Rights Laws.

First of all, contrary to the majority's intimation that the City Council has carved out a unique definition of disability ("any physical, medical, mental or psychological impairment . . . [meaning] an impairment of any system of the body"), the detailed listing of such impairments in § 8-102(16)(b)(1), upon which it relies, is virtually identical to the physical impairments defined in the Rehabilitation Act's regulations (45 CFR 84.3[j][2][i]) that the Supreme Court was dealing with in *Toyota* (534 US at 194-195). However, as the Supreme Court held there,

"[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity," examples of which are walking, seeing, hearing and, performing manual tasks (*id.* at 195). The claimant must further show that the limitation on the major life activity is substantial, which is defined in 29 CFR 1630.2(j)(1) as "Unable to perform a major life activity that the average person in the general population can perform," or "Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." The Supreme Court thus held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term" (534 US at 198). Contrary to the majority's statement that neither the State nor the City Human Rights Law requires any showing that the disability substantially limits any major life activity, both laws require an employer to make reasonable accommodation to the needs of persons with disabilities so as to permit the employee with a disability to perform in a reasonable manner "the activities involved in the job" or occupation held (Executive Law

§ 292[21] and [21-e]) or to enable a person with a disability to satisfy "the essential requisites of a job" (Administrative Code § 8-107[15][a]). It goes without saying that performance of "the activities involved in the job" or "the essential requisites of a job" are without doubt major life activities within the meaning of the ADA as well. As to the majority's reliance upon the Administrative Code § 8-102(18) provision that an accommodation cannot be unreasonable unless the employer proves that it causes undue hardship, that is exactly the same standard applied by the Supreme Court in *US Airways v Barnett* (535 US 391 [2002]), where it held that undermining a seniority system would create an undue hardship. Rather than being irrelevant to any discussion of disability under the State or City Human Rights Law, the Supreme Court's holdings in *Toyota and Barnett* are very relevant, since a complainant's ability to perform his or her job with or without reasonable accommodations is central to federal, state, as well as local disability jurisprudence. Thus, even assuming petitioner suffers from a disability within the meaning of the City law, she still has failed to allege or prove in any way that she is able to perform her job even with a reasonable accommodation.

While *McFarlane* involved a motion for summary judgment, the result should be no different in this case. The majority's conclusion that respondents have not met the City law's requirement of pleading as an affirmative defense that even with

reasonable accommodation, petitioner could not have performed the essential requisites of her job, is simply incorrect. Since we are dealing with an Article 78 proceeding, respondents had the option of either filing an answer in response to the petition, in which they could raise any objection in point of law, or moving to dismiss it for legal insufficiency on those grounds (CPLR 7804[f]). Such objections can produce a summary disposition of the proceeding (Alexander, McKinney's CPLR Practice Commentary C7804:7). That is exactly what respondents did in their motion to dismiss the petition, which was made in lieu of answer. Respondents contended that not only did petitioner not show she had proposed and was refused an objectively reasonable accommodation allowing her to fulfill the functions of her job, but she actually admitted that she could not work at all. In response, petitioner did not propose any alternative accommodation, but merely continued to make the argument, which is simply a conclusory statement of law, that by denying her request for an unpaid medical leave of absence without even considering the feasibility of her request, based solely on the policy of denying any such leave to noncompetitive employees, and then discharging her based upon her inability to report to work, respondents discriminated against her in violation of the State and City Human Rights Laws.

Applying the CPLR 3211 standard urged by the majority, Supreme Court correctly found that "even assuming the truth of

the facts asserted in her Complaint, plaintiff fails to allege facts demonstrating that her cancer condition falls within the definition of the term 'disability' as contemplated by the NYSHRL and NYCHRL and, accordingly, the termination of petitioner did not constitute an unlawful discrimination on the part of defendants."

The majority heavily relies upon the Ninth Circuit's en banc decision in *Barnett v U.S. Air, Inc.* (228 F3d 1105, 1116 [2000]) for the premise that a good faith interactive process is "the key mechanism for facilitating the integration of disabled employees into the workplace" and notes that that decision was vacated on other grounds. However, the majority's discussion of *Barnett* is more significant for what it leaves out.

Robert Barnett was a customer service agent for U.S. Air who injured his back while working in a cargo position at San Francisco International Airport. After returning from disability leave, he discovered he could not perform all the physical requirements of handling freight, and upon his doctors' recommendation that he avoid heavy lifting and bending, etc., he used his seniority to transfer into the company's mail room. Subsequently he learned that he was about to be bumped from his mail room job by two employees with more seniority. In the ensuing suit alleging discrimination for failure to provide a reasonable accommodation, the district court granted U.S. Air summary judgment for all claims, including Barnett's claim that

U.S. Air had discriminated by not participating in the interactive process mandated by EEOC's regulations implementing the ADA. As does the City's Human Rights Law, the ADA's reasonable accommodation requirement puts the burden on the employer to show that the proposed accommodation will cause undue hardship (*see* 42 USC § 12112[b][5][A]). Barnett argued that it would have been a reasonable accommodation for U.S. Air to allow him to remain in the mail room by making an exception to its seniority policy, and the key questions before the Ninth Circuit were whether a seniority system is a per se bar to reassignment as a reasonable accommodation, and whether a disabled employee seeking reasonable accommodation should have priority in reassignment.

A majority of the Ninth Circuit held that reassignment is a reasonable accommodation, and that a seniority system is not a per se bar to reassignment, and a case-by-case fact-intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer (228 F3d at 1120). However, the United States Supreme Court granted certiorari and reversed the Ninth Circuit, holding that even assuming the employee is an "individual with a disability" and the accommodation requested would be reasonable within the meaning of the ADA were it not for one circumstance (there, the rules of a seniority system, and here, Civil Service rules and regulations), that circumstance alone supports the conclusion

that the proposed accommodation is not a "reasonable" one and the statute does not require proof on a case-by-case basis that a seniority system should prevail (*US Airways, Inc. v Barnett*, 535 US 391, 403 [2002]). Taking one sentence from the Court's decision out of context, the majority claims the Court explained that accommodation that would conflict with seniority provisions implicated "the employees' expectations of consistent, uniform treatment" (535 US at 404). Then, in true ipse dixit fashion, it goes on to say that "of course, the provision of additional leave time as an accommodation requires nothing to be 'taken away' from any other employee." What bearing that has on this case is unclear; however, a reading of the full paragraph from which the majority excerpts its quote explains the Court's rationale for concluding that "the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" (*id.* at 405). To require more, the Court explained, might well undermine the employees' expectations of consistent, uniform treatment because such a rule would substitute a complex case-specific "accommodation" decision made by management for the more uniform impersonal operation of seniority rules. The Court could find nothing in the statute that suggests that Congress intended to undermine seniority systems in this way.

The same rationale applies with even greater force to this case. Here, unlike *Barnett*, the threshold question of whether petitioner was disabled within the meaning of the respective

Human Rights Laws is disputed, whereas in *Barnett* the plaintiff's status as a disabled person was assumed. Also unlike petitioner, Mr. Barnett was able to return to work and specify what duties he was able to perform with the accommodations he was seeking. Moreover, just as the Supreme Court found in *Barnett*, there is nothing in the State or City Human Rights Laws that suggests that either the Legislature or the City Council intended to undermine their respective Civil Service systems in any way.

What is uncontested in this case is that petitioner, like all other employees in the noncompetitive class, is not protected by the Civil Service Law (*see Matter of Roberts v City of New York*, 21 AD3d 329, 330 [2005], *lv denied* 6 NY3d 702 [2005]), and that § 5.1 of DHS's Career and Salary Plan provides that the leave of absence requested by petitioner is available only to permanent employees and is applied uniformly to all DHS employees, whether disabled or not. Therefore, under the standard enunciated in *U.S. Air v Barnett*, petitioner's request for additional medical leave to which she is otherwise not entitled is, as a matter of law, not a request for a "reasonable" accommodation.

While I do not think the majority, in interpreting a similarly worded statute, would not consider itself bound to follow United States Supreme Court precedent, it nonetheless concludes that the New York City Council, in amending the City Human Rights Law in 2005, legislatively overruled cases that had

failed to respect the differences between the City's local law and its State and federal counterparts. However, while a legislative body can certainly overrule court interpretations of its laws with which it disagrees by amending or clarifying those laws, the City Council, in enacting the Local Civil Rights Restoration Act of 2005, did not do so. It merely added "partnership status" to the categories of proscribed bases for discrimination, lowered the standard for a finding of an unlawful retaliatory action, and urged broad construction of the City Human Rights Law independent of a court's consideration of counterpart federal and New York State statutes. The simple answer to the majority's protestations regarding the City Council's efforts in the Restoration Act to make "core revisions" to the City Human Rights Law is that if the Council wanted to, it could have done so in plain and unequivocal directory language, just as it did in response to the Court of Appeals decision in *McGrath v Toys "R" Us, Inc.* (3 NY3d 421 [2004]). It did not change any of the provisions relevant to this appeal, and it is not this Court's function to give its own interpretation to legislation that is plain on its face or to fill in blanks left by the legislative body, especially when there is nothing to indicate that any omissions were inadvertent. Indeed, where an amendment leaves portions of the original act unchanged, such portions are continued in effect, with the same meaning and effect as they had before the

amendment (McKinney's Statutes § 193[a], at 359).

The majority also seeks to distinguish *US Airways v Barnett* by alluding to the very different conception and statutory architecture of "reasonable accommodation" under the City Human Rights Law. In urging such distinction, however, it seemingly acknowledges sub silentio that *US Airways* bars petitioner's claim under the State Human Rights Law.

In any event, the majority's attempt to distinguish the import of the City's local law from the State statute is unconvincing since it fails to demonstrate that the reasonable accommodation required by Administrative Code § 8-107(15)(a) ("reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job") is, in any meaningful way, different from the reasonable accommodation requirement of Executive Law § 292(21-e) ("actions taken which permit an employee . . . with a disability to perform in a reasonable manner the activities involved in the job").

Nevertheless, the majority concludes that unlike the State statute, the issue of the ability to perform the essential requisites of a job is not bound up in the City Human Rights Law definition of disability or in its definition of reasonable accommodation. It thus concludes that there is no subset of persons with disabilities not included in the City's requirement of "reasonable accommodation," and unlike the State Human Rights Law and the ADA, "there is no accommodation (whether it be

indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation," nor any that may be "unreasonable" as long as they do not cause undue hardship. Such conclusion, however, flies in the face of the holding in *US Airways* that overriding a uniformly applied seniority system - or, in this case a similar Civil Service classification system - in order to accommodate a disabled employee is per se not a reasonable accommodation.

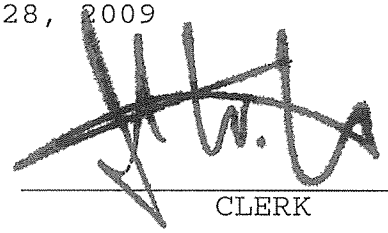
To the extent it seeks to distinguish or ignore federal and State precedent on the issue and conclude that in New York City - and only in New York City - an employee is entitled to allege any and all physical ailments as a disability and that such employee is entitled to any and all accommodations, without regard to any seniority or Civil Service system, the majority seems to rely in great part on the City Council's statement of purpose or preamble to its Local Civil Rights Restoration Act of 2005. That statement, which included "the sense of the Council that New York City's Human Rights Law has been construed too narrowly," sought to underscore that the provisions of the City's Human Rights Law are to be construed independently from similarly worded or identical provisions of New York State or federal statutes, which were to be viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise" (Local Law 85 [2005] § 1). However, recourse to a preamble is permissible

only when ambiguity must be resolved or statutory language interpreted, and the language of a preliminary recital cannot control the enacting part of a statute that is already clear and unambiguous in its terms (McKinney's Statutes § 122, at 245). The process of judicial construction of a law or statute also presupposes doubt or ambiguity (*see generally* McKinney's Statutes § 71). Thus, inasmuch as the City Council, in enacting the local law, did not amend the clear and unambiguous definitions in the City's Human Rights Law pertinent to this appeal, its preamble is clearly precatory in nature, and courts are free to apply the law according to its plain language. Moreover, to the extent the majority's rationale depends upon the majority opinion in *Williams,* the concurring opinion in that case noted (61 AD3d at 82) that the plaintiff there never enunciated a specific claim under the City's Human Rights Law, and even assuming arguendo that she had raised it at nisi prius, she clearly abandoned any such claim on appeal. Therefore, the vast majority of the majority opinion in *Williams* is simply dictum, which is not binding on this or any other court and has no stare decisis effect (McKinney's Statutes § 72 at 141-142). Contrary to the majority's assertion that the majority opinion in *Williams "necessarily"* required consideration of the City Human Rights Law, even if it could be argued that the petitioner had raised a City Human Rights Law issue in the court of first instance, she clearly had not pursued it on appeal. As to the

validity of the majority's reasoning in *Williams*, it would serve no purpose then or now to address an issue that was not before us. I would simply note, that the author of *A Return to Eyes on the Prize* (33 Fordham Urb L J 255 [2006]), upon which the majority relied so heavily in *Williams*, admitted that in enacting the Restoration Act, the City Council did not specifically address many issues, but he suggested nonetheless that any failure to address a specific issue in the amendments should be overcome by "judicial activism" (*id.* at 290-291). My colleagues seem to have taken the bait.

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

ENTERED: JULY 28, 2009



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