SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 2, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

462N

Diane Johnson, etc., et al.,
Plaintiffs-Appellants,

Index 24965/99

-against-

Family Support Systems Unlimited, Inc.,
Defendant-Respondent.

[And A Third-Party Action]

Diamond & Diamond, LLC, New York (Stuart Diamond of counsel), for appellants.

DeCicco, Gibbons & McNamara, P.C., New York (Ankur H. Doshi of counsel), for respondent.

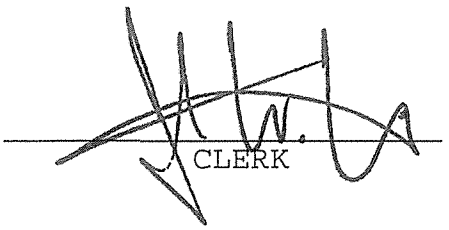
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about September 30, 2008, which, inter alia, granted plaintiffs' motion to reargue an order, same court and Justice, entered August 1, 2007, and, upon reargument, after an in camera inspection, denied discovery of certain of the infant plaintiff's foster care records and granted discovery of others as redacted, unanimously affirmed, without costs.

In identifying the categories of voluminous records as to which disclosure was denied and providing the reasons for its determination, the court substantially complied with the

procedures set forth in *Wheeler v Commissioner of Social Servs. of City of N.Y.* (233 AD2d 4 [1997]). We also agree with the substance of the motion court's discovery determinations.

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

ENTERED: JUNE 2, 2009



Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

675-
676 The People of the State of New York, Ind. 5372/93
Respondent,

-against-

Jose Luis Taveras,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 18, 2005, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him to a term of 8 years to life, to be served consecutively to a sentence upon a New Jersey conviction, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentence be served concurrently with the New Jersey sentence, and otherwise affirmed. Order, same court and Justice, entered on or about April 10, 2008, which specified and informed defendant that the court would resentence him to a term of 7½ years, unanimously affirmed, and the matter remanded to Supreme Court, New York County for further proceedings upon defendant's application for resentencing.

Although we decline to disturb the proposed resentence under

the Drug Law Reform Act (L 2005, ch 643, § 1), which reduces the original sentence to 7½ years, we find the original sentence excessive to the extent that it directed the sentences to run consecutively. Because of the procedural posture of this case, the rule that resentencing under the Drug Law Reform Act does not permit the issue of concurrent versus consecutive sentencing to be revisited (*see People v Vaughan*, __ AD3d __, 876 NYS2d 82 [2009]) does not apply. We have before us, not only the appeal from the proposed resentence, but defendant's direct appeal from the original judgment of conviction. Defendant filed a timely notice of appeal from that conviction, the appeal has never been dismissed, and we deem defendant to have perfected that appeal, under the circumstances presented, by way of his appeal from the proposed resentence (*see* CPLR 2001).

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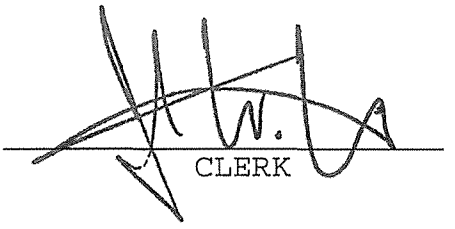

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4869 The People of the State of New York, Ind. 1505/04
Respondent,

-against-

Anthony Brewer,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. on speedy trial motion; Robert E. Torres, J. at jury trial and sentence), rendered July 6, 2006, convicting defendant of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously reversed, on the law, and the indictment dismissed.

CPL 30.30(1)(a) provides for the dismissal of an indictment if the People are not ready for trial within 6 months (in this case 184 days) of the commencement of a criminal action, less excludable time. This prosecution commenced with the filing of a felony complaint on March 25, 2004 (CPL 1.20[17]). The People announced their readiness for trial on April 28, and for purposes of this appeal, concede 168 days of chargeable time. Defendant's revised brief places in issue 4 adjournments covering a total of 91 days.

The matter was adjourned from May 9 to May 17, 2005. Defendant, who was incarcerated, was not produced on May 9. The People, however, argue that this time should be excluded due to the absence of defendant's counsel (*see* CPL 30.30[4][f]). The defendant generally has the burden of demonstrating that any postreadiness adjournments occurred under circumstances that should be charged to the People (*People v Daniels*, 217 AD2d 448, 452 [1995], *appeal dismissed* 88 NY2d 917 [1996]). The inquiry on a speedy trial motion is whether the People have done all that is required of them to bring the case to a point where it may be tried (*see People v England*, 84 NY2d 1, 4 [1994]). The People are not presently ready where they fail to produce an incarcerated defendant for trial (*id.*). Here the record discloses that the absence of defendant's counsel did not contribute to the delay, but was manifestly the result of defendant's nonproduction. Accordingly, defendant was not "without counsel" within the meaning of CPL 30.30(4)(f) (*see People v Nunez*, 47 AD3d 545, 546 [2008]). Therefore, this eight-day period should be charged to the People.

The next adjournment in issue covered the period from May 17 to May 31, 2005. Neither the prosecutor nor defense counsel appeared before the court on May 17. The transcript reflects that the court informed defendant that the prosecutor made a telephone request for an adjournment to May 31 for a hearing and

a trial. The People assert that the prosecutor found no reason to appear because she knew defendant's counsel would not be in court. Such speculation provides no basis for a determination of the issue. Moreover, this time should be chargeable based upon the People's failure to meet their burden of clarifying on the record the basis for the adjournment (*see People v Liotta*, 79 NY2d 841 [1992]). Accordingly, as we find 22 days should be added to the 170 found includable by the motion court, the total of 192 days is above the 184 days permitted by statute and the motion should have been granted. Additionally, and in the interest of justice, we would also find the 12-day period from July 21 to August 2, 2005 to be chargeable to the People. As reflected by the transcript, the People requested an adjournment for this period due to a police officer's vacation.

In light of the foregoing, we need not consider defendant's remaining arguments.

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

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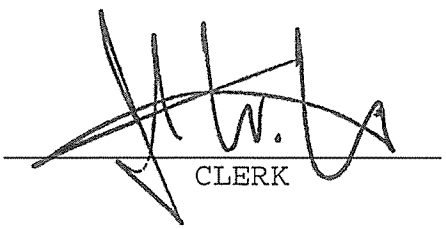

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5022 Carolyn Thomas French, Index 100207/98
Plaintiff-Appellant,

-against-

Alfred L. Schiavo, et al.,
Defendants-Respondents.

Ronemus & Vilensky, Garden City (Lisa M. Comeau of counsel), for appellant.

Mauro Goldberg & Lilling LLP, Great Neck (Barbara D. Goldberg of counsel), for respondents.

Judgment, Supreme Court, New York County (John E.H. Stackhouse, J.), entered December 28, 2007, in plaintiff's favor, bringing up for review an order, same court and Justice, entered on or about June 29, 2007, which, upon a jury verdict awarding plaintiff, inter alia, $94,000 for past medical expenses, $176,000 for past lost earnings, and $3,100,000 for future lost earnings, denied plaintiff's motion, inter alia, to increase the award for past medical expenses, pursuant to stipulation, to $166,371.63, and granted defendants' motion for a collateral source offset to the extent of reducing the award for past medical expenses from $94,000 to $38,559, reducing the award for past lost earnings from $176,000 to $0, and reducing the award for future lost earnings from $3,100,000 to $1,133,016, unanimously modified, on the law, to increase the award for past medical expenses to $166,371.63, and otherwise affirmed, without

costs.

The parties' stipulation to the fair and reasonable value of past medical expenses in the amount of $166,371.63 should be enforced (*see Sanfilippo v City of New York*, 272 AD2d 201 [2000], *lv dismissed* 95 NY2d 887 [2000]).

In light of the fact that plaintiff did not become eligible for disability payments from Social Security and Aetna until after the first trial of this action and the limited discovery afforded defendants regarding the subsequent post-traumatic occipital lobe epilepsy diagnosis (9 AD3d 279 [2004]), the trial court providently exercised its discretion in granting defendants post-verdict discovery and a collateral source hearing pursuant to CPLR 4545(c) (*see Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 37-38 [2008], *lv denied* 11 NY3d 705 [2008]; *Hoffmann v S.J. Hawk, Inc.*, 273 AD2d 200 [2000], *affg* 177 Misc 2d 305 [1998]). Contrary to plaintiff's evidentiary objections and the conflicting testimony of the parties' expert as to the possibility that plaintiff's present disability benefits might be reduced or discontinued, the transcript of the post-verdict hearing reflects that defendants carried their burden of demonstrating "with reasonable certainty" that plaintiff's past medical expenses and past and future lost earnings were or would be replaced from collateral sources (CPLR 4545[c]; *see generally Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995]).

We have not considered plaintiff's remaining argument regarding the accrual of interest on the judgment, which is not properly before us.

The Decision and Order of this Court entered herein on January 13, 2009 is hereby recalled and vacated (*see* M-769 decided simultaneously herewith).

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

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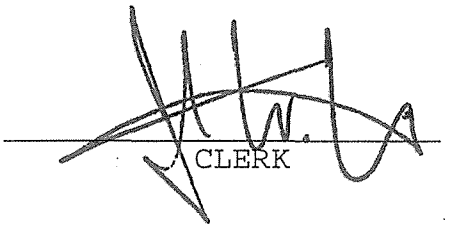

Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5370 Nestor Perez, Index 102820/00
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 25, 2007, which, in an action for personal injuries sustained when plaintiff slipped and fell in a playground owned by defendant City, granted plaintiff's motion for an order directing the Clerk to enter judgment dismissing the action, reversed, on the facts, without costs, the motion denied, the action reinstated, and a continuance granted so that plaintiff may (a) depose the police officer who wrote the aided report about the incident, and (b) obtain the documents that defendant was still photocopying on the day of trial.

Although there was a long, unexplained delay between mid-April 2003 (when the trial court refused to sign plaintiff's order to show cause seeking to vacate the March 4, 2003 order that had dismissed the action upon plaintiff's refusal to proceed to trial) and the end of July 2007 (when plaintiff first

undertook to have a judgment entered dismissing the complaint so as to facilitate an appeal of the dismissal), we reject defendant's argument that the appeal should be dismissed because of the prejudice caused by this delay. Defendant could have entered a judgment as easily as plaintiff, and it would not be fair to dismiss the appeal where plaintiff's inability to proceed to trial and resulting dismissal of the action were caused by defendant's failure to turn over the long-demanded aided report until the day before trial when the parties picked a jury (*see Dwyer v Mazzola*, 171 AD2d 726, 728 [1991]).

On the merits, defendant's failure to promptly disclose the aided report did not warrant the striking of its answer, where no reason appears to doubt defense counsel's representation to the trial court, on the day of trial, March 4, 2003, that she did not know that the Comptroller's Office had faxed the aided report to defendant's Law Department as early as February 6, 2003, and that she told plaintiff's counsel about the report as soon as she discovered it in the file on February 28, 2003 (*cf. e.g. Frye v City of New York*, 228 AD2d 182 [1996]). Nor was the striking of defendant's answer warranted by the fact that defendant had not yet turned over other documents that plaintiff had demanded, and was still photocopying those documents on the day of trial (*see Commerce & Indus. Ins. Co. v Lib-Com, Ltd.*, 266 AD2d 142, 145 [1999]). However, the trial court did improvidently exercise its

discretion by refusing to grant a continuance so that plaintiff could depose the officer who wrote the aided report and receive and review the documents that defendant was still photocopying on the day of trial. Plaintiff had requested the documents as long ago as April 2000, so the need for a continuance was not caused by any lack of due diligence on his part, and defendant, who stated that it had no objection to producing the officer for deposition, would not have been prejudiced by a continuance (*see Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 52 [2008]; *SKR Design Group, Inc. v Avidon*, 32 AD3d 697, 699 [2006]).

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

DEGRASSE, J. (dissenting)

I respectfully dissent with respect to the majority's conclusion that the trial court improvidently exercised its discretion in refusing to grant plaintiff a continuance. Plaintiff was injured when he tripped and fell while playing soccer in a public playground. After the jury was selected, plaintiff's counsel orally moved the trial court for an order striking the answer based on defendant's alleged failure to provide required discovery. Counsel cited defendant's late production of a New York City Police Department aided report which she did not see until just prior to jury selection. Hardly a "smoking gun," that report's narrative reads: "aided states while playing soccer he slipped and fell causing SPI (broken right leg)[. A]ided states his fall was due to unlevel ground near drain. Aided also states it was raining heavy. PO Quirindongo inspected site. PO observed slight unlevelness by drain in the playground. Nothing major." Counsel also advised the court that other overdue documentary discovery was purportedly being photocopied for delivery to her by defendant. Upon defendant's offer to produce the police officer for a deposition, counsel responded as follows:

> My position at this point, with everything that's been going on, is that a deposition alone will not be sufficient under these circumstances. We need a deposition, we need further discovery for all of these things that are mysteriously appearing at this point. Clearly they exist and clearly they result in -- or

> they should be provided to us so that we have an opportunity to take a look at them and to do whatever discovery flows from that during the normal discovery process.

Upon the court's inquiry, counsel was unable to describe the "mysteriously appearing" documents mentioned. Because willfulness on defendant's part was not shown, the court declined to strike its answer but instead granted plaintiff's application to the extent of precluding defendant from calling the police officer and introducing the aided report into evidence. Plaintiff's counsel reacted to the court's ruling as follows:

> At this time, Your Honor, with all due respect, I have no choice but to ask Your Honor to issue the decision and the order, adjourn this trial so that I may take the appropriate remedies to protect the interest of my client, which would be to take this to the Appellate Division.

Upon the court's denial of that application, counsel stated that she could not proceed with the trial. The court thereupon stated that the complaint would be dismissed.

It is well settled that the decision on whether to grant a continuance is a matter within the sound discretion of the trial court and should not be disturbed absent a clear abuse of that discretion (*Mayorga v Jocarl & Ron Co.*, 41 AD3d 132, 134 [2007], *appeal dismissed* 9 NY3d 996 [2007]). Here, the trial court appropriately exercised its discretion in denying counsel's request for leave to "do whatever discovery flows . . . during the normal discovery process," in light of the open-ended nature of the application and the fact that the jury had just been

selected. Under the circumstances, the remedy of preclusion fashioned by the trial court was not an abuse of discretion. The denial of plaintiff's request for a continuance for the purpose of taking an appeal from the court's ruling was also appropriate. If counsel felt that discovery was essential plaintiff would have been better served by a request for leave to withdraw the note of issue as opposed to his attorney's refusal to proceed with the trial. I would affirm the order entered below.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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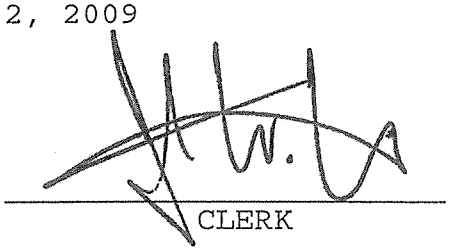

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Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5385 Shamika Taylor, Index 24248/05
Plaintiff-Appellant,

-against-

American Radio Dispatcher, Inc., et al.,
Defendants-Respondents.

Proner & Proner, New York (Tobi R. Salottolo of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered January 15, 2008, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established their prima facie case that plaintiff did not suffer a serious injury within the meaning of the statute by submitting the reports of two independent medical examinations, and plaintiff failed to raise a triable issue of fact. Her experts' reports opining, based on positive MRI findings, that, as a result of the accident, she sustained a tear of the anterior talo-fibular ligament and a tear of the meniscus of the right knee that will require arthroscopic surgery are insufficient, absent objective, contemporaneous evidence of the extent and duration of the alleged physical limitations resulting

from the injury (*compare Ayala v Douglas*, 57 AD3d 266 [2008]; *Bentham v Rojas*, 48 AD3d 314 [2008]).

With regard to plaintiff's claim that her injury prevented her from performing substantially all of her usual and customary activities for 90 of the 180 days following the accident, there was no contemporaneous medical proof submitted by plaintiff that she was unable to perform any activities in the 180 days following the accident. Without objective findings of limitations of motion contemporaneous with the accident, plaintiff's assertions that she cannot stand, sit or walk for extended periods without experiencing extreme discomfort and has been unable to work as an apprentice construction worker or as a part time bartender since the accident are insufficient to raise a triable issue of fact as to whether there was a curtailment of her customary activities during the requisite 90/180-day period (*see Brantley v New York City Tr. Auth.*, 48 AD3d 313 [2008]). Indeed, in the only contemporaneous evaluation of plaintiff's

ability to work, dated less than two weeks after the accident, her treating physician left blank the entry in his records asking whether the patient was disabled from work.

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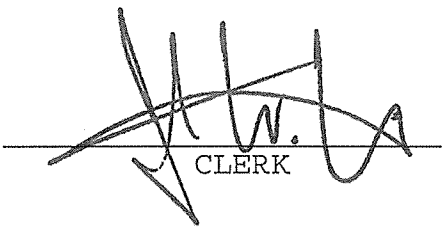

Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ

585 The People of the State of New York, Ind. 3211/05
Plaintiff-Respondent,

-against-

Joseph Odom,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered March 14, 2007, convicting defendant, upon his plea of guilty, of burglary in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

Defendant's claim that his 2000 conviction should not have been counted as a predicate violent felony at his 2007 plea and sentencing is without merit, as such claim is procedurally barred. Although defendant was not informed of postrelease supervision at his 2000 plea proceeding, thus rendering the proceeding improper (*People v Catu*, 4 NY3d 242 [2005]), he failed to make that claim on direct appeal. Moreover, at the time defendant entered a plea to robbery in the second degree, Queens County in 2006, he did not challenge his 2000 conviction, although given the opportunity to do so. The 2006 conviction

Queens second violent felony offender adjudication, based, like the present case, on the 2000 conviction, has preclusive effect here.

Where a defendant fails to challenge the constitutionality of a prior conviction at the appropriate time, and fails to demonstrate good cause for such failure, he waives any future challenge to the constitutionality of the prior conviction for sentence enhancement purposes (CPL 400.15[7][b]; *see People v Crawford*, 204 AD2d 203 [1994], *lv denied* 84 NY2d 906 [1994]). Where such predicate violent felony offender finding has been made, it shall be binding upon that defendant in any future proceeding in which the issue may arise. Furthermore, a defendant is precluded by statute from contesting the use of a prior conviction as a predicate conviction where he has previously been adjudicated a second violent felony offender based on that conviction (CPL 400.15[8]; *People v Boutte*, 304 AD2d 307, 308 [2003], *lv denied* 100 NY2d 579 [2003]).

It should be noted that defendant raised this identical claim in the Second Department on the direct appeal from his 2006 conviction entered by plea as aforesaid. That Court rejected his argument and affirmed his conviction, holding that "[h]aving failed to challenge the constitutionality of the 2000 conviction at the predicate felony proceeding held at the time he pleaded guilty in the matters before us, the defendant waived his current

claim" (__ AD3d __, NY Slip Op 3198, *2 [2009]). The Second Department thus declined defendant's invitation to retroactively apply *Catu* to recidivist sentencing proceedings, as do we. To hold otherwise would effectively eviscerate the binding effect of predicate violent felony offender proceedings on a defendant as mandated by CPL 400.15(8).

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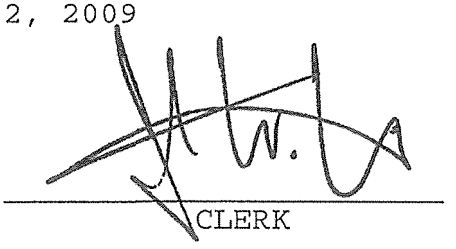

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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

641 The People of the State of New York, Ind. 43028C/05
Respondent,

-against-

Donald McKinnon,
Defendant-Appellant.

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered May 23, 2007, convicting defendant, after a jury trial, of assault in the first degree, attempted kidnapping in the second degree and criminal possession of stolen property in the fifth degree, and sentencing him to consecutive terms of 25 years, 15 years and 1 year, unanimously affirmed.

We find that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620 [1983]), was legally sufficient to establish that the victim sustained a permanently disfiguring scar on her arm as a result of being bitten by defendant (*see People v Felice*, 45 AD3d 1442 [2007], *lv denied* 10 NY3d 764 [2008]; *People v Kenney*, 291 AD2d 331 [2002], *lv denied* 98 NY2d 638 [2002]), and that defendant had the intent to cause such injury (Penal Law § 120.10[2]). The evidence showed that, during a struggle, defendant twice bit the

victim's arm, leaving bite marks that were described as "severe" and "deep." Photographs of the bite marks were placed in evidence, and the victim displayed her scars to the jury. As to intent, the jury was entitled to draw the reasonable inference that defendant intended the natural consequences of his acts (*see generally People v Getch*, 50 NY2d 456, 465 [1980]). We also find that the verdict comported with the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Supreme Court did not err in imposing consecutive sentences, since defendant bit the victim after, and independent of, the events that constituted the kidnapping (*see People v Simpson*, 209 AD2d 281, 282 [1994]).

We perceive no basis to reduce the sentences.

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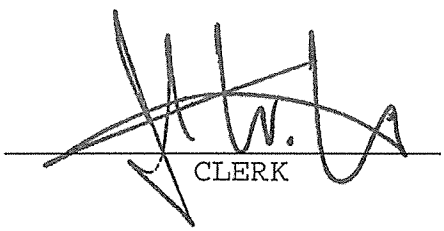

Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

681 The People of the State of New York, Ind. 128/05
Respondent,

-against-

Eric Hollis,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered August 5, 2005, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court properly permitted the People to elicit three theft-related convictions. Each of these convictions was probative of defendant's credibility, and none was similar to the charge for which defendant was being tried.

Since defendant did not produce evidence sufficient to permit the court to draw an inference of discrimination (*see Johnson v California*, 545 US 162, 170 [2005]), the court properly

denied his application pursuant to *Batson v Kentucky* (476 US 79 [1986]). In the second of three rounds of jury selection, the prosecutor used two peremptory challenges. Those challenges removed the only two African-American panelists available at that particular point in jury selection. While a prima facie showing of discrimination "may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination" (*People v Smocum*, 99 NY2d 418, 422 [2003]), and while the use of peremptories to exclude all or nearly all the members of a cognizable group normally raises such an inference (*see e.g. People v Hawthorne*, 80 NY2d 873 [1992]), the circumstances of the second round do not suggest discrimination, as opposed to happenstance (*see People v McCloud*, 50 AD3d 379 [2008], *lv denied* 11 NY3d 738 [2008]. Furthermore, when jury selection is viewed as a whole, the record is silent as to the overall racial composition of the venire, what share of its overall allotment of 15 peremptory challenges the prosecutor used against African-American panelists, and what portion of such panelists in the overall venire was challenged by the prosecutor. Moreover, defendant declined the court's offer of an opportunity to renew the application at a later juncture (*see People v Johnson*, 37 AD3d 344 [2007], *lv denied* 8 NY3d 986 [2007]).

Defendant's argument concerning the court's charge is

unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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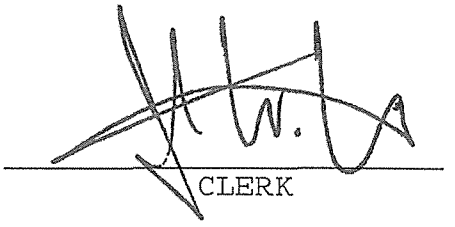


CLERK

Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

682 In re Anthony L. Grasso, Index 111840/08
Petitioner-Appellant,

-against-

New York City Transit Authority, et al.,
Respondents-Respondents.

The Sarcone Law Firm, PLLC, White Plains (Stephen M. DeLuca of counsel), for appellant.

Martin B. Schnabel, Brooklyn (Gena B. Usenheimer of counsel), for respondents.

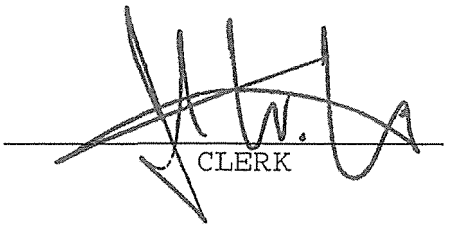
Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 8, 2008, which granted respondents' motion to dismiss the petition, unanimously affirmed, without costs.

Petitioner lacks standing to challenge respondents' determination to prohibit him from operating a crane on any of their projects or property. To establish standing, he was required to show, in addition to an "injury in fact," that the injury he asserts "fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). Petitioner failed to identify any statutory provision pursuant to which respondents acted in making their determination. Were we

to reach the merits of petitioner's claim, we would find it without validity.

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

ENTERED: JUNE 2, 2009



Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

683 Maria Hernandez, Index 26874/04
Plaintiff-Appellant,

-against-

Central Parking System of New York, Inc., et al.,
Defendants-Respondents.

Akin & Smith, LLC, New York (Derek T. Smith of counsel), for appellant.

Mark Borteck, New York, for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 19, 2008, which granted defendants' motion to dismiss the complaint for failure to state a cause of action to the extent of dismissing the causes of action for constructive discharge and intentional and negligent infliction of emotional distress and granted defendants' motion for summary judgment to the extent of dismissing the causes of action for retaliation, hostile work environment and quid pro quo sexual harassment, unanimously modified, on the law, to deny defendants' motion for summary judgment in its entirety, and otherwise affirmed, without costs.

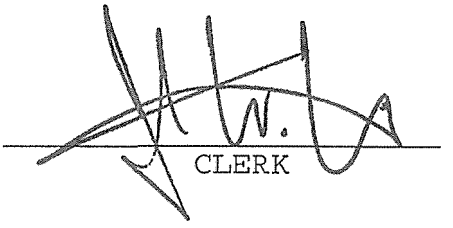
Defendants failed to demonstrate good cause for the late filing of their motion for summary judgment (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]).

The complaint fails to state a cause of action for

constructive discharge since it contains no allegation that plaintiff resigned from her job (*see Whidbee v Garzarelli Food Specialties, Inc.*, 223 F 3d 62, 73 [2000]). It fails to state a cause of action for either intentional or negligent infliction of emotional distress because the conduct it alleges as to defendant Marcelino is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983] [internal quotation marks and citations omitted]).

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

ENTERED: JUNE 2, 2009



Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

685 KSW Mechanical Services, Inc., etc., Index 604104/07
Plaintiff-Respondent-Appellant

-against-

Willis of New York, Inc.,
Defendant-Appellant-Respondent,

American Home Assurance Company,
Defendant-Respondent-Appellant.

Loeb & Loeb LLP, New York (David M. Satnick of counsel), for appellant-respondent.

James F. Oliviero, Long Island City, for KSW Mechanical Services, Inc., respondent-appellant.

Law Offices of Beth Zaro Green, Brooklyn (Erika Aljens of counsel), for American Home Assurance Company, respondent-appellant.

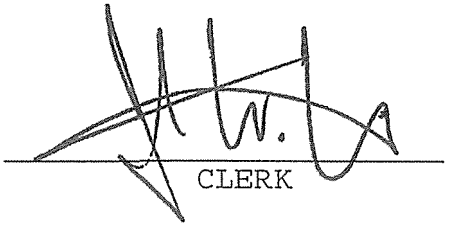
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 1, 2008, which, to the extent appealed from, denied defendant Willis of New York's motion to dismiss plaintiff's first, second and fourth causes of action and defendant American Home Assurance's motion to dismiss the fourth cause of action, unanimously reversed, on the law, without costs, and the motions granted.

Plaintiff's fraud claims based on alleged misrepresentations regarding coverage made in a construction project insurance manual are not viable for lack of reasonable reliance as a matter of law in light of the manual's disclaimers stating that it provides an overview and that the policies alone govern coverage.

Since the claims are flatly contradicted by the documentary evidence (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999], *affd* 94 NY2d 659 [2000]), this is one of those rare circumstances in which summary disposition of the issue of reasonable reliance is appropriate (*cf. Brunetti v Musallam*, 11 AD3d 280, 281 [2004]).

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

ENTERED: JUNE 2, 2009



Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

686 The People of the State of New York, Ind. 4051/03
Respondent,

-against-

Daniel Bumbray,
Defendant-Appellant.

Alireza Dilmaghani, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered February 26, 2004, convicting defendant, after a jury trial, of rape in the first degree and sexual abuse in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

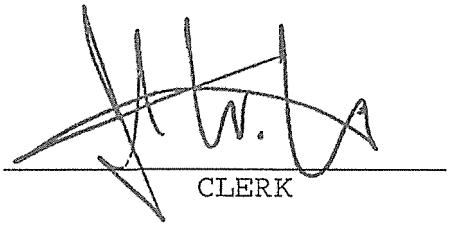
Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The victim's testimony clearly established the element of penetration.

Defendant's claim of prosecutorial misconduct is

unreviewable on direct appeal because it relates to matters outside the record, which defendant has not sought to expand by way of a CPL 440.10 motion. Defendant's remaining contention is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: JUNE 2, 2009



CLERK

Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

687 Hudson Towers Housing Co., Inc., etc., Plaintiff-Appellant, Index 601835/04

-against-

VIP Yacht Cruises, Inc., Defendant-Respondent.

Pennisi, Daniels & Norelli, LLP, Rego Park (Sherrie A. Taylor of counsel), for appellant.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered July 1, 2005, which denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

We disagree with the motion court's finding that summary judgment is precluded by an issue of fact whether there was a surrender of the premises by defendant tenant and acceptance by plaintiff landlord. Article 25 of the parties' lease specifically states that there is no surrender of the premises without an agreement accepting such surrender in writing signed by the landlord. It is undisputed that there was no written agreement signed by the landlord accepting any purported surrender of the premises by the tenant at any time before the parties entered into a stipulation of settlement that resolved a summary non-payment proceeding brought by the landlord in Civil Court. Nor can there be any claim by the tenant of constructive eviction. Article 9 of the lease explicitly states that the

tenant waived the provisions of Real Property Law § 227, which permits a tenant to quit leased premises that are rendered untenable or unfit for occupancy and consequently to be relieved of its obligation to pay rent (*see Milltown Park v American Felt & Filter Co.*, 180 AD2d 235, 237 [1992]; *Trinity Ctr., LLC v Wall St. Correspondents, Inc.*, 4 Misc 3d 1026(A), 2004 NY Slip Op 51060(U), *4 [2004]). Article 9 requires the tenant to give the landlord notice of any damage to the premises. The landlord is then required to make repairs. The tenant's liability for rent is abated during the period in which the repairs are being made and is resumed five days after written notice by the landlord that the premises are substantially ready for the tenant's occupancy.

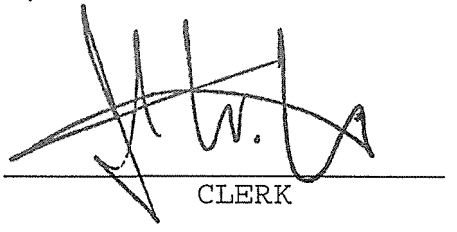
We also disagree with the motion court that the parties' stipulation of settlement was ambiguous. The plain meaning of the stipulation is that the parties were settling the issue of possession of the leased premises by the tenant's surrender thereof and that the parties were expressly reserving their right to pursue, at a later time, in a different proceeding, any and all other claims they may have had arising out of the lease or the tenancy. Even assuming that the pre-printed clause in the court form stipulation contradicted the handwritten portions, the

handwritten portions would prevail (*Joseph Francese, Inc. v Enlarged City School Dist. of Troy*, 263 AD2d 582, 548 [1999], *revd on other grounds* 95 NY2d 59 [2000]).

The conflicting affidavits submitted by the parties, however, raise issues of fact concerning the impact of the September 11, 2001 terrorist attack on the tenant's ability to re-enter and use the premises and the extent, if any, to which the tenant was relieved of its obligation to pay rent under Article 9 of the lease. While the tenant did not give the landlord written notice of a defective condition in the leased premises, given the building's close proximity to the World Trade Center and the catastrophic events of September 11, 2001, the landlord had actual knowledge of adverse conditions affecting the habitability of the premises.

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

ENTERED: JUNE 2, 2009



CLERK

Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

689 Eleanor Capogrosso, Index 100333/04
Plaintiff-Appellant,

-against-

Reade Broadways Associates,
Defendant-Respondent.

Eleanor Capogrosso, New York, appellant pro se.

Itkowitz & Harwood, New York (Simon W. Reiff of counsel), for respondent.

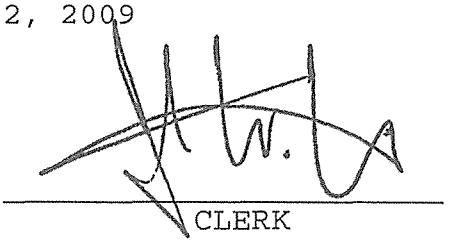
Judgment, Supreme Court, New York County (Rosalyn Richter, J.), entered May 31, 2007, after a nonjury trial in an action arising out of a commercial tenancy, in favor of defendant landlord and against plaintiff tenant in the amount of $225,186.09, inclusive of interest, unanimously affirmed, with costs.

There is no merit to plaintiff's argument that because defendant did not settle an order within 60 days of the trial court's decision, defendant's claims underlying the award of damages in the judgment should be deemed abandoned pursuant to 22 NYCRR 202.48. The directive in the decision to "[s]ettle order on notice" pertained only to so much of the decision as determined that defendant was entitled to reasonable attorneys' fees and referred defendant's claim therefor to a Special Referee for a report or, upon the parties' stipulation, a determination. The settle order directive could not have had any pertinence to

so much of the decision as awarded defendant a sum certain, "'which speaks for itself'" (*Farkas v Farkas*, 11 NY3d 300, 309 [2008], quoting *Funk v Barry*, 89 NY2d 364, 367 [1996]). Indeed, the decision was fairly explicit in "permit[ting]" defendant to enter a money judgment for that sum certain without further court involvement.

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

ENTERED: JUNE 2, 2009



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Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

690 The Rainbow Coop, et al., Index 108071/07
Plaintiffs-Appellants,

-against-

The City of New York, etc., et al.,
Defendants,

NCB Capital Impact, etc.,
Defendant-Respondent.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellants.

Loeb & Loeb LLP, New York (David M. Satnick of counsel), for respondent.

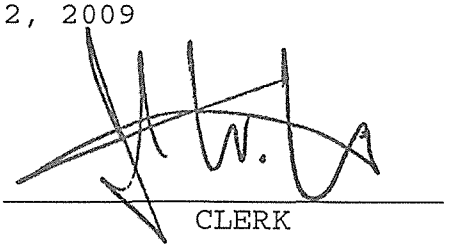
Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 27, 2008, which, in an action by an unincorporated cooperative association and its members involving, inter alia, title to a multiple dwelling, granted defendant-respondent mortgagee's (NCB) motion to dismiss as against it, for failure to state a cause of action, (1) plaintiffs' cause of action for an injunction prohibiting NCB from, inter alia, commencing a foreclosure action with respect to its mortgage or security interest in the building, and (2) plaintiffs' related causes of action for declarations settling their claim of title to the building and its units by reason of adverse possession, unanimously affirmed, without costs.

The motion court correctly held that even if it were to declare that plaintiffs' adverse possession of the building and

its units had given them title thereto by the time defendant City purported to transfer title to defendant UHAB, the mortgage on the building delivered by UHAB to NCB is nonetheless valid under Real Property Law § 260. We reject plaintiff's argument that since the validity of a conveyance of real property depends on the validity of title held by the grantor, Real Property Law § 260 cannot be construed to validate a mortgage based on an invalid deed. Under the clear and unambiguous language of that statute, NCB's mortgage is not rendered void by reason of plaintiffs' possession of the building under a claim of title adverse to UHAB (9-96 Warren's Weed, New York Real Property, Mortgage Foreclosure § 96.30 ["no mortgage is void because at the time of its delivery the property was adversely possessed"]). The court may not resort to rules of statutory construction to alter this clear and unambiguous meaning (*see* McKinney's Cons Law of NY, Book 1, Statutes § 76; *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 107 [1997]). We have considered plaintiffs' other arguments and find them unavailing.

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

ENTERED: JUNE 2, 2009



CLERK

Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

691 The People of the State of New York, Ind. 4029/06
Respondent,

-against-

David Coleman,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J. at suppression hearing; Arlene R. Silverman, J. at nonjury trial and sentence), convicting defendant of criminal sale of a controlled substance in the third degree and tampering with physical evidence, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to concurrent terms of 3½ years and 1½ to 3 years, respectively, unanimously affirmed.

The court properly denied defendant's motion to suppress his statements to the police, notwithstanding that they were made while defendant was in custody, and before he received *Miranda* warnings. When defendant engaged in conduct clearly indicating that he had swallowed illegal drugs, a police lieutenant properly asked him what he had swallowed. The police intended to take defendant to a hospital, and the need for prompt and appropriate

treatment once he arrived there dictated that the police obtain this information in order to be able to relay it to medical personnel, especially in the event that defendant lost consciousness. Accordingly, the lieutenant's question was necessary for processing defendant's arrest and providing for his physical needs; thus it did not require *Miranda* warnings regardless of whether it might lead to an incriminating response (*see People v Goodings*, 300 AD2d 50 [2002], *lv denied*, 99 NY2d 628 [2003]). Defendant's argument that a detective's comment that defendant would be subject to a tampering charge was also the functional equivalent of interrogation is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Rivers*, 56 NY2d 476 [1982]). Finally, we conclude that the voluntariness of defendant's spontaneous statements was not undermined by the circumstances that the statements occurred during a strip search, and that the police had used force in struggling with defendant in an effort to stop him from swallowing evidence. Moreover, these circumstances were entirely of defendant's own making.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). With regard to the sale conviction, there is no basis for disturbing the court's determinations

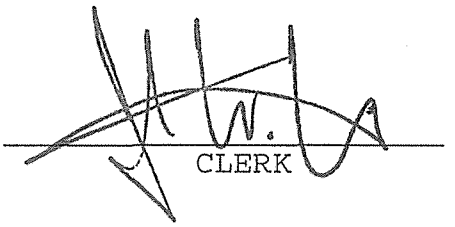
concerning credibility and identification. The undercover officer made a reliable identification, and there is no merit to defendant's argument that the People did not establish a chain of custody for the drugs. With regard to the tampering with physical evidence conviction, defendant's conduct, with particular reference to his violent struggle with the police, made no sense whatsoever unless he was swallowing evidence (*see People v Green*, 54 AD3d 603 [2008], *lv denied* 11 NY3d 899 [2008]). In addition, defendant made incriminating statements to the police, which, as we have determined, were lawfully obtained, and made similar statements to medical personnel.

Defendant has not preserved his present objections to closing the courtroom during the undercover officer's testimony, or to having the undercover officer testify under his shield number, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The record supports each of these determinations (*see People v Ramos*, 90 NY2d 490, 499-500 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]; *People v Waver*, 3 NY3d 748, 750 [2004]), and there was no violation of defendant's rights to a public trial and to confront witnesses.

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

ENTERED: JUNE 2, 2009



Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

692 James W. Holme, Index 600232/08
Plaintiff-Respondent,

-against-

Global Minerals and Metals Corp., et al.,
Defendants-Appellants,

B.H. Shah, et al.,
Defendants.

Kaye Scholer LLP, New York (H. Peter Haveles, Jr. of counsel), for appellants.

Graubard Miller, New York (Lawrence D. Bernfeld of counsel), and Seidman & Seidman, New York (Irving P. Seidman of counsel), for respondent.

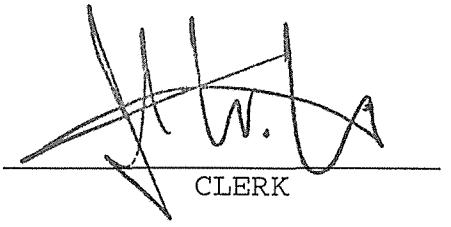
Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered January 14, 2009, which, insofar as appealed from, denied defendants-appellants' motion to dismiss the fourth and fifth causes alleging de facto merger and alter-ego liability, unanimously affirmed, with costs.

Plaintiff, who has been unable to collect a 2006 judgment he obtained against defendant Global Minerals and Metals Corp. (Global), alleges that Global's individual shareholders named herein as defendants caused Global to cease doing business in or about 2000, stripping it of assets and leaving it a moribund shell in order to avoid payment of the contractual obligation underlying plaintiff's judgment, but continued to operate Global's business through the other corporate entities named

herein as defendants, which they also dominated, the last of which was defendant GMMC, LLC (New GMMC) set up in 2003. These allegations of continuity, domination and fraudulent transfers, which are particularized with considerable detail in the complaint, are sufficient to state causes of action seeking to hold Global's individual shareholders liable for plaintiff's judgment against Global on the theory that they were Global's alter egos (*see Godwin Realty Assoc. v CATV Enters.*, 275 AD2d 269, 270 [2000]; *Solow v Domestic Stone Erectors*, 269 AD2d 199, 200 [2000]; *Chase Manhattan Bank (N.A.) v 264 Water St. Assoc.*, 174 AD2d 504, 505 [1991]), and to impose the same liability on New GMMC on the theory that it succeeded to Global's obligations pursuant to a de facto merger (*see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [2001] [legal dissolution not necessary to find de facto merger "(s)o long as acquired corporation is shorn of its assets and has become, in essence, a shell"]).

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

ENTERED: JUNE 2, 2009



CLERK

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

697 Slemish Corp., S.A., Index 109226/07
Plaintiff-Appellant, 109227/07

-against-

Robert M. Morgenthau, District Attorney
of New York County,
Defendant-Respondent.

- - - - -

Tupi Cambios, S.A.,
Plaintiff-Appellant,

-against-

Robert M. Morgenthau, District Attorney
of New York County,
Defendant-Respondent.

Bernard D'Orazio, New York, for appellants.

Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), respondent pro se.

Order, Supreme Court, New York County (Martin Shulman, J.), entered August 7, 2008, which denied plaintiffs' motions for summary judgment on their respective claims for money had and received, unanimously affirmed, without costs.

Plaintiffs are each engaged in the business of providing international transmission of funds and other banking services, and maintained accounts at J.P. Morgan Chase Bank (Chase) for that purpose managed by their agent, nonparty Beacon Hill Services Corporation. An investigation by the New York County District Attorney (the DA) into money laundering and international transmission of funds eventually focused on Beacon

Hill, which, despite not being licensed to engage in the business of transmission of funds in New York, engaged in transfers here totaling billions of dollars. Beacon Hill subsequently pleaded guilty to violations of Banking Law § 641 and § 650(2)(b)(1) and entered into a stipulation providing, among other things, for forfeiture, pursuant to CPLR article 13A, of most of the funds in its own and its clients' Chase accounts, including plaintiffs'. Plaintiffs were not criminally charged and were not notified of the charges against Beacon Hill, the order of attachment of the accounts or the stipulation of forfeiture. After the funds were seized by the DA, plaintiffs, claiming ownership of their accounts and procedural defects in the forfeiture proceeding, commenced the identical actions at bar alleging claims for, among other things, remission of funds seized (CPLR 1311[7]) and money had and received.

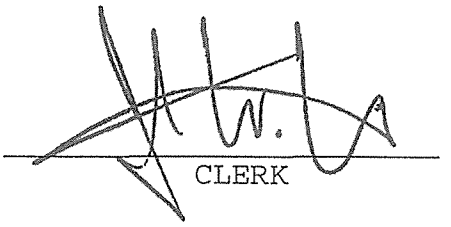
On the present record, we find that summary judgment was appropriately denied. Plaintiffs initially demonstrated their prima facie entitlement to summary judgment on the theory of money had and received. Their evidence established, among other things, their ownership of the seized funds, and that under principles of equity and good conscience, defendant should not be

allowed to retain the funds (*Parsa v State of New York*, 64 NY2d 143, 148 [1984]; *Insurance Co. of State of Pa. v HSBC Bank USA*, 37 AD3d 251, 255 [2007], *revd on other grounds* 10 NY3d 32 [2008]). In response, defendants point to record evidence raising material questions of fact as to plaintiffs' ownership of the funds. This evidence suggests that the funds are owned and controlled by plaintiffs' undisclosed clients and that plaintiffs are mere intermediaries who act in accordance with their directions. Also, the agreement governing Beacon Hill's management of plaintiffs' accounts raises questions whether Beacon Hill, or plaintiffs, had superior rights with respect to the funds. Finally, the construction of key provisions of the stipulation of forfeiture, which necessarily relates to the issue of the ownership of the funds, is unclear. The record also raises questions as to the equity of remitting the funds to plaintiffs. Although plaintiffs disclaim any culpability on their part, questions exist regarding whether they knew or should have known that either their own activities or the use of their funds violated New York law. In any event, at this pre-discovery juncture in a case where plaintiffs appear to have exclusive

possession of many of the relevant facts, summary judgment is not appropriate (*see* CPLR 3212[f]).

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

ENTERED: JUNE 2, 2009



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

698-
699 In re T-Shauna K.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Candice B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Susan Jacobs, Center for Family Representation, Inc., New York (Rebecca Horwitz of counsel), for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

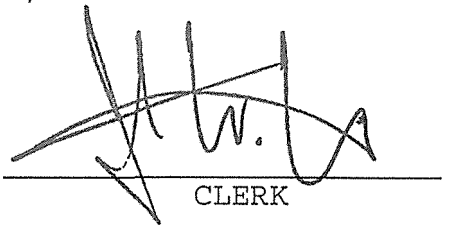
Order, Family Court, New York County (Jody Adams, J.), entered on or about February 11, 2008, which, upon granting the motion of petitioner Administration for Children's Services for summary judgment, found that respondent mother had derivatively neglected the subject child, unanimously affirmed, without costs.

The finding of derivative neglect was supported by a preponderance of the evidence, including that respondent had, in the past, failed to comply with the treatment for her psychiatric illness to the point where she had to be hospitalized. She also failed to ensure that her two older children attended school, leading to their unexcused absences on 50 days of the school year. Although respondent's condition improved when she complied

with her prescribed treatments, her original failure to comply with necessary medical treatment, and her lack of insight into the need for treatment for her psychiatric illness, demonstrated a "fundamental defect in [her] understanding of the duties of parenthood" (*Matter of Amber C.*, 38 AD3d 538, 541 [2007], *lv denied* 8 NY3d 816 [2007], *lv dismissed* 11 NY3d 728 [2008] [internal quotation marks and citations omitted]; *see Matter of Hannah UU.*, 300 AD2d 942, 944 [2002], *lv denied* 99 NY2d 509 [2003]). Furthermore, the conduct that formed the basis for the finding of neglect as to respondent's three other children was sufficiently proximate in time to the derivative proceeding that it could reasonably be concluded that the condition still existed (*see Matter of Baby Boy W.*, 283 AD2d 584 [2001]; *Matter of Cruz*, 121 AD2d 901, 902 [1986]).

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

ENTERED: JUNE 2, 2009



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

701 The People of the State of New York, Ind. 2684/06
Respondent,

-against-

Dominique Joseph,
Defendant-Appellant.

Stanley L. Cohen & Associates, LLC, New York (Stanley L. Cohen of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Elizabeth Hyon of counsel), for respondent.

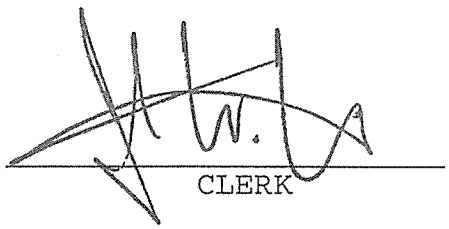
Judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Michael J. Obus, J. at plea and sentence), rendered January 17, 2008, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The court properly determined that defendant lacked standing to challenge the search of the livery cab in which he was a passenger. Defendant was not entitled to rely on the automatic standing exception announced in *People v Millan*, 69 NY2d 514 (1987) since the People did not rely solely on the statutory presumption contained in PL 265.15(3) to establish his guilt (*see People v Cheatham*, 54 AD3d 297 [2008], *lv denied* 11 NY3d 854 [2008]), but also relied on evidence that defendant pushed the

bag containing the weapon off the seat onto the floor of the cab. The People therefore established defendant's actual exercise of dominion and control over the gun and did not solely rely on the statutory presumption. Since defendant failed to establish that he had a legitimate expectation of privacy in the cab (*see People v Wesley*, 73 NY2d 351 [1989]), he lacked standing to challenge the search. In any event, the record also supports the court's alternative finding that the search and seizure was lawful.

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

ENTERED: JUNE 2, 2009



CLERK

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

702 The Risk Management Planning Group, Inc., Plaintiff-Respondent, Index 109017/08

-against-

Cabrini Medical Center, Defendant-Appellant.

Garfunkel, Wild & Travis, P.C., Great Neck (John G. Martin of counsel), for appellant.

Philip A. Greenberg, New York, for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 9, 2008, which granted plaintiff's motion for summary judgment on its cause of action for an account stated, unanimously affirmed, with costs.

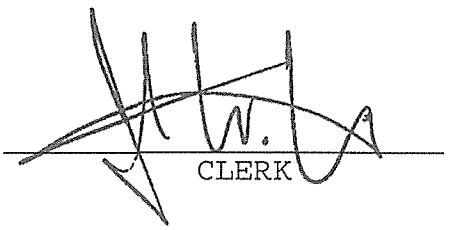
Plaintiff established the existence of an account stated with copies of various agreements, at least one of which defendant admittedly found in its own files, demonstrating a debtor-creditor relationship between the parties. Defendant failed to raise an issue of fact that the underlying relationship was either repudiated by it or did not exist (*see e.g. Ryan Graphics v Bailin*, 39 AD3d 249, 250-251 [2007]; *Martin H. Bauman Assocs. Inc. v H & M Intl. Transp., Inc.*, 171 AD2d 479, 485 [1991]). Moreover, the retention of invoices by defendant, in some cases for over three years without comment or objection, is sufficient to create an account stated. Furthermore, it is

uncontroverted that defendant attempted partial payment of the invoices (*see Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [2004]).

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

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

ENTERED: JUNE 2, 2009



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

703 Christopher F. McGuire, et al., Plaintiffs-Respondents, Index 15943/04

-against-

Ivio Mazzella, et al., Defendants-Appellants.

Steven J. Mines, Long Beach, for appellants.

Markewich and Rosenstock LLP, New York (Lawrence M. Rosenstock of counsel), for respondents.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered May 23, 2008, which, inter alia, in an action pursuant to RPAPL article 15 to quiet title, granted plaintiffs' motion for summary judgment to the extent of declaring that they were entitled to the full frontage on Ditmars Street of 153.20 feet, unanimously affirmed, without costs.

The motion court properly determined that plaintiffs were entitled to the full frontage on Ditmars Street of 153.20 feet as described in the relevant deeds and the tax maps in effect at the time of the respective conveyances. Plaintiffs' 2002 deed unequivocally provides that the northern boundary of Lot 314 (plaintiffs' lot) adjacent to the southerly side of Ditmars Street runs a distance of 153.20 feet between Lot 312 on the western boundary and Lot 375 (defendants' underwater lot) on the eastern boundary. Defendants' 1966 deed provides that the western boundary of the underwater lot is the high-water mark.

The tax map in effect at the time of the conveyance to defendants showed that Lot 314 had at least 153.20 feet of frontage on Ditmars, as did the most recent 1983 tax map. The tax maps also show that the high-water mark, defendants' western boundary, is located to the east of the disputed frontage.

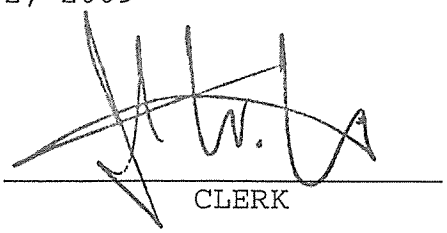
The well-established standard by which the adequacy of a tax map description is measured is whether, notwithstanding any errors or omissions, the property at issue "can be identified and located with reasonable certainty" (*Riggs v Kirschner*, 187 AD2d 759, 760 [1992]). There is no ambiguity concerning the boundaries set forth in the tax maps, particularly as those maps comport with the descriptions contained in the pertinent deeds.

The issue of whether the high-water mark migrated due to accretion or due to landfill need not be addressed, since the record reflects that any such landfill was, according to defendants, done by their predecessor-in-title prior to the time they acquired the property in 1966 and prior to the time the high-water mark was placed at its present location on the applicable tax map. The high-water mark on the tax map is

clearly beyond the disputed frontage. Neither *City of New York v Mazzella* (50 AD3d 578 [2008]) nor *DiMino v Mazzella* (Sup Ct, Bronx County, Aug. 21, 1978, McCooe, J., Index No. 15307/76), is dispositive of the issues presented herein.

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

ENTERED: JUNE 2, 2009



CLERK

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

704 The People of the State of New York, Ind. 3916/01
Respondent,

-against-

Bruce Rivers,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bryan C. Hughes of counsel), for respondent.

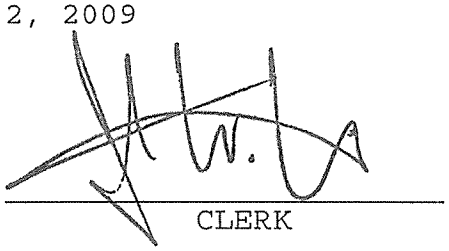
Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered May 14, 2008, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

Since the final plea proceeding expressly incorporated by reference the allocution conducted at a prior plea proceeding, defendant's prior waiver of his right to appeal is enforceable (*see People v Hickman*, 57 AD3d 370 [2008]; *People v Morrison*, 48 AD3d 2008 [2008], *lv denied* 10 NY3d 867 [2008]), and it forecloses defendant's present procedural claim relating to his sentencing. Furthermore, aside from the waiver, defendant did not preserve his claim that when the court ordered his sentence to be served consecutively to another sentence it misapprehended its discretion under Penal Law § 70.25(2-b) to impose a

concurrent sentence upon a finding of mitigating circumstances (*see People v Hamlet*, 227 AD2d 203, 204 [1996], *lv denied* 88 NY2d 1021 [1996], and we decline to review it in the interest of justice. Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record (*see People v Love*, 57 NY2d 998 [1982]).

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

ENTERED: JUNE 2, 2009



CLERK

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

705 In re Tanya T. McD.,
Petitioner-Respondent,

-against-

Timothy E.D.,
Respondent-Appellant.

Randall S. Carmel, Syosset, for appellant.

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about January 18, 2008, which, upon a finding that respondent father was in willful violation of a child support order, committed him to the New York City Department of Corrections for a term of six months to be served on weekends only, unanimously reversed, on the law, without costs, and the petition dismissed.

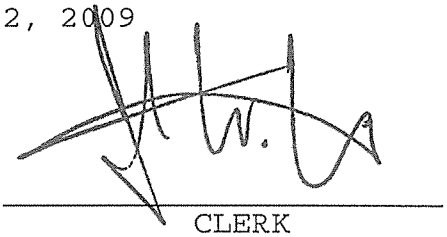
We reach the father's contention that he was deprived of his right to counsel at the hearing that resulted in the issuance of the order of commitment, even though the father's jail term has ended (*see Matter of Bickwid v Deutsch*, 87 NY2d 862, 863 [1995]; *Matter of Michelle F.F. v Edward J.F.*, 50 AD3d 348, 349 [2008], *lv denied* 11 NY3d 708 [2008]). Since the proceeding was one that could and did result in the loss of physical liberty, the father had both a constitutional and statutory right to have assigned

counsel (*see Matter of Broome County Dept. of Social Servs. v Basa*, 56 AD3d 1092, 1093-1094 [2008]; *Matter of Er-Mei Y.*, 29 AD3d 1013, 1015 [2006]; Family Ct Act § 262[a][vi]). Furthermore, the fact-finding order and recommendation of the Support Magistrate specifically states that the father invoked his right to counsel, and that the matter proceeded notwithstanding the unavailability of counsel for assignment.

Under the circumstances presented, no further proceedings are warranted inasmuch as the appeal is from an order of commitment which has already been served.

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

ENTERED: JUNE 2, 2009



CLERK

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

706-
706A Yoda, LLC, et al., Index 115498/06
Plaintiffs-Respondents,

-against-

National Union Fire Ins. Co. of Pittsburgh, PA,
Defendant-Appellant,

Han Soo Lee, et al.,
Defendants-Respondents.

Sedgwick, Detert, Moran & Arnold LLP, New York (Jeffrey M. Winn of counsel), for appellant.

Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (Michael A. Miranda of counsel), for Yoda, LLC, Riverhead Pooh, LLC and United National Insurance Company, respondents.

Law Offices of Kenneth A. Wilhelm, New York (Barry Liebman of counsel), for Han Soo Lee and Soon Ok Jang, respondents.

Orders, Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 16, 2008 and September 15, 2008, which, respectively, denied defendant National Union's pre-discovery motion for summary judgment declaring that it is obligated to provide only the final tier of liability coverage in the underlying Labor Law action, and denied National Union's motion for a protective order staying discovery, unanimously affirmed, with costs.

When ruling on National Union's first appeal to this Court (50 AD3d 492 [2008]), we agreed with its argument that insofar as no discovery had been exchanged, the Supreme Court had acted

prematurely when granting summary judgment to the extent of declaring that National Union was obligated to provide second tier liability coverage in the underlying Labor Law action. We also held that unresolved questions concerning, inter alia, National Union's "delay in disclaiming while monitoring the underlying . . . litigation" precluded, as a matter of law, a determination that it was not obligated to provide second tier liability coverage (*id.* at 492).

Despite these rulings, immediately upon this matter's remand to the Supreme Court and before the exchange of any discovery between the parties, National Union moved for summary judgment to declare that it is obligated only to provide final tier liability coverage upon the exhaustion of plaintiff United National Insurance Company's liability policy. In light of this Court's earlier ruling, the Supreme Court properly denied National Union's pre-discovery motion (*see Kern Suslow Secs., Inc. v Baytree Assocs., Inc*, 283 AD2d 230, 230-31 [2001]; *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809, 809-810 [2007]).

National Union's request that the Justice presiding over this matter be recused and a new Justice assigned is improperly raised for the first time on appeal (*see Matter of Peter G. v Karleen K.*, 51 AD3d 541, 542 [2008]). Were we to consider such

request, we would conclude that recusal is unwarranted (see *R & R Capital LLC v Merritt*, 56 AD3d 370 [2008]).

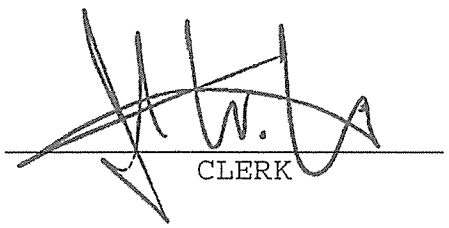
We have considered National Union's remaining arguments and find them unavailing.

M-1676 & 2130 - Yoda, LLC, et al. v National Union Fire Insurance Company of Pittsburgh, PA

Motion and cross motion seeking leave to strike brief denied.

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

ENTERED: JUNE 2, 2009



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

710N Christopher Walton, Index 13259/06
Plaintiff-Respondent,

-against-

Mercy College, et al.,
Defendants-Appellants.

Wade Clark Mulcahy, New York (Paul F. Clark of counsel), for Mercy College, appellant.

Shafer Glazer, LLP, New York (Timothy M. Wenk of counsel), for Allied Security LLC, appellant.

Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge (Scott G. Christesen of counsel), for respondent.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered August 19, 2008, which denied the motion of defendant SpectaGuard Acquisition, LLC i/s/h/a Allied Security Inc., LLC (Specta/Allied) to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

The court properly denied Specta/Allied's motion to change venue in this action where plaintiff, a resident of Bronx County, seeks damages for injuries suffered when he was allegedly assaulted in a dormitory while a student at defendant Mercy College located in Westchester County. Specta/Allied failed to make the requisite showing that retention of the action in Bronx County would inconvenience the Dobbs Ferry police officers who investigated the assault (*see* CPLR 510[3]). Specta/Allied did not submit proof in admissible form concerning the location of

the officers' residences for the motion court to determine whether the distance from their homes to the Bronx County courthouse is greater than the distance to the Westchester County courthouse (*see Montero v Elrac, Inc.*, 300 AD2d 9 [2002]; *compare Henry v Central Hudson Gas & Elec. Corp.*, 57 AD3d 452 [2008]). Moreover, assuming arguendo that all four officers indeed reside in Westchester County, plaintiff submitted evidence showing that the differences in distance and time between the Bronx courthouse and the Westchester courthouse were not significant, and any inconvenience to the witnesses would be minimal (*see Timan v Sayegh*, 49 AD3d 274 [2008]; *Cardona v Aggressive Heating*, 180 AD2d 572 [1992]). Furthermore, Specta/Allied failed to set forth the facts as to which the subject police officers would testify and how such testimony would be material and necessary to its defense (*see Walsh v Mystic Tank Lines Corp.*, 51 AD3d 908 [2008]).

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

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

ENTERED: JUNE 2, 2009

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
Eugene Nardelli
Karla Moskowitz
Dianne T. Renwick, JJ.

4761-4761A
Index 112301/07

Hon. Susan Larabee, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Governor of the State of New York,
Defendant-Respondent-Respondent,

New York State Senate, et al.,
Defendants-Appellants-Respondents.

- - - -

The Association of Justices of the Supreme Court of the State of New York, The Supreme Court Justices Association of the City of New York, Inc., The New York State Association of City Court Judges, The New York County Lawyers' Association, Chief Judge Judith S. Kaye and The New York State Unified Court System,
Amici Curiae.

Cross appeals from an order of the Supreme Court, New York County (Edward H. Lehner, J.), entered February 7, 2008, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint to the extent of dismissing the complaint as against defendant Governor of

the State of New York and dismissing plaintiffs' first cause of action as against the remaining defendants, and denied the motion to the extent it sought dismissal of the second cause of action, and order same court and Justice, entered June 11, 2008, which granted plaintiffs' motion for summary judgment on their second cause of action declaring that the remaining defendants through the practice of linkage unconstitutionally abused their power by depriving the Judiciary of any increase in compensation for approximately ten years and directing that the remaining defendants proceed in good faith to adjust judicial compensation to reflect the increase in the cost of living since 1998, with leave to apply for consideration of other remedies should the remaining defendants fail to act within 90 days.

Andrew M. Cuomo, Attorney General, Albany (Julie M. Sheridan of counsel), for New York State Senate and New York State Assembly, appellants-respondents.

Schlam Stone & Dolan, LLP, New York (Richard H. Dolan, David J. Katz and Erik S. Groothuis of counsel), for State of New York, appellant-respondent, and Governor of the State of New York, respondent-respondent.

Cohen & Gresser, LLP, New York (Thomas E. Bezanson of counsel) and Chadbourne & Parke, LLP, New York (George Bundy Smith and J. Carson Pulley of counsel), for respondents-appellants.

Stroock & Stroock & Lavan LLP, New York (Joseph L. Forstadt, Burton N. Lipshie, Jerry H. Goldfeder and Sandra Rampersaud of counsel), for The Association of Justices of The Supreme Court of the State of New York, The Supreme Court Justices Association of The City of New York, Inc. and the New York State

Association of City Court Judges, amici curiae.

Suhana S. Han, New York (Adam R. Brebner and Charles R. Korsmo of counsel), for The New York County Lawyers' Association, amicus curiae.

Wachtell, Lipton, Rosen & Katz, New York (Bernard W. Nussbuam, George T. Conway III and Graham W. Meli of counsel), and Michael Colodner, New York, for Chief Judge Judith S. Kaye and The New York State Unified Court System, amici curiae.

Tom, J.

This is a lawsuit by members of the New York State Judiciary against various officials of the State of New York in which plaintiffs challenge the failure of the government of the State of New York to enact any enhancement in compensation for members of the State Judiciary.[1] Although the lawsuit asserts the rights of plaintiffs, it actually constitutes a legal challenge which pits the New York Judiciary against other branches of the state government. While only the individual plaintiffs' rights are at issue in the present case, these plaintiffs' claims involve policies allegedly encroaching upon New York's Judiciary as a distinct branch of government.

Plaintiffs are two Family Court Judges, a Civil Court Judge and a Criminal Court Judge sitting in courts within New York County, whose salaries are specified in Judiciary Law § 221-e and § 221-g. Defendants include the Governor, the New York State Senate, the State Assembly, and the State of New York.

A review of some of the issues that gave rise to these lawsuits may provide a useful context to understanding not only

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[1]There are two related cases pending: *Matter of Maron v Silver*, 58 AD3d 102 [2008]; and *Kaye v Silver* (Index No. 400763/08 [Sup Ct NY County]), presently assigned to Justice Lehner. Dismissal and summary judgment motions have been argued in *Kaye v Silver*, and remain sub judice.

why judges are suing the government of which they are a part, but also how the concepts of judicial independence and the doctrine of the separation of powers lie at the core of the present lawsuit. The New York Judiciary last received an increase in compensation on January 1, 1999 (L 1998, ch 630). As reported by the National Center for State Courts, this lapse of time is exceptional among state judiciaries, in that none of the others have experienced such an extensive delay in updating their salaries. Within a few years of the last enhancement of judicial compensation in New York, it became apparent that the rising cost of living in New York has consumed an increasing portion of judges' salaries. Although estimates vary, judicial salaries have lost between one-quarter and one-third of their value since the 1998 legislation was enacted.

The sheer complexity of much of New York's litigation, and its often crushing caseloads, require a fully operational, efficient and well-informed third branch of government, capable of managing its own affairs and presided over by well-qualified jurists trained to dispense justice efficiently and fairly. Many cases decided on a daily basis directly impact on all aspects of regional life, from alleviating heart-rending family crises, to depriving wrongdoers of their assets or even their liberty, to crafting decisions ensuring the continuing commercial stability

of one of the world's leading financial centers. Resolution of the full range of these disputes typically requires application of sophisticated skills to multiple tasks in order to perform the adjudicative process.

During recent decades, compensation for New York legal professionals rose dramatically, with the anomalous result that salaries of young, newly minted lawyers often exceed those of the experienced jurists before whom they appear. It became broadly recognized by the middle years of the present decade that the erosion in the value of judicial salaries might potentially bring the court system to a precipice, as a generation of experienced jurists retired or sought other employment, while younger, highly qualified, attorneys too often sought nonjudicial careers. Leading members of the bench and bar began to publicly advocate in favor of adjusting judicial salaries to better account for the constant corrosive power of inflation, so as to retain experienced jurists and attract to judicial service the next generation of highly motivated lawyers.

Nevertheless, obscure and even arcane practices, primarily involving linkage of salary increases for judges to increases for legislators, have defeated the reasonable solution of increasing judicial compensation to a level commensurate with the responsibilities. Political leaders, including several governors

and the leadership of each house of the Legislature, who often disagreed about many issues of government, in fact agreed on the necessity of such a measure. In 2006, the Judiciary submitted its budget request to the Governor, totaling approximately $1.6 billion, including a request for $69.5 million for judicial compensation adjustments. Pursuant to article VII, § 1 of the New York Constitution, the Governor forwarded the budget request for fiscal year 2006-2007 unaltered, and even noted his approval of the judicial salary increase.

In 2007, the Senate passed two bills to bring the salaries of New York trial judges in line with the salary of Federal District Court judges. One Senate Bill (S5313) also sought to untangle the ritual of linking judicial salary increases to legislative salary increases by the expedient of appointing a commission to recommend legislative compensation adjustments on a routine basis. The Assembly declined to pass the companion bill (A7913) when the Governor threatened to veto the measure unless the Legislature acquiesced in his demand for campaign finance reform. The Senate opposed the Governor's demand. The Assembly resisted advancing the measure because the Governor would not approve legislative pay raises. In the resulting stalemate, judicial compensation remained frozen. A second Senate bill (S6550), which omitted a legislative pay commission, passed

almost unanimously in the Senate, but was not acted on by the Assembly.

By that time, the Chief Judge and others proposed a commission to regularly consider judicial salary levels as a means to, in effect, depoliticize the ritual of linkage. While both the executive branch and the legislative branch advocated for their respective agendas, the judicial branch was without a means to participate in the budgetary process. Compared with the other two branches of government, the Judiciary is at a disadvantage with respect to seeking public support for its interests, particularly as to pay raises. Nevertheless, $69.5 million was actually appropriated in the 2006-2007 budget for judicial salary increases and proposed retroactive payments (L 2006, ch 51, § 2), but no authorization to spend the sums was introduced or passed, nor was any bill introduced to amend Judiciary Law article 7-B to create a new schedule of judicial salaries. This inaction by the Legislature is the subject of the present appeal. The Governor also proposed judicial pay increases in the 2008-2009 executive budget that he submitted to the Legislature, but the Legislature declined to act.

The complaint, seeking declaratory and injunctive relief, set forth two causes of action. The first claim was that judicial compensation has suffered an unconstitutional diminution

when measured against the substantial inflation since the last judicial pay raise, thus presenting a violation of article VI, § 25(a) of the New York Constitution, which prohibits any diminishment of the compensation of enumerated judges and justices. Plaintiffs contended that, notwithstanding that the New York courts are among the busiest in the nation, the annual compensation levels of the New York Judiciary rank 12th in the nation measured in absolute terms. However, they asserted, the more accurate measurement is the value of those wages relative to the local cost of living. By this measure, New York judicial compensation drops to 48th in the nation. Plaintiffs claimed that the 26% increase in the cost of living since 1999 was ignored by the Legislature during the ensuing decade while judicial wages remained unchanged.

In the second cause of action, plaintiffs claimed that defendants repeatedly engaged in the unconstitutional practice of "linkage," whereby the political branches of New York government combined the consideration of legislation for judicial pay raises with unrelated matters. Plaintiffs specifically alleged that the allocation of $69.5 million became legislatively "impounded" because of the vituperative battling between the Governor and the Legislature over legislative salaries and campaign finance reform, which are inherently unrelated to the consideration of

what salary levels are appropriate for the Judiciary. Plaintiffs argued that the timing of increases in judicial compensation in recent decades has not been coincidental. Rather, judicial salary increases were typically accompanied by legislative salary increases. Plaintiffs asserted that such a "linkage" between increases in judicial compensation and the Legislature's enhancement of its own salary levels was never constitutionally sanctioned in any explicit sense, yet, nevertheless, became a matter of legislative habit.[2] Plaintiffs claimed that the result of linkage in the present case was that because the Governor refused to condone legislative salary increases, the Legislature did not act on the proposed judicial salary increases notwithstanding public expressions of support. Plaintiffs asserted that the manner in which salary linkage was employed in the ongoing series of battles between the executive and legislative branches of state government economically punished the members of the judicial branch, necessarily implicating the

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[2]For instance, it appears that when judicial pay raises were considered in 1998, the issue also became mired in disputes between the Governor and the Legislature. The Governor's goal, to create 100 charter schools that were insulated from the teachers' unions, was negotiated with the Legislature, which wanted a 38% pay increase. In the meantime, judicial pay raises were not independently considered as a separate item. Ultimately, the Legislature acceded to the Governor's demand (*see* Gershman, *Lame Duck Session Likely to Confront A Rasher of Deals*, New York Sun, Nov 29, 2006).

independence of the Judiciary from those other branches of government in violation of the separation of powers doctrine.

In addition to seeking declaratory relief, the complaint sought orders compelling the disbursement of certain annual payments and enjoining defendants to hold the $69.5 million allocated for judicial salary increases in the 2006-2007 budget pending disbursement to New York judges and justices. Plaintiffs also sought to permanently enjoin defendants from linking judicial salary increases to legislative salary increases or other unrelated initiatives.

Two orders are presently under review. By pre-answer motion dated October 30, 2007, defendants moved, inter alia, to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, which resulted in the dismissal of the first cause of action and all claims against the Governor. Subsequently, plaintiffs moved for summary judgment on the second cause of action, which the court granted.

During oral argument on both motions, the parties made several concessions narrowing the issues to be decided. During the January 10, 2008 oral argument on the CPLR 3211 motion, defendants conceded that a judicial pay increase was in order, but argued that the legislative process provided the exclusive recourse under the New York Constitution. Although initially

positing that the Legislature's action or inaction on such a measure was entirely insulated from constitutional challenge, defendants eventually conceded that the independence of the Judiciary as a discrete branch of government could be impaired, and the doctrine of separation of powers would then be violated, by inadequate judicial compensation, although it was claimed that the present salary levels did not implicate such constitutional concerns. Plaintiffs conceded that, insofar as they actually sought a legislative remedy, the Governor was not an essential party to the action.

In its order entered February 7, 2008, Supreme Court granted the CPLR 3211 motion in part. The court dismissed the complaint as against the Governor on the ground that the actual relief sought by plaintiffs required legislative action - passing a budget bill including judicial salary increases - and did not implicate an executive function. Rather, the court found that by acting in a quasi-legislative role, the Governor was entitled to legislative immunity. The court also found that dismissal was warranted because the Governor's role was at most a technical one, basically signing the legislation.

The court next concluded that judicial salaries had not been diminished within the meaning of New York Constitution article VI, § 25, since no direct action had been taken by defendants to

reduce judicial compensation. The court also found that plaintiffs had not suffered any economic impact distinct from others who were also affected by the inflation-induced erosion of compensation. However, the court denied that portion of defendants' CPLR 3211 motion seeking to dismiss the second cause of action. The court found that plaintiffs had sufficiently stated a claim that the legislative conduct at issue infringed on the independence of the Judiciary and violated the doctrine of separation of powers.

Plaintiffs then moved for summary judgment on the second cause of action. In support of their separation of powers claim, plaintiffs cited to legal publications as well as general media articles reporting widespread public and professional support for a judicial pay increase, acknowledging the public benefits of an adequately compensated Judiciary, and explaining how linkage was politically manipulated in this case to effect a stalemate between the Governor and legislative leaders that collaterally deprived plaintiffs of the already appropriated salary increase.

During oral argument on the summary judgment motion, defendants reiterated the acknowledgment that members of the New York Judiciary deserved a salary increase, even conceding that defendants did not oppose an increase matching the salary paid to Federal District Court judges, but, again, insisted that

achieving that goal remained the exclusive province of the Legislature. Defendants also conceded the basic aspects of plaintiffs' linkage claim.

In the second order under review, entered June 11, 2008, the court parsed the difference between linkage that might merely constitute bad policy and might not be judicially reviewable, and linkage that had constitutional ramifications. The court found that there was no policy dispute, since defendants agreed that judicial compensation should be increased. Rather, this case presented a disagreement involving the method of doing so, that is, whether any pay increase for the Judiciary was, of necessity, an exclusive legislative prerogative. The court found that the only reason why there had been no adjustment in judicial compensation during the past decade was the Legislature's insistence on linking any judicial pay increase to a simultaneous legislative pay increase, with the result that if no legislative pay increase was implemented, judicial pay increases were likewise postponed. Hence, the court found that the Judiciary's compensation was left unchanged solely because of entirely extraneous issues, irrelevant to the merits of the salary increase, which the two political branches could not resolve between themselves and as to which the Judiciary was without any forum to promote its interests. Supreme Court found that the

constitutional infirmity arose from the abuse of power by which the political branches of government used the Judiciary as a pawn, thereby impermissibly infringing on its independence. The court further found that the device of linkage, as employed by the Legislature, was "repugnant to our tripartite form of government" and violated the separation of powers doctrine.

The court declared defendants' actions to be unconstitutional. It directed defendants to remedy the abuse, within 90 days, by proceeding in good faith to adjust compensation payable to members of the Judiciary to reflect the increased cost of living since the last salary adjustment in 1998/1999. The remedial portion of the court's order has been stayed pending resolution of this appeal.

DISCUSSION

Supreme Court's decisions and the information provided during oral argument amply demonstrate that a judicial salary increase is uncontroversial, has the support of the other branches of government and was even poised for final legislative action. We find that advancement of the measure foundered on the combination of the Assembly's refusal to act unless legislative pay increases were linked to any enhancement of judicial compensation, the Governor's refusal to approve any legislative salary increase unless his demands for, inter alia, campaign

finance reform were satisfied, and the Senate's refusal to agree to the Governor's demands. It is obvious that none of these matters are even remotely related to the merits of an adjustment in judicial compensation, if those merits were to be independently considered. Hence, we agree with Supreme Court that it is manifestly clear that the only reason why the Legislature declined to finalize any measure to enhance judicial compensation, after such a lengthy delay, was that it perceived itself locked into an interbranch conflict with the Governor and was using the judicial branch to advance its own salary increase while simultaneously resisting campaign finance reform.

Moreover, we find that these facts do not present merely a pedestrian pay dispute involving state employees who happen to work for the Judiciary (see NY Const, article XIII, § 14; cf. People v Ohrenstein, 77 NY2d 38, 46 [1990] [the Legislature has power to establish salaries of state workers]), or even the judicial pay scales set forth in the Judiciary Law. Our concern transcends the particulars of how much, specifically, judges should earn, although that matter itself eminently deserves attention. Nor is this a challenge to a state budgetary and funding scheme (cf. Campaign for Fiscal Equity, Inc. v State of New York, 8 NY3d 14, 28 [2006]). Rather, we review the more important constitutional problem presented by these facts: what

otherwise would have been a routine exercise of legislative responsibility, that is, to authorize the expenditure of already appropriated funds for salaries as to which the Governor had communicated his assent (an outcome that was imminent), was turned into a political weapon against the Legislature's rival, the Governor. This outcome necessarily denigrated the third branch of government, and subordinated it to the competing political strategies of the other branches of government. That dynamic impinged on the independence of the Judiciary as a discrete branch of New York government. The question before us is whether these facts allow for a viable legal remedy.

The concern is not just that individual jurists are experiencing increasingly diminished economic security. Rather, our constitutional concern, as set forth below, is that the Legislature's self-serving grip on judicial compensation ultimately compromises the operation of the court system and thereby diminishes the Judiciary as a self-functioning, and thus independent, branch of government. After so many years of legislative inaction, and no indication that the Legislature seems inclined to abandon its customary practice of linkage, we are persuaded that the constitutional claim is ripe for review.

DISMISSAL OF THE ACTION AGAINST THE GOVERNOR

Initially, we agree with Supreme Court that plaintiffs have

no actionable claim against the Governor. There is no evidence that the state's Chief Executive exceeded his authority, or thwarted either the enactment of the judicial pay raise legislation or the expenditure of the appropriated funds for judicial compensation. To the contrary, the Governor facilitated the process by bringing the issue of judicial salaries to the Legislature by means of submitting the Judiciary's budget request to the Legislature unchanged, as he was required to do, and with his approval. His conflict with the Legislature was in connection with legislative matters; his refusal to approve a legislative pay increase, too, was related to those matters in dispute. The fact that the Legislature reacted by refusing to enact a judicial pay increase cannot be attributed to the Governor. Hence, as plaintiffs conceded in oral argument, the Governor is not properly part of this action and we affirm that part of the order dismissing the action against the Governor.

THE COMPENSATION CLAUSE - ARTICLE VI, § 25

Plaintiffs contend that, taking into account a 30%[3] loss of purchasing power due to inflation since their last adjustment in salary, "the de facto 70 cents paid for judicial work today is

[3]The estimated increase in the cost of living, including inflation, as set forth in the record and briefs, ranges from 26% to 30%.

less than the dollar paid in 1999." Plaintiffs perceive "a serious attack on the compensation of the Judiciary [which] ... is no less devastating than a direct reduction of the number of salaried dollars," citing to federal case law purportedly recognizing that "cost of living adjustments are necessary to maintain compensation's value in the face of an inflationary environment" (see e.g. Atkins v United States, 556 F2d 1028, 1074 [Ct Cl 1977, Nichols, J., concurring], cert denied 434 US 1009 [1978]; Williams v United States, 240 F3d 1019, 1040 [2001], cert denied 535 US 911 [2002]).

Article VI, § 25(a) of the New York Constitution, the state's equivalent to the Federal Constitution's "Compensation Clause," provides that the compensation of the constitutionally created judgeships enumerated therein "shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed." The New York provision parallels article III, § 1 of the United States Constitution, which also provides that judges' compensation "shall not be diminished during their Continuance in Office." The Federal Compensation Clause, and, by analogy, New York's provision, have their "roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if

there is a right to have claims decided by judges who are free from potential domination by other branches of government" (United States v Will, 449 US 200, 217-218 [1980]). The Compensation Clause, providing a means by which judicial salaries may be adjusted for inflation but vesting the mechanics of doing so in the Legislature, recognizes the need to "accept[] a limited risk of external influence in order to accommodate the need to raise judges' salaries when times change[]" (id. at 220).

The central issue herein is whether diminishment results only when there has been an affirmative reduction of compensation, consisting of the pay scale and benefits, below that which was available when the jurist entered office, or whether a more flexible construction is permissible which includes a gradual diminution of the relative value of wages and benefits over a period of time. In effect, plaintiffs, advocating for the latter construction, juxtapose their nominal salaries against the spending power of those salaries as years go by.

We agree with Supreme Court that the legislative inaction did not "diminish" judicial compensation by reducing wages or benefits in any direct fashion, and that this is the operative consideration. Notably, New York Constitution article VI § 25(a) states that "compensation ... shall not be diminished," (emphasis

added) rather than addressing itself to the relative value of that compensation. Even as a practical matter, though, if we were to adopt plaintiffs' construction of article VI, section 25(a), it would follow that some standard would have to be devised to determine at what pace, and at what point, "diminishment" occurs because wages and benefits have slipped behind the rate of inflation. The present action does not provide a basis for us to determine, as a general principle, the point at which salary "diminishment" occurs within the meaning of article VI, section 25(a), because salaries have lagged behind inflation and the cost of living, and we are not prepared to undertake that task. Although the type of commission proposed elsewhere to evaluate the pace of increases in judicial compensation makes sound sense, that is not our present role.

In any event, the scarce case law interpreting article VI, § 25(a) does not support plaintiffs' construction. In Matter of Benvenga v LaGuardia (294 NY 526 [1945]), the New York City Board of Estimate issued a series of resolutions reducing the City's annual contribution to the salaries of certain justices. This was an actual reduction in salary, which violated the constitutional prohibition against the diminishment of judicial compensation and supports our construction of article VI, § 25(a). In Black v Graves (257 App Div 176 [1939], affd 281 NY

792 [1939]), by contrast, the Court rejected the claim that requiring a judge to pay a personal income tax constituted an unconstitutional diminishment of compensation. The plaintiff in that case had previously enjoyed an exemption from income tax obligations that was applicable to judges but was eliminated during the plaintiff's term of office. The concurring opinion in the Appellate Division noted a theme later articulated in United States v Hatter (532 US 557, 569-572 [2001]), that paying taxes is merely an incident of citizenship, universally applicable, and is not a targeted diminishment of judicial compensation. Notably, that reasoning has logical force for the present case, in that the absolute salaries are not being reduced. Rather, only the relative value of the net compensation has been affected, a consequence of inflation that affects other persons in addition to plaintiffs. In Hatter, the United States Supreme Court drew a sharp distinction between an affirmative legislative reduction of salary - an unconstitutional exercise of power - and indirect effects on judicial salaries that are not unique to, or targeted at, the Judiciary.

In United States v Will (449 US 200 [1980], supra), the Court noted that a concern for the "ravages of inflation" (id. at 220) on judicial compensation and the fear that an underfunded Judiciary might too easily lose its special status motivated the

draftsmen of the Federal Constitution, notably Madison, Hamilton and Morris, to devise the unidirectional nature of the Compensation Clause: judicial salaries could be increased but not decreased (id. at 220-224). However, in Atkins v United States, the Federal Court of Claims, after a comprehensive discussion of the framers' intent in selecting the particular phrasing in the Compensation Clause, addressed, but nevertheless rejected, claims that the protections of the Compensation Clause are necessarily invoked when judicial salaries lose real value in the face of substantial inflation. Inflation only presents a nonactionable "indirect, nondiscriminatory lowering of judicial compensation" (Atkins, 556 F2d at 1051).

The Third Department recently analyzed the same facts in Matter of Maron v Silver (58 AD3d 102 [2008], supra) also concluding that inflation and the escalation in the cost of living in New York do not constitute the diminishment of judicial compensation within the meaning of article VI, section 25(a) in the face of the Legislature's inaction. The Third Department therein stated that "the Compensation Clause neither offers complete protection of the purchasing power of judicial salaries nor mandates cost of living adjustments to offset inflation" (id. at 111), a conclusion with which we agree.

Accordingly, we affirm the February 7, 2008 order of Supreme

Court insofar as it dismissed the Compensation Clause claim (first cause of action).

LEGISLATIVE IMMUNITY

With respect to the second cause of action, defendants assert absolute immunity by operation of the Speech or Debate Clause of the NY Constitution, article III, § 11.[4] They argue that by virtue of the Speech or Debate Clause, a court is not empowered to inquire into the Legislature's reasons for adopting or not adopting particular measures which thus remain beyond judicial review. Defendants characterize Supreme Court's linkage analysis as an exercise in speculation about the motives of its members, and a constitutionally prohibited inquiry relating to core legislative functions. Defendants describe decisions to pass or not pass bills as "the quintessential (and wholly proper)

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[4]In dismissing the complaint against the Governor, Supreme Court relied, in part, on legislative immunity, a defense raised in that context, and on behalf of legislators, in defendants' memorandum of law in support of their motion to dismiss and argued during oral argument before Supreme Court. Plaintiffs claim that the defense was waived with respect to the legislative bodies since it was not articulated in those terms. Although the defense was weakly articulated in that sense, we recognize that each house of the Legislature necessary acts through its individual members. Moreover, implicit in Supreme Court's ruling with respect to the Governor was the finding that there was legislative immunity in the first place. We affirm the order dismissing the action against the Governor on different grounds. Nevertheless, the issue of legislative immunity was sufficiently in issue below as to require review on appeal.

give and take of political compromise in a representative democracy." Finally, defendants argue that legislative immunity is not abrogated even as to unconstitutional or illegal actions.

Legislative immunity has been described as "an attempted accommodation of the competing constitutional commitments to judicial review and legislative autonomy" (Tribe, American Constitutional Law [3d ed], § 5-20, at 1019 [2000]). The Speech or Debate Clause states that "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place" (article III, § 11). This spare phrasing has been interpreted as creating an immunity that is as broad as the immunity enjoyed by Congress under federal law (People v Ohrenstein, 77 NY2d at 53-54). The federal constitutional provision (article I, § 6) was, itself, the outcome of a lengthy common-law tradition founded in the experience of political conflicts that arose within the English government and among the diverse governing bodies of the American colonies, which also found expression in New York's 1787 Bill of Rights (Tenny v Brandhove, 341 US 367, 372-376 [1951]).

The original purpose of legislative immunity was to insulate legislators from intimidation by the executive branch as well as protect them from being held accountable for their legislative acts by a possibly hostile Judiciary (Eastland v United States

Servicemen's Fund, 421 US 491, 502 [1975]; Gravel v United States, 408 US 606, 616 [1972]). The immunity has expanded in recognition of the importance of allowing a legislator to independently discharge his or her duties free from the chilling effects of lawsuits seeking damages or the compulsion of injunctions directing a legislator how to vote (see Tenny v Brandhove, 341 US 367 [1951], supra; Gravel v United States, 408 US 606 [1972], supra). An official should be able to make decisions necessary for the public good, and faithfully perform the responsibilities of office, without a fear of personal liability that otherwise might discourage fidelity to those responsibilities (Scheuer v Rhodes, 416 US 232, 241-242 [1974]). Legislative immunity allows legislators to be free

> "from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good ... The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial ... or to the hazard of a judgment ... based upon a jury's speculation as to motives" (Tenney, 341 US at 377).

Notwithstanding the constitutional nomenclature, legislative immunity applies not only to speeches and debates, but also to acts that fall within "the sphere of legitimate legislative activity" (id. at 376-378 [conduct of legislative committee

immunized]; Eastland, 421 US at 502). In interpreting the Clause, courts take a practical rather than a strictly literal approach, which otherwise would limit its protections to "utterances made within the four walls of [the Legislature]" (Hutchinson v Proxmire, 443 US 111, 124 [1979]). The protected activities include other legislative functions such as voting and committee work (Gravel, 408 US at 624; Matter of Straniere v Silver, 218 AD2d 80, 83 [1996], affd 89 NY2d 825 [1996]), and even investigations (Eastland, 421 US at 504). The immunity correlates with acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House" (Gravel, 408 US at 625), including the regular and usual budgetary decisions involving departmental funding (Bogan v Scott-Harris, 523 US 44 [1998]).

However, considering the impervious nature of the immunity, if applicable, courts have been parsimonious in invoking it. It does not necessarily insulate the outcome of legislative conduct from the judicial review of its constitutionality. That is, individual statements of legislators or legislative acts may be

protected from litigation, but it does not automatically follow that the manner in which legislative decisions are made is similarly protected; otherwise, the fundamental purpose of judicial review, to determine the constitutionality of governmental acts, would be eviscerated. Since the goal is to protect legislators from harassment caused by litigation, lawsuits challenging the constitutionality of legislative decisions, which do not impede that goal, are not barred (see Powell v McCormack, 395 US 486, 504-505 [1969]). Not all acts by legislators acting in an official capacity are functionally legislative in nature; the immunity conferred by the Speech or Debate Clause does not extend beyond the "legislative sphere" (Gravel 408 US at 624-625). As noted by the Supreme Court, "[t]he gloss going beyond a strictly literal reading of the Clause has not, however, departed from the objective of protecting only legislative activities" (Hutchinson, 443 US at 125).

> "The heart of the Clause is speech or debate ... Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which [legislators] participate in committee and [legislative] proceedings with respect to the consideration and passage or rejection of proposed legislation ... [T]he courts have extended the privilege to matters beyond pure speech and debate ... but only when necessary to prevent indirect

> impairment of such deliberations" (Gravel, 408 US at 625 [internal quotation marks and citations omitted]; accord Hutchinson, 443 US at 126-127 [with reference to defamatory speech outside of legislative function]).

"The line separating protected from unprotected legislative activity is ultimately one between 'purely legislative activities' and 'political' matters" (Straniere, 218 AD2d at 83, quoting United States v Brewster, 408 US 501, 512 [1972]; see Tribe, American Constitutional Law, at 1016-1020).

Hence, legislative interactions with the executive branch might further legislative interests, but would not generally be protected legislative activity (Gravel 408 US at 625). Nor would protection be required for legislators' issuance of press releases (Straniere, 218 AD2d at 83; People v Ohrenstein, 77 NY2d at 54), or their public statements, even if such are tangentially related to speech or debate that might be immunized (Hutchinson, 443 US at 131-132). Even if legislative statements resulting in a decision or action are immune, the unlawful discharge of an immunized decision might not itself be within the circle of immunity, if it is not essential to legislative independence (Gravel, 408 US at 621). As noted by Professor Tribe, "to the extent that legislative and non-legislative actions are entangled in practice, the privileged status of legislative action does not

preclude its judicial review," which may still be accomplished without formally requiring individual legislators "to answer personally for legislative acts" (Tribe, American Constitutional Law, § 5-20 at 1019). Courts are empowered to determine the constitutional boundaries of each branch of government (Pataki v New York State Assembly, 4 NY3d 75, 96 [2004]) and whether an action is within the purview of legitimate legislative activity (Straniere, 218 AD2d at 85).

We find that legislative immunity is unavailable to shield defendants from plaintiffs' separation of powers claim. Since no member of the Legislature has been named a defendant in his or her individual capacity, we need not be concerned with the historical and entirely appropriate concern that a legislator might be harmed by the prospect of civil or even criminal liability as a consequence of his or her unfettered discharge of legislative duties.

To the extent that the Speech or Debate Clause bars inquiry into the motivations underlying legislative decisions and communications, those concerns are academic, considering that the record is replete with information, including public statements by legislative leaders, explaining why judicial salary increases were abandoned at the eleventh hour (Straniere, 218 AD2d at 83; Hutchinson, 443 US at 131-132). Defendants essentially conceded

that linkage was the causative factor in this case. We are not reviewing legislative "communication or deliberation." We need only look to the outward manifestation of the contentious relationship between the Governor and the respective legislative bodies when linkage was employed to alternatively block or prod action by the Governor on matters that were fundamentally unrelated to the harm ultimately suffered by plaintiffs as members of the Judiciary. Our focus, thus, is on the overtly political manner in which linkage was employed. In this regard we differ with the approach taken by the Third Department in Matter of Maron v Silver (58 AD3d 102, supra), which concluded that no remedy was available because legislative immunity precluded a challenge to the Legislature's inaction with respect to a judicial pay increase (id. at 120-121).

Defendants, though, claim that linkage is a policy decision and, as such, it is inherently a legislative function protected from a judicial challenge to the manner in which it is employed. The New York Constitution, as well as the statutory law governing the respective branches of government, is silent on linkage, which, as a result, does not benefit from any particular legal imprimatur. Linkage as applied seems to be merely a legislative custom that served no legitimate legislative purpose other than to facilitate the personal remunerative goals of its members.

Thus, the practice of linkage does not enjoy any particular recognition as a legislative function in and of itself.

The Supreme Court's ruling in Bogan v Scott-Harris (523 US 44, supra), upon which defendants rely, does not constrain our analysis. The decision, in an action commenced under 42 USC § 1983, noted the extant protections afforded state and federal officials, then found that alternative remedies were still available against municipal corporations should legislative immunity be extended to municipal officials (id. at 53). Those underpinnings of the decision, of course, are inapplicable to the present dispute. The Supreme Court probed whether the challenged conduct in that case - eliminating a department from the City budget - was consonant with a legislative function. It so happened that the plaintiff, who had an acrimonious history with some municipal officials, was the sole employee of the department being eliminated. The Supreme Court declined to inquire into the Legislature's motives, since eliminating a department traditionally was a budgetary, and hence a legislative, function and the legislative motive was potentially explainable as such. Obviously, the present case does not involve a city council decision whether to fund a municipal agency falling under its jurisdiction. Moreover, unlike Bogan, the failure to increase judicial compensation can only be explained by reference to the

political conflicts between the Legislature and the Chief Executive, which had no relation to budgetary considerations pertaining to judicial compensation. Although the Supreme Court in Bogan conferred deference on legislatures regarding the allocation of resources, defendants herein have never asserted that a different allocation of resources was called for.

In this case, the political back and forth between the Governor and the respective Houses of the Legislature manifested itself in discussions and positioning that gravitated beyond the boundaries of the Legislature's internal communications, debates, committee work, investigations and the like which rest within the legislative sphere, as that cloistered notion has traditionally been understood. Under these circumstances, we cannot conclude that judicial review of this constitutional challenge is barred by operation of the Speech or Debate Clause. Since legislative immunity is inapplicable, we turn to defendants' claim that the separation of powers is not implicated.

SEPARATION OF POWERS

We agree with the Supreme Court's decision to grant plaintiffs' summary judgment motion on their second cause of action. Plaintiffs allege that linkage as employed in this case violated the doctrine of the separation of powers, an essential component of our constitutional form of government. The

structure of both our state and our federal governments provides for three separate, co-equal, branches of government. Hence, our analysis focuses in large part on whether defendants under the circumstances of this case have distorted that carefully balanced structure.

Defendants maintain that they did not transgress the separation of powers but, rather, acted in conformity with the powers conferred on them by the State Constitution so that their actions were, a fortiori, constitutional. However, the facts are undisputed that the legislative branch, rather than being solely engaged in a legislative function, was using the Judiciary tactically in a political battle with the Governor. The question is whether this legislative action sufficiently threatened the independence of the judicial branch of government as to violate the doctrine of separation of powers. We focus not so much on the legislative inaction - not implementing a judicial salary increase - but on its action - making a judicial salary increase contingent on its own success in achieving a legislative pay increase. The principle underlying plaintiffs' second cause of action is that judicial review becomes necessary when the functional independence of the Judiciary is threatened (see Matter of Kelch v Town Bd. of Town of Davenport, 36 AD3d 1110, 1112 [3d Dept. 2007] [municipality's establishment of an unduly

meager salary for a new town justice threatened judicial independence]).

Since the dispute originates with funding, the analysis regarding this aspect of the relations among the branches of government necessarily starts with identifying the means by which members of the Judiciary are compensated. Notably, the New York Constitution sets forth the provisions relating to compensation for each branch of government, not in article III governing the Legislature, but in the particular article for each branch, none of which mirrors the other. As already noted, article VI, § 25(a) provides the constitutional linchpin for compensating plaintiffs and certain other judicial classifications, whose salaries are specified in Judiciary Law article 7-B (§ 220 et seq.), and are to be paid by annual appropriations pursuant to Judiciary Law § 39, which may be increased only by appropriation (article VII, § 7). The Governor's salary is to be fixed by a joint resolution of the Senate and Assembly (article IV, § 3). The Legislature may increase or decrease legislative salaries, but not for the term in which a legislator was elected (article III, § 6). This structural scheme suggests, at the outset, that the Judiciary was not intended to be subordinated to legislative whim on matters of compensation, notwithstanding the legal necessity that salary increases must be appropriated and

implemented as part of the budgetary process because no state money may be spent except pursuant to a budget appropriation.[5]

It was noted in early New York case law that the "object of a written Constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers," in furtherance of a stability that "rests upon the independence of each branch and the even balance of power between the three" (People ex rel. Burby v Howland, 155 NY 270, 282 [1898]). Insofar as the Judiciary has already been recognized to be the weakest of the branches of government, which "might be dwarfed or swayed by the ... legislative" (Evans v Gore, 253 US 245, 249 [1920] overruled in part by United States v Hatter, 532 US 557 [2001]), the concern becomes acute that it could be "weaken[ed]

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[5]For a history explaining why any spending measure must begin as an appropriation, see *Pataki v New York State Assembly*, 4 NY3d at 80-85. *See also* John Buckley, *The Governor - From Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive*, 68 Alb L Rev 865 (2005) (the author is a member of this Court). The present constitutional requirement is the result of an evolutionary movement away from the excessively political and fiscally unsound history of ad hoc spending by the Legislature to a more unified process under Executive control, thereby shifting the balance of power to the Chief Executive, and away from the Legislature, on budgetary matters. Nowhere is it evident that the Judiciary as a branch of government was accorded a lesser constitutional status in either the historic or the present process. For a history of the judicial review of the Executive Budget, see Buckley, *id.* at 886-904.

... by making it unduly dependent upon" the Legislature. Legislative action that "hampers judicial action or interferes with the discharge of judicial functions is in conflict with the principles of the Constitution" (Burby, 155 NY at 282). The manner in which the powers of the distinct branches of government are separated or conjoined springs from the recognition that the independence of the Judiciary is especially relevant to the purpose and continued stability of government itself (id.).

In New York, the doctrine of the separation of powers inheres "by implication in the pattern of government adopted by the State" (Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 355-356 [1985]). The New York Court of Appeals, which early recognized that making any branch unduly dependent on another branch weakens the dependent branch and thereby upsets the delicate balance of power (Burby, 155 NY at 282), characterizes the doctrine as a means to impede "one [b]ranch [of government] seeking to maximize power" (Cohen v State of New York, 94 NY2d 1, 13 [1999]; see also Matter of County of Oneida v Berle, 49 NY2d 515, 522 [1980]). The Court of Appeals has afforded a continuing vitality to the doctrine as applied to intra-governmental disputes (Under 21, Catholic Home Bur. for Dependent Children, 65 NY2d at 356).

Hence, it would be inappropriate for a court to sit in

review of the Legislature's wholly internal affairs or practices, or, conversely, of the Governor's limited, though exclusive, quasi-legislative constitutional prerogatives (Urban Justice Ctr. v Pataki, 38 AD3d 20 [2006], lv denied 8 NY3d 958 [2007]). However, it follows that those branches of government may not act to the detriment of the judicial branch's own ability to function without interference. That consideration is at the heart of judicial independence from the perspective of the separation of powers.

The judicial system is at its best when it stands above and apart from the political interactions that more typically characterize the other two branches of government. Yet, the third branch of government is effectively dependent on the other two branches in matters of compensation. The political branches of government must discharge the responsibility of considering, and acting upon, an enhancement in judicial salaries on its objective merit.

The intersection of the separation of powers and judicial compensation has a lengthy history. Salary disputes that pitted a Legislature against the Judiciary have occurred since the early days of the Republic. Certain general themes have emerged which underscore the delicate intragovernmental relations that are threatened when legislative bodies, on the basis of various

motives and agendas, act in ways that financially burden judges as they perform their duties, even if their compensation is not, nominally, "diminished," and even if the burden does not directly distort the performance of those duties.

Shortly after the ratification of the United States Constitution, the judges of the Virginia Court of Appeals, in a "respectful remonstrance" directed to the Virginia Assembly, cautioned that the unique role undertaken by the Judiciary, to protect the people from the powers of government if need be, required that relations between the branches of government be managed "to exclude a dependence on the legislature." Those judges warned that a dependency contrary to the newly crafted scheme of government could easily arise as a consequence of the subordination of the Judiciary to the Legislature in matters of compensation (Cases of the Judges of the Court of Appeals, 8 Va 135, 141, 143-145 [1788]).

During the early part of the twentieth century, the United States Supreme Court noted the importance of ensuring a judge's "sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office." Adequate judicial compensation was analyzed not as a benefit to the judge, but "as a limitation imposed in the public interest" so as "to attract good and competent men to the bench

and to promote that independence of action" necessary to the administration of the system of justice (Evans v Gore, 253 US at 249, 253). Elsewhere, also in the context of a compensation dispute, the Supreme Court characterized the peculiarly American scheme of government as a "separation [which] is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital ... to preclude a commingling of these essentially different powers of government in the same hands" (O'Donoghue v United States, 289 US 516, 530 [1933]). There, the Supreme Court cautioned that each branch of government "should be kept completely independent of the others" in the sense that none should be subjected to duress by either of the other branches. The Supreme Court therein noted the "anxiety of the framers of the Constitution to preserve the independence especially of the judicial department" (id. at 530-531). Hence, American jurisprudence recognized early that matters of judicial compensation are inextricably intertwined with judicial independence vis-a-vis the legislative branch of government, requiring "a continuing guaranty of an independent judicial administration for the benefit of the whole people" (id. at 533).

More recently, in a pay dispute, the Supreme Court described the separation of powers doctrine, albeit under different circumstances, as

> "a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features ... it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict" (Plaut v Spendthrift Farm, Inc., 514 US 211, 239 [1995]).

An erosion of the functional independence of the Judiciary may be incremental, and subtle, yet, unlike the political branches of government, the judicial branch is not empowered to assert its interests by means of politics. If the acts of another branch of government threaten the functional independence of the Judiciary as an institution, then the "separateness" of those branches may become illusory.

Here, there has been a violation of the doctrine of separation of powers. We assume, as did the Supreme Court in Hatter, that there is no legislative ill will toward the Judiciary in the events giving rise to this litigation, and we need not find that the Legislature intentionally intruded upon the independence of the judicial branch of government. Our conclusion also does not require evidence relating to the integrity of judging in individual cases, and, indeed, there is no record evidence of undue influence. Rather, we are concerned with the integrity, in a structural sense, of the judicial system

as an independent institution, in that New York's constitutional architecture prohibits the subordination of the judicial branch to the other branches of government either in practice or in principle. More significantly, the political maneuvering by the other branches of government, by reducing the issue of judicial compensation to a tactical weapon, consequentially subordinated the status of the Judiciary to that of an inferior governmental entity. Linkage, as employed in these circumstances, manifested an abandonment of any pretense to an objective consideration of judicial compensation unimpeded by extraneous political considerations. These acts and their ramifications necessarily undermine the carefully constructed architecture of New York government.

Defendants argue that linkage benefitted the Judiciary in the past when judicial salary increases accompanied legislative salary increases with no affront to New York's constitutional framework of government, so that plaintiffs' separation of powers claim, arising only when they have not benefitted at present, should be rejected. However, the fact that in the past the Judiciary may have, by happenstance, benefitted from linkage would not necessarily have ratified the propriety of the Legislature's practice. Moreover, there is a practical basis to reject any correlation between judicial and legislative

compensation, notwithstanding the linkage of past "benefits." Placing judicial compensation and legislative pay on an equal footing, although perhaps politically convenient, is an illusory comparison. "Linkage" in this sense is innately skewed against the Judiciary because the members of the respective branches of government are differently situated economically. Legislators are not barred from outside employment, and many enjoy considerable revenue from other activities, an economic capacity that is denied, with very narrow exceptions, to members of the Judiciary. The Legislature, too, may be free to time its own salary increases to accompany judicial salary increases. But that is not the gravamen of the present dispute, where linkage was employed to restrict the implementation of updates for judicial compensation until such time as the Legislature found it expedient to give itself a raise. Judicial compensation, rather than being independently addressed, became contingent on the Legislature's treatment of its own members.

We disagree with the conclusions of the Third Department in Maron v Silver (58 AD3d 102 [2008], supra), which, inter alia, looked for evidence of a present impairment of the judicial system as a prerequisite to the viability of a separation of powers claim. Although that kind of evidence could be sufficient to state the claim, we do not find it to be a prerequisite (see

e.g. New York County Lawyers Assn. v State of New York, 294 AD2d 69, 73-74 [2002] [claims of prospective harm to court system valid as basis for preventative remedies]). The threat to judicial independence arises not only from specific instances of legislative or executive overreaching, but, also when political jousting erodes the institutional barricades which protect the judicial branch. Thus, it is the manner in which the Legislature employed linkage that implicates the separation of powers doctrine. The absence of evidence of undue influence, or of current systemic operational deficiencies, is not dispositive. We are also mindful of the many concerns set forth in the record about the future retention of qualified jurists and the attraction of highly qualified attorneys to the bench as judges retire or otherwise leave. However, we are concerned with not only the prospective harm to the functioning of the court system, but also with the manner in which linkage distorted the relationships among the branches of government implicit in New York's constitutional framework. Our conclusions in this latter regard proceed from the consequential exploitation of the Judiciary, not any present impairment in its operations. The constitutional defect is predicated on the manifest affront to

the Judiciary's structural independence (Plaut, 514 US at 239).

The Legislature, by subordinating the Judiciary to its whims and caprices in matters of salary adjustments, brings the Judiciary closer to the world of politics than is tolerable for the disinterested functioning of a court system that must act for "the benefit of the whole people" (O'Donoghue, 289 US at 533). The fact that salary adjustments for the third branch of government became politicized as the byproduct of an interbranch conflict removes this case from the otherwise mechanical processes for adjusting judicial compensation. When judicial compensation becomes politicized, a line has been crossed in contravention of the warnings long articulated in what has become a deeply rooted constitutional jurisprudence. The basic tenet of the separation of powers doctrine, to promote and maintain the independence and stability of each branch of government, has been violated.

We conclude with the observation already made above that, consistent with our concern that judicial compensation should be as far removed as is practicable from political considerations, it makes sound sense to delegate the issue of judicial compensation to a commission created for that purpose, to analyze and make recommendations to the Legislature on the timing and scope of future increases in judicial salaries, a device that had

utility in Campaign for Fiscal Equity v State of New York (100 NY2d 893 [2003]; 8 NY3d 14 [2006]).

Accordingly, the order of the Supreme Court, New York County (Edward H. Lehner, J.), entered February 7, 2008, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint to the extent of dismissing the complaint as against defendant Governor of the State of New York and dismissing plaintiffs' first cause of action as against the remaining defendants, and denied the motion to the extent it sought dismissal of the second cause of action, and the order of the same court and Justice, entered June 11, 2008, which granted plaintiffs' motion for summary judgment on their second cause of action declaring that the remaining defendants through the practice of linkage unconstitutionally abused their power by depriving the Judiciary of any increase in compensation for approximately ten years and directing that the remaining defendants proceed in good faith to adjust judicial compensation to reflect the increase in the cost of living since 1998, with leave to apply for consideration of other remedies should the

remaining defendants fail to act within 90 days, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 2, 2009

CLERK