SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 4, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

5251 Roman Bednarczyk, et al., Index 111776/05
Plaintiffs-Respondents-Appellants, 590218/07

-against-

Vornado Realty Trust, et al.,
Defendants-Appellants-Respondents,

Call Electric Co., Inc.,
Defendant-Respondent-Appellant.

- - - - - - -

Call Electric Co., Inc.,
Third-Party Plaintiff-
Respondent-Appellant,

-against-

Superior Acoustics, Inc.,
Third-Party Defendant-
Respondent-Appellant.

Wilson, Elser Moskowitz Edelman & Dicker LLP, New York (Aviva Sofer of counsel), for appellants-respondents.

Jaroslawicz & Jaros, LLC, New York (David Tolchin of counsel), for Bednarczyk respondents-appellants.

Morris Duffy Alonso & Faley, New York (Pauline E. Glaser of counsel), for Call Electric Co., Inc., respondent-appellant.

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for Superior Acoustics, Inc., respondent-appellant.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 11, 2008, which, in an action for personal

injuries sustained when an overhead light fixture fell and struck plaintiff porter on the head while he was cleaning a bathroom undergoing renovation in an office building owned, leased, and managed by the building defendants (Vornado), inter alia, denied plaintiffs' motion for summary judgment on the cause of action against Vornado under Labor Law § 240(1), denied Vornado's motion for summary judgment dismissing the complaint as against it, denied defendant lighting contractor's (Call) motion for summary judgment dismissing the complaint as against it, and denied third-party defendant tile contractor's (Superior) motion for summary judgment dismissing Call's third-party action, unanimously modified, on the law, to dismiss the complaint as against Vornado, and to dismiss the causes of action under Labor Law § 240(1) and § 241(6) as against Call, and otherwise affirmed, without costs. The Clerk is directed to enter a judgment dismissing the complaint as against defendants Vornado Realty Trust, Vornado Office Management, LLC, Korpenn LLC, and One Penn Plaza, LLC.

The allegedly dangerous condition was an electric light fixture that was suspended, apparently from a beam, after removal of the acoustic tiles and grids forming the bathroom's drop ceiling. Issues of fact exist, including who removed the grid that held the fixture and who suspended the original fixture from a beam, that make it uncertain whether the allegedly dangerous

condition was created by Call, hired to remove old lighting and install temporary and new permanent lighting, or Superior, hired to remove and install ceiling tiles. Thus, dismissal of the common-law negligence-based claims by plaintiff against Call and by Call against Superior was properly denied (*see Cornell v 360 W. 51st St. Realty, LLC*, 51 AD3d 469, 470 [2008]). However, the deposition testimony establishes that no such issues of negligence exist as to Vornado, whose employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures but did not otherwise exercise supervisory control over the work (*see Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [2005]). Further, since the tiles were removed on the same night as the accident, there would have been no opportunity for Vornado's employees to have noticed the alleged unsafe condition. Accordingly, we modify to dismiss the common-law negligence/Labor Law § 200 causes of action against Vornado.

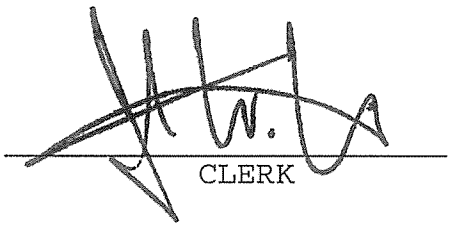
We also modify to dismiss plaintiffs' Labor Law § 240(1) claims on the ground that the suspended light fixture did not pose an elevation-related risk of the kind that would be addressed by safety devices of the kinds enumerated in the statute (*cf. Quattrochi v F.J. Sciame Constr. Corp.*, 11 NY3d 757 [2008], *affg* 44 AD3d 377 [2007]), and to dismiss plaintiffs' Labor Law § 241(6) claims since plaintiff was not injured while

engaged in construction, excavation or demolition work within the meaning of that statute (*see Jock v Fien*, 80 NY2d 965, 967 [1992]). Moreover, the Industrial Code provisions invoked by plaintiffs (12 NYCRR 23-1.7[a][1],[2]; 23-1.33[a][1],[2],[3]; 23-2.1[a][1],[b]; and 23-3.3[c],[g]) are either inapplicable or insufficiently concrete to support liability (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JUNE 4, 2009



Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

388 Alan D. Glatt, Index 601590/07
Plaintiff-Appellant,

-against-

Mariner Partners, Inc., et al.,
Defendants-Respondents.

Greenbaum, Rowe, Smith & Davis LLP, Woodbridge, NJ (Raymond M. Brown, Jr. of the State of New Jersey Bar, admitted pro hac vice, of counsel), and Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Robert N. Holtzman of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered January 7, 2008, which granted defendants' motion to dismiss certain causes of action to the extent of dismissing the causes of action for fraud and quantum meruit, and denied the motion with respect to the cause of action for breach of contract, deemed to have dismissed so much of the second cause of action for breach of contract as is based on the "Responsibilities" section of the contract, and, so considered, unanimously affirmed, without costs.

Plaintiff's cause of action for fraudulent inducement was properly dismissed. Not only is there no allegation of a misrepresentation that is collateral to the contract (*see Glanzer v Keilin & Bloom*, 281 AD2d 371 [2001]; *Orix Credit Alliance Inc. v R.E. Hable Co.*, 256 AD2d 114 [1998]), but in addition there is

no allegation of a knowing misrepresentation of a present material fact with the intent to deceive (*see Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 [1958]; *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1056 [2009]). This fraud cause of action, based on the claim that defendants represented that plaintiff would be able to transfer his Morgan Stanley clients and fully manage their accounts, actually hinges upon defendants' *implicit* representation that they possessed, or would obtain, the broker dealer licensing necessary to permit plaintiff to transfer and manage the securities accounts of his existing clients at Morgan Stanley. There are no allegations in the complaint that the parties ever discussed defendant Mariner Partners' licensing in advance of contracting. The alleged explicit representations are insufficient to establish a knowingly false statement made with the intent to deceive, and the relied-upon implicit statement cannot serve as a misrepresentation upon which a claim of fraud may properly be based. Moreover, the allegations fail to support an assertion that plaintiff acted reasonably to the extent he relied on defendants' implicit representations.

With respect to the cause of action for breach of contract, we agree with the motion court's finding that the contract is unambiguous, and that nothing in the "Responsibilities" section pertaining to plaintiff's Morgan Stanley clients may be read to

require defendants to have the type of broker-dealer licensing needed for plaintiff to fully service his Morgan Stanley clients.

Plaintiff's delay of nearly four years before seeking to rescind the contract after learning in October 2003 that defendants would not seek the licensing needed to service his Morgan Stanley clients constituted a waiver of his right to sue in quantum meruit (*see R & A Food Servs. v Halmar Equities*, 278 AD2d 398 [2000]).

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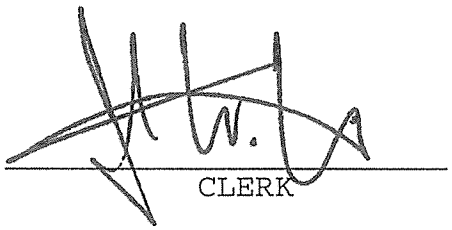

CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

394 Philip Masullo, et al.,
Plaintiffs-Appellants,

Index 100893/05
591195/05

-against-

1199 Housing Corporation,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

Technical Construction Services, Inc.,
Third-Party Defendant-Respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellants.

Baker Greenspan & Bernstein, Bellmore (Robert L. Bernstein, Jr. of counsel), for 1199 Housing Corporation, respondent.

Mulholland, Minion & Roe, Williston Park (Christine M. Gibbons of counsel), for Technical Construction Services, Inc., respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 7, 2007, which denied plaintiffs' motion for partial summary judgment and granted the motions by defendant 1199 Housing and third-party defendant Technical Construction Services for summary judgment dismissing plaintiffs' complaint in its entirety, unanimously modified, on the law, to the extent of denying dismissal of the Labor Law § 240(1) cause of action, that cause of action reinstated, and otherwise affirmed, without costs.

On June 11, 2003, plaintiff, a foreman for Technical, was working on a project involving restorative concrete work and

waterproofing at an apartment complex owned by 1199. To supply power to a work trailer on the project, the plaintiff worker had to run a cable from an electric panel inside the trailer to one of the apartment buildings located approximately 30 to 40 feet away. Pedro Robles, an electrician employed by 1199, provided the electric cable and told the plaintiff worker to run the wire through three trees located between the trailer and the building. Both Robles and plaintiff agreed that the electric cable had to be elevated off the ground to avoid interfering with workers and equipment traversing the work site. Plaintiff worker further testified that a "Bobcat" vehicle was being used in the area, and the cable needed to be high enough that the Bobcat would not run into it.

Robles did not provide the plaintiff worker with any safety device such as a ladder or scaffold to perform the task, but instead suggested he throw the electric cable through the tree branches like a lasso. Plaintiff worker then constructed a makeshift scaffold with a platform 3 to 3 ½ feet high. Standing on the scaffold, he affixed the cable to the side of the trailer at a height of 13 to 15 feet off the ground and then attempted to toss the cable over the first of the three trees. The tree branch over which plaintiff tossed the cable was approximately two to three feet higher than his outstretched arm. As he tossed the cable over the branch, plaintiff fell off the scaffold.

The motion court improperly granted defendant's and third-party defendant's motions for summary judgment dismissing the Labor Law § 240(1) claim. The work here, which involved running electrical cable from a construction trailer to the building where the waterproofing project was being done, was sufficiently construction-related to fall within the ambit of the statute (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878 [2003]; *Robinson v City of New York*, 22 AD3d 293 [2005]). No fair reading of the record supports the motion court's conclusion that the accident was not elevation-related. Robles himself admitted that a ladder was probably needed to do the job because the trailer was pretty high. Moreover, two of the injured plaintiff's coworkers submitted affidavits stating that in order to hang the cable, it was necessary to construct a platform on which to stand. Under all these circumstances, there is no question that this accident falls within the elevation risks contemplated by § 240(1) (*see Swiderska v New York Univ.*, 10 NY3d 792 [2008]; *DeKenipp v Rockefeller Ctr., Inc.*, 60 AD3d 550 [2009]).

Guercio v Metlife Inc. (15 AD3d 153 [2005], *lv denied* 5 NY3d 714 [2005]), upon which the motion court relied, did not involve the type of elevation-related accident present here. In *Guercio*, to complete his task of installing bathroom wall tile, the plaintiff had to reach, at most, 13 inches above his head. Here, in contrast, to elevate the electric cable above the path of

workers and vehicles passing through the construction area, plaintiff affixed the wire to a 13 to 15-foot-tall trailer. Defendants are unpersuasive in arguing that plaintiffs' claim should be dismissed merely because Robles had in the past tossed electric wire over the trees while standing on the ground, especially in the absence of any showing that those prior circumstances involved a construction project with equipment and workers below.

It is well established that there can be no liability under Labor Law § 240(1) where the plaintiff's actions are the sole proximate cause of his or her injuries (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Montgomery v Fed. Express Corp.*, 4 NY3d 805, 806 [2005]). The motion court found that plaintiff was the sole proximate cause of the accident because he constructed his own scaffold and ignored the available safety devices on the site. However, the record does not establish whether such devices, in fact, were available to him and that he chose for no good reason not to use them (*cf. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *Gallagher v New York Post*, 55 AD3d 488, 490 [2008]).

The injured plaintiff acknowledged that if he needed any type of equipment, he knew he could call Technical's owners and it would be delivered later in the day or the next morning. Plaintiff did not recall whether he ever requested the delivery

of any such equipment on this job. Moreover, even if plaintiff had called, the record is unclear as to exactly where the equipment was stored prior to delivery, the time frame for delivering something as simple as a ladder, and whether any delay in obtaining a ladder or other safety device would impact the overall construction project. Plaintiff's sparse testimony on the general procedure for obtaining equipment is insufficient to establish as a matter of law whether a ladder or other safety device was "readily available" (*Montgomery*, 4 NY3d at 806).

This case is controlled by *Miro v Plaza Constr. Corp.* (9 NY3d 948 [2007]), where the plaintiff had slipped and fallen off a ladder partially covered with sprayed-on fireproofing material. Despite having knowledge of the ladder's deficiencies, the plaintiff did not request a different ladder, conceding that he could have obtained a replacement ladder by calling his employer, although the record was unclear as to whether replacement ladders were on the job site or at an off-site location. The majority of this Court had dismissed the plaintiff's Labor Law § 240(1) claim on the basis that he knowingly chose to use a defective ladder despite being aware that he could have requested his employer to provide a replacement (38 AD3d 454). The Court of Appeals modified and reinstated the § 240(1) claim because, even assuming that the ladder was unsafe, it was not clear from the record how easily a replacement ladder could have been procured. Likewise

here, there is an issue of fact as to how easily plaintiff could have obtained a ladder or other safety device, and neither party should have been granted summary judgment on the § 240(1) claim.

The motion court properly dismissed the Labor Law § 241(6) claim. Most of the cited sections of the Industrial Code are either too general to confer liability or not applicable to the facts of this case. Furthermore, to the extent plaintiffs allege violation of Industrial Code sections pertaining to scaffolds, no liability exists because the gravamen of their claim is that no safety device was provided, not that an inadequate scaffold provided by either defendant led to this accident.

The motion court correctly dismissed plaintiffs' Labor Law § 200 and common-law negligence claims. The evidence showed only that Robles furnished the injured plaintiff with an electrical cable, suggested that he throw it over the trees, and stated that he would return to make the necessary connection to the power source. This advice is not tantamount to supervising the means and methods of plaintiff's work, nor does it establish constructive or actual notice of any allegedly dangerous condition, particularly where Robles had no reason to believe the worker would proceed to construct a makeshift scaffold from which he would throw the cord (*see Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732 [2006]).

The motion court's order was limited to dismissal of the

main action, and the third-party plaintiff did not file a notice of appeal. Thus, any arguments concerning the third-party action are not properly before us.

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

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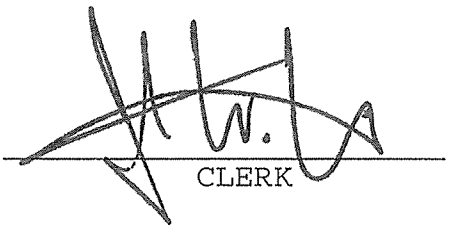

Tom, J.P., Sweeny, Nardelli, McGuire, DeGrasse, JJ.

4472 Duane Reade, etc., Index 600675/03
Plaintiff-Respondent,

-against-

Stoneybrook Realty, LLC,
Defendant-Appellant,

Bear Stearns Commercial Mortgage, Inc.,
Defendant.

Coffinas & Coffinas, L.L.P., New City (Kirk P. Tzanides of counsel), for appellant.

Law Offices of Jody E. Markman, New York (Jody E. Markman of counsel), for respondent.

Judgment, Supreme Court, New York County (Rolando T. Acosta, J.), entered June 14, 2007, declaring, inter alia, plaintiff tenant entitled to a rent abatement and awarding it attorneys' fees, unanimously modified, on the law, the award of attorneys' fees vacated, the rent abatement reduced by eliminating the period during which the temporary restraining order was in effect, and otherwise affirmed, without costs.

The rent abatement clause in the lease between these sophisticated parties was an enforceable liquidated damages provision and not a penalty, since it compensated the tenant, which was to operate in a new geographical market, for damages flowing from delays in delivering possession that were not readily ascertainable when the parties executed the lease, and such damages were not unreasonably disproportionate to

foreseeable losses (*see Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120 [2006]; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]).

The motion court determined that the rent abatement date would commence on September 26, 2002. In setting this date, the court did not take into account the 40-day period from September 21 through October 31, 2001, during which defendant landlord Stonybrook Realty was prevented from continuing with construction of the building as a result of a TRO issued by Supreme Court. The court determined that this period should not be added to the landlord's time of performance, as the force majeure provision of the contract did not specifically include this event.

The force majeure clause agreed to by the parties provided that certain acts beyond the control of the landlord "shall be added to the time for performance of such act." One of the listed acts that would trigger this clause was "governmental prohibitions." Interpretation of force majeure clauses is to be narrowly construed and "only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused " (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902-903 [1987]). Certainly, a judicial TRO falls within the meaning of the term "governmental prohibition," and the time during which such TRO was in effect must be included in computing the starting date of the rent abatement.

While the lease provides for the landlord's attorneys' fees, the prevailing commercial tenant lacks an implied reciprocal right to such fees (*see Gracie Tower Realty Assoc. v Danos Floral Co.*, 142 Misc 2d 920, 925 [1989]).

We have considered the landlord's other contentions and find them unavailing.

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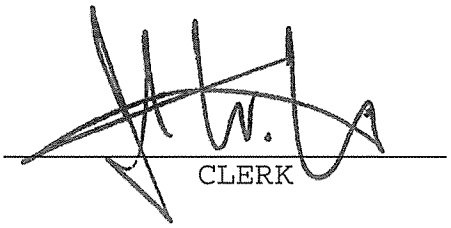

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5426-
5427-
5427A Gurumurthy Kalyanaram, Index 107961/07
Petitioner-Appellant,

-against-

New York Institute of Technology,
Respondent-Respondent.

- - - - - -

Labe M. Richman,
Nonparty-Appellant.

Gallet Dreyer & Berkey, LLP, New York (David T. Azrin of counsel), for Gurumurthy Kalyanaram, appellant.

Labe M. Richman, New York, appellant pro se.

Stephen J. Kloepfer, Old Westbury, for respondent.

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 15, 2007, dismissing the petition in this special proceeding pursuant to CPLR 7502(c), granting respondent's motion to enjoin petitioner and his agents from threatening, or attempting to influence any of the witnesses or prospective witnesses in the arbitration proceeding, and awarding respondent costs pursuant to 22 NYCRR 130-1.1(c)(2) totaling $5,142.50 as against petitioner and $10,142.50 as against his attorney, nonparty appellant Labe M. Richman, Esq., modified, on the law and the facts, as to the awarding of costs only, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 18, 2007, unanimously dismissed, as

subsumed in the appeal from the judgment. Order, same court and Justice, entered November 30, 2007, which denied petitioner's motion for injunctive relief and denied his request for 22 NYCRR 130-1.1 sanctions against respondent, unanimously affirmed, without costs.

The court properly exercised its discretion (*see Town of Esopus v Fausto Simoes & Assoc.*, 145 AD2d 840, 841 [1988]) in denying injunctive relief to reinstate petitioner's rights and privileges as a tenured professor pending resolution of an arbitration proceeding. Petitioner failed to meet his burden of demonstrating a "likelihood of success on the merits, irreparable injury in [the] absence of such relief and a balancing of the equities in [his] favor" (*Matter of Non-Emergency Transporters of N.Y. v Hammons*, 249 AD2d 124, 127 [1998]). The record shows that respondent's representatives promptly and thoroughly investigated the students' allegations against petitioner and found them credible. Nor did the record support petitioner's contention that respondent violated the collective bargaining agreement, as respondent maintained petitioner on the payroll pending determination of the agreement's grievance/arbitration process.

However, we find that under all of the circumstances, the court abused its discretion in awarding costs against petitioner and his attorney pursuant to 22 NYCRR 130-1.1 based on the record before it and modify the decision so as to eliminate the award of

costs.

We have considered the remaining arguments of petitioner and Mr. Richman and find them unavailing.

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

TOM, J.P. (dissenting in part)

Petitioner, already represented by an attorney on his claim of wrongful termination of employment, retained a criminal lawyer whose sole contribution was to send a letter to respondent's witness stating that her testimony against petitioner could constitute perjury, followed by a letter to the respective director of security at each of respondent's New York campuses asserting that "an investigation by your office will lead you to the conclusion that [the witness] committed perjury in violation of New York Penal Law Sections 210.05; 210.10." Since I agree that no valid basis has been advanced for the equitable relief sought by petitioner and because I regard the unauthorized communication as an unvarnished attempt to intimidate a witness, I conclude that the imposition of costs and the award of attorneys' fees against petitioner and additional counsel was a provident exercise of Supreme Court's discretion.

After investigating complaints from 37 students regarding petitioner's inappropriate conduct during class, respondent sent a letter to petitioner notifying him that, pursuant to the collective bargaining agreement (CBA) governing professors employed by New York Institute of Technology, "you are hereby dismissed, effective as of May 21, 2007, for engaging in serious professional misconduct." The letter asserted that petitioner denigrated students' intelligence and ethnicity, made sexually

explicit remarks, demeaned other faculty members at an affiliated college and made sexual advances toward female students. On June 4, petitioner invoked the grievance procedure under the CBA and, the following day, brought this proceeding (a) to compel arbitration (CPLR 7503[a]) and (b) for equitable relief (CPLR 7502[c]) "prohibiting respondent from effectuating petitioner's dismissal . . . and (c) compelling respondent to permit petitioner to continue in his employment . . . until the completion of grievance and arbitration proceedings."

The CBA provides that in the event respondent decides to "suspend or dismiss a faculty member," he or she may file a grievance, in which case the parties will utilize the CBA's grievance and arbitration procedures. The CBA further provides that the faculty member "shall be paid until the review procedures set forth herein are exhausted and a final determination rendered." It is undisputed that petitioner is continuing to receive his regular salary pending resolution of the grievance proceeding.

Having filed his grievance on June 4, 2007, petitioner was not, on June 5, 2007 when the petition was filed, "[a] party aggrieved by the failure of another to arbitrate" (CPLR 7503[a]) so as to warrant issuance of an order compelling arbitration. The petition alleges neither that respondent refused to proceed with arbitration nor delayed the proceedings. Furthermore, the

relief sought by petitioner is already available to him under the parties' CBA. Thus, petitioner failed to demonstrate the need for judicial intervention.

The availability of limited provisional relief under article 75 is not an invitation to commence proceedings merely collateral to arbitration. To avoid resort to the courts to protract the proceedings, "the Legislature has assigned the courts a minimal role in supervising arbitration practice and procedures" (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]). Injunctive relief is available "only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief" (CPLR 7502[c]). Petitioner has not shown why an award rendered in arbitration would be less than effective in affording him the full relief to which he is entitled under the CBA. Nor, as the majority notes, has petitioner established the customary equitable criterion of immediate and irreparable injury (CPLR 6301; *see Koultukis v Phillips*, 285 AD2d 433, 435 [2001]) required of a party seeking injunctive relief under CPLR 7502(c) (*see Koob v IDS Fin. Servs.*, 213 AD2d 26, 32 [1995]). Thus, he has not established that his is an exceptional case warranting reversal of the denial of preliminary injunctive relief (*see Town of Esopus v Fausto Simoes & Assoc.*, 145 AD2d 840, 841 [1988]).

As to respondent's motion for costs and attorneys' fees

against petitioner and additional counsel (collectively, appellants) under Rules of the Chief Administrator of the Courts (22 NYCRR) § 130.1.1(c)(2), "[t]he authority to impose sanctions or costs is committed to the court's sound discretion and, absent an abuse thereof, [an appellate court] will not disturb such an award" (*McCue v McCue*, 225 AD2d 975, 977 [1996]). This Court "will defer to a trial court regarding sanctions determinations unless there is a clear abuse of discretion" (*Pickens v Castro*, 55 AD3d 443, 444 [2008]). No such abuse is discernable.

According to his affidavit, counsel was consulted by petitioner for the limited purpose of sending a letter to a witness against petitioner, followed by a second letter to respondent's campus security directors. The witness submitted an affidavit attesting to petitioner's unwelcome verbal and physical advances, conduct that resulted in the witness's filing a formal complaint with respondent's director of human resources. Specifically, she avers that petitioner spent a good portion of class time asking her personal questions, that he asked her to break up with her boyfriend, invited her to dinner in his apartment, and hugged her and kissed her. Counsel's letter to the witness is dated within two weeks of her affidavit, and his letter to respondent's security staff is dated approximately two weeks thereafter. Another student also submitted an affidavit in support of respondent's opposition to petitioner's proceeding for

injunctive relief.[1]

From the perspective of a sophisticated reader, well versed in the law, counsel's letter to the witness is something less than an unqualified accusation of perjury. It states, equivocally, "I determined that it was my client's position that statements made in your affidavit were untrue." The language employed is conditional: "If indeed your sworn allegations were knowing falsehoods, without a retraction, you could be guilty of perjury." But the threat of prosecution and the proffered solution are unlikely to have been lost on an unsophisticated, young layperson: "if you change your affidavit to rectify any untrue statements before the proceeding in New York State Supreme Court is over, you may have a defense to the perjury charges." Copies of the pertinent Penal Law provisions were enclosed. Finally, while the letter advises the witness to seek independent advice, it counsels the witness to consider retraction and invites further communication, stating, "Although you should certainly obtain your own legal advice, I wanted to inform you that if you lied in your statement, you might want to retract the statement sooner rather than later, so that this defense might be

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[1] The student asserted that petitioner (1) told a female student that his libido increased whenever she walked into class and then made a stroking motion at his crotch; (2) commented on several occasions on the size of a particular student's breasts; and (3) regularly disparaged the backgrounds of foreign students and called them "stupid" and "idiots."

available to you." The letter concludes, "If you do not have an attorney, feel free to contact me at the above number to discuss this further."

In his affidavit in opposition to respondent's motion for costs, counsel states that he is unfamiliar with civil litigation. He professes to have been misled by petitioner's claim that the witness was in an abusive relationship and was pressured into filing a false statement. He explains that he was persuaded "to send the letter because I believed that if, in fact, she had committed perjury, notably because of pressure from her boyfriend, that she might welcome the knowledge about the defense to perjury and would obtain counsel in an effort to help herself." However, this sentiment is in sharp contrast to the tone of counsel's letter to respondent's campus security directors, which states that the witness's affidavit "makes outlandish statements against Mr. Kalyanaram. We believe that a modest investigation by you of these statements will uncover the statement's [*sic*] falsity and that after this investigation, you will determine that the matter should be referred to law enforcement." It should be noted that during the course of the proceeding, the parties and their attorneys appeared twice before the court and submitted extensive affidavits and information. At no time did counsel on behalf of petitioner seek discovery or request an evidentiary hearing which would have shed light on the

veracity of the complaints.

It bears emphasis that the standard of review in this matter is not whether this Court, examining the circumstances de novo, might conclude that the propriety of this communication with an adverse witness should be consigned to the Departmental Disciplinary Committee, to which it has been referred, for investigation and determination. Nor is it a question of whether Supreme Court committed legal error in imposing costs and fees against petitioner and counsel. The only issue before us is whether the imposition of costs and fees constitutes "a clear abuse of discretion" by the court (*id.*).

Appellants have advanced no basis for departing from Supreme Court's conclusions that petitioner "decided to threaten [the witness] with the specter of having to endure a criminal perjury investigation and indictment which he would initiate," and that counsel "should have recognized that such extra-judicial efforts to put pressure on [the witness] to retract her charges against petitioner in this proceeding and in the arbitration proceeding were highly improper." As the court noted, costs may be awarded for frivolous conduct upon motion after affording a reasonable opportunity to be heard (22 NYCRR 130-1.1[d]) and, in this case, appellants received ample opportunity to oppose respondent's motion, submitting extensive opposing papers.

While, as noted, there is little merit to petitioner's

application for injunctive relief, which seems to have been interposed merely to prolong the proceedings, whether it is so devoid of legal merit as to be considered frivolous is subject to interpretation (22 NYCRR 130-1.1[c][1], [2]). There can be no question, however, that the communications with the witness and with respondent's campus security directors, whether or not amounting to an outright accusation of perjury, were intended "to harass or maliciously injure" respondent's witness (22 NYCRR 130-1.1[c][2]). The communications transgressed the former Code of Professional Responsibility DR 7-105(A) (22 NYCRR 1200.36[a]), which provided, "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." They also offended DR 7-104(A) (22 NYCRR 1200.35[a]), which provided:

> "During the course of the representation of a client a lawyer shall not:
>
> * * *
>
> "(2) Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client."

Because petitioner and counsel were both involved in the decision to send the offending letters, the court properly imposed costs against both.

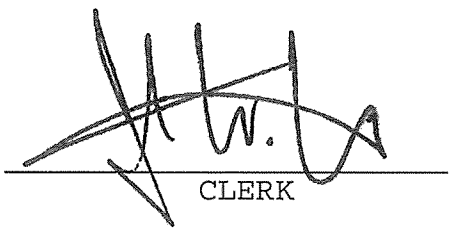
As a final consideration, "this State favors and encourages

arbitration as a means of conserving the time and resources of the courts and the contracting parties" (*Matter of Nationwide Gen. Ins. Co.*, 37 NY2d at 95). Due to petitioner's application for relief already afforded to him by the CBA and appellants' attempt to influence the testimony of a witness, respondent has been required to invoke the courts' exercise of supervision over the arbitral process. The record in this matter, which exceeds 800 pages, reflects the extent of the imposition on the time and resources of both respondent, as a party to the arbitration, and of the courts, in contravention of the legislative intent to avoid court litigation in arbitrated disputes (*see Matter of Weinrott [Carp]*, 32 NY2d 190, 199 [1973]).

The need to respond to petitioner's unnecessary resort to judicial intervention in the arbitral process and to move for preliminary relief enjoining any further attempt to threaten or influence witnesses more than justifies the imposition of costs against both petitioner and counsel. Accordingly, the order should be affirmed.

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

ENTERED: JUNE 4, 2009



CLERK

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

417 Logan Advisors, LLC, etc., Index 602095/06
Plaintiff-Appellant,

-against-

Patriarch Partners, LLC, et al.,
Defendants-Respondents.

Levi Lubarsky & Feigenbaum LLP, New York (Howard B. Levi of counsel), for appellant.

Brune & Richard LLP, New York (Hillary Richard of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 11, 2008, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In December 2000, defendant Ark CLO 2000-1 purchased a portfolio of distressed loans, known as Collateral Debt Obligations (CDOs), and bundled them into a Collateralized Loan Obligation which it financed by issuing investment-grade Notes and Preference Shares to outside investors. Pursuant to the governing Indenture, Ark appointed JP Morgan Chase, a wholly independent entity, to serve as the Trustee responsible for handling all cash for Ark's investors. On a quarterly basis, the Trustee would distribute payments made by the underlying debtors to the investors.

Ark hired codefendant Patriarch Partners to manage the loan

portfolio. For its services, Patriarch was to receive, inter alia, a Supplemental Collateral Management Fee (Patriarch's "Success Fee"), which would become payable following the sale of substantially all of Ark's assets and only to the extent funds were available after Ark fully satisfied its other obligations. Patriarch hired plaintiff to assist in managing a portion of Ark's portfolio. Under their agreement, plaintiff was entitled to receive its own Success Fee equal to 10% of Patriarch's Success Fee, if any.

In October 2002, Patriarch terminated plaintiff's services as financial advisor, and plaintiff subsequently brought an action against Patriarch. That lawsuit was resolved by a settlement agreement which provided, in pertinent part, that if Patriarch sold Ark's assets to an affiliate, the sale would be conducted on arm's-length terms. The agreement also ended the contract between the parties but required Patriarch to pay plaintiff its Success Fee if one became due.

In January 2005, Ark sold substantially all of its assets to Zohar II 2005-1 Limited, a Patriarch affiliate. The sale of Ark's assets triggered a final application of the payments by the Trustee to Ark's investors and other obligees, after which a percentage of the remaining monies, if any, was to be used to pay Patriarch's Success Fee. The Trustee determined, however, that Ark did not have sufficient funds with which to pay its

obligations in full, and thus no Success Fee was paid to Patriarch or to plaintiff.

In the instant breach of contract action, plaintiff alleges that Patriarch breached the settlement agreement by engaging in a non-arm's-length transaction with Zohar and by undervaluing remaining assets left in Ark so as to deprive plaintiff of its Success Fee. Plaintiff's claim that Patriarch undervalued Ark's remaining assets is barred by the waivers contained in the settlement agreement. Plaintiff explicitly agreed not to contest its Success Fee "in any way" unless the amount of such fee was less than 10% of Patriarch's Success Fee as determined and reported by the Trustee. Since it is undisputed that the Trustee paid no Success Fee to Patriarch, plaintiff was not entitled to a Success Fee and is precluded by the broad waivers from challenging Patriarch's failure to pay such a fee based on Ark's retained assets.

Regardless of whether or not plaintiff waived its right to challenge the arm's-length nature of the Ark-Zohar sale, we find no triable issue of fact underlying that claim. The motion court correctly found plaintiff was precluded from using Ark's financial statements to establish that the sale was not conducted at arm's length. Plaintiff's agreement as part of the settlement of the prior lawsuit to "disclaim any reliance" on the statements "for any purpose" must logically preclude using them in

opposition to defendants' motions for summary judgment. Allowing plaintiff to challenge the Ark-Zohar sale based on the financial statements would render meaningless the phrase "for any purpose" and deprive Patriarch the benefit of its bargain. Plaintiff unpersuasively argues that the term "disclaim reliance" is typically used only in the context of a fraud claim and thus cannot be construed to preclude use of the statements here. Plaintiff cites no authority, nor has this Court found any, to support its strained construction of the challenged phrase. Courts may not, under the guise of contract interpretation, distort the meaning of the terms used (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

Plaintiff's contention that the Ark-Zohar sale was not an arm's-length transaction is based on unsupported assumptions and speculation that are insufficient to defeat summary judgment (*see Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, __ AD3d __, 873 NYS2d 592, 598 [2009]). Although certain equity securities were transferred to Zohar for no consideration, under the Indenture these assets were deemed to be worth "zero" "for all purposes." Moreover, plaintiff has offered no proof that these securities had any value at the time they were transferred to Zohar. With respect to the CDOs sold to Zohar, there is no dispute that all but two of these assets were priced near, at or above par value. Nor is there any question that Patriarch and LoanX/Markit

Partners, an independent valuation firm hired by Patriarch to value the CDOs, followed the pricing mechanism in the Indenture for arm's-length sales to an affiliate. More importantly, plaintiff points to no evidence that the values assigned by Patriarch and LoanX were below fair market value, nor provides any proof as to what the fair market value of the transferred assets should have been. As to the discounted price of two of the CDOs, plaintiff does not challenge Patriarch's assertions that the underlying debtor company went into bankruptcy, and that the loans had been subordinated and were scheduled to be liquidated at a deep discount. Nor does plaintiff submit any alternative value for these assets that would lend credence to its claim that they were sold at prices below fair market value.

The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach of contract claim because both claims arise from the same facts (*see Cerberus Intl., Ltd. v BancTec, Inc.*, 16 AD3d 126, 127 [2005]). In light of the dismissal of the complaint as against Patriarch, Ark's motion for summary judgment was correctly granted. Finally, plaintiff was not entitled to a denial of the summary judgment motions as premature. Plaintiff has failed to offer anything other than mere hope that evidence favorable to its claim might be obtained if additional discovery

is had (*see Waverly Corp. v City of New York*, 48 AD3d 261, 265 [2008]).

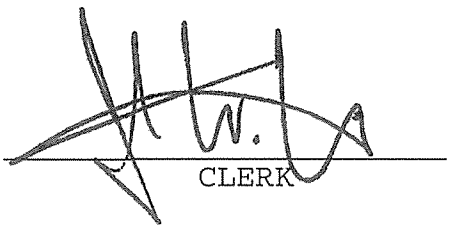
We have considered plaintiff's remaining contentions and find them unavailing.

M-1669 - *Logan Advisors, LLC v Patriarch Partners, LLC, et al.*

Motion seeking leave to strike reply brief denied.

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

ENTERED: JUNE 4, 2009



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Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

712 The People of the State of New York, Ind. 5394/06
Respondent,

-against-

William Stepteau,
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 (Edward A. Jayetileke of counsel), for respondent.

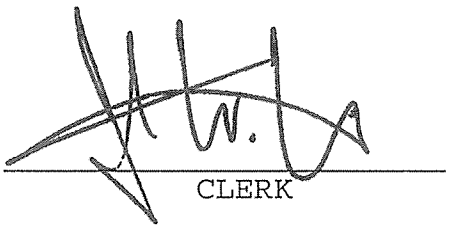
Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 29, 2007, as amended June 4, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

After according defendant sufficient opportunity to present his claims, the court properly exercised its discretion in denying his motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). At sentencing, after defense counsel made a perfunctory request to withdraw defendant's guilty plea, the court immediately denied the motion without further elaboration. Nevertheless, the court then permitted defendant to explain the basis for the motion at considerable length, after which the court adhered to its original decision. Thus,

regardless of whether the court's initial denial of the motion was premature, any error was cured when the court gave defendant a full opportunity to be heard. The court properly determined that the motion was without merit, because the plea allocution record refuted defendant's claims. The allocution made clear that defendant might not be accepted by a drug treatment program, and that, in that event, defendant would receive the promised prison sentence.

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

ENTERED: JUNE 4, 2009



CLERK

Andrias, J.P., Buckley, DeGrasse, Richter, JJ.

713 Harvey Axelrod, doing business as S. Axelrod Co., Plaintiff-Appellant, Index 602783/06

-against-

Magna Carta Companies, et al., Defendants-Respondents.

Bruce D. Katz, New York, for appellant.

Weber Gallagher Simpson Stapleton Fires & Newby LLP, Philadelphia, PA (Kenneth M. Portner of counsel), for respondents.

Order, Supreme, Court, New York County (Karla Moskowitz, J.), entered November 14, 2007, which, upon the parties' respective motions for summary judgment, declared that defendants were not obligated to defend and indemnify plaintiff in an underlying copyright infringement action that plaintiff settled, and severed, for purposes of assessment, defendants' counterclaims for costs, disbursements and attorneys' fees, unanimously modified, on the law, to vacate the severance of defendants' counterclaim for attorneys' fees and to dismiss such counterclaim, and otherwise affirmed, without costs.

The subject policies cover, in pertinent part, claims of copyright infringement arising out of plaintiff's advertising of goods, products or services. The underlying complaint alleged that plaintiff infringed the underlying plaintiff's copyright by, in pertinent part, "reproducing, manufacturing, and/or

distributing" charms that are copies of charms created by the underlying plaintiff and by "preparing derivative works based on" the copyrighted charms. As the motion court correctly held, such allegations do not show advertising activities (*see Quitman Mfg. Co. v Northbrook Natl. Ins. Co.*, 266 AD2d 105 [1999]). Nor does the underlying complaint's "Prayer for Relief," which makes no reference to preventing any type of false, misleading or injurious advertising (*see A. Meyers & Sons Corp. v Zurich Am. Ins. Group*, 74 NY2d 298, 303 [1989]). Nor does plaintiff's catalog, which was attached to the underlying complaint, where the underlying complaint did not allege harm based on use of the catalog but apparently submitted the catalog solely as evidence that plaintiff was selling the infringing charms (*id.* at 304), and, as the motion court held, cannot be construed as asserting a claim that the catalog itself, or the product depictions therein, were infringing "derivative works." The motion court also properly rejected plaintiff's argument that the underlying plaintiff's demand for any and all "matrices" indicated that it was seeking delivery of all materials used to print plaintiff's catalog. Read in context, the underlying plaintiff was seeking matrices that were used to manufacture the copyrighted charms, not the materials used to print plaintiff's catalog.

Plaintiff's 20-month delay in notifying defendants of the new claim alleging advertising in the underlying amended

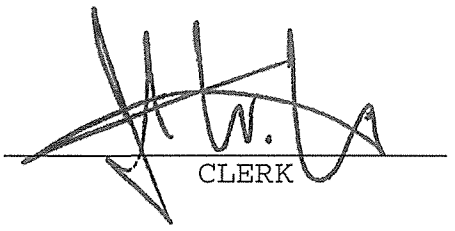
complaint was unreasonable as a matter of law (*see Martini v Lafayette Studio Corp.*, 273 AD2d 112, 113 [2000]). Plaintiff was not relieved of the obligation to notify defendants of this new claim simply because defendant insurer Public Service Mutual had disclaimed coverage based on the allegations in the original underlying complaint (*compare AJ Contr. Co. v Forest Datacom Servs.*, 309 AD2d 616, 617-618 [2003]; *Moye v Thomas*, 153 AD2d 673 [1989]). Nor did defendant insurer Paramount waive its right to disclaim coverage of the claim raised in the underlying amended complaint; the doctrine of waiver is simply inapplicable where, as here, the defense is the nonexistence of coverage (*see Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]). The motion court correctly found that defendants Paramount and Magna Carta Companies did not issue policies relevant to the underlying action. There is no evidence that Magna Carta issued a policy to plaintiff, and no genuine issue of fact exists as to whether coverage was barred under the "Designated Premises Endorsement" in the Paramount policy (*see Accessories Biz, Inc. v Linda & Jay Keane, Inc.*, 533 F Supp 2d 381, 388-389 [SD NY 2008]).

Since no statute, agreement or court rule provides for

attorneys' fees in this case, the motion court improperly directed an assessment thereof (*see generally Chapel v Mitchell*, 84 NY2d 345, 348-349 [1994]), and we modify accordingly.

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

ENTERED: JUNE 4, 2009



Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ,

714-
715-
716 In re Theodore H.,

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

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for presentment agency.

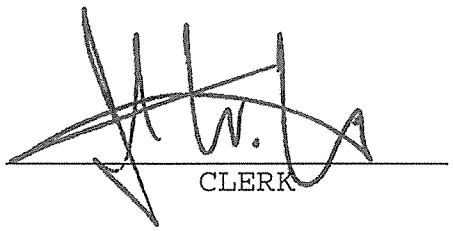
Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about July 31, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of attempted robbery in the second degree, attempted assault in the third degree and menacing in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

There was ample evidence to corroborate the testimony of appellant's accomplice (*see People v Caban*, 5 NY3d 143, 155 [2005]).

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

ENTERED: JUNE 4, 2009



CLERK

Andrias, J.P., Moskowitz, DeGrasse, Richter, JJ.

718-
718A Kadeem Foster, an infant under the age of 14 years, by his mother and natural guardian, Ruby Foster Odemene, et al., Plaintiffs-Appellants-Respondents, Index 22770/02

-against-

Alfred S. Friedman Management Corp., et al., Defendants-Respondents-Appellants.

Scaffidi & Associates, New York (Robert M. Marino of counsel), for appellants-respondents.

Leahey & Johnson, P.C., New York (James P. Tenney of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered December 26, 2007, which, in an action for lead paint injuries, denied plaintiffs' motion for partial summary judgment on the issue of liability, and granted defendants' motion for summary judgment dismissing the complaint only to the extent of dismissing the complaint as against deceased defendant Alfred S. Friedman, unanimously modified, on the law, to dismiss the complaint as well as against defendants Kenneth G. Friedman and Kenneth G. Friedman Management Corp., and to grant plaintiffs partial summary judgment on the issue of liability to the extent of finding the remaining defendants liable for the injuries sustained by the infant plaintiff in his mother's apartment, and otherwise affirmed, without costs. The Clerk is directed to

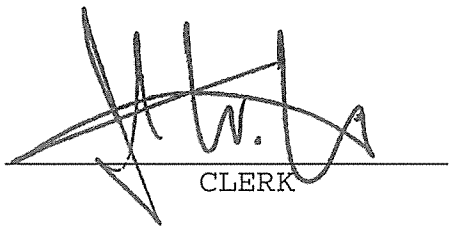
enter judgment in favor of said defendants dismissing the complaint as against them. Appeal from an order, same court and Justice, entered July 15, 2008, which, upon granting defendants' motion for reargument, adhered to the prior order, unanimously dismissed, without costs, as academic in view of the foregoing.

Plaintiffs allege that the infant plaintiff was exposed to lead paint both in his mother's apartment and in the apartment of his godmother who lived in the same building and often took care of him. Summary judgment as to liability for the injuries allegedly sustained by reason of exposure to lead paint in the godmother's apartment was properly denied on the ground that an issue of fact exists as to whether defendants had notice that a child under the age of seven lived in the godmother's apartment (*see Munoz v Mael Equities*, 2 AD3d 118 [2003]). However, since defendants do not dispute that they had notice that a child under the age seven lived in the mother's apartment, and the Department of Health found that the lead condition in the mother's apartment constituted a nuisance and ordered abatement, defendants are liable to plaintiffs for the injuries sustained by plaintiff in the mother's apartment (*see id.*). The extent of the injuries sustained in the mother's apartment goes to the question of damages (*id.*). We therefore remand for a trial on the issue of liability for injuries sustained in the godmother's apartment, and thereafter on all issues of damages (*id.*). We also modify to

dismiss the action as against defendant Kenneth G. Friedman Management Corp., there being no dispute that an entity by that name has never existed, and defendant Kenneth G. Friedman, there being no evidence warranting that one or more of the corporate defendants' veils be pierced in order to impose personal liability on this corporate officer (*see Worthy v New York City Hous. Auth.*, 21 AD3d 284 [2005]).

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

ENTERED: JUNE 4, 2009



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Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

719-
719A-
719B Hotel 71 Mezz Lender LLC, Index 601175/07
Plaintiff-Respondent,

-against-

Guy T. Mitchell,
Defendant-Appellant,

Robert D. Falor, et al.,
Defendants.

Mitchell Silberberg & Knupp LLP, New York (Paul D. Montclare of counsel), for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (John W. Berry of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered April 21, 2008, to the extent appealed from, awarding plaintiff the amount of $52,404,066.54 on a guaranty as against defendant Guy T. Mitchell, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 13, 2008, which, inter alia, granted plaintiff's motion for summary judgment against Mitchell, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment. Order, same court and Justice, entered May 14, 2008, which, inter alia, granted plaintiff's motion to strike Mitchell's answer, affirmative defenses and counterclaims, unanimously affirmed, with costs.

Plaintiff met its burden of establishing prima facie that it

made a loan to Chicago H & S Senior Investors, LLC, that Mitchell executed a personal guaranty of repayment of the loan in the event of Chicago H & S's default, and that Chicago H & S defaulted on the loan (*see Eastbank v Phoenix Garden Rest.*, 216 AD2d 152 [1995], *lv denied* 86 NY2d 711 [1995]). Both the guaranty and the subsequent forbearance agreement, in which the guaranty was reaffirmed, contain express waivers of any and all defenses to enforcement of the guaranty. The language of the waivers is sufficiently specific to bar Mitchell's asserted defenses of frustration of performance of Chicago H & S's obligations under the loan agreement by plaintiff, breach of the covenant of good faith and fair dealing, and fraudulent inducement (*see Sterling Natl. Bank v Biaggi*, 47 AD3d 436 [2008]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-210 [2007], *lv dismissed* 10 NY3d 741 [2008]).

In any event, these defenses are without merit. Mitchell asserts that plaintiff breached express or implied provisions of the loan agreement, or impaired Mitchell's interest in the collateral, thereby discharging his obligation on the guaranty to the extent that such impairment devalued the collateral, by failing to disburse funds and give its approvals of certain decisions regarding management of the subject building and marketing of the condominium units contained therein in a timely fashion. However, Mitchell fails to identify a single

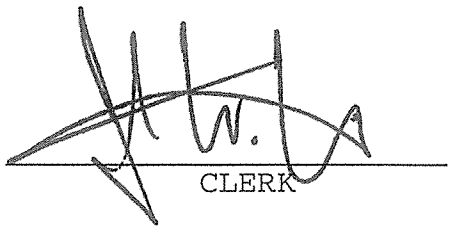
contractual provision that plaintiff allegedly breached, and indeed, the loan agreement does not impose any specific time constraints on plaintiff with regard to said disbursements and approvals. In any event, Mitchell's defenses sounding in breach of contract are premised on allegations of misconduct by plaintiff vis-a-vis Chicago H & S alone and therefore belong to and may be asserted by Chicago H & S alone (*see Citibank v Plapinger*, 66 NY2d 90, 93 n * [1985]; *Walcutt v Clevite Corp.*, 13 NY2d 48, 55-56 [1963]). Mitchell's allegations supporting his defense of fraudulent inducement sound in failure to perform promises of future acts, which amounts simply to breach of contract. Mitchell does not allege that plaintiff breached any duty owed him separate and apart from the contractual duty (*see Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607 [1985], *appeal dismissed* 65 NY2d 637 [1985]).

Based on Mitchell's willful defiance of its order to appear for his continued deposition, the court properly dismissed Mitchell's counterclaims, which in any event were virtually identical to his affirmative defenses, and precluded him from offering his own testimony in support of his defenses and counterclaims.

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

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

ENTERED: JUNE 4, 2009



CLERK

Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

720 Peter Schorr, et al., Index 605647/00
Plaintiffs-Appellants,

-against-

Stuart Steiner,
Defendant-Respondent.

- - - - -

721 Peter Schorr, et al., Index 102300/05
Plaintiffs-Respondents,

-against-

Fores Persaud,
Defendant-Appellant.

Joseph P. Dineen, Garden City, for Peter Schorr, Allegra Schorr Fitch and Star Meth Corp., appellants/respondents.

Aronwald & Pykett, White Plains (William I. Aronwald of counsel), for Fores Persaud, appellant and Stuart Steiner, respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 27, 2008, which granted defendant Steiner's motion to dismiss the third amended complaint, unanimously reversed, on the law, with costs, the motion denied, and the third amended complaint reinstated.

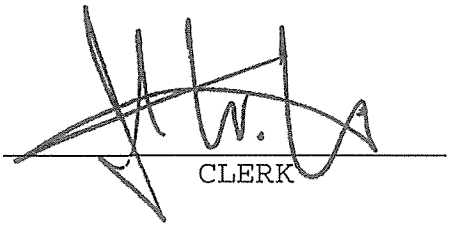
Order, same court (Edward H. Lehner, J.), entered October 24, 2008, which denied defendant Persaud's motion to dismiss the complaint, unanimously affirmed, with costs.

Justice Cahn's affirmed ruling in another action (25 AD3d 361 [2006]), that Dr. Silbermann owned the clinic that Star Meth and the Schorrs managed, did not necessarily determine

entitlement to the revenues remaining after payment of Dr. Silbermann's compensation and the clinic expenses (*see Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]). In this light, the affidavit of Seymour Schorr raised an issue of fact whether payment of salaries to fictitious employees as part of defendants' embezzlement scheme injured Star Meth.

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

ENTERED: JUNE 4, 2009



CLERK

Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

723 Adan Soto-Maroquin, Index 108798/07
Plaintiff-Respondent,

-against-

Maureen Mellet, et al.,
Defendants-Appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Alan C. Kelhoffer of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

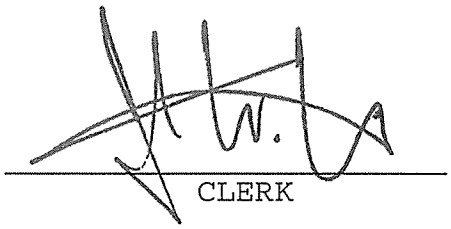
Order, Supreme Court, New York County (Paul Wooten, J.), entered October 20, 2008, which, in an action for personal injuries sustained when plaintiff's vehicle was struck in the rear by defendants' vehicle, granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

The affidavit submitted by a passenger in defendants' vehicle stating that the accident occurred because plaintiff's vehicle came to a sudden stop fails to explain why defendant driver did not maintain a safe distance between herself and the vehicle ahead, and is otherwise insufficient to rebut the presumption that no negligence on plaintiff's part contributed to the accident (*see Sosa v Rehmat*, 46 AD3d 306 [2007]; *Verdejo v Aguirre*, 8 AD3d 63 [2004]; *Malone v Morillo*, 6 AD3d 324 [2004]). It does not avail defendants to argue that summary judgment was

prematurely granted prior to plaintiff's deposition, where defendants' passenger provided no information concerning road conditions other than plaintiff's alleged sudden stop, defendant driver did not submit an affidavit in opposition to the motion, and defendant driver is the party presumably with knowledge of any non-negligent reasons for the accident (*see Johnson v Phillips*, 261 AD2d 269, 272 [1999]; *Jean v Zong Hai Xu*, 288 AD2d 62 [2001]). Consideration of the police report was harmless in view of defendants' passenger's affidavit attesting to what defendants object to in the police report, namely, that defendants' vehicle struck plaintiff's vehicle in the rear after plaintiff's vehicle stopped to avoid hitting another vehicle. We have considered defendants' other arguments and find them unavailing.

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

ENTERED: JUNE 4, 2009



CLERK

Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

724 Kwaku Peprah, Index 8091/03
Plaintiff-Appellant,

-against-

Curtis McDonald,
Defendant-Respondent.

Barry Siskin, New York, for appellant.

Boeggeman, George, Corde, P.C., White Plains (Cynthia Dolan of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered on or about November 27, 2007, which granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

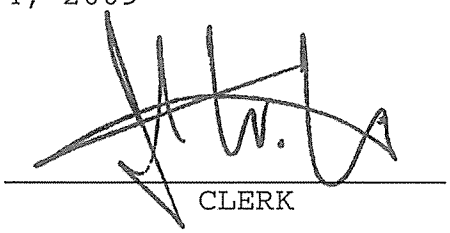
The motion court correctly determined that defendant established his prima facie entitlement to summary judgment with the affidavit of his medical expert, Dr. Nathan, whose examination of plaintiff disclosed no objective medical findings supporting his serious injury claims (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [2003]). Plaintiff, in response, failed to raise a triable issue of fact precluding summary judgment. The affidavit of plaintiff's medical expert was insufficient in that it failed to adduce evidence of serious injury based upon objective medical

findings made within a reasonable time after the accident (*see e.g. Santana v Khan*, 48 AD3d 318 [2008]).

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

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

ENTERED: JUNE 4, 2009



CLERK

Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

725 Carmen Torres, Index 6455/05
Plaintiff-Appellant,

-against-

Cinderetha Knight, et al.,
Defendants,

Kamnaki Service, Inc., et al.,
Defendants-Respondents.

Carro, Carro & Mitchell, LLP, New York (John S. Carro of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 1, 2008, which granted the motion of Kamnaki Service, Inc. and Sidi Sall for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff does not dispute the motion court's finding that defendants are not liable for the car accident in which she alleges she sustained a serious injury within the meaning of Insurance Law § 5102(d), and she tacitly concedes that she is unable to proceed against any other defendant because none are liable except the driver of a stolen car, who was never served in this action. We therefore affirm the grant of summary judgment dismissing the complaint on the ground that defendants' nonliability was conclusively established.

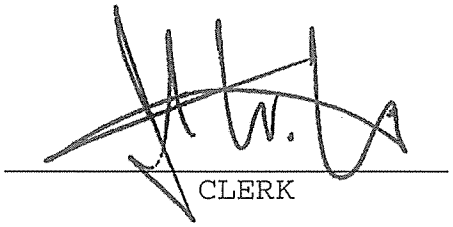
However, because the court's finding as a matter of law that

plaintiff did not sustain a serious injury will have collateral estoppel effect on her uninsured motorist claim, the serious injury issue is not moot, and we therefore address it (*see Urbina v 26 Ct. St. Assoc., LLC*, 12 AD3d 225 [2004]; *Tehan v Peters Print. Co.*, 71 AD2d 101, 104 [1979]). We find that defendants failed to demonstrate their entitlement to summary judgment dismissing the complaint on that ground.

Both defendants' neurology and orthopedics experts reported significant limitations of range of motion in plaintiff's cervical and lumbar spine (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]), and neither identified a potential cause of the injury other than the accident (*see Diaz v Anasco*, 38 AD3d 295 [2007]). Rather, the experts opined that plaintiff's limited range of motion was the result of lack of effort on her part. However, this opinion was unsupported by objective medical proof, and therefore it is insufficient to establish a prima facie case (*see Lamb v Rajinder*, 51 AD3d 430 [2008]; *Busljeta v Plandome Leasing, Inc.*, 57 AD3d 469 [2008]).

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

ENTERED: JUNE 4, 2009



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Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

726 Travelers Casualty and Surety Company,
Plaintiff-Appellant,

-against-

Honeywell International, Inc.,
Defendant-Respondent,

American Re-Insurance Company, et al.,
Defendants,

Employers Insurance Company of Wausau, et al.,
Defendants-Appellants.

Index 107138/06

Simpson Thacher & Bartlett LLP, New York (Helena Almeida of counsel), for Travelers Casualty and Surety Company, appellant.

Seward & Kissel LLP, New York (Dale C. Christensen, Jr. of counsel), for Employers Insurance Company of Wausau and National Casualty Company, appellants.

Smith, Stratton, Wise Heher & Brennan, LLP, New York (Steven D. Cantarutti of counsel), for Employers Mutual Casualty Company, appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Robert P. Siegel of counsel), for Evanston Insurance Company, appellant.

Hogan & Hartson LLP (James P. Ruggeri of counsel), for Hartford Accident and Indemnity Company, First State Insurance Company, New England Reinsurance Corporation and Twin City Fire Insurance Company, appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Carl J. Pernicone of counsel), and London Fischer LLP, New York (Perry Kreidman of counsel), for MidState ReInsurance Corporation, appellant.

Christie Pabarue Mortensen & Young, Philadelphia, PA (Bradley J. Mortensen of counsel), for Arrowwood Indemnity Company, appellant.

K&L Gates LLP, Pittsburgh, PA (Michael J. Lynch of counsel), for Honeywell International Inc., respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered April 1, 2008, which, in a declaratory judgment action involving, inter alia, the obligations, if any, of plaintiff-appellants and defendants-appellants (the insurers) to indemnify defendant-respondent (the insured) for certain asbestos-related claims, upon the parties' respective motions for partial summary judgment, insofar as appealed from, determined that New Jersey law, not New York law, governs the subject insurance policies, unanimously affirmed, without costs.

In *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.* (36 AD3d 17 [2006], *affd* 9 NY3d 928 [2007]), this Court, after noting that a contract of liability insurance is generally "governed by the law of the state which the parties understood was to be the principal location of the insured risk" (*id.* at 21-22 [internal quotation marks omitted]), held that "where it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured's domicile [at the time of contracting] should be regarded as a proxy for the principal location of the insured risk" (*id.* at 24), and that, for such purposes, a corporate insured's domicile is the state of its principal place of

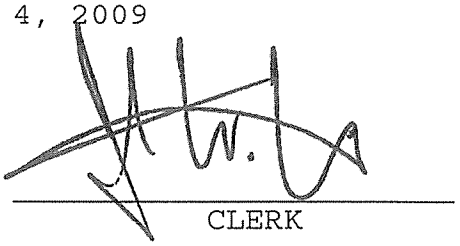
business, not the state of its incorporation (*id.* at 25; *see also Appalachian Ins. Co. v Di Sicurata*, 60 AD3d 495 [2009]). There is no dispute that the principal place of business of the insured's predecessor, the purchaser of the policies, was in New Jersey. Neither the predecessor's use of a New York address on some of the policies (while also using a New Jersey address on some of the same policies or only a New Jersey address on yet other policies), nor the predecessor's use of New York brokers, nor the use of New York amendatory endorsements on some of the policies (while New Jersey's or other states' or no state-specific amendatory endorsement was used on others), nor any of the other incidental connections to New York on which appellants rely, raises a triable issue of fact as to whether the predecessor made a conscious choice of New York law at the time of contracting, or whether the application of New York law constituted the parties' reasonable expectation, where not one of the policies contains a choice-of-law provision and all parties knew that the risks were spread nationwide and that the predecessor's principal place of business was in New Jersey (*cf. Foster Wheeler* at 27-28).

M-1940 *Travelers Casualty and Surety Co. v Honeywell Int'l. Inc., et al.*

Motion seeking leave to supplement record denied.

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

ENTERED: JUNE 4, 2009



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Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

728-
728A The Commissioners of the State Insurance Fund,
Plaintiff-Respondent,

-against-

Manuel Ramos, et al.,
Defendants-Appellants,

Lenny Pereira,
Defendant,

J.M.R. Concrete of Long Island Corp.,
Judgment-Debtor.

Index 402464/05

Brian R. Hoch, White Plains, for appellants.

Jan Ira Gellis, P.C., New York (Kenneth J. Katz of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 22, 2008, which, in an action to collect a judgment against, among others, defendants-appellants (defendants) on the theory that they are the judgment debtor's alter egos, insofar as appealed from as limited by the briefs, granted plaintiff's motion to dismiss defendants' affirmative defense of laches, and, order, same court and Justice, entered July 7, 2008, which, insofar as appealed from and appealable, denied defendants' motion to renew, unanimously affirmed, with costs.

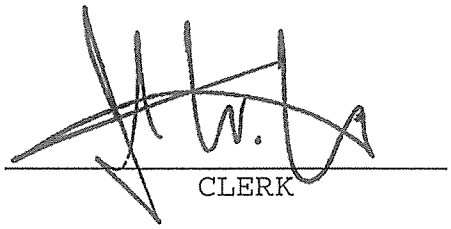
Insofar as pertinent, defendants' answer contains an affirmative defense alleging, in its entirety, that

"[p]laintiff's claims are barred by the equitable doctrine of laches." In opposition to plaintiff's motion to dismiss this defense, defendants' attorney submitted an affirmation arguing that the alleged laches is "self-explanatory" in that this action seeks to collect a 2004 judgment entered in a 1997 action against the judgment debtor to recover unpaid 1992/1993 workers' compensation premiums. The motion court, in the first order on appeal, correctly dismissed the defense as pleading only a bare legal conclusion without supporting facts (CPLR 3013; *see Robbins v Growney*, 229 AD2d 356, 357-358 [1996]). Concerning the second order on appeal, defendants have appealed only from that portion of the order as denied that branch of their motion as sought to reargue or renew plaintiff's motion to dismiss the laches defense. Thus, whether the motion court properly denied the branch of the motion as sought leave to amend the answer to assert the facts supporting the defense of laches is not properly before this Court (*see City of Mount Vernon v Mount Vernon Hous. Auth.*, 235 AD2d 516, 517 [1997]). In any event, for the reasons stated, the defense of laches is unavailable. We would add that the affirmation of defendants' attorney submitted in support of the motion to amend the answer lacks probative value with respect to the prejudice allegedly caused defendants by plaintiff's delay

of prosecution against the judgment debtor (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

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

ENTERED: JUNE 4, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John T. Buckley
Karla Moskowitz
Dianne T. Renwick, JJ.

4849-
4849A

Index 400705/05

x

In re The City of New York,
Petitioner-Appellant,

-against-

Antonia C. Novello, as Commissioner of the New York State Department of Health, et al.,
Respondents-Respondents.

x

Petitioner appeals from orders of the Supreme Court, New York County (Debra A. James, J.), entered on March 30, 2006, and February 5, 2007, which, to the extent appealed from as limited by the briefs, denied the petition, granted respondents' cross motion declaring lawful their intercept of $28.6 million, and dismissed this proceeding.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross, Edward F.X. Hart and Joshua Rubin of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Scott J. Spiegelman, Michael S. Belohlavek and Carol Fischer of counsel), for respondents.

RENWICK, J.

In this case of statutory interpretation, the issue is whether the State can disregard a particular statutory directive to act within a specified time. The issue arises within the context of a dispute between New York State and the City of New York over the timeliness of the State's revocation of a $27 million reimbursement to the City for home health care services the City provided. The State argues that the statutory deadline to invoke the revocation is merely directory. This Court, however, finds that the State may not disregard peremptory language that contains a plain, clear and distinct expression of mandatory legislative intent.

The seeds of this dispute were sown by the State Legislature when it promulgated legislation intended to reduce the recent spiraling costs of home health care-related services. Home health care services provided throughout the State by localities like the City of New York are eligible for reimbursement under the State's medicaid program, which is jointly funded by the federal government and participating states (Social Services Law § 365-a). The State pays 40% of the cost of home health care services provided by localities, the federal government pays 50%, and the locality itself pays the remaining 10%.

The Legislature enacted a target method to compel local

social service districts to reduce the cost of home health care. Specifically, pursuant to Chapter 62, part Z2, §26 of the Laws of 2003, the New York State Department of Health (DOH) developed "district-specific targets" (savings targets) to create incentives for each local district, such as the City of New York, to efficiently manage the cost of home health care services. The statute provides a methodology for calculating savings targets for a given year, and identifies "target periods" for DOH to analyze in determining if the City, as well as the other localities, is meeting the savings target set for it. Since 1997, the Legislature has enacted the target methodology, and re-enacts it periodically to cover specific periods of time.

The statute provides that if the local district fails to meet the savings target, DOH will "intercept" home health care service payments and other payments to the district in an amount "sufficient to reimburse the state for [the amount the district exceeded] the savings target" (*id.*, amending L 1997, ch 433 § 36 [6]). The intercept process occurs in four stages. In the first stage, by January 1 of the applicable year, DOH notifies each district as to its progress toward reaching the savings target (L 1996, ch 43, § 36[3], as amended by L 1999, ch 412, pt F, § 36[3], L 1999, ch 1, § 43 and L 2003, ch 62, pt Z2, § 26). By March 1, DOH again notifies the district as to its progress

toward reaching the savings target, and specifies an amount, if any, by which DOH projects that the district will fall short, and the amount of State payments DOH would intercept (L 1997, ch 433, §36[4][a], as amended through L 2003, ch 62, pt Z2, §26). In the third step, DOH makes an initial intercept by March 31, if it projects that a district will fail to meet its savings target (L 1997, ch 433, §36[5][a], as amended through L 2003, ch 62, pt Z2, §26). Finally, "as soon as possible, *but in no event later than three months after the end of the target period*" (emphasis added), DOH makes the final intercept if its final calculation indicates the district failed to meet the savings target, or issue a refund if the initial intercept exceeded the final calculation ((L 1997, ch 433, § 6, as amended through L 2003, ch 62, pt Z2, § 26).

The relevant target period in this case is fiscal year 2003-2004. At the inception, DOH set a savings target amount of $32,003,775. On or about March 24, 2004, it made an initial estimate that the City of New York would fall short of the target by $1,391,461, but did not set a final interceptor by the end of the required statutory deadline of June 30, 2004. Instead, for some unexplained reason, DOH delayed its decision for another four months. Specifically, on October 29, 2004, DOH notified the City of its final calculation, demanding a final intercept of

$27,375,822.[1]

Faced with this dilatory final intercept, which was more than $25 million over the initial estimate, the City of New York commenced this Article 78 petition, challenging the timeliness of the final intercept and the calculations that went into it, and issue has been joined. Initially, Supreme Court found that the language requiring the final intercept to occur "in no event later than three months after the end of the target period" was not merely directory but mandatory. Accordingly, Supreme Court held that the final intercept, which occurred well after the June 30, 2004 deadline, was invalid, and granted the petition to this extent. However, DOH was properly held to have retained the initial intercept amount because the City had failed to carry its burden of demonstrating that the methodology used by DOH in calculating the final intercept was improper.

On reargument, the court adhered to the part of its prior decision that DOH's calculations were rational, but reversed

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[1] DOH's final intercept calculation corrected two errors it had made during its interim calculation. First, the interim calculation projected that more Medicaid recipients were receiving home care services during the final three months of the nine-month target period than were actually receiving such services. This resulted in an incorrect decrease in the per-recipient cost of home care services provided. DOH also adjusted a wage exemption from 9.8% to 13.1%, about which the City had alerted DOH, and which resulted in reducing the City's expenditures by $138 million.

itself as to the timeliness of the final intercept, reasoning that provisions directing a public officer to do an act at a certain time are generally directory without any negative words restraining it from doing the act afterwards. The court thus found the final intercept timely, and denied the petition.

While mindful that the line between mandatory and directory statutes cannot be drawn with precision (*People v Karr*, 240 NY 348, 351 [1925]), we disagree with the court's directory reading of the provision limiting the time for the State to perform the final intercept. This type of issue must be resolved on a case-by-case basis, but in determining whether a statute is mandatory or directory, our primary consideration must be to ascertain and give effect to the intent of the Legislature (*Matter of McCulloch v New York State Ethics Commn.*, 285 AD2d 236, 238-239 [2001]; *see also Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]).

With regard to provisions directing public officials to take action within certain time limits, the general rule is that such limits will be considered directory, absent evidence that such requirements were intended by the Legislature as a limitation on the authority of the body or officer (*Matter of Grossman v Rankin*, 43 NY2d 493, 501 [1977]; *see also Munro v State of New York*, 223 NY 208 [1918]). Conversely, a mandatory interpretation

is justified where "the nature of the act to be performed, or the language used by the legislature [shows] that the designation of the time was intended as a limitation of the power of the officer" (*People v Allen*, 6 Wend 486, 487 [1931]; *see e.g. Matter of King v Carey*, 57 NY2d 505 [1982]); *see also Gonkjur Assoc. v. Abrams*, 57 NY2d 853 [1982]).

Accordingly, courts have consistently ruled that when the phraseology or language of the statute not only provides a time limit upon an administrative agency to act, but also a limitation on the authority of the agency if it does not act within the required period, that language indicates a legislative intent to make the time limit mandatory, rather than directory *(Matter of 400 Delaware Ave. Prop. Co. v State of New York Div. of Hous. & Community Renewal*, 105 AD2d 1046 [1984]). For instance, the Legislature's inclusion of a "specific consequence to flow from the administrative agency's failure to act within the time limit establishes that the time limit was not a mere unessential particular," and thus cannot be viewed as directory (*Matter of Janus Petroleum v New York State Tax Appeals Trib.*, 180 AD2d 53, 55 [1992] [subsequently amended statute provided that if agency failed within three months to issue a notice of refusal to register the applicant as a diesel fuel distributor, then the agency "shall" register the applicant]).

In this case, we are of the view that the legislative intent is discerned solely from the peremptory language of the statute itself. The Legislature coupled the affirmative directive that the interceptor must be done "as soon as possible" with the negative prohibition "in no event later than three months." The particular juxtaposition of the affirmative act to be performed with the negative language limiting performance to the prescribed time frame indicates an unequivocal legislative intent that a specific time provision must be met, and is thus tantamount to an unmistakable limitation on the Department's authority to act once the time period has closed. Where the statutory language is so clear and unambiguous as to belie any interpretation other than its expressed peremptory term, courts are without authority to enlarge or limit this unambiguous language (*Marcus Assoc. v Town of Huntington*, 45 NY2d 501, 505 [1978]; Matter of *Grossman v Herkimer County Indus. Dev. Agency*, 60 AD2d 172, 178 [1977]; McKinney's Statutes, §§ 76, 94).

This Court may not disregard peremptory language that contains a plain, clear and distinct expression of mandatory legislative intent, absent a clearly contrary expression. No other provision of the savings target statute gives an indication that the time limitation provided for DOH to act was meant to be anything other than mandatory. In addition, this Court has

reviewed the relevant legislative history, in which the Legislature sheds no light whatsoever on the legislative intent of the provision. This is not surprising, since the Legislature has expressed itself most emphatically and plainly by the peremptory language ("in no event") used in the mandatory provision, leaving no room for the suggestion and possible debate as to whether it was intended to be directive.

Nor are we persuaded by respondents' argument that the mandatory construction of the statutory deadline for the State to act is inconsistent with the purpose of the savings target statute. It is undisputed that the general purpose of the statute is to enable DOH to achieve savings for the State. It is, however, also undisputed that any such savings are to be carried out at the expense of the local social services districts, which are striving to reduce their home health care services by the targeted amount. It is thus apparent that the time limit is essential to the ability of any affected district, like the City of New York, to manage its own budget in a timely manner. Of course, this could not reasonably be accomplished where DOH is able to intercept funds at virtually any time, leaving the districts with no means to project accurately their available funds and thus avoid any deleterious effect from any unexpected budgetary changes. Under the circumstances, the time

frame for the administrative agency to act cannot be viewed as "a mere unessential particular," and thus simply directory (*cf. Gonkjur Assoc. v Abrams*, 57 NY2d 853 [1982]).

The case law on which respondents rely (*e.g. Giant Supply Corp. v City of New York*, 248 AD2d 231 [1998] and *Matter of Sinwaski v Cuevas*, 123 AD2d 548 [1986], *lv denied* 68 NY2d 609 [1986]), which have interpreted the term "shall" and similar language as merely directory does not persuade us to reach a different result. These cases are readily distinguishable. They stand for the incontrovertible proposition that while the word "shall" (and similar language) is generally regarded as mandatory, it may be given a directory meaning where it is evident from the entire act -- in context and purpose sought to be served -- that it was not intended to receive a peremptory construction (*see e.g. Matter of 140 W. 57th St. Corp v State Div. of Hous. & Community Renewal*, 130 AD2d 237 [1987]). Here, in contrast, as fully explained above, respondents have failed to demonstrate any circumstance suggesting that the language, peremptory in form, should not be given its peremptory meaning.

In short, where, as here, an administrative body fails to comply with a mandatory provision that directly affects its determination, such a determination will not be permitted to stand. Given this resolution, we need not address petitioner's

argument regarding the calculation of the intercept.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered February 5, 2007, which, upon reargument of a prior order, and to the extent appealed from as limited by the briefs, denied the petition, granted respondents' cross motion declaring lawful their intercept of $28.6 million, and dismissed this proceeding, should be reversed, on the law, without costs, the cross motion denied and the petition granted. The appeal from the order of the same court and Justice, entered March 30, 2006, should be dismissed, without costs, as subsumed in the appeal from the later order.

All concur.

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

ENTERED: JUNE 4, 2009