SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 24, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

365 Elana B. Lubit, Index 350479/04
Plaintiff-Respondent,

-against-

Roy H. Lubit,
Defendant-Appellant.

Snitow Kanfer Holtzer & Millus, LLP, New York (Timothy M. Tippins of counsel), for appellant.

Segal & Greenberg LLP, New York (Philip C. Segal of counsel), for respondent.

Michele Tortorelli, New York, Law Guardian.

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered September 19, 2007, after a non-jury trial, which, to the extent appealed from, as limited by the briefs, granted plaintiff custody of the parties' children and denied defendant's request for joint custody, unanimously affirmed, without costs.

The court's determination awarding custody to the mother with liberal visitation privileges to the father was based on a thoughtful assessment of the testimony of the parties and the court-appointed forensic expert, and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982];

cf. Mohen v Mohen, 53 AD3d 471 [2008], *lv denied* 11 NY3d 710 [2008]; *Matter of Rebecca B.*, 204 AD2d 57 [1994], *lv denied* 84 NY2d 808 [1994]). The evidence demonstrates that the acrimony and mistrust that marks the parties' relationship makes joint custody a nonviable option (*see Braiman v Braiman*, 44 NY2d 584, 589-590 [1978]; *Trapp v Trapp*, 136 AD2d 178, 181-183 [1988]). An attempt at joint custody that the parties negotiated failed when appellant unreasonably insisted that the parties share custody on such a strictly equal basis that for several months the three children, ages 2 to 8, alternated daily between their parents' residences. A detailed alternative worked out with a law guardian also failed. The parties were unable to co-parent because they were openly hostile to each other and, without drawn-out negotiations, could not reach agreement on any decisions with respect to their children, including important matters involving education, extra-curricular activities and medical care.

The court properly found that the interests of the young children will best be served by awarding sole custody to the mother because her style of parenting is more nurturing and conducive to the children's emotional and intellectual development, and because she was the children's primary caretaker before this litigation commenced. Although the court found that the father is a loving, committed parent, it also found that his

parenting skills had significant shortcomings. Among other things, the father demonstrated excessive anxiety about the children's physical well-being, and was inflexible in his response to the children's needs.

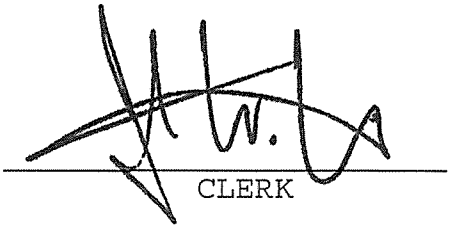
Contrary to the father's position, the testimony of the expert was admissible since the expert opinion was primarily based upon direct knowledge derived from the expert's psychiatric interviews of the parties and their children, alone and in combination (*see Balsz v A & T Bus Co.*, 252 AD2d 458 [1998]). To the extent that the expert's report and testimony may have incorporated inadmissible hearsay, we find that the admissible evidence in the record, including the portion of the expert's report that did not include hearsay, was sufficient to support the trial court's conclusion, and we would independently reach the same result based on the unobjectionable portions of the record. Although the court should have stricken the hearsay aspects of the expert's written report, admitting it did not constitute reversible error.

Finally, the court did not treat the law guardian as an unsworn witness by briefly referring to her opinion as to custody and her basis for it. Rather, the court appropriately took notice of the position that the law guardian had taken as an advocate on the children's behalf (*see Bluntt v O'Connor*, 291 AD2d 106, 117 [2002], *lv denied* 98 NY2d 605 [2002]).

We have considered the father's additional arguments and find them without merit.

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

ENTERED: SEPTEMBER 24, 2009



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

1041 The People of the State of New York, Ind. 3312/97
Respondent,

-against-

David Barrow,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Melissa A. Pennington of counsel), for respondent.

Order, Supreme Court, New York County (Micki A. Scherer, J.), entered on or about April 17, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing risk factors bearing a sufficient total point score to support a presumptive level two adjudication, from which the court made an upward departure. The case summary and victim's statement constituted "reliable hearsay" (Correction Law § 168-n[3]) that satisfied the People's burden (*see People v Mingo*, 12 NY3d 563, 572-574, 576-577 [2009]; *People v Hines*, 24 AD3d 524 [2005], *lv denied* 6 NY3d 712 [2006]). However, the court should have assessed 10 points rather than 25 points for the sexual contact factor, since the record fails to establish that defendant subjected the victim to

sexual intercourse or any of the other forms of sexual contact that would authorize an assessment of 25 points under the Risk Assessment Guidelines.

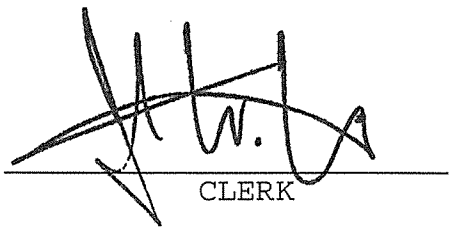
Even after reducing defendant's point score from 105 to 90, we conclude that the record supports the court's upward departure to level three, based on aggravating factors that were established by clear and convincing evidence and were not adequately taken into account by the risk assessment instrument (*see e.g. People v Sullivan*, 46 AD3d 285 [2007], *lv denied* 10 NY3d 704 [2008]). Defendant had been convicted of first-degree manslaughter, and committed the present offense while on parole from that conviction. Furthermore, defendant's conduct was blatant and egregious. Among other things, he forced his 14-year-old daughter to become a prostitute by means that included threats to kill her mother, and he had a business card bearing a lewd photograph of his daughter and her friend that advertised their services as prostitutes.

Defendant's challenge to the choice of risk factors made by the Legislature and the Board of Examiners of Sex Offenders is

unavailing (*see People v Bligen*, 33 AD3d 489 [2006], *lv denied* 8 NY3d 803 [2007]). We have considered and rejected defendant's remaining claims.

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

ENTERED: SEPTEMBER 24, 2009



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

1043 In re Jeffrey V.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about June 12, 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 robbery in the second and third degrees, grand larceny in the fourth degree, petit larceny, criminal possession of stolen property in the fifth degree, menacing in the third degree and attempted assault in the third degree, and placed him on probation for a period of 12 months, unanimously modified, on the law, to the extent of vacating the findings as to robbery in the third degree and petit larceny and dismissing those counts of the petition, and otherwise affirmed, without costs.

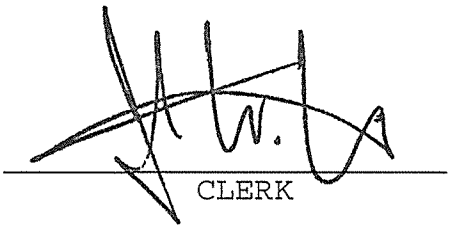
The court's findings were based on legally sufficient evidence and was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility, including its rejection of appellant's alibi defense. We have considered and rejected defendant's remaining arguments for dismissal of the petition. Appellant's challenges to the admissibility of certain rebuttal evidence are either meritless or would not warrant a new fact-finding hearing.

As the presentment agency concedes, third-degree robbery and petit larceny are lesser included offenses of second-degree robbery.

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

ENTERED: SEPTEMBER 24, 2009



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Tom, J.P., McGuire, DeGrasse, Freedman, JJ.

1044 Charla Mitchell, Index 115258/93
Plaintiff-Appellant,

-against-

The Port of Authority of New York
and New Jersey,
Defendant-Respondent.

Jonah Grossman, Jamaica (Lawrence B. Lame of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Gregory Silbert of counsel), for respondent.

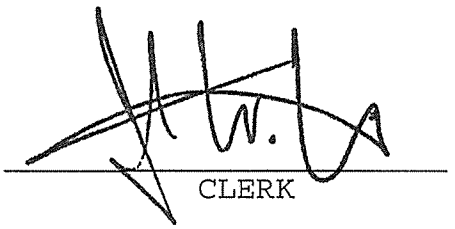
Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 7, 2009, which, upon defendant's motion to set aside the jury's verdict finding it liable and awarding plaintiff $480,000 for future pain and suffering and plaintiff's motion to set aside the award of $20,000 for past pain and suffering, set aside the verdict in its entirety and directed a new trial, unanimously affirmed, without costs.

The record demonstrates that the parties presented sharply conflicting evidence as to whether defendant's evacuation plan for the World Trade Center, which required plaintiff to walk down 100 flights of stairs after the bombing on February 26, 1993, was a substantial factor in causing her to slip and fall 10 days later. As to damages, while the jury awarded plaintiff $480,000 for future pain and suffering for a period of 24 years, it awarded her only $20,000 for past pain and suffering for the 16

years elapsed between the accident and the trial. In view of the severity of plaintiff's injury, the sharply contested issue of causation, and the inexplicable inconsistency of the damages awards, an impermissible compromise verdict is, as the trial court found, "strongly indicated" (*see Moreno v Thaler*, 255 AD2d 195 [1998]).

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

ENTERED: SEPTEMBER 24, 2009



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

1045 Isieni Ogunbemi, etc., et al., Index 27989/03
Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for appellants.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 15, 2008, which denied plaintiffs' motion to vacate a prior order granting defendant summary judgment dismissing the complaint on default, unanimously affirmed, without costs.

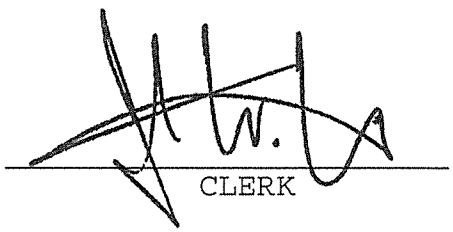
Plaintiffs failed to demonstrate a reasonable excuse for their default (*St. Rose v McMorrow*, 43 AD3d 1146 [2007]). Their proffered excuse of inability to obtain the expert engineer's affidavit in a timely manner because he was out of town for an extended period is unpersuasive because plaintiffs concede they received the affidavit six days before the motion's return date. Plaintiffs' excuse that they were unable to obtain their medical expert's signed affirmation due to the doctor's busy schedule is similarly unavailing, even assuming that the delay in obtaining the affirmation was not the result of their own lack of diligence, because the affirmation was not necessary to oppose

the motion in light of the engineer's affidavit. Finally, the excuse that they misplaced certain photographs documenting the scene of the accident and the injuries to the child is unconvincing, not only because it was raised at the eleventh hour, three months after the motion was filed, but also because plaintiffs admitted they may have misplaced the photos themselves, proffered no reason for why the photos were even necessary to oppose summary judgment given the child's mother's testimony regarding the layout of the accident scene, and conceded that they had numerous other photos that would have sufficed if indeed they were necessary. Nor did plaintiffs meet their burden of demonstrating a meritorious opposition to the summary judgment motion.

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: SEPTEMBER 24, 2009



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

1046 The People of the State of New York, Ind. 1579/04
Respondent,

-against-

Timothy Baker,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

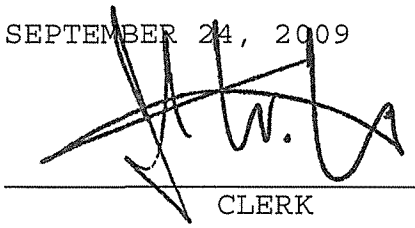
Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about February 28, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: SEPTEMBER 24, 2009



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Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

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

1047 The People of the State of New York, Ind. 1760/08
Respondent,

-against-

Jalil Abdul,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

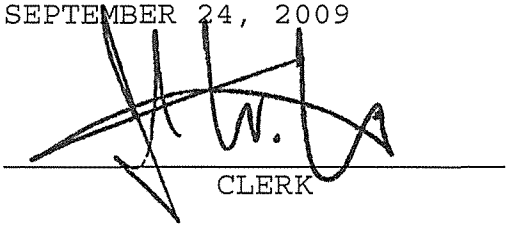
Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about November 3, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: SEPTEMBER 24, 2009



CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

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

1048 Twin City Fire Insurance Company, Index 116986/04
Plaintiff-Respondent,

-against-

State Insurance Fund,
Defendant-Appellant.

Dillon Horowitz & Goldstein LLP, New York (Thomas Dillon of counsel), for appellant.

Law Offices of Michael E. Pressman, New York (Robert H. Fischler of counsel), for respondent.

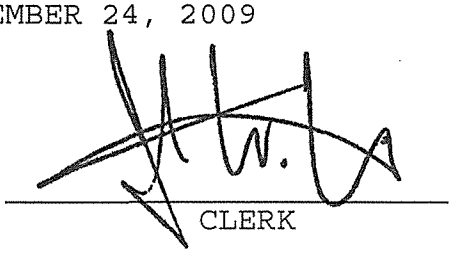
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered on May 7, 2008, which granted plaintiff's motion for summary judgment and denied defendant's cross motion to dismiss the complaint, unanimously reversed, on the law, with costs, the motion denied, the cross motion granted, and the complaint dismissed, without prejudice. The Clerk is directed to enter judgment accordingly.

Plaintiff sought defendant's assumption of its defense and indemnity in an underlying personal injury action, and contribution of 50% toward the costs of defending and settling that action. Although denominated an action for declaratory relief, this is essentially an action to recover money damages

against a State agency, the proper forum for which is the Court of Claims (*D'Angelo v State Ins. Fund*, 48 AD3d 400, 402 [2008]).

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

ENTERED: SEPTEMBER 24, 2009



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

1049 Steven Akins, Index 23901/04
Plaintiff-Respondent,

-against-

D.K. Interiors, Ltd., et al.,
Defendants,

Akam Associates,
Defendant-Appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for respondent.

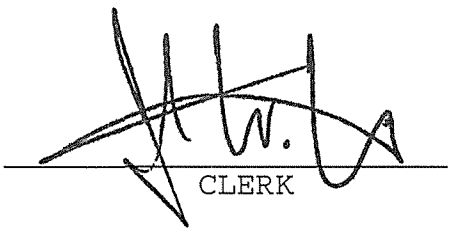
Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered October 23, 2007, which, to the extent appealed from, denied defendant Akam Associates' motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The record establishes that while plaintiff was employed as a doorman by defendant 230 Tenants Corporation Co-Op and was supervised by and reported to the building's superintendent, also an employee of 230 Tenants, the superintendent took his instructions from Akam's employee, the building's property manager. Moreover, the contract between 230 Tenants and Akam, the managing agent, gave Akam control of the building employees, which was exercised by Akam's property manager, who managed,

supervised and disciplined staff members, monitored their work schedules, dress and job performance, inspected the premises and supervised work being performed. The property manager generated documentation for plaintiff's successful workers' compensation claim arising from the subject accident based on plaintiff's general employment by 230 Tenants. These facts show prima facie that Akam controlled the daily operation of the building and the manner and details of plaintiff's work and therefore that Akam was plaintiff's special employer (*see Ayala v Mutual Hous. Assn., Inc.*, 33 AD3d 343 [2006]; *Ramirez v Miller*, 41 AD3d 298 [2007], *lv denied* 12 NY3d 705 [2009]). This prima facie showing is not rebutted by the fact that the board of directors of 230 Tenants was involved in the management of the building or that 230 Tenants retained the ultimate power to hire and fire staff (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]; *Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.*, 37 AD3d 155 [2007]).

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

ENTERED: SEPTEMBER 24, 2009



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

1050 Vishnu Chintam, Index 100006/07
Plaintiff-Respondent-Appellant,

-against-

Joslin Fenelus,
Defendant-Appellant-Respondent.

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

Weiser & Associates, LLP, New York (Huy M. Le of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 3, 2009, which denied 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), unanimously modified, on the law, to dismiss plaintiff's claims of injury to his lumbar spine and a significant disfigurement, and otherwise affirmed, without costs.

Defendant established prima facie, through her experts' affirmations reporting the results of the objective tests they performed, that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]), notwithstanding the experts' failure to review the MRI and EMG reports (*see Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]; *Style v Joseph*, 32 AD3d 212, 214 [2006]).

In opposition, plaintiff presented sufficient evidence to raise an issue of fact as to the existence of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" (Insurance Law § 5102[d]). His treating physician's affirmation reported, based on objective tests, losses of range of motion in his cervical and lumbar spine and in his right ankle (*see Toure*, 98 NY2d at 352-353). However, as to his claimed lumbar spine injury, plaintiff failed to present sufficient evidence to meet defendant's assertion of lack of causation, which arose from plaintiff's own deposition testimony admitting a prior work-related injury to his lower back, with "positive" x-ray (*see Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007]). Plaintiff's physician's assertion that the prior injury had resolved before the automobile accident was conclusory, made apparently in reliance solely on plaintiff's statements, and not substantiated by any medical or objective evidence (*see DeSouza v Hamilton*, 55 AD3d 352 [2008]). As the evidence of this prior injury to his lumbar spine was plaintiff's own "persuasive" admission, defendant was not required to submit medical records of the injury (*see Linton v Nawaz*, 62 AD3d 434, 442-443 [2009]).

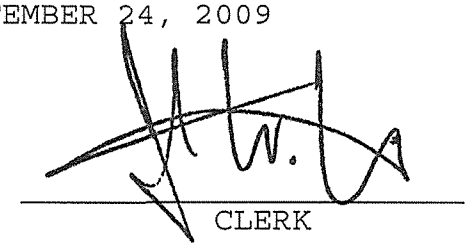
Defendant's argument that plaintiff failed to explain the more-than-one-year gap in his treatment (*see Pommells v Perez*, 4 NY3d 566, 572, 574 [2005]) is unpreserved and not properly

considered on appeal, as defendant did not raise the issue of the treatment gap in the motion court, where plaintiff might have offered evidence to explain the gap.

While the court's order appears to deny defendant's motion in its entirety, its discussion makes clear that the court found that plaintiff failed to raise an issue of fact whether the scar above his right eyebrow is a "significant disfigurement" within the meaning of the statute. Upon our review of the photograph in the record, we concur (*see Hutchinson v Beth Cab Corp.*, 207 AD2d 283, 283-284 [1994]).

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

ENTERED: SEPTEMBER 24, 2009



CLERK

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

1052 The People of the State of New York, Ind. 1593/03
Respondent,

-against-

Edward Armstrong,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Claudia S. Trupp of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 6, 2006, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

In 1988, defendant pleaded guilty to first-degree burglary, and was adjudicated a second felony offender based on a 1985 New Jersey conviction. On appeal (167 AD2d 108 [1990], *lv denied* 77 NY2d 903 [1991]), this Court rejected defendant's claim that the New Jersey conviction was not the equivalent of a New York felony. In 2003, defendant pleaded guilty to second-degree robbery and, without objection, was adjudicated a second violent felony offender based on the 1988 burglary conviction. This Court (31 AD3d 291 [2006]) reversed on the ground that defendant was not advised of the postrelease supervision component of his

sentence during the plea allocution.

On remand, defendant again pleaded guilty to second-degree robbery, and was again adjudicated a second violent felony offender, this time over counsel's objection. Counsel argued that the 1988 second felony offender adjudication was defective in that the 1985 New Jersey conviction would have been the equivalent of a misdemeanor conviction in New York. However, counsel did not argue that such a defect would have rendered the 1988 New York conviction unconstitutionally obtained within the meaning of CPL 400.15(7)(b).

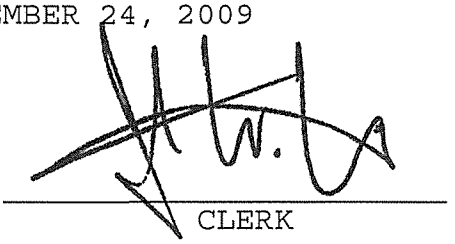
On this appeal, defendant asserts, for the first time, that the 1988 conviction was the product of ineffective assistance in that counsel failed to ascertain defendant's "true" predicate status, and he claims he was entitled to a hearing on the constitutionality of the 1988 conviction. Aside from being both unpreserved (*see People v Samms*, 95 NY2d 52, 56-58 [2000]) and procedurally barred (*see* CPL 400.15[8]; *People v Young*, 255 AD2d 907, 908 [1998], *affd* 94 NY2d 171 [1999] [initial predicate felony adjudication binding on reconviction following reversal]), this claim is entirely without merit, because its underpinning is defendant's suggestion that the 1985 New Jersey conviction did not qualify as a predicate felony conviction. This court

expressly resolved that issue against defendant in the 1990 appeal.

We have considered and rejected defendant's remaining claim.

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

ENTERED: SEPTEMBER 24, 2009



CLERK

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

1053 Martin Disla, Index 111875/06
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants,

LS Cabrini Associates LLC,
Defendant-Respondent.

Mallilo & Grossman, Flushing (Steven Barbera of counsel), for appellant.

Nicoletti Gonson Spinner & Owen LLP, New York (Laura M. Mattera of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered September 29, 2008, which, in an action for personal injuries, granted defendant-respondent's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

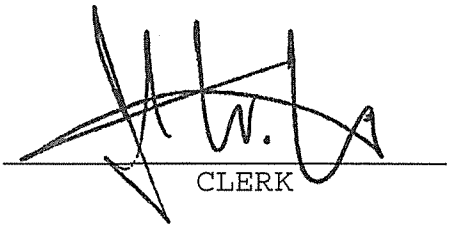
Plaintiff alleges that he was injured when, while walking on the sidewalk adjacent to respondent's building, his right foot slipped on a patch of ice and he was caused to fall when his foot became caught on a crack in the sidewalk. In opposition to respondent's prima facie showing that it lacked notice of the alleged icy condition, plaintiff failed to raise a triable issue of fact (*see Espinell v Dickson*, 57 AD3d 252, 253 [2008]). There is no evidence as to whether the ice upon which plaintiff slipped resulted from a snow accumulation two days earlier or was the

later product of a thaw/freeze cycle reflected in the meteorological data, and plaintiff's contention that defendant had notice of the ice condition or that it was the result of improper snow removal is speculative (*see Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 973-974 [1994]; *Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288, 289 [2008]). Furthermore, plaintiff's affidavit is insufficient to defeat respondent's motion, as it contradicts his deposition testimony and denotes an attempt to avoid the consequences of his earlier testimony (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

Respondent also established that the cracked condition of the sidewalk was, as demonstrated by its expert, too trivial to be actionable (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]), and plaintiff failed to raise a triable issue of fact where his expert rendered an opinion with respect to the wrong area of the sidewalk.

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

ENTERED: SEPTEMBER 24, 2009



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

1054 The People of the State of New York, Ind. 41/06
Respondent,

-against-

Wiley Bennett,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (John S. Moore, J.), rendered on or about April 18, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

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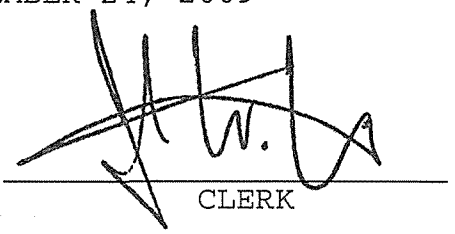


CLERK

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

1055 The People of the State of New York, Ind. 4481N/07
Respondent,

-against-

Mario Valdivia,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered April 22, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 6 years, unanimously affirmed.

The court properly denied defendant's challenge for cause to a prospective juror who volunteered that two friends had died from the use of drugs, as a result of which she had "issues" with serving on a drug case. Upon defense counsel's inquiry whether she could follow the court's instructions, and listen to the evidence in the case, she responded "I think I could," an assurance of fairness and impartiality that, in context, was unequivocal (*see People v Chambers*, 97 NY2d 417 [2002]; *People v Rivera*, 33 AD3d 303 [2006], *affd* 9 NY3d 904 [2007]). Although defense counsel also asserted that he thought the panelist was

falling asleep, defendant has not substantiated this claim or established that the panelist would have been unable to perform her duties as a juror.

Defendant's generalized objections failed to preserve his challenge to testimony by the arresting officer that alluded to the relationship between the quantity of drugs possessed by an arrestee and the likelihood that the drugs were possessed for sale or for personal use, and we decline to review it in the interest of justice. As an alternative holding, we find that this testimony was in the nature of evidence that may be received pursuant to *People v Hicks* (2 NY3d 750 [2004]).

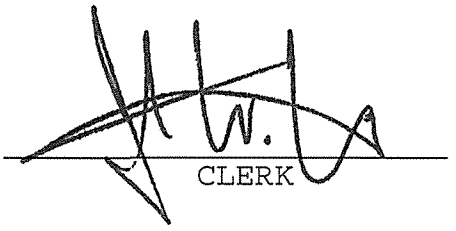
Defendant also contends that the court erred in precluding his attempt to impeach the arresting officer with a portion of the separately convicted codefendant's arrest report. Defendant's claim that he was constitutionally entitled to pursue this line of inquiry is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]). In any event, any error in receiving the challenged portion of the arresting officer's testimony, or in precluding impeachment of his testimony by way of the codefendant's arrest report, was harmless in view of the

overwhelming evidence that defendant possessed drugs with intent to sell them.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 24, 2009



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

1056 Robert Hecht, Index 111528/07
Plaintiff-Appellant,

-against-

Helmsley-Spear, Inc., etc., et al.,
Defendants-Respondents.

Liddle & Robinson LLP, New York (David Marek of counsel), for appellant.

Herrick Feinstein, LLP, New York (Carol M. Goodman of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 5, 2008, granting defendants' motion for summary judgment dismissing plaintiff's third cause of action for breach of contract, unanimously affirmed, with costs.

The court correctly found that the alleged promises made by defendant Schneider with respect to severance benefits to be provided plaintiff in the event of a sale of Helmsley-Spear, Inc., or at the time of his departure from the company, are insufficient, as a matter of law, to provide the basis for a legally enforceable oral agreement. The oral assurances lacking any actual terms as to the amount, form, and timing of payment of any compensation, and including no methodology or custom providing for the determination of the same, failed to manifest a clear intention on the part of the parties to form a binding,

definite severance agreement (*see Dombrowski v Somers*, 41 NY2d 858, 859 [1977]; *Stanwich Consulting v Etkin*, 47 AD3d 403 [2008]; *Freedman v Pearlman*, 271 AD2d 301, 303 [2000]). Moreover, to the extent that any of the alleged promises evinced defendants' intent to undertake an enforceable severance obligation with respect to plaintiff, the terms of the promised severance benefits therein were so indefinite as to require a review of extrinsic evidence in order to fill in the gaps. As the court correctly concluded, the extrinsic evidence relied upon by plaintiff failed to establish an industry standard or course of dealing, or to otherwise provide an objective basis for filling in the price term missing from the purported severance agreement. Accordingly, summary judgment was properly granted (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109-110 [1981]; *Mark Bruce Intl., Inc. v Blank Rome, LLP*, 60 AD3d 550 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
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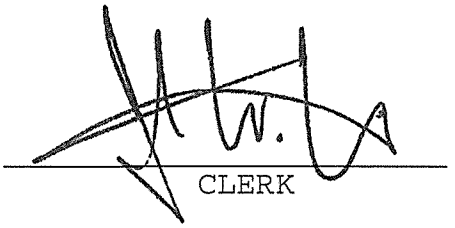

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Tom, J.P., Sweeny, McGuire, DeGrasse, Freedman, JJ.

1057 In re AJK Café, Inc., Index 100906/09
Petitioner,

-against-

New York State Liquor Authority, et al.,
Respondents.

John W. Russell, New York, for petitioner.

Thomas J. Donohue, New York (Scott A. Weiner of counsel), for New York State Liquor Authority, respondent.

Determination of respondent New York State Liquor Authority, dated November 26, 2008, finding petitioner in violation of 9 NYCRR 48.3 by employing an unlicensed security guard and imposing a $2,500 civil penalty, and an alternative penalty of a 15-day suspension of petitioner's liquor license plus a $1,000 bond forfeiture, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Joan B. Lobis, J.], entered March 4, 2009) dismissed, without costs.

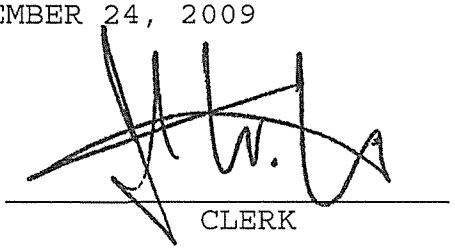
Substantial evidence, including the testimony of a detective who performed a business inspection of petitioner's bar, established that petitioner was in violation of 9 NYCRR 48.3 by employing an unlicensed security guard. Petitioner offered no testimony or other admissible proof to support its positon that the subject employee worked as a busboy and that the investigating detectives mistook him for a security guard. There

is, therefore, no basis to disturb the credibility findings of the ALJ (*see Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [2007]).

The penalty imposed does not shock our sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

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

ENTERED: SEPTEMBER 24, 2009



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

1059 Rebecca Garris, Index 115988/07
Plaintiff-Respondent,

-against-

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

Joseph Orbach, et al.,
Defendants-Appellants.

Gannon, Rosenfarb & Moskowitz, New York (Jennifer B. Ettenger of counsel), for appellants.

Budd Larner, P.C., New York (Averim Stavsky of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered December 18, 2008, which denied the motion of defendants Joseph Orbach and Sidney Orbach and/or Lighthouse 37, LLC (collectively "Lighthouse") for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as to said defendants. The Clerk is directed to enter judgment accordingly.

Lighthouse met its burden on summary judgment with a prima facie showing establishing as a matter of law that plaintiff did not trip on the sidewalk, but rather on a "gap" between the metal portion of the curb and the concrete portion of the curb, and that Lighthouse neither caused nor created the defect involved in plaintiff's accident (*see Miller v City of New York*, 253 AD2d 394, 395-396 [1998]). Since Administrative Code of the City of

New York § 19-101(d) defines sidewalk as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, *but not including the curb*, intended for the use of pedestrians" (emphasis added), the Lighthouse defendants were not obligated to maintain the curb and are not liable to plaintiff (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008] [tree well]; *Ortiz v City of New York*, __ AD3d __, 2009 NY Slip Op 6299 [2009] [pedestrian ramp]; *Fernandez v Highbridge Realty Assocs.*, 49 AD3d 318 [2008] [multiple-flight stairway running between two avenues]). The certified transcript of plaintiff's § 50-h examination was properly submitted by Lighthouse, as an admission, in support of its motion (*see Morchik v Trinity School*, 257 AD2d 534, 536 [1999]; *Claypool v City of New York*, 267 AD2d 33, 35 [1999]).

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

ENTERED: SEPTEMBER 24, 2009

CLERK

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

1060N Mauhoi Tung, Index 119616/03
Plaintiff-Appellant,

-against-

Henry Chiu D.D.S., doing business as
Mott Street Dental Services P.C.,
Defendant-Respondent.

Mauhoi Tung, appellant pro se.

Law Offices of Charles E. Kutner, LLP, New York (Charles E. Kutner of counsel), for respondent.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered June 10, 2008, which, to the extent appealed, denied plaintiff's motion to vacate an order, same court and Justice, entered August 23, 2004, which had transferred this action to Civil Court pursuant to CPLR 325(d), unanimously affirmed, without costs.

Plaintiff advances no ground for vacating the 2004 transfer order (*see* CPLR 5015[a]). Furthermore, subsequent to the transfer order, which plaintiff apparently never appealed, defendant was granted summary judgment dismissing the complaint in this action (10 Misc 3d 142[A] [2006], *lv denied* 2006 NY Slip

Op 71966[U] [July 13, 2006], *lv dismissed* 7 NY3d 861 [2006], *cert denied* __ US __, 128 S Ct 159 [2007]).

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

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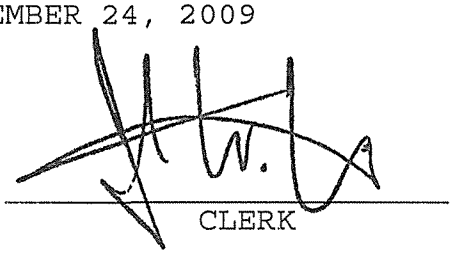

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Tom, J.P., Sweeny, McGuire, DeGrasse, Freedman, JJ.

1061N Monique Casimir, Index 22020/01
Plaintiff-Respondent,

-against-

Consumer Home Mortgage Inc., et al.,
Defendants,

Louis Cirillo,
Defendant-Appellant.

Malapero & Prisco LLP, New York (Frank J. Lombardo of counsel), for appellant.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered September 2, 2008, which denied defendant Cirillo's motion to vacate a prior default judgment (and orders subsumed therein) entered against him, and either to grant summary judgment dismissing the complaint against him or to restore the action to the trial calendar and disqualify plaintiff's counsel as a necessary witness, unanimously affirmed, with costs.

Cirillo's claim that he did not receive any correspondence or notices in the mail concerning the litigation is belied by the record and his own sporadic appearances in the proceedings, such as at the hearing on the motion to compel his deposition and the deposition itself, where he confirmed his mailing address to plaintiff's counsel. Cirillo did not meet his burden of overcoming the presumption of proper mailing and establishing nonreceipt (*see Engel v Lichterman*, 62 NY2d 943 [1984]). That he

neglected his role as a party in ongoing litigation he was aware of is inexcusable and indicates a willful default (*see e.g. Cipriano v Hank*, 197 AD2d 295 [1994]).

Nor has Cirillo demonstrated a meritorious defense to this action. The affidavit in support of his motion to vacate, containing conclusory statements that simply tried to blame the fraud on his absent and defaulting codefendant, was insufficient to support vacatur of his own default (*see Matter of Donnell E.*, 288 AD2d 39 [2001]).

In light of our ruling, we need not reach the issue of attorney disqualification. Were we to consider that argument, we would find it without merit.

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

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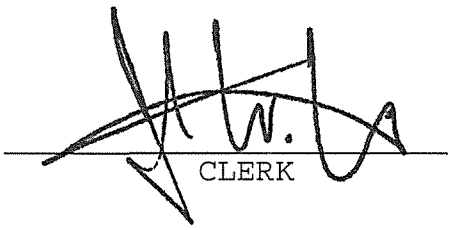


SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
John T. Buckley
James M. Catterson
Rolando Acosta, JJ.

5419
Index 105441/07

x

In re Sylvie Grimm,
Petitioner-Respondent,

-against-

State of New York Division of
Housing and Community Renewal
Office of Rent Administration,
Respondent-Appellant,

151 Owners Corp.,
Intervenor-Respondent-Appellant.

x

Respondent State of New York Division of Housing and Community Renewal (DHCR) and intervenor-respondent 151 Owners Corp. appeal from an order and judgment (one paper) of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 11, 2008, which vacated a determination of DHCR denying petitioner's rent overcharge complaint and remanded the matter to DHCR to consider whether the registration statement for petitioner's apartment on the base date was reliable.

Gary R. Connor, New York (Martin B. Schneider of counsel), for DHCR, appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz, Sherwin Belkin, S. Stewart Smith and Kristine L. Grinberg of counsel), for 151 Owners Corp., appellant.

Kenneth B. Hawco, New York, for respondent.

ACOSTA, J.

In this appeal we are asked to consider the obligation of respondent Division of Housing and Community Renewal (DHCR) when a rent overcharge complainant makes a colorable argument that there are genuine issues that an owner committed fraud by charging an illegal rent, even if more than four years passed before the complaint was filed.

The basic facts are undisputed. The rent-stabilized apartment at issue was registered with DHCR in 1999 at a monthly rent of $587.86. The following year, instead of using the required rent-setting formula to determine the rent that it could legally charge the next tenants of the apartment, the owner, through an agent, notified prospective tenants Tracy Hartman and Jon Bozak that the rent for the subject apartment was a fictitious and illegal $2,000 per month, but that if Hartman and Bozak agreed to make repairs and paint the apartment at their own expense, the rent would be reduced to an equally fictitious and illegal $1,450. The offer was accepted, and the rent was memorialized in a nonregulated written lease agreement. Neither Hartman nor Bozak ever received a statement showing the apartment was registered with DHCR. The rent for they year 2000 represented a 150% increase over the previous year.

On April 1, 2004 petitioner moved into the apartment, at the

pre-existing illegal rental rate of $1,450. Thereafter, on July 19, 2005, petitioner filed a rent overcharge complaint with DHCR. In its answer, the owner, intervenor 151 Owners Corp., acknowledged that the premises had not been registered since 1999. In September 2005, 151 Owner's Corp., through its purported managing agent, Michelle Goldstein, filed registration statements for 2001, 2002, 2003, 2004 and 2005.

In an order dated June 21, 2006, the DHCR Rent Administrator denied petitioner's Complaint of Rent Overcharge on the ground that the base date of the proceeding is July 19, 2001, which was four years prior to the filing date of the complaint (at which time the rent was $1,450), and that the rent adjustments subsequent to the base date have been lawful, so that there was no rent overcharge. The Rent Administrator erroneously failed to address the issue of whether the registration statement in effect on the base date was unreliable because of the possibility that the owner had committed fraud by charging an illegal rent to the previous tenants of the apartment. Petitioner subsequently filed a Petition for Administrative Review, which was denied by DHCR. The determination simply calculated the rent, assuming without discussion that the registration on the base date was legitimate.

The Rent Regulation Reform Act of 1997 (L 1997, ch 116) clarified and reinforced that the statute of limitations for a

rent overcharge complaint is four years.[1] However, as this Court has previously held, a default formula "should be used to determine the base rent in an overcharge case where . . . no valid rent registration statement was on file as of the base date" (*Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 401 [2005], citing *Thornton v Baron*, 5 NY3d 175, 180 n1 [2005]). That is, while the applicable four-year statute of limitations reflects a legislative policy to "alleviate the burden on honest landlords to retain rent records indefinitely" (*id.* at 181), and thus precludes us from using any rental history prior to the base

---

[1] "Except as to complaints [not pertinent here], the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.

. . .

"Except as provided under clauses [not applicable here], a complaint under this subdivision shall be filed with [DHCR] within four years of the first overcharge alleged and no determination of an overcharge and no award or *calculation* of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed . . . This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision" (emphasis added).

(Rent Stabilization Law [Administrative Code of City of NY] §26-516[a]).

date, where there is fraud or an unlawful rent, the lease is rendered void. The legal rent should be established by using the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date.

Based on the facts in this case, DHCR acted arbitrarily, capriciously and in disregard of its obligation in failing to consider whether the rent charged to petitioner was unlawful, and thus whether establishing a rental rate based on the *Thornton* formula was appropriate. The tenants immediately preceding petitioner were never given a rent-stabilized lease rider, were never provided with annual registration statements, and were not told how their initial monthly rent was calculated. Therefore, if the rent in 2001 was established at an illegal rate, that lease as well as petitioner's lease at the same rate is a nullity, and the default formula would be the appropriate mechanism for determining the base rent. Sanctioning the owner's behavior on a statute of limitations ground "can result in a future tenant having to pay more than the legal stabilized rent for a unit, a prospect which militates in favor of voiding agreements such as this in order to prevent abuse and promote enforcement of lawful regulated rents" (*Drucker v Mauro*, 30 AD3d 37, 40 [2006], *lv dismissed* 7 NY3d 844 [2006]). Knowing that the owner agreed to "lower" the rent to the previous tenants should

have caused DHCR to determine whether the owner complied with rent regulations rather than to summarily dismiss petitioner's rent overcharge complaint.

The dissent attempts to distinguish *Thornton* in order to support its contention here that DHCR acted rationally. The dissent correctly points out that the Court of Appeals properly applied the default formula in *Thornton*, since the landlord in that case improperly removed the apartment from rent stabilization, thus rendering the leases void ab initio. However, that is precisely why remand to DHCR is appropriate here, where there are indicia of fraud. Given the specific facts of this case, DHCR should not be allowed to turn a blind eye to what could be fraud and an attempt by the landlord to circumvent the Rent Stabilization Law. Our holding merely follows the holding in *Thornton*. If DHCR fulfills its obligation to investigate whether there was fraud by the landlord, and finds that there was indeed fraud, then use of the default formula would be necessitated. Unlike what the dissent suggests, our holding does not summarily mandate use of the default formula in the instant case.

The dissent also ignores our explicit holding in *Drucker*, based on well settled law that "the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law. Any lease provision that subverts a protection afforded by the rent stabilization scheme in not merely voidable, but void" (*Drucker*, 30 AD3d at 39). The dissent seems to conflate when the default formula should be applied with DHCR's affirmative obligation to determine whether fraud has been committed in instances such as this.

Here, DHCR also inexplicably failed to examine the peculiar nature of the transfer of the building and to consider the connection between the prior owner and the current owner. The current owner contends that it purchased the building from a previous owner, giving the impression that there was no connection between the two. However, although the two owners have different corporate names, they are both controlled by the same individual. In fact, title to the building was transferred without any purchase price or tax being paid. In circumstances where, as here, there is an indication of possible fraud that would render the rent records unreliable, it is an abuse of discretion for DHCR not to investigate it. To be sure, if DHCR is permitted to turn a blind eye to a situation such as this, the

limited exception to the four-year statute of limitations is nugatory, and the protections afforded by the Rent Stabilization Law can be subverted to the detriment of those in need of affordable housing.

Finally, the fact that the owner filed registration statements with DHCR for 2001, 2002, 2003, 2004 and 2005 is not dispositive of whether the rent of $1,450 is the legal rent under the Rent Stabilization Code. If the owner engaged in fraud in setting an excessive rent, the Court of Appeals has made it clear that it should not be allowed to hide behind the four-year statute of limitations. "[A]n unscrupulous landlord . . . could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable. That surely was not the intention of the Legislature when it enacted the RRRA" (*Thornton*, 5 NY3d at 181).

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 11, 2008, which vacated a February 21, 2007 determination of respondent DHCR denying petitioner's rent

overcharge complaint and remanded the matter to DHCR to consider whether the registration statement for petitioner's apartment on the base date (July 19, 2001) was reliable, should be affirmed, without costs.

All concur except Friedman and Buckley, JJ.
who dissent in an Opinion by Buckley, J.

BUCKLEY, J. (dissenting)

I would find that DHCR acted rationally in complying with the legislative intent expressed in the statute of limitations set forth in CPLR 213-a and Rent Stabilization Law (Administrative Code of City of NY) § 26-516(a).

CPLR 213-a provides:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

The CPLR thus expressly states that the four-year statute of limitations applies to both an initial determination of whether there was an overcharge and any calculation of the amount of an overcharge. The statute goes even further in specifically declaring that the rental history predating the four-year period shall not be examined.

Similarly, Rent Stabilization Law § 26-516(a) states:

> Except as to complaints [not pertinent herein], the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement,

> . . . plus in each case any subsequent lawful increases and adjustments. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.
>
> . . .
>
> (2) Except as provided under clauses [not applicable herein], a complaint under this subdivision shall be filed with [DHCR] within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed. . . . This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision.

The only basis for finding an overcharge with respect to the subject apartment, as alleged in petitioner's July 2005 complaint, is an examination of the rental history in 1999, which is beyond the four-year period permitted by the statutes. The statutes specifically prohibit an examination of the rental history more than four years before the complaint for the purpose of finding an overcharge: "no determination of an overcharge . . . may be based upon an overcharge having occurred more than four years before the action is commenced" (CPLR 213-a); "no

determination of an overcharge . . . may be based upon an overcharge having occurred more than four years before the complaint is filed" (Rent Stabilization Law § 26-516[a]). To eliminate any confusion, the Legislature added: "This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action" (CPLR 213-a; *see* Rent Stabilization Law § 26-516[a] [using nearly identical language]). As this Court has previously recognized, that "legislative scheme specifically precludes examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of the complaint even where the prior rental history clearly indicates that an unauthorized rent increase had been imposed" (*Matter of Hatanaka v Lynch*, 304 AD2d 325, 326 [2003] [citations and internal marks omitted]).

The majority disregards those express legislative statements by using the 1999 rental history to establish that there was an overcharge. The majority's use of a default formula (the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date), rather than the rental history to calculate the amount of the alleged overcharge, does not cure the statutory elision, but merely complies with the second part of the statutes, that "no award or calculation of an

award of the amount of any overcharge may be based upon an overcharge having occurred more than four years" before the action is commenced (CPLR 213-a; Rent Stabilization Law § 26-516[a]).

As justification for ignoring the explicit legislative language, the majority asserts that the statute of limitations was intended to alleviate the burden on honest landlords, not fraudulent ones, in maintaining rent records. However, the same general goal is true of all statutes of limitations: to grant defendants repose from claims that have lain dormant past a certain specified time, at which point evidence may have been lost, memories faded, and witnesses disappeared (*see Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 773 [1997]). By their very nature, statutes of limitations are bright-line rules that will result in the preclusion of some meritorious claims. The fact that some fraudulent landlords might escape liability is not a valid ground for ignoring the statute of limitations; indeed, even causes of action for fraud are subject to time limitations periods (*see* CPLR 213[8]).

Thornton v Baron (5 NY3d 175 [2005]) is not to the contrary. In *Thornton*, the Court of Appeals reiterated that an apartment's rental history beyond four years prior to the filing of an overcharge complaint "may not be examined" and that any rent

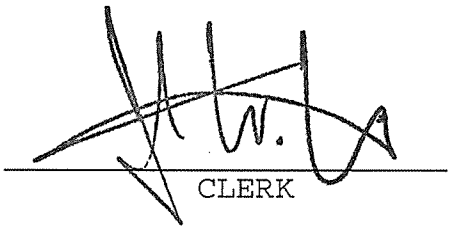
before that four-year period is "of no relevance" (*id.* at 180). Thus, the Court of Appeals expressly rejected the proposition embraced by the majority, that whenever there are indicia of fraud, DHCR must investigate, no matter how old those indicia are. The Court in *Thornton* used the default formula to ascertain the correct rent because there were no valid registration statements for the base date. There was no question that the landlord in *Thornton* had improperly attempted to remove multiple apartments from rent stabilization by colluding with the tenants to falsely represent in the leases that the apartments were nonprimary residences, and therefore exempt from rent stabilization, and to obtain consent judgments to that effect. The non-stabilized leases were therefore void ab initio, and the rent registration statements upon which they were based were also a nullity, thus leaving the Court no recourse but to utilize the DHCR default formula. Unlike *Thornton*, the instant case does not involve an apartment that was improperly taken out of rent stabilization. *Thornton* is further distinguishable in that the Court of Appeals did not consider the rental history prior to the base date for any purpose, whereas the majority can only establish a rent overcharge by examining the rental history pre-dating the four-year period. Moreover, DHCR's decision here, to only consider the rental history within the allowable time frame,

is consistent with its approach in *Thornton*; in contrast to the Court of Appeals, which deferred to the determination of DHCR, the agency with expertise in rent stabilization, the majority would reject DHCR's decision as arbitrary and irrational.

For the reasons discussed *supra*, I would find that DHCR was not arbitrary or capricious in obeying the legislative mandates set forth in CPLR 213-a and Rent Stabilization Law § 26-516(a).

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

ENTERED: SEPTEMBER 24, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Karla Moskowitz
Rolando Acosta
Rosalyn H. Richter, JJ.

810
Index 105904/07

x

Resort Sports Network Inc., et al.,
Plaintiffs-Respondents,

-against-

PH Ventures III, LLC, et al.,
Defendants-Appellants.

x

Defendants appeal from an order of the Supreme Court, New York County (Bernard J. Fried, J.), entered December 12, 2008, which granted plaintiffs' motion for summary judgment.

Pepper Hamilton LLP, Philadelphia, PA (Thomas E. Zemaitis and Matthew R. Williams of counsel), and Pepper Hamilton LLP, New York, for appellants.

McCormick & O'Brien, LLP, New York (Liam O'Brien of counsel), for respondents.

MOSKOWITZ, J.

This case involves what defendants euphemistically describe as a "mutual mistake," but was instead defendants' unilateral error. On October 27, 2006, plaintiff RSN Acquisition Inc. (RSN Acquisition), plaintiff Resort Sports Network Inc. (RSN) and RSN Merger Sub, Inc. (Merger Sub) entered into a merger agreement to purchase all of RSN's stock. Advent International Corporation (Advent), defendants' general partner, signed as "Stockholder Representative" on behalf of defendants, three investment funds that the merger agreement defines as "Significant Stockholders" of RSN.

The merger agreement provided that, upon closing, RSN Acquisition would pay $4.65 million, adjusted pursuant to Section 2.4. Section 2.4(a) provided for closing adjustments related to an outstanding bank loan. Section 2.4(b) provided for a working capital adjustment:

> "(b) Working Capital Adjustment
>
> "(i) Target Net Working Capital. The Parties acknowledge and agree that the *Merger Consideration has been determined based upon an estimated Net Working Capital* (as such term is defined below) *of the Company equal* to $324,359 if the Closing occurs on or before November 30, 2006, $730,259 if the Closing occurs on or before December 31, 2006, *$948,659 if the Closing occurs on or before January 31, 2007, $1,437,059 if the Closing occurs on or before February 28, 2007*

> and $1,640,459 if the Closing occurs on or before March 31, 2007 (collectively, the 'Target Net Working Capital'). For the purpose hereof, *'Net Working Capital' as of any date shall be equal to the adjusted cash working capital value calculated as set forth on Exhibit B hereto for the month on which the Closing Date occurs.*[1]
>
> "(ii) Adjustment. The Parties agree that there shall be a reduction to the Merger Consideration equal to the amount by which the Net Working Capital of the Company as of the close of business on the last calendar day of the month prior to the Closing Date is less than the Target Net Working Capital, and any such deficiency shall be paid to Buyer by the Significant Stockholders (the 'Net Working Capital Adjustment'). . ."

(emphasis added). Section 2.4(b)(iii) provides procedures for review and resolution of the adjustments. Section 2.1(b) provides that the closing will take place "on the first business day of the month following the month in which all of the conditions set forth in Article VIII have been satisfied or waived."

Thus, the merger agreement provides that the Significant Shareholders would have to reimburse the Buyer for any deficiencies between the pre-determined Target Working Capital and the actual level of working capital "as of the close of business on the *last calendar day of the month prior* to the

---

[1]A spreadsheet calculation of adjusted cash working capital shows the same figures used in Sec. 2.4(b)(i).

Closing Date" (emphasis added). Advent proposed this language on October 16, 2006, although now defendants contend this was a mistake because of confusion that a change in a different part of the merger agreement engendered. The agreement also contains clauses providing that it is the "entire agreement of the parties . . . and supersedes all prior agreements and undertakings, both written and oral . . ." (Section 11.7), and "may not be amended or modified except by an instrument in writing" signed by the parties (Section 11.10).

The closing took place on February 5, 2007. After making a bank loan adjustment that Section 2.4(a) required, and deducting $3.8 million that the buyers paid to satisfy RSN's outstanding bank loan and certain closing costs of sellers, the remaining adjusted merger consideration was $463,260. Of the total net consideration, $433,737 was payable to defendants as Significant Shareholders.

On February 16, 2007, RSN provided Advent with a Closing Date Working Capital Schedule. The Schedule showed adjusted working capital of $962,761 as of January 31, 2007. RSN asserted that the amount due to RSN from the Significant Stockholders as a net working capital adjustment was $474,298. As the merger agreement called for, RSN calculated the working capital adjustment by comparing the actual net working capital as of the

close of the last day of business of the month prior to the closing date, January 2007 ($962,761), to the target net working capital for a closing occurring in the month of February ($1,437,059) (Section 2.4[b][i]). When Advent refused to pay, plaintiffs commenced this action. The motion court granted summary judgment to plaintiffs and enforced the merger agreement according to its terms. Defendants appealed.

Defendants do not claim that the merger agreement is in any way ambiguous. Rather, defendants claim that they should not have to pay because the proposed reduction in consideration under Section 2.4 of the merger agreement is the result of mutual mistake. What the parties really intended, according to defendants, was to calculate the actual working capital using figures from the same month as the closing (February 2007), not the month prior to the closing as the merger agreement states (January 2007).

In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). The Court of Appeals has strongly cautioned, however, that allowing parol and oral evidence "obviously recreates the very danger against which the parol evidence rule and Statute of Frauds were supposed to protect - the danger that

a party, having agreed to a written contract that turns out to be disadvantageous, will falsely claim the existence of a different, oral contract" (*id.*). Therefore, there is a "heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties" and a "correspondingly high order of evidence is required to overcome that presumption" (*id.* at 574, quoting *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). Thus, "[t]he proponent of reformation must 'show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties'" (*Chimart Assoc.*, 66 NY2d at 574, quoting *Backer*, 46 NY2d at 219).

Here, defendants do not show what the parties really agreed to "in no uncertain terms." First and foremost, to have reformation based on mutual mistake, the mistake must be just that - mutual. Here, all defendants can point to is a unilateral mistake of Advent's. There is no showing that RSN misunderstood Section 2.4 of the merger agreement, a provision that *defendants* (through Advent) drafted. Indeed, that RSN invoiced Advent shortly after the merger indicates that RSN was fully aware of the provision and its implications.

A unilateral mistake may give rise to reformation where the other party takes advantage of an error only it has noticed under circumstances constituting fraud (*see George Backer Mgt. Corp.*, 46 NY2d at 219). However, defendants expressly disavow this "unilateral mistake plus fraud" argument and therefore we will not consider it. Nor is this a case like *Nash v Kornblum* (12 NY2d 42 [1962]), where the agreement of the parties was ascertainable by reference to a single immutable fact (calculation of linear feet on subject property) that was the substance of the agreement (*see also Baby Togs v Harold Trimming Co.*, 67 AD2d 868 [1979] [reformation warranted for clear arithmetical miscalculation]).

What we have here is at most a unilateral mistake on the part of defendants. This is not enough to rewrite an agreement that is complete on its face, unambiguous and contains a merger clause that claims to supercede all prior agreements, particularly where, as here, the parties were sophisticated business entities represented by counsel (*Chimart Assoc.* at 571). Although defendants may not have expected this result, "[r]eformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate

the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of *both* parties" (emphasis added) *(George Backer Mgmt. Corp.*, 46 NY2d at 219). Accordingly, we affirm that part of the order of the motion court that awarded summary judgment to plaintiffs based on the terms of the merger agreement.

Defendants have also appealed from that part of the motion court's order holding that the merger agreement did not limit defendants' potential liability. Defendants argue that if we uphold the grant of summary judgment to RSN, Section 10.4(b) of the merger agreement limits their liability to an aggregate of $433,736.45, the amount they actually received under the agreement. Plaintiffs claim the merger agreement does not limit their entitlement to legal fees and expenses.

Section 10.4 of the merger agreement, entitled "Limitation on Liability for Losses," provides that the parties agree that their "respective Liability for *Indemnifiable Losses* under this Article X shall be limited," (emphasis added) and, specifically, that the "aggregate Liability of the Significant Stockholders under this Article X,[2] other than Indemnifiable Losses arising under Section 10.2(a)(i)(C) or 10.2(a)(i)(F), shall not exceed

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[2]Article X is entitled "Indemnification; Expenses."

the amount actually received by the Significant Stockholders . . ."

Section 10.2(a)(i) contains a non-exclusive list of "Indemnifiable Losses," including losses arising out of such events as breach of warranty. That section also requires the Significant Stockholders to "indemnify, defend and hold harmless" RSN Acquisition and RSN against those losses. However, the immediately following section, Section 10.2(a)(ii), requires the Significant Stockholders to reimburse RSN for all fees, "including, *without limitation*, any and all reasonable Legal Expenses" related thereto (emphasis added).

By discussing legal expenses "without limitation" separate from "Indemnifiable Losses" in the preceding section, the parties clearly meant to exclude legal expenses from the category of "Indemnifiable Losses." Section 10.4(b) only limits liability for "Indemnifiable Losses." Hence, by its own terms, Section 10.4(b) does not apply to Section 10.2(a)(ii) and consequently does not limit the payment of legal expenses. Therefore, we also affirm that part of the motion court's order that granted summary judgment to plaintiffs for reasonable legal expenses.

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered December 12, 2008, that granted

plaintiffs' motion for summary judgment in the amount of $474,298, plus interest and attorneys' fees in an amount to be determined, should be affirmed, without costs.

All concur except Saxe, J.P. and Acosta, J. who dissent in an Opinion by Saxe, J.P.

SAXE, J.P. (dissenting)

I would reverse and deny plaintiffs' motion for summary judgment.

Although there is a heavy presumption that the contract between these sophisticated parties represented by counsel manifests their true intent (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573-574 [1986]), defendants submitted sufficient evidence to overcome that presumption and raise an issue of fact as to whether reformation is warranted.

As the majority points out, it is often said that in the absence of fraud, the mistake shown "'must be one made by both parties to the agreement so that the intentions of neither are expressed in it'" (*Amend v Hurley*, 293 NY 587, 595 [1944], quoting *Salomon v North Br. & Mercantile Ins. Co. of N.Y.*, 215 NY 214, 219 [1915]; *see Strong v Reeves*, 280 App Div 301 [1952], *affd* 306 NY 666 [1953]). However, the Court of Appeals has described a type of circumstance in which one party makes an inadvertent mistake in the nature of a scrivener's error when preparing the writing, so that in some material respect it does not reflect the terms of the parties' agreement, and the other party, "with knowledge of the mistake, [tries] to take advantage of the error" (*Nash v Kornblum*, 12 NY2d 42, 47 [1962]). Although such circumstances technically establish neither mutual mistake

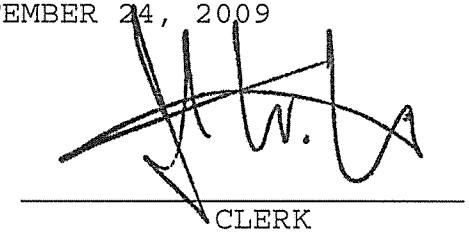
nor fraud, "equity will conform the written instrument to the parol agreement which it was intended to embody" (*id.* at 47, quoting *Pitcher v Hennessey*, 48 NY 415, 423 [1872]). As the Court in *Nash* explained, "'Where there is no mistake about the agreement and the only mistake alleged is in the reduction of the agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected' (*Born v Schrenkeisen*, 110 NY 55, 59 [1888])" (12 NY2d at 47, quoting *Hart v Blabey*, 287 NY 257, 262 [1942]).

Defendants submitted convincing evidence that the merger agreement did not embody the parties' actual agreement that the adjustment would be computed by comparing the companies' actual working capital at the end of the month in which all conditions for closing were satisfied with the projected working capital for that same month, not the succeeding month. Defendants presented a detailed history of the parties' negotiations, a series of draft agreements showing the parties' clear mutual agreement that the working capital adjustment would be derived from a comparison between actual and target working capital figures for the same month, and the testimony of their attorney that, in attempting to incorporate a negotiated change concerning the timing of the closing, he made the drafting error that resulted in a deviation from the agreement concerning the adjustment. Plaintiffs

submitted no evidence controverting defendants' showing that the parties reached agreement about the method of computing the adjustment and that the change in the method of computation made by defendants' attorney was not the result of a negotiated change. Plaintiffs' suggestion that they recognized and accepted the change assuming it was made intentionally by defendants' attorney - although it was obviously detrimental to defendants - does not defeat defendants' equitable claim for reformation but merely raises an issue of fact.

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

ENTERED: SEPTEMBER 24, 2009



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