SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 19, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

5365N TAG 380, LLC,
Plaintiff-Appellant,

-against-

The Estate of Howard P. Ronson, by its Executors, Ivor Walter Freeman and Barclays Private Bank & Trust Limited,
Defendant-Respondent,

ComMet 380, Inc., et al.,
Defendants.

Index 101396/04

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for appellant.

DLA Piper LLP (US), New York (Todd B. Marcus of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 25, 2008, which, insofar as appealed from as limited by the briefs, granted the motion of Ivor Walter Freeman and Barclays Private Bank & Trust Limited, as executors of the Estate of Howard P. Ronson, to be substituted for defendant decedent Howard P. Ronson, and directed resumption of a hearing to determine the amount of sanctions to be imposed on plaintiff, unanimously affirmed, with costs.

This action was commenced in 2004 by plaintiff TAG 380, LLC (TAG), as owner of a leasehold for the land and commercial building located at 380 Madison Avenue in Manhattan. TAG sought damages and injunctive relief for, inter alia, fraud and unjust enrichment in connection with its purchase of the leasehold, against nine defendants, including Howard Ronson. TAG, which is owned by Sheldon Solow, claimed that defendants fraudulently inflated the rent of the leasehold and nullified TAG's option to purchase the fee estate. Solow also alleged that he was charged excessive and illegal closing costs. Defendants moved to dismiss the ground that the action was frivolous.

In a decision filed July 7, 2005, the motion court sustained plaintiff's claim involving an alleged late rent payment and dismissed the rest of the complaint as "completely without merit." With regard to the fraud and unjust enrichment claims, the court added that they were "premised on an implausible, if not absurd, factual scenario." The court found that sanctions were warranted given the baseless nature of the complaint. It noted that sanctions had been awarded against Solow and his attorneys in several prior lawsuits. The court awarded sanctions in the amount of $10,000 against both plaintiff and its counsel at the time, Dreier LLP, and also awarded defendants their actual expenses and reasonable attorneys' fees, with the specific amount of the latter to be determined after a hearing. An order and

judgment based on this decision was entered July 18, 2005, which, insofar as pertinent, held the action in abeyance pending the completion of a hearing before a special referee to hear and report on the issue of attorneys' fees and expenses. There is no record of a notice of appeal having been filed from this order and judgment.

The hearing commenced on January 22, 2007, during which Ronson's counsel submitted bills reflecting fees and expenses of more than $300,000. However, Ronson, a citizen of the United Kingdom and resident of the Principality of Monaco, died on March 21, 2007 and proceedings were stayed until a duly appointed personal representative could be substituted. Ronson's last will and testament, executed and duly registered under the laws of Monaco, where he resided at the time of his death, provided for the appointment of Barclays Private Bank & Trust Limited as executor and trustee of the "will trust" and of Ivor Walter Freeman as an additional executor and trustee. A motion for substitution was made after TAG refused to consent to a stipulation for substitution. TAG inexplicably cross-moved for sanctions.

By order dated September 6, 2007, the court denied the estate's motion to substitute Barclays and Freeman, with leave to renew. The court found that the estate failed to submit competent evidence as to Freeman's status as a successor or

personal representative of Howard Ronson or his authority to speak on behalf of the coexecutor Barclays and that the estate also failed to address the issue of whether foreign representatives must have ancillary letters from a New York State court. The court also denied TAG's cross motion for sanctions "as entirely without merit."

By order to show cause brought March 11, 2008, Barclays and Freeman, as executors of the estate, again moved for substitution of the estate in place of Ronson, this time supported by affidavits and a translated copy of Ronson's will reflecting the due appointment of Freeman and Barclays as executors. Freeman and Barclays averred that they are both responsible for collecting and distributing the assets under the will and are the designated trustees of any trust that receives assets. They also asserted that Ronson's remaining interest in the action, i.e., his right to recover sanctions in the form of attorneys' fees and expenses, passed at his death, along with the residual assets, to the estate, with any recovery to be held by the executors until distributed to a trust.

Remy Brugnetti, a lawyer licensed in Monaco and counsel for the executors, offered his legal opinion that, under the laws of Monaco, Freeman and Barclays would be the appropriate persons to pursue assets and claims, including the award of sanctions at issue in this action previously belonging to Ronson.

Additionally, he explained that where a will has been executed in "authentic" form, there is no formal estate administration or judicially supervised "probate" proceeding in Monaco. Rather, administration is a private matter overseen by a notaire, a concept unique to civil law. According to Brugnetti, Barclays and Freeman appear on an established list of approved trustees and they became the executors simply by their appointment in the will without any further act or demonstration necessary under laws of Monaco.

TAG opposed the renewed motion for substitution and cross-moved to vacate the award of attorneys' fees and expenses based on the unreasonable delay in substituting the proper party defendant for Ronson. Relying both on what it claims to be well-settled common law in New York and on Surrogate's Court Procedure Act § 1601, TAG contended that to have standing in New York courts a foreign executor is required to obtain ancillary letters "to sue or be sued."

In reply, Ronson's estate argued that a foreign executor is only required to obtain ancillary letters to sue in New York, and not when the decedent is or was a defendant. In further support of the estate's position that there is no need for ancillary letters, Freeman averred that the estate does not own or possess any property located in New York.

By order entered August 25, 2008, the court granted the

motion for substitution, finding that the estate had addressed the previously identified deficiencies and demonstrated that Freeman and Barclays are Ronson's duly appointed executors. The court rejected TAG's contention that the estate could not pursue the sanctions award without first obtaining New York ancillary letters, reasoning that no precedent requires such letters where "the defense of the action has been concluded and the foreign defendant has not asserted an independent counterclaim, but merely seeks to continue with a previously commenced hearing on the amount of Ronson's reasonable expenses and attorneys' fees in defending the action." Further, the court denied TAG's cross motion to vacate the award to Ronson of attorneys' fees and reasonable expenses.

We hold that the court properly granted the motion to substitute Freeman and Barclays as executors of Ronson's estate, and properly directed resumption of the Special Referee's hearing, without requiring ancillary letters. When a party to an action dies and a claim for or against the party is not thereby extinguished, the court shall order substitution of the proper parties (CPLR 1015[a]), upon a motion for substitution to be made before or after final judgment by the successors or representatives of a party or by any party (CPLR 1021). In this case, counsel for the estate provided sufficient documentary evidence to support the court's finding that Freeman and Barclays

were the duly appointed executors of Ronson's estate under the laws of Monaco and thus are the proper parties for substitution.

TAG's argument that estate executors and administrators appointed in foreign countries cannot be sued in the courts of New York unless they have ancillary letters lacks merit. Contrary to TAG's unsupported position, representatives appointed in foreign countries must obtain New York ancillary letters or other appointment only to invoke jurisdiction and sue in New York (*see* 41 NY Jur 2d Decedent's Estates § 1584, at 197, citing, at footnote 12, EPTL § 13-3.5[a]); *Haines v Cook Elec. Co.*, 53 Misc2d 178, 179 [1967]. The law, i.e., EPTL 13-3.5, does not directly address whether foreign representatives appointed in other jurisdictions of the United States or foreign countries must have ancillary letters or other appointment in New York in order to be sued in New York. Were we to adopt TAG's argument that a foreign country executor must have New York ancillary letters in order to be sued, surely no responsible foreign executor would ever obtain ancillary letters for the privilege of being sued in a New York court. Whether a foreign executor can be sued in New York is not governed by requirements for ancillary letters as TAG argues, but by the scope of the applicable long-arm statute, which provides for jurisdiction over, and service of

process upon, nondomiciliaries and absent residents (*see* CPLR 302, 313, 1015[a], 1021; Siegel NY Prac § 85, at 146 [4th ed], citing *Rosenfeld v Hotel Corp. of Am.*, 20 NY2d 25 [1967]).

Here, the foreign executors seeking to substitute for the deceased Ronson never invoked the jurisdiction of New York courts as they were neither plaintiffs nor counterclaiming defendants in this action. They seek to appear for the sole purpose of obtaining a determination regarding the amount of fees and costs incurred as a result of TAG's frivolous complaint against Ronson. A defendant's motion for sanctions based on frivolous conduct does not convert him or her into a claimant or plaintiff for jurisdictional purposes (*cf. World Sports Group v Motion Picture Academy of Arts & Sciences*, 273 AD2d 53 [2000]).

Furthermore, even if TAG's contention were a viable one based on the common-law rule that generally required foreign executors to have ancillary letters to sue or be sued in New York (*see Helme v Buckelew*, 229 NY 363, 365-67 [1920]), the grant of this motion would still have been a provident exercise of discretion. The common law rule requiring ancillary letters was never meant to be applied as a uniform bar to suit. It allowed for exceptions in the interests of the estate and when failure of justice would follow if equity withheld relief (*see id.* at 367-68; *Kirkbride v Van Note*, 275 NY 244, 250-251 [1937]; *Haines v Cook Elec., supra*). Such an exception would be warranted here,

given that the purpose of these post-judgment proceedings is to fix the amount of sanctions for bringing a frivolous complaint, a matter of public interest (*see Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1999]). There is no legal or practical reason to further delay final disposition of this matter.

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

ENTERED: JANUARY 19, 2010

DEPUTY CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1560 The People of the State of New York, Ind. 2667/93
Respondent,

-against-

Amantina Alvarez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Sheila Abdus-Salaam, J. at trial; Brenda Soloff, J. at sentence), rendered June 4, 2007, convicting defendant of criminal possession of a controlled substance in the second and third degrees and conspiracy in the second degree, and sentencing her to an aggregate term of 3 years to life, unanimously modified, on the facts, to the extent of reducing the conviction on criminal possession of a controlled substance in the second degree to criminal possession of a controlled substance in the third degree, and remanding for sentencing on that conviction, and otherwise affirmed.

At the time of the trial in 1994, the crime of criminal possession of a controlled substance in the second degree for which defendant was convicted required proof that she both possessed at least two ounces of cocaine (former Penal Law

§ 220.18 [1]) and knew that she possessed at least two ounces of cocaine (*People v Ryan*, 82 NY2d 497 [1993]). The evidence at trial was that defendant possessed a clear plastic bag containing 2 1/4 ounces and 16 grains of cocaine. Even assuming that the evidence was legally sufficient to establish that defendant knew that the cocaine weighed more than two ounces (*but cf. People v Pitterson*, 234 AD2d 79 [1996], *lv denied* 89 NY2d 1014 [1997] [evidence that defendant's travel bag contained a paper bag in which three ounces of cocaine were packaged in 506 ziplock bags legally insufficient to establish defendant's awareness that he possessed at least two ounces of cocaine]), we find that the verdict was against the weight of the evidence. Nothing in the intercepted conversations established defendant had knowledge of the weight of the drugs; the narcotics were in a single plastic bag and the amount was too close to the statutory minimum to conclude that she would have been aware of the contraband 's weight (*see People v Campbell*, 230 AD2d 636 [1996]. Accordingly, we reduce the conviction to criminal possession of a controlled substance in the third degree, which required at the time of trial proof that defendant knowingly possessed at least half an ounce of cocaine (former Penal Law § 220.16[2]), and remand for sentencing.

However, defendant's contention that the trial evidence was likewise against the weight of the evidence to support the

criminal possession of a controlled substance in the third degree (intent to sell) is without merit. The evidence, including wiretapped conversations, showed that defendant was involved in packaging large amounts of drugs for sale, and that this activity took place in two apartments, one of which was the location of the arrest. Hence the inference that defendant intended to sell the drugs she possessed was warranted.

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

ENTERED: JANUARY 19, 2010

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

1683 Claudio Lopez, Index 113638/05
Plaintiff-Appellant,

-against-

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

Alexander J. Wulwick, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered January 13, 2009, which, insofar as appealed from, granted defendants' cross motion for summary judgment dismissing plaintiff's cause of action for false arrest, reversed, on the law, without costs, the cross motion denied and the cause of action for false arrest reinstated.

Issues of fact as to probable cause are raised by plaintiff's indictment and acquittal (*cf. Broughton v State of New York*, 37 NY2d 451, 458 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]) and the conflicting versions of the events leading up to the arrest given by plaintiff and the arresting officer (*see Coleman v City of New York*, 182 AD2d 200, 203 [1992]; *see generally Harris v City of New York*, 147 AD2d 186, 188-189 [1989]).

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

NARDELLI, J. (dissenting)

I would affirm the grant of summary judgment. It is evident that the arresting officer, who testified that he saw defendant retrieve a white object, later determined to be seven ounces of cocaine, had more than probable cause to arrest defendant. Plaintiff was arrested on September 28, 2003, and did not give his version of the events until his deposition in this case on August 31, 2006, almost three years later. The officer who identified him as being involved in the drug transaction swore to a criminal complaint dated September 29, 2003; and was the sole witness at the criminal trial, which occurred on November 16-17, 2004. The detailed version he gave was consistent with the allegations in the criminal complaint. There was also a motion made to challenge the sufficiency of the evidence before the grand jury, and the motion was denied after review of the grand jury minutes, which were, presumptively, consistent with the version offered at the criminal trial.

At the criminal trial, defendant exercised his constitutional right not to testify, but apparently also did not offer any other evidence in his behalf. Thus, until plaintiff was deposed almost three years after the original incident there was only one version of the facts, Detective Negron's, and that version had been given three times.

Defendant was acquitted after a nonjury trial. The judge

who acquitted him simply stated, without elaboration, "The verdict with respect to the only count in the indictment, criminal sale of controlled substance in the first degree, is not guilty." The court did not make any specific findings with regard to, for instance, the officer's credibility, or the implausibility of the People's case, which would have bearing on the issues in this case. Thus, the only legal significance to be drawn from the verdict in the criminal trial insofar as this case is concerned is that the finder of fact made a conclusion that the People had failed to establish beyond a reasonable doubt that defendant had committed the crime with which he was charged.

Inasmuch as the reasonable doubt standard is significantly more stringent than whether probable cause existed, the verdict in the criminal case, contrary to the majority's position, has no other legal significance. "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed . . ." (*People v Bigelow*, 66 NY2d 417, 423 [1985]). "The legal conclusion is to be made after considering all of the facts and circumstances together" (*id.; see also Marrero v City of New York*, 33 AD3d 556 [2006]).

The existence of probable cause constitutes a complete defense to a claim of false arrest, under both state and federal

standards (*Arzeno v Mack*, 39 AD3d 341 [2007]). "Once a suspect has been indicted . . . the law holds that the Grand Jury action creates a presumption of probable cause" (*Colon v City of New York*, 60 NY2d 78, 82-83 [1983]). "The presumption may be overcome only by evidence establishing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith" (*id.* at 83, citations omitted).

Plaintiff has not met the test for overcoming the presumption. In his brief, plaintiff states that defendants failed to meet their prima facie burden of demonstrating entitlement to judgment "principally due to the fact that Detective Negron's deposition testimony . . . was inherently incredible, or at least so improbable that it should be subject to the common sense and good judgment of a jury." In support of this claim he argues that it strains credulity to believe that Detective Negron could walk up to a group of complete strangers while they were in the midst of a drug transaction. The fallacy with this argument is that defendant himself stipulated that the bag which was seized by the police as a result of the transaction contained over seven ounces of cocaine. Thus, the police officer's version was not incredible at all, or even improbable,

since it is evident that a drug transaction did take place in his presence, that individuals were arrested as a result of his observations, and that the bag which was the focus of the transaction contained cocaine.

Consequently, since plaintiff has failed to rebut the presumption of probable cause, I submit that the grant of summary judgment should be affirmed.

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

ENTERED: JANUARY 19, 2010

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1936N Nancy Murrell, as Administratrix of the Estate of Ingram Irwin, Deceased, Plaintiff-Appellant, Index 20259/04

-against-

Tami Seaman, M.D., et al., Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about June 5, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 17, 2009,

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

ENTERED: JANUARY 19, 2010

DEPUTY CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

1995 The People of the State of New York, Ind. 679/08
Respondent,

-against-

Charles Restivo,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered January 29, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 1½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). We do not find the officer's account of the events to be implausible, and the evidence

establishes that he had a sufficient opportunity to observe the apparent drug transaction.

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

ENTERED: JANUARY 19, 2010

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

1996 Aurelio Carrazana, Index 8180/07
Plaintiff-Respondent,

-against-

Stratford Five Realty, LLC,
Defendant-Appellant.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for appellant.

Slingsby, Sanders & Pagano, Bronx (Carl Sanders of counsel), for respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered on or about April 8, 2009, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The action is by a tenant against his landlord for personal injuries sustained in an explosion and fire allegedly caused by a gas leak coming from the kitchen stove. In support of its motion for summary judgment, defendant adduced expert opinion that the fire originated in the bedroom, along a wall where the bed had been located and where, after the fire, the expert observed matches among the debris; defendant also adduced evidence that plaintiff was a smoker, that plaintiff had never complained to defendant's superintendent about a gas leak, and that the fire had caused significant damage to the bedroom but little damage to the kitchen. Included in defendant's motion papers was

plaintiff's deposition, wherein plaintiff testified that he had recently complained to the superintendent about the smell of gas coming from the stove, that the superintendent told plaintiff that the stove's pilot light was broken but never fixed it, and that plaintiff first felt heat and then became aware of an enveloping fire while in the kitchen, immediately after he closed the refrigerator door.

The motion court held, correctly, that defendant failed to make a prima facie showing that the fire was not caused by the alleged unaddressed gas leak (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Reading defendant's expert's affidavit and the accompanying earlier report he had prepared as expressing uncertainty only as to whether the exact cause of the fire was careless smoking, not as to its origin in the bedroom, the expert's affidavit fails to conclusively rebut plaintiff's testimony, based on personal observation, that the fire originated in the kitchen, or conclusively establish that a gas leak coming from the stove could not have fueled a fire in the bedroom ignited by a match.

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

ENTERED: JANUARY 19, 2010

CLERK

DEPUTY CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

1999 In re Imiya P.,

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

Randall S.,
Respondent-Appellant,

Sidnie L.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for ACS respondent.

Appeal from order of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about December 9, 2008, which conditioned the release of the subject child to respondent mother with agency supervision for 12 months upon, inter alia, respondent Randall S.'s completion of a drug rehabilitation program, unanimously dismissed as moot, without costs.

Respondent Randall S.'s challenge to the disposition is moot, since the terms of the order, along with the agency supervision, have expired (*see Matter of Kazmir K.*, 63 AD3d 522 [2009]; *Matter of Lashina P.*, 52 AD3d 293, 293 [2008]).

Were we to consider the merits, we would find that the requirement that respondent complete a drug rehabilitation

program was supported by a preponderance of the evidence, including his own admission at fact-finding that he neglected the child by virtue of his drug use, and his failure to seek any treatment (*see Matter of Jolie S.*, 298 AD2d 194 [2002]).

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

ENTERED: JANUARY 19, 2010

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2000 Jacqueline Baez, Index 27065/03
Plaintiff-Respondent,

-against-

2347 Morris Realty, Inc.,
Defendant-Appellant,

Salvatore Emanuele,
Defendant.

Steven Weissman, New York, for appellant.

Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered December 30, 2008, which, in an action for personal injuries sustained in a rape allegedly caused by inadequate building security, denied defendant landlord's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

An issue of fact as to the foreseeability of the rape is raised by the printouts of police reports and complaints submitted by plaintiff tending to show prior violent criminal activity in or near the subject building, including attacks, as well as prior drug arrests in front of the building, and by plaintiff's testimony that she and other tenants regularly complained to the superintendent about criminal activity and

loiterers in the building (*see Jacqueline S. v City of New York*, 81 NY2 288, 295 [1993]; *Rivera v 1652 Popham Assoc., LLC*, 31 AD3d 297, 298 [2006]; *Wayburn Madison Land Ltd. Partnership*, 282 AD2d 301, 303-304 [2001]). We have considered defendant's other arguments and find them unavailing. We note the absence of argument by defendant on the issue of causation.

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

ENTERED: JANUARY 19, 2010

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2001 Footlocker, Inc., et al., Index 105811/04
Plaintiffs-Appellants,

-against-

KK&J, LLC, et al.,
Defendants-Respondents.

[And a Third-Party Action]

Sheps Law Group, P.C., Melville (Robert C. Sheps of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Frank D. Thompson, II of counsel), for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered November 17, 2008, which granted defendants' motion for summary judgment dismissing the claims asserted by plaintiff St. Paul Fire and Marine Insurance Company, unanimously reversed, on the law, without costs, the motion denied, and St. Paul's claims reinstated.

This subrogation action was commenced after a fire occurred on September 24, 2002 in a food court located below street level at 2916 Third Avenue in the Bronx. The fire allegedly broke out when a torch used by one of the individuals removing duct work from a former Burger King came into contact with cooking grease that had accumulated in the duct work. The fire resulted in extensive property damage to surrounding businesses, including that of plaintiff St. Paul's insured, Duane Reade, at 2914 Third

Avenue. At the time of the fire, defendant KK&J was the owner of 2912, 2914, and 2916 Third Avenue, and defendant Springfield Food Court was the managing agent for these properties. Springfield also independently operated the Burger King.

Duane Reade's lease agreement provides that each party waived "any and all" rights of recovery against the other for loss, injury or damage covered by its insurance, notwithstanding that the loss, injury, or damage may have resulted from the other's negligence or fault. We reject St. Paul's argument that this waiver of subrogation is unenforceable with respect to any allegations of negligence against defendants. However, issues of fact preclude summary judgment in defendants' favor.

While, as St. Paul's points out, "a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]), by the terms of the subject clause, Duane Reade waived recovery for "any" loss caused by defendants for which it was covered by insurance, not solely losses that originated within its leased premises. In addition, although the term "Building" is not defined in the lease, the rider to the lease refers to the basement restaurant as located within the "Building." Thus, the renovation work being performed in the Burger King, which resulted in a fire that spread to Duane Reade's leased premises, was not "wholly outside the scope of the

landlord and tenant relationship" (*Interested Underwriters at Lloyds v Ducor's Inc.*, 103 AD2d 76, 77 [1984], *affd* 65 NY2d 647 [1985]; *see Atlantic Mut. Ins. Co. v Elliana Props.*, 261 AD2d 296 [1999]).

However, the record raises an issue of fact whether KK&J satisfied its insurance procurement responsibilities in accordance with the intended risk allocation scheme under the lease agreement. As St. Paul points out, waiver of subrogation clauses are "necessarily premised on the procurement of insurance by the parties" (*Liberty Mut. Ins. Co. v Perfect Knowledge*, 299 AD2d 524, 526 [2002]). Although the plain language of the subject lease agreement does not require any party other than Duane Reade to procure fire insurance, defendants submitted an umbrella third-party liability insurance policy to demonstrate that KK&J was covered for the risk of fire, and since the lease agreement does not require that the insurance procured be first-party property insurance, it may be that this policy satisfies KK&J's obligation to procure the type of insurance necessary to the enforcement of the waiver clause. A triable issue is raised by the fact that the policy identifies "Hospitality and Leisure Services, Inc.," and not KK&J, as the named insured.

As to defendant Springfield, the complaint and bill of particulars allege that, as the franchisee operator of the Burger King, it was negligent in permitting grease to accumulate in the

duct work and in failing to clean out the grease, knowing that the duct work would be removed when the Burger King ceased to operate. The record evidence that the cause of the fire was the contact between a torch and grease in the duct work precludes summary judgment dismissing St. Paul's claims against Springfield in its capacity as the operator of the Burger King.

Finally, contrary to St. Paul's contention, a waiver of subrogation may bar a claim for gross negligence (*Great Am. Ins. Co. of N.Y. v Simplexgrinnell LP*, 60 AD3d 456 [2009]).

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

ENTERED: JANUARY 19, 2010

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2002 Pegasus Aviation I, Inc., et al., Index 603076/08
Plaintiffs-Respondents,

-against-

Varig Logistica S.A., et al.,
Defendants,

MatlinPatterson Global Advisers, LLC,
Defendant-Appellant.

Bracewell & Giuliani LLP, New York (Kenneth A. Caruso of counsel), for appellant.

Boundas, Skarzynski, Walsh & Black, LLC, New York (James T. Sandnes of counsel), for respondents.

Order, Supreme Court, New York County (Barbara J. Kapnick, J.), entered April 21, 2009, which denied MatlinPatterson's motion to dismiss the complaint, unanimously affirmed, with costs.

This is an action for replevin and damages for breach of airplane leases. Accepting the alleged facts as true and according plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the complaint sufficiently alleges that MatlinPatterson exercised complete domination over Varig Logistica -- and was thus its alter ego -- with respect to the transaction at issue, and that such domination facilitated the fraud or wrongdoing that resulted

in plaintiff's injury (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

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

ENTERED: JANUARY 19, 2010

DEPUTY CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2003 Jean Graham Jones, et al., Index 103156/07
Plaintiffs-Appellants,

-against-

170 East 92nd Street Owners Corp., et al.,
Defendants-Respondents.

[And a Third-Party Action]

Law Offices of Lee M. Nigen & Assoc., P.C., Brooklyn (Lee M. Nigen of counsel), for appellants.

Gartner & Bloom, P.C., New York (Arthur P. Xanthos of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered February 9, 2009, which, in an action for personal injuries allegedly caused by mold in plaintiffs tenants' apartment, insofar as appealable, denied plaintiffs' motion to renew defendants building owners' prior motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

No appeal lies from the portion of the order on appeal that denied reargument (CPLR 2221; *Stratakis v Ryjov*, 66 AD3d 411 [2009]). With respect to renewal, the only purportedly new evidence submitted by plaintiffs was a doctor's affidavit responsive to the portion of the motion court's prior order stating that defendants' medical evidence was unrefuted, and opining that the mold in plaintiffs' apartment had contributed to

the sinusitis and respiratory problems for which he was treating one of the two plaintiffs. Putting aside that this affidavit was inadvertently omitted from plaintiffs' moving papers and first submitted only in their reply (*but cf. Tomaino v 209 E. 84 St. Corp.*, __ AD3d __, 2009 NY Slip Op 9283, *2 [Dec. 15, 2009]), plaintiffs' attorney's bald statement that the doctor's affidavit was not included in their opposition to the prior motion because "it was not made available to Plaintiffs until this time" does not satisfy plaintiffs' burden "to show due diligence in attempting to obtain the statement before the submission of the prior motion" (CPLR 2221[e][3]; *see Taub v Art Students League of N.Y.*, 63 AD3d 630 [2009]).

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

ENTERED: JANUARY 19, 2010

DEPUTY CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2006 The People of the State of New York, Ind. 1146/06
Respondent,

-against-

Ronald Hamer,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David P. Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered September 12, 2006, convicting defendant, after a jury trial, of robbery in the first and third degrees, and sentencing him, as a persistent violent felony offender, to concurrent terms of 25 years to life, unanimously modified, on the law, to the extent of vacating the conviction of robbery in the third degree and dismissing that count of the indictment, and otherwise affirmed.

Defendant's challenge to the evidence supporting the dangerous instrument element of first-degree robbery is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that it was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). This element was established by the

victim's testimony that he felt an unseen hard object "jabbing" into his back, coupled with defendant's death threat, in which he told the victim the object was an icepick (*see People v Lawrence*, 124 AD2d 597 [1986], *lv denied* 69 NY2d 713 [1986]).

The court responded meaningfully to a note from the deliberating jury. In its main charge, and then again in response to an earlier note, the court had given the jury the full definition of dangerous instrument set forth in Penal Law § 10.00(13). Then, in the note at issue on appeal, the jury asked whether "the People have to prove specifically that an ice pick itself was used, or just that a dangerous sharp object was used?" The court replied that the People did not have to prove the item was an ice pick, but only that it was a dangerous sharp object. Defendant argues that this response improperly changed the definition of dangerous instrument by eliminating the requirement that, under the circumstances of its use or threatened use, the object be readily capable of causing death or serious physical injury. However, the jury's note, read in context, essentially asked whether the dangerous instrument element could be satisfied by a dangerous instrument other than an icepick, and the court correctly answered in the affirmative. When this instruction is taken together with the court's main and supplementary instructions on the statutory definition of

dangerous instrument (*see People v Drake*, 7 NY3d 28, 33-34 [2006]; *People v Fields*, 87 NY2d 821, 823 [1995]; *People v Coleman*, 70 NY2d 817 [1987]), it is clear that the jury could not have been misled into thinking that the definition had suddenly changed.

As the People concede, the third-degree robbery count should have been dismissed as a lesser included offense.

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

ENTERED: JANUARY 19, 2010

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2007 Steve Rabinowitz, et al., Index 107322/08
Plaintiffs-Respondents,

-against-

Devereux Connecticut Glenholme, et al.,
Defendants-Appellants.

Danaher, Lagnese & Sacco, P.C., Bridgeport, Ct (Jeremy P. Chen of counsel), for appellants.

Shafer Glazer, LLP, New York (Melissa Y. Wu of counsel), for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered March 17, 2009, which denied defendants' motion to dismiss plaintiffs' complaint on the ground of forum non conveniens, unanimously affirmed, with costs.

In this personal injury action, plaintiffs allege defendants' negligent supervision of plaintiff Anapaula, a special needs student at the defendant Devereux Glenholme School, located in Connecticut, who intentionally jumped out of the window of her second floor dorm room and fractured her right ankle.

The common law doctrine of forum non conveniens, codified in CPLR 327, permits a court to stay or dismiss an action where the action, although jurisdictionally sound, would be better adjudicated elsewhere (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *see* CPLR

327). Among the factors to be considered are the burden on the New York courts; the potential hardship to the defendant; the availability of an alternate forum in which the plaintiff may bring suit; the residency of the parties; the forum in which the transaction from which the cause of action arose; and the extent to which the plaintiff's interests may otherwise be properly served by pursuing the claim in this State (*see Pahlavi*, 62 NY2d at 479; *Varkonyi v S.A. Empresa De Viacao Airea Rio Grandense [Varig]*, 22 NY2d 333, 338 [1968]; *Nyugen v Banque Indosuez*, 19 AD3d 292, 294 [2005], *lv denied* 6 NY3d 703 [2006]).

Here, the motion court properly considered all relevant factors (*see Pahlavi*, 62 NY2d at 479), and concluded that New York was an appropriate forum for litigating this dispute. Both plaintiffs reside in New York, and the matter bears a substantial nexus to New York in that the New York City Board of Education funded plaintiff's residence at defendant school, located in Connecticut. While defendants claim that it would cause undue hardship to maintain the action in New York because it would be difficult to find substitutes for the witnesses who work at the school when they are testifying and because the witnesses are Connecticut residents whose personal lives would be disrupted if the trial were conducted in New York, these circumstances would

exist even if the trial were conducted in Connecticut.

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

ENTERED: JANUARY 19, 2010

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2008 Amalgamated Dwellings, Inc., Index 117239/07
Plaintiff-Appellant,

-against-

Ira Blutreich, et al.,
Defendants-Respondents.

Rosen Livingston & Cholst LLP, New York (Andrew J. Wagner of counsel), for appellant.

Ira Blutreich and Iris Blutreich, respondents pro se.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered October 24, 2008, which, in an action by a cooperative corporation against two of its shareholders to recover attorneys' fees incurred by the cooperative in a special proceeding pursuant to CPLR 5206 it had brought to enforce two prior judgments against defendants for unpaid maintenance and electric charges and for attorneys' fees incurred in prosecuting the claims for unpaid maintenance and electric charges, denied the cooperative's motion for partial summary judgment on the issue of liability and, sua sponte, dismissed the complaint, unanimously affirmed, with costs.

The cooperative waived any right it might have had to recover the attorneys' fees it seeks herein when it settled its prior CPLR 5206 proceeding without any reference to the language contained in the order to show cause that initiated that proceeding requesting, inter alia, that the two judgments it had

obtained against defendants, "and the costs, disbursements and attorneys' fees of this proceeding," be adjudged and enforced as liens on the shares allocated to defendants' apartment (*see J.D. Realty Assoc. v Shanley*, 288 AD2d 27 [2001]; *512 E. 11th St. HDFC v Als*, 10 Misc 3d 412[A], 2006 NY Slip Op 50079[U] [2006]). In short, the cooperative asserted a claim for the attorneys' fees it seeks herein, and settled it. It does not avail the cooperative to assert, for the first time in its reply brief on the appeal, that inclusion of this claim for attorneys' fees was included in the order to show cause "inadvertently." We have considered the cooperative's claim based on the no-waiver clause in the lease and find it to be without merit.

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

ENTERED: JANUARY 19, 2010

David Gonzalez

DEPUTY CLERK

CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2009 Jose Castillo, Index 110092/04
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

Gottesman, Wolgel, Malamy, Flynn & Weinberg, P.C., New York (Steven Weinberg of counsel), for appellants.

The Feinsilver Law Group, P.C., Millburn, NJ (David Feinsilver of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered November 12, 2008, which, insofar as appealed from, as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

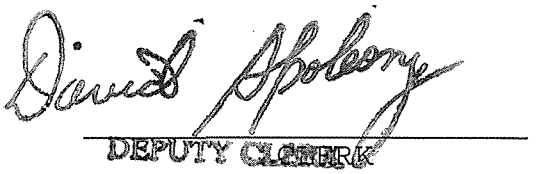
The evidence submitted by defendants was insufficient to establish as a matter of law that plaintiff solely caused his accident in this slip-and-fall matter or that defendants did not create the alleged water-and-debris hazard and lacked actual or constructive notice of it. Not only did defendants fail to offer specific evidence as to their activities on the day of the accident, but the defendant church acknowledged that it maintained and cleaned the premises daily, with the exception of

Sundays, the day the accident occurred (*Lebron v Napa Realty Corp.*, 65 AD3d 436 [2009]; *Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323 [2008]; *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007]). The motion court also properly found that plaintiff's submissions were sufficient to create triable issues of fact and that issues of credibility were to be resolved at trial, and not by summary judgment (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

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

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

ENTERED: JANUARY 19, 2010



Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2011 The People of the State of New York, Respondent, Ind. 3297/02

-against-

Prela Malaj, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Brenda G. Soloff, J.), rendered November 10, 2005, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Defendant's claim that he was improperly sentenced without an evidentiary hearing on the issue of whether he violated the terms of his plea agreement is unpreserved since defendant neither requested a hearing nor moved to withdraw his plea (*see People v Cooper*, 21 AD3d 836, 836 [2005], *lv denied* 6 NY3d 774 [2006]), and we decline to review it in the interest of justice. As an alternate holding, we find that the court properly sentenced defendant to a term of incarceration since he failed to comply with the terms of the plea agreement. The court's decision was not based solely on a disputed hearsay allegation

(*compare Torres v Berbary*, 340 F3d 63 [2d Cir 2003]), but on defendant's well-documented failure to successfully complete a drug treatment program, along with the court's rejection of his excuses (*see e.g. People v Redwood*, 41 AD3d 275 [2007], *lv denied* 9 NY3d 880 [2007]). There was no factual dispute requiring the taking of testimony (*see People v Valencia*, 3 NY3d 714 [2004]).

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

ENTERED: JANUARY 19, 2010

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2012 Frank Croce, Index 102208/08
Plaintiff-Appellant,

-against-

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

Ameduri, Galante & Friscia, LLP, Staten Island (Marvin Ben-Aron of counsel), for appellant.

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

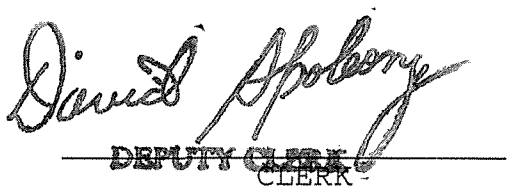
Order, Supreme Court, New York County (Karen S. Smith, J.), entered December 12, 2008, which granted defendants' motion for summary judgment dismissing the complaint for failure to serve a timely notice of claim, and denied plaintiff's cross motion for leave to serve a late notice of claim, unanimously affirmed, without costs.

Plaintiff's service of an admittedly late notice of claim was a nullity (*McGarty v City of New York*, 44 AD3d 447, 448 [2007]), and his failure to seek a court order excusing such lateness within the time limited for commencement of the action (General Municipal Law § 50-e[5]), i.e., within one year and 90 days after the happening of the accident (General Municipal Law § 50-i[1][c]), requires dismissal of the action (*McGarty, supra*). We reject plaintiff's argument that, by virtue of CPLR 306-b, his time to seek leave to serve a late notice of claim was extended

until 120 days after the timely filing of his summons and complaint. The argument rests on the incorrect premise that an action is commenced upon service, not filing, of a summons and complaint (*see* CPLR 304[a]).

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

ENTERED: JANUARY 19, 2010



DEPUTY CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2014N James Lamont Bryant, Index 17710/06
Plaintiff-Respondent,

-against-

The New York City Housing Authority,
Defendant-Appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered June 8, 2009, which denied defendant's motion to vacate an order granting, on default, plaintiff's motion to strike defendant's answer, unanimously affirmed, without costs.

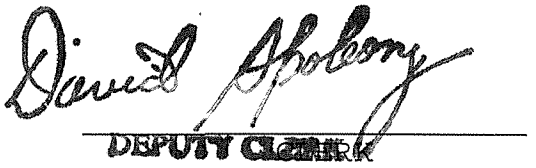
To vacate its default in opposing plaintiff's motion pursuant to CPLR 3126 to strike its answer, defendant was required to demonstrate both a reasonable excuse for the default and a meritorious defense (*see* CPLR 5015[a]; *QRT Assoc., Inc. v Mouzouris*, 40 AD3d 326 [2007]; *Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [2007]). While a default resulting from law office failure may be excused (CPLR 2005), defendant's bare denial of receipt of the motion papers, and of a subsequent letter from plaintiff's counsel referring to the pending motion, was insufficient to rebut the proof that the motion papers were properly mailed and the presumption of receipt

arising from that proof (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Grieco v Walker*, 8 AD3d 66 [2004]). Since defendant did not submit an affidavit of merit or argue that the deposition testimony in the record supported a valid defense to this slip and fall action based on lack of notice of a dangerous condition, the motion court properly determined that defendant had not shown a meritorious defense to the complaint (*see Fidelity & Deposit Co. of Md. v Andersen & Co.*, 60 NY2d 693, 694-695 [1983]).

Defendant's pattern of noncompliance with court-ordered disclosure over a period of over two years created an inference of willful and contumacious conduct warranting the sanction of striking the answer (*see Figiel v Met Food*, 48 AD3d 330 [2008]; *Brewster v FTM Servo, Corp.*, 44 AD3d 351 [2007]).

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

ENTERED: JANUARY 19, 2010



Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2015 [M-4987] In re Shawn Southerland, Petitioner,

-against-

Hon. Miriam R. Best, etc., et al., Respondents.

Ind. 4114/08

Shawn Southerland, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Susan Anspach of counsel), for Hon. Miriam R. Best, respondent.

Robert T. Johnson, District Attorney, Bronx (David Birnbaum of counsel), for Robert T. Johnson, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed as moot, without costs or disbursements.

ENTERED: JANUARY 19, 2010

DEPUTY CLERK
CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John T. Buckley
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, JJ.

765
Index 105870/08

x

Michele Beudert-Richard, etc.,
Plaintiff-Appellant,

-against-

Pamela Richard,
Defendant-Respondent.

x

Plaintiff appeals from an order and judgment (one paper) of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered December 2, 2008, which, to the extent appealed from as limited by the briefs, rescinded a 2007 agreement to sell the cooperative apartment and share equally in the proceeds and dismissed the complaint seeking to enforce that agreement.

Julie Hyman, P.C., Bronx (Julie Hyman of counsel), for appellant.

Toback, Bernstein & Reiss LLP, New York (Brian K. Bernstein of counsel), for respondent.

SAXE, J.P.

Plaintiff Michele Beudert-Richard, the second wife and widow of decedent Adam Richard and executor of his estate, commenced this action against Adam's first wife, Pamela Richard, seeking to enforce a claim to share in the proceeds of the sale of a cooperative apartment that had been the joint marital property of Adam and Pamela before their divorce.

Pamela and Adam purchased the cooperative apartment in 1978, while they were married. They took title to the co-op shares as joint tenants with rights of survivorship rather than as tenants by the entirety, since prior to the amendment of EPTL 6-2.1 and 6-2.2 on January 1, 1996 (L 1995, ch 480), co-op shares were treated as personalty rather than realty, and a married couple's ownership interest in such shares could be as joint tenants or as tenants in common, but could not be as tenants by the entirety (*see* EPTL 6-2.1; *Stewart v Stewart*, 118 AD2d 455, 457 [1986]).

On April 12, 1989, Pamela and Adam entered into a separation agreement which provided for distribution of the marital property. The paragraph of the separation agreement concerning the apartment erroneously stated that the couple owned the apartment "as tenants by the entirety," and gave Pamela exclusive possession during their child's minority, after which the apartment was to be sold and the net proceeds split. Adam also

agreed to pay one-half of the mortgage and maintenance for the apartment until it was sold and to maintain a life insurance policy to cover his child support obligations in the event of his death. The parties' December 1989 divorce judgment, which incorporated but did not merge their separation agreement, stated that the marital property was to be distributed pursuant to the separation agreement.

Adam thereafter married plaintiff Michele. Adam died on September 23, 1999, and his will bequeathed to Michele his ownership interest in the apartment. At the time of Adam's death, the obligation to sell the apartment under the separation agreement had not yet been triggered because his child with Pamela was then 16 years old. The proceeds of Adam's life insurance policy were turned over to Pamela in accordance with the separation agreement.

Several years after Adam and Pamela's son completed college and became emancipated, Michele and Pamela entered into an agreement dated November 21, 2007, which provided that Pamela was the owner of a one-half interest in the apartment and Michele was the beneficiary of Adam's one-half interest in the apartment, and both agreed to sell the apartment and split the net proceeds. In January 2008, Michele and Pamela, as sellers, entered into a contract to sell the apartment for $1,385,000. However, in

February, 2008, the managing agent of the cooperative insisted that the contract be amended to omit Michele's name from the contract. Pamela then filed an application in the context of the Connecticut probate proceeding concerning Adam's estate, seeking a determination that the estate did not have a legal right or interest in the apartment or the proceeds of its sale, while Michele commenced this action seeking enforcement of the separation agreement and the November 2007 contract. The Connecticut probate court declined jurisdiction with respect to all claims arising under the separation agreement.

Michele moved, pre-answer, for an order substituting the estate as plaintiff for the purposes of enforcing the separation agreement and directing Pamela to sell the apartment and equally divide the proceeds. Pamela cross-moved for an order directing that Michele was not entitled to share in the proceeds of the sale of the apartment and rescinding the November 2007 agreement between them based upon mutual mistake, maintaining that because the co-op had been owned by Adam and Pamela as joint tenants with the right of survivorship, Adam's death, which preceded the events that would trigger a sale under the separation agreement, left her the sole owner of the co-op.

The motion court denied Michele's motion to divide the net proceeds of the estate, and granted Pamela's cross motion,

directing that Michele was not entitled to share in any portion of the proceeds of the sale of the apartment, rescinding the 2007 agreement and dismissing the complaint. Relying on *Matter of Violi* (65 NY2d 392 [1985]), the motion court reasoned that at the time of Adam's death the relevant provision of the separation agreement was merely an executory contract to divide the proceeds when a sale occurred that did not alter the form of its ownership, and since Adam's contract right to the sale of the co-op was not enforceable at the time of his death, his estate could not claim it (citing *Brower v Brower*, 226 AD2d 92 [1997]).

For the reasons that follow, we reverse.

Matter of Violi involved a situation where spouses who owned their residence as tenants by the entirety entered into a separation agreement pursuant to which they agreed to sell their residence within four years and split the net proceeds, but the wife died a year later, before the parties were divorced, with the residence still unsold. Since the parties had not altered their tenancy by the entirety either by a judicial decree such as a divorce judgment, or by a written instrument satisfying General Obligations Law § 3-309 by clearly expressing an intent to convert the form of tenancy in which the property was held, the tenancy had continued to be held by the entirety; so, upon the wife's death, the husband became seized of the whole property

(*Violi*, 65 NY2d at 395). Had the parties in *Violi* actually gotten the divorce before the wife's death, the property would have automatically been held as a joint tenancy and the wife's estate would have been entitled to her share.

In *Brower v Brower* (226 AD2d 92 [1997], *supra*), a small but important difference in the facts led to a different result from that in *Violi*. Like *Violi*, the parties held the marital residence by the entirety, and, like *Violi*, they entered into a separation agreement providing for its sale, but one party died before either the sale or the divorce. However, unlike *Violi*, in *Brower*, "[t]he date prescribed in the agreement for defendant [wife] to vacate the property so that it could be sold preceded decedent's death," and therefore the husband in *Brower* had a viable breach of contract claim against the surviving wife at the time of his death, which viable right entitled his estate to seek specific performance of the agreement after his death (*id.* at 94).

In the case now before us, unlike either *Violi* or *Brower*, the parties actually obtained a final judgment of divorce, incorporating the separation agreement in which they expressed their mutual belief that they held the co-op shares by the entirety and the concomitant, if implicit, expectation that upon the divorce their tenancy would be automatically converted into a

tenancy in common.

While a married couple's tenancy by the entirety automatically converts into a tenancy in common upon entry of a divorce judgment (*see Goldman v Goldman*, 95 NY2d 120, 122 [2000]; *Freigang v Freigang*, 256 AD2d 539, 539-540 [1998]; 13 Warren's Weed, New York Real Property, Tenancy in Common, § 2.08[1] [4th ed]), the same does not hold true for a married couple's joint tenancy. However, General Obligations Law § 3-309 allows a married couple to freely "convey or transfer real or personal property directly, the one to the other, without the intervention of a third person." Therefore, as the court observed in *Matter of Violi* (65 NY2d at 395), a married couple may convert the form of tenancy in which they hold property by expressing in a writing an intent to do so.

While Adam and Pamela did not specifically state in their separation agreement an intent to *convert* their ownership of the co-op from joint tenancy to a tenancy by the entirety, as they had a right to do, their failure to do so appears to be based on their (albeit incorrect) understanding that their ownership already took that form. There can be little doubt from the language of their separation agreement that Adam and Pamela intended, and assumed, that upon entry of their divorce judgment they would automatically become tenants in common without any

right of survivorship. Not only is there no indication that Adam intended to waive his (or his estate's) property interest in the co-op, or that Pamela thought he had done so, but in fact, the record contains numerous indications to the contrary.

The spouses' mutual expectation that entry of the divorce judgment would result in a tenancy in common is apparent from the language of their separation agreement. Importantly, that Pamela and Adam both proceeded in the belief that the divorce would convert their ownership of the apartment into a tenancy in common is established by Pamela's entry into the 2007 agreement to sell the apartment, which stated "Michele is the Executrix of the Estate of Adam Richard who died owning the other one-half (½) interest in said apartment." In fact, Pamela did not claim the sole right of survivorship until after the managing agent of the cooperative insisted that the contract of sale be amended to provide that Michele's name be omitted from the contract. Moreover, Adam's will, where he stated, "I give, devise and bequeath to my wife, Michele F. Beudert, my entire ownership interest in [the apartment], to be hers outright," reflects his understanding that upon his divorce from Pamela the form of their ownership of the co-op would leave them each with an ownership interest in the event of his death.

The foregoing constellation of facts and events demonstrate

the inaccuracy of the motion court's observation that "there is no evidence in the record that either Adam or defendant evinced an intent to alter their joint tenancy with right of survivorship." Although there is no direct assertion of intent to *alter* their joint tenancy, that was due to the fact that neither party viewed their tenancy as a joint tenancy at that time; there is substantial evidence that they intended that following the divorce, their ownership of the co-op would automatically become a tenancy in common. The court's observation that the parties provided for other "entitlements in the event of a party's demise" refers merely to boilerplate waivers and standard provisions in the separation agreement, and the presence of those provisions does not negatively reflect on the absence of any provision to terminate the right of survivorship regarding ownership of the apartment.

The dissent employs what we believe to be an overly strict formalistic application of General Obligations Law § 3-309. It ignores the clear understanding of both husband and wife at the time they entered into their 1989 separation agreement as to how they would own the apartment upon entry of the divorce judgment, and instead relies on the lack of formal language expressly stating an intent to change the form of ownership of the apartment. In our view, this is unnecessarily rigid. For the

law to be given the respect it is due, it must be applied so that the clear facts and intentions are recognized, and not ignored due to technical legalistic requirements. There may be times when the law imposes exacting requirements in regard to the language that must be used in a document to render it legally effective. This is not such a circumstance. The result we reach in this case, on these facts, will not interfere, as the dissent warns, with certainty in title to real property; we are satisfied that the suggested danger to bona fide purchasers is vastly exaggerated.

So, at a minimum, the record evidence raises issues of fact as to whether the language of the separation agreement demonstrates an understanding that the ownership of the apartment was intended to be altered upon their divorce so as to eliminate any existing right of survivorship. This issue alone precludes the entry of final judgment declaring that Adam's estate is not entitled to share in any portion of the proceeds of the sale of the apartment.

Nor do we agree that rescission of the 2007 agreement and dismissal of the complaint was warranted as a matter of law. It is true that mutual mistake of fact may constitute grounds for rescission of an instrument (*see Matter of Gould v Board of Educ. Of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]).

But, even if we accepted as fact the premise that the parties' 2007 agreement was based on a mutual mistake regarding the legal form of Adam and Pamela's ownership interest in the apartment, under the unique circumstances reflected in the record, rescission, an equitable remedy, may not be appropriate as a matter of equity. In any event, since the separation agreement may be interpreted to establish the couple's expression of mutual intent that upon divorce the property would be owned as tenants in common, rescission as a matter of law in the context of a motion pursuant to CPLR 3211 was at least premature.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered December 2, 2008, which, to the extent appealed from as limited by the briefs, rescinded a 2007 agreement to sell the cooperative apartment and share equally in the proceeds and dismissed the complaint seeking to enforce that agreement, should be reversed on the law, without costs, the rescission of the agreement vacated, the complaint reinstated, and the matter remanded for further proceedings.

All concur except Moskowitz, J. who dissents in an Opinion.

MOSKOWITZ, J. (dissenting)

I would affirm. The reversal the majority propounds disregards completely centuries-old black letter law controlling joint ownership of property.

Pamela Richard with her then husband Adam Richard purchased a cooperative apartment in 1978. The stock certificate indicates that they took title to the co-op shares as "tenants with rights of survivorship." They never changed the form of ownership of these co-op shares.

In December 1989, Pamela and Adam divorced via a separation agreement dated April 12, 1989. The separation agreement erroneously stated that Pamela and Adam owned the co-op shares as "tenants by the entirety" as opposed to joint tenants with rights of survivorship as the stock certificate reflects. The separation agreement provided that Pamela would have exclusive possession during the minority of her and Adam's only child, Alexander, after which they would sell the apartment and split the proceeds. The separation agreement became incorporated into the parties' judgment of divorce that provided for the distribution of the marital property pursuant to the separation agreement.

Some time later, Adam remarried. On September 23, 1999, Adam died. His will granted plaintiff, his widow, what he

thought was his continued ownership interest in the apartment.

Once Alexander completed college, defendant and plaintiff entered into an agreement dated November 21, 2007, in which they agreed to sell the apartment and split the net proceeds. This agreement too assumed that defendant was the owner of only a one-half interest in the apartment and that plaintiff, by virtue of Adam's will, was the beneficiary of his one-half interest.

In January 2008, plaintiff and defendant both entered into a contract to sell the apartment to a third party. However, prior to the closing, the managing agent of the co-op required an amendment to the contract of sale to omit plaintiff's name. Defendant subsequently contested plaintiff's legal interest in the apartment and its proceeds.

Plaintiff commenced this action seeking to enforce the separation agreement and the November 2007 contract between herself and defendant. Before issue was joined, plaintiff moved for an order substituting the estate as plaintiff for the purposes of enforcing the separation agreement. Defendant cross-moved for an order declaring that plaintiff was not entitled to share in the proceeds of the sale of the apartment. She also moved to rescind the November 2007 agreement because she was the sole owner of the apartment and had entered the November 2007 agreement under the mistaken assumption that she was not. The

motion court directed that Michelle was not entitled to share in the proceeds of the sale of the apartment because upon Adam's death, defendant became the sole owner.

The estate has no property interest in the apartment because the separation agreement did not change the status of the property from a joint tenancy with right of survivorship. A "joint tenancy" is "a tenancy with two or more co-owners who take identical interests simultaneously by the same instrument and with the same right of possession" (Black's Law Dictionary 1505 [8th ed 2004]). A "tenancy in common" is a "tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship" (*id.* at 1506). A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share. Another form of joint property ownership is "tenancy by the entirety." This type of property ownership is only available to a husband and wife. It is similar to joint tenancy because, upon the death of either husband or wife, the survivor automatically acquires title to the share of the deceased spouse (*id.* citing Robert Kratovil, *Real Estate Law* 198 [6th ed. 1974]). Upon divorce, a tenancy by the entirety automatically converts to a tenancy in common *(Matter of Violi*, 65 NY2d 392, 395 [1985]).

However, defendant and Adam did not hold the shares in the apartment as tenants by the entirety, but rather as joint tenants with rights of survivorship. A joint tenancy with rights of survivorship does not convert to a tenancy in common upon the divorce of the parties. Thus, defendant and Adam's divorce could not convert the form of ownership to a tenancy in common. Accordingly, once Adam died, defendant became the sole owner of the apartment.

I do not agree with the majority that the separation agreement's mere expression of Adam and defendant's mistaken belief that they held the co op shares as tenants by the entirety changed the status of the property from a joint tenancy with right of survivorship to tenants in common or any other form of ownership. First, as the majority recognizes, prior to 1996 it would not have been legally possible for defendant and Adam to have held the co-op shares as tenants by the entirety. They entered the separation agreement in 1989. Accordingly, it is irrelevant that defendant and Adam thought they held the shares as tenants by the entirety. Nor would it have been possible for the parties to evince an intent in the separation agreement to hold the shares as tenants by the entirety, because to do so would have been a legal impossibility.

Nevertheless, even if they could have held the co-op shares

as tenants by the entirety in 1989, "[a]s a general matter, title to estates in land should be altered only by clear expressions of intent" (*Matter of Violi*, 65 NY2d at 396). While General Obligations Law § 3-309 permits a husband and wife to "make partition or division of . . .real property held by them as tenants in common, joint tenants or tenants by the entireties," the separation agreement at issue merely established the event that would trigger the time in the future to sell the property. The parties' mistaken assumption that they held the property as tenants by the entireties is just that, a mistake. "There is no language in the agreement evincing an intent to alter the form of ownership." (*Violi* at 396). The separation agreement was therefore insufficient to satisfy the requirements of General Obligations Law § 3-309 to "make partition or division of . . . real property."

Nor is defendant's recognition in the November 2007 agreement that "Adam Richard . . . died owning the other one-half (½) interest in said apartment" sufficient to change the form of ownership. Defendant's adoption of that language in the 2007 agreement relied on the same mistaken assumption she made in the separation agreement, namely that she owned the property as a tenant by the entirety. Similarly, when Adam bestowed his one-half interest in the apartment to plaintiff, this was also based

on the same mistaken assumption.

While this result may contradict the assumption of the parties, that assumption was based on a mistake that kept repeating itself with each step Adam and defendant took concerning the property. As the majority admits, "there is no direct assertion of intent to alter their joint tenancy." But, a "direct assertion of intent" is precisely what is necessary to alter the form of ownership (*Violi* at 396). It remains that there was nothing Adam and defendant did, no action they took, to change the form of ownership of the shares to the apartment. For example, they could have changed the stock certificate to hold the co-op shares as tenants in common.

Respect for the form of property ownership and the concomitant public policy favoring certainty in title to real property dictate this result (*see Violi*, 65 NY2d at 396 ["(i)n reaching this conclusion, I am mindful also of a public policy favoring certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownership which may engender needless litigation"]).

Finally, contrary to the majority's conclusion, it was correct for the motion court to rescind the November 2007 agreement between plaintiff and defendant to split the proceeds of the apartment. A contract entered into under mutual mistake

of fact is voidable and subject to rescission (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]).

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

ENTERED: JANUARY 19, 2010

DEPUTY CLERK