SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 28, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1371 The People of the State of New York, Ind. 4489/07
Respondent,

-against-

Carlos Reyes,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Molly E. Presant of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered March 19, 2008, convicting defendant, upon his plea of guilty, of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, reversed, on the law and the facts, the motion to suppress physical evidence and statements granted, the plea vacated, and the matter remanded for further proceedings.

At a pretrial hearing on defendant's motion to suppress, arresting police officer Peralta testified that: on August 26, 2007, he and his partner received a radio dispatch in their patrol car that a 911 call had been received "about a dispute with a knife" at a location at St. Nicholas Avenue in Manhattan.

The officers had no description of the alleged perpetrator and were not told the identity of the 911 caller.

When the officers arrived at the location, Peralta observed two men standing in front of a store; they pointed at defendant, who was walking away from them down the middle of the street, and said, "That's him, that's him." Without first speaking to the men, the officers approached defendant and attempted to apprehend him, but he resisted and fled into a nearby apartment building.

The officers were admitted into the building and directed to an apartment, whose front door was latched and could only be opened a few inches. After Peralta's partner reached inside to unlatch the door and defendant tried to bar his entry, the officers sprayed Mace on defendant and kicked the door open. Defendant exited the apartment through a window and hid in the basement of the building, where the officers arrested and searched him. The officers found a gravity knife and an imitation revolver on defendant's person that they had not observed before.

Later that evening, Peralta spoke to the men he had seen standing in front of the store, who it turned out were its owners. They now told Peralta, for the first time, that defendant had stolen lottery tickets from the store, and then returned with winning tickets which they refused to honor. When defendant displayed what they thought was a revolver, they called

the police. The owners were standing outside the store when the officers arrived, and pointed out defendant.

Before trial, defendant moved for an order suppressing the gravity knife and the imitation revolver that the officers seized, as well as statements that defendant made to the police after his arrest, on the ground that they lacked probable cause to stop, arrest and search him. The court denied the suppression motion, finding that the officers' knowledge of the 911 call about a knife dispute, when coupled with the store owners' pointing to defendant when the officers arrived at the scene, gave them reasonable suspicion that defendant was involved in the dispute, which escalated when defendant took flight.[1]

The motion to suppress should have been granted because the officers lacked valid grounds to forcibly detain defendant on the street and then pursue him when he fled. In evaluating the propriety of the police action, we must consider whether it was justified at its inception and whether it was reasonably related in scope to the circumstances leading to the encounter (*People v De Bour*, 40 NY2d 210, 215 [1976]; *People v Cantor*, 36 NY2d 106, 111 [1975]). In *De Bour*, the Court of Appeals set forth a four-level test for evaluating street encounters that the police

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[1] After the court's decision, defendant pleaded guilty to attempted robbery in the third degree. However, as the People concede, defendant did not waive his right to appeal the suppression ruling since the court did not explain the appeal waiver at any time and defendant did not sign a written waiver.

initiate. The first three levels are relevant: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two - the common-law right of inquiry - permits a somewhat greater intrusion, short of a forcible seizure, and requires a founded suspicion that criminal activity is afoot; level three, authorizing an officer to forcibly stop and detain an individual, requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor (40 NY2d at 223; *see also People v Hollman*, 79 NY2d 181, 184-185 [1992]).

Flight alone, even if accompanied with equivocal circumstances that would justify a police request for information, does not establish reasonable suspicion of criminality and is insufficient to justify pursuit, although it may give rise to reasonable suspicion if combined with other specific circumstances indicating the suspect's possible engagement in criminal activity (*People v Holmes*, 81 NY2d 1056, 1057-1058 [1993]). Specific circumstances could include a description of the perpetrator or the alleged crime (*see People v Woods*, 98 NYS2d 627 [2002]). Here there were no such circumstances.

When the officers arrived at the scene, no criminal activity

was in progress. They arrived knowing only that a 911 call had been received about a vaguely described dispute with a knife; they lacked a description of the suspect and did not know who had called the police. The two unidentified men they encountered pointed out defendant without accusing him of any specific acts. Neither defendant's knife nor his imitation revolver was visible to the officers, and he was not engaged in any suspicious activity.

Under these circumstances, the officers would have been justified in conducting a level one inquiry by attempting to question defendant to clarify the situation, or in conducting a level two inquiry under the founded suspicion that defendant was involved in criminal activity. However, the officers' attempted detention of defendant when he tried to leave the location and their pursuit of him into the apartment building constituted an unjustified level three forcible seizure because the police lacked reasonable suspicion that defendant had committed a crime.

In *Matter of Manuel D.* (19 AD3d 128[2005], *lv denied* 5 NY3d 714 [2005]), this Court found, under similar circumstances, that the police had an insufficient basis for chasing after and arresting a fleeing suspect and charging him with resisting arrest. The officers in *Manuel D.* responded to a radio dispatch about a report of a possible burglary in progress at a particular location; they lacked any description of the alleged perpetrators

and did not know whether the caller was reliable. When the officers approached the suspect, he was not acting suspiciously, but he fled when the officers questioned his companion.

While, as the dissent points out, it can be discerned from the case law of this Court that "drawing the attention of the police to a person leaving a scene can provide reasonable suspicion" of criminality justifying a forcible seizure, we have never found that the fact that attention was drawn, by itself, is sufficient to give rise to reasonable suspicion. We have instead adhered to the well established principle that whether the police have reasonable suspicion depends on the entire circumstances of each case (*see People v Evans*, 65 NY2d 629 [1985]).

In the cases on which the dissent relies, where reasonable suspicion was found, various incriminating factors were present in addition to a third party's direction of the police's attention to the suspect. These factors included the suspect's matching a description (*People v Jenkins*, 44 AD3d 400 [2007], *lv denied* 9 NY3d 1007 [2007] [two black male suspects observed leaving a delicatessen by police on lookout for two black men who had been robbing delicatessens in the area]; *People v Davila*, 37 AD3d 305 [2007], *lv denied* 9 NY3d 842 [2007] [suspect fit description of perpetrator of violent crime]; *People v Cephas*, 240 AD2d 169 [1997], *lv denied* 90 NY2d 938 [1997] [suspect was only one of three people in vicinity who matched a description of

a black male wearing a brown jacket]). In some cases, the police observed the suspect in close proximity to recent, definite criminal activity (*People v Rosa*, 67 AD3d 440 [2009] [immediately after hearing gunfire, officer saw several people pointing at defendant, who was very close to the gunfire, and saw victim lying on ground]; *Davila*, 37 AD3d at 306 [after receiving a report that a violent crime had just been committed in a park, police saw suspect near the park]; *People v Dickerson*, 238 AD2d 147 [1997], *lv denied* 90 NY2d 857 [1997] [police arrived at scene and observed suspect less than 30 seconds after receiving report]; *People v Hurtado*, 160 AD2d 654 [1990], *lv denied* 76 NY2d 789 [1990] [after hearing gunshots, officers saw third party drawing suspect to their attention]).

In this case, the store owners' direction of the officers' attention to the suspect without relating it to any specific event did not provide a basis for the officers' reasonable suspicion. Accordingly, we find that the suppression motion should have been granted.

All concur except Sweeny, J.P. and Buckley, J. who dissent in a memorandum by Buckley, J. as follows:

BUCKLEY, J. (dissenting)

Veteran Police Officer Peralta, who had participated in approximately 200 arrests, testified at the suppression hearing that he and his partner were on uniformed patrol in a marked car when they received a radio run of a dispute involving a knife or possibly a gun at a location in Manhattan. When the officers arrived at the scene and exited their car, two men, standing in front of a store at the address specified in the radio run, pointed at defendant, who was walking away in the middle of the street, and stated, "That's him, that's him." The officers approached and attempted to apprehend defendant, who struggled and fled into a nearby apartment building.

A building resident let the officers in and directed them to a particular apartment. The officers could only open the door a few inches, since it was chained. As Officer Peralta's partner reached in to unlatch the chain, defendant closed the door on his arm. The officer sprayed Mace and kicked the door in. Defendant fled through a window to the basement, where the officers found him hiding behind some pipes. As the officers took defendant into custody, he protested, "I didn't do it, I didn't do it." The officers found a gravity knife and imitation revolver in defendant's pocket. Subsequently, the police spoke with the two men who had directed their attention to defendant. They explained that they were the store owners and had made the 911

call following an incident with defendant.

I would affirm the hearing court's finding that the police had reasonable suspicion to pursue and detain defendant, who was departing the scene while two people called the officers' attention to him. Defendant objects that the two men did not expressly tell the officers he had committed a crime. However, the officers reasonably interpreted the unsolicited pointing and exclamation, "That's him, that's him," by the men standing in front of the precise address relayed in the radio transmission, as accusatory (*see People v Davila*, 37 AD3d 305 [2007], *lv denied* 9 NY3d 842 [2007]), rather than a revelation of an epiphany or some other criminologically inapplicable statement. Under appropriate circumstances, even volunteered pointing alone can be "interpreted as a nonverbal accusation that has often been recognized as a significant factor justifying police action" (*People v Rosa*, 67 AD3d 440 [2009]).

Matter of Manuel D. (19 AD3d 128 [2005], *lv denied* 5 NY3d 714 [2005]), relied on by the majority, bears little resemblance to the instant case. In *Manuel D.*, the officers received a radio communication of a burglary involving four males at a certain residence. Arriving at the scene, the police saw three men in the vicinity of a parked car, whom they approached and asked, "what's going on, guys." One individual responded, "nothing," at which point the appellant fled. The police gave chase and

arrested the appellant, who was found guilty of resisting arrest. Notably absent from that fact pattern is anyone directing the officers' attention to the appellant in an accusatory manner, such as occurred here. Had Officer Peralta pursued defendant merely upon sighting him or upon flight, *Manuel D.* would be instructive.

The instant case is more akin to *People v Cephas* (240 AD2d 169 [1997], *lv denied* 90 NY2d 938 [1997]), where "[t]he police had reasonable suspicion to stop and detain defendant, who matched the radio transmission, received seconds earlier, of a black male wearing a brown jacket, and who was the only person in the vicinity, other than a man and a woman who were both standing on the steps of the building indicated in the radio run and were pointing at the defendant and telling the police 'that's him'" (citation omitted).

Similarly, in *People v Jenkins* (44 AD3d 400 [2007], *lv denied* 9 NY3d 1007 [2007]), during an early November morning, the police were patrolling an area where there had been a pattern of delicatessen robberies by two black men using a getaway car; two black men exited a delicatessen, and one of them removed a ski mask. A man followed them out of the store, looked at the officers, and pointed at the two men, which provided reasonable suspicion that a crime had been committed.

The vague descriptions of "a black male wearing a brown

jacket" in *Cephas* and "two black men" with a getaway car in *Jenkins* do not render those cases inapposite; the salient fact is that people directed the officers' attention to the defendant under circumstances that raised a reasonable suspicion of criminality. Indeed, in *People v Dickerson* (238 AD2d 147 [1997], *lv denied* 90 NY2d 857 [1997]), there was a radio report of a man, of unspecified description, with a gun in a particular restaurant. As the police approached the location, a man in the street told them, "the man you're looking for is in the restaurant," and as they entered, a person behind the counter pointed at the defendant. Neither person explicitly stated that he was the one who had telephoned the police or that the defendant possessed a firearm; nevertheless, the unsolicited declaration and pointing were found to provide reasonable suspicion. Under the circumstances, the pointing and statement, "That's him, that's him" in the present case was the functional equivalent of the pointing and statement "the man you're looking for is in the restaurant" in *Dickerson*.

This Court has consistently found that drawing the attention of the police to a person leaving a scene can provide reasonable suspicion (*see Rosa*, 67 AD3d 440; *Davila*, 37 AD3d 305; *People v Brown*, 266 AD2d 77 [1999], *lv denied* 95 NY2d 794 [2000]; *People v Lopez*, 258 AD2d 388 [1999], *lv denied* 93 NY2d 1022 [1999]; *People v Hurtado*, 160 AD2d 654 [1990], *lv denied* 76 NY2d 789 [1990]).

While *Davila*, *Brown*, and *Lopez*, involved one or more people chasing the defendant while waving at the police or pointing, civilian pursuit is not a requirement for reasonable suspicion. For example, in *Rosa*, an officer heard gunshots, and in close temporal and spatial proximity thereto saw several people pointing at the defendant, who was walking away and looking over his shoulder. Similarly, in *Hurtado*, the police heard gunshots and saw a store manager pointing at the defendant's vehicle and yelling, "That's him, get him."

The overriding principle in all those cases is that the bystanders' verbal or nonverbal expressions could reasonably be viewed as communicating that the defendant had committed a crime. I would follow those precedents and affirm the determination that there was reasonable suspicion.

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

ENTERED: JANUARY 28, 2010

DEPUTY CLERK

Friedman, J.P., Sweeny, Freedman, Abdus-Salaam, JJ.

1754 Nereida Santiago, Index 16621/05
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellant.

Laurence M. Savedoff, P.L.L.C., Bronx (Laurence M. Savedoff of counsel), for respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered June 13, 2008, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff, who was injured when she stumbled upon boarding a bus, claims that the bus operator was negligent in failing to lower the bus platform for her. The record establishes, however, that, before boarding, plaintiff (then 57 years old) did not ask the operator to lower the platform, and that she did not appear unable to negotiate the height differential between the curb and the bus platform. Under these circumstances, there was no duty to lower the platform (*see Trainer v City of New York*, 41 AD3d 202 [2007] [where disembarking 77-year-old passenger neither "request(ed) that the bus be lowered" nor "appeared incapable of

negotiating the distance" between the bus and the street, "there was no duty to lower the (bus's) steps"]; *see also Sabella v City of New York*, 58 AD3d 712 [2009]; *Carlino v Triboro Coach Corp.*, 22 AD3d 624 [2005]). In view of the foregoing, any discrepancy between plaintiff's testimony and that of the bus operator concerning the height differential between the curb and the platform is immaterial.

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

ENTERED: JANUARY 28, 2010

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

1926 The People of the State of New York, Ind. 3531/08
Respondent,

-against-

Albert Green,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about August 5, 2008, 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.

ENTERED: JANUARY 28, 2010

DEPUTY CLERK

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

1937 [M-4891] In re EQR-50 West 77 LLC, Petitioner,

-against-

Hon. Marilyn Shafer, etc., et al., Respondents.

Index 500047/09

Calabro & Associates, P.C., New York (Gregory G. Calabro and Jacqueline Kahman of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Susan Anspach of counsel), for Hon. Marilyn Shafer, 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, without costs or disbursements.

ENTERED: JANUARY 28, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1980 Alan Green, Index 118893/06
Plaintiff-Appellant,

-against-

Combined Life Insurance Co.
of New York, et al.,
Defendants-Respondents.

Weiss & Hiller, PC, New York (Michael S. Hiller and Lauren Rudick of counsel), for appellant.

White Fleischner & Fino, LLP, New York (Evan A. Richman of counsel), for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered February 13, 2008, which granted defendants' motion to dismiss the second cause of action, unanimously affirmed, with costs.

Plaintiff alleges he was defamed by defendant Downie's written report to the insurer defendants of his interview with and examination of plaintiff. Even if defamatory, the statements are protected by a qualified privilege because they were made in a medical report to the insurer (*see Gould v Broad*, 22 AD2d 800 [1964], *affd* 16 NY2d 666 [1965]). Plaintiff's conclusory

allegations of malice are insufficient to overcome the privilege (*see Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288 [2006]).

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

ENTERED: JANUARY 28, 2010

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2054 The People of the State of New York, Ind. 618/07
Respondent,

-against-

Israel Soto,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Cassiah M. Ward of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 2, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

Defendant did not preserve his challenge to the sufficiency of the evidence, 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 further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence, especially when viewed in light of the presumption contained in Penal Law § 265.15(3), warrants the conclusion that defendant possessed a

revolver found behind the front passenger seat of a car. Defendant had been observed sitting in that seat for 20 to 30 minutes, and he was the sole occupant of the car. Although defendant was not the registered owner, the owner testified that she had given defendant the car months before, and that she had removed her belongings.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2010

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Román, JJ.

2058 Marta Lopez,
Plaintiff-Respondent-Appellant,

Index 7117/04
84622/05
85067/06

-against-

Fordham University,
Defendant-Appellant-Respondent,

- - - - -

Fordham University,
Third-Party Plaintiff-Appellant,

-against-

Turner Construction Company,
Third-Party Defendant-Respondent,

- - - - -

Turner Construction Company,
Second Third-Party Plaintiff-Respondent,

-against-

Olympic Plumbing & Heating Corporation,
Second Third-Party Defendant-Respondent.

Wade Clark Mulcahy, New York (Tamara T. Mosby for counsel), for appellant-respondent/appellant.

The Pagan Law Firm, P.C., New York (Tania M. Pagan of counsel), for respondent-appellant.

Malapero & Prisco, LLP, New York (Mary Beth Harmon of counsel), for Turner Construction Company, respondent.

Carlucci & Giardina, LLP, New York (Don David Carlucci of counsel), for Olympic Plumbing & Heating Corporation, respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered April 13, 2009, which, inter alia, denied defendant Fordham University's motion for summary judgment dismissing the complaint and plaintiff's motion for summary judgment on the

issue of liability, and granted third-party defendant Turner Construction Company's motion to dismiss the third-party complaint and second third-party defendant Olympic Plumbing & Heating Corporation's motion to dismiss the second third-party complaint, unanimously affirmed, without costs.

Plaintiff failed to establish prima facie that Fordham had notice of the alleged recurring hazardous condition of the floor near the sink and drainage system in the kitchen of a restaurant on Fordham's Bronx campus where she worked (*see Casado v OUB Houses Hous. Co. Inc.*, 59 AD3d 272 [2009]). She testified that she frequently saw water on the floor and on occasion complained about it to her (nonparty) employer, but offered no evidence that Fordham was notified of the condition. She also testified that she saw oil on the floor before she fell, but did not indicate how long it had been there or how it came to be there. Contrary to plaintiff's argument, it is not the issue of her comparative negligence, if any, that precludes summary judgment in her favor, but the fact that she failed to demonstrate conclusively any negligence on Fordham's part.

The basis for Fordham's motion was that since plaintiff was responsible for keeping the kitchen clean, Fordham was not responsible for the condition of the floor that posed the hazard (*see Brugnano v Merrill Lynch & Co.*, 216 AD2d 18 [1995], *lv to appeal dismissed in part, denied in part* 86 NY2d 880 [1995]).

However, it is undisputed that plaintiff was injured not while cleaning the floor but while engaged in food preparation.

The third-party and second third-party complaints were correctly dismissed since Turner established prima facie that the accident did not result from any negligence on its part in connection with the construction of the building and Fordham failed to raise issues of fact whether Turner properly installed the drain and whether it complied with its contractual obligations. The record reflects that the sink and drainage system were designed, inspected and approved by Fordham's architects and engineers and were found in compliance with the applicable codes by the New York City Health and Building Departments when the project was completed a year before the accident occurred. Fordham's expert's opinion was based on inspection and testing conducted approximately six years after the accident occurred and was therefore speculative (*see Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1995]). Moreover, the expert's opinion that the drain that was installed was not

the drain that was approved by Fordham was without factual support and was contradicted by witnesses who worked on the job.

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

ENTERED: JANUARY 28, 2010

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2059 Tran Han Ho, et al., Index 102956/03
Plaintiffs-Appellants,

-against-

Patrick J. Brackley,
Defendant-Respondent.

Polly Eustis, New York, for appellants.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Noah Nunberg of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 14, 2008, which, in an action for legal malpractice, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly refused to consider the sur reply affirmation of plaintiffs' legal expert presented to the court after the motion had been fully submitted (*see Foitl v G.A.F. Corp.*, 64 NY2d 911 [1985]). Absent an expert's affidavit, and given claims that, as pleaded, raise issues of professional standards and causation beyond the ordinary experience of persons who are not lawyers, summary judgment was properly granted (*see Ehlinger v Ruberti, Girvin & Ferlazzo*, 304 AD2d 925, 926 [2003]; *cf. Butler v Brown*, 180 AD2d 406, 407 [1992], *lv denied* 80 NY2d 751 [1992], citing *S&D Petroleum Co. v Tamsett*, 144 AD2d 849, 850

[1988]). We have considered plaintiffs' other arguments and find them to be without merit.

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

ENTERED: JANUARY 28, 2010

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2060 Halcyon Jets, Inc., Index 113854/09
Plaintiff-Respondent,

-against-

Jet One Group, Inc., et al.,
Defendants-Appellants.

Steven G. Legum, Mineola, for appellants.

Schrader & Schoenberg, LLP, New York (Bruce A. Schoenberg of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 16, 2009, which, insofar as appealed from, denied defendants' motion pursuant to CPLR 3211(a)(7) to dismiss plaintiff's cause of action for defamation, unanimously affirmed, without costs.

The parties are business competitors. After filing a federal court complaint setting forth fraud and RICO claims for various alleged wrongdoing by plaintiff, defendants disseminated what the parties characterize as a "press release" reporting the filing of their federal complaint and summarizing its allegations. Plaintiff then instituted this action for defamation, alleging that the press release was false and resulted in significant consequential business losses; defendants moved to dismiss on the basis of the protections afforded by New York Civil Rights Law § 74 to fair and accurate reports of judicial proceedings; and the motion court denied the motion on

the basis of *Williams v Williams* (23 NY2d 592 [1969]).

Williams created a judicial exception to the statutory protections if it appears that the public policy goals of the statute are being thwarted by the commencement of litigation intended as a device to protect a report thereof and thereby disseminate defamatory information (*see id.* at 599). Defendants' intention to use the federal action as such a device is a factual issue that is sufficiently pleaded and cannot be presently be decided. We note, as did the motion court, that the press release here, unlike that in *Williams*, was not the reportage of an independent publisher but rather was issued by defendants themselves. While not dispositive, defendants' self-publication tends to connect the litigation and report thereof more closely than in *Williams*, making this an *a fortiori* case, and undermining defendants' argument that because their press release, unlike that in *Williams*, was not directed at members of the parties' industry but was disseminated as a general news item, *Williams* does not apply as a matter of law.

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

ENTERED: JANUARY 28, 2010

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2061 Halina Avery, Index 109295/06
Plaintiff-Respondent,

-against-

Molly Caldwell,
Defendant-Appellant.

Gibson, Dunn & Crutcher LLP, New York (Colin R. Young of counsel), for appellant.

Kurland, Bonica & Associates, P.C., New York (Yetta G. Kurland of counsel), for respondent.

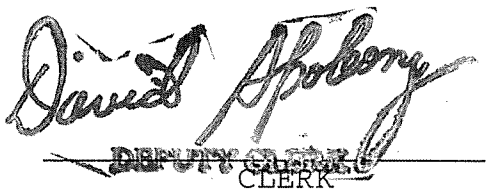
Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered February 29, 2008, which granted plaintiff's motion for summary judgment dismissing the third and eleventh counterclaims for statutory equitable distribution, spousal support and counsel fees, and denied defendant's cross motion for partial summary judgment on said counterclaims, unanimously affirmed, without costs.

The parties, who are of the same sex, had a long-term, significant relationship, but never married, so the Domestic Relations Law (*see* § 236[B][2]) is inapplicable. In *Hernandez v Robles* (7 NY3d 338 [2006]), the Court rejected the equal protection and due process arguments that defendant now asserts.

We note that the parties executed a Living Together Agreement, providing for distribution of certain assets.

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

ENTERED: JANUARY 28, 2010



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Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2062 RBP Ventures, Ltd., Index 103372/08
Plaintiff-Appellant,

-against-

Concord Electronics, Inc., etc.,
Defendant-Respondent.

Nesenoff & Miltenberg, LLP, New York (Philip A. Byler of counsel), for appellant.

Brown Rudnick LLP, New York (Diane M. Nardi of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 25, 2009, which, to the extent appealed from, as limited by the briefs, granted defendant's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff failed to preserve its argument that defendant breached the parties' contract by not providing the certificates required by sections 4.24 and 9.08 at the closing (*see e.g. Omansky v Whitacre*, 55 AD3d 373, 374 [2008]; *220-52 Assoc. v Edelman*, 18 AD3d 313, 315 [2005]).

Even if plaintiff believed that defendant had anticipatorily breached the contract, it was still required "to show that it was ready and able to perform its own contractual undertakings on the closing date, in order to secure specific performance"

(*Huntington Min. Holdings v Cottontail Plaza*, 60 NY2d 997, 998 [1983]). Instead of making such a showing, plaintiff rejected defendant's tender. Since plaintiff submitted "no documentation or other proof to substantiate that it had the funds necessary to purchase the property," it is not entitled to specific performance (*see Fridman v Kucher*, 34 AD3d 726, 728 [2006]).

The motion court properly granted summary judgment dismissing plaintiff's claim for fraud in the inducement. Even if one views the evidence in the light most favorable to plaintiff, it fails to raise a triable issue of fact as to whether defendant's representation in section 4.19(1) of the contract was false. The Phase II environmental report, which is dated October 2007, does not prove defendant's knowledge as of the contract date (June 1, 2006). Defendant submitted expert evidence that there were no environmental violations at the property; plaintiff did not submit any expert evidence saying there were such violations.

Since defendant - not plaintiff - was the prevailing party, the motion court properly dismissed plaintiff's claim for attorneys' fees and granted defendant's motion for summary judgment on its counterclaim for attorneys' fees (section 17.12 of the contract). The motion court also properly granted summary judgment on defendant's counterclaims for breach of contract and

retention of the down payment (*see e.g. Uzan v 845 UN Ltd. Partnership*, 10 AD3d 230 [2004]).

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

ENTERED: JANUARY 28, 2010

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2063-
2064 Index 108379/06

Cindy Yuen,
Plaintiff-Respondent,

-against-

Kwan Kam Cheng, et al.,
Defendants-Appellants.

Marie J. Scavetta, Forest Hills, for appellants.

Edmonds & Co., P.C., New York (Douglas D. Aronin of counsel), for respondent.

Appeal from order Supreme Court, New York County (Ira Gammerman, JHO), entered May 16, 2008, which, inter alia, granted plaintiff's motion for summary judgment on her claim for breach of contract, deemed an appeal from judgment (CPLR 5501[c]), same court and JHO, entered July 3, 2008, awarding plaintiff the total amount of $133,164.53, and, so considered, said judgment unanimously affirmed, with costs.

Defendants' argument on appeal that the judicial hearing officer lacked jurisdiction to hear the motion for summary judgment has been waived by their complete and active participation in the hearing and resolution of the motion without objection (*see e.g. Morton v Brookhaven Mem. Hosp.*, 308 AD2d 566 [2003]).

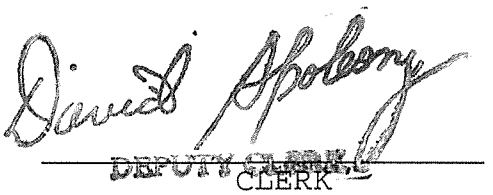
On the merits, the motion court correctly determined that plaintiff was entitled to the refund of her down payment. The

contract contained no time limit within which plaintiff had to cancel the purchase agreement, and therefore a reasonable time for cancellation thereunder is implied (*see e.g. Combs v Lewis*, 1 AD3d 236 [2003], *lv denied* 3 NY3d 610 [2004]). Plaintiff's notice of cancellation, based on the bank's denial of the mortgage application, was reasonable. Additionally, any breaches of the contract by plaintiff were unrelated to the reasons for the denial of the mortgage application (*see e.g. Gorgolione v Gillenson*, 47 AD3d 472 [2008]).

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

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

ENTERED: JANUARY 28, 2010



DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2066 The People of the State of New York, Ind. 4318/03
Respondent,

-against-

Jerome Reyes,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered December 13, 2006, convicting defendant, after a jury trial, of falsifying business records in the second degree, and sentencing him to a term of 3 years, with 200 hours of community service and a fine of $750, unanimously reversed, on the facts, and the indictment dismissed.

Defendant was a correction officer at the Rose M. Singer Center on Rikers Island. He was charged with, among other things, first- and third-degree rape and first- and second-degree falsifying business records, stemming from his alleged rape of an inmate in August 2003.

At the time of the alleged rape, defendant's assignment was to remain in a glass-enclosed control room overlooking two housing units. The falsifying business records counts were based on defendant's false logbook entry that at the time in question

he was helping to escort inmates to the mess hall. The People's theory was that defendant falsely indicated he was at the mess hall in order to give himself an alibi and conceal the fact that he was in the complainant's cell sexually assaulting her.

As pertinent here, a person is guilty of second-degree falsifying business records when, "with intent to defraud, he... [m]akes or causes a false entry in the business records of an enterprise" (Penal Law § 175.05[1]). A person is guilty of first-degree falsifying business records when "he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof" (Penal Law § 175.10). Hence, second-degree falsifying business records is a lesser included offense of the first-degree crime, with the sole difference between the two being that the higher crime requires a specific intent to commit or conceal another crime (*see People v Grates*, 66 AD3d 1517, 1519 [2009]).

We conclude that the court erred in submitting the second-degree crime to the jury over defendant's objection, because there was no reasonable view of the evidence that defendant committed the lesser offense but not the greater. As noted, the People's sole theory with respect to the two counts of falsifying business records was that defendant falsely indicated in the logbook that he was off-post during the inmates' mealtime, in

order to hide the fact that he had raped the complainant during that time frame. Given this exclusive theory and the evidence adduced at trial to support it, there would be no way for the jury to acquit defendant of first-degree falsifying business records — entailing a rejection of an intent to conceal a rape — but still convict him of the second-degree count. The People simply did not afford the jury any basis, other than intent to conceal the alleged rape, to support any finding of the generalized "intent to defraud" which is a requisite element of the second-degree crime. To the extent the People are now arguing there was a reasonable view that defendant's false logbook entry was only intended to conceal his absence, in violation of Department of Correction rules, from his post in the control room, no such theory was ever presented at trial. Moreover, such a theory makes no sense, because defendant would have had no reason to make a false admission that he had improperly left his assignment by going to the mess hall.

Under the facts, either defendant's intent was to conceal

the alleged rape, or he had no fraudulent intent at all. As such, only the higher count of first-degree falsifying business records should have been submitted to the jury.

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

ENTERED: JANUARY 28, 2010

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2067 5757 Associates, Index 602178/08
Plaintiff-Appellant,

-against-

William Blanford,
Defendant,

Yohannes Syoum,
Defendant-Respondent.

Louis Klieger, New York, for appellant.

Brianne E. Murphy, New York, for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered May 6, 2009, which denied plaintiff's motion for summary judgment and dismissed the complaint as against defendant Syoum, unanimously affirmed, with costs.

Even though plaintiff had moved for summary judgment, the motion court had authority to grant summary judgment to the nonmoving defendant (CPLR 3212[b]). The court properly dismissed the complaint on undisputed facts. The lease between the parties required plaintiff to give notice of a default to Syoum, the assignor of the lease. Plaintiff's failure to give Syoum such notice constituted a breach of its obligations under the lease

(*see Poole v Pellati*, 251 AD2d 480, 481-482 [1998], *lv dismissed* 92 NY2d 1002 [1998]).

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

ENTERED: JANUARY 28, 2010

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2068 The People of the State of New York, Ind. 674/05
Respondent,

-against-

Larry Gray, also known as Scott Bruce,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Hilary Hassler 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 (Laura Ward, J.), rendered on or about May 25, 2007,

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: JANUARY 28, 2010

David Sweeny

DEPUTY CLERK

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

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2069 The Education Resources Institute, Inc., Plaintiff-Respondent, Index 108057/08

-against-

Timothy Concannon, Defendant-Appellant.

Timothy M. Concannon, New York, appellant pro se.

Goldman Warshaw & Parrella, Warwick (Angela M. Morisco of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 23, 2008, which, to the extent appealed from, as limited by the briefs, granted plaintiff's motion to stay and/or dismiss defendant's counterclaims and affirmative defenses and denied defendant's cross motion to compel discovery and for leave to amend his answer, unanimously modified, on the law, to reinstate the affirmative defenses, clarify that the second counterclaim is stayed, grant defendant leave to amend his answer to assert the first counterclaim as an affirmative defense, and compel plaintiff to serve a bill of particulars and documentary discovery requested by defendant, and otherwise affirmed, without costs.

On April 7, 2008, plaintiff filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code. Thereafter, plaintiff commenced this action to recover amounts due pursuant

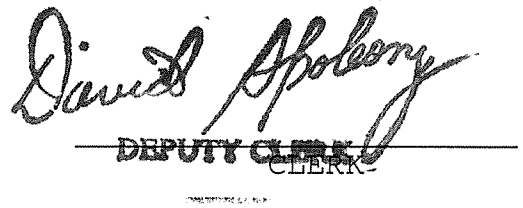
to promissory note(s) (the notes) executed by defendant to guarantee educational loans. Defendant's answer set forth affirmative defenses and two counterclaims.

As the automatic stay provision of Section 362(a) of the Bankruptcy Code only applies to proceedings "against" the debtor (*see Koolik v Markowitz*, 40 F3d 567 [2d Cir 1994]), the automatic stay does not preclude defendant from presenting a defense to the action (*see In re Merrick*, 175 BR 333 [9th Cir BAP 1994]; *Martin-Trigona v Champion Fed. Sav. & Loan Assn.*, 892 F2d 575 [7th Cir 1989]). In contrast, counterclaims seeking affirmative relief against a debtor implicate the automatic stay (*see Koolik v Markowitz*, 40 F3d at 568; *Drexel Burnham Lambert v Terex Corp.*, 184 AD2d 328 [1992], *lv dismissed* 80 NY2d 892 [1992]). Thus, the second counterclaim was properly stayed. However, as the first counterclaim merely sought a declaration that defendant was not in default and that any acceleration of the principal balance on the notes was invalid, the nature of the relief sought thereby was defensive and could have been pleaded as an affirmative defense, in which case it would not have been affected by the automatic stay. As such, given that leave to replead is to be "freely given upon such terms as may be just" (CPLR 3025[b]), defendant is entitled to amend the answer so as to convert the allegations contained in the first counterclaim to the form of an affirmative defense(s).

As plaintiff concedes, it is entitled to the adjudication of its claims (*see Vasile v Dean Witter Reynolds Inc.*, 20 F Supp 2d 465, 499 [ED NY 1998], *affd* 205 F3d 1327 [2nd Cir 2000]). Such adjudication necessarily includes defendant's right to discovery.

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

ENTERED: JANUARY 28, 2010



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Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2070-
2071-
2072 Index 602395/05

Sterling National Bank,
Plaintiff-Appellant,

-against-

Fashion Associates,
Defendant-Respondent.

Meyer, Suozzi, English & Klein, P.C., Garden City (Abraham B. Krieger of counsel), for appellant.

Thomas R. Kleinberger, PLLC, New York (Thomas R. Kleinberger of counsel), for respondent.

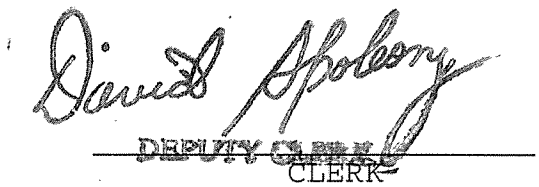
Judgment, Supreme Court, New York County (Louis Crespo, Special Referee), entered December 24, 2008, awarding defendant damages of $197,773.48, inclusive of interest, costs and disbursements, and bringing up for review an order (denominated judgment and order), Supreme Court, New York County (Leland DeGrasse, J.), entered May 6, 2008, which, inter alia, declared, upon the parties' respective motions for summary judgment, that plaintiff tenant was contractually obligated to restore the subject premises to a rentable condition upon termination of the parties' lease, and referred the issue of defendant landlord's damages to a special referee to hear and determine, unanimously affirmed, with costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the above judgment.

Th motion court correctly held that the parties' lease modification agreement pertained not to the lease at issue, but rather to a previously expired lease between the same parties for different premises, and that tenant was not relieved of its obligation, under article 12 of the lease, to remove its alterations, installations, additions and improvements from the premises and restore the premises to good order and condition. Tenant's claim that landlord's notice invoking article 12 was insufficiently specific as to the particular installations and alterations to be removed seeks to impose notice obligations that were not required by the lease. We also reject tenant's argument that Supreme Court's declaration that tenant was obligated to restore the premises to "a rentable condition" reformed the lease requirement to restore to "good order and condition." "A rentable condition," at least as minimally defined by the Special Referee ("the barest, but legal, necessities essential for letting the space"), does not involve a greater burden of restoration than the lease's well-understood "good order and condition" requirement (*see Akron Meats v 1418 Kitchens*, 160 AD2d 242, 244, *lv denied* 76 NY2d 704 [1990]), and we note that no damages were awarded landlord for the part of the restoration

costs it incurred in upgrading the space specially for the new tenant it had procured.

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

ENTERED: JANUARY 28, 2010



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Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2073 Mr. Robert Lyons D'Andrea, Index 117993/05
Plaintiff-Appellant,

-against-

Mr. Coleman Hutchins, C.S.W.,
Defendant-Respondent,

GH Life Management,
Defendant.

Robert L. D'Andrea, appellant pro se.

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

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 9, 2008, to the extent it denied the part of plaintiff's motion that sought to renew defendant's prior motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from that part of the order that denied plaintiff's motion for reargument, unanimously dismissed, as taken from a nonappealable paper.

Plaintiff offered no new evidence in support of the part of his motion that sought renewal (CPLR 2221[e][2]; *CR v Pleasantville Cottage School*, 302 AD2d 259 [2003]).

No appeal lies from the denial of a motion for reargument (*Parker v Marglin*, 56 AD3d 374, 374-375 [2008]).

Because he did not appeal from the order that granted

defendant's motion for summary judgment dismissing the complaint, plaintiff's arguments addressed to that determination are not properly before us (*Matter of Gonzalez v New York City Clerk*, 25 AD3d 389 [2006]).

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

ENTERED: JANUARY 28, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2074 William Mack, Index 6098/07
Plaintiff-Appellant,

-against-

New York Yankees Partnership,
Defendant-Respondent.

Hodges, Walsh & Slater, LLP, White Plains (Paul E. Svensson of counsel), for appellant.

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr. J.), entered March 5, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie entitlement to summary dismissal by submitting evidence that it had no notice of the condition on the stadium's escalator allegedly causing plaintiff's fall and that the escalator steps were reasonably safe for traversing, and plaintiff's opposition failed to create any material issue of fact. Although plaintiff alleged that water accumulated on the escalators each time it rained at Yankee Stadium, this raised no more than a general awareness that the escalators became wet during inclement weather, which was insufficient to establish constructive notice of the specific condition causing plaintiff's injury (*Solazzo v New York City Tr.*

Auth., 6 NY3d 734 [2005]). Plaintiff produced no evidence to raise a factual issue as to whether defendant had received such notice from any other source (*see Casado v OUB Houses Hous. Co. Inc.*, 59 AD3d 272 [2009]).

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

ENTERED: JANUARY 28, 2010

JAN 28 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
James M. Catterson
Karla Moskowitz
Rosalyn H. Richter, JJ.

866
Index 570367/05

x

Santorini Equities, Inc.,
Petitioner-Respondent,

-against-

Francisco Picarra, et al.,
Respondents-Appellants.

x

Respondents appeal from an order of the Appellate Term of the Supreme Court, First Department, entered on or about April 23, 2008, which affirmed a final judgment of the Civil Court, New York County (Ulysses B. Leverett, J.), entered February 7, 2007, awarding possession of the subject premises to petitioner-landlord in this proceeding seeking to terminate a tenancy based upon non-primary residency.

José Luis Torres, White Plains, for appellants.

Kossoff & Unger, New York (Michael David Nachtome of counsel), for respondent.

CATTERSON, J.

In this action, Santorini Equities, Inc. (hereinafter referred to as the "landlord") sought to terminate a tenancy based upon non-primary residency. After a nonjury trial, the court awarded possession of the subject premises to the landlord. The trial court held that the tenant did not occupy his apartment for at least 183 days in the year 1999 and possibly 2000. Nevertheless, for the reasons set forth below, we reverse and find that the court improperly awarded possession to the landlord.

The plain language of the Rent Stabilization Law and its calculation of the effective date of the term of an untimely renewal lease cannot be ignored. It is beyond question that in order to terminate a rent-stabilized tenancy based solely on the allegation of non-primary residence, the landlord is required to notify the tenant of its intention not to renew the lease within a very specific time period: not more than 150 days nor less than 90 days prior to the expiration of the lease. Rent Stabilization Code [9 NYCRR] § 2524.2(c)(2); §2524.4(c); Golub v. Frank, 65 N.Y.2d 900, 493 N.Y.S.2d 451, 483 N.E.2d 126 (1985). No proceeding to terminate a tenancy on the grounds of non-primary residence can even be commenced without a valid Golub notice. 83rd St. Assoc. v. Beldough, 118 A.D.2d 520, 500 N.Y.S. 2d 127

(1st Dept. 1986); Crow v. 83rd St. Assoc., 116 A.D.2d 1048, 496 N.Y.S.2d 1004 (1st Dept. 1986). The expiration date of the lease is obviously critical to any calculation of this statutory time frame.

The instant case requires a calculation based upon a late renewal lease provided to the tenant, appellant Francisco Picarra (hereinafter referred to as the "tenant"). The statute regarding notification of lease renewal in the rent-stabilization scheme provides in relevant part, as follows:

"§ 2523.5 Notice for renewal of lease and renewal procedure.

> "(a) On a form prescribed or a facsimile of such form approved by the DHCR, dated by the owner, every owner, other than an owner of hotel accommodations, shall notify the tenant named in the expiring lease not more than 150 days and not less than 90 days prior to the end of the tenant's lease term, by mail or personal delivery, of the expiration of the lease term, and offer to renew the lease or rental agreement at the legal regulated rent permitted for such renewal lease and otherwise on the same terms and conditions as the expiring lease. The owner shall give such tenant a period of 60 days from the date of service of such notice to accept the offer and renew such lease."

It is uncontroverted that the landlord failed to comply with 9 NYCRR 2523.5(a) and proffered an untimely renewal lease on August 15, 2000. Indeed, it was approximately 15 years too late.

Where, as here, the landlord has failed to comply with the regulations cited above, the regulations further provide that:

> "(c)(1) Where the owner fails to timely offer a renewal lease or rental agreement in accordance with subdivision (a) of this section, the one- or two-year lease term selected by the tenant shall commence at the tenant's option, either (i) on the date a renewal lease would have commenced had a timely offer been made, or *(ii) on the first rent payment date occurring no less than 90 days after the date that the owner does offer the lease to the tenant*" (Emphasis added)(9 NYCRR 2523.5(c)(i)).

Furthermore, under the regulation in effect at the time of the tenant's renewal in 2000, the date for commencement of the new lease term was at least 120 days (instead of the 90 days that applies now) after the landlord offered the renewal lease to the tenant. See former 9 NYCRR 2523.5.

The landlord's lease renewal notice dated August 15, 2000 had the lease renewal term already written in as commencing on "9/1/00," some 16 days (instead of 120 days) after the form was admittedly presented to and signed by the tenant. Because the lease renewal offer was late, the new lease term could not, by regulation, begin until 120 days after August 15, 2000, or on December 15, 2000.

The trial court was entirely correct in this respect. It correctly held that it was bound by precedent from this Court which considered this precise issue. In Hughes v. Lenox Hill Hosp. (226 A.D.2d 4, 651 N.Y.S.2d 418 (1st Dept. 1996), lv. denied, 90 N.Y.2d 829, 660 N.Y.S.2d 552, 683 N.E.2d 17 (1997)),

we considered the import of section 2524.2(c)(2) in the context of succession rights to a tenancy in a rent controlled apartment. That Hughes involved succession rights rather than the issue of non-primary residence is of no moment as the following passage demonstrates:

> "The one factual dispute arises from confusion regarding the term of the renewal lease in effect at the time of Mrs. Black's death. Defendant landlord correctly construes the renewal agreement she executed on December 5, 1987 as extending the lease term until March 31, 1990. The renewal agreement states that 'your new rent will commence 4/1/88' while reciting that the tenant's present 'lease will expire 11/30/87.' Contrary to Supreme Court's misapprehension, the end of the original lease term is not dispositive of the commencement of the renewal period. Where the landlord gives late notice of its offer to renew or otherwise delays in furnishing the tenant with the renewal agreement, the effective date of the renewal lease is extended (Sommer v. New York Conciliation and Appeals Bd., 116 A.D.2d 457, 459, 496 N.Y.S.2d 736). Here, the notice of lease renewal is dated December 1, 1987 and must, by regulation and case law (9 NYCRR § 2524.2[c][2]; Crow v. 83rd St. Assocs., 68 N.Y.2d 796, 506 N.Y.S. 858, 498 N.E.2d 422; Golub v. Frank, 65 N.Y.2d 900, 493 N.Y.S.2d 451, 483 N.E.2d 126), give the tenant at least 120 days' notice. Therefore, the renewal lease term cannot begin prior to April 1988, and defendant is correct in its assertion that its term extends from April 1, 1988 to March 31, 1990." 226 A.D.2d at 8-9, 651 N.Y.S.2d at 421-422.

The landlord in Hughes served the Golub notice in November 1989. We found such notice of the landlord's intention not to renew the lease timely because it was within the statutory time period of "150 [to] 120 days prior to expiration date of the

renewal lease on March 31, 1990." 226 A.D.2d at 16, 651 N.Y.S.2d at 426. We came to this conclusion on a plain reading of section 2524.2(c)(2) and in derogation of the date originally entered on the renewal lease by the landlord. The Appellate Term subsequently followed this precedent in KSB Broadway Assoc., LLC v. Sanders (191 Misc.2d 651, 652, 743 N.Y.S.2d 800, 801 (1st Dept. 2002), holding that, "the language of the Code is clear and unambiguous, and does not contemplate examination of 'the equities' in each case to determine the commencement date of the renewal lease."

Our decision in South Park Associates v. Toledano (259 A.D.2d 306, 686 N.Y.S.2d 433 (1st Dept 1999), lv. denied, 94 N.Y.2d 755, 701 N.Y.S.2d 712, 723 N.E.2d 567 (1999)), relied on by the landlord, does not alter the conclusion. South Park merely stands for the proposition enunciated therein, that a tenant's obligation to sign an untimely proffered renewal lease is controlled by section 2523.5(a) and (c). Furthermore, "§ 2523.5(a) specifically refers to subsection (c) as controlling, and subsection (c) gives the tenant the option in such cases to choose the commencement date of the lease, subject to the restrictions set forth." 259 A.D.2d at 308, 686 N.Y.S.2d at 434-435.

The landlord's view in this case improperly creates a third

option for commencement of the lease term not described in 9 NYCRR 2524.2(c)(2): namely, the date on the untimely renewal lease prepared by the landlord. When pressed at oral argument for the authority for this addition to the Rent Stabilization Code, counsel for the landlord offered none. Such view is not only bereft of authority but contrary to clear precedent from this Court.

Accordingly, the order of the Appellate Term of the Supreme Court, First Department, entered on or about April 23, 2008, which affirmed a final judgment of the Civil Court, New York County (Ulysses B. Leverett, J.), entered February 7, 2007, awarding possession of the subject premises to petitioner-landlord in this proceeding seeking to terminate a tenancy based upon non-primary residency, should be reversed, on the law, the holdover petition denied, and the proceeding dismissed, without costs.

All concur.

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

ENTERED: JANUARY 28, 2010

DEPUTY CLERK