SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 28, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6993-
6993A Joseph W. Sullivan,
Plaintiff-Respondent,

-against-

William F. Harnisch, et al.,
Defendants-Appellants.

Index 115092/08

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

The Law Offices of Daniel Felber, New York (Benjamin N. Leftin of counsel), for respondent.

Orders, Supreme Court, New York County (Richard B. Lowe, III, J.), entered May 5 and 6, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff Joseph W. Sullivan partial summary judgment as to his first cause of action, and denied defendants William F. Harnisch, Peconic Partners LLC and Peconic Asset Managers LLC's motion for summary judgment with respect to plaintiff's first and eighth causes of action, unanimously reversed, on the law, with costs, plaintiff's motion denied, and defendants' motion granted.

"It is well settled that a written agreement which is

complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Masters v 14-22 Leonard St. Assoc. LLC*, 11 AD3d 380, 381-382 [2004], citing *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470 [2004]). The substantially similar operating agreements governing the subject investment funds clearly and unambiguously provided that defendant Harnisch had the sole discretion to determine plaintiff's "Sharing Ratio," which would be used to determine his allocation of the bonus pool comprised of 75% of the funds' profits. There was no limitation on when Harnisch was permitted to set the sharing ratio, since the operating agreements provided that it was to be "determined from time to time."

Section 10(d) of the operating agreements, which states, in pertinent part, that "[i]f there is a change in any Member's Ownership Percentage or Sharing Ratio during any fiscal year or other period of the Company, subsequent allocations of Profits and Losses shall be adjusted in accordance with Section 706 of the [IRS] Code using the closing-of-the-books method," cannot, as the motion court found, be reasonably construed to bar all retroactive adjustments of the sharing ratio. Rather, that section merely sets forth how the LLC will allocate profits and losses in the event that a sharing ratio is altered during a

fiscal year and there is thus one ratio for the period of the fiscal year before the date of the change and another ratio for the period after that date. It cannot be read to prohibit Harnisch, after a fiscal year is complete, from first deciding retroactively what a member's sharing ratio will be for that fiscal year, a right that, again, is clear from the definition of the term sharing ratio.

We reject plaintiff's other various arguments. For example, plaintiff contends that because the operating agreements contemplated that the sharing ratio would be set forth on a schedule, it was "imbued with some permanence and stability." However, the discretion granted to Harnisch was clear, and there is no reason to believe that in requiring that the ratio be recorded the parties intended to dilute that discretion. Plaintiff further argues that if defendants' interpretation of the operating agreements is correct, it leaves him in the untenable position of having paid estimated taxes with an expectation that his income would be significantly higher than it turned out to be. However, that plaintiff detrimentally relied on an interpretation of the operating agreements that turns out to have been mistaken is no reason to rewrite the agreements.

Finally, plaintiff relies on extra-contractual evidence in support of his interpretation. This includes K-1s and a draft

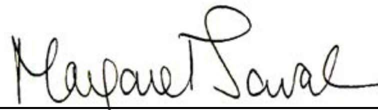
memo that plaintiff proclaims establish that he was entitled to a 15% sharing ratio. Even if these documents establish that plaintiff had a sharing ratio of 15% before Harnisch decided on how to distribute the bonus pool for the 2007 fiscal year, they shed no light whatsoever on whether Harnisch had the right to change the sharing ratio, even impetuously and on a retroactive basis. Indeed, the operating agreements allowed Harnisch to alter plaintiff's sharing ratio as he saw fit. Because plaintiff failed to protect himself in the operating agreements, his bonuses were subject to Harnisch's whimsy, and the court erred in supplying its own calculation of a sharing ratio for plaintiff (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]) instead of dismissing his breach of contract claim.

Plaintiff's breach of fiduciary duty claim should have been dismissed, since plaintiff has not even alleged a duty separate and apart from defendants' duties under the terms of the

operating agreements (*see Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176, 179-180 [2011]).

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7001 In re Lillian Roberts, etc., et al.,
Petitioners-Appellants, Index 109438/10

-against-

Gayle A. Gavin, etc., et al.,
Respondents-Respondents.

Mary J. O'Connell, New York (Dena Klein of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered March 2, 2011, which denied the petition and dismissed this proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In this article 78 proceeding, petitioner Lillian Roberts, Executive Director of District Council 37, AFSCME, AFL-CIO (DC 37) seeks to annul a determination of respondent Personnel Review Board of the New York City Health and Hospitals Corporation (PRB) which upheld a decision by respondent Health and Hospitals Corporation (HHC) to restructure its layoff units in response to the recent financial crisis. DC 37 is an amalgam of 55 local labor unions, representing approximately 125,000 workers, some of whom are employed by HHC. The remaining petitioners are various

local unions and their presidents.

Prior to 1991, HHC had a single corporation-wide layoff unit that included all of its facilities throughout New York City. In 1991, HHC created smaller layoff units based on individual hospitals and health care facilities within HHC. In 2009, in response to financial pressures faced by the City, HHC again restructured its layoff units. By memorandum dated April 21, 2009, HHC gave notice that it was amending its Personnel Rules and Regulations (the HHC Rules) to create eighteen additional, smaller, layoff units within the existing hospital and medical centers that had previously been designated as the layoff units.[1] HHC announced plans to either close or reduce staff at the clinics and programs designated as the new layoff units. Approximately 87 HHC employees were affected.

The proposed rule amendment became effective on May 3, 2009. In response, DC 37 sent a letter to HHC objecting to the creation of the new layoff units and requesting review of the amendment. HHC upheld the amendment, asserting that the creation of the layoff unit subdivisions was within its power under the HHC

[1] For example, prior to the 2009 amendment, the HHC rules designated North Central Bronx Hospital as a layoff unit. Following the amendment, three additional layoff units were created: Jacobi HIV-COBRA Case Management, NCB COBRA Case Management, and Tremont Communicare.

Rules. DC 37 filed an appeal with PRB, which has the authority to review personnel rules promulgated by HHC. On March 25, 2010, after a hearing, PRB denied DC 37's appeal.

By petition dated July 15, 2010, DC 37 and its affiliated local unions commenced the instant article 78 proceeding contending that PRB's decision to uphold HHC's amendment was arbitrary and capricious. Respondents cross-moved to dismiss the petition as time-barred and for failure to state a claim. In a judgment entered March 2, 2011, the motion court dismissed the proceeding, concluding that the petition was untimely since it was filed more than four months after the May 3, 2009 effective date of the amended rule (*see* CPLR 217[1]).

The motion court should not have dismissed the proceeding as time-barred. Petitioners did not obtain a "final and binding" determination within the meaning of CPLR 217(1) until PRB rendered its decision on March 25, 2010 (*see Walton v New York State Dept. Of Correctional Servs.*, 8 NY3d 186, 194-195 [2007]). Because petitioners commenced this proceeding within four months of PRB's determination, it was timely (*see* CPLR 217[1]). Indeed, on appeal, respondents expressly abandoned their argument that the petition is time-barred.

Although the motion court did not address that part of respondents' cross motion seeking dismissal for failure to state

a claim, the parties on appeal both have asked this Court to determine the merits of the petition based on the record below and the arguments set forth in the appellate briefs. CPLR 7804(g) provides, in relevant part, that "[w]hen the [article 78] proceeding comes before it, *whether by appeal or transfer*, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding" (emphasis added). Thus, we are empowered to resolve all issues in an article 78 proceeding regardless of the manner in which the proceeding has reached us (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:8 ["To preserve judicial economy, . . . 7804(g) has been interpreted as a direction to the Appellate Division to consider all of the questions that are presented in an Article 78 proceeding no matter how the case arrived at its doorstep," *citing 125 Bar Corp. v State Liq. Auth. of State of N.Y.*, 24 NY2d 174 (1969)]). Since the papers here are sufficient to permit review, and in light of the parties' specific request, we deem respondents' cross motion and appellate brief to be their answer, and proceed to address the merits of the petition (*see Matter of Ecumenical Task Force of the Niagara Frontier v Love Canal Area Revitalization Agency*, 179 AD2d 261, 266 [1992], *lv denied* 80 NY2d 758 [1992]).

It is well settled that judicial review of administrative determinations is limited to whether the determination was affected by an error of law, was arbitrary and capricious, or constituted an abuse of discretion (*Matter of Langham Mansions, LLC v New York State Div. of Hous. & Community Renewal*, 76 AD3d 855, 857 [2010]); CPLR 7803). An action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Where a rational basis exists for an agency's action, a court may not substitute its judgment for that of the agency, and the agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference (*Matter of Tockwotten Assoc., LLC v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [2004]).

Petitioners have failed to show that PRB's upholding HHC's creation of additional layoff units was arbitrary or capricious, or affected by an error of law. Section 2.2.1 of the HHC Rules gives HHC the authority to amend its own rules and regulations. And section 7.6.2, which governs layoff units, provides that HHC "may by rule designate an individual facility *or division of any facility* of [HHC] as separate units for layoff or demotion under

this rule" (emphasis added). Thus, the HHC Rules explicitly grant HHC the discretion to designate programs and clinics of HHC facilities as layoff units. And, as pointed out at the hearing, HHC acted consistent with its past practice of designating hospital programs as layoff units.

At the hearing, HHC explained that the closing of the clinic and hospital-based programs was necessary to provide continuity of patient care in light of the budget deficit crisis facing the City. And in its decision, PRB found that HHC's actions were predicated on budgetary deficits that required closure and/or consolidation of programs and clinics in order to minimize the impact on patient care. PRB's decision was consistent with its previous precedent that "a presumption of regularity exists in the establishment of separate layoff units, *until* it is demonstrated that the layoffs were not done in accordance with a rational plan" (PRB Decision No. 682 [May 27, 1992] [emphasis in original]).

Petitioners have failed to show how the creation of the new layoff units was irrational in the face of the budgetary crisis facing HHC (*see e.g. Matter of Aldazabal v Carey*, 44 NY2d 787, 788 [1978] [in the face of budgetary constraints, agency did not act arbitrarily or capriciously by abolishing positions and creating lower-grade positions]; *Matter of Civil Serv. Empls.*

Assn., Inc., Local 1000, AFSCME, AFL-CIO v Rockland County Bd. of Coop. Educ. Servs., 39 AD3d 641, 642 [2007] ["A public employer may abolish civil service positions for the purpose of economy or efficiency"]). Nor is there any merit to petitioners' claim that the creation of the new layoff units violates the seniority and displacement rights contained in sections 7.6.3 and 7.6.5 of the HHC Rules. Those sections merely outline the order of layoffs and the right of displacement within the same layoff unit, and do not prohibit HHC from creating additional layoff units, as specifically authorized by rule 7.6.2. We recognize that some longtime employees may lose their jobs, and newer employees may not. Although that is unfortunate, in the absence of any nonconclusory showing of bad faith, we will not disturb HHC's determination (*see Matter of Aldazabal*, 44 NY2d at 788).

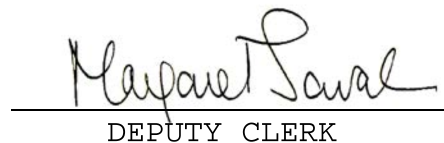
Although there may have been a different way for HHC to structure its layoff plan, we cannot say that the agency acted in an arbitrary or capricious manner (*see Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 79 AD3d 630, 635-636 [2009] ["a court's opinion that a particular outcome is not fair or is not in the interests of justice is not sufficient to overcome the deference to be afforded an agency acting rationally within its area of expertise"], *affd* 18 NY3d 446 [2012]). We decline to substitute our judgment as to how HHC

should implement personnel decisions when determining how best to provide health care to the people of New York City (*see Matter of Merson v McNally*, 90 NY2d 742, 752 [1997] [it is not role of a court to weigh the desirability of an agency's action or to substitute its judgment for that of the agency]). To do so would be an unwarranted intrusion into the managerial prerogative of HHC, which acted within its rule-making authority.

We have considered petitioners' remaining contentions, including their conclusory claim of age discrimination, and find them unavailing.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7099 Jerome Ackerman, et al., Index 340006/08
Plaintiffs-Appellants,

-against-

D'Agostino Supermarkets, Inc.,
Defendant-Respondent,

Metropolitan Security Storage Limited,
et al.,
Defendants.

Salamon, Gruber, Blaymore & Strenger, P.C., Roslyn Heights
(Sanford Strenger of counsel), for appellants.

Torino & Bernstein, P.C., Mineola (Charles R. Strugatz of
counsel), for respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered July 30, 2010, which, in an action seeking damages arising out of a warehouse fire, denied plaintiffs-owners' motion for summary judgment on their first cause of action for breach of the parties' lease against defendant-tenant D'Agostino Supermarkets, Inc., unanimously affirmed, without costs.

In their first cause of action, plaintiffs alleged that D'Agostino breached the parties' lease by failing to maintain the fire alarm and sprinkler systems, and that such failure resulted in damages to the subject premises. Contrary to the motion court's finding, plaintiffs' nondelegable duties with regard to the premises did not preclude the grant of summary judgment,

because D'Agostino contractually assumed full responsibility for maintaining the sprinkler system (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 687-688 [1990]. Nevertheless, we affirm the motion court's denial of summary judgment for reasons other than those stated by the motion court. We disagree with the motion court's finding that there is an issue of fact as to whether the sprinkler was properly functioning on the date of the fire. D'Agostino entered into a contract with Allstate to perform sprinkler inspection services on a monthly basis as per local Fire Department codes. A fire occurred at the premises on June 6, 2005 and the Fire Department report shows that the sprinkler valve was turned off. The record shows that Allstate's inspector last gained access to the premises in November 2004, when he found the sprinkler system shut off. Between January 2003 and June 2005, Allstate was only able to gain access to the premises on six of the many occasions it attempted to do so. On each of those six occasions, the sprinkler system was shut off.

D'Agostino argues that the fire inspector testified that he found the valve to be in a closed position the day *after* the fire, and that there is no proof in the record that the valve was closed before the fire. However, given the record evidence that the valve was consistently closed during the inspections and was closed the day after the fire, contrasted with the total lack of

proof by D'Agostino that the sprinkler system was operational on the date of the fire, D'Agostino's speculation that the valve may have been open the day of the fire and turned off either by the firefighters or other individuals, is insufficient to raise a triable issue of fact as to whether the sprinkler valve was closed on the day of the fire.

Yet, plaintiffs should be denied summary judgment on the basis of their failure to offer any proof as to causation of damages -- i.e., that an operative sprinkler system would have put out the fire or mitigated the fire damage (*see generally Wakeman v Wheeler & Wilson Mfg. Co.,* 101 NY 205, 209 [1886] ["One who violates his contract with another is liable for all the direct and proximate damages which may result from the violation."]; *see also Stratus Servs. Group, Inc. v Kash 'N Gold, Ltd.*, 90 AD3d 641 [2011]); *Jorgensen v Century 21 Real Estate Corp.*, 217 AD2d 533 [1995]; 2 N.Y. PJI 4:20 [plaintiff must

establish a causal relationship between breach of contract and damages]).[1]

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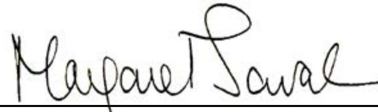

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[1]We note that while an expert's affidavit stating that an operational sprinkler system would have contained the fire was submitted by The Charter Oak Fire Insurance Company, plaintiff in Action No. 4, in opposition to a separate motion by Allstate Sprinkler for summary judgment dismissing all claims against it in all six actions, that affidavit was not tendered by plaintiff nor incorporated by reference in the present motion, and was not addressed by either the parties or the motion court (the separate summary judgment motions were not consolidated for disposition and were decided on different dates). Thus, the expert's affidavit is not part of the record for this appeal by the Ackerman plaintiffs and has not been considered.

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7100 All American Moving and Storage, Inc., et al., Plaintiffs,

-against-

W. Reilly Andrews, et al. Defendants.

- - - - -

[And Other Actions]

- - - - -

Jerome Ackerman, et al., Plaintiffs-Respondents,

-against-

D'Agostino Supermarkets, Inc., et al., Defendants-Respondents,

Allstate Sprinkler Corp., Defendant-Appellant,

New York Marine and General Insurance Company, Defendant-Respondent.

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303185/08
86167/06
86168/06
67761/07
308925/08

Armienti DeBellis Guglielmo & Rhoden LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Salamon, Gruber, Blaymore & Strenger, P.C., Roslyn Heights (Sanford Strenger of counsel), for Ackerman respondents.

Torino & Bernstein, P.C., Mineola (Charles R. Strugatz of counsel), for D'Agostino Supermarkets, Inc., respondent.

Lester Schwab Katz & Dwyer LLP, New York (Steven B. Prystowsky of counsel), for Metropolitan Security Storage, Ltd., respondent.

Speyer & Perlberg, LLP, Melville (Marie E. Garelle of counsel), for New York Marine & General Insurance Company, respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.),

entered June 17, 2010, which, insofar as appealed from as limited by the briefs, denied defendant Allstate Sprinkler Corp.'s motion for summary judgment dismissing the claims and cross claims asserted against it in action No. 3 and for conditional summary judgment on its cross claim for contractual indemnification against defendant D'Agostino Supermarkets, Inc., in action No. 3, unanimously affirmed, without costs.

In this action to recover damages arising out of a warehouse fire, Allstate failed to establish as a matter of law that it did not owe the non-contracting respondents a duty of care or breach any duty owed. The record shows that Allstate owed plaintiffs - owners of the property - a duty of care, as plaintiffs were third-party beneficiaries to the sprinkler inspection services contract between Allstate and defendant-tenant D'Agostino. Indeed, D'Agostino entered into the contract to fulfill its duty to maintain the sprinklers pursuant to its lease with plaintiffs, who were required by law to have the sprinkler systems inspected at least once a month by a person holding a certificate of fitness (*see* former Administrative Code of the City of New York, § 27-4265). Thus, D'Agostino clearly intended to benefit plaintiffs by engaging Allstate to inspect the sprinklers (*see MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313 [1992] ["the intention which controls in determining whether a stranger to a

contract qualifies as an intended third-party beneficiary is that of the promisee"], and the benefit to plaintiffs was "sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the non-contracting parties] if the benefit is lost" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]).

Furthermore, while "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), there are three exceptions to this general rule pursuant to which a party may be said to have assumed a duty of care to third parties (*id.* at 140). One of those exceptions is where the third party has detrimentally relied on the continued performance of the contracting party's duties (*id.*). Given Allstate's admitted failure to inspect the sprinkler system for months before the fire, despite its contractual obligation to perform monthly inspections, and evidence of its failure to report to the owner and the Fire Department that it had found the sprinkler system shut off on several inspections, we agree with the motion court that issues of fact exist as to whether plaintiffs and defendant-subtenant Metropolitan detrimentally relied on Allstate's continued performance of its contractual duties.

However, we find that the other two *Espinal* exceptions do not apply. Any failure by Allstate to inspect the sprinklers did not launch a force or instrument of harm (*see Church v Callanan Indust.*, 99 NY2d 104, 112 [2002] [incomplete performance of contractual duty to install guiderail did nothing more than neglect to make highway safer, as opposed to making it less safe]; *see also H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928] ["[t]he query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good"]; *compare Powell v HIS Contrs., Inc.*, 75 AD3d 463 [2010] [where evidence indicated contractor had negligently installed a new sidewalk, issue of fact as to whether it created unreasonable risk of harm or increased that risk], with *Ocampo v Abetta Boiler & Welding Serv., Inc.*, 33 AD3d 332 [2006] [where evidence presented that contractor negligently repaired machine that was put back into operation, issue of fact existed as to whether contractor launched a force or instrument of harm]). Nor was the sprinkler inspection contract the type of comprehensive and exclusive service agreement found by the Court of Appeals in *Palka v Servicemaster Mgt. Servs. Corp*. (83 NY 2d 579, 588 [1994]) that would create a duty of care to noncontracting third parties (*see*

Fairclough v All Serv. Equip. Corp., 50 AD3d 576, 578 [2008]; *Gamarra v Top Banana, LLC*, 50 AD3d 425 [2008]).

Regarding the matter of Allstate's alleged negligence, issues of fact include whether Allstate was able to gain access to the premises to inspect the sprinkler system; whether it breached its duty to inspect the system and whether any breach of Allstate's regulatory and contractual duties (including any failure to report to the owners, D'Agostino, and/or the Fire Department that the sprinkler valve was found to be shut off on several inspections) was a proximate cause of the damage.

Given that triable issues of fact exist as to Allstate's negligence, it is not entitled to summary judgment on its cross claim for contractual indemnification from D'Agostino (*see Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 534 [2009]).

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

ENTERED: JUNE 28, 2012

DEPUTY CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7390 150 Nassau Associates LLC, Index 601879/04
Plaintiff-Appellant-Respondent,

-against-

RC Dolner LLC,
Defendant-Respondent-Appellant,

Kensington-Nassau, LLC,
Defendant-Appellant.

Snitow Kanfer Holtzer & Millus, LLP, New York (Franklyn H. Snitow and Virginia K. Trunkes of counsel), appellant-respondent.

Foley & Lardner LLP, New York (Todd C. Norbitz and Anne B. Sekel of counsel), for respondent-appellant and appellant.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered February 15, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff 150 Nassau Associates LLC's motion to compel discovery, denied the motions made by defendants RC Dolner LLC and Kensington-Nassau, LLC to compel the production of certain income tax records and to impose discovery sanctions against Nassau, unanimously modified, on the law, to the extent of granting the motion to compel production of tax records of certain entities insofar as the records relate to the entities' interests in the property located at 150 Nassau Street, New York, New York, and otherwise affirmed, without costs.

On this record, where the only documents responsive to Nassau’s document requests have been produced multiple times, the final time in a searchable PDF format, and where Nassau did not request documents in the “native” file format, read and written by Nassau’s spreadsheet and accounting software, until its reply on its own motion to compel, it cannot be said that it was an abuse of the court’s discretion to deny reproduction of the documents in their native format (*Miracle Sound v New York Prop. Ins. Underwriting Assn.*, 169 AD2d 468, 469 [1991]; *Autotech Tech. Ltd. Partnership v Automationdirect.com, Inc.*, 248 FRD 556, 559-560 [2008]). This is especially true because Nassau has admitted that the only benefit of requiring RC Dolner to produce these documents again is Nassau’s convenience.

Defendants have, however, proven entitlement to the tax records of those entities that have an ownership interest in the subject property. Defendants have adequately shown that they have no other way of obtaining the profit information necessary to prove one of their claims, and the motion court erred in denying access to the records, despite recognizing that defendants’ argument had “traction,” and despite there being no substantive opposition from plaintiff.

Finally, the denial of defendants’ motion for sanctions was not improper. Such an award is discretionary (*Orner v Mount*

Sinai Hosp., 305 AD2d 307, 311 [2003]), and we cannot say that, on a record where accusations of discovery abuse abound and neither party appears to have been fully cooperative, the court's denial of sanctions was improvident (*id.*).

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

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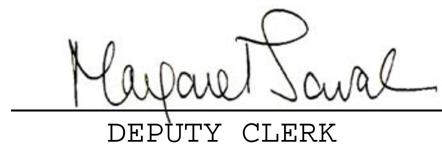
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

7836-
7837 The People of the State of New York, Ind. 5779/08
Respondent,

-against-

Javone Major,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Caleb Kruckenberg of counsel), for respondent.

Appeal from judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 1, 2009, convicting defendant, after a jury trial, of criminal possession of marijuana in the third degree, and sentencing him, as a second drug offender previously convicted of a violent felony, to a term of two years, held in abeyance, and the matter remitted for a suppression hearing. Order, same court and Justice, entered on or about May 18, 2011, which denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously affirmed.

The court was correct in summarily denying the CPL 440.10 motion since sufficient facts appear on the record on the direct appeal to permit our review (CPL 440.10[2][b]). However, the record on the direct appeal supports defendant's contention that

he was deprived of the effective assistance of counsel. The actions of the officers in stopping defendant and seizing the bag he had been carrying were of questionable propriety, and raised a colorable basis for suppression (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Under the circumstances, defense counsel's admitted failure to timely file a suppression motion, or to provide good cause or strategic reasons for such failure, constituted ineffective assistance (*see People v Vega*, 276 AD2d 414, 414 [2000]; *People v Ferguson*, 114 AD2d 226, 230 [1986]). Accordingly, we hold the appeal in abeyance and remand the matter for a suppression hearing (*id*.).

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

ENTERED: JUNE 28, 2012

DEPUTY CLERK

Friedman, J.P., Renwick, DeGrasse, Richter, JJ.

8029 The People of the State of New York, Ind. 41/10
Respondent,

-against-

Franklin Troche,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carl S. Kaplan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered July 21, 2010, as amended November 3, 2010, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to an aggregate term of six years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that defendant stabbed the victim with a knife or other sharp object.

The court properly exercised its discretion when it struck testimony that it found to be inadmissible and gave curative instructions, but denied defendant's request for a mistrial (*see*

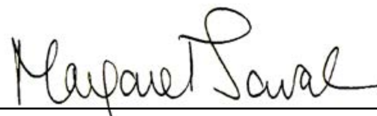
People v Santiago, 52 NY2d 865 [1981]). Defendant's objection was belated (*see People v Ortiz*, 54 NY2d 288, 292 n 3 [1981]; *see also People v Narayan*, 54 NY2d 106, 114 [1981]), in that it was made after the prosecutor had already asked several questions about the allegedly inadmissible matter. The drastic remedy of a mistrial was unnecessary, because the stricken testimony was not unduly prejudicial and the curative instructions, which the jury is presumed to have followed, were sufficient to prevent any prejudice. Defendant's remaining claims regarding this issue, including his challenges to the content and timing of the curative instructions, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Defendant's generalized objections failed to preserve his challenges to the prosecutor's summation (*see e.g. People v Harris*, 98 NY2d 452, 492 [2002]), and we decline to review them

in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8030- Index 28497/03
8031 Masoud Micky,
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (Julia Rodriguez, J.), entered April 13, 2011, after a jury trial, in plaintiff's favor, unanimously modified, on the facts, without costs, to vacate the awards for past and future pain and suffering and to direct a new trial on those issues, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to a reduction of the award for past pain and suffering from $250,000 to $100,000 and future pain and suffering from $500,000 to $150,000 and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered December 21, 2010, which denied defendants' post-trial motion, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The issue of proximate cause was correctly submitted to the jury (*see Hecker v New York City Hous. Auth.*, 245 AD2d 131 [1997]). The jury's resolution of any credibility issue raised by plaintiff's inconsistent explanations for his fall is entitled to deference (*see Haiyan Lu v Spinelli*, 44 AD3d 546 [2007], *lv denied* 10 NY3d 716 [2008]).

The issue of prior written notice of the defective condition of the sidewalk, pursuant to Administrative Code of City of NY § 7-201(c)(2), was also correctly submitted to the jury (*see Patterson v City of New York*, 1 AD3d 139 [2003]; *Vasquez v City of New York*, 298 AD2d 187 [2002]).

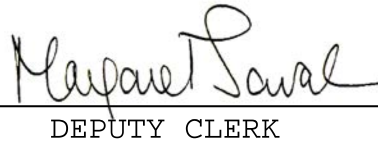
We see no basis for disturbing the jury's finding that plaintiff was not negligent.

We note that the City not only failed to offer expert testimony as to damages or to contradict plaintiff's evidence as to damages, but also conceded the severity of plaintiff's injuries and invited the jurors to feel his pain, an invitation they apparently accepted. Nonetheless, we find that the award for past and future pain and suffering deviates materially from reasonable compensation to the extent indicated (*see* CPLR 5501[c]; *compare Rivera v New York City Tr. Auth.*, 92 AD3d 516

[2012]; *Alicea v City of New York*, 85 AD3d 585 [2011]; *Hopkins v New York City Tr. Auth.*, 82 AD3d 446 [2011]; *Ruiz v New York City Tr. Auth.*, 44 AD3d 331 [2007]).

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8032 CSFB 2004-C3 Bronx Apts LLC, Index 380163/11
Plaintiff-Appellant-Respondent,

-against-

Sinckler, Inc.,
Defendant-Respondent-Appellant,

Baron Associates LLC, et al.,
Defendants.

K&L Gates LLP, New York (Eli R. Mattioli of counsel), for appellant-respondent.

Law Office of Paul R. Kenney, LLC, New York (Jill B. Savedoff of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about February 16, 2012, which, insofar as appealed from, denied plaintiff's motion for summary judgment foreclosing a commercial mortgage and dismissing defendant Sinckler, Inc.'s defenses and affirmative defenses, granted the part of Sinckler's motion that sought to vacate a prior order appointing a receiver and denied the part that sought summary judgment dismissing the complaint on the ground of standing, unanimously modified, on the law, to grant plaintiff's motion, and to deny the part of Sinckler's motion that sought to vacate the order appointing a receiver, and otherwise affirmed, without costs.

The record establishes that plaintiff was validly assigned

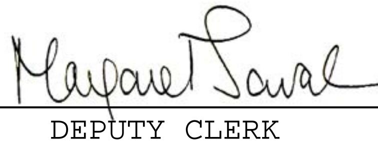
the note and mortgage that is the subject of this foreclosure action (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 280-281 [2011]). Although Sinckler asserted a number of defenses and affirmative defenses, its entire argument is premised upon the contention that plaintiff lacks standing to bring this action because the assignment was invalid. Thus, since this argument lacks merit, plaintiff should have been granted summary judgment on its foreclosure claim. We note that Sinckler admits in its papers on appeal that if plaintiff has standing, then there are no triable issues of fact.

The mortgage agreement provides for the appointment of a receiver, in an action to foreclose the mortgage, "as a matter of strict right and without notice to Mortgagor and without regard to the adequacy of the Property for the repayment of the indebtedness secured hereby." Thus, plaintiff was entitled, "without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and

profits of the premises covered by the mortgage" (Real Property Law § 254[10]; *see Naar v Litwak & Co.*, 260 AD2d 613 [1999]). Under the circumstances, vacatur of the order appointing the receiver was not warranted (*see Naar*, 260 AD2d at 614-615).

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8034-
8035-
8036-
8037-
8038-
8039-
8040

Index 601853/09
601951/09

In re Lichtenstein Loan Guaranty Litigation

- - - - -

Bank of America, N.A., et al.,
Plaintiffs-Respondents,

-against-

Lightstone Holdings, LLC, et al.,
Defendants-Appellants.

- - - - -

Line Trust Corporation Ltd., et al.,
Plaintiffs-Respondents,

-against-

David Lichtenstein, et al.,
Defendants-Appellants,

Wells Fargo Bank, N.A., etc., et al.,
Defendants.

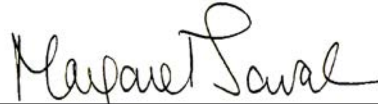
____

Appeals having been taken to this Court by the above-named appellants from an amended order and judgment (one paper) of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered October 27, 2011, and from orders, same court and Justice, entered on or about September 29, 2011 and September 30, 2011,

And said appeals 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 May 25, 2012 and June 7, 2012,

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8041-
8042 The People of the State of New York, Ind. 8586/99
Respondent,

-against-

Timothy Swinton,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 27, 2009, resentencing defendant to concurrent terms of nine years, to be followed by five years' postrelease supervision, unanimously affirmed. Appeal from order, same court and Justice, entered on or about April 21, 2010, which denied defendant's CPL 440.20 motion to set aside the resentence, unanimously dismissed as academic.

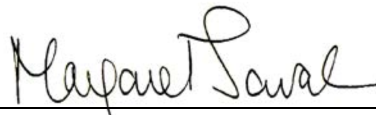
The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). Defendant was resentenced prior to the maximum expiration date of his

single aggregated sentence (*see People v Wilson*, 92 AD3d 512 [2012]).

We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8043 In re Princess Ashley C. and Another,

Children Under Eighteen
Years of Age, etc.,

Florida S. C.,
Respondent-Appellant,

Administration for Children's Services,
et al.,
Petitioners-Respondents.

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Graham Morrison of counsel), for Administration for Children's Services, respondent.

Israel P. Inyama, New York, for Carol E., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the children.

Order of disposition and custody, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about June 27, 2011, which, upon a fact-finding determination that the mother neglected the subject children, granted the custody petition of their paternal aunt and placed them in her custody, unanimously affirmed, without costs.

"A preponderance of the evidence supports Family Court's finding that the [children]'s physical, mental or emotional condition was in imminent danger of becoming impaired as a result

of the mother's long-standing history of mental illness and resistance to treatment" (*Matter of Naomi S. [Hadar S.]*, 87 AD3d 936, 937 [2011], *lv denied* 18 NY3d 804 [2012]; *see also* Family Ct Act §§ 1046 [b][I], 1012 [f][i][B]). The mother suffers from long-standing severe mental illness, which is characterized by major depression, anxiety and trichotillomania, an anxiety disorder that manifested in her pulling out her hair and peeling off the skin on her feet. The record shows her lack of insight into the effect of her illness on the subject children, as well as deterioration of her condition due to noncompliance with treatment (*see Matter of Christopher R. [Lecrieg B.B.]*, 78 AD3d 586, 586-587 [2010]). Her mental illness not only created an imminent risk of harm to the children, but resulted in actual impairment, as the condition caused her to be unable to provide them with adequate supervision and to permit them to have excessive school absences. In addition, her condition often rendered her unable to provide the children with adequate food (*see e.g. Matter of Aliyah B. [Denise J.]*, 87 AD3d 943, 943 [2011]; *Matter of Lavountae A.*, 57 AD3d 1382, 1382 [2008], *affd* 12 NY3d 832 [2009]).

The court exercised sound discretion in denying her request to assign an independent social worker to interview the children to explore reinstating contact between her and the children. The

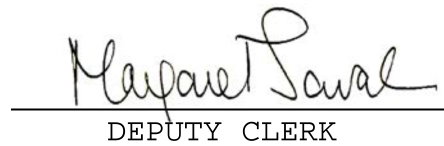
children, on several occasions, had previously been interviewed by therapists, social workers, caseworkers, and their attorney as to their feelings regarding having contact with their parents. Moreover, throughout the entirety of the proceedings, the children's stance on having no contact with the mother remained unaltered (*see e.g. Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 41 [2010]).

Finally, the mother did not object, on the grounds of the court's purported inability to properly analyze the evidence, to the court's holding a consolidated custody and dispositional hearing, thus, this argument is unpreserved on appeal (*see Matter of Crystal P. [Andrea L.]*, 93 AD3d 576 [2012]). In any event, the court properly considered first, a disposition with regard to the neglect case and then, petitioner Carol E.'s custody petition, and determined that awarding custody to her was in the best interests of the children, given the evidence that they were

thriving and wished to remain in her care (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]).

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8045-
8045A Gard Entertainment, Inc., Index 651782/10
Plaintiff-Respondent-Appellant,

-against-

Country in New York, LLC,
Defendant,

Adam R. Block,
Defendant-Appellant-Respondent.

Porzio Bromberg & Newman, PC, New York (Gary M. Fellner of counsel), for appellant-respondent.

Eva H. Posman, New York, for respondent-appellant.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 29, 2011, awarding plaintiff the total amount of $391,578.92 as against defendant Adam R. Block and dismissing the complaint as against defendant Country in New York, LLC (Country) pursuant to an order, same court and Justice, entered May 3, 2011, which, inter alia, granted plaintiff's motion for summary judgment in lieu of complaint as against Block, denied plaintiff's motion as against Country, and dismissed the complaint as against Country, unanimously affirmed, without costs. Appeals from the above order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

"[A] guarantee agreement is separate and distinct from the

contract between lender and borrower" (*Kinville v Jarvis Real Estate Holdings, LLC*, 38 AD3d 1225, 1227 [2007] [internal quotation marks omitted]). "While ordinarily the liability of a guarantor will not exceed in scope that of his principal, the guarantee is a separate undertaking and may impose lesser or even greater collateral responsibility on the guarantor" (*American Trading Co. v Fish*, 42 NY2d 20, 26 [1977]). Where a guarantee specifically imposes liability on the guarantor, it will be enforceable even though the principal escapes liability *(see Bank of N. Am. v Shapiro*, 31 AD2d 465, 466 [1969]).

Here, plaintiff established its entitlement to summary judgment as against Block by demonstrating proof of the guarantee he made in connection with a note executed by Country and his failure to make payments called for by its terms. The burden shifted to Block to come forward with evidentiary proof sufficient to raise an issue as to an affirmative defense to the payment on the guarantee (*see e.g. Gateway State Bank v Shangri-La Private Club for Women*, 113 AD2d 791, 792 [1985], *affd* 67 NY2d 627 [1986]; *Kornfeld v NRX Tech.*, 93 AD2d 772, 773 [1983], *affd* 62 NY2d 686 [1984]). Contrary to Block's contention, the guarantee he signed unconditionally guaranteed the payment of amounts due pursuant to the note signed by Country on the third anniversary date of the note, should Country fail to

do so (*see Standard Brands v Straile*, 23 AD2d 363 [1965]).

Plaintiff, however, failed to establish its entitlement to summary judgment as to Country. The note states that it is subordinated to senior indebtedness as outlined therein and the record demonstrates that the conditions precedent for payment by Country have not been met (*see e.g. Morse, Zelnick, Rose & Lander, LLP v Ronnybrook Farm Dairy, Inc.*, 92 AD3d 579 [2012]).

Point I of plaintiff's reply brief contains an impermissible surreply and those arguments have been stricken.

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

ENTERED: JUNE 28, 2012

DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8046 Walnut Place LLC, et al., Index 650497/11
Plaintiffs-Appellants,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants-Respondents,

The Bank of New York Mellon, etc.,
Nominal Defendant.

Grais & Ellsworth LLP, New York (David J. Grais of counsel), for appellants.

Goodwin Procter LLP, New York (Mark Holland of counsel), for Countrywide Home Loans, Inc., Park Granada LLC, Park Monaco Inc. and Park Sienna LLC., respondents.

Wachtell, Lipton, Rosen & Katz, New York (Theodore N. Mirvis of counsel), for Bank of America Corporation, respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about March 29, 2012, which, in this action alleging breach of representations and warranties made by defendant sellers in pooling and service agreements (PSAs), granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

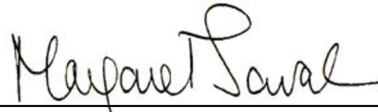
The court correctly held that plaintiff certificate holders' action is barred by the "no-action" clause in the PSAs, which plainly limits certificate holders' right to sue to an "Event of Default," which, under section 7.01 of the PSAs, involves only

the Master Servicer (*cf. Sterling Fed. Bank, F.S.B. v DLJ Mortg. Capital, Inc.*, 2010 WL 3324705, *4, 2010 US Dist LEXIS 85771, *14 [ND Ill, Aug. 20, 2010, No. 09-C-6904]). Contrary to plaintiffs' contention, section 2.03 of the PSAs does not render the no-action clause ambiguous, nor does it permit plaintiffs' to bring this action. That section merely provides for a remedy in the event of a breach, and does not reference or contemplate actions by certificate holders to achieve that remedy. Plaintiffs' argument that the "Event of Default" provision does not apply in this case is unavailing. Plaintiffs' interpretation of the "no-action" clause would improperly excise the "Event of Default" provision and distort the plain meaning of the clause (*see Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Nor are plaintiffs excused from complying with the "Event of Default" provision because of the alleged impossibility of showing such an event. The "prevention/impossibility" doctrine, upon which plaintiffs' argument relies, only applies, where, unlike here, nonperformance of a condition precedent was caused by the party insisting that the condition be satisfied (*see Ellenberg Morgan Corp. v Hard Rock Café Assoc.*, 116 AD2d 266, 271 [1986]).

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

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8047-
8048 &
M-924 &
M-964 &
M-1502

Index 107142/04
590214/08

William C. Samuels,
Plaintiff-Appellant,

-against-

Consolidated Edison Company of
New York, Inc.,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

Roadway Contracting, Inc.,
Third-Party Defendant-Respondent.

- - - - -

Consolidated Edison Company of
New York, Inc.,
Second Third-Party Plaintiff,

-against-

Alex R. Fradkoff, etc., et al.,
Second Third-Party Defendants,

Theodore Wagner Plumbing and
Heating Corp.,
Second Third-Party
Defendant-Respondent.

Zetlin & De Chiara, LLP, New York (James H. Rowland of counsel), for appellant.

Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, Inc., respondent.

Mauro Lilling Naparty LLP, Great Neck (Katherine Herr Solomon of counsel), for Roadway Contracting, Inc., respondent.

Faust Goetz Schenker & Blee, LLP, New York (Christopher B. Kinzel of counsel), for Theodore Wagner Plumbing and Heating Corp., respondent.

Order, Supreme Court, New York County (Judith Gische, J.), entered June 11, 2010, which granted defendant Consolidated Edison Company of New York's (Con Ed) oral application to dismiss plaintiff's action against it, unanimously reversed, on the law, without costs, and the application denied. Appeal from the so-ordered transcript, same court and Justice, entered September 7, 2010, unanimously dismissed, without costs, as moot.

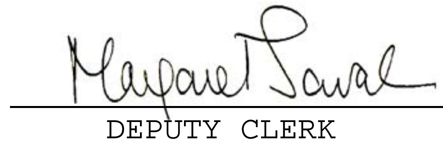
The court improperly heard Con Ed's pre-trial oral application to dismiss plaintiff's complaint. The motion was in substance a motion for summary judgment and as such was untimely. CPLR 3212 [a]; *Brill v City of New York* 2 NY3d 648 (2004). In addition the motion should have been made on papers.

M-924 &
M-964 &
M-1502 - ***William C. Samuels v Consolidate Edison Company of New York, Inc.***

Motions to dismiss appeal denied and cross motion to deem the appeal timely granted.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8049 In re George Sun, Index 115206/10
Petitioner-Appellant,

-against-

Brian E. Lawlor, etc.,
Respondent,

210 West 94th Street LLC,
Respondent-Respondent.

George Sun, appellant pro se.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for 210 West 94th Street LLC, respondent.

Order and judgment (one paper), Supreme Court, New York County (Saliann Scarpulla, J.), entered June 17, 2011, which denied the petition brought pursuant to CPLR article 78 seeking to vacate an order of respondent Division of Housing and Community Renewal (DHCR) dated September 22, 2010, affirming an order of the DHCR Rent Administrator (RA) denying petitioner's rent overcharge complaint and dismissed the proceeding, unanimously affirmed, without costs.

In June 1994, the RA issued an order reducing the rent for all apartments in the subject Building. It appears that the 1994 Order was never implemented to reduce the rent for petitioner's apartment. In July 2007, petitioner filed a rent overcharge complaint, asserting that respondent owner 210 West 94th Street

LLC had applied major capital improvement (MCI) rent increases at an excessive rate. Petitioner did not raise the 1994 order as a basis for adjusting his rent. In September 2008, the RA issued an order which, among other things, determined that the owner had misapplied two of the MCI rent increases, calculated the legal regulated rent and collectible rent for the subject apartment through May 2008, and awarded petitioner damages for rent overcharges. DHCR upheld the RA's rent calculations for the subject apartment in a determination dated January 21, 2009, and petitioner did not seek judicial review of the order, which thereby became final (*see Matter of D'Alessandro v New York State Div. of Hous. & Community Renewal*, 92 AD3d 421, 421-422 [2012]).

In December 2009, petitioner filed the instant rent overcharge complaint, alleging that he was being overcharged because the rent reduction ordered by the 1994 order had never been implemented and was still in effect for his apartment. The RA denied the rent overcharge complaint, finding that "all rent adjustments subsequent to the base date" of "June 2, 2005" (four years prior to the filing of the complaint in 2009) were "lawful." Despite the nominal base date of June 2, 2005, the RA noted that he had reviewed rent increases only subsequent to June 1, 2008, as the 2009 rent order established a legal regulated rent for the apartment of $1,481.08 through May 2008. In a

determination dated September 22, 2010, DHCR upheld the denial of petitioner’s rent overcharge complaint, finding that his claim was “barred” by the 2009 rent order, which was “a final determination of the legal regulated rents through May 2008,” such that “any challenges to rents prior to that date may not be considered.”

DHCR’s determination had a rational basis in the record and is not arbitrary and capricious (*see Matter of Tockwotten Assocs. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [2004]). As the 2009 order established the legal rent for the subject apartment through May 2008, the doctrine of collateral estoppel precludes petitioner from relitigating that issue, including under the “newly advanced theory” that the rent should be lowered by virtue of the 1994 order (*D’Alessandro*, 92 AD3d at 422; *see Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 204 [2011]).

Petitioner makes no substantial argument that he did not have a full and fair opportunity in the 2008 proceeding to raise his claim based on the 1994 rent order (*see D’Alessandro*, 92 AD3d at 421; *Gersten*, 88 AD3d at 201-02). Petitioner’s contention that he could not have raised the 1994 order in 2008 because he was not aware of it lacks merit. Although that order was apparently overlooked by DHCR, it is part of the public record.

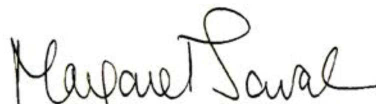
Petitioner's related argument, that his time to seek judicial review of the 2009 order was tolled by virtue of his lack of actual knowledge of the 1994 order is similarly without merit.

Matter of Cintron v Calogero (15 NY3d 347 [2010]) does not provide any basis for remittal to DHCR. In *Cintron*, the Court of Appeals held that the "four-year limitations/look-back period" applicable to rent overcharge claims does not preclude the agency from considering previously issued rent reduction orders which remain in effect during that period (*id.* at 355-56). Here, by contrast, petitioner is precluded from raising the 1994 order not by virtue of the four-year limitations period, but rather by the preclusive effect of the 2009 order.

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

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8051N In re Dwight Blair, Index 260724/09
Petitioner-Respondent,

-against-

New York State Division of
Housing and Community Renewal,
Respondent,

Concourse Village, Inc.,
Respondent-Appellant.
- - - - -
New York State Division of Housing
and Community Renewal,
Amicus Curiae.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for Dwight Blair, respondent.

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for amicus curiae.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered November 21, 2011, which ordered a hearing to determine the amount of attorney's fees to which petitioner was entitled in connection with an Article 78 proceeding and the underlying administrative proceedings commenced to establish his successor interest in a Mitchell-Lama apartment, unanimously reversed, on the law, without costs, and the motion for attorney's fees denied.

Real Property Law § 234 provides for a reciprocal right to attorney's fees where a residential lease authorizes such fees in favor of the landlord "in any action or summary proceeding" (*Real Property Law 234*). Because this provision does not apply to either administrative proceedings or proceedings brought pursuant to CPLR Article 78 (*see Matter of Chessin v New York City Conciliation and Appeals Bd.*, 100 AD2d 297, 306 [1984]), petitioner is not entitled to attorney's fees.

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

ENTERED: JUNE 28, 2012

DEPUTY CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8052 Ind. 4565/00
[M-2356] In re Echo W. Dixon, etc., 2370/01
Petitioner,

-against-

State of New York, et al.,
Respondents.

Echo W. Dixon, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for State respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for District Attorney of New York County, respondent.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for District Attorney of Bronx County, 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: JUNE 28, 2012

DEPUTY CLERK

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

8053-
8053A The People of the State of New York, Respondent,

Ind. 3527/09
142N/10

-against-

Deshawn Livingston,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgments, Supreme Court, New York County (Michael R. Sonberg, J.), rendered April 27, 2010, convicting defendant, upon his pleas of guilty, of criminal sale of a controlled substance in the third and fourth degrees, and sentencing him to an aggregate term of 4½ years, unanimously affirmed.

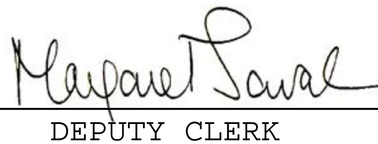
Defendant failed to preserve, and expressly waived, his claim that the court improperly enhanced his negotiated sentence, and we decline to review it in the interest of justice. The court offered to conduct a hearing on the issue of whether defendant violated a term of the plea agreement, but defendant declined that offer. Instead, defendant withdrew his challenge to the imposition of additional prison time and accepted the court’s six-month enhancement of the promised sentence.

As an alternative holding, we reject defendant's claim on the merits. The record supports the court's finding that defendant violated a plea condition requiring him to be truthful with the Department of Probation concerning the underlying facts of the crimes to which he pleaded guilty (*see People v Hicks*, 98 NY2d 185, 189 [2002]).

We perceive no other basis for reducing the enhanced sentence.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8054 G & M Realty, L.P., Index 111814/09
Plaintiff-Respondent,

-against-

Jesse Masyr, et al.,
Defendants-Appellants.

Abrams, Gorelick, Friedman and Jacobson, LLP, New York (Barry Jacobs of counsel), for appellants.

Howard Vingan, Edgewood, for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about February 9, 2012, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

The motion court correctly found that defendants failed to demonstrate as a matter of law that they did not represent plaintiff continuously and that the statute of limitations on this legal malpractice action therefore was not tolled (*see McCoy v Feinman*, 99 NY2d 295, 306 [2002]; *Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). The record shows that defendants represented plaintiff through May 2008 with respect to the development of

plaintiff’s Long Island City property through land use rezoning to increase the permissible floor-to-area ratio. Initially, plaintiff acquired a special permit for commercial development. After that permit expired, plaintiff applied for a residential permit. Defendants failed to demonstrate that the residential permit application was a matter separate and distinct from the commercial special permit application, despite the requirement of filing entirely different plans.

Nonetheless, the complaint must be dismissed because plaintiff failed to show that any negligence on defendants’ part proximately caused it to be unable to exploit the commercial permit (*see Leder v Spiegel*, 31 AD3d 266, 267-268 [2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]; *Brooks v Lewin*, 21 AD3d 731, 734 [2005], *lv denied* 6 NY3d 713 [2006]).

Plaintiff’s principal, Gerald Wolkoff, testified that during the time the commercial special permit was in force, he would not have started construction without having secured a 600,000-square-foot tenant. He also testified that until the time he decided, for market reasons, to develop the building for residential rather than commercial use, he did not have a single entity committed to becoming a commercial tenant. Hence, before it made its independent, market-based decision to pursue residential development, plaintiff was never in a position to

exploit the commercial permit. Thus, even assuming defendants were negligent in failing to inform plaintiff that the commercial permit would lapse unless renewed, their negligence did not cause plaintiff any loss. Wolkoff's testimony that, even without any tenants, he would have proceeded with the commercial project if he had known that the permit was of finite duration fails to raise a genuine issue of fact. The testimony directly conflicts with his testimony that he would not have commenced construction without a commitment for a 600,000-square-foot tenant (*see Schwartz v JPMorgan Chase Bank, N.A.*, 84 AD3d 575, 577 [2011]).

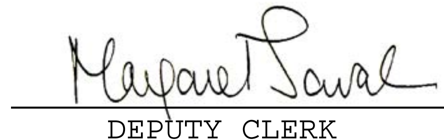
Plaintiff also failed to submit non-speculative evidence in support of its damages claims (*see Leder*, 31 AD3d at 268; *Dweck Law Firm v Mann*, 283 AD2d 292, 294 [2001]). Plaintiff claims damages of more than $73 million, based on the loss of the right to construct an additional 366,465 square feet of floor area on the property, the claimed market value of which was $150 to $200 per square foot. However, the only source plaintiff gives for these figures is Wolkoff's opinion, and it identifies no factual support therefor in the record.

Plaintiff claims further that it incurred several hundred thousand dollars in professional expenses to pursue the residential permit. However, as indicated, the record demonstrates that plaintiff made an independent, market-based

decision to pursue residential development of the property. Defendants established, through the uncontroverted report of their expert architect, that plaintiff could not have proceeded with a residential development under the commercial special permit. Thus, plaintiff would have had to file a new application and incur additional fees to pursue a residential development regardless of defendants' alleged negligence.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8055 Lisa Rachlin, Index 115613/08
Plaintiff-Respondent,

-against-

34th Street Partnership, Inc.,
Defendant-Appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Raphaelson & Levine, P.C., New York (Jared C. Glugeth of counsel), for respondent.

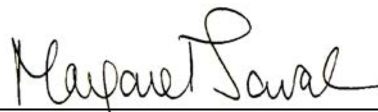
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 6, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to demonstrate its entitlement to judgment as a matter of law in this action where plaintiff was injured when she tripped over a foot-long metal bar forming the base of a barrier used by defendant at its taxi stand. Defendant failed to established prima facie that the base was both open and obvious and not inherently dangerous. Plaintiff testified that the accident happened at night and that the area was poorly lit. Defendant's claim that *Broodie v Gibco Enters., Ltd.* (67 AD3d 418 [2008]) stands for the proposition that plaintiff's testimony about lighting conditions is insufficient to defeat defendant's

motion for summary judgment is misplaced. In *Broodie*, the defendant established affirmatively that the lighting was present, operative at the time of the accident, and adequate. In this case, defendant offered no evidence on lighting conditions at the time of the accident. Thus, plaintiff's testimony was not even rebutted. Furthermore, the base of the barrier protruded into the middle of the sidewalk and appeared similar in color to the sidewalk. Photographs corroborated this account (*see Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [2011]). Defendant also failed to show that it did not create the hazardous condition. Indeed, defendant's employee testified that defendant was responsible for installing and maintaining the metal barriers (*see Salvador v New York Botanical Garden*, 74 AD3d 540 [2010]).

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8057 Flor Ruiz, Index 309966/08
Plaintiff-Appellant,

-against-

Allan J. Anderson, et al.,
Defendants,

Ebrahim Gohari, et al.,
Defendants-Respondents.

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for appellant.

Burke, Gordon & Conway, White Plains (Ashley E. Sproat of counsel), for respondents.

Order, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered July 13, 2011, which granted the motion of defendants Ebrahim Gohari and Dorit Gohari (Goharis) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff previously moved for summary judgment on the issue of liability in this action for personal injuries arising out of a motor vehicle accident. By order dated July 10, 2009, plaintiff's motion was granted and the court found that since plaintiff was a passenger, she was immune from liability. The court reserved for trial the issue of whether "one or another" of the defendant drivers or "possibly both" were jointly and

severally liable. Since the Goharis are not seeking to renew that motion and its determination, they did not need to provide a reasonable justification for the failure to present the "new facts" in the original opposition to plaintiff's motion (*compare Cabrera v Gilpin*, 72 AD3d 552, 553 [2010]).

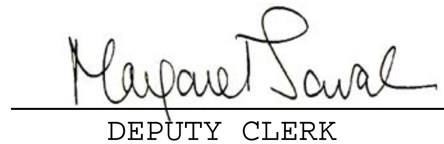
Contrary to plaintiff's contention, the doctrine of law of the case, which "generally operates to preclude successive motions by the same party upon the same proof," does not apply (*Colpitts v Cascade Val. Land Corp.*, 145 AD2d 750, 751 [1988]). Moreover, since the 2009 order did not decide the issue of apportionment of liability as between codefendants, leaving such issue for discovery and trial, the motion court was likewise not so bound (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Grullon v City of New York*, 297 AD2d 261, 265-266 [2002]).

The record demonstrates that the Goharis' motion for summary judgment was properly granted. The Goharis submitted Dorit Gohari's affidavit, wherein she stated that while proceeding through an intersection after lawfully stopping, her vehicle, in which plaintiff was a passenger, was struck by codefendants' vehicle, which did not fully stop before entering the intersection (*see e.g. McNamara v Fishkowitz*, 18 AD3d 721

[2005]). Neither plaintiff nor codefendants disputed Dorit's version of the accident and failed to raise a triable issue of fact.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8059-
8060 In re Federico R.,

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

Randall S. Carmel, Syosset, for appellant.

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

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about July 18, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of unlawful possession of an air pistol, possession of an imitation firearm, reckless endangerment in the second degree and resisting arrest, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion as untimely. Appellant made the motion after the commencement of the fact-finding hearing, and failed to demonstrate good cause

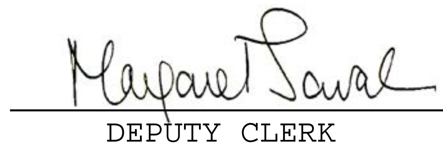
for the untimeliness of the motion (*see* Family Ct Act § 332.2 [1], [3]).

In any event, the circumstances of appellant's arrest were explored at the fact-finding hearing. We have reviewed the record of that hearing and conclude that there is no reasonable likelihood that a suppression motion would have succeeded.

The disposition was a proper exercise of the court's discretion that constituted the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), particularly since appellant was a repeat probation violator.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8061-
8062 The People of the State of New York, Ind. 1538/01
Respondent,

-against-

Beltra Cruz,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

Order, Supreme Court, Bronx County (Robert G. Seewald, J.), entered February 16, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, the motion granted, and the matter remanded for further proceedings consistent with this decision to include specifying and informing defendant of a proposed sentence.

The record of the resentencing proceeding does not dictate denial of resentencing on substantial justice grounds (*see e.g. People v Milton*, 86 AD3d 478 [2011]). The court denied the motion primarily on the ground that defendant absconded prior to trial and remained at large for six years. However, we find that this misconduct may have been outweighed by mitigating

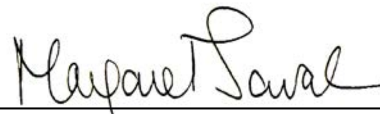
factors.

Although defendant is a second felony drug offender, both his predicate felony and the underlying offense involved street level drug sales, and the remainder of his criminal history is insignificant. Defendant has no history of violence, and his prison disciplinary record is relatively minor. While incarcerated, defendant participated extensively in educational and training programs and received recommendations for potential future employment. Thus, we remand the matter for reconsideration of defendant's motion.

We leave the length of the new sentence to the independent discretion of Supreme Court.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8063 Arrowood Indemnity Company, etc., et al., Plaintiffs-Respondents, Index 600881/10

-against-

Atlantic Mutual Insurance Company, Defendant,

Travelers Property and Casualty Company of America, etc., et al., Defendants-Appellants.

Drinker Biddle & Reath LLP, New York (James M. Altieri of counsel) and William T. Corbett, Jr., Florham Park, NJ, of the bars of the States of New Jersey and Connecticut, admitted pro hac vice, for appellants.

Littleton Joyce Ughetta Park & Kelly LLP, Purchase (Robert L. Joyce of counsel), for respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 9, 2011, which denied defendants' cross motion for summary judgment, and granted plaintiffs' motion for partial summary judgment to declare that Travelers owed a duty to defend plaintiffs Kerry, Inc. and Mastertaste, Inc. (collectively, Kerry) in connection with the underlying personal injury actions claiming damages as a result of exposure to diacetyl, unanimously affirmed, with costs.

St. Louis Flavors Corp. formerly operated a flavorings business, in which, among other things, it manufactured diacetyl

and diacetyl- containing products used in artificial butter flavoring. Kerry purchased virtually all of St. Louis's assets under an Asset Purchase Agreement dated December 4, 2002 (the APA). In several underlying actions, the plaintiffs allege personal injuries arising from exposure to St. Louis's products, and allege tortious conduct by Kerry on a de facto merger or continuation theory.

The APA states that pre-merger product liability claims remain excluded liabilities, and the APA also contains a "no-transfer" clause; however, under New York law, "[t]he enforceability of a no-transfer clause in an insurance contract is limited" (*Globecon Group, LLC v Hartford Fire Ins. Co.*, 434 F3d 165, 170 [2d Cir 2006] [applying New York law]). New York generally follows the majority rule that a no-transfer provision in an insurance contract is "valid with respect to transfers that were made prior to, but not after, the insured-against loss" (*id.*; *see also Kittner v Eastern Mutual Ins. Co.*, 80 AD3d 843, 846, n 3 [2011], *lv dismissed* 16 NY3d 890 [2011]). As noted by the motion court, this principle is based on a judgment that while "insurers have a legitimate interest in protecting themselves against additional liabilities [that they] did not contract to cover, once the insured against loss has occurred, there is no issue of an insurer having to insure against

additional risk" and, "in that circumstance, the only question is who the insurer will pay for the loss" (*Viking Pump, Inc. v Century Indem. Co.*, 2 A3d 76, 103 [Del Ch 2009] [applying New York law]).

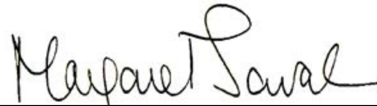
The Travelers policies were not listed in the APA's exclusive list of "Excluded Assets," and therefore fall within the APA's broadly inclusive "Purchased Assets." Even if the APA did not expressly transfer the Travelers Policies to Kerry, the benefits or coverage under those policies transferred, as a matter of law, to Kerry as the alleged successor to St. Louis's pre-acquisition liabilities. The lack of Travelers' consent to a transfer of benefits to Kerry (either expressly or by operation of law) is unimportant, as all of the underlying plaintiffs' product sale and exposure allegations show that the potential liabilities in question arose before the transfer, and as such, Travelers cannot claim that its risk increased.

Travelers' contention - that since the plaintiffs in the underlying action did not sue until after the sale, no "chose in action" existed at the time that could have been assigned by St. Louis to Kerry - is unavailing (*see id.* at 103, 105), as is its assertion that, balancing St. Louis and Kerry's relative pre-acquisition sizes, Kerry's larger size necessarily translates to a greater potential risk. It is the "nature of the

risk, rather than the particular characteristics of the defendant" that will have the greater effect on defense costs (*Northern Ins. Co. of N.Y. v Allied Mut. Ins. Co.*, 955 F2d 1353, 1358 [9th Cir 1992], *cert denied* 505 US 1221 [1992]), and in the final analysis, Kerry is only seeking a defense from Travelers to the extent of the risk that Travelers contracted to undertake — those claims that potentially implicate St. Louis's products.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8064 Patriot Kosovrasti, Index 103514/07
Plaintiff-Respondent,

-against-

Epic (217) LLC,
Defendant,

Tribbles, Ltd.,
Defendant-Respondent,

Compound Contracting Inc.,
Defendant-Appellant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for Patriot Kosovrasti, respondent.

Carroll, McNulty & Kull LLC, New York (Emilio F. Grillo of counsel), for Tribbles, LTD., respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 1, 2011, which, insofar as appealed from as limited by the briefs, denied defendant Compound Contracting Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to dismiss the Labor Law § 241(6) claim as against Compound, and otherwise affirmed, without costs.

Defendant Compound made a prima facie showing that it could not be held liable as a general contractor under Labor Law

§ 240(1), § 241(6) or § 200 by demonstrating that it had no authority, contractual or otherwise, to supervise, direct, or control the workers or activities at the work site (*see Temperino v DRA, Inc.*, 75 AD3d 543 [2010]; *Aversano v JWH Contr., LLC*, 37 AD3d 745 [2007]; *Filchuk v Lehrer McGovern Bovis Constr.*, 232 AD2d 329 [1996]). The proposal entered into by Compound and defendant Tribbles shows that Compound was responsible only for certain enumerated work, specifically states that Compound is "not liable for owner's contractors or suppliers," and excludes from the scope of Compound's services, inter alia, work by other trades and the filing of permits. Compound's principal testified that Tribbles was responsible for coordinating the work among all the involved contractors associated with the construction project.

In opposition, plaintiff and Tribbles raised a triable issue of fact as to Compound's role on the project. The work permits issued after the accident that list Compound as the general contractor are alone insufficient to establish general contractor status (*see Huerta v Three Star Constr. Co., Inc.*, 56 AD3d 613 [2008], *lv denied* 12 NY3d 702 [2009]). However, Tribbles's vice president testified that, before the work began, she and Compound agreed that Compound would be responsible for obtaining the necessary permits and that Compound was to "oversee the

coordination" of the "involved trades" on the project. It is not entirely clear whether the referred-to permits and "involved trades" relate only to the work covered by the proposal between Compound and Tribbles or to all the work on the site. However, viewed in the light most favorable to the nonmovants, this testimony, coupled with the aforesaid work permits, raises a triable issue of fact whether Tribbles retained Compound to oversee the project.

The sole Industrial Code provision upon which plaintiff may rely (12 NYCRR 23-5.1[b]) to support his Labor Law § 241(6) claim is insufficiently specific to constitute a proper predicate since it is a subpart of Industrial Code (12 NYCRR) § 23-5.1, "General Provisions for All Scaffolds" (*see Greaves v Obayashi Corp.*, 55 AD3d 409 [2008], *lv dismissed* 12 NY3d 794 [2009]; *but see O'Connor v Spencer (1997) Inv. Ltd. Partnership*, 2 AD3d 513 [2003]). To the extent plaintiff seeks to rely upon 12 NYCRR 23-5.18(g) and (h) to support the claim, we note that he improperly cited these provisions for the first time on appeal.

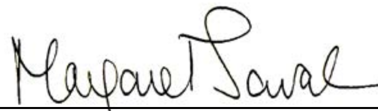
Compound failed to demonstrate that the Labor Law § 200 and common-law negligence claims should be dismissed as against it. There is no evidence that Compound controlled, supervised, or directed the manner or method of plaintiff's work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352-353 [1998]; *Vasiliades v*

Lehrer McGovern & Bovis, 3 AD3d 400, 401-402 [2004]). Nor is there evidence that it had actual notice of the alleged uneven floor condition that caused the scaffold to rock. However, triable issues of fact exist as to whether Compound exercised general control over the work site and had constructive notice of the alleged uneven floor condition that caused plaintiff's fall (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [2009]).

We have reviewed Compound's remaining contentions and find them unavailing.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8066-
8067 In re Antonio Dwayne G.,
Petitioner-Appellant,

-against-

Ericka Monte E.,
Respondent-Respondent.

Leslie S. Lowenstein, Woodmere, for appellant.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), attorney for the child.

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about August 30, 2010, which, to the extent appealed from as limited by the briefs, granted, without a hearing, respondent mother's motion to dismiss petitioner father's petition to modify an order of custody, unanimously affirmed, with costs. Appeal from order, same court and Referee, entered on or about December 7, 2010, which, to the extent appealed from as limited by the briefs, denied petitioner's application to reargue, unanimously dismissed, without costs, as taken from a nonappealable paper.

Family Court providently exercised its discretion in declining to hold a hearing before it dismissed the petition to modify the existing custody arrangement. A court is not required to conduct a hearing whenever a party moves for a change in

custody especially where, as here, the claims are "speculative and frivolous" (*David W. v Julia W.*, 158 AD2d 1, 6 [1990]). Indeed, the record shows that respondent did not medically neglect the child.

To the extent petitioner sought to reargue the motion dismissing his petition, the denial of his application is not appealable (*see McCoy v Metropolitan Transp. Auth.*, 75 AD3d 428, 430 [2010]).

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

ENTERED: JUNE 28, 2012

DEPUTY CLERK

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

8068 Rahmat Hedvat, Index 111703/07
Plaintiff, 590715/08
590465/09

-against-

Yonkers Contracting Company, Inc.,
Defendant-Respondent,

Chu & Gassman, Consulting
Engineers - P.C.,
Defendant,

URS Corporation - New York, etc.,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

Techno Consult, Inc.,
Third-Party Defendant.
\- - - - -
URS Corporation - New York, etc.,
Second Third-Party
Plaintiff-Appellant,

-against-

Stone & Webster Engineering
New York, P.C.,
Second Third-Party
Defendant-Respondent.

Winston & Strawn LLP, New York (Kenneth D. O'Reilly of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for Yonkers Contracting Company, Inc., respondent.

Ahmuty, Demers & McManus, Albertson (Catherine R. Everett of counsel), for Stone & Webster Engineering New York, P.C., respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 28, 2011, which, insofar as appealed from as limited by the briefs, denied so much of defendant URS Corporation's motion for summary judgment as sought dismissal of defendant Yonkers's cross claim for contribution and second third-party defendant Stone & Webster's counterclaim for contribution, unanimously affirmed, with costs.

The court properly declined to dismiss the contribution claims, as triable issues of fact exist as to whether URS, the construction manager, had the authority to control the work site and whether it had notice of the alleged dangerous condition on the site (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [2009]).

As to whether URS had sufficient control over the site to address the alleged dangerous condition, URS's quality control inspector testified that URS employed three to four inspectors for the project, that it hired various subcontractors to perform inspections, that it was required to report any dangerous conditions on the site, and that it had a site safety officer at the site. In addition, plaintiff testified that he reported to URS's quality control inspector, among others. Plaintiff also testified that he reported to one of Stone & Webster's construction managers who, in turn, reported to URS's project

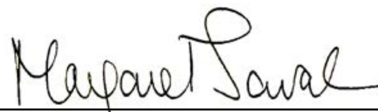
manager. Accordingly, questions of fact exist as to the scope and extent of URS's control and authority (*see Urban*, 62 AD3d at 556).

With regard to notice, URS failed to offer any evidence in admissible form that it did not have actual or constructive notice of the alleged dangerous condition. The testimony of its quality control inspector, that he "likely went through th[e] area" where plaintiff was injured but was not "intimately familiar" with it, was insufficient to make a prima facie showing of lack of notice (*compare Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570 [2010], *and Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 713-714 [2005]).

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

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8071-
8071A In re Shaqualle Khalif W., etc.,
and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Denise W.,
Respondent-Appellant,

Edwin Gould Services for Children and
Families,
Petitioner-Respondent,

Administration for Children's Services,
Petitioner.

Neal D. Futerfas, White Plains, for appellant.

John R. Eyerman, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia
Colella of counsel), attorney for the children.

Orders, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 22, 2010, which, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect were supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]).

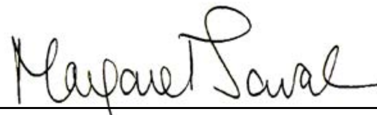
The record shows that the agency exercised diligent efforts to encourage and strengthen the parental relationship by, inter alia, assisting the mother in filling out applications for housing and in challenging the denial of her applications, referring her for mental health services and drug treatment programs, and scheduling visitation. Despite these efforts, the mother failed to maintain contact with the children on a consistent basis, refused drug treatment and failed to obtain suitable housing (*see Matter of Calvario Chase Norall W. [Denise W.]*, 85 AD3d 582 [2011]).

A preponderance of the evidence shows that termination of the mother's parental rights was in the best interest of the children, who had been in foster care for more than four years and needed permanency. A suspended judgment is not warranted because the mother significantly delayed addressing the problems

that remained unresolved at the time of disposition, including completion of a drug treatment program, which prevented the return of the children (*see Matter of Nakai H. [Angela B. H.]*, 89 AD3d 434 [2011]).

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8073N 11 Essex Street Corp., Plaintiff,

Index 600176/04
110019/04
101984/05
590172/06
590479/06
590879/06
590972/06
590456/09

-against-

Tower Insurance Company of New York, Defendant.

\- - - - -

11 Essex Street Corp., Plaintiff-Respondent,

-against-

7 Essex Street, L.L.C., etc., et al., Defendants,

Berzak Gold, P.C., Defendant-Appellant.

\- - - - -

[And Other Actions]

\- - - - -

Tower Insurance Company of New York, Third Third-Party Plaintiff,

-against-

7 Essex Street, L.L.C., etc., et al., Third Third-Party Defendants,

Berzak Gold, P.C., Third Third-Party Defendant-Appellant.

\- - - - -

7 Essex Street, LLC, Fifth Third-Party Plaintiff,

-against-

Franke, Gottsegen, Cox Architects, Fifth Third-Party Defendant-Respondent.

____

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina and Andrea M. Alonso of counsel), for appellant.

Weg & Myers, P.C., New York (Juliette J. Song of counsel), for 11 Essex Street Corp., respondent.

Donovan Hatem LLP, New York (Douglas M. Marrano of counsel), for Franke, Gottsegen, Cox Architects, respondent.

Appeal from order, Supreme Court, New York County (Emily Jane Goodman, J.), entered September 10, 2010, which, to the extent appealed from as limited by the briefs, denied the motion of fifth third-party defendant Franke, Gottsegen, Cox Architects (FGCA) to vacate the note of issue, and granted plaintiff 11 Essex Street's cross motion to sever the fifth third-party action, unanimously dismissed, without costs.

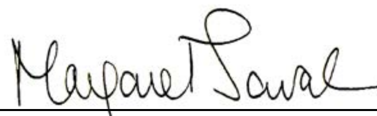
Defendant Berzak Gold, the engineering firm retained to design the underpinning and support for plaintiff's building, has no standing to bring this appeal, as it is not an "aggrieved party" within the meaning of CPLR 5511. Indeed, Berzak Gold is not a party to the fifth third-party action, filed by defendant 7 Essex against FGCA for indemnification and contribution, and it has not asserted any claims against FGCA. Although Berzak Gold has an interest in the underlying litigation involving property damage to plaintiff's building, this does not establish that it has an interest in the fifth third-party action (*see e.g. Baca v*

HRH Constr. Corp., 200 AD2d 538 [1994], *lv denied* 84 NY2d 807 [1994]).

Were we to consider the merits of the appeal, we would affirm the order appealed from. There was no basis to vacate the note of issue, as discovery in the underlying actions was complete. Indeed, after plaintiff served the supplemental bill of particulars, there were no new demands for discovery or motions to compel additional discovery (*cf. Club Italia v Italian Fashion Trading*, 268 AD2d 219 [2000]). There was, however, a pre-answer motion to dismiss in the fifth third-party action, which, at the time of severance, had not been resolved. Discovery had not yet occurred in that action, which no party disputes is necessary. Prior to filing the fifth third-party complaint, the discovery process spanned almost eight years. To further delay resolution of the other actions in order to conduct discovery in the fifth third-party action would be unduly prejudicial to plaintiff, the injured party (*see* CPLR 1010).

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK

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

8074 Index 310418/93
[M-2477]&
M-2593 In re Kenneth Zahl,
Petitioner,

-against-

Hon. Sherry Klein Heitler, etc.,
Respondent.

Kenneth Zahl, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for 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,

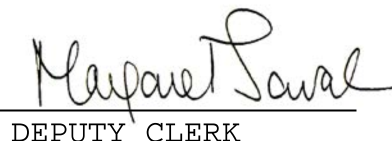
Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

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

M-2593 - ***Kenneth Zahl v Hon. Sherry Klein Heitler***

Motion seeking change of venue denied.

ENTERED: JUNE 28, 2012



DEPUTY CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5852 Verizon New England Inc.,
Petitioner-Appellant,

Index 104208/10

-against-

Transcom Enhanced Services, Inc.,
Respondent-Respondent.

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel of counsel), for appellant.

Arent Fox LLP, New York (Hunter T. Carter of counsel), for respondent.

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered July 20, 2010, affirmed, with costs.

Opinion by Catterson, J. All concur except Mazzarelli, J.P., and Friedman, J. who dissent in an Opinion by Mazzarelli, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Rosalyn H. Richter, JJ.

5852
Index 104208/10

____x

Verizon New England Inc.,
Petitioner-Appellant,

-against-

Transcom Enhanced Services, Inc.,
Respondent-Respondent.

____x

Petitioner appeals from a judgment of the Supreme Court, New York County (Anil C. Singh, J.), entered July 20, 2010, which, to the extent appealed from as limited by the briefs, dismissed the petition with prejudice.

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel and Jason W. Myatt of counsel), for appellant.

Arent Fox LLP, New York (Hunter T. Carter and Matthew S. Trokenheim of counsel), for respondent.

CATTERSON, J.

In this CPLR article 52 turnover proceeding, we affirm that a restraining notice is effective only if, at the time of service, the third party on whom the notice is served owes a debt to, or is in possession of property of, the judgment debtor.

In this proceeding, Verizon, the judgment creditor, seeks to enforce a restraining notice against a third party pursuant to article 52 of the CPLR, on monies paid by Transcom Enhanced Services, Inc. (hereinafter referred to as "Transcom") to judgment debtor, Global NAPs, Inc. (hereinafter referred to as "GNAPS"), a telecommunications vendor. Transcom purchased voice-over-internet termination services for its customers from GNAPS.

The following facts are undisputed: In January 29, 2009, the U.S. District Court for the District of Massachusetts entered a $57,716,714 judgment in favor of Verizon and against GNAPS and others. The judgment was affirmed. See Global NAPs, Inc. v. Verizon New England Inc., 603 F.3d 71 (1st Cir. 2010), cert. denied, __ U.S. __, 131 S. Ct. 1044 (2011).

On March 6, 2009, Verizon domesticated the judgment in New York. On March 30, 2009, Verizon served Transcom, a New York corporation, with a restraining notice and information subpoena. The restraining notice directed Transcom not "to make or suffer any sale, assignment or transfer of, or interference with, any

property in your possession in which [GNAPS] ... has as interest."

On or about February 11, 2010, Transcom served its response to the information subpoena. In response to Question #2, which directed Transcom to "[i]dentify any and all . . . agreements entered into between you . . . and any of the Judgment Debtors," Transcom identified a telephone switch service agreement dated October 21, 2003.

In response to Question #5, which asked Transcom to identify any receivables and outstanding obligations owed to GNAPS, Transcom stated, "None. All payments are made in advance or contemporaneously with service." In response to Question #11, which asked Transcom to identify payments made to GNAPs, Transcom annexed a Vendor Balance Detail (hereinafter referred to as "VBD"). The VBD reflected that on April 1, 2009, the day before Transcom's acceptance of the restraining notice, Transcom had received a $246,000 bill from GNAPS. The bill was paid by four checks issued for April 1, April 6, April 15 and April 21, each in the amount of $61,500.

On or about March 31, 2010, Verizon commenced a special proceeding seeking, inter alia, a turnover of property and debts of the judgment debtor held by Transcom, a judgment equal to the amount paid by Transcom to the judgment debtors in violation of

the restraining notice, and a finding of civil contempt. Verizon asserted that Transcom's agreement with GNAPS created an ongoing contractual relationship which required Transcom to pay GNAPS $281,000 per month.

Transcom asserted that it did not violate the restraining notice because GNAPS' monthly invoices were issued in advance of services being rendered, and Transcom had no obligation to use GNAPS' services. Transcom explained that, because it prepaid for GNAPS' services at the time that the restraining notice was served, Transcom did not owe GNAPS any money.

Transcom submitted the affidavit of Larry Dewey, its Chief Accounting Officer and a CPA whose duties included managing payments to GNAPS. He set forth that, since 2004 GNAPS had invoiced Transcom on or at the beginning of each month for services to be rendered in the following month and Transcom paid in advance for services to be rendered on an approximately weekly basis. Dewey set forth that, as of April 2, 2009, Transcom had a credit balance with GNAPS and no obligation to make future payments. He issued the April 1 check to GNAPS by overnight delivery for services to be rendered the first week in April. Dewey stated that

> "because Transcom and GNAPS have always operated ... under the assumption that Transcom pays in advance for services, and

> GNAPS only provides services if it has been paid. Transcom [...] could easily switch to [other] vendors and discontinue using GNAPS simply and quickly by entering a blocking code in the network operations center."

Transcom also submitted the affidavit of Bradford Masuret, GNAPS' Vice President of Sales, who set forth that the parties verbally agreed to allow Transcom to prepay in four installments, rather than the two provided for in the written agreement.

By order, dated April 12, 2010, the court declined to extend the terms of the restraining notice, and scheduled the matter for a hearing on April 19, 2010. At that hearing, Transcom called two witnesses, Dewey and Scott Birdwell. Verizon did not call any witnesses and relied on Transcom's response to the information subpoena.

Dewey gave testimony consistent with his affidavit. He stated that Transcom never owed money to GNAPS because it prepaid for services for the following week, making payments for the month in four equal installments. Dewey conceded that, on its face, the VBD reflected a $246,000 accounts payable to GNAPS on April 1, 2009, and a $184,500 debt to GNAPS as of April 2. However, he explained that such a view of "the records would be incomplete," as Transcom did not owe GNAPS any money as of April 2, 2009, and the balance listed as of that date was for services which had not yet been provided.

Scott Birdwell, Transcom's Chief Executive Officer, testified that Transcom's relationship with GNAPS has been "strained" for years due to poor service quality, and that the parties had been operating pursuant to a verbal arrangement for several years because Transcom did not trust GNAPS' financial condition or its reliability in providing service. Under the verbal arrangement, Transcom prepaid for services one week in advance, committing itself to take services only for the week covered by the prepayment. After the week, if GNAPS service was still running, Transcom would then pay for the following week. The court denied the turnover, dismissed the petition, vacating all restraints, and denied the application to hold Transcom in contempt. The court credited Dewey's and Birdwell's testimony as to the oral modification of the payment terms of the agreement, and found that such modification was proper under Massachusetts law, which governed. The court further found that the prepayment for services was not a form of property or debt subject to restraint.

On appeal, Verizon argues that, as of April 2, 2009, Transcom possessed GNAPS' property, and contemptuously continued paying GNAPS, entitling Verizon to damages in the amount improperly paid. Verizon further argues that GNAPS' "bundle of rights" under the agreement was property subject to restraint,

regardless of any prepayment, especially concerning the outstanding balances reflected in the VBD for April 2009. Verizon also maintains that the court erred in finding that the agreement was terminable at will, as there was no testimony that the requirement of 30 days' written notice was modified.

For the reasons set forth below, we find that Transcom, the third-party garnishee, owed no debt, but rather held a credit balance with GNAPS. Moreover, the undisputed modified agreement between GNAPS and Transcom dispensed with any contractual obligations or "bundle of rights" that could be considered attachable property.

CPLR 5222(b), in relevant part, states:

> "A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor ... or ... is in the possession or custody of property in which ... the judgment debtor ... has an interest .... All property in which the judgment debtor ... is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor ... shall be subject to the notice ..." (emphasis added).

In this regard, "[a] money judgment may be enforced against any debt, which is past due or which is yet to become due,

certainly or upon demand of the judgment debtor." CPLR 5201(a). Additionally, "[a] money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested." CPLR 5201(b).

The statute therefore codifies well-established principles by eliminating enforcement of judgment, whether by attachment or restraining notice on a third party, on a general category of contingent debts and property rights based on contractual contingencies. See Matter of Supreme Mdse. Co. v. Chemical Bank, 70 N.Y.2d 344, 350, 520 N.Y.S.2d 734, 737, 514 N.E.2d 1358, 1361 (1987) (statute precludes "the levy against contingent obligations not certain to ripen into something real") (internal quotation marks omitted); see also Glassman v. Hyder, 23 N.Y.2d 354, 358, 296 N.Y.S.2d 783, 786, 244 N.E.2d 259, 261 (1968) (where "a duty to pay is conditioned . . . upon contractual contingencies there is no debt certain to become due"); Sheehy v. Madison Square Garden Corp., 266 N.Y. 44, 47, 193 N.E. 633, 633 (1934) (judgment debtor's right to payment was not attachable because it was a "mere right to earn money" and was entirely contingent upon judgment debtor's performance); Herrmann & Grace v. City of New York, 130 App. Div. 531, 535, 114 N.Y.S. 1107, 1110 (1909), aff'd, 199 N.Y. 600, 93 N.E. 376 (1910)

("indebtedness is not attachable unless it is absolutely payable at present, or in the future and not dependable upon any contingency").

In this case, it is undisputed that the contract between Transcom and GNAPS was orally modified to one based on Transcom's weekly prepayment for services. The contract no longer contained the previous terms of payments by Transcom every half-month for the following half-month's services and where the agreement was automatically renewed and subject to 30 days' notice.

At the time of the restraining notice issued by Verizon, it is uncontested that Transcom was ordering GNAPS services on a weekly basis by weekly prepayment. Supreme Court credited the uncontroverted testimony of Transcom executives that Transcom was not contractually bound to purchase the services and there was no exclusive relationship between it and GNAPS. Thus, there was no debt due or certain to come due "by the mere passage of time or by demand of the judgment creditor." See Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 5, CPLR 5201(a). Transcom's prepayment effectively gave it a credit balance with GNAPS upon which GNAPS had an obligation to provide the service.

Nevertheless, Verizon argues that "the timing of the payments to [GNAPS] does not alter [GNAPS'] right to be paid for the services it delivers." Verizon relies on ABKCO Indus. v.

Apple Films, (39 N.Y.2d 670, 385 N.Y.S.2d 511, 350 N.E.2d 899 (1976)), to argue that the fact that no monies were owed to GNAPS at the time the restraining notice was served is not relevant. Rather, Verizon argues that the prepayments are a "bundle of GNAPS' rights" under the agreement, and therefore attachable property. The dissent adopts this view. Verizon and the dissent miss the point.

In ABKCO, the judgment debtor, LTD, owned a movie "Let It Be," which featured the Beatles. LTD entered into a licensing agreement with a New York corporation, INC, which agreed to promote the movie in the United States and to pay LTD 80% of the net profits from the promotion. The Court found that ABKCO, a judgment creditor, had an attachable interest in the right to future net profits received from the promotion of a film. 39 N.Y.2d at 674, 385 N.Y.S.2d at 513. The ABKCO Court rejected LTD's argument that the rights were not attachable because no sums were due at the time of attachment and because it was not known whether any amounts would become due since they were contingent on gross receipts. Instead, the Court found that LTD's interests in the licensing agreement

> "constituted property, composed of the bundle of all its rights under the Agreement, of which ... the obligation of INC to pay [LTD] under the 80% Clause [relating to net profits received by INC from the promotion of the

> film] was the principal feature of economic significance. That property was attachable because concededly it was assignable by LTD."

39 N.Y.2d at 674, 385 N.Y.S.2d at 513, citing CPLR 5201(d).

ABKCO is not analogous to the instant case: ABKCO stands for the proposition that if one of the judgment debtor's rights under a contract is an obligation by the other party to pay some amount at some future date, that right is assignable and attachable even if the value is contingent. In other words, under the ABKCO agreement LTD had an unconditional right to receive 80% of gross receipts from the promotion of the movie. The fact that the 80% did not translate into a stated amount in dollars and cents at the time of attachment was irrelevant. It was not LTD's rights that were contingent, but simply the value of those rights.

Upon a "proper analysis and classification of [GNAPS'] rights under the agreement" as mandated by ABKCO (39 N.Y.2d at 674, 385 N.Y.S.2d at 512), we must conclude that GNAPS does not have any rights under the modified agreement: there is simply no obligation for Transcom to purchase services from GNAPS. Thus, GNAPS has no right to payment that it could assign or that could be attached by its judgment creditors. Transcom correctly asserts that a contract is not a property subject to possible attachment if that contract does not obligate the other party to pay the judgment debtor, or if the obligation to pay is

contingent upon some uncertain future act of performance by the parties. See Matter of Supreme Mdse. Co., 70 N.Y.2d at 351, 520 N.Y.S.2d at 737.

Moreover, contrary to Verizon's argument, the modified agreement dispensed, de facto, with the 30-day notice requirement, and thus with any possible property interest GNAPS may have held in such notice. As Transcom's executives testified, the modified agreement resulted, in part, because of GNAPS' unreliability in providing the service; Transcom therefore required the flexibility to switch vendors, "literally at the flip of a switch." Thus, the credited and uncontroverted testimony of two Transcom executives supports the view that a 30-day notice requirement would have been inconsistent with the nature of the modified agreement and the reasons for such an agreement. This, instead, was a situation where GNAPS' performance depended on Transcom's prepayment for services in any given week, and therefore involved "intangibles that may never ripen into a significant property right as where they depend on a contingency that may never occur." See Matter of Supreme Mdse. Co., 70 N.Y.2d at 350, 520 N.Y.S.2d at 737 (internal citations omitted).

In Matter of Supreme Mdse. Co., the Court rejected the existence of an attachable property right under an agreement

where contingent performance was wholly in the control of the judgment debtor. In that case, the Court found that a beneficiary's interest in a letter of credit is not the property of the beneficiary for purposes of attachment since the beneficiary's interest is dependent on its own future performance (timely shipment of goods, compliance with terms of credit and presentation of conforming documents). 70 N.Y.2d at 350-351, 520 N.Y.S.2d at 737. The Court found that, since the beneficiary "retains the option to defeat the interest and render it worthless, ... allowing attachment ... could serve as a disincentive to a beneficiary's performance of the underlying contract." Id.

The Court cautioned that this factor alone is not dispositive in any determination of whether an attachable property interest exists. However, the rationale should be applied to the facts of the instant case where Verizon argues that Transcom could have stopped payment on the check it sent to GNAPS on April 1, 2009. Once Transcom sent the check, contrary to the dissent's view, the contingent performance would have been solely within the control of GNAPS, the judgment debtor. Further, it is clear that compliance with the restraining notice not only "could serve as a disincentive," but almost certainly would result in GNAPS declining to provide the weekly service for

which the check had been sent.

The dissent's observation that it would be "unfortunate," but "irrelevant" if, as a result of Transcom's compliance with the restraining notice, GNAPS terminated its service to Transcom, indicates that it completely misapprehends the economic nature of their business relationship. Upon the failure of GNAPS to provide service to Transcom, the latter would be compelled to switch to another supplier/vendor whereupon its "highly regular and predictable business relationship" with GNAPS would terminate, and would thus stop generating any revenues for GNAPS. The net result is that Verizon might gain $61,500 (the amount of the check sent on April 1 for GNAPS' weekly service) in partial satisfaction of a $57 *million* judgment; but it would have caused a loss to, and disrupted the business of, an innocent bystander garnishee. Setting aside for the moment, the public policy concern implicit in such a result, more significantly, Verizon would find itself in a situation that the Legislature expressly put beyond the grasp of the statute: levying against a contingent obligation that, in this case, was never again going to "ripen into something real." Matter of Supreme Mdse. Co., 70 N.Y.2d at 350, 520 N.Y.S.2d at 737 (internal quotation marks omitted). If the Legislature wants to expand the scope of the statute, it may do so but it is not up to this Court to make this change.

Moreover, contrary to the dissent's view that "the manner in which Transcom structured its transactions with [GNAPS] could be said to reveal its knowledge of [GNAPS'] plan to shirk its responsibilities," there simply are no allegations, nor any evidence in the record, that the agreement was forged with the intent of facilitating GNAPS' avoidance of attachment of debt owed to third parties. On the contrary, according to the testimony of Transcom's executive officers, the agreement to prepay for services was nothing more than a consequence of GNAPS' unreliability in its provision of services, and was a deal struck for the benefit of Transcom.

Accordingly, the judgment of the Supreme Court, New York County (Anil C. Singh, J.), entered July 20, 2010, to the extent appealed from as limited by the briefs, dismissing the petition with prejudice, should be affirmed, with costs.

All concur except Mazzarelli, J.P. and Friedman, J. who dissent in an Opinion by Mazzarelli, J.P.

MAZZARELLI, J.P. (dissenting)

In an unrelated litigation, petitioner Verizon New England, Inc. (Verizon) secured a judgment against nonparty Global NAPs, Inc. (Global) in the amount of $57,716,714. On March 30, 2009, Verizon served respondent Transcom Enhanced Services, Inc. (Transcom), a regular customer of Global, with a restraining notice and information subpoena. Transcom admits to receiving those documents on or about April 2, 2009. The restraining notice directed Transcom not "to make or suffer any sale, assignment or transfer of, or interference with, any property in your possession in which [Global] . . . has as interest." It "applie[d] to all property in which [Global] . . . presently has or is believed to have an interest, and to all property hereafter coming into the possession or custody of [Global]."

Transcom had purchased telecommunications services from Global since 2003, when the two companies entered into a "Telephone Switch Service Agreement." While the agreement did not require Transcom to purchase services from Global, it established the framework that would be utilized if it did. Should Transcom order services from Global, the agreement required Transcom to pay Global's monthly charges in two installments and pay Global "the set up fee and the first one half of the monthly trunk charge prior to provid[ing] service.

Subsequent one half of the monthly trunk charges will be billed in advance of the half of the month to which they apply," with payments to "be made without set off." The agreement was subject to an initial six-month term, to be automatically renewed on a monthly basis, unless either party provided the other with 30 days' written notice of its intent not to renew and could be amended only by a writing.

In responding to the information subpoena, Transcom identified the agreement and stated that "[c]urrently, the Agreement requires payment of a monthly recurring charge of $28,000 per circuit for eight (8) circuits, along with additional charges of $57,000 per month." However, when asked to identify all receivables or outstanding obligations owed by it to Global, Transcom replied in its response to the information subpoena that there were "[n]one. All payments are made in advance or contemporaneously with service." In response to a question requesting any payments made by Transcom to Global within the last five years, Transcom attached a ledger called a "Vendor Balance Detail" (VBD). This showed all of the transactions between Transcom and Global from December 1, 2004 through January 27, 2010. The VBD reflected that, on April 1, 2009, the day before its acceptance of the restraining notice, Transcom received a $246,000 bill from Global and that prior to that there

had been a zero dollar balance. The bill was paid in four checks, each in the amount of $61,500. The first check was issued on April 1, leaving an outstanding balance of $184,500. The other three checks were paid on April 6, April 15 and April 21. The VBD reflects a pattern of Transcom paying amounts owed in weekly installments, with more than $2.4 million in payments made to Global between April 2, 2009 and January 27, 2010.

Verizon commenced this special proceeding seeking to compel Transcom, among other things, to turn over to it monies which it paid to Global after receipt of the restraining notice, and for a finding of civil contempt. Verizon asserted that Transcom's agreement with Global created an ongoing contractual relationship which required Transcom to pay Global $281,000 per month. In response, Transcom argued that it did not violate the restraining notice because Global's monthly invoices were issued in advance of services being rendered. According to Transcom, the invoices were essentially offers to provide service and imposed no obligation on Transcom to make any payments at all. Thus, Transcom claimed, Global never had an expectation of payment from Transcom which could have served as the basis for attachment by Global's judgment creditors.

The court scheduled the matter for a hearing. At that hearing, Transcom called two witnesses. The first was Larry

Dewey, Transcom's Chief Accounting Officer. Dewey was responsible for paying and recording Global's invoices. He stated that Transcom never owed money to Global because it prepaid for services rendered the following week, making payments for the month in four equal installments. Dewey explained that the April 1, 2009 entry in the VBD referred to a March 1 invoice for services to be rendered in April. As the invoice was for April charges, Dewey entered it in the system for that month as an accounts payable item. He conceded that, on its face, the VBD reflected a $246,000 accounts payable to Global on April 1, 2009, and a $184,500 debt to Global as of April 2. However, he explained that such a view of "the records would be incomplete," because Transcom did not owe Global any money as of April 2, 2009, and the balance listed as of that date was for services which had not yet been provided. Dewey also testified that Global was a vendor with no affiliation to Transcom. He was unaware of the agreement's renewal term and stated that the parties had not operated according to the agreement's terms, as Transcom made payments weekly instead of twice per month. Dewey also testified that Transcom never sent Global a notice of termination.

The second witness for Transcom was Scott Birdwell, its Chief Executive Officer. Birdwell testified that Transcom's

relationship with Global had been “strained” for years, due to poor service quality, and because Global often lost markets without notice and frequently lied about the cause of service outages. He also stated that Transcom did not trust Global’s reliability to provide service or its financial condition and that, therefore, the parties’ course of conduct departed from the terms of the agreement. Indeed, Birdwell explained that for several years the parties had been operating pursuant to a verbal arrangement whereby Transcom prepaid for services one week in advance, committing itself to take services only for the week covered by the prepayment. After the week, if Global’s service were still running, Transcom would then pay for the following week. Birdwell testified that the parties had orally amended the agreement, had not entered into any other written agreement, and that Transcom never issued a written notice terminating the agreement.

Birdwell further testified that Transcom had 10 to 20 alternative vendors it could use to provide services in areas covered by Global, and switching to one such provider would involve only “[a] few key strokes on a computer,” and be complete in 30 to 60 seconds. Nevertheless, Birdwell stated, Transcom had not discontinued business with Global, as while “[i]t is practical, from a technical perspective . . . [i]t does cost us

more, in some cases, to move off of Global . . ." On or about April 2, 2009, Birdwell learned of the restraining notice, but did not direct Dewey to stop making prepayments to Global. He did, however, check to make sure that Transcom owed nothing to Global. While Birdwell conceded that Dewey's "working payments [the VBD] indicate there are" payables, the "point of fact is, there was no amounts owed to [Global] at that point in time." Verizon did not call any witnesses to testify at the hearing.

The court denied the petition in its entirety and vacated the restraining notice. It credited the testimony of Dewey and Birdwell and found that Transcom established that the business relationship with Global was indeed based on prepayment for services and that Transcom was not bound to accept additional services. The court further found that the prepayment for services was not a form of property or debt subject to restraint as the "principle feature of economic significance" was that Transcom had no obligation to purchase services from Global and was thus not in possession of property in which Global had an interest. The court stated that "[i]n light of this economic reality . . . there is no property or debt in the instant matter subject to a restraining order, levy or turnover pursuant to Article 52 of the CPLR."

CPLR 5222(b) provides that a restraining notice is effective

against a person only if "at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest." Further, "[a] money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor" (CPLR 5201[a]), and "[a] money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested" (CPLR 5201[b]).

The Court of Appeals has defined what constitutes property for purposes of being subject to a restraining notice in *ABKCO Indus. v Apple Films* (39 NY2d 670 [1976]), which is the leading decision on the subject. In that case, the recipient of a restraining notice, a film promoter, had entered into a licensing agreement with the judgment debtor, a film owner, pursuant to which the promoter was required to pay royalties to the owner if the former's efforts to promote the film realized profits. However, at the time the judgment creditor served the promoter with a restraining notice, the film had not realized a profit, so it owed the film owner nothing. The Court of Appeals held that the restraining notice was nevertheless effective, because the

owner's interest in the licensing agreement "constituted property, composed of the bundle of all its rights under the Agreement, of which, of course, the obligation of [the promoter] to pay [owner] under the [royalty] clause was the principal feature of economic significance. That property was attachable because concededly it was assignable by [the judgment debtor]" (39 NY2d at 674, citing CPLR 5201[b]).

The only difference between this case and *ABKCO* is that here Transcom was not obligated to turn over monies to Global at any specific time. However, that is not dispositive. Indeed, in *Matter of Supreme Mdse. Co. v Chemical Bank*, 70 NY2d 344, 350 [1987]), the case on which Transcom most heavily relies, the Court of Appeals stated that "[d]ispositive instead is whether [a property] interest has potential economic value to the creditor." In *Supreme Mdse. Co.*, the Court found that the asset which was sought to be restrained, a letter of credit issued in favor of the judgment debtor who was the seller in an international transaction, did not have such value. The recipient of the restraint (an order of attachment), was the bank that had issued the letter of credit. When the restraint was issued, the seller had not yet satisfied the terms of the letter of credit. The Court of Appeals determined that the letter was executory and not subject to restraint. In so holding, the Court stated that "[a]

guiding principle in our analysis is that, while CPLR 5201 is obviously intended to have broad reach, still the Legislature expressly put beyond the grasp of the statute the general category of contingent debts, 'to preclude a levy against contingent obligations not certain to ripen into something real'" (70 NY2d at 350, quoting Siegel, NY Prac § 323, at 389).

The Court's focus in *Supreme Mdse. Co.* on whether the interest sought to be restrained has economic value to the judgment creditor supports Verizon's position here. Thus, Transcom's and the majority's reliance on *Supreme Mdse. Co.* is unavailing. As the majority acknowledges, the Court of Appeals in *Supreme Mdse. Co.* was particularly concerned about subjecting letters of credit to restraints, since such instruments are a primary facilitator of international commerce. There is no comparable public policy concern here.

Transcom should not be allowed to ignore the restraining notice when it had every reason to predict that it would continue to do business with Global. Transcom and Global had a highly regular and predictable business relationship which was all but certain to, and in fact did, continue to generate revenues after Transcom received Verizon's restraining notice. Indeed, despite Birdwell's testimony that Transcom found Global to be an unreliable partner and that it had the right to switch to another

service provider at any time, it never actually did so. Transcom consistently used and paid for Global's services beginning in December 2004 and continued to do so even after it received Verizon's information subpoena over five years later.

Moreover, the pattern of conduct here demonstrates that *at the time it received the restraining notice from Verizon*, Transcom should have been reasonably "certain" that its relationship with Global had "ripen[ed] into something real" (70 NY2d at 350). The timing is critical because the touchstone is whether a judgment debtor has a particular property interest held by a garnishee at "the time of service" of the restraining notice (CPLR 5222[b]). By focusing on the series of events that might or might not occur after Transcom's receipt of the restraining notice, the majority ignores this provision.

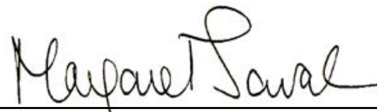
Further, the majority's bald speculation that had Transcom stopped payment on the check, which was sent the day before receipt of the restraining notice, it would have placed itself at risk of not receiving services in return, is irrelevant. While this would have been unfortunate, it does not override the need for full compliance with proper judgment enforcement mechanisms. Indeed, just as Transcom may find itself without a business partner if it redirects payment to Verizon, so too might a valued employee stop working for an employer forced to garnish his or

her wages, when he receives his or her first diminished paycheck. These are simply accepted risks of the collection system. Nor would my view place Transcom in a different position than other creditors who make a decision to deal with entities that seek to evade their just obligations. In fact, the manner in which Transcom structured its transactions with Global could be said to reveal its knowledge of Global's plan to shirk its responsibilities to Verizon. The majority's narrow view of what constitutes property for purposes of CPLR article 52, judgment debtors and those who transact business with them places in its hands a virtual road map for frustrating the efforts of judgment creditors. The goal of article 52, to promote and ensure the enforceability of money judgments, is too critical to the conduct of commerce in this state to permit that to happen. In light of the clear property interest that Global had in Transcom's payments based on the latter's long and consistent history of making those payments, the laudable purpose of the statute is undermined by the majority's decision to not require Transcom to abide by Verizon's restraining notice.

Accordingly, I believe that Global had a "future interest" in payments from Transcom that constituted property pursuant to the plain language of CPLR 5201(b), and which was subject to restraint.

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

ENTERED: JUNE 28, 2012



DEPUTY CLERK