SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 9, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Renwick, DeGrasse, JJ.

1186 In re Jayvien E.,

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

Marisol T.,
Respondent-Appellant,

Commissioner of The New York City
Administration for Children's Services,
Petitioner-Respondent.

Susan Jacobs, New York (Rebecca Horwitz of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about April 8, 2008, which, upon a fact-finding determination that respondent mother neglected the subject child, inter alia, placed the child with his maternal grandmother pending the completion of the next permanency hearing, unanimously reversed, on the law and the facts, without costs, the findings of neglect vacated and the neglect petition dismissed.

On December 14, 2006, at approximately 11:15 a.m., respondent, who was then 19 years old, gave birth to a son, Jayvien E., at Beth Israel Medical Center (BIMC). After delivery, a nurse came to respondent's room and began to push on her stomach. Respondent asked the nurse to stop. When the nurse continued to push on her stomach, respondent became upset and allegedly yelled at the nurse to stop. That evening, at approximately 10:30 p.m., respondent called and requested that an unwanted visitor, the baby's father, be removed from her hospital room. Security had to be called to remove Jayvien E.'s father from respondent's room.

The next morning, at approximately 6:15 a.m., a medical student overheard respondent calling her baby "greedy" and "too much." As a result, BIMC conducted a psychiatric consultation of respondent. Dr. A. Newfield, a psychiatrist, prepared a report. Dr. Newfield stated that when he first encountered respondent, she was in bed holding and feeding her son, and she appeared fairly groomed, well-related with appropriate eye contact, seemingly reliable and cooperative. Dr. Newfield's report noted that respondent had an "unclear" psychiatric history.

During his second visit with respondent later that same day, Dr. Newfield was accompanied by another doctor, Dr. Kato. When the two first arrived, respondent was asleep. Dr. Newfield recounted that after being awakened, respondent appeared less

well-related, that she was ignoring the conversation at times and was uncooperative. He recommended that the New York City Administration for Children's Services (ACS) be contacted to determine respondent's history and to evaluate what should be done with her son. Dr. Newfield further recommended that respondent be referred to outpatient treatment, stating "Axis I R/O Borderline MR, R/O intermittent explosive D/O, R/O Bipolar, R/O Psychotic D/O."

Dr. Kato also prepared a report, in which he stated that during his interview with respondent, she became easily agitated and uncooperative. Dr. Kato further reported that respondent had vague thoughts, poor insight and judgment. Dr. Kato's report states "R/O depression/anxiety" and that he was "concerned about her ability to safely . . . care for the baby." Neither Dr. Newfield nor Dr. Kato indicated in their reports how long they spent interviewing respondent.

The record also contains a number of BIMC Postpartum Daily Patient Care Flow Sheets signed by registered nurses tracking respondent's behavior after the birth of her son. Two of these sheets, prepared on December 14, 2006, for the day and night shifts, state that respondent's mood was appropriate, and that she was cuddling and talking to her son and performing baby care. Another flow sheet similarly described respondent's interaction with her son during the night shift of December 15, 2006.

Further, the flow sheet dated December 16, 2006, for the day shift, noted the identical observations. The record also contains a progress note titled "Psych F/U," which states that respondent was observed on December 15, 2006, at approximately 9:15 p.m., and that she did "not display any psychiatric symptoms at present."

The medical records from BIMC assert that respondent has a history of behavior problems including aggressive outbursts, depression, and suicidal ideation, and that she has been prescribed medication including Wellbutrin and Risperdal. The BIMC reports indicate that she had been hospitalized and evaluated previously at Saint Vincent's Hospital and had received counseling services. However, the record does not contain any of respondent's medical records from Saint Vincent's Hospital. Respondent does acknowledge that she has had periods of depression and that she has been hospitalized five or six times.

On December 15, 2006, ACS received a mandated Oral Report Transmittal (ORT) from a social worker indicating that ACS should investigate respondent. The ORT asserts that "safety factors" were involved because respondent suffered from a mental illness or disability that impaired her ability to care for Jayvien E. ACS assigned Child Protective Specialist Karina Vargas to investigate the allegations.

Vargas commenced her investigation by speaking to her

supervisor, contacting the social worker who was the source of the ORT and having a 15 minute telephone conversation with respondent. On December 15, 2006, at approximately 6:00 p.m., Vargas telephoned respondent's hospital room and asked her why she had called her baby "greedy." Respondent explained to Vargas that after she had fed her son, he started to cry as if he wanted to be fed again. Respondent then picked up her child and called him "greedy." Respondent told Vargas that she did not mean it in a bad way.

Vargas also questioned respondent about why she had yelled at a nurse shortly after delivering Jayvien E. Respondent explained to Vargas that she told the nurse to stop pressing on her stomach because she was not feeling well and was still sore from the birth of her son. She became angry after the nurse had ignored her requests and continued to press down on her stomach. Respondent also told Vargas that she was not an angry person, however, sometimes when she gets upset, she would throw things, but not directly at people.

In a petition dated December 18, 2006, ACS asked the Family Court to find that Jayvien E. was a neglected child. ACS's petition asserts it was necessary to remove Jayvien E. from respondent's custody on December 16, 2006, without a court order, because his physical, mental or emotional well-being had been impaired or was in imminent danger of becoming impaired due to

his mother's mental illness. The neglect petition specifically alleges that after respondent gave birth she: (1) exhibited bizarre behavior; (2) was not nurturing toward the child; (3) would not look at the child; and (4) had called the baby "greedy" when her son was hungry. The petition further asserts that after a psychiatric evaluation of respondent, it was revealed that she suffers from Intermittent Explosive Disorder and that she has Borderline Cognitive Abilities with poor insight and judgment. The petition also asserts that respondent failed to be forthcoming about the medications she had been prescribed and that she used to take antidepressants, antipsychotics, and mood stabilizers.

The Family Court conducted a fact-finding hearing on June 13, 2007, August 10, 2007, October 5, 2007 and March 14, 2008. The court heard testimony from two witnesses: Vargas, who was the assigned caseworker and the person who signed the neglect petition, and respondent's expert witness, psychologist Dr. Peter F. Wolf.

At the fact-finding hearing, Vargas admitted during her cross-examination that Jayvien E.'s physical or emotional well-being had not been impaired, nor was it in imminent danger of being impaired, by respondent asking the nurse to stop pressing on her stomach or by her calling him "greedy." Vargas also admitted that Jayvien E.'s physical and emotional well-being had

not been impaired, and had not been in imminent danger of being impaired, by the fact that respondent had been prescribed antidepressant medication.

When questioned regarding what information lead her to believe that respondent had been physically violent, Vargas stated that she had reviewed some domestic incident reports describing altercations between respondent and respondent's mother, Jayvien E.'s maternal grandmother. In particular, Vargas stated that according to a February 2005 domestic incident report, there had been an altercation between respondent and her mother which involved some pushing, a verbal argument and a chair being thrown. However, Vargas admitted that the February 2005 report failed to state who pushed whom and that the report only indicated "that somebody threw a chair at someone."

Vargas never contacted Dr. Newfield although she admitted that speaking to him was important. Moreover, Vargas admitted she never ascertained the identity of the nurse who had pushed on respondent's stomach, nor obtained her account of the interaction. Vargas testified that Dr. Newfield's report was the document upon which she based some of the allegations contained within the negligence petition. However, after being asked to show the court where in Dr. Newfield's report he diagnosed respondent with having Intermittent Explosive Disorder, Vargas identified the portion of the report which stated "Axis I . . .

R/O Intermittent explosive D/O." When asked what the quoted phrase meant, Vargas admitted that she "[did]n't know for sure." When asked to identify the source of the diagnosis that respondent had borderline cognitive abilities, Vargas admitted she did not see anything in Dr. Newfield's report that diagnosed respondent with borderline cognitive abilities.

According to respondent's expert witness, a psychologist, Dr. Peter F. Wolf, "R/O" means "rule out." It is used where a diagnosis is a "possibility," and indicates that more information is required to "rule it out or rule it in." Dr. Wolf testified that Dr. Newfield's report contained "no diagnosis that's ruled in." Dr. Wolf recounted that he met with respondent for approximately two hours. During a psychological evaluation of respondent, he performed two psychological tests: Thematic Apperception Test and the Rorschact Test. Dr. Wolf stated that based upon his evaluation as to whether respondent had Intermittent Explosive Disorder, he determined that "[t]here was no indication of that and there was no indication that at the time she was seen in [at BIMC] at least from the hospital's report that there was anything of that nature."

Although Dr. Wolf did not perform an IQ test for respondent, he stated "she was able to communicate coherently" and that she had a good awareness of reality. When asked if respondent had any psychological condition that would negatively impact her

ability to parent her son, Dr. Wolf testified that "I think that she's young she's had a rough life . . . she needs to learn . . . to grow[] into being a parent. . . I don't see that reaches the point where I would be concerned about neglect or abuse." However, Dr. Wolf admitted that he did not review respondent's medical records regarding her prior hospitalizations.

On December 12, 2008, the Family Court rendered an oral decision holding Jayvien E. was a neglected child whose physical, mental and emotional condition was in imminent danger of becoming impaired as a result of respondent's failure to exercise a minimum degree of care. The court expressed concern over the altercation between respondent and Jayvien E.'s father, noting that security had to be called to resolve the situation. The court found that Dr. Wolf's testimony was of limited value because he did not examine respondent's complete psychiatric history and had placed undue reliance on respondent's self-reporting. The court concluded that given these deficiencies in Dr. Wolf's testimony, it was insufficient to rebut ACS' direct case.

The court held that the evidence established a causal connection between respondent's condition and actual and potential harm to her child, based upon

> "the chronicity and durability of [respondent's] behavior symptoms[,] . . . [her] chronic history of the pattern of noncompliance with treatment, medication, and

> follow-up treatment recommendations . . . [and that] [t]here is no evidence in the record that she understands the nature of her own behavior and how it could affect her ability to safely care for a child."

The court noted that respondent had been "psychiatrically hospitalized" at Saint Vincent's Hospital in 1999, which resulted in her being discharged with a prescription for psychiatric medication, and that she was considered to be a patient at high risk.

Citing a "November 2002 report in the Beth Israel records of aggression in [respondent's] day treatment that led to a concern for the safety of others in her program," the court found a "nexus between respondent's symptoms and her parental capacity is her long standing pattern of aggressive acting out." The Family Court held that an adverse inference against respondent was warranted due to her failure to testify at the fact-finding hearing. Ultimately, the court concluded that respondent's chronic aggressive behavior "would pose a risk for a vulnerable, young, dependent child in her care" and ordered that Jayvien E. be placed temporarily in the custody of his maternal grandmother.

We reverse. "A finding of neglect should not be made lightly, nor should it rest upon past deficiencies alone" (*Matter of Daniel C.*, 47 AD2d 160, 164 [1975]). The Family Court Act defines "neglected child" as a child, less than 18 years old, "whose physical, mental or emotional condition has been impaired

or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent or other person legally responsible for his [or her] care to exercise a minimum degree of care" (Family Ct Act § 1012[f][i]). "A respondent's mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child[]" (*Matter of Jesse DD.*, 223 AD2d 929, 930-931 [1996], *lv denied* 88 NY2d 803 [1996]; *see also* Family Ct Act § 1046[b][i]).

Before rendering a finding of neglect, Family Court Act § 1012(f)(i) requires the court to determine whether there is proof of actual or imminent danger of physical, emotional or mental impairment to the child. Indeed, a Family Court is required to:

> "focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. 'Imminent danger' reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed. . . Imminent danger, however, must be near or impending, not merely possible" (*Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]).

Expert testimony or a definitive psychiatric diagnosis is not required to show a parent suffers from a mental illness because "the consequences of the proceedings are temporary rather than permanent" (*Matter of Zariyasta S.*, 158 AD2d 45, 48 [1990]; *see also Matter of Caress S.*, 250 AD2d 490 [1998]). However, the quantum of evidence presented at a fact-finding hearing must be

"sufficient to prove that if the child were released to the mother there would be a substantial probability of neglect" that places the child at risk (*Matter of Baby Boy E.*, 187 AD2d 512, 512 [1992] [internal quotation marks and citation omitted]); *see also Matter of Danielle M.*, 151 AD2d 240 [1989]; *Matter of Eugene G.*, 76 AD2d 781 [1980] *appeal dismissed* 51 NY2d 878 [1980]).

Here, the record contains no evidence sufficient to support the hearing court's finding of "a link or causal connection between the basis for the neglect petition and the circumstances that allegedly produce the child's impairment or imminent danger of impairment" (*Nicholson v Scoppetta*, 3 NY3d at 369). Assuming the truth of ACS' factual assertions regarding respondent's actions during her hospitalization at BIMC, that she had been hospitalized on prior occasions, and that she had been prescribed medications, no inference can be fairly drawn that anything in her history impaired or placed her son "in imminent danger of becoming impaired" (Family Ct Act § 1012[f][i]).

ACS Child Protective Specialist Vargas testified that the report prepared by Dr. Newfield was the document upon which she based some of the allegations contained within the negligence petition. However, the negligence petition's assertions that a psychiatric evaluation was performed upon respondent and that it revealed she suffers from Intermittent Explosive Disorder and Borderline Cognitive Abilities with poor insight and judgment

find no support in any of the testimony presented at the fact-finding hearing. Indeed, Dr. Wolf's unrefuted testimony establishes that there was no diagnosis in Dr. Newfield's report.

Given the fact that the BIMC records contain conflicting observations of respondent's postpartum behavior, we find that these records fail to provide clear evidence that respondent's suffers from mental illness that affects her ability to care for her son (*compare Matter of Kazmir K.*, 63 AD3d 522, 523 [2009]). Further, ACS failed to produce a single witness at the fact-finding hearing that observed respondent's allegedly bizarre behavior (*see Zariyasta S.*, 158 AD2d at 48). Thus, the evidence produced by ACS failed to provide the quantum of proof necessary to support the Family Court's conclusion that Jayvien E. would be at immediate risk if placed in respondent's custody.

We find that the record provides no support for the Family Court's conclusion that respondent has engaged in chronic aggressive behavior that "would pose a risk for a vulnerable, young, dependent child in her care." The November 2002 report does state that respondent's day treatment program was concerned that her aggressive behavior presented issues of safety of others in her program. However, this report is too vague and too far removed to establish a "'causal connection between the basis for the neglect petition and the circumstances that allegedly produce

the child's impairment or imminent danger of impairment'" (*Matter of Tequan R.*, 43 AD3d 673, 677-678 [2007], quoting *Nicholson v Scoppetta*, 3 NY3d at 369).

Although the record does show there have been instances of domestic violence between respondent and her mother, the person to whom the Family Court gave temporary custody of Jayvien E., and between respondent and the baby's father, there is no evidence that respondent was the aggressor in any of these altercations. The February 2005 domestic incident report between respondent and Jayvien E.'s maternal grandmother which states that "someone threw a chair at someone" is also too vague and too far removed to provide evidence of imminent danger to the physical, emotional or mental impairment of Jayvien E. Thus, the record fails to show that respondent's behavior constituted conduct toward her son that was of a "serious nature requiring the aid of the court" (Family Ct Act § 1012[f][i][B]).

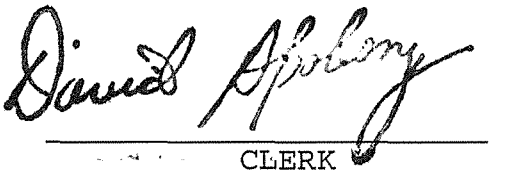
The Family Court was entitled to draw the "'strongest negative inference'" against respondent from her failure to testify at the fact-finding hearing (*Matter of Devante S. v John H.*, 51 AD3d 482, 482 [2008], quoting *Matter of Nicole H.*, 12 AD3d 182, 183 [2004]; *see also Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]). This inference notwithstanding, we find that ACS failed to prove by a preponderance of the evidence that respondent mother has a mental

illness that had impaired her infant son, or that her mental illness placed him in imminent danger of becoming impaired, or posed to Jayvien E. an imminent risk of harm.

Therefore, the finding of neglect should be vacated and the petition dismissed.

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

ENTERED: FEBRUARY 9, 2010



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Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2025 Apple Bank for Savings, Index 603492/06
Plaintiff-Respondent,

-against-

PricewaterhouseCoopers LLP,
Defendant-Appellant.

Curtis, Mallet-Prevost, Colt & Mosle LLP, New York (Eliot Lauer of counsel), for appellant.

Foley & Lardner LLP, New York (Peter N. Wang of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 15, 2009, which, insofar as appealed from as limited by the briefs, in an action alleging accounting malpractice, denied defendant's motion for summary judgment dismissing plaintiff's claims accruing more than three years prior to the commencement of this action, plaintiff's claim for gross negligence and its claim for punitive damages, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff's malpractice claim accrued in early 2000 when its accountant rendered the allegedly improper tax advice. However, the motion court erred in finding that the statute of limitations was tolled under the continuous representation doctrine during defendant's subsequent relationship with plaintiff. Although defendant audited plaintiff's year-end financial statements, prepared its tax returns and provided ad hoc tax advice to

plaintiff, it never had any express, mutual agreement to advise plaintiff on the effect of the stock buy back, after the original advice (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 10-11 [2007]; *Zaref v Berk & Michaels*, 192 AD2d 346, 347-348 [1993]).

Dismissal of the claim alleging gross negligence is appropriate because without the time-barred claims, defendant's conduct could not arise to gross negligence, as it did not "smack[] of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 824 [1993] [internal quotation marks and citation omitted]). Furthermore, since defendant's conduct was neither wantonly dishonest nor aimed at the public, the claim for punitive damages should have been dismissed (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 60 [2004], *lv dismissed* 2 NY3d 793 [2004]).

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

ENTERED: FEBRUARY 9, 2010

CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2159 Jose Marquez, Index 14735/05
Plaintiff-Respondent,

-against-

J.A. Jones Construction Group, LLC, et al.,
Defendants-Appellants.

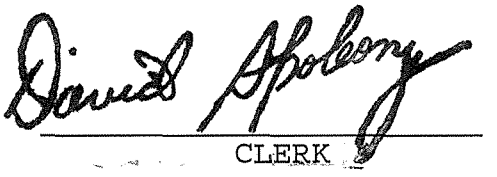
[And a Third-Party Action]

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about June 26, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 26, 2010,

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

ENTERED: FEBRUARY 9, 2010



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Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

192 In re Levin & Glasser, P.C., Index 105412/07
Plaintiff-Respondent,

-against-

Kenmore Property, LLC,
Respondent-Appellant.

Norman A. Olch, New York for appellant.

Levin & Glasser, P.C., New York (Steven I. Levin of counsel), for respondent.

Judgment, Supreme Court, New York County (Lottie E. Wilkins, J.), entered November 19, 2007, confirming an arbitration award of $280,000 in favor of petitioner and, insofar as appealed from as limited by the briefs, dismissing respondent's counterclaim to recover certain funds that had been held in escrow by petitioner, and awarding petitioner prejudgment interest, costs and disbursements, unanimously reversed, on the law with costs, the awards of interest, costs and disbursements in favor of petitioner vacated, respondent's counterclaim reinstated, respondent awarded the amount over $280,000 in the escrow account as of March 13, 2007, with interest from that date, and petitioner directed to return to respondent any amount over $280,000 paid by respondent in satisfaction of the judgment, with interest from the date of payment. The matter is remanded for settlement of an amended judgment in accordance herewith.

The petitioner law firm was the claimant in an arbitration

proceeding against respondent, its former client, under the Fee Dispute Resolution Program (Rules of Chief Admin Of Cts [22 NYCRR] part 137). By an award dated February 13, 2007, the arbitrators awarded petitioner $280,000 in fees and disbursements, roughly $30,000 less than petitioner claimed it was owed. At the time the fee dispute arose, petitioner was holding in escrow $402,128.60 in settlement proceeds from the underlying litigation in which it represented respondent. Prior to the arbitration hearing taking place, petitioner sent respondent a check for $92,266.03, retaining in escrow $309,862.57, the amount it claimed it was owed in fees and disbursements.

Petitioner commenced the instant proceeding to confirm the award and requested that the judgment confirming the award include interest at the statutory rate of 9% from the date it claimed the fees and disbursements were due, December 23, 2005 (the date of its final bill). By a judgment entered November 19, 2007, Supreme Court confirmed the award and directed that interest be paid from December 23, 2005, which it calculated to be $48,052.60. Because the amount awarded with interest was greater than the amount held in escrow, respondent was required to pay an additional sum to petitioner to satisfy the judgment. Respondent contends, and we agree, that the court erred in awarding interest prior to the date of the award.

We have previously held that "[i]n a contract dispute brought before an arbitrator the question of whether interest from the date of the breach of the contract should be allowed in an arbitration award is a mixed question of law and fact for the arbitrator to determine" (*Matter of Gruberg [Cortell Group]*, 143 AD2d 39, 39 [1988], citing *Matter of Penco Fabrics [Louis Bogopulsky, Inc.]*, 1 AD2d 659 [1955] ["The question whether interest was to be allowed on the award from the date when payment of the invoices was found to be due was for the arbitrators to determine"]).

We perceive no basis for coming to a different conclusion with respect to arbitrations under the Fee Dispute Resolution Program. To be sure, the Rules of the Chief Administrator do not authorize an award of pre-award interest. But neither do they forbid it and, for several reasons, we think the silence of the Rules on this subject is an insufficient basis for concluding that the arbitrators have no authority to award pre-award interest. First, "the cases grant arbitrators broad authority to resolve disputes" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 93 [1991]; *see also Matter of Board of Educ. Of Norwood-Norfolk Cent. School Dist. [Hess]*, 49 NY2d 145, 152 [1979] ["to achieve what the arbitration tribunal believes to be a just result, it may shape its remedies with a flexibility at least as unrestrained as that employed by a

chancellor in equity"]). Accordingly, the legally significant fact is the absence of a provision in the Rules prohibiting, rather than the absence of one authorizing, the award of pre-award interest (*see Hunter v Glenwood Mgt.*, 156 AD2d 310, 311 [1989] ["an arbitrator's power to resolve a dispute properly before him is ordinarily plenary unless expressly limited by the terms of the agreement to arbitrate"]).

In addition, to conclude that arbitrators under the Fee Dispute Resolution Program lack that authority would make little sense, as it would invite, as it did here, subsequent judicial proceedings whenever attorneys prevail in an arbitration. Judicial proceedings would be necessary for attorneys to vindicate their right under CPLR 5001, on a claim for breach of contract, to interest on the sum awarded "computed from the earliest ascertainable date on which the . . . cause of action existed and if that date cannot be ascertained with precision, . . . from the earliest time at which it may be said the cause of action accrued" (*Ogletree, Deakins, Nash, Smoak & Stewart v Albany Steel*, 243 AD2d 877, 880 [1997] [internal quotation marks omitted]). Moreover, in some cases those judicial proceedings would be at least partially duplicative of the arbitral proceedings, contrary to both a principal purpose of arbitration,

the swift and efficient resolution of disputes (*see Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]), and the summary nature of a special proceeding pursuant to CPLR 7510 to confirm an arbitration award (*see Matter of Bernstein Family Ltd. Partnership v Sovereign Partners*, L.P., 66 AD3d 1, 8 [2009]). After all, the parties may disagree about the date from which interest should run, and resolving such disputes may require the court to become familiar with the underlying controversy (*see e.g. Ogletree*, 243 AD2d at 880).

Given that the arbitrators had authority to award pre-award interest and made no such award, we would be required to reverse so much of the judgment as directed payment of pre-award interest if petitioner sought pre-award interest from the arbitrators (*see Matter of Gruberg*, 143 AD2d 39 at 39 ["on a motion to confirm an arbitration award, if the award is silent on the question of prejudgment interest, a court is not entitled to award such interest. Rather, 'upon confirmation of an arbitrator's award, interest should be provided from the date of the award'"]). Respondent contends that petitioner did seek pre-award interest, and relies in particular on the answer given by petitioner's counsel when one of the arbitrators asked, "Are you claiming interest?" Counsel responded, "We are claiming interest from the period when the money became due and payable. November '05." Although petitioner acknowledges that its counsel gave that

answer, it nonetheless asserts, without further explanation, that it "at no time claimed that it was seeking such interest in the arbitration for the obvious reason that the panel could not award interest." We need not decide, however, whether petitioner did or did not seek pre-award interest from the arbitrators. Because petitioner could have sought interest from the arbitrators, it is barred from seeking it from the court in its petition to confirm the award (*cf. Clemens v Apple*, 65 NY2d 746 [1985] [where party had a full and fair opportunity to litigate claim during arbitration proceeding, it cannot seek to litigate the same claim in judicial forum]).

Further, petitioner is not entitled to post-award, pre-judgment interest since it was holding the $310,000 at issue in escrow and chose not to avail itself of the funds when the arbitrators' award of $280,000 became final. Although petitioner asserts that it could not pay itself from the escrowed funds without respondent's consent and also asserts that appellant never gave its consent, the relevant rule, former Code of Professional Responsibility DR 9-102(b)(4)(22 NYCRR 1200.46[b][4])(now Rules of Professional Conduct [22 NYCRR 1200.15[b][4]), does not require client consent under these circumstances. To the contrary, it provides that the lawyer may withdraw the funds being held upon final resolution of the dispute. Nonetheless, when the award became final, petitioner

did not pay itself the amount of the award and transmit the balance (approximately $35,000) to respondent. Rather, in addition to seeking respondent's written authorization for payment of the award from the escrow account, petitioner improperly sought to obtain a benefit from its former client by refusing to transmit the balance unless respondent and its principal executed releases. The balance belonged to respondent and petitioner had no legal claim to it. Accordingly, petitioner was required to "promptly pay" to respondent the funds to which it was entitled after the arbitrators' award became final (former Code of Professional Responsibility DR 9-102(c)(4)(22 NYCRR 1200.46[c][4])(now Rules of Professional Conduct [22 NYCRR 1200.15[c][4])[1]

In short, petitioner both deprived itself of the use of the funds awarded to it and deprived respondent of the use of the balance of the funds being held in escrow. Under settled law, petitioner's statutory right to interest is far from absolute. To the contrary, as then Justice Bergan stated for a panel of

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[1]On April 13, 2007, when respondent refused to supply the releases, its attorney transmitted to petitioner a signed authorization for respondent and stated "feel free to make the [$280,000] distribution to your firm today, and send the check for . . . the remaining balance to our office." Although petitioner contends that the authorization contained an inaccurate statement about the underlying action in which it represented respondent, we note that the authorization did not purport to require the signature of a representative of petitioner.

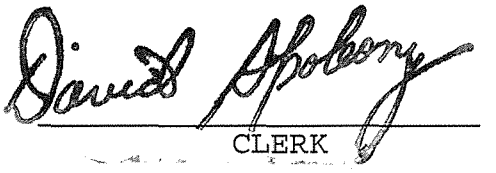
this Court, "[t]he holder of the judgment may be estopped by equitable considerations, or by his own acts, from enforcing the interest which the statute gives him" (*Feldman v Brodsky*, 12 AD2d 347, 350 [1961], *affd* 11 NY2d 692 [1962]; *id.* at 351 ["Interest may be cut off because of some action by the judgment creditor which would make it inequitable or oppressive that he get interest on his judgment, *e.g.*, his refusal to accept a tender"]; *see also Matter of Venables v Painewebber, Inc.*, 205 AD2d 788, 789 [1994]). Given the "special and unique duties" petitioner owed to respondent, including "safeguarding client property and honoring the client['s] interests over [its own]" (*Matter of Cooperman*, 83 NY2d 465, 472 [1994]), we think it would be particularly inequitable to require respondent to pay statutory interest to petitioner and thus recompense petitioner for its own failure to pay itself.

Because petitioner was holding more than the $280,000 it was awarded by the arbitrators on the date the award became payable, March 13, 2007, respondent is entitled to the balance that would have remained in the escrow account after payment of the award on that date, with interest on such balance from that date. In addition, because Supreme Court erred in awarding interest to petitioner and respondent was thereby required to pay an

additional sum to petitioner to satisfy the judgment, respondent is entitled to the amount it paid over $280,000 to satisfy the judgment with interest from the date the sum was paid.

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

ENTERED: FEBRUARY 9, 2010



CLERK

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

1390 Thomas Signorelli, Index 111889/05
Plaintiff-Appellant,

-against-

The Great Atlantic & Pacific Tea Company, Inc., etc., et al.,
Defendants-Respondents.

Alexander J. Wulwick, New York for appellant.

Kral, Clerkin, Redmond, Ryan, Perry & Girvan, LLP, Mineola (John J. Ullrich of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about April 1, 2009, which, in an action for personal injuries sustained in a slip and fall on a wet floor in the vestibule of defendants' supermarket, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

As plaintiff entered defendants' supermarket, he slipped and fell in the vestibule, which was covered in linoleum tiles that were wet because "[i]t was raining all day and coming in." He observed no mats or signs warning of a slippery condition.

At his examination before trial, defendants' grocery clerk testified that, when it rained, "somebody would go and get some mats and put them in the front," but he did not remember whether he had ever seen "the porter place down mats in the vestibule

area when it was raining." Nor did he recall what the weather was like on the day of the accident or whether he had seen "any mats down in the vestibule area that day."

On their motion, defendants denied actual or constructive knowledge of the alleged hazardous condition, contending that they had no duty to provide an ongoing remedy when a slippery condition is caused by moisture tracked into the premises during a constant rain. Supreme Court agreed, reasoning that plaintiff "failed to submit evidence sufficient to raise an issue of fact as to constructive notice that there was a recurrent dangerous condition with respect to rainy weather conditions." We disagree.

Plaintiff's statement that the floor was wet and slippery due to a constant rain is evidence sufficient to raise a factual question as to whether defendant knew or should have known of the existence of a hazardous condition. His testimony constitutes evidence from someone with personal knowledge of the facts and, whether or not it is regarded as self-serving, it is sufficient to present an issue for trial (*see Butler v Helmsley Spear, Inc.*, 198 AD2d 131, 132 [1993]). Plaintiff identified the wet and slippery floor as the reason for his fall; thus, his testimony cannot be dismissed as mere

speculation regarding causation (*cf. Keom Choi v Olympia and York Water St. Co.*, 278 AD2d 106, 106-107 [2000] ["plaintiff inferred his fall was caused by water on the floor"]; *Pagan v Local 23-25 Intl. Ladies Garment Workers Union*, 234 AD2d 37 [1996] [plaintiff "could not remember whether or not the floor had been wet"]). In addition, defendants' employee testified that it was the store's practice to put down mats during inclement weather. Together, the testimony satisfies plaintiff's burden to demonstrate that a visible and apparent hazardous condition had existed for a sufficient length of time to permit defendants' employees to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]) but that they failed to take reasonable measures to do so.

In any event, defendants' moving papers failed to make out a prima facie case for summary judgment. The testimony of defendants' employee does not establish that defendants lacked actual or constructive knowledge of the condition of their vestibule, only that the employee had no recollection of conditions or remedial measures that might have been implemented

on the date of the accident (*see Josephson v Crane Club*, 264 AD2d 359, 360 [1999]).

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

ENTERED: FEBRUARY 9, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1697 Davin Dessasore, Index 16097/04
Plaintiff-Respondent-Appellant,

-against-

New York City Housing Authority,
Defendant-Appellant-Respondent.

Shaub Ahmuty Citrin & Spratt, LLP, Lake Success (Timothy R. Capowski and Gerard S. Rath of counsel), appellant-respondent.

Sonkin & Fifer, New York (David Samel of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered March 20, 2009, which denied defendant's posttrial motion to set aside the jury's verdict on liability, granted both parties' motions to set aside the damages award and directed a new trial on damages, modified, on the law, defendant's motion to set aside the liability verdict granted and the matter remanded for a new trial of all the issues, and otherwise affirmed, without costs.

Plaintiff seeks damages for injuries he sustained when he fell down a stairway in defendant's building after tripping on a handrail that had partially come loose from the wall and was resting at the top of the steps. At trial, plaintiff conceded that he was looking straight ahead at the time of the accident and had not reached for the handrail before commencing his descent on the stairway. There was evidence that plaintiff may

have been talking on his cell phone at the time of the accident. The jury found that both plaintiff and defendant were negligent but that plaintiff's negligence was not a substantial factor in causing his injuries. It awarded plaintiff $5 million for past pain and suffering and nothing for medical expenses or future pain and suffering.

The jury's award of zero damages for medical expenses and future pain and suffering cannot be explained rationally, given the extent of plaintiff's injuries and the evidence of permanence. As the trial court found, the jury either did not understand the court's instructions on damages or did not follow them. The court properly declined to speculate as to the jury's thinking, and directed a new trial on damages.

We would go further. Although defendant's challenge to the verdict on liability as inconsistent is unpreserved because it was not raised before the jury was discharged (*see Barry v Manglass*, 55 NY2d 803 [1981]), portions of the verdict are indisputably irrational, not only with respect to the anomalous damages award, but also with respect to the issue of liability. Accordingly, we consider the matter in the interest of justice (CPLR 4404[a]). The jury's finding of liability is irreconcilably inconsistent. As noted, there was evidence that plaintiff was not looking down before he proceeded to descend the stairs, that he was not paying attention to his surroundings, and

that he was talking on a cell phone just before he fell. Under these circumstances, "the issues of negligence and proximate cause are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*McCollin v New York City Hous. Auth.*, 307 AD2d 875, 876 [2003]).

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

SAXE, J. (dissenting)

Plaintiff established at trial that he was injured when he fell down a stairway in defendant's building after tripping on a handrail that had come loose from the wall and was resting at the top of the steps. Despite plaintiff's admission that he was looking straight ahead at the time of the accident and had not reached for the handrail before commencing his descent on the stairway, and evidence that plaintiff may have been talking on his cell phone at the time of the accident, the jury had more than enough evidentiary support for its finding that defendant Housing Authority was 100% liable for plaintiff's accident.

However, as the trial court correctly recognized, there was an irreconcilable inconsistency in the jury's award of damages. Once the jury determined that plaintiff sustained injuries causing substantial past pain and suffering, its failure to award any damages for medical expenses and future pain and suffering cannot be explained rationally. Either the jury did not understand the court's instructions on damages or did not follow them, making it necessary to direct a new trial on damages. Nor may we limit the new damages trial to the issues of medical expenses and future pain and suffering, since it was possible that the $5 million award was intended to include more than one category of damages.

The irrationality of the damages award does not affect the

jury's liability finding. The issue of liability is not so inextricably interwoven with the issue of damages as to warrant a new trial of both issues. Nor is there anything irreconcilable about the jury's findings on negligence and proximate cause that would warrant upsetting the jury's liability determination. Where a jury's findings are rationally based on the evidence before it, a reviewing court should not set those findings aside simply because it might have found otherwise (*Rivera v 4064 Realty Co.*, 17 AD3d 201, 203 [2005], *lv denied* 5 NY3d 713 [2005]). That deferential standard of review for jury findings continues to apply even where the findings on another issue, such as the damages award in this instance, should be set aside and the issue re-tried. Here, the jury rationally concluded that although plaintiff was negligent in talking on his cell phone and not looking down as he approached the stairs, his negligence was not a proximate cause of his accident, and that the sole proximate cause of the accident was the handrail on the floor. There is no basis for this Court to set that finding aside. Moreover, the exercise of our interest of justice jurisdiction to review defendant's unpreserved challenge to the liability verdict

is not warranted. The trial court's grant of a new trial solely on the issue of damages was proper.

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

ENTERED: FEBRUARY 9, 2010

CLERK

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

1873 The People of the State of New York, Respondent, Ind. 2625/06

-against-

Umar Delgado, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Nicole Coviello of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered October 11, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. When the circumstances are viewed collectively rather than individually (*see People v Stephens*, 47 AD3d 586, 588 [2008], *lv denied* 10 NY3d 940 [2008]), they provided, at least, reasonable suspicion justifying the police actions. In the first place, defendant was linked to a past assault in which the assailant left his cell phone at the scene. Through a ruse, the police arranged for the owner to pick up his phone, and when defendant and another man arrived at the place of the planned meeting, the assault victim told the police that one of these men might have

been his assailant. As officers, one of whom knew defendant from a prior arrest, observed and approached defendant, they saw that he was wearing gloves and a sweatshirt on a warm day, that he had a crowbar-like object sticking out of his pocket, and that he took a series of furtive and evasive actions. Finally, the officers saw a bulge in defendant's waistband, which is a familiar telltale sign of a weapon (*see People v Benjamin*, 51 NY2d 267, 271 [1980]; *People v De Bour*, 40 NY2d 210, 221 [1976]). The bulge, taken together with these other indicia of criminality, provided ample basis for the officer to touch defendant's waistband and, upon feeling a hard object, to conduct a frisk.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 9, 2010

CLERK

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

2036 Fidelity National Title Insurance Company, et al., Petitioners-Appellants, Index 110144/08

Sheila Ferrari, etc., et al., Petitioners-Intervenors-Appellants,

-against-

Regent Abstract Services, Ltd., et al., Respondents,

New York Life Insurance Company, Third Party Respondent.

Kleinman, Saltzman & Bolnick, P.C., New City (Caryn F. Blaustein of counsel), for Fidelity National Title Insurance Company, Commonwealth Land Title Insurance Company, United General Title Insurance Company and Old Republic National Title Insurance Company, appellants.

Feeney & Associates, PLLC, Hauppauge (Rosa M. Feeney of counsel), for Sheila Ferrari, Rachal Ferrari, Maureen Cappelli, Kathleen Delvecchio and Eileen Lutz, appellants.

Lally Mahon & Rooney LLP, New York (Christopher S. Rooney of counsel), for New York Life Insurance Company, respondent.

Judgment and order (one paper), Supreme Court, New York County (Edward H. Lehner, J.), entered January 12, 2009, which granted respondent New York Life Insurance Company's cross motion to dismiss the petition brought pursuant to CPLR 5225 seeking an order directing respondent to release to petitioners the full value of the life insurance policy covering decedent's life, owing to Regent Abstract Services, LTD., unanimously affirmed, without costs.

The IAS court correctly held that the subject insurance policy, which had lapsed for nonpayment of premiums, was not reinstated prior to decedent's death. The policy expressly required that the insured be alive at the time it received a past due premium in order for the policy to be reinstated. The policy lapsed on February 27, 2008. The insurer, New York Life Insurance Company, received the overdue premium payment on March 6, 2008; however, the decedent died in the interim, on March 3, 2008. Since a condition for reinstatement was not met, the policy could not be revived (*see Scott v American Republic Life Ins. Co.*, 88 AD2d 949 [1982]).

Petitioners' and cross-petitioners' reliance on the "postal acceptance rule" for payment is misplaced because here the policy specifically required receipt while the insured was alive in order for the policy to be reinstated (*compare Government Empls. Ins. Co. v Solaman*, 157 Misc 2d 737 [1993]).

We have considered petitioners' and cross-petitioners' remaining contentions and find them unavailing.

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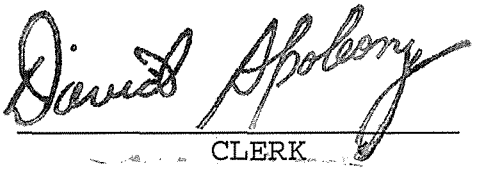

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2112 The People of the State of New York, Ind. 2824/07
Respondent,

-against-

Miguel Santana,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc Adam Sherman of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered July 11, 2008, as amended August 26, 2008, convicting defendant, after a nonjury trial, of attempted murder in the second degree, assault in the first degree (two counts) and criminal possession of a weapon in the second degree (two counts), and sentencing him to an aggregate term of 25 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The requisite intent for the attempted murder and first-degree assault convictions could be readily inferred from defendant's actions in shooting the victims (*see People v Getch*, 50 NY2d 456, 465 [1980]). The evidence shows that defendant was firing at targeted individuals, and not merely at random. Defendant's argument that he was "seemingly intoxicated or mentally unstable" is speculative and

unsupported by any evidence. We note that defendant did not raise an intoxication defense, or any defense relating to his emotional state or mental condition. Defendant did not preserve his claim that there was insufficient evidence of serious physical injury with regard to one of the victims (*see People v Gray*, 86 NY2d 10, 20 [1995]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see* Penal Law § 10.00[10]; *People v Mohammed*, 162 AD2d 367 [1990], *lv denied* 76 NY2d 861 [1990]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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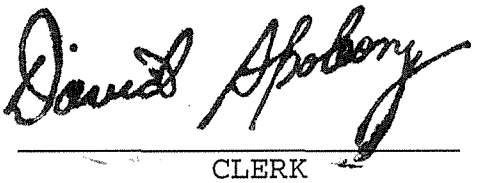

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2114 Alexie Amamedi, et al., Index 15722/07
Plaintiffs-Respondents,

-against-

Joel O. Archibala, et al.,
Defendants-Appellants.

Feinman & Grossbard, P.C., White Plains (Steven N. Feinman of counsel), for appellants.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Philip M. Aglietti of counsel), for respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about August 5, 2009, which denied defendants' motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Contrary to defendants' contention, plaintiffs' medical evidence was admissible, as the submissions of the injured plaintiff's treating doctors were both affirmed, and defendants' expert, Dr. Montalbano, specifically referenced the unaffirmed MRI reports and relied on the results therein. Nevertheless, defendants established prima facie entitlement to judgment that the injured plaintiff did not sustain a "serious injury" (Insurance Law § 5102[d]) by submitting expert affirmations that found no medical evidence of recent trauma on the patient's diagnostic films and reported normal ranges of motion in all

tested body areas by specifying the tests they used to arrive at the measurements, and concluding that the injuries resolved without permanency (*see DeJesus v Paulino*, 61 AD3d 605 [2009]). The affirmation of defendants' radiologist, Dr. Eisenstadt -- who stated that dessication along the spine "involves a drying out of [d]isc material which is a degenerative process greater than three months in origin. It could not have occurred in the time interval between examination and injury, and it is located at the most common levels in the population for degenerative disc disease to occur" -- was sufficient to establish defendants' prima facie entitlement to summary judgment.

Defendants made a prima facie showing that plaintiff did not sustain a 90/180-day injury (§ 5102[d]); absent evidence sufficient to raise an issue of fact as to causation, this claim lacks merit (*see Valentin v Pomilla*, 59 AD3d 184, 186-187 [2009]). The fact that the injured plaintiff may have missed more than 90 days of work is not determinative of this claim (*Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [2009]), and there is no evidence in the record suggesting that he was prevented from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 of the 180 days following the accident (*see Uddin v Cooper*, 32 AD3d 270, 271 [2006], *lv denied* 8 NY3d 808 [2007]).

Plaintiffs failed to meet the consequent burden of

demonstrating serious injuries as defined in the statute (*Franchini v Palmieri*, 1 NY3d 536 [2003]), since both of the treating physicians failed to address the degenerative condition noted by both of defendants' experts (*see Valentin*, 59 AD3d at 186). Dr. Montalbano affirmed that absent any other detailed evidence, the injured plaintiff's degenerative condition was consistent with his age, occupation and comorbid condition of being overweight; at the very least, this warranted some kind of rebuttal on plaintiffs' behalf (*cf. June v Akhtar*, 62 AD3d 427 [2009]).

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

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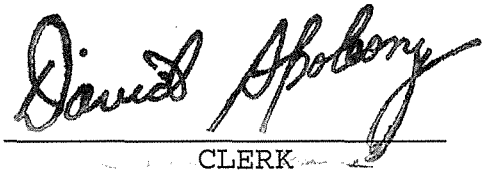

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2115 Henry Rodriguez, Index 26653/04
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant,

IMS Hospital Services, Inc.,
Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for appellant.

Greenstein & Milbauer, LLP, New York (Andrew Bokar of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 1, 2008, which, upon reargument, denied defendant the City of New York's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against the City of New York.

The City established prima facie that it did not own the real property abutting the sidewalk on which plaintiff fell and that the property was a vacant lot, and that therefore, pursuant to Administrative Code of City of NY § 7-210(c), it was not liable for plaintiff's injuries. In opposition, plaintiff failed to raise any issues of fact.

Plaintiff's reliance on Administrative Code § 7-212 is

unavailing. Section 7-212, which authorizes the comptroller to make payments, at his discretion and under certain conditions, to an individual injured because of a defective sidewalk, does not create a right of action against the City.

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

ENTERED: FEBRUARY 9, 2010

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2117 The Execu/Search Group, Inc., Index 104005/06
Plaintiff-Respondent, 591057/06

-against-

Richard Scardina, et al.,
Defendants-Appellants.

[And A Third-Party Action]

Peckar & Abramson, P.C., New York (Kevin J. O'Connor of counsel), for appellants.

Littler Mendelson, P.C., New York (Gregory B. Reilly, III of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 19, 2009, which, insofar as appealed from as limited by the briefs, denied defendants' motion for partial summary judgment on their second and third counterclaims, without prejudice to renewal of the motion after the parties complete discovery, unanimously affirmed, with costs.

Given the procedural posture of the litigation, the IAS court properly denied defendants' motion for partial summary judgment on their counterclaims seeking unpaid commissions. Whether defendants misappropriated information while they were still working for plaintiff Execu/Search is a matter peculiarly within their own knowledge; however, at the time that the summary judgment motion was decided, defendants had not appeared for deposition or made their computers available for inspection.

Thus, defendants cannot be heard to say that Execu/Search has failed to come forth with evidence sufficient to defeat the motion (CPLR 3212[f]; *see Raffaele v United States Life Ins. Co.*, 266 AD2d 100 [1999]).

M-214 - *The Execu/Search Group v Richard Scardina*

Motion seeking leave to supplement record and for other related relief denied.

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

ENTERED: FEBRUARY 9, 2010

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2120 The People of the State of New York, Ind. 3629/07
Respondent,

-against-

Curtis Ballard,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard Carruthers, J.), rendered March 31, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4 years, unanimously reversed, on the law, and the matter remanded for a new trial.

As the People concede, defendant is entitled to a new trial because, in a proceeding pursuant to *Batson v Kentucky* (476 US 79 [1986]), the prosecutor failed to provide any race-neutral explanation for her peremptory challenge to one of the venirepersons at issue.

In view of this disposition, we see no reason to reach any

of defendant's other claims, except that we find the verdict was not against the weight of the evidence.

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

ENTERED: FEBRUARY 9, 2010

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2123 The People of the State of New York, Ind. 6488/03
Respondent,

-against-

Rodney David,
Defendant-Appellant.

Susan V. Tipograph, New York, for appellant.

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at hearing; William A. Wetzel, J. at jury trial and sentence), rendered September 19, 2006, convicting defendant, of criminal possession of a weapon in the third degree, and sentencing him, as a persistent felony offender, to a term of 17 years to life, unanimously affirmed.

Defendant's claim that he was deprived of his right to a public trial is both procedurally defective and without merit. After conducting a suppression hearing, the hearing court made a ruling granting the People limited closure of the courtroom at trial during the testimony of a civilian witness, based on possible witness-tampering concerns. Although the record is unclear, it sufficiently establishes that there was no opposition by defendant to this ruling. When the case was assigned to a different Justice for trial, defendant sought to reopen this ruling based on allegedly changed circumstances. The trial court

directed defendant to ask the hearing court to reconsider its decision, but defendant did not avail himself of that opportunity. Accordingly, defendant abandoned the issue (*see e.g. People v Graves*, 85 NY2d 1024, 1027 [1995]). To the extent defendant is arguing that the trial court was obligated to resolve the issue itself rather than to refer it back to the hearing court, that argument is without merit (*see People v Jennings*, 69 NY2d 103, 113-114 [1986]; *see also People v Evans*, 94 NY2d 499 [2000] [law of the case doctrine]). Accordingly, defendant's public trial claim is procedurally barred, both because he consented to the closure order, and because he waived an opportunity to have it reconsidered. As an alternative holding, the record supports the court's determination in issuing the partial closure order (*see Waller v Georgia*, 467 US 39 [1984]).

The challenged portions of the People's summation generally constituted fair comment on the evidence, and nothing in the summation deprived defendant of a fair trial (*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]).

The procedure by which defendant was sentenced as a persistent felony offender was not unconstitutional (*see People v Rivera*, 5 NY3d 61, 70-71 [2005], *cert denied* 546 US 984 [2005]).

Defendant' statutory claim regarding this adjudication is unpreserved and without merit (*see People v Young*, 41 AD3d 318, 319-320 [2007], *lv denied* 9 NY3d 1040 [2008]). We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 9, 2010

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2124-
2125 In re Elizabeth S.,
Appellant,

Katherine S., and Another,

Children Under the Age of
Eighteen Years, etc.,

Dona M.,
Respondent-Respondent,

Alexis M.,
Respondent,

Administration for Children's Services,
Petitioner-Appellant.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), Law Guardian for Elizabeth S., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for ACS, appellant.

Phillips Nizer LLP, New York (Elliot Wiener of counsel), for Dona M., respondent.

Lawyers for Children, Inc., New York (Hal Silverman of counsel), and Proskauer Rose LLP, New York (Jennifer L. Jones of counsel), Law Guardian for Katherine S. and Gwendolyn S.

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about September 26, 2008, which, after the commencement of respondent mother's testimony at a fact-finding hearing, granted the mother's motion to dismiss the abuse and neglect petition as against her for failure to make out a prima facie case, unanimously reversed, on the law, without costs, the motion denied, the petition reinstated, and the matter remanded

for a continued fact-finding hearing.

The court erred in finding that petitioner agency failed to establish prima facie that the mother should have known of respondent stepfather's sexual abuse of her daughter and taken appropriate action to protect her. The daughter testified, inter alia, that she had told her mother twice that she was being sexually harassed by the stepfather, that her mother had arranged the stepfather's regular visits to her bedroom at night (in an attempt to improve their relationship) and had approved of the massages the stepfather had given her, that her mother had ridiculed her claims and dismissed them as lies, that her mother deferred to the stepfather in all family matters, and that she knew her mother would not believe her. This testimony, which the court credited, as well as emails sent by the mother to the daughter's biological father that tended to contradict her claim that she had no knowledge of her daughter's sexual harassment complaints, made out a prima facie case of abuse (*see Matter of Jaquay O.*, 223 AD2d 422 [1996], *lv denied* 88 NY2d 801 [1996]). The burden then shifted to the mother to explain her conduct and rebut the evidence of her culpability (*Matter of Philip M.*, 82 NY2d 238, 244 [1993]). However, the motion to dismiss was made shortly after the mother began testifying but before she addressed the allegations against her, and the mother never gave an explanation that would rebut the evidence of her culpability.

Instead, the court observed that the mother's disinclination to believe her daughter's claims could be explained in light of other evidence, which included certain out-of-court statements made by the mother, about which petitioner and the law guardian had no opportunity to cross examine her. Thus, the court apparently assumed, without evidentiary foundation, both that the mother would have testified that her daughter's allegations were fabricated and that a claim of fabrication would have constituted a reasonable explanation for her failure to take action to protect her daughter.

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

ENTERED: FEBRUARY 9, 2010

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2128N Youni Gems Corp., et al., Index 603053/02
Plaintiffs-Appellants-Respondents,

-against-

Bassco Creations Incorporated,
Defendant,

Efraim Basalel, et al.,
Defendants-Respondents-Appellants.

Miller Law Office, PLLC, Lawrence (Eric D. Cherches of counsel) for appellants-respondents.

Naidich Wurman Birnbaum & Maday, LLP, Great Neck (Robert P. Johnson of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 14, 2008, insofar as it denied defendants' motion to vacate a prior order striking their answer and counterclaim and a judgment entered against them following an inquest, unanimously affirmed, without costs. Plaintiff's appeal from so much of the order as granted defendants' application to stay certain eviction proceedings pending in New York City Civil Court, Queens County, pending the resolution of this appeal, unanimously dismissed, without costs, as academic.

The April 16, 2007 order striking defendants' answer and counterclaim for failure to comply with a prior discovery order and directing an inquest on the issue of plaintiffs' damages was the result of a contested motion on notice and therefore was

directly appealable (*see Achampong v Weigelt*, 240 AD2d 247 [1997]; *Spatz v Bajramoski*, 214 AD2d 436 [1995]). Accordingly, defendants' motion, to the extent that it sought vacatur of the April 16, 2007 order was procedurally defective (*id.*). Nevertheless, the procedural irregularity does not, under the circumstances, preclude a review of the April 16, 2007 order since defendants properly moved pursuant to CPLR 5015 to vacate their default at the inquest and the timely appeal from the denial of their motion to vacate the judgment brings up for review the April 16, 2007 order.

The court properly struck defendants' answer and counterclaim for their wilful failure to comply with the court's disclosure order (*see* CPLR 3126[3]). Defendants' wilfulness may be inferred from their failure to comply with the court's deadline, their failure to respond to plaintiffs' repeated efforts to obtain discovery until plaintiffs brought a second motion seven months later and their submission of responses to plaintiffs' interrogatories and document requests on the return date of the motion to strike that were incomplete and did not include relevant financial information (*see John R. Souto, Co. v Coratolo*, 293 AD2d 288 [2002]; *Gutierrez v Bernard*, 267 AD2d 65 [1999]; *Helms v Gangemi*, 265 AD2d 203 [1999]).

It is well settled that in order to vacate its default pursuant to CPLR 5015 a defendant must demonstrate both a

reasonable excuse for the failure to appear and a meritorious defense (*see AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904, 905 [2009]; *Goldman v Cotter*, 10 AD3d 289, 291 [2004]). While law office failure may serve as an acceptable excuse for vacating a default, "bare allegations of incompetence on the part of prior counsel cannot serve as the basis to set aside a [default] pursuant to CPLR 5015" (*Spatz*, 214 AD2d at 436).

Defendants failed to establish a reasonable excuse for their default at the inquest. Their prior attorney's claimed medical reasons for failing to appear were not excusable given that defendants had contested the motion to strike and counsel was aware of the scheduled date of the inquest before he underwent surgery, and yet did not seek an adjournment prior to that date (*see Fuchs v Midali Am. Corp.*, 260 AD2d 318 [1999]; *Teachers Ins. & Annuity Assn. of Am. v Code Beta Group*, 204 AD2d 193 [1994]). Although the court delayed the inquest for several hours to enable substitute counsel to appear on defendants' behalf, neither counsel nor defendants appeared. Moreover, defendants made no attempt to vacate their default until almost a year later when plaintiffs sought to enforce the judgment. "Given this persistent and wilful inaction," vacatur of defendants' default is unwarranted (*Pires v Ortiz*, 18 AD3d 263, 264 [2005]; *see Nahar v Awan*, 33 AD3d 680 [2006]). Defendants' claim that they were misled by their prior attorney was properly rejected by the court

(*see Chery v Anthony*, 156 AD2d 414 [1989]).

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

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

ENTERED: FEBRUARY 9, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
John W. Sweeny, Jr.
Rolando T. Acosta
Helen E. Freedman, JJ.

Index 103583/07

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Dominique Bazin, et al.,
Plaintiffs-Respondents,

-against-

Walsam 240 Owner, LLC,
Defendant-Appellant.

Defendant appeals from an order of the Supreme Court, New York County (Walter B. Tolub, J.), entered November 8, 2007, which granted plaintiffs' motion for permission to restore a wall that had previously separated their combined apartments, and from an order, same court and Justice, entered June 6, 2008, which, upon reargument, adhered to the original determination.

Steven Raison, New York and Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant.

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon and Sanem Ozdural of counsel), for respondents.

SAXE, J.

This appeal challenges the motion court's interpretation of a lease rider that gave the rent-stabilized tenants of two adjoining apartments permission to connect the two apartments by breaking through the common wall of back-to-back foyer closets. The court rejected the landlord's assertion that it alone has the authority to decide whether to restore the wall, and held that, under the lease, the tenants were entitled to restore the wall to its former condition if they so chose. We reverse.

In 1979, plaintiff Dominique Bazin and her then husband, Peter Thall, became rent-stabilized tenants of Apartment 8A, a two-bedroom unit, at 240 West End Avenue, a building then owned by 240 West LLC. In 1983, the couple also rented the adjoining one-bedroom apartment, 8B, entering into a lease for that unit which contained a rider with the following language:

> "39. It is understood and agreed that Tenant may construct an entrance through the foyer area only, from Apartment 8-A to Apartment 8-B. It is also understood that Tenant has deposited $700 which may be used for the restoration of the proposed aforesaid opening."

The apartments were thereafter combined by the tenants through the creation of an entrance approximately 3½ feet wide in the identified portion of the wall. Further, the landlord asserts, without contradiction, that the kitchen fixtures in 8A were

removed, and the gas and plumbing lines were capped and sealed, with the approval of the New York City Buildings Department.

At some point thereafter, Thall and Bazin divorced, and Bazin became the sole tenant of record of both apartments. Also residing in the apartments was the couple's daughter, plaintiff Sophie Thall, who was born in 1983.

The record contains no indication that the landlord took any steps between 1983 and 2002 to formally treat the combined apartments as a re-configured single apartment. There was neither a proposal nor an attempt to treat the combined apartments in a single lease, nor was any effort made to amend the certificate of occupancy to reflect the re-configuration. The landlord submitted with its opposition to plaintiffs' motion for permission to restore the wall an affidavit by an expediter asserting that he reviewed the Buildings Department file and that the documents therein reflect that "[t]he combined unit 8AB is a legal single unit in full compliance with Department regulations," and referring to "a comprehensive floor plan detailing the work performed to create this combined unit." However, the affidavit does not indicate when any of this occurred, and no copies of the cited documents were provided.

In 2002, the landlord attempted to register 8A/8B as a single unit with the Division of Housing and Community Renewal

(DHCR). That attempt was rejected by DHCR in an order dated November 27, 2002, in which DHCR explained that the evidence submitted to it indicated that apartments 8A and 8B had been registered as separate units and "there is no evidence in the record that a new apartment had been created which would warrant an initial registration."

In July 2003, Bazin returned to the landlord the renewal lease she had been sent for apartment 8A, stating that she no longer lived in that apartment and that the lease should be in the name of Sophie Thall, her now adult daughter, who had resided in the apartment since her birth. An exchange of letters ensued, but it appears that no such lease was ever produced.

In June 2005, the landlord took a different tack, filing a petition for high income rent deregulation of apartment 8A/8B. On June 23, 2006, the petition was denied, because while DHCR acknowledged that the two apartments were a single combined living unit for purposes of high income de-regulation, it concluded that the combined annual income of the tenants was not in excess of $175,000 in 2003.

After the high income deregulation petition was filed, plaintiff's counsel advised the landlord in a letter dated September 28, 2005, that, "[i]n accordance with paragraph 39," Bazin intended to restore the wall between the apartments. He

inquired whether the landlord wished to send Bazin a check for $700 or have her deduct the cost from her rent. Counsel added that, if the landlord believed that this restoration required its permission, it should let plaintiffs know, and should "of course grant permission as required under paragraph 39."

The landlord's counsel responded by requesting that plaintiffs forward proof that they had ever paid the $700 deposit, and directing that no steps be taken, inasmuch as "[a] wall between two (2) apartments must [be] constructed according to the Building Code" and required approval of plans. Plaintiffs' counsel replied that the lease acknowledged payment of the deposit and that Building Department approval was not necessary, since no such permits or plans had been needed or used for the removal of the wall.

In October 2006, the landlord began returning Sophie's rent checks for apartment 8A.

On or about February 12, 2007, plaintiffs commenced this action for a judgment declaring, among other things, that they are allowed to restore the apartments to their original condition, that Sophie is the lawful tenant of apartment 8A, and that defendant may not proceed on notices of termination served on plaintiffs. Plaintiffs then brought the underlying motion for an order compelling the landlord to allow plaintiffs to complete

the alterations and prohibiting it from proceeding on notices of termination; this motion was subsequently limited to requesting only a determination of whether plaintiffs have the right to separate the apartments under paragraph 39 of the lease rider.

The motion court found paragraph 39 ambiguous in failing to indicate which party may undertake restoration of any opening created, and when it may do so. It then found in plaintiffs' favor on the following ground:

> Since neither party is favored by the language contained within paragraph 39 of the lease for Apartment 8B, this court can only conclude that the parties contemplated the restoration of any opening created by *either* the landlord or the tenant. Moreover, since the lease provision is silent as to when that restoration may occur, the court can conclude that the parties contemplated situations outside of the tenants vacating both apartments, where restoration would be warranted. The right to restore the opening may therefore be elected by either party. As such, Ms. Bazin may restore the opening, i.e.[,] the walls and closets which were removed in 1983 in order to create a passageway between Apartments 8A and 8B, provided that she obtains any and all necessary permits as required by law. Furthermore, if Ms. Bazin decides to restore the opening, the landlord shall cooperate with said construction.

The landlord challenges this interpretation of the lease, and argues as well that the ruling improperly made findings of fact in the context of an application for preliminary relief. The landlord further challenges the court's subsequent adherence to this ruling in response to its motion to renew and reargue, in

which it asked the court to consider the facts that Sophie had vacated the premises in June 2007 and that a condominium offering plan listing 8A/B as a single unit had been filed in July 2007.

Discussion

The only issue before us is whether the lease gives plaintiffs the right to reconstruct the wall to separate the apartments without the landlord's permission. We hold that it does not.

At the outset, we reject the contention that the challenged order improperly granted a preliminary injunction because plaintiffs failed to demonstrate their entitlement to such relief. This argument misconstrues the nature of plaintiffs' application. The issue presented to the motion court involved the legal interpretation of lease language, i.e. whether plaintiffs had the right under the lease to restore the wall. Although plaintiffs did not seek a final judgment, this was not an application for, or a determination of, preliminary injunctive relief per se. Rather, the motion was akin to a motion for summary judgment on a discrete issue where there are no disputed facts. The motion presented an issue equally amenable to determination as a matter of law at that stage as it would have been in the context of the final judgment in this declaratory judgment action.

However, we disagree with the motion court's construction of the lease. Initially, we take issue with its characterization of the lease as ambiguous with regard to which party was entitled to restore the wall, and when the restoration could be done. Paragraph 39 provided for the restoration of the wall by the landlord by ensuring that the landlord had funds for the restoration, if it became necessary. The absence of a provision for the possibility that the tenants would decide during the term of the lease that they no longer wanted the opening is not an ambiguity, but merely an omission (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [where stock warrants provided for a potential stock split, but failed to address the contingency of a reverse stock split, the court declined to hold that the latter was implicit in the warrants]).

Nor is it appropriate to find implicit in the lease a provision that the parties could have included, but did not. "[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]). "Hence, 'courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under

the guise of interpreting the writing'" (*id.*, quoting *Reiss*, 97 NY2d at 199).

Examination of the terms of the lease discloses nothing that explicitly gives the tenants the right to restore the wall after they have removed it as authorized by paragraph 39. Nor do any of the lease terms include such a right by reasonable implication.

Paragraph 9 of the standard form portion of the lease does not support plaintiffs' contention that they possess a contractual right to reconstruct the wall. It reads:

> "9. **CARE OF YOUR APARTMENT - END OF LEASE - MOVING OUT**
>
> "A. You will take good care of the Apartment and will not permit or do any damage to it... You will move out on or before the ending date of this lease and leave the Apartment in good order and in the same condition as it was when You first occupied it...
>
> "B. When this Lease ends, You must remove all of your movable property. You must also remove at your own expense, any wall covering, bookcases, cabinets, mirrors, painted murals or any other installation or attachment You may have installed in the Apartment, even if it was done with Owner's consent. You must restore and repair to its original condition those portions of the Apartment affected by those installations and removals."

The portion of paragraph 9B that requires the tenant to remove all "installations or attachments" by its terms is clearly intended to apply only to the type of installations discussed in

that paragraph, such as bookcases or cabinets bolted to the wall, and has no application to an alteration such as a doorway newly created in a wall.

If any other provision applies to this situation, it is paragraph 10 of the standard form portion of the lease:

"10. **CHANGES AND ALTERATIONS TO APARTMENT**

> "You cannot build in, add to, change or alter, the Apartment in any way without getting Owner's written consent before You do anything."

Considered as a whole, the lease (1) permitted the tenants to create an opening, (2) ensured that the landlord would be able to defray the cost of restoring the wall, if necessary, as presumably it would be after the tenants vacated one or both of the apartments, and (3) prohibited the tenants from making any other alterations to the apartments without the landlord's written consent. None of its provisions explicitly or implicitly authorizes the tenants to reconstruct the wall once the agreed-on alteration has been made. The language of paragraph 39, while recognizing and addressing the possibility that the landlord might eventually need to restore the wall, does not address the possibility that the tenants will want to restore the wall during their tenancy. A provision specifically permitting a certain alteration cannot, and should not, be read to implicitly allow

for the reversal of that alteration without specific permission for it.

We observe that there is nothing unreasonable or illogical about the parties having provided for the landlord's eventual need to restore the wall, without including any provision for the possibility that the tenants would desire to do so. There were clearly circumstances in which it was foreseeable that the landlord would be forced to restore the wall, or at least might find it to be advisable. For instance, if the tenants vacated both apartments and the landlord sought to re-let them, it might need to restore them to the configuration reflected in the building's current certificate of occupancy, if it had not amended the certificate of occupancy to reflect the reconfiguration. Or if the tenants vacated one of the two apartments, the landlord would have to restore the wall before leasing the apartment to a new tenant.

In contrast, there was no equivalent foreseeable circumstance in which the tenants would need to restore the wall during their tenancy. The failure to provide for the possibility that the tenants would *prefer* to restore the living quarters to two separate apartments during their tenancy in both apartments is merely an omission due to a failure to imagine other possible developments.

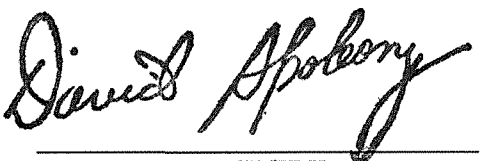
Inasmuch as we vacate the order authorizing plaintiffs to restore the wall without the landlord's permission, we need not address the motion court's failure to reconsider based upon the matters raised in the renewal application.

Accordingly, the order of the Supreme Court, New York County (Walter B. Tolub, J.), entered June 6, 2008, which, upon reargument of a prior motion, adhered to the original determination granting plaintiffs' motion for permission to restore a wall that had previously separated their combined apartments, should be reversed, on the law, without costs, plaintiffs' motion denied, and it should be declared that plaintiffs are prohibited under the lease from making this restoration without the landlord's written consent. The appeal from the order, same court and Justice, entered November 8, 2007, should be dismissed, without costs, as superseded by the appeal from the June 6, 2008 order.

All concur.

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

ENTERED: FEBRUARY 9, 2010



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