SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 8, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2687-
2688 Index 601805/05

Weiser LLP,
Plaintiff-Appellant,

-against-

Jeffrey S. Coopersmith, et al.,
Defendants-Respondents.

Greenberg Traurig, LLP, New York (Leslie D. Corwin of counsel), appellant.

Torys LLP, New York (David Wawro of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered September 15, 2009, after a nonjury trial, dismissing plaintiff Weiser's first, second and third causes of action and awarding defendants Coopersmith and Vogel $211,365.17 on their counterclaims, unanimously modified, on the law and the facts, to reinstate the first cause of action for breach of the restrictive covenant in article 14.1 of the subject partnership agreement to the extent it seeks liquidated damages in accordance with article 14.3 with respect to uncollected accounts receivable and clients who joined Weiser at the time of the 1999 merger and were serviced by Coopersmith, Simon & Vogel after April 27, 2005, and award judgment in favor of Weiser as to liability on that

cause of action, the matter remanded for assignment to a special referee to calculate the amount of damages to be awarded, and otherwise affirmed, without costs. Appeal from the decision of the same court and Justice, entered August 18, 2009, unanimously dismissed, without costs, as taken from a nonappealable paper.

We previously held that Weiser made a prima facie showing that defendants agreed to be bound by the restrictive covenant in the Weiser partnership agreement in the context of a merger between their old firm and Weiser and that the covenant was not more extensive than reasonably necessary to protect Weiser's legitimate interests in enjoying the goodwill acquired in the merger (51 AD3d 583 [2008]; *see American Para Professional Sys. v Examination Mgt. Servs.*, 214 AD2d 413, 414 [1995]). We further found that Weiser made a prima facie showing that the liquidated damages provision was reasonable and did not impose an impermissible penalty (51 AD3d 583). On remand, at the close of defendants' case, Weiser did not renew its motion for judgment pursuant to CPLR 4401, thereby conceding the issues to be for the trial court as trier of fact (*Miller v Miller*, 68 NY2d 871 [1986]). The trial court found, among other things, that the restrictive covenant was overbroad as to all three defendants and declined to partially enforce it because Weiser had not shown an absence of overreaching and that it acted in good faith to support a legitimate interest. Upon our de novo review of the

factual record, giving the trial court's findings deference to the extent based on an assessment of credibility (*see Matter of Falk*, 47 AD3d 21, 28 [2007], *lv denied* 10 NY3d 702 [2008]), we conclude that the trial court failed to accord our prior decision the appropriate precedential weight, and in denying recovery to Weiser erred to the extent indicated.

No evidence submitted by defendants in rebuttal warranted the trial court's departure from this Court's prior determination that the exchange of promises in the context of this commercial transaction supports enforcement of the restrictive covenant to the extent it requires defendants Coopersmith and Vogel to reimburse Weiser for the loss of clients brought to Weiser in connection with the merger. In particular, Weiser's agreement to assume liabilities of the old firm, including its substantial unfunded pension obligations owed to retired partners and partners nearing retirement, was given in exchange for the individual partners' agreement to bring their clients to Weiser and to be bound by the two-year restrictive covenant in the partnership agreement. Further, the restrictive covenant does not prevent competition by withdrawing partners, but requires them to reimburse the firm for damages resulting from the loss of clients within a reasonable period of time (*see BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]). The instant case is thus distinguishable from the situation considered in *Lynch v Bailey*,

(275 App Div 527 [1949], *affd* 300 NY 615 [1949]), in which there was no indication that the newly formed accounting partnership assumed any liabilities of the plaintiff-partner's old firm, and the restrictive covenant was unreasonable in both geographic and temporal scope. In the context of this case, the liquidated damages provision, to the extent it requires defendants to pay damages based on gross billings charged to clients of the old firm who became Weiser clients at the time of the merger and who transferred their business to defendants' newly formed firm within two years after their departure, is reasonable.

However, Coopersmith and Vogel asserted in affidavits submitted in rebuttal that some clients who transferred their business from Weiser to their new firm had been developed, in the five years following the merger, from sources independent of Weiser, including Vogel's family and other clients. The sale of business rationale, which supports enforcement of the restrictive covenant as to clients "acquired" in the merger, does not extend to personal clients developed by defendants from sources independent of the firm after the merger. The sale of business rationale only permits enforcement of a restraint to the extent it is "'reasonable,' that is, not more extensive, in terms of time and space, than is reasonably necessary to the buyer for the protection of his legitimate interest in the enjoyment of the asset bought" (*Purchasing Assoc. v Weitz*, 13 NY2d 267 [1963]; *see*

Lynch v Bailey, 275 App Div 527 [1949], *supra*).

Further, with respect to Simon, a fair interpretation of the record supports the trial court's finding that he joined Weiser as an employee at the time of the merger and agreed to be bound by a modified partnership agreement that gave him no equity interest. His position is thus substantively indistinguishable from that of the senior manager in *BDO Seidman v Hirshberg* (93 NY2d 382 [1999], *supra*), and Weiser's legitimate interests therefore do not include protecting clients developed by Simon independently and without assistance from the firm (*id.*).

Although we conclude that the restrictive covenant is overbroad to the extent indicated with respect to all three defendants, upon consideration of the equities and the record, we find that partial enforcement of the restrictive covenant is appropriate as to all defendants. Although Weiser did not modify the restrictive covenant after the decision in *BDO Seidman* was issued, that case did not consider the reasonableness of a restrictive covenant agreed to by partners in connection with a merger or upon promotion to a position as income partner (*see* 93 NY2d at 395; *cf. Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 808 [2004], *lv denied* 3 NY3d 612 [2004]). The trial court's finding that Weiser acted in bad faith following defendants' departure with respect to their capital accounts and calculation of liquidated damages does not fully take into

account that defendants preemptively informed Weiser that they would not be liable for any liquidated damages under the partnership agreement, aside from the guaranty of uncollected accounts receivable. The trial court also erred in finding that Weiser was not entitled to any recovery of liquidated damages because it failed to give defendants the periodic written notice of amounts claimed as required under the partnership agreement. Defendants waived that affirmative defense (CPLR 3015[a]), and the failure to give notice, although it may affect the timing of defendants' obligation to pay damages under the agreement, does not relieve them of the obligation entirely.

As for the calculation of the amount of liquidated damages, the record supports the trial court's findings that Weiser's demand for liquidated damages improperly included a total of about $670,000 billed with respect to clients who did not leave Weiser, and for nonrecurrent services, which are excluded from the calculation by the plain language of Article 14.3. Weiser submitted no evidence that the executive committee made a good faith determination concerning the nature of the services billed by the withdrawing partners in the preceding year, while defendants set forth a detailed rationale for each claimed exclusion. Defendants further identified a total of about $250,000 that they claim should be excluded with respect to about 85 personal clients developed after the merger as the result of a

specified referral source, independent of any subsidy or client development assistance from Weiser, and one pre-merger personal client of Simon. The trial court's finding that none of the claimed personal clients were shown to have been developed as a result of client development subsidies provided by Weiser is supported by a fair interpretation of the record.

The trial court's findings that Weiser suffered no damages as a result of any breach of fiduciary duty on the part of the defendants and that it improperly reduced the capital accounts of Coopersmith and Vogel after they departed, and without authority in the partnership agreement, are supported by a fair interpretation of the evidence.

No appeal lies from a decision directing settlement of judgment (*see* CPLR 5512).

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

ENTERED: JUNE 8, 2010

CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2971 Wo Yee Hing Realty, Corp., et al., Index 115517/07
Plaintiffs-Respondents,

-against-

Howard Stern, Esq.,
Defendant-Appellant.

Braverman & Associates, P.C., New York (Jon Kolbrener of counsel), for appellant.

Drabkin & Margulies, New York (Caitlin A. Robin of counsel), for respondent.

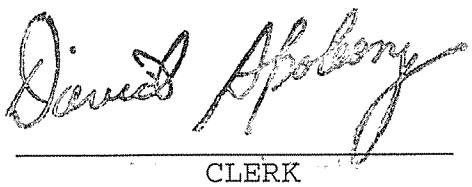
Order, Supreme Court, New York County (Debra A. James, J.), entered April 8, 2009, which, to the extent appealable, denied defendant's motion to renew his prior motion to compel the deposition of plaintiff Chun Yee Yung, a/k/a Sunny Yung, unanimously affirmed, with costs.

Having deposed two of the corporate plaintiff's three principals, defendant failed to make the requisite "detailed showing" of the necessity of taking the additional deposition of Sunny Yung (*see Alexopoulos v Metropolitan Transp. Auth.*, 37 AD3d 232 [2007]; *Tolliver v New York City Housing Auth.*, 225 AD2d 412 [1996]; *Colicchio v City of New York*, 181 AD2d 528 [1992]). Despite his own presence during the discussions concerning the subject real estate transaction, defendant failed to refute the deposed principals' testimony that Sunny Yung attended the

closing only as an observer and was not involved in the transaction.

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

ENTERED: JUNE 8, 2010



CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2972 In re Angelica G.,

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

Frank G.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

Law Offices of Randall S. Carmel, P.C., Syosset (Randall S. Carmel of counsel), for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

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

Order, Family Court, Bronx County (Carol Ann Stokinger, J.), entered on or about June 22, 2009, which, upon a fact-finding determination that respondent father had permanently neglected the child, terminated his parental rights and committed custody and guardianship of the child jointly to the New York City Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

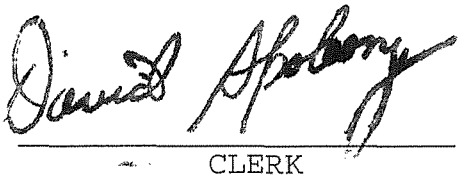
The evidence demonstrated that petitioner made diligent efforts to reunite father with child, making referrals for drug treatment and other services, and arranging visitation. However, despite these efforts, by his own admission, respondent failed to remain drug-free, and he continued to live with the mother, who

remained a drug user. Respondent did not object to the admission into evidence of his medical records, which included drug test results. Accordingly, any challenge at this point is unpreserved for our review (*Matter of Darren HH.*, 68 AD3d 1197, 1198 [2009], *lv denied* 14 NY3d 703 [2010]). In any event, respondent admitted having relapsed into drug use four or five times during the period between the child's foster care placement and the filing of the petition in this proceeding (*see Matter of Jolie S.*, 298 AD2d 194, 195 [2002]). He also admitted that he never completed a drug treatment program, thus adding to the clear and convincing evidence that he permanently neglected the child.

The court properly found that the child's best interests warranted termination of respondent's parental rights, to enable adoption by her foster mother, with whom she has lived and thrived in a loving relationship since infancy. A suspended judgment is not warranted, given respondent's failure to remain drug-free and to separate himself from the mother.

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

ENTERED: JUNE 8, 2010



CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2973 Birgit Mayo, Index 101810/07
Plaintiff-Respondent,

-against-

George T. Santis, et al.,
Defendants-Appellants.

Russo, Keane & Toner, LLP, New York (Christopher G. Keane of counsel), for appellants.

Morton Povman, P.C., Forest Hills (Ricardo Rengifo of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about November 17, 2009, which denied defendants' motion for summary judgment, unanimously affirmed, without costs.

In exercising its function of issue-finding rather than issue-determination (*see Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [2008]), the motion court properly determined that photographs of defendants' stair step, upon which plaintiff tripped and fell, demonstrated not only the quarter-inch rise at the edge of the step where plaintiff testified she tripped, but also the approximately 12 inches of missing bullnose protector and an exposed nail in the middle of the step. Based on these photographs, a jury could also reasonably conclude that this step was more worn than the steps beneath it and was surfaced with slippery linoleum. This presents a question of fact as to whether the condition of the step constituted a defect

that -- despite its triviality (*see Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [2000]) -- nonetheless had the characteristics of a trap or a snare (*see Rivera v 2300 X-tra Wholesalers*, 239 AD2d 268 [1997]).

We have considered defendants' other contentions and find them unavailing.

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

ENTERED: JUNE 8, 2010

CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2974 Douglas DiPasquale, Index 602045/07
Plaintiff-Appellant,

-against-

Ronald Gutfleish, et al.,
Defendants-Respondents.

Richardson & Patel, LLP, New York (David B. Gordon of counsel), for appellant.

Reid Davis LLP, New York (Rachel S. Fleishman of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 18, 2009, which denied plaintiff's motion for partial summary judgment on his fourth cause of action in the amended complaint, unanimously dismissed, without costs, as taken from a non-appealable order.

Although plaintiff captioned his motion as one for partial summary judgment, the IAS court correctly held it to be a motion for reargument of a portion of a 2008 order that had granted defendants partial summary judgment dismissing the fourth cause of action. Since no appeal lies from the denial of a motion for

reargument, even if not denominated as such (*see Johnson v Fuller Co.*, 235 AD2d 348 [1997]), this appeal must be dismissed.

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

ENTERED: JUNE 8, 2010

CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2975-
2976 The People of the State of New York, Ind. 2944/06
Respondent, 3612/06

-against-

Juan Cruz,
Defendant-Appellant.

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

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

Judgments, Supreme Court, New York County (Thomas Farber, J.), rendered November 15, 2007, as amended December 6, 2007 and January 4, 2008, convicting defendant, upon his pleas of guilty, of attempted murder in the second degree, assault in the first degree, reckless endangerment in the first degree, endangering the welfare of a child (two counts), and sexual abuse in the first degree (three counts), and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

Defendant claims that he was denied effective assistance at sentencing by counsel's failure to argue for more leniency than the court had promised, and failure to submit a presentence report. These claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Ramos*, 44 AD3d 438 [2007], *lv*

denied 9 NY3d 1037 [2008]). On the unexpanded record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]), in that he was not prejudiced by counsel's failure to seek further leniency. Defendant pleaded guilty to all the counts contained in two indictments, involving very serious crimes that would have justified lengthy consecutive sentences. While the prosecutor was not a party to the agreement between the court and defendant, the court made a specific promise of an aggregate term of 20 years and expressly refused to go any lower. Although, at sentencing, the court was free to impose a lower sentence, and was in possession of a thorough psychiatric evaluation, there is no reason to believe it could have been persuaded to extend further leniency.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 8, 2010

CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2977 Freya Koss, et al., Index 22218/00
Plaintiffs-Respondents,

-against-

Hadley Bach, D.D.S.,
Defendant-Appellant.

Costello, Shea & Gaffney LLP, New York (Thomas A. Rhatigan of counsel), for appellant.

McCallion & Associates LLP, New York (Kenneth F. McCallion of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered October 28, 2009, which denied defendant's motion for summary judgment, unanimously affirmed, without costs.

Plaintiffs' claim of dental malpractice is primarily predicated on the theory that defendant deviated from accepted standards of care by employing an amalgam that contained mercury, resulting in the patient suffering mercury poisoning, rather than using a pre-mixed, precapsulated amalgam filling. Even assuming defendant met his initial burden of establishing, prima facie, that he did not deviate from accepted standards of dental practice (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and that any purported departures on his part were not a cause of the patient's injuries, defendant has not made a direct evidentiary refutation of plaintiffs' specific allegations (*see Roques v Noble*, 2010 NY App Div LEXIS 3121, 2010 WL 1541513).

The submissions by plaintiffs' three expert witnesses sufficiently raise a triable issue of fact as to whether defendant departed from the standards of accepted dental practice, and whether such deviation was a proximate cause of the patient's injuries (*see Erdogan v Toothsavers Dental Servs., P.C.*, 57 AD3d 314 [2008]). Rather than offering simply conclusory, unsupported views, those experts relied on such objective factors as the failure to use pre-mixed dental amalgams, and the high levels of gaseous mercury that the vapor testing found in plaintiff's mouth (*see Ashton v D.O.C.S. Continuum Med. Group*, 68 AD3d 613 [2009]).

We have considered defendant's argument for entitlement to a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) and his challenge to the cause of action for lack of informed consent, and find them both without merit.

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

ENTERED: JUNE 8, 2010

David Friedberg

CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2978 Kenneth Orr, Index 603423/06
Plaintiff-Appellant,

-against-

Daniel Yun, et al.,
Defendants-Respondents.

Richard Paul Stone, New York, for appellant.

Heller, Horowitz & Feit, P.C., New York (Martin Stein of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about March 10, 2010, which, to the extent appealed from as limited by the briefs, granted defendants' motion to quash plaintiff's non-party subpoenas, unanimously affirmed, with costs.

The trial court providently exercised its discretion in granting defendants' motion to quash the post-note of issue subpoenas. The circumstances presented do not warrant allowing plaintiff to conduct additional discovery over three months after the filing of the note of issue (22 NYCRR 202.21 [d]). Plaintiff's requests for documents and for depositions of defendants' lawyers and accountants could have been made before

the note of issue was filed (*see Med Part v Kingsbridge Hgts. Care Ctr., Inc.*, 22 AD3d 260 [2005]).

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

ENTERED: JUNE 8, 2010

David Apolony
CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2979 143-145 Madison Avenue LLC, et al., Index 100254/06
Plaintiffs-Appellants,

-against-

Tranel, Inc.,
Defendant-Respondent.

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

Belkin Burden Wenig & Goldman, LLP, New York (Robert A. Jacobs of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered October 21, 2009, declaring plaintiff tenants in violation of the subject lease, granting defendant landlord's motion for summary judgment dismissing the second and third causes of action and vacating the *Yellowstone* injunction issued September 19, 2006, and denying plaintiffs' cross motion for summary judgment, unanimously affirmed, with costs.

The motion court correctly rejected plaintiffs' argument based on impossibility, since plaintiffs' difficulties in obtaining sufficient water pressure to install a separate sprinkler system for the subject premises were foreseeable and could have been guarded against in the contract (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). As plaintiffs, who had been in possession of the premises for years, were on

notice, or at least inquiry notice, of the condition of the building and its plumbing before entering into the contract promising to install the sprinklers, it is their own negligence for which they seek relief (*see P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201-202 [1996]). Moreover, the only evidence they submitted to support their contention that a separate sprinkler system was impossible was an affidavit by their plumber, who failed to refute any of the material assertions supporting defendant's expert engineer's opinion that a separate system could be installed.

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

ENTERED: JUNE 8, 2010

CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2980 Thomas A. Ofori, Index 17834/07
Plaintiff,

Gerardo M. Velez,
Plaintiff-Respondent,

-against-

Creishea P. Green, et al.,
Defendants-Appellants.

Stockschlaeder, McDonald & Sules, P.C., New York (Richard T. Sules of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered on or about December 22, 2008, which denied defendants' motion for summary judgment, unanimously affirmed, without costs.

This personal injury action arose out of a 2006 automobile accident in New Jersey. It is undisputed that the parties were residents of New York, where their vehicles were registered. The sole issue on appeal is whether the fortuitous circumstance that the accident happened in New Jersey should negate the requirement of plaintiff having to prove a "serious injury" under Insurance Law § 5102(d). It does.

By its express terms, New York's no-fault law applies only to "injuries arising out of negligence in the use or operation of a motor vehicle *in this state*" (Insurance Law § 5104[a], emphasis added). In this regard, it has consistently been held that the

statute is not to be given extraterritorial effect (*see Matter of McHenry v State Ins. Fund*, 236 AD2d 89, 91 [1997], citing *Morgan v Bisorni*, 100 AD2d 956 [1984]). Since the statute abrogates a common law right, it must be strictly construed, "and as so construed, the section does not purport to regulate actions for personal injury arising out of the negligent use or operation of a vehicle outside this State" (*id.* at 956).

We reject defendants' alternative argument that even if § 5102(d) is inapplicable, the matter should be remanded to the motion court to determine whether the New Jersey no-fault law, which similarly limits noneconomic loss, applies, since that law applies only to a vehicle "registered or principally garaged" in New Jersey (NJ Stat Ann § 39:6A-3; *see Zabilowicz v Kelsey*, 200 NJ 507, 509, 984 A2d 872, 873 [2009]), which was not the case here.

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

ENTERED: JUNE 8, 2010

CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2981 Angel Quezada, Index 300096/08
Plaintiff-Respondent,

-against-

111 Wilkens Avenue LLC, et al.,
Defendants-Appellants,

Raymond Martinelli,
Defendant.

DeCicco, Gibbons and McNamara, P.C., New York (Daniel E. DeCicco of counsel), for appellants.

Schwartzapfel, Truhowsky & Marcus, P.C., Jericho (James Modzelewski of counsel), for respondent.

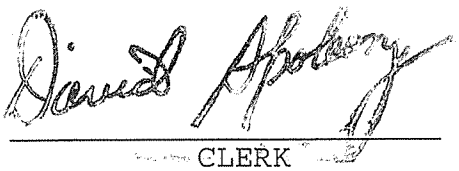
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 22, 2009, which granted defendants-appellants' motion to strike the complaint only if plaintiff failed to appear for certain physical examinations "within 60 days prior to trial," unanimously modified, on the facts, to grant the motion only if plaintiff fails to appear for the physical examinations at least 60 days prior to trial, and otherwise affirmed, without costs.

We modify the order to allow defendants an adequate period before trial in which to evaluate the results of the physical examinations. The motion court's order, as written, permits

plaintiff to appear for the physical examinations as late as the day before the trial.

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

ENTERED: JUNE 8, 2010



CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2984 The People of the State of New York, Ind. 2823/08
Respondent,

-against-

Sergio Santana,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered on or about January 28, 2009,

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

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

ENTERED: JUNE 8, 2010

CLERK

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

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2985 Sydney Attractions Group Pty Ltd., Index 603394/09
Plaintiff-Respondent,

-against-

Fredrick Schulman,
Defendant-Appellant.

Jacob Laufer, P.C., New York (Shulamis Peltz of counsel), for appellant.

Leader & Berkon LLP, New York (Caroline C. Marino of counsel), for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered February 17, 2010, which granted defendant's motion to dismiss the complaint only to the extent of staying the action, unanimously reversed, on the law, with costs, and the motion to dismiss granted. The Clerk is directed to enter a judgment in favor of defendant dismissing the complaint.

The subject contract states, "The parties submit to the exclusive jurisdiction of the Courts of the State of New South Wales and of the Commonwealth of Australia in respect of any dispute that arises in connection with this Deed." It may be, as plaintiff asserts, that defendant will engage in all sorts of delaying tactics if the litigation is taken to Australia, but that is not tantamount to depriving plaintiff, an Australian company with its principal place of business in New South Wales, of its day in court (*see Sterling Natl. Bank v Eastern Shipping*

Worldwide, Inc., 35 AD3d 222, 222 [2006]). Nor does it avail plaintiff to argue that since the clause was for its sole benefit, it can unilaterally waive it; presumably, the clause was also for the benefit of the other Australian company that is a party to this contract. Furthermore, the contract says that it "may not be varied except by written instrument executed by the parties." In short, no reason appears to depart from the well-settled policy of the courts of this State to enforce forum selection clauses (*see Sterling* at 222, citing, inter alia, *Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]).

Since enforcement of a forum selection clause does not allow for a stay, at least where there is no argument that the designated court lacks jurisdiction of all necessary parties or is otherwise unable to accord complete relief (*compare Micro Balanced Prods. Corp. v Hlavin Indus.*, 238 AD2d 284, 285-286 [1997]), we dismiss the action outright (*see Lischinskaya v Carnival Corp.*, 56 AD3d 116, 124 [2008], *lv denied* 12 NY3d 716 [2009]).

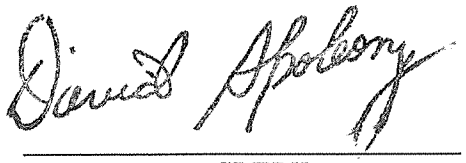
We reject defendant's contention that plaintiff's commencement of the action in New York constituted frivolous conduct warranting an award of costs and attorneys' fees (*see Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 837 [2009], *lv denied* 13 NY3d 706 [2009]).

In view of the foregoing, we do not reach defendant's

arguments regarding forum non conveniens and venue, and plaintiff should not be required to give security for costs pursuant to CPLR 8501(a).

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

ENTERED: JUNE 8, 2010



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Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2986 Ikeeda Garvey, Index 116922/06
Plaintiff-Appellant,

-against-

Kamrul Talukder, et al.,
Defendants-Respondents.

Mallow, Konstam & Nisonoff, P.C., New York (Mirra Khavulya of counsel), for appellant.

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

Order, Supreme Court, New York County (Paul Wooten, J.), entered July 23, 2009, which granted defendants' motion for summary judgment dismissing the complaint for lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied to the extent of reinstating that portion of the complaint premised on allegations of serious injury involving permanent limitation of use of a body member and permanent limitation of use of a body function or system, and otherwise affirmed, without costs.

Defendants' experts did not address MRIs indicating that plaintiff had suffered lateral and medial tears in her menisci and straightening of the lordosis in her cervical spine. Similarly, none of those experts addressed the EMG results, which showed evidence of bilateral C5-6 radiculitis. Defendants' experts also failed to state what, if any, objective tests they

used to lead them to the conclusions that plaintiff had full ranges of motion in her cervical spine and right knee and that the alleged injuries to those body parts had fully resolved. Accordingly, defendants failed to establish prima facie that plaintiff did not sustain a permanent consequential or significant injury in accordance with the statutory threshold (*see Wadford v Gruz*, 35 AD3d 258 [2006]).

To the extent the complaint alleges serious injury by reason of plaintiff's incapacity to perform substantially all of her daily activities for 90 of the first 180 days following the accident, this has not been substantiated by competent medical evidence (*see Uddin v Cooper*, 32 AD3d 270, 272 [2006], *lv denied* 8 NY3d 808 [2007]), and that portion of the complaint was properly dismissed.

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

ENTERED: JUNE 8, 2010

CLERK

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2987 The People of the State of New York, Ind. 7766/01
Respondent,

-against-

Jesus Garcia,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 21, 2009, resentencing defendant, as a second felony offender, to a term of 9 years, unanimously reversed, on the law, and the matter remanded for resentencing.

The court improperly resentenced defendant in his absence. When the court resentenced defendant on his drug conviction after granting his CPL 440.46 application, he was entitled to be present for the actual pronouncement of the new sentence, notwithstanding his presence at a proceeding three days earlier at which the terms of the new sentence were discussed (*see People v Lucks*, 91 AD2d 896 [1983]). Defendant did not waive his presence for sentencing; on the contrary, counsel specifically objected to her client's absence. A defendant's right to hear the pronouncement of a sentence is guaranteed by statute (*see* CPL

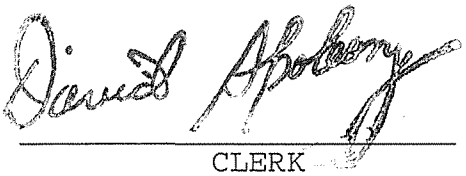
380.40; *People v Sparber*, 10 NY3d 457, 469-471 [2008]), and it does not depend on whether the defendant would have something to contribute. Accordingly, there is no reason to create an exception for cases where all matters relating to sentencing were resolved at prior proceedings; such an a exception would render a defendant's presence unnecessary in many cases involving plea bargains.

In addition, the record is unclear whether the court imposed sentence on both of the counts on which defendant was convicted (*see* CPL 380.20).

We have considered and rejected defendant's requests for additional relief.

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

ENTERED: JUNE 8, 2010



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Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2989N Oded Nachmani, Index 600110/10
Petitioner-Respondent,

-against-

By Design, LLC,
Respondent-Appellant.

The Law Office of Bo-Yong Park, P.C., New York (William J.T. Brown of counsel), for appellant.

Kalnick, Klee & Green, LLP, New York (Allen Green of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered January 25, 2010, granting the petition to compel a non-American Arbitration Association ("AAA") arbitration and to stay the AAA arbitration demanded by respondent, unanimously affirmed, without costs.

The court aptly perceived that respondent, by demanding AAA arbitration nearly four months after service of petitioner's demand for arbitration and without seeking a stay of petitioner's proceeding, was seeking to delay the matter and effectively refusing to arbitrate pursuant to petitioner's demand; we need not address whether respondent had other improper motives (*but see generally Brady v Williams Capital Group, L.P.*, _NY3d_, 2010 NY Slip Op 2434 [2010]). We note that respondent had participated in the earlier-commenced proceeding by service of a response advancing a counterclaim and by designating its

arbitrator pursuant to the parties' agreement (*see Matter of North Riv. Ins. Co. [Morgan]*, 291 AD2d 230, 233 [2002]). The subject agreement's choice of New York law for its enforcement displaced the provisions of the Federal Arbitration Act, and, in any event, we are not bound by respondent's authority regarding the ability of the court to provide the relief sought (*see ImClone Sys., Inc. v Waksal*, 22 AD3d 387 [2005]). With respect to its purely speculative claims regarding petitioner's designated arbitrator (*see Bronx Lebanon Hosp. Ctr. v Signature Med. Mgt. Group, L.L.C.*, 6 AD3d 261 [2004]), AAA arbitration would not have provided respondent any greater assurances of arbitrator impartiality (*see Morgan Guar. Trust Co. v Solow Bldg. Co.*, 279 AD2d 431 [2001], *lv denied* 96 NY2d 711 [2001]). Petitioner correctly interpreted the provision requiring that the decision be in accordance with the AAA Commercial Rules as a choice of law rather than a forum selection clause (*see Merrill Lynch, Pierce, Fenner & Smith v McLeod*, 208 AD2d 81, 83-84 [1995]), the AAA's view on the issue notwithstanding.

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

ENTERED: JUNE 8, 2010

CLERK

Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1352 Hayden Williams, et al.,
Plaintiffs,

-against-

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

- - - - -

New York State Dormitory Authority,
Third-Party Plaintiff-Respondent,

-against-

F&R Installers,
Third-Party Defendant-Appellant.

Index 18019/04
84158/04

Marks, O'Neill, O'Brien & Courtney, P.C., Elmsford (James M. Skelly of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Mary J. Joseph of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered December 17, 2008, which, to the extent appealed from as limited by the briefs, granted summary judgment to defendant Dormitory Authority on its third-party claim, unanimously affirmed, without costs.

Plaintiff commenced this action to recover for personal injuries sustained in February 2004 when he slipped and fell on "black ice" while performing construction work for third-party defendant at the Bronx Criminal Courthouse. According to plaintiff, he stepped inside a partially enclosed "bulkhead" to help his foreman install a panel and slipped on the ice. As he

was falling to the ground, he cut his arm on an iron angle embedded in the ice. The third-party action seeks contractual indemnification against the subcontractor.

Paragraph 3.7 of the contract between nonparty prime contractor Enclos and third-party defendant expressly provided for the indemnity of the Dormitory Authority, as owner, and defendant Bovis, as construction manager:

> "Subcontractor shall indemnify and hold Enclos, Construction Manager, and Owner harmless from any and all fines, liabilities, damages, and/or expenses assessed against or incurred by Enclos, Construction Manager, or Owner as a result of Subcontractor's failure to so comply."

Paragraph 9.3 incorporated by reference the terms of the prime contract between the Dormitory Authority and Enclos, and clarified that third-party defendant agreed to indemnify Enclos with respect to these provisions. The subcontractor's obligation to indemnify was thus expressly stated in these agreements. Paragraph 9.2 expressly provided for partial indemnification by including recognized "savings" language ("To the fullest extent permitted by law"), and thus did not violate General Obligations Law § 5-322.1 (*see Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [2002], *lv denied* 99 NY2d 511 [2003]).

Nor has the subcontractor established that there is an issue of fact as to whether the owner and general contractor were actively negligent such that full indemnification is inappropriate. While there is evidence that Bovis had

responsibility for snow and debris removal, F&R failed to demonstrate that it had actual or constructive notice of the condition which caused plaintiff's injury. Finally, F&R failed to establish that the Dormitory Authority and Bovis actually exercised any authority they had over plaintiff's work on the morning he was injured (*see Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [2005]).

The Decision and Order of this Court entered herein on November 5, 2009 is hereby recalled and vacated (*see* M-399 decided simultaneously herewith).

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

ENTERED: JUNE 8, 2010

CLERK

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

1796 Fratelli's Pizza and Restaurant Corp.,
Plaintiff-Appellant,

-against-

Kayzee Realty Corp., et al.,
Defendants-Respondents.

Index 15023/07

Alter & Barbaro, Brooklyn (Bernard Mitchell Alter of counsel), for appellant.

Cinquemani & Green, New Rochelle (Joseph Cinquemani of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 8, 2008, which granted defendants' motion to dismiss the complaint based on documentary evidence, unanimously affirmed, without costs.

On March 20, 2006, plaintiff and defendant landlord entered into a lease extension, for a term commencing June 1, 2010 and ending May 31, 2026, that provides: "Landlord shall not rent [certain specified nearby premises] to any party who offers for sale the same type of food sold by [plaintiff] and if a tenant occupying one of these premises commences the sale of prohibitive [*sic*] foodstuffs, landlord shall take steps necessary to have tenant cease and desist from those sales." The complaint seeks injunctive relief, alleging that defendant tenant occupies one of the premises specified in the lease extension and is selling the same type of food as plaintiff. In support of dismissal,

defendants landlord and tenant, who appear together, rely on the fact that their lease, which is dated January 5, 2006 and is for the term "which shall commence on January, 2005 [*sic*] . . . and shall expire on December 31, 2019," preexists plaintiff's lease extension, and argue that, as a matter of law, the restrictive covenant in the lease extension cannot be enforced against a "prior tenant," i.e., that the covenant can be enforced only prospectively from its March 2006 execution date, if not its June 2010 commencement date.

We hold as a matter of law that the subject restrictive covenant cannot be enforced against a competing tenant whose lease predates the covenant's execution, absent evidence that the competing tenant's lease is falsely dated, or that the competing tenant, before entering into its lease, had notice of the landlord's intention to enter into the covenant (*see L'Art de Jewel Ltd. v Hudson Sheraton Corp., LLC*, 46 AD3d 418, 420 [2007]; *Key Drug Co. v Luna Park Realty Assoc.*, 221 AD2d 598, 599 [1995]). It does not avail plaintiff that its complaint, liberally construed, conclusorily alleges that defendant tenant is a "subsequent lessee"; i.e, that defendant tenant entered into its lease with "full knowledge" of the restrictive covenant (*see Robinson v Robinson*, 303 AD2d 234, 235 [2003] [factual allegations in complaint plainly contradicted by documentary evidence need not be accepted as true on motion to dismiss]). In

addition, guided by the principles that restrictive covenants in leases, such as use clauses, are "strictly construed against those seeking to enforce them" and that "where there are two equally plausible interpretations of a restrictive covenant, the less restrictive interpretation will be adopted" (*Bear Mtn. Books v Woodbury Common Partners*, 232 AD2d 595, 596 [1996], *lv denied* 90 NY2d 808 [1997]), we find that the language of the subject restrictive covenant is consistent with its prospective application (*cf. L'Art de Jewel*, 46 AD3d at 419), and that the parties did not intend the covenant to apply to tenants with preexisting leases.

All concur except Tom, J.P. and Manzanet-Daniels, J. who concur in a separate memorandum by Tom, J.P. as follows:

TOM, J.P. (concurring)

On March 20, 2006, plaintiff, a tenant of defendant Kayzee Realty Corporation under a 10-year lease commencing in April 2000, entered into an agreement commencing June 1, 2010 "extending" its lease "for 16 additional years" until May 31; 2026. This lease extension contains a restrictive covenant that provides: "Landlord shall not rent [certain specified nearby premises] to any party who offers for sale the same type of food sold by [plaintiff] and if a tenant occupying one of these premises commences the sale of prohibitive [*sic*] foodstuffs, landlord shall take steps necessary to have tenant cease and desist from those sales." Defendant Feel the Steel Corp. (FTS) is also Kayzee's tenant under a lease commencing January 5, 2006, and is the successor of a corporation that began selling food from the same premises in September 2003. The complaint alleges that FTS is selling the same type of food as plaintiff in violation of the restrictive covenant of plaintiff's lease extension and seeks permanent injunctive relief barring FTS from selling competing food items.

In support of their preanswer motion to dismiss the complaint, defendants relied upon a prior order that denied plaintiff's motion seeking preliminary injunctive relief, arguing collateral estoppel and, in their reply, law of the case. In opposition, plaintiff asserted that defendants were attempting to

obtain dismissal based upon the tenants' respective leases with Kayzee (CPLR 3211[a][1]). Supreme Court granted the motion, dismissing the matter as "premature" on the ground that the lease extension does not take effect until June 1, 2010.

On appeal, plaintiff argues that the restrictive covenant of the lease extension should be construed as an independent covenant that takes effect immediately upon signing, not at the future commencement of the lease term. Even assuming, without deciding, that this is the case, the FTS lease predates plaintiff's lease extension by some two months, and the restrictive covenant cannot be reasonably interpreted as binding upon FTS (*see Key Drug Co. v Luna Park Realty Assoc.*, 221 AD2d 598, 599 [1995] [absent notice, restrictive covenant does not bind tenants who were occupants of their premises when the plaintiff's tenancy began]). The law favors free and unconstrained use of property as a matter of policy, and any restraint on the use to which premises can be put is strictly construed against the party seeking to enforce it (*see Huggins v Castle Estates*, 36 NY2d 427, 430 [1975]). Moreover, under the doctrine of caveat emptor, plaintiff is presumed to have ascertained that the premises were suitable for its business purposes (*see First Nationwide Bank v 965 Amsterdam*, 212 AD2d 469, 472 [1995]) and, thus, to have been familiar with the type of food sold by FTS, warranting dismissal of its claim for

injunctive relief (*see L'Art de Jewel Ltd. v Hudson Sheraton Corp., LLC*, 46 AD3d 418, 420 [2007]). Plaintiff's conclusory allegation that FTS entered into its lease with full knowledge of the restrictive covenant does not preclude dismissal since this factual assertion is manifestly contradicted by the documentary evidence (*see Robinson v Robinson*, 303 AD2d 234, 235 [2003]).

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

ENTERED: JUNE 8, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2269N Iva Kelly, Index 119612/97
Plaintiff-Respondent,

-against-

Metro-North Commuter Railroad,
Defendant-Appellant.

Seth J. Cummins, New York (Jesse A. Raye of counsel), for appellant.

Altier & Vogt, LLC, New York (Philip P. Vogt of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered February 23, 2009, which denied defendant's motion to preclude the testimony of certain expert witnesses for plaintiff, or at least to hold a pretrial hearing to probe the admissibility of their testimony, unanimously modified, on the law, to permit defendant to seek a ruling from the trial court as to the admissibility of certain expert testimony, and otherwise affirmed, without costs.

Plaintiff was employed by defendant from 1985 to 1995 in various positions in which her duties included writing and computer data entry. She commenced this action in 1997, alleging that her job activities caused trauma to her hands, wrists and arms, and as a result, she developed bilateral carpal tunnel syndrome (CTS). Plaintiff seeks damages based on her claim that under the Federal Employers' Liability Act (45 USC § 51 *et seq.*),

defendant is liable for not providing her with a reasonably safe place to work.

During discovery, plaintiff advised defendant that she planned to call Michael Shinnick, Ed.D., as an expert witness in ergonomics, who would testify that defendant failed to provide plaintiff with a reasonably safe place to work and that her occupation caused or contributed to her CTS. Plaintiff later furnished defendant with Dr. Shinnick's preliminary report, in which he concluded that defendant had not met industry standards for ergonomic safety programs. Plaintiff also advised defendant that she planned to call treating physicians as experts regarding her medical treatment.

In August 2008, defendant moved for an order precluding Dr. Shinnick's and the physicians' testimony and dismissing the complaint, or for a "*Frye/Daubert*"[1] hearing concerning the testimony. Defendant characterized Dr. Shinnick's testimony as "incredible" because plaintiff had not retained him until 13 years after she stopped working for defendant, and because he drew his conclusions without performing any tests or reviewing any physical or photographic evidence of defendant's work site.

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[1]New York courts adhere to the so-called *Frye* standard of admissibility for new scientific theories and methodologies, and not the *Daubert* standard that the federal courts have adopted (*see People v Wesley*, 83 NY2d 417 [1994], affirming the continuing vitality in this state of the standard set forth in *Frye v United States*, 293 F 1013 [DC Cir 1923]).

Defendant further argued that it "presumed" that the physician witnesses would diagnose plaintiff with CTS and state that it was caused by her work for defendant. According to defendant, the medical doctors' testimony about causation would "not meet the standards set" in *Frye*.

The court denied the motion both as to preclusion and a hearing. As to whether the physicians' causation testimony should be precluded, the court stated that it would "let the trial Judge decide." The court added that a *Frye* hearing was unnecessary because "There's a lot of medical testimony both ways . . . on these issues dealing with carpal tunnel," which has created "a battle of the experts" that should be tried before a jury. In addition, the court ruled that a *Frye* hearing was an improper vehicle to address defendant's claim that Dr. Shinnick's opinion lacked a foundation in fact. The court first held that defendant should make a motion in limine before the trial court to preclude the opinion, but then ruled that defendant could not ask the trial court to reconsider the evidentiary ruling: "If this issue comes up again in front of the trial Judge, that is the law of the case; no *Frye* hearing, no preclusion."

While an evidentiary ruling made before trial is generally reviewable only in connection with an appeal from the judgment rendered after trial (*Weatherbee Constr. Corp. v Miele*, 270 AD2d 182 [2000]), it was error for the motion court to preclude

defendant from re-raising the evidentiary issues before the trial court. A motion court's evidentiary ruling before trial does not foreclose a related application to the trial court, which is always empowered to determine whether an expert is qualified to testify (*see De Long v County of Erie*, 60 NY2d 296, 307 [1983]), and whether a proper foundation exists for the expert's testimony (*see generally Caton v Doug Urban Constr. Co.*, 65 NY2d 909, 911 [1985]; *see also Hassett v Long Is. R.R. Co.*, 6 Misc 3d 168 [2004]).

Moreover, legitimate questions were raised about both the basis for the experts' causation opinions and Dr. Shinnick's methodology.[2] Accordingly, the motion court should not have precluded an appropriate inquiry as to foundation or methodology (*see Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]).

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

ENTERED: JUNE 8, 2010

CLERK

[2]The National Institute of Neurological Disorders and Stroke, in its Fact Sheet concerning CTS, states: "There is little clinical data to prove whether repetitive and forceful movements of the hand and wrist during work or leisure activities can cause [CTS]" (*see* http://www.ninds.nih.gov/disorders/carpal_tunnel/detail_carpal_tunnel.htm [last updated Dec. 18, 2009]).

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2469 Conchita Ortiz, Index 14574/04
Plaintiff-Appellant,

-against-

975 LLC,
Defendant-Respondent.

Law Offices of Jeffrey B. Melcer, PLLC, New York (Jeffrey B. Melcer of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Melissa M. Murphy of counsel), for respondent.

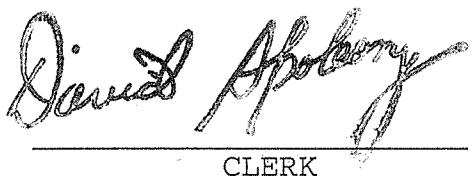
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 16, 2008, which, after a jury verdict in plaintiff's favor, denied her motion for a new trial on damages or for an additur, unanimously modified, on the facts, to the extent of vacating the award for past and future pain and suffering and directing a new trial on the issue of damages for past and future pain and suffering, and otherwise affirmed, without costs, unless defendant stipulates, within 30 days of the date of this order, to entry of a judgment awarding, before apportionment, $40,000 for past pain and suffering, and $50,000 for future pain and suffering.

Plaintiff tripped and fell on a step at the entrance to defendant's building. The jury awarded plaintiff $10,000 for past pain and suffering, $10,000 for future pain and suffering, and $10,000 for medical costs. Generally, the amount of damages

awarded for personal injury is primarily a question for the jury, the judgment of which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony (*Vaval v NYRAC, Inc.*, 31 AD3d 438 [2006], *lv dismissed* 8 NY3d 1020 [2007]). Nevertheless, we conclude that the jury's determination of plaintiff's damages with respect to future pain and suffering deviated materially from what would constitute reasonable compensation under the circumstances, and thus direct a new trial on that issue unless defendant stipulates as indicated (*see* CPLR 5501(c); *Sassonian v City of New York*, 261 AD2d 319 [1999]).

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

ENTERED: JUNE 8, 2010



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Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2585 Edward Bryant, et al., Index 113800/05
Plaintiffs-Respondents-Appellants,

-against-

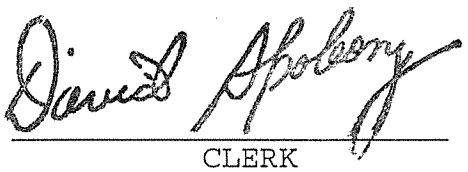
CVP I, LLC, et al.,
Defendants-Appellants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on or about July 24, 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 May 25, 2010,

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

ENTERED: JUNE 8, 2010



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Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2661 In re Clydeane C.,

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

Annetta C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about April 15, 2009, insofar as appealed from as limited by the briefs, bringing up for review the fact-finding determination that respondent mother neglected the subject child, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed.

Respondent and her 11-year-old daughter lived for three years in an apartment owned by an elderly friend, who had asked respondent to take care of him as his health deteriorated. She acted as his nurse, took him to doctor appointments, cooked for him and bathed him. Arrangements had been made for a cleaning

person to clean the apartment on weekends. When the owner died at age 96, his son attempted to evict respondent. Respondent was informed by the police to go to Housing Court, and when she did the following day, the son called the police and reported that the child was alone in the apartment. A Family Court action was commenced that ultimately led to a finding of neglect.

The evidence merely established, among other things, that the apartment was cluttered with bags and boxes of legal files belonging to the owner and had a kitchen that was dirty. These conditions, however, were neither unsafe nor unsanitary (*see Matter of Iyanah D.*, 65 AD3d 927 [2009]; *Matter of Erik M.*, 23 AD3d 1056 [2005]). The child had adequate sleeping accommodations and was adjudged by a doctor and a juvenile officer to be clean, "well taken care of, verbal and very smart," and well-fed. Her school principal stated that the child was attending school and passing her classes, and was generally well-regarded as a student, although she sometimes had body odor and dirty clothes.

Moreover, certain Family Court findings regarding the condition of the apartment are not supported by the evidence. For instance, the court found that there were feces in the kitchen, but the officer said that she saw them in one room, which is not out of the ordinary for a family with a pet cat as

was the case here. While the court found that the apartment "reeked" of urine, the caseworker stated that there was a "mild smell" of urine. In any event, a musty or urine smell is not unusual in an apartment where an aged and sick man had been living alone for many years. The caseworker also testified that only one bathroom had a clogged sink and was dirty, and there was no evidence that it was the bathroom used by the child. The mother in fact testified there was one bathroom that no one used, where the litter box was kept. Although there was evidence that the condition of the apartment was far from ideal, we find that there was insufficient evidence that the condition of the apartment was chronic and attributable to respondent, as she was not the owner of the apartment and a cleaning lady was responsible for cleaning the apartment. The condition of the premises did not constitute neglect (*see Matter of Allison B.*, 46 AD3d 313 [2007]), and did not place the child's physical, mental or emotional state in imminent danger of impairment (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]; *Matter of Devin N.*, 62 AD3d 631 [2009]).

We also find no basis for a neglect finding in the fact that the mother left the child for a period of approximately two

hours, either alone or with an adult who was known to the child and the mother, and with whom the mother had a comfortable relationship.

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

ENTERED: JUNE 8, 2010

CLERK

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

2990 The People of the State of New York, Ind. 5303/05
Respondent,

-against-

Louis Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki A. Scherer, J.), rendered February 21, 2007, as amended April 13, 2007, convicting defendant, upon his plea of guilty, of attempted conspiracy in the second degree, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

The court resentenced defendant to an indeterminate term after discovering that the original sentence to a determinate term of five years was unlawful. Defendant failed to preserve his contention that the court erred in resentencing him without first offering him an opportunity to withdraw his guilty plea, since he did not object to the resentencing or move to withdraw his plea (*see People v Berdecia*, 223 AD2d 444 [1996], *lv denied* 88 NY2d 1019 [1996]). While the court addressed this issue in denying defendant's CPL article 440 motion, that motion is not

properly before this Court because defendant did not obtain leave to appeal (*see* CPL 450.15 [1]; *People v Bailey*, 275 AD2d 663 [2000], *lv denied* 95 NY2d 960 [2000]). We decline to review defendant's claim in the interest of justice.

As the resentencing proceeding expressly incorporated the first allocution, defendant's prior waiver of his right to appeal is enforceable, and it forecloses defendant's present claim that the sentence was excessive (*see People v Givens*, 36 AD3d 454 [2007], *lv denied* 8 NY3d 922 [2007]). As an alternative holding, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 8, 2010

CLERK

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

2991 Trans High Corporation, Index 602079/08
Plaintiff-Appellant,

-against-

Pollack Associates, LLC, etc., et al.,
Defendants-Respondents.

Cuomo LLC, New York (Matthew A. Cuomo of counsel), for appellant.

Cullen and Dykman LLP, New York (Deborah A. Bryant of counsel), for respondents.

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered May 28, 2009, dismissing the complaint pursuant to an order which, in an action against insurance brokers for failure to procure insurance, granted defendants' motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

Even if, as plaintiff alleges, defendants failed to satisfy their common-law duty to procure the coverage that plaintiff had requested (*see Murphy v Kuhn*, 90 NY2d 266, 270 [1997]), plaintiff's receipt and retention of the policy for three months before the fire without objection to the missing coverage waived any right of action it might have had against defendants (*see Busker on Rood Ltd. Partnership Co. v Warrington*, 283 AD2d 376, 376-377 [2001]). Indeed, more was involved here than mere

passive receipt, retention, and presumptive knowledge of and assent to the policy's terms; as evidenced by plaintiff's post-procurement request to defendants to increase the policy limits, it is clear that plaintiff actually reviewed the policy and had actual knowledge of its terms.

Nor is a special relationship, such as might have imposed on defendants an additional duty to advise plaintiff that the policy did not contain the coverage in question (*see generally Murphy*, 90 NY2d at 270-272), made out by plaintiff's allegations concerning defendants' efforts to retain plaintiff as a customer following the discovery that another policy containing the coverage had lapsed (*cf. Busker*, 283 AD2d at 377 [that broker discouraged client from hiring an insurance advisor, and assured client that its services would meet client insurance needs, not so exceptional as to support imposition of a special duty]). Moreover, plaintiff's own account of its interactions with defendant -- to the effect that it specifically requested the coverage in question, that it otherwise actively discussed with defendant the procurement, type and amount of coverage, and that

it actively reviewed the procured policy -- effectively admits that it was not relying on defendants' expertise (*see Murphy*, 90 NY2d at 272).

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

ENTERED: JUNE 8, 2010

CLERK

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

2992 In re Lanise Moena R.,

Simone R.,
Respondent-Appellant,

SCO Family of Services, as Successor
in Interest to Harlem-Dowling Westside
Center for Children and Family Services,
Petitioner-Respondent.

Anne Reiniger, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Ronnie Dane of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about October 17, 2008, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner for Social Services for the purpose of adoption, unanimously affirmed, without costs.

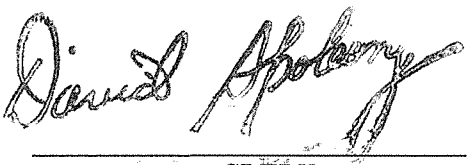
The finding of permanent neglect was supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record shows that the agency made diligent efforts to encourage and strengthen the parental relationship by making appointments and referrals for respondent for drug and mental health treatment, arranging visitations with the child, advising

respondent of the child's progress, and making available to her staff and counseling for developing a plan for appropriate services (*see Matter of Lady Justice I.*, 50 AD3d 425 [2008]; *Matter of Ashley Lisa D.*, 46 AD3d 359 [2007]; *Matter of Jah'lil Dale Emanuel McC.*, 44 AD3d 547 [2007]). Notwithstanding respondent's mental disorder, she remained responsible for cooperating with and completing mandated drug and mental health treatment, which she failed to do (*see Lady Justice I.*, 50 AD3d at 426; *Jah'lil Dale Emanuel McC.*, 44 AD3d at 548; *Matter of Paul Michael G.*, 36 AD3d 541 [2007]). Further, respondent continued her use of marijuana and repeatedly failed to take her prescribed psychiatric medication.

We have considered respondent's remaining arguments and find them without merit.

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

ENTERED: JUNE 8, 2010



CLERK

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

2994 Luis Ramirez, et al., Index 602381/08
Plaintiffs-Respondents,

-against-

Mansions Catering, Inc., et al.,
Defendants-Appellants.

Epstein Becker & Green, P.C., New York (Douglas Weiner of counsel), for appellants.

Law Office of William Coudert Rand, New York (William Coudert Rand of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered July 28, 2009, which, to the extent appealed from, certified as plaintiffs a class of all wait staff employees employed by defendants Mansions Catering and/or Sam Milliken, from August 14, 2002 through the present, who have not been paid gratuities or similar payments received by defendants from customers, to which the class is allegedly entitled, unanimously affirmed, with costs.

Section 196-d of the Labor Law provides, in pertinent part, that no "employer or his agent . . . shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." In *Samiento v World Yacht* (10 NY3d 70 [2008]), the Court of Appeals held that the

"gratuity" provisions of Section 196-d "can include mandatory charges when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees" (*World Yacht*, 10 NY3d at 81).

Defendants' principal argument on this appeal is that the Court of Appeals' holding in *World Yacht* should not be applied retroactively to plaintiffs' class or individual claims. Defendants contend that, because they assertedly changed their policies to comply with *World Yacht* within months of that ruling, prospective-only application of the *World Yacht* holding would eliminate the bulk of plaintiffs' claims, most of which predate *World Yacht*, and compel the decertification of plaintiffs' class action. Defendants' arguments lack merit.

Although cases are generally decided in accordance with the law as it exists at the time they are decided, a new rule of State law need not automatically be applied retroactively (*People v Favor*, 82 NY2d 254, 262 [1993]). A judicial decision announces a "new rule" where it "overrul[es] established precedent" or constitutes "such a sharp break in the continuity of law" or "a dramatic shift away from customary and established procedure" that its "impact will wreak more havoc in society than society's interest in stability will tolerate" (*Favor*, 82 NY2d at 263 [citations and internal quotation marks omitted]).

The Court of Appeals' holding in *World Yacht* is "[a]

judicial decision construing the words of a statute," and, as such, "does not constitute the creation of a new legal principle" (*Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 192 [1982], *cert denied* 459 US 837 [1982]). Moreover, the only pre-*World Yacht* appellate decision construing Section 196-d's "gratuity" provisions was our decision in *Bynog v Cipriani Group* (298 AD2d 164 [2002], *affd as mod* 1 NY3d 193 [2003]), where we held that a "contractual 22% 'service charge'" was not a "voluntary gratuity" within the meaning of Section 196-d (*Bynog*, 298 AD2d at 165). In modifying our order on other grounds, however, the Court of Appeals expressly "reserve[d] judgment as to whether those waiters would be entitled to a share of Cipriani's service charge under Labor Law section 196-d if they were employees" (*Bynog*, 1 NY3d at 199 n 4). Hence, prior to the Court of Appeals' decision in *World Yacht*, the issue of whether mandatory service charges could constitute "gratuities" under Section 196-d had not been authoritatively resolved. Because there was no existing body of established precedent on the issue, *World Yacht* was not a departure from existing law and thus not a "new rule" subject to retroactivity analysis. To the contrary, the Court of Appeals' construction of Section 196-d was "foreshadowed" by the plain meaning of the term "gratuity," as used in the statute (*Gurnee*, 55 NY2d at 192).

Since no "new rule" was pronounced in *World Yacht*, there is no basis here for disturbing the presumption that its holding be accorded retroactive effect (*see Favor*, 82 NY2d at 262-63).

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

ENTERED: JUNE 8, 2010

David Spotony

CLERK

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

2995-
2995A Index 107372/09

Bayerische Hypo-und
Vereinsbank AG, etc., et al.,
Plaintiffs-Respondents,

-against-

Domenick DeGiorgio,
Defendant-Appellant.

Marc Bogatin, New York (Jonathan Weinberger of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman, LLP, New York (Michael A. Hanin of counsel), for respondents.

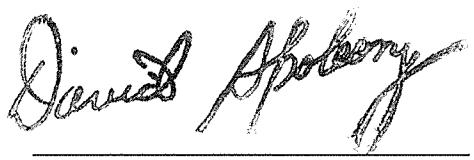
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 28, 2009, which, in an action for conversion against plaintiffs' former employee, granted plaintiffs' motion for an attachment of defendant's rollover IRA account with a nonparty IRA custodian, unanimously reversed, on the law, without costs, the motion denied, and the attachment vacated. Appeal from paper, same court and Justice, entered November 2, 2009, which, insofar as appealed from, directed settlement of an order granting plaintiff's motion for an attachment, unanimously dismissed, without costs, as taken from a nonappealable paper.

Defendant's rollover of an exempt employee retirement account maintained in his name with plaintiffs to a new IRA account maintained in his name with a nonparty custodian,

although made within 90 days of the interposition of plaintiffs' conversion claims, did not constitute a nonexempt "addition" to the new IRA account within the meaning of CPLR 5205(c)(5). CPLR 5205(c)(2) exempts from enforcement of money judgments retirement assets "created as a result of rollovers" from other exempt retirement assets. Here, there being no evidence that any additions were made to defendant's employee retirement from any sources whatsoever within 90 days of the interposition of plaintiffs' claims, the assets that defendant rolled over into his new IRA account could not have included monies from nonexempt sources, e.g., salary, deposited into the employee retirement account within such 90-day period (*cf.* *Memmo v Perez* 63 AD3d 472 [2009] [wife's IRA assets transferred to husband's IRA pursuant to divorce settlement made within 90 days of interposition of husband's creditor's claim not exempt under CPLR 5205(c)(2),(5); IRAs originally held by husband exempt]).

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

ENTERED: JUNE 8, 2010



CLERK

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

2996 Jonathan R. Steinberg, Index 114728/99
Plaintiff-Appellant,

-against-

Queens Import Motors, et al.,
Defendants-Respondents.

Jonathan R. Steinberg, New York, appellant pro se.

Robert E. Michael & Associates PLLC, New York (Robert E. Michael of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about February 11, 2010, which granted defendants' motion to confirm the report and recommendations of the special referee, dated October 13, 2009, awarding defendants' legal fees in the amount of $35,100 plus a sanction of $5,000 payable to the Lawyers' Fund for Client Protection, as modified by the court to reduce the legal fee award to $28,600, and denied plaintiff's cross motion to renew and reargue prior motions, including one for the court's recusal, unanimously affirmed, with costs.

The report and recommendations of the special referee as to legal fees were properly confirmed, as modified, since the findings contained therein were supported by the record (*see Nager v Panadis*, 238 AD2d 135, 135-136 [1997]). Sanctions were also properly awarded against plaintiff for his "frivolous conduct" in connection with this action (22 NYCRR § 130-1.1).

There was no evidence to support plaintiff's contention that the court should have recused itself.

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

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

ENTERED: JUNE 8, 2010

CLERK

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

2997-
2997A The People of the State of New York,
Respondent,

Ind. 4346/07
2109/08

-against-

Anthony Quinones also known
as Eric Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

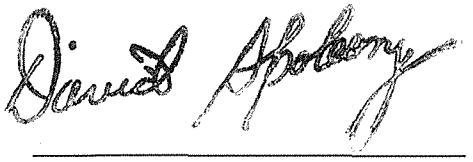
Judgment, Supreme Court, New York County (Micki Scherer, J. at *Parker* hearing; Ronald A. Zweibel, J. at jury trial and sentence), rendered August 28, 2008, as amended October 10, 2008, convicting defendant of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, and judgment, same court (Ronald A. Zweibel, J.), rendered August 28, 2008, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him to a concurrent term of 2 to 4 years, unanimously affirmed.

The court properly proceeded with the trial in defendant's absence. It is undisputed that the court informed defendant of the consequences of failing to appear for trial, and that he

forfeited his right to be present (*see People v Parker*, 57 NY2d 136 [1982]). The court properly declined to adjourn the trial, since it "had no reason to believe that an adjournment would result in defendant's presence" (*People v Michael*, 293 AD2d 428, 428-429 [2002], *lv denied* 99 NY2d 537 [2002]; *see also People v Jones*, 163 AD2d 203 [1990], *lv denied* 76 NY2d 987 [1990]). The *Parker* proceedings established that defendant had been engaged in a pattern of evasive conduct, and that it would be difficult to apprehend him without undue delay. Furthermore, there had been numerous adjournments before defendant absconded. Finally, we do not read any of the language employed by the court as meaning it misapprehended or failed to exercise its discretion as to adjourning the trial (*cf. People v Delgado*, 80 NY2d 780 [1992]).

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

ENTERED: JUNE 8, 2010



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

2998 Margaret E. King, etc., Index 105298/08
Plaintiff-Respondent,

-against-

870 Riverside Drive Housing Development Fund Corp., etc., et al.,
Defendants-Appellants.

Braverman & Associates, P.C., New York (Tracy Peterson of counsel), for appellants.

Marc E. Scollar, Staten Island, for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered September 10, 2009, which, to the extent appealed from, denied defendants' motion to dismiss the first, fourth, fifth and sixth causes of action, unanimously modified, on the law, the motion granted to dismiss the fourth, fifth and sixth causes of action as against defendant Board of Directors and the individual defendants, and otherwise affirmed, without costs.

Plaintiff and her father acquired shares in the subject cooperative corporation, and entered into a proprietary lease with it in 1985. After her father's death, plaintiff sought to have his interests transferred to her. The proprietary lease provides that transfer of shares and assignment of the lease cannot take effect until authorized by the directors, either by resolution or by written consent of a majority, and that in the event of the death of a lessee shareholder, such "consent shall

not be unreasonably withheld." Plaintiff alleges that after initially consenting to the requested transfer, the board and its members, acting inexplicably and without any stated reason, withheld their consent and refused to execute the documents necessary to complete the transfer and assignment.

The first cause of action, which seeks to compel the board and its individual members to execute the necessary documents, thus states a valid cause of action for injunctive relief against all the defendants (*see Schwartz v Marien*, 37 NY2d 487 [1975]). However, the fourth and sixth causes of action, to the extent they allege breach of the provisions of the proprietary lease that obligate the coop to maintain the apartment in good repair, are inadequate as to the board and the individual defendants because the board is not a party to the lease, and there are no allegations of tortious or wrongful conduct on the part of the individual board members that would render them personally liable (*see Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324 [1998]).

The complaint adequately pleads a cause of action against the coop alone for constructive eviction based on leaks causing extensive water damage to the apartment, as a result of which plaintiff could not use or sublet the apartment (*see Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1999]; *Oresky v Azzouni*, 232 AD2d 463 [1996]). The evidence submitted by defendants does

not eliminate all issues (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]), or so flatly contradict the allegations of the complaint as to warrant dismissal in toto (*see Beattie v Brown & Wood*, 243 AD2d 395 [1997]). Plaintiff's claim for damages arising from the coop's alleged failure, in violation of the proprietary lease, to repair the continuing leaks is not time-barred, but recovery of monetary damages is limited by CPLR 214(4) to any alleged damage that occurred within three years of the commencement of the instant action (*see Kaymakcian v Board of Mgrs. of Charles House Condominium*, 49 AD3d 407 [2008]). The evidence submitted by defendants does not establish that no property damage occurred within that three-year period.

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

ENTERED: JUNE 8, 2010

CLERK

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

3000 The People of the State of New York, Ind. 4163/08
Respondent,

-against-

Everton Caines,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about October 8, 2008,

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

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

ENTERED: JUNE 8, 2010

CLERK

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

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

3001 35 Lispenard Partners, Inc., Index 600481/06
Plaintiff-Appellant,

-against-

35 Smoke & Grill, LLC, et al.,
Defendants-Respondents.

Karlsson & Ng, P.C., New York (David Ng of counsel), for appellant.

Steven T. Gee, New York, for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 2, 2009, which denied plaintiff's motion seeking a money judgment, a judgment of possession and the striking of defendants' answer, and granted the cross motion of defendants for a stay of the action pending the determination of a proceeding in Surrogate's Court, New York County, unanimously modified, on the law, to grant that part of plaintiff's motion seeking past use and occupancy in the amount of $153,000 in accordance with a prior order, same court and Justice, directing the payment of use and occupancy pendente lite, and to vacate that part of the stay affecting the payment of continued use and occupancy, and otherwise affirmed, without costs.

Defendants have no right to occupy the subject premises rent-free (*see Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 403 [2005]), and thus, pursuant to the motion court's prior order, defendants are directed to pay past use and occupancy

covering the period of April 2004 to May 2007 at the rate of $3,000 per month ($114,000), which was the amount reserved for rent in the lease covering said period. Defendants are also to pay use and occupancy at the rate of $7,800 for the period between June 2007 through October 2007 ($39,000), which was the amount ultimately determined to be the fair market rent for the premises.

The stay with respect to the hearing on the capacity of plaintiff to sue remains in effect pending the resolution of the Surrogate's Court proceeding involving the will of a deceased partner of plaintiff, since it may be determinative of plaintiff's right to maintain the instant action.

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

ENTERED: JUNE 8, 2010

CLERK

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

3003 The People of the State of New York, Ind. 4896/06
Respondent,

-against-

Derrick Lattimore,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about August 13, 2009,

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

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

ENTERED: JUNE 8, 2010

CLERK

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

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

3004-
3004A-
3004B

Index 602625/09

Russell L. Nype, et al.,
Plaintiffs-Appellants,

-against-

Las Vegas Land Partners LLC, et al.,
Defendants-Respondents.

[And Another Action]

Lionel A. Barasch, New York, for appellants.

Katsky Korins LLP, New York (Thomas M. Lopez of counsel), for respondents.

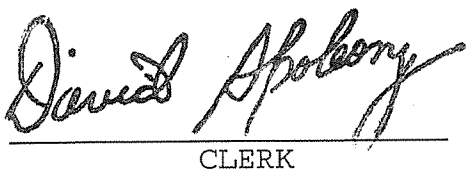
Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 3, 2010, which dismissed plaintiffs' complaint pursuant to CPLR 3211(a)(4), and orders, same court and Justice, entered March 3, 2010, which dismissed as moot plaintiffs' motions to dismiss defendants' five counterclaims and sixteen of defendants' affirmative defenses, unanimously affirmed, with costs.

The IAS court providently exercised its discretion in granting defendants' motion to dismiss plaintiffs' New York action based on a previously-filed Nevada action involving substantially the same parties and the same causes of action (*see* CPLR 3211[a][4]). Given that plaintiffs asserted counterclaims in the Nevada action and did not commence this New York action until nearly two years after the commencement of the Nevada

action, they cannot be heard to complain that the Nevada action was vexatious, oppressive or instituted to obtain some unjust or inequitable advantage (*cf. L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1 [2007]; *White Light Prods. v On the Scene Prods.*, 231 AD2d 90 [1997]).

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

ENTERED: JUNE 8, 2010



CLERK

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

3006 Cesar Laguna, et al., Index 402786/08
Plaintiffs-Respondents,

-against-

New York City Housing Authority,
Defendant-Appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Barton Barton & Plotkin, LLP, New York (Thomas P. Giuffra of counsel), for respondents.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered September 2, 2009, which, inter alia, granted leave to serve a late notice of claim to plaintiffs infant and mother of the infant, unanimously affirmed, without costs.

The infant's father allegedly sustained injuries on July 26, 2007 as a result of an assault and robbery while in an elevator on defendant's premises; the infant allegedly sustained post-traumatic stress disorder as a result of witnessing the assault on his father; and the infant's mother allegedly sustained damages as a result of losing the infant's services and incurring medical expenses on his behalf. After the father served a timely notice of claim on October 23, 2007, and after a complaint was filed on or about September 5, 2008 naming the infant and the mother as well as the father as plaintiffs, the infant and mother moved in late January 2009 for leave to serve a late notice of

claim. According to the mother, the infant's injuries did not begin to manifest until January 2008 and were not diagnosed until March 2008. It also appears that on January 30, 2008, the father testified at his General Municipal Law § 50-h hearing that the child was with him on the elevator; on July 24, 2008, prior to the September 2008 filing of the complaint, the mother served a notice of claim on behalf of the infant and herself alleging the child's injury and her damages but, concerned that the notice was defective, replaced it with a substantively identical notice of claim served on September 12, 2008, immediately after the filing of the complaint; and a section 50-h hearing was held for the mother on October 27, 2008, at which she gave detailed testimony regarding the infant's claims. The order on appeal deemed the September 12, 2008 notice of claim timely served nunc pro tunc.

Leave to serve the September 12, 2008 notice of claim was properly granted even assuming that the alleged post-90-day first manifestation of illness and subsequent diagnosis of PTSD do not excuse the subsequent 10- to 12-month delay in moving for leave, and that this subsequent delay was not, in any "factually demonstr[able] way" (*Williams v Nassau county Med. Ctr.*, 6 NY3d 531, 538 [2006]), caused by infancy. Indeed, we would grant leave even if the infant's injuries had immediately manifested themselves. It would be "'unfair and unjust' to deprive the infant of a remedy based on [his] mother's ignorance of the law"

(*Pearson v New York City Health & Hosps. Corp.*, 43 AD3d 92, 94 [2007], *affd* 10 NY3d 852 [2008]), where the father's timely notice of claim gave defendant actual knowledge of the essential facts constituting the infant's and mother's claims of negligent maintenance of building security (*see Heredia v City of New York*, 141 AD2d 473 [1988]), defendant had actual notice of the infant's and mother's claims of injuries and damages within a reasonable time after the 90-day period (*see Weiss v City of New York*, 237 AD2d 212, 213 [1997] [late notice of claim served without leave provided City with actual knowledge of essential facts]; *Pearson*, 43 AD3d at 94 [same]), and defendant fails to explain why, as it claims, the delay has prejudiced its ability to investigate the infant's medical history (*see Heredia*, 141 AD2d 473, *supra*).

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

ENTERED: JUNE 8, 2010

David Friedberg

CLERK

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

3007N MBIA Insurance Corporation, Index 650280/08
Plaintiff-Respondent,

-against-

Greystone & Co., Inc.,
Defendant-Appellant,

Stephen Rosenberg,
Defendant.

Patton Boggs LLP, New York (Michael B. Tristan of counsel), for appellant.

Bingham McCutchen LLP, New York (Jared R. Clark of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered December 4, 2009, which granted plaintiff's motion to amend the complaint, unanimously affirmed, with costs.

In granting the motion, the court permitted plaintiff to pierce the corporate veil and add Stephen Rosenberg as a party defendant. Plaintiff had learned in the course of certain deposition testimony that Rosenberg was the 100% owner and sole director of the corporate defendant, whose primary, if not only, source of income was the periodic capital contributions made to it by Rosenberg. Motions for leave to amend pleadings should be freely granted (CPLR 3025[b]), absent prejudice or surprise resulting therefrom (*see Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652 [2009]), unless the proposed amendment is palpably insufficient or patently devoid of merit.

On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations (*Lucido v Mancuso*, 49 AD3d 220, 227 [2008]), but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [2007]), which it has done. Contrary to the corporate defendant's argument, the proposed amendment was supported by a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of relevant deposition testimony.

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

ENTERED: JUNE 8, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
James M. Catterson
Rolando T. Acosta, JJ.

1308
Index 406796/07

x

The People of the State of New York
by Andrew Cuomo, Attorney General of
the State of New York,
Plaintiff-Respondent,

-against-

First American Corporation, et al.,
Defendants-Appellants.

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Defendants appeal from the order of the Supreme Court, New York County (Charles Edward Ramos, J.), entered April 8, 2009, which, insofar as appealed from as limited by the briefs, denied their motion to dismiss the complaint on the ground of federal preemption.

DLA Piper LLP (US), New York (Richard F. Hans, Patrick J. Smith, Kerry Ford Cunningham and Jeffrey D. Rotenberg of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (Richard Dearing, Benjamin N. Gutman and Nicole Gueron of counsel), for respondent.

GONZALEZ, P.J.

This appeal calls upon us to determine whether the regulations and guidelines implemented by the Office of Thrift Supervision (OTS) pursuant to the Home Owner's Lending Act of 1933 (HOLA) (12 USC § 1461 *et seq.*) and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) (Pub L 101-73, 103 STAT 183 [codified in scattered sections of 12 USC]), preempt state regulations in the field of real estate appraisal.

The Attorney General claims that defendants engaged in fraudulent, deceptive and illegal business practices by allegedly permitting eAppraiseIT residential real estate appraisers to be influenced by nonparty Washington Mutual, Inc. (WaMu) to increase real estate property values on appraisal reports in order to inflate home prices. We conclude that neither federal statutes, nor the regulations and guidelines implemented by the OTS, preclude the Attorney General of the State of New York from pursuing litigation against defendants First American Corporation and First American eAppraiseIT, LLC. We further conclude that the Attorney General has standing to pursue his claims pursuant to General Business Law § 349.

In a complaint dated November 1, 2007, plaintiff, the People of the State of New York, commenced this action against

defendants asserting claims under Executive Law § 63(12) and General Business Law § 349, and for unjust enrichment. The complaint alleges that in Spring 2006, WaMu hired two appraisal management companies, defendant eAppraiseIT and nonparty Lender's Service, Inc., to oversee the appraisal process and provide a structural buffer against potential conflicts of interest between WaMu and the individual appraisers. The gravamen of the Attorney General's complaint asserts that defendants misled their customers and the public by stating that eAppraiseIT's appraisals were independent evaluations of a property's market value and that these appraisals were conducted in compliance with the Uniform Standards and Professional Appraisal Practice (USPAP), when in fact defendants had implemented a system allowing WaMu's loan origination staff to select appraisers who would improperly inflate a property's market value to WaMu's desired target loan amount.[1]

Defendants moved for dismissal of the complaint pursuant to CPLR 3211, asserting that the Attorney General is prohibited from

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[1] USPAP is incorporated into New York law and it prohibits a State-certified or State licensed appraiser from accepting a fee for an appraisal assignment "that is contingent upon the appraiser reporting a predetermined estimate, analysis, or opinion or is contingent upon the opinion, conclusion or valuation reached, or upon the consequences resulting from the appraisal assignment" (NY Exec Law § 160-y; 19 NYCRR 1106.1).

litigating his claims because HOLA and FIERRA impliedly place the responsibility for oversight of appraisal management companies on the OTS, and asserting a failure to state a cause of action. Supreme Court denied defendants' motion, finding that HOLA and FIRREA do not occupy the entire field with respect to real estate appraisal regulation and that the enforcement of USPAP standards under General Business Law § 349 neither conflicts with federal law, nor does it impair a bank's ability to lend and extend credit. We affirm.

The Supremacy Clause of the United States Constitution provides that Federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (US Const, art VI, cl [2]), and it "vests in Congress the power to supersede not only State statutory or regulatory law but common law as well" (*Guice v Charles Schwab & Co.*, 89 NY2d 31, 39 [1996], *cert denied* 520 US 1118 [1997]). Indeed, "[u]nder the U.S. Constitution's Supremacy Clause (US Const, art VI, cl 2), the purpose of our preemption analysis is . . . to ascertain the intent of Congress" (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 113 [2008], *cert denied* _ US _, 129 S Ct 999 [2009]).

Congressional intent to preempt state law may be established "by express provision, by implication, or by a conflict between federal and state law" (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006], quoting *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 654 [1995]). Express preemption occurs when Congress indicates its "pre-emptive intent through a statute's express language or through its structure and purpose" (*Altria Group, Inc. v Good*, 555 US __, __, 129 S Ct 538, 543 [2008]). Absent explicit preemptive language, implied preemption occurs when "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . [o]r the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" (*Rice v Santa Fe El. Corp.*, 331 US 218, 230 [1947]). Further, when "[a] conflict occurs either because compliance with both federal and state regulations is a physical impossibility, or because the State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the State law is preempted (*City of New York v Job-Lot Pushcart*, 213 AD2d 210, 210 [1995], *affd* 88 NY2d 163 [1996], *cert denied* 519 US 871 [1996] [internal quotation marks

and citations omitted]).

Here, defendants do not argue, nor have they directed this Court's attention to any language within HOLA or FIRREA that establishes, that Congress expressly created these statutes to supersede state law governing the causes of actions asserted in the Attorney General's complaint. Defendants also have not argued that there exists a conflict between federal and State laws or regulations. Rather, defendants assert that because Congress has legislated so comprehensively, and that federal law so completely occupies the home lending field, the Attorney General is precluded from bringing claims against them under the theory of field preemption. Thus, the necessary starting point is to determine whether HOLA and FIRREA so occupy the field that these two statutes preempt any and all state laws speaking to the manner in which appraisal management companies provide real estate appraisal services.

In 1933, Congress enacted HOLA "to provide emergency relief with respect to home mortgage indebtedness at a time when as many as half of all home loans in the country were in default" (*Fidelity Fed. Sav. & Loan Assn. v De la Cuesta*, 458 US 141, 159 [1982] [internal quotation marks and citations omitted]). HOLA

created a general framework to regulate federally chartered savings associations that left the regulatory details to the Federal Home Loan Bank Board (FHLBB). The FHLBB's authority to regulate federal savings and loans is virtually unlimited and "[p]ursuant to this authorization, the [FHLBB] has promulgated regulations governing the powers and operations of every Federal savings and loan association from its cradle to its corporate grave" (*id.* at 145 [internal citations and quotation marks omitted]).

When Congress passed FIRREA in 1989, it restructured the regulation of the savings association industry by abolishing the FHLBB and vested many of its functions into the newly-created OTS (*see* FIRREA § 301 [12 USCA § 1461 *et seq.*] [establishing OTS], § 401 [12 USCA § 1437] [abolishing the FHLBB]). According to FIRREA's legislative history

> "[t]he primary purposes of the [FIRREA] are to provide affordable housing mortgage finance and housing opportunities for low- and moderate-income individuals through enhanced management of federal housing credit programs and resources; establish organizations and procedures to obtain and administer the necessary funding to resolve failed thrift cases and to dispose of the assets of these institutions . . . and, enhance the regulatory enforcement powers of the depository institution regulatory

> agencies to protect against fraud, waste and insider abuse" (HR Rep 101-54 [I], at 307-308, reprinted in 1989 US Code Cong to Admin News, at 103-104).

FIRREA was also designed

> "to thwart real estate appraisal abuses, [by] establish[ing] a system of uniform national real estate appraisal standards. It also requires the use of state certified or licensed appraisers for real estate related transactions with the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Fannie Mac), the RTC, or certain real estate transaction [*sic*] regulated by the federal financial institution regulatory agencies" (HR Rep 101-54 (I), at 311, reprinted in 1989 US Code Cong to Admin News, at 107).

Further, 12 USCS § 3331, which was enacted as part of FIRREA,

states that the general purpose of this statute, is

> "to provide that Federal financial and public policy interests in real estate related transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision."

The uniform standards described in 12 USCS § 3331, are defined in

12 USCS § 3339 which requires that the OTS, as a

> "Federal financial institution[] regulatory agency . . . shall prescribe appropriate standards for the performance of real estate appraisals in connection with federally

> related transactions[2] under the jurisdiction of each such agency or instrumentality. These rules shall require, at a minimum -- (1) that real estate appraisals be performed in accordance with generally accepted appraisal standards as evidenced by the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation; and (2) that such appraisals shall be written appraisals."

The Appraisal Standards Board (ASB) of the Appraisal Foundation promulgates the appraisal standards mandated by 12 USC § 3339 and are called USPAP. The Appraisal Foundation is a private "not-for-profit organization dedicated to the advancement of professional valuation [and] was established by the appraisal profession in the United States in 1987" (Welcome to The Appraisal Foundation [The Appraisal Foundation], https://netforum.avectra.com/eWeb/StartPage.aspx?Site=TAF [accessed May 27, 2010]). The ASB is responsible for "develop[ing], interpret[ing] and amend[ing]" USPAP (Welcome to The Appraisal Foundation, https://netforum.avectra.com/eWeb/DynamicPage.aspx?Site=TAF&WebCode=ASB [accessed May 27, 2010]). However, "[e]ach U.S. State or Territory has a State appraiser

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[2] 12 USC § 3350(4) states that "[t]he term 'federally related transaction' means any real estate-related financial transaction which--(A) a federal financial institutions regulatory agency or the Resolution Trust Corporation engages in, contracts for, or regulates; and (B) requires the services of an appraiser."

regulatory agency, which is responsible for certifying and licensing real estate appraisers and supervising their appraisal-related activities, as required by Federal law" (State Regulatory Information [The Appraisal Foundation], https://netforum.avectra.com/eWeb/DynamicPage.aspx?Site=taf&WebCode=RegulatoryInfo [accessed May 27, 2010]; *see also* State Appraiser Regulatory Programs > State Contact Information [Appraisal Subcommittee], https://www.asc.gov/State-Appraiser-Regulatory-Programs/StateContactInformation.aspx [accessed May 27, 2010] [listing each State appraiser regulatory agency's website]). Further, the OTS itself has determined that

> "[i]t does not appear that OTS is required by title XI of FIRREA to implement an appraisal regulation that reaches all the activities of savings and loan holding companies, at least to the extent that those activities are unrelated to the safety and soundness of savings associations or their subsidiaries. Neither the language of Title XI nor its legislative history indicate that Congress intended title XI to apply to the wide range of activities engaged in by savings and loan holding companies and their non-saving association subsidiaries" (55 Fed Reg 34532, 34534-34535 [1990], codified at 12 CFR 506, 545, 563, 564 and 571).

Indeed, the OTS encourages financial institutions

> "to make referrals directly to state appraiser regulatory authorities when a State licensed or certified appraiser violates USPAP, applicable state law, or engages in other unethical or unprofessional conduct.

> Examiners finding evidence of unethical or unprofessional conduct by appraisers will forward their findings and recommendations to their supervisory office for appropriate disposition and referral to the state, as necessary" (OTS, Thrift Bulletin, Interagency Appraisal and Evaluation Guidelines at 10 [November 4, 1994], http://files.ots.treas.gov/84042.pdf [accessed May 27, 2010]).

In looking at the legislative history it becomes clear that Congress intended to establish

> "a system of uniform real estate appraisal standards and requires the use of State certified and licensed appraisers for federally regulated transactions by July 1, 1991. . . The key . . . lies in the creation of State regulatory agencies and a Federal watchdog to monitor the standards and to oversee State enforcement. . . It is this combination of Federal and State action . . . that . . . assur[es] . . . good standards are properly enforced (135 Cong Rec S3993-01, at S4004 [April 17, 1989], 1989 WL 191505 [remarks of Senator Christopher J. Dodd]).

Thus, we conclude that neither HOLA or FIRREA preempts or precludes the Attorney General from pursuing his claims.

Having rejected defendants' general arguments for preemption under HOLA and FIRREA, "[t]he Court's task, then, is to decide which claims fall on the regulatory side of the ledger and which, for want of a better term, fall on the common law side" *(Cedeno v IndyMac Bancorp, Inc.*, 2008 WL 3992304, *7, 2008 US Dist LEXIS 65337, *22 [SD NY 2008] [internal quotation marks and citation omitted]). Defendants assert that the Attorney General is

preempted from pursuing his claims because subsequent to FIRREA's passage, the OTS issued extensive regulations specifically addressing the composition and construction of appraisal programs undertaken by federal savings and loans.

It is well settled that "[a]gencies delegated rulemaking authority under a statute . . . are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer" (*Rapanos v United States*, 547 US 715, 758 [2006]). Indeed, the OTS regulations "have no less pre-emptive effect than federal statutes" (*Fidelity Fed. Sav. & Loan Assn.*, 458 US at 153). 12 CFR 545.2, states that regulations promulgated by the OTS are "preemptive of any state law purporting to address the subject of the operations of a Federal saving association." However, 12 CFR 560.2(a) limits the language of 12 CFR 545.2 by setting parameters to the OTS' authority to promulgate regulations that

> "preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations . . . to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA" (12 CFR 560.2[a]).

12 CFR 560.2(b) provides a non-exhaustive list of illustrative examples of the types of state laws preempted by 12

CFR 560.2(a). Further, 12 CFR 560.2(c) states that the following types of State law are not preempted

> "to the extent that they only incidentally affect the lending operations of Federal savings associations . . . (1) Contract and commercial law; (2) Real property law; (3) Homestead laws specified in 12 U.S.C. 1462a(f); (4) Tort law; (5) Criminal law; and (6) Any other law that OTS, upon review, finds: (i) Furthers a vital state interest; and (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section."

The OTS advises that when a court is

> "analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption" (61 Fed Reg 50951-01, 50966-50967 [1996]).

Defendants argue that the Attorney General's challenges to defendants' business practices are preempted because the conduct falls within 12 CFR 560.2(b)(5), which provides examples of loan-related fees "including without limitation, initial charges, late

charges, prepayment penalties, servicing fees, and overlimit fees." Defendants also assert that their alleged conduct is within 12 CFR 560.2(b)(9), which provides

> "[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants" (*id.*).

Lastly, defendants assert that their alleged conduct falls within 12 CFR 560.2(b)(10) which states that "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages" is preempted.

The Attorney General's complaint asserts that defendants engaged in conduct proscribed by Executive Law § 63(12)[3] and General Business Law § 349.[4] It further alleges that defendants

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[3] Executive Law § 63(12) states, in pertinent part, that "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages. . ."

[4] General Business Law § 349(b) states, in pertinent part, that "[w]henever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be

unjustly enriched themselves by repeated use of fraudulent or illegal business practices, in that they allowed WaMu to pressure eAppraiseIT appraisers to compromise their USPAP-required independence and collude with WaMu to inflate residential appraisal values so that the appraisals would match the qualifying loan values WaMu desired.

Under the first prong of the preemption analysis, we find that this action brought pursuant to Executive Law § 63(12), General Business Law § 349(b) and on the theory of unjust enrichment is not preempted by 12 CFR 560.2(b)(5) because it involves no attempt to regulate bank-related fees. We also find, under the first prong of the preemption analysis, that there is no preemption pursuant to 12 CFR 560.2(b)(9) because these claims do not involve a state law seeking to impose or require any specific statements, information or other content to be disclosed. Although at least one case has held that claims similar to those asserted here were preempted (*see Spears v Washington Mut., Inc.*, 2009 WL 605835 [ND Cal 2009]), we find

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unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices."

under the first prong of the preemption analysis that 12 CFR 660.2(b)(10) does not preclude the Attorney General's complaint because prosecution of the alleged conduct will not affect the operations of federal savings associations (FSA) in how they process, originate, service, sell or purchase, or invest or participate in, mortgages.

The question then becomes whether the Attorney General is nevertheless precluded from litigating his claims under the second prong of the preemption analysis. Because enjoining a real estate appraisal management company from abdicating its publicly advertised role of providing unbiased valuations is not within the confines of 12 CFR 560.2(c), we answer it in the negative.

Defendants argue the OTS's authority under HOLA and FIRREA is not limited to oversight of a FSA and that its authority under these two statues extends over the activity regulated and includes the activities of third party agents of a FSA. Defendants assert that providing real estate appraisal services is a critical component of the processing and origination of mortgages and represents a core component of the controlling federal regime. Defendants cite 12 USC § 1464(d)(7)(D) and *State Farm Bank, FSB v Reardon* (539 F3d 336 [6th Cir 2008]) for

support. 12 USC § 1464(d)(7) states, in pertinent part, that

> "if a savings association . . . causes to be performed for itself, by contract or otherwise, any service authorized under [HOLA] such performance shall be subject to regulation and examination by the [OTS] Director to the same extent as if such services were being performed by the savings association on its own premises . . ."

Here, it is alleged eAppraiseIT and Lender's Service, Inc., were hired by WaMu to provide appraisal services. However, defendants are incorrect in asserting that providing real estate appraisal services is an authorized banking activity under HOLA. In an opinion letter dated October 25, 2004, OTS concluded that it had the authority to regulate agents of an FSA under HOLA because

> "[i]nherent in the authority of federal savings associations to exercise their deposit and lending powers and to conduct deposit, lending, and other banking activities is the authority to advertise, market, and solicit customers, and to make the public aware of the banking products and services associations offer. The authority to conduct deposit and lending activities, and to offer banking products and services, is accompanied by the power to advertise, market, and solicit customers for such products and services . . . A state may not put operational restraints on a federal savings association's ability to offer an authorized product or service by restricting the association's ability to market its products and services and reach potential customers . . . Thus, OTS has authority under the HOLA to regulate the

> Agents the Association uses to perform marketing, solicitation, and customer service activities" (2004 OTS Op No. P-2004-7, at 7, http://files.ots.treas.gov/560404.pdf, 2004 OTS LEXIS 6, at *15 [accessed May 27, 2010]).

State Farm Bank, FSB v Reardon (539 F3d 336 [6th Cir 2008]) follows this principle. In *Reardon*, the plaintiff, a FSA chartered by the OTS under HOLA, decided to offer, through its independent contractor agents, first and second mortgages and home equity loans in the State of Ohio. The Sixth Circuit concluded that although the statute at issue

> "directly regulates [the plaintiff FSA's] exclusive agents rather than [the FSA] itself . . . the activity being regulated is the solicitation and origination of mortgages, a power granted to [the FSA] by HOLA and the OTS. This is also a power over which the OTS has indicated that any state attempts to regulate will be met with preemption . . . [T]he practical effect of the [statute] is that [the FSA] must either change its structure or forgo mortgage lending in Ohio. Thus, enforcement of the [statute] against [the FSA's] exclusive agents would frustrate the purpose of the HOLA and the OTS regulations because it indirectly prohibits [the FSA] from exercising the powers granted to it under the HOLA and the OTS regulations" (*Reardon*, 539 F3d at 349 [internal quotation marks and citation omitted]).

Since appraisal services are not authorized banking products or services of a FSA, defendants have failed to show that the Attorney General is preempted from pursuing his claims under 12 USC § 1464(d)(7)(D). Consequently, under the second prong of the

preemption analysis, the result of the Attorney General litigating his claims against a company that independently administers a FSA's appraisal program would "only incidentally affect the lending operations of [the FSA]" (12 CFR 560.2[c]). Thus, defendants have failed to show that OTS's regulations and guidelines preempt or preclude the Attorney General from pursuing his claims.

Defendants assert that *Cedeno v IndyMac Bancorp, Inc.* (2008 WL 3992304, 2008 US Dist LEXIS 65337 [SD NY 2008]) provides this Court with persuasive authority that the federal government and its regulators alone regulate the mortgage loan origination practices of FSAs including all aspects of the appraisal programs they utilize. In *Cedeno*, the Southern District found preemption precluded a private individual from maintaining a cause of action against a bank. It was alleged that the bank failed to disclose to the plaintiff that it selected appraisers, appraisal companies and/or appraisal management firms who would inflate the value of residential properties in order to allow the bank to complete more real estate transactions and obtain greater profits. This practice resulted in the plaintiff being misled as to the true

equity in her home. The Southern District found that the conduct of the bank was

> "directly regulated by the OTS: the processing and origination of mortgages, a loan-related fee, and the accompanying disclosure. The appraisals are a prerequisite to the lending process, and are inextricably bound to it. Because the plaintiff's claim is not a simple breach of contract claim, but asks the Court to set substantive standards for the Associations' lending operations and practices, it is preempted" (*Cedeno*, 2008 WL 3992304, *9, 2008 US Dist LEXIS 65337, at *28 [internal quotation marks and citations omitted]).

Contrary to defendants' assertions, we find that *Cedeno* is not applicable here because *Cedeno* does not reach the question as to whether HOLA, FIRREA or OTS's regulations and guidelines are intended to regulate the conduct of real estate appraisal companies.

Annexed to the OTS's October 25, 2004 opinion letter is a document entitled Appendix A - Conditions. In this document, OTS requires FSAs that wish to use agents to perform marketing, solicitation, customer service, or other activities related to the FSA's authorized banking products or services to enter into written agreements that "(4) expressly set[] forth OTS's statutory authority to regulate and examine and take an enforcement action against the agent with respect to the activities it performs for the association, and the agent's

acknowledgment of OTS's authority" (2004 OTS Op No. P-2004-7, at 16, http://files.ots. treas.gov/560404.pdf, 2004 OTS LEXIS 6, at *37 [accessed May 27, 2010]). We note that defendants have neither asserted that such written agreements exist nor produced such documents. Thus, we conclude that the Attorney General may proceed with his claims against defendants because his challenge to defendants' allegedly fraudulent and deceptive business practices in providing appraisal services is not preempted by federal law and regulations that govern the operations of savings and loan associations and institution-affiliated parties.

Defendants assert that the Attorney General cannot rely upon a substantive violation of a federal law to support a claim under General Business Law § 349 because this is an improper attempt to convert alleged violations of federal law into a violation of New York law. Defendants claim that where a plaintiff seeks to rely upon a substantive violation of a federal law to support a claim under General Business Law § 349, the federal law relied upon must contain a private right of action.

However, the Attorney General is statutorily charged with the duty to "[p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of

attorney or counsel, in order to protect the interest of the state" (Executive Law § 63[1]). Indeed, when the Attorney General becomes aware of allegations of persistent fraud or illegality of a business, he

> "is authorized by statute to bring an enforcement action seeking 'an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, [and] directing restitution and damages' (Executive Law § 63 [12]). He is also authorized, when informed of deceptive acts or practices affecting consumers in New York, to 'bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained' thereby (General Business Law § 349 [b])" (*People v Coventry First LLC*, 13 NY3d 108, 114 [2009]).

It is well settled that "[o]n a motion to dismiss pursuant to CPLR 3211, the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Wiesen v New York Univ.*, 304 AD2d 459, 460 [2003], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The Attorney General's complaint alleges that defendants publicly claimed on their eAppraiseIT website that eAppraiseIT provides a firewall between lenders and appraisers so that customers can be assured that USPAP and FIRREA guidelines are followed and that each appraisal is being audited for compliance.

The Attorney General charges that defendants deceived borrowers and investors who relied on their proclaimed independence by allowing WaMu's loan production staff to select the appraiser based upon whether they would provide high values.

We find defendants' assertions that the Attorney General lacks standing under General Business Law § 349 and that his complaint fails to state a cause of action are without merit. Indeed, the Attorney General's complaint references misrepresentations and other deceptive conduct allegedly perpetrated on the consuming public within the State of New York, and "[a]s shown by its language and background, section 349 is directed at wrongs against the consuming public" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 24 [1995]). Therefore, we find that the Attorney General's complaint articulates a viable cause of action under General Business Law § 349, and that this statute provides him with standing.

Consequently, we conclude that defendants have failed to demonstrate that HOLA, FIRREA or the OTS's regulations and guidelines preempt or preclude the Attorney General from pursuing the causes of action articulated in his complaint. We additionally find that the Attorney General has standing under General Business Law § 349. We have reviewed defendants' remaining contentions and we find them without merit.

Accordingly, the order of the Supreme Court, New York County (Charles Edward Ramos, J.), entered April 8, 2009, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint on the ground of federal preemption, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 8, 2010

CLERK