SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 13, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2615 Joseph M. Meehan, et al., Index 16434/06
Plaintiffs-Appellants,

-against-

Barksdale Tenants Corp., et al.,
Defendants-Respondents,

A.L. Eastmond & Sons, Inc., etc., et al.,
Defendants.

Worby Groner Edelman LLP, White Plains (Michael L. Taub of counsel), for appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Howard R. Silver, J.), entered March 12, 2009, dismissing the complaint as against defendants-respondents pursuant to an order granting their motion for summary judgment, unanimously reversed, on the law, without costs, and the complaint reinstated as against said defendants.

Plaintiff's testimony that the patch of ice on which he slipped was gray or white and approximately 8 feet by 4 feet, coupled with the evidence that the temperature had not been above freezing for at least two days prior to the accident, is sufficient to raise an issue of fact on constructive notice (*see*

Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986] ["a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owner's] employees to discover and remedy it"]; *cf. Espinell v Dickson*, 57 AD3d 252 [2008] ["defendants lacked . . . constructive notice of the icy condition . . . due to the fact that the icy condition was not readily visible and to the relatively short [less than 3-hour] interval between the end of the storm and the accident"]). Moreover, although "plaintiff did not notice the hazard . . . just prior to the accident, that circumstance does not definitively establish [defendants'] lack of notice" (*Wade-Westbrooke v Eshagian*, 21 AD3d 817 [2005]).

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

ENTERED: MAY 13, 2010

David Gropper
CLERK

Friedman, J.P., McGuire, Acosta, DeGrasse, Freedman, JJ.

4815 Wendy S. Popowich, Index 350290/01
Plaintiff-Respondent,

-against-

Jason Korman,
Defendant-Appellant.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Robert Fryd of counsel), for appellant.

William N. Binderman, New York, for respondent.

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered December 18, 2006, insofar as appealed from as limited by defendant-appellant's brief, awarding plaintiff a money judgment of $1,844,931 plus statutory interest on her cause of action for repayment of certain loans and a distributive award of $886,907, and awarding defendant no share of the value of plaintiff's brokerage account and $30,000 representing a five-months' share of the appreciation of the value of the New York townhouse, modified, on the law and the facts, to vacate the money judgment and dismiss the cause of action for repayment of the loans, to reduce the distributive award of $886,907 to $560,747, to award defendant $253,751 representing 15% of the value of the brokerage account, and to increase defendant's share of the appreciation on the townhouse to $54,000, and otherwise affirmed without costs. The Clerk is directed to enter an amended judgment accordingly.

Certain loans made by plaintiff are central to this appeal. Plaintiff contends that the loans were made to defendant, but defendant contends that the loans were made to California Direct Limited (CDL), a corporation he formed and partially owns. As discussed below, because it would avail plaintiff nothing if we were to regarded the loans as loans to defendant, we will assume without deciding that the loans were made to CDL.

Supreme Court erred in determining that plaintiff's separate property included the right to repayment of the loans, as she "failed to demonstrate that the loans were not made with marital funds" (*Sagarin v Sagarin*, 251 AD2d 396, 396 [2d Dept 1998]). To the contrary, as Supreme Court found in its decision, plaintiff's separate property was commingled with marital property in the brokerage account of plaintiff from which the loans were made. Of course, plaintiff's separate property was the source of the loans made prior to the marriage, but it is undisputed that the premarital loans were repaid in full. Accordingly, as Supreme Court should have concluded that the brokerage account in plaintiff's name was marital property (*see Pullman v Pullman*, 176 AD2d 113 [1st Dept 1991], *Kirshenbaum v Kirshenbaum*, 203 AD2d 534, 535 [2d Dept 1994]), it also should have concluded that the right to repayment of the loans was marital property. Notably, because marital property and plaintiff's separate property were commingled in the brokerage account, Supreme Court correctly

concluded that two properties, a beach house and a townhouse purchased in whole or in part with funds from the brokerage account, were marital property subject to equitable distribution. For the reasons discussed below, although the right to repayment of the loans is marital property, a remand for the purpose of conducting further proceedings to value this asset is not warranted.

Supreme Court also erred in concluding that defendant was liable to plaintiff for repayment of the loans. Because the written guaranty requires defendant to repay the loans, it is an agreement that makes "provision for the ownership, division or distribution of separate and marital property" (Domestic Relations Law § 236[B][3]). The guaranty was executed by defendant during the marriage, but was not "acknowledged or proven in the manner required to entitle a deed to be recorded" (*id.*). Accordingly, the clear terms of the statute render it unenforceable (*Matisoff v Dobi*, 90 NY2d 127 [1997]). Contrary to Supreme Court's reasoning, the "commercial background of both parties" is of no moment (*id.* at 132 ["the plain language of Domestic Relations Law § 236(B)(3) . . . recognizes no exception to the requirement of formal acknowledgment"]).

Nor can defendant be held liable for repayment of the loans on the alternative ground that he, as Supreme Court wrote, "ran the corporations [CDL and a related entity] as his alter ego,

while disregarding corporate forms." Neither CDL nor the related entity, after all, were made parties to this action (*see Stewart Tenants Corp. v Square Indus.*, 269 AD2d 246, 248 [1st Dept 2000] ["An action to pierce the corporate veil requires that the purported dummy corporations be parties, even if the parent corporation is alleged to be the one which unjustly retains the funds"]; *see also Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 144 [1993] ["to pursue (the individual) under the doctrine of piercing the corporate veil presupposes that the corporation is liable"] [internal quotation marks omitted]). Our decision in *Goldberg v Goldberg* (172 AD2d 316 [1st Dept 1991], *lv dismissed* 78 NY2d 1124 [1991]) is not to the contrary; the husband was not held liable for any obligations of the "alter ego corporations" (*id.* at 316) on account of his misuse of those entities. We need not determine whether defendant also is correct in urging that plaintiff failed to show that he perpetrated a wrong against her through his alleged domination of the corporate entities (*see id.* at 316-317).

Using the income capitalization method of valuation, the neutral expert valued CDL as of the commencement date of the action at $1.3 million; defendant's expert did not dispute the reasonableness of this valuation or the methodology. The court found that the fair market value of CDL was $1.3 million and that plaintiff was entitled to a distributive award of 40% of its

total value or $520,000. As defendant correctly maintains, however, the parties collectively owned 85% of CDL, with third parties owning the rest. Accordingly, the value of this marital asset should have been fixed at $1,105,000 (85% of $1.3 million), and the CDL component of the distributive award to plaintiff should have been $442,000 (40% of $1,105,000). To correct this oversight, we reduce the distributive award to plaintiff by $78,000.

The neutral expert valued two other marital assets related to CDL: the CDL "Directors' Loan Account," representing, as the court stated, "money advanced to CDL" (by plaintiff, defendant and another CDL-related entity), and Calitalia, an entity founded by defendant that served as a vehicle for charging defendant's annual management fees to CDL. The expert valued the Directors' Loan Account at $330,000 and Calitalia at $620,400. The valuation of Calitalia reflected the book value of its sole asset, the receivable from CDL for accumulated unpaid management fees, after discounts to account for both the possibility CDL would be unable to pay and taxes Calitalia would owe if CDL did pay. However, because it found that defendant's expert "was persuasive in his testimony that the value of CDL already included the Directors' Loan Account," the court "d[id] not attribute a separate value to the Directors' Loan Account." Accordingly, with respect to the Directors' Loan Account and

Calitalia, the court ruled that the amount of the distributive award to which plaintiff was entitled was $248,160, 40% of the value of Calitalia.

We agree with Supreme Court that the reasoning of defendant's expert is persuasive. We also agree with defendant, however, that his expert's reasoning applies with equal force to Calitalia, and for this reason we reduce the distributive award to plaintiff by $248,160. As defendant's expert explained, the $1.3 million valuation of CDL makes sense only if both "liabilities" of CDL are reclassified as CDL equity and subsumed within the $1.3 million valuation. Only on that basis would the debt to equity ratio of CDL justify the capitalization rate that the neutral expert employed, a rate that is essential to the $1.3 million valuation. That valuation, as defendant's expert testified, "encompasses all the assets and all [the] liabilities of CDL . . . includ[ing] what we know as due to . . . shareholders, called the Directors' Loan [A]ccount, and the payable to Calitalia." Thus, the separate valuation of Calitalia reflects what amounts to a form of double counting.[1] Without recapitulating every aspect of the reasoning of defendant's expert, we note that we also find persuasive his testimony that a

[1]In other words, if it were appropriate to value Calitalia separately, the value of CDL would have to be reduced because of its liability to Calitalia by an amount greater than the amount of the discounted value of Calitalia.

hypothetical buyer of CDL would not pay $1.3 million for it if it were obligated to pay off the "liability" to Calitalia over a five-year amortization period. If CDL were so obligated, there would not be nearly enough cash flow both to pay Calitalia and provide the buyer with a reasonable return on investment. Relatedly, moreover, in computing the annual after-tax profit of CDL, the neutral expert did not allow for an expense attributable to CDL's payment of the accumulated management fees. We also note that Supreme Court's disparate treatment of Calitalia and the Directors' Loan Account may reflect a misrecollection of defendant's position, the expert's testimony or both. In its written decision, after all, the court stated that defendant valued Calitalia at $620,400, and made no mention of either defendant's expert's testimony that Calitalia's value should be included in the value of CDL or any tension between its treatment of Calitalia and the Directors' Loan Account.

As noted earlier, the parties' right to repayment of the loans to CDL is a marital asset. At this juncture, we can more easily explain our determination not to remand for the purpose of further proceedings to value this asset. In the first place, plaintiff has not asked that we direct such a remand in the event we agree with defendant that it is a marital asset. Second, we cannot perceive any rational basis for treating this asset differently than Calitalia and the Directors' Loan Account, i.e.,

for concluding that its value should not be subsumed within the value of CDL. Third, because it appears that the value of CDL would have to be reduced in the event this asset were to be separately valued, we doubt that any net benefit flowing to plaintiff, the party with the greater equitable share of both assets, would compare favorably with the costs of further proceedings in this already costly and protracted litigation (*see Wechsler v Wechsler*, 58 AD3d 62, 78 [1st Dept 2008], *appeal dismissed* 12 NY3d 883 [2009]).

The court found both that the value of plaintiff's brokerage account as of the commencement of the action was $1,691,673.51 and that the increase in value of the account during the marriage, $528,022, was marital property. Without explanation, however, the court failed to make any equitable distribution of this marital asset to defendant. We agree with defendant that this was error (*see* Domestic Relations Law § 236[B][5][c]). And, as already discussed, we also agree with defendant that, because of the commingling in the brokerage account of plaintiff's separate property with other property acquired during the marriage, the entire account should be deemed marital property. We disagree, however, with defendant that he should be awarded the same percentage share of this account, i.e., 30%, that the court awarded him of the other marital property acquired through plaintiff's direct efforts. On the facts of this case --

including plaintiff's proof of the value of the brokerage account at the time of marriage, the appreciation of the securities due to passive economic forces, the substantial gifts during the marriage to plaintiff from her parents, the substantial sums from the account advanced directly to CDL and the evidence that, as Supreme Court aptly stated, "plaintiff not only was the financial engine of this marriage, but . . . was also the primary caretaker of the parties' son" -- we find that an award of 15%, or $253,751, of the total value ($1,691,673) of this marital asset is appropriate.

Because the parties bought the New York townhouse in July 2000 and defendant moved out of the house in April 2001, the court erred in awarding defendant only five months' worth of the appreciation on the value of the house. Accordingly, we award defendant nine months' worth of appreciation, as indicated.

The dissent is unpersuasive in contending that plaintiff's mere ability to value the brokerage account as of the commencement date is sufficient to entitle her to retain as her separate property an amount equal to that commencement date value. The dissent relies on inapposite decisions and ignores the trading activity that occurred during the course of the marriage and the deposits of substantial sums representing marital property during the marriage as well as the fungibility of money. Notably, in her brief, plaintiff does not refer us to

any pages of the 10-volume record on appeal that reflect efforts to trace over the course of the marriage the property in the account at the commencement date. The dissenter, who authored the majority's opinion in *Fields v Fields* (65 AD3d 297 [2009]), fails to recognize that the brokerage account is marital property for the same reason the bank account in that case was marital property: "because the husband commingled numerous marital funds in this account and failed to trace them sufficiently to delineate what might have been separate property" (*id.* at 302 n 3).

Nor is the dissent persuasive with respect to the loans relating to CDL. By way of a brief response, suffice it to say that it is undisputed that the loans made prior to the marriage were repaid. Presumably, the dissent agrees they need not be repaid again. With respect to loans made during the marriage, characterizing them as loans to defendant recognizes an unacknowledged agreement that makes "provision for the ownership, division or distribution of separate [or] marital property" in violation of Domestic Relations Law § 236(B)(3). The dissent believes that equitable principles permit the corporate veil to be pierced to hold defendant personally responsible for repayment of the loans even though CDL is not a party. The dissent, however, cites no authority for the proposition that equitable considerations permit plaintiff to do indirectly what she cannot

do directly because of the bar of Domestic Relations Law § 236(B)(3). Nor does the dissent cite any authority recognizing an equity-based exception to the rule requiring the corporate entity to be a party. We note, too, that by holding defendant personally liable on a piercing-the-corporate-veil theory, the dissent would confer a windfall on the minority owner of CDL.

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

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

ACOSTA, J. (dissenting in part)

I respectfully dissent on two issues: first, I would find in plaintiff's favor on her cause of action for repayment of the loan; and second, I would award defendant a percentage only of the appreciation of plaintiff's brokerage account during the parties' marriage.

The parties were married on December 11, 1994. At the time of the marriage, plaintiff had had an unusually successful career; she was employed at US Trust Company as a managing director and was the youngest person ever to attain that position at US Trust. For his part, beginning in the late 1980s and early 1990s, defendant was a wine broker and owned two wineries, one of which was sold and the other of which eventually went bankrupt.

In February 1994, less than one year before the parties married, defendant established California Direct, Ltd. (CDL), which was in the business of providing California wines to European grocery chains. Defendant was the managing director of CDL, and the initial investors in the company were plaintiff, defendant, defendant's brother, and a British investor, the last of whom gave his share to his children, who eventually owned 15%. Defendant also owned a company called Namrok Holding Corporation, which he solely organized and wholly controlled. The parties never filed joint income tax returns.

When Namrok was formed, defendant used that corporation to

collect management fees and receive any money that CDL loaned or paid to him. In 1996, however, defendant stopped using Namrok for that purpose and instead formed another corporation, Calitalia, Inc. Like Namrok, Calitalia was organized and wholly controlled by defendant. As he had with Namrok, defendant used Calitalia as a pass-through entity to receive fees from CDL for the time defendant spent on CDL's business, and to pay certain administrative expenses. At the time of this action, Namrok still existed, but had completely stopped operating.

According to plaintiff, between September 1994 and March 1999, she loaned defendant a total of $2,799,500, with $300,000 of the loan made before the parties were married. Although plaintiff conceded that defendant had repaid $1,000,000 of the principal amount, she argued that he still owed her $1,799,500 of the principal, plus interest. Defendant, on the other hand, maintained that any loans were made not to him as an individual, but to the corporate entities that he controlled, and thus, that he could not be held personally liable for them. Defendant also claimed to have invested $300,000 in CDL before the marriage; however, as the trial court noted, defendant never adduced credible evidence of his investment.

On March 15, 2001, several months after plaintiff discovered that defendant was having an extramarital affair, defendant, at plaintiff's behest, signed a document entitled "Summary of Notes

Due to [Plaintiff] (the "written guaranty"). The written guaranty purported to secure defendant's repayment of "the aforementioned amounts advanced as described above and confirm the terms and obligation to guarantee payment for the portion outstanding as of this date." The amounts due totaled $2,891,738. Although defendant signed the written guaranty and made certain handwritten changes to the preprinted language, it was not acknowledged in the manner required for a deed, as required by Domestic Law § 236(B)(3).[1]

I disagree with the majority that defendant is not liable for repayment of monies to plaintiff. First of all, under the circumstances presented, the relevant issue in this case is not whether the loan is marital property, but whether defendant should become entitled to the repayment of a loan on which he himself agreed to be liable for repayment. The majority's conclusion essentially amounts to an argument that the loan arrangement, which was made before the parties' marriage, was at least partially cancelled upon the marriage by dint of plaintiff's actually making the agreed-upon loans to defendant

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[1] Defendant did not object to the written guaranty's admissibility when it was introduced into evidence, although he did, in a written posttrial submission, challenge the written guaranty's enforceability under *Matisoff v Dobi* (90 NY2d 127 [1997]). However, even assuming that defendant failed to preserve at the trial court level the issue of the written guaranty's enforceability, the issue is purely one of law that we may properly consider for the first time on appeal (*see Public Serv. Mut. Ins. Co. v Zucker*, 225 AD2d 308, 309 [1996]).

pursuant to the pre-nuptial agreement. The majority's conclusion, therefore, essentially penalizes plaintiff for abiding by the parties' agreement. This conclusion also leads to the incongruous result that defendant becomes entitled to repayment of the very loan that he agreed to receive from plaintiff before they were married.

Sagarin v Sagarin (251 AD2d 396 [1998]), cited by the majority, does not stand for any proposition to the contrary. In *Sagarin*, the court found that "certain loans made by the husband to the corporation . . . should be classified as marital property, inasmuch as the husband failed to demonstrate that the loans were not made with marital funds" (*id.* at 396). However, in *Sagarin*, there is no indication that the loans were the subject of a premarital agreement between the parties; rather, the facts indicate that the loans were simply made to the corporation -- which was itself marital property -- during the marriage. By contrast, the parties in this case had an agreement that predated the marriage.

Furthermore, the majority characterizes as "notabl[e]" the trial court's finding that the parties' California beach house and the Manhattan townhouse were both marital assets because the parties bought them during the marriage with the use of funds from plaintiff's brokerage account. However, the trial court's finding in that regard is not inconsistent with its finding on

the loan issue. On the contrary, the joint ownership of the houses is governed by the unremarkable rule that property acquired during the marriage is generally assumed to be marital property, even where, as here, the title remains in the name of one of the spouses (Domestic Relations Law § 236[B][1][c]; *see Mesholam v Mesholam*, 11 NY3d 24, 28 [2008]). The court also found, with respect to the houses, that defendant involved himself in the process of locating and furnishing them, contributed to their upkeep, paid for ancillary services, and contributed to some of the costs of maintaining them -- another reason for its finding that the houses were marital property and the loans were not.

I also conclude, contrary to the majority, that CDL's corporate veil can be pierced and that defendant can be held liable for repayment on the loans on that basis.

To begin, I disagree with the majority that plaintiff's effort to recover the loans must be denied because she failed to join the corporations as a party to this matrimonial action. As the majority accurately notes, in *Stewart Tenants Corp. v Square Indus., Inc.* (269 AD2d 246 [2000]), this Court held that an action to pierce the corporate veil requires that the controlled corporation be named as a defendant in the action. However, *Stewart* was not a matrimonial action. Incorporating to avoid personal liability to creditors is, without question, permissible

under New York law (*see e.g. Ventresca Realty Corp.*, 28 AD3d at 538). The policy behind this rule makes perfect sense in the context of business and corporate law -- it allows for entrepreneurship and risk-taking without the risk of personal liability to the entrepreneur. This policy, of course, differs markedly from the policy behind equitable distribution, namely, the distribution of property upon divorce in a manner that treats the marriage as an economic partnership (*Price v Price*, 69 NY2d 8, 14-15 [1986]).

And in fact, no New York court appears to have held that one may use incorporated status to avoid personal liability to one's spouse. Indeed, allowing defendant to do so is particularly inequitable here, where defendant testified that CDL paid for many of the couple's personal expenses, such as the rent on the parties' residence in New York and parking for the parties' car. In light of his testimony that many payments from CDL were of a personal nature, used to pay for daily expenses of the couple's marriage, defendant should not now be heard to say that CDL and Namrok were separate entities against which plaintiff must commence an action separate from the matrimonial action. That defendant's actions occasionally benefitted both spouses does not serve to change this result, since the issue is not who benefitted, but which party seeks to use the corporate form to avoid repayment of loans -- in this case, defendant.

Certainly, this conclusion is not without precedent. For instance, in *Goldberg v Goldberg* (172 AD2d 316 [1991], *lv dismissed* 78 NY2d 1124 [1991]), no corporation was joined as a party to the matrimonial action. Nevertheless, this Court affirmed a distributive award to the wife as her share of the marital property after finding that the husband had deliberately dissipated and secreted marital assets by conveying them to various trusts and alter ego corporations. This Court found that because those entities served as the "defendant's personal 'pocket book,'" it was necessary to make a "distributive award to the plaintiff of her share of the marital property, in lieu of equitable distribution, so as to achieve an equitable result in the distribution of that property" (*id.* at 316-317).

Although the majority correctly notes that the husband in *Goldberg* was not held liable for any obligations of the alter ego corporations on account of his misuse of those entities, this observation misses the mark, as *Goldberg* held that a party may not evade payment to his spouse through use of the corporate form. At any rate, the majority's conclusion fails to account for the equitable principles, set forth above, that govern this proceeding, namely, that defendant, having brought the corporation into the marriage, may not, at the same time, hide behind the corporation to avoid liability to plaintiff, his former spouse. The equities are particularly strong in this

case, where plaintiff was not merely a party whose spouse controlled a corporation, but rather, according to the neutral expert's report, the largest source of funds to that corporation (*see Ventresca Realty Corp. v Houlihan*, 28 AD3d 537 [2006]).

As to whether defendant used his domination of the corporate form to perpetrate a wrong against plaintiff, an issue that the majority does not reach, there is no dispute that defendant controlled CDL, Calitalia, and Calitalia's predecessor entity Namrok -- indeed, defendant so testified, stating, for example, that a debt owed to Calitalia was, in reality, a debt owed to him. To be sure, the record shows a nearly complete unity of interest between defendant and his various corporate entities. Additionally, the record makes clear that defendant did, in fact, use his domination of these entities to commit a wrong against plaintiff and that the wrong caused her harm. For example, defendant conceded that in 1997, he signed a document on behalf of Namrok, unilaterally assigning a receivable that Namrok owed to plaintiff. The result of the assignment was that the transaction was recast so that CDL owed the receivable to plaintiff and defendant, rather than to plaintiff alone. Similarly, defendant testified that without plaintiff's consent, he made himself her agent with respect to that transaction. Defendant also conceded that he had written down at least part of plaintiff's loan account by the amount of personal expense

reimbursements that he was receiving from CDL. These transactions, which were effected solely through defendant's domination of the corporate entities, inflicted substantial financial injury on plaintiff (*see Teachers Ins. Annuity Assn. of America v Cohen's Fashion Optical of 485 Lexington Ave. Inc.*, 45 AD3d 317, 318 [2007]; *Fern, Inc. v Adjmi*, 197 AD2d 444, 445 [1993]).

It is also difficult to understand why the majority believes itself compelled to accept the framework that defendant now offers -- that is, the one set forth under *Matisoff v Dobi* (90 NY2d 127, *supra*) and Domestic Relations Law § 236(B)(3) -- rather than the one he himself offered at trial.[2] Indeed, defendant did not even raise the written guaranty's enforceability until his posttrial submission, choosing instead to argue at trial that, among other things, he was a mere guarantor of the loans to CDL and that plaintiff could not recover the loans because she had failed to join the corporations as parties. Since defendant chose to use the corporate form as his shield at trial, this

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[2] *Matisoff*, incidentally, addressed a situation in which the parties agreed, in a postnuptial agreement, that "'neither party shall have nor shall such party acquire any right, title or claim in and to the real and personal estate of the other solely by reason of the marriage of the parties'" (*id.* at 130). The agreement in this case, by contrast, concerns loans that, according to defendant, need not be paid back, and in fact, must be repaid to him as well as to the lender.

Court should not allow him to now reject that same reasoning when used as a sword.

Next, I agree with the majority that the court erred when it neither equitably distributed the marital portion of the brokerage account nor stated any reason for not doing so. I disagree, however, that *Kirshenbaum v Kirshenbaum* (203 AD2d 534 [1994]) and *Pullman v Pullman* (176 AD2d 113 [1991]), cited by the majority, lead to the conclusion that, because of the commingling in the brokerage account of plaintiff's separate property with other property acquired during marriage, the entire brokerage account should be deemed marital property.

Despite the majority's broad reading of *Pullman* and *Kirschenbaum*, neither case stands for the proposition that a separate account is wholly converted into marital property when the titled party deposits funds acquired during the marriage. Rather, those cases stand for the proposition that where property is acquired during the marriage, the acquired property is presumed to be marital property unless one party can adequately trace the acquisition to separate funds (*see Pullman*, 176 AD2d at 114; *Kirschenbaum*, 203 AD2d at 535). Indeed, we tacitly conceded in *Pullman* that had the husband provided "clear proof" that he possessed separate funds and acquired the parties' property with the separate funds, the acquired property would have been held to be separate, not marital (*Pullman*, 176 AD2d at 114).

Of course, while comingling of premarital assets with marital assets creates a presumption that the separate property has become marital property, such a situation usually arises where separate property is deposited into a joint, marital account, not the other way around, as defendant asserts was the case here (*see e.g. Judson v Judson*, 255 AD2d 656, 657 [1998]). By actively putting separate property in a joint account, it is presumed that the party doing so intended to make a gift of the separate property to the other spouse. As the cases hold, however, this presumption can be rebutted (*see Lagnena v Lagnena*, 215 AD2d 445, 446 [1995]).

In this matter, the documents that plaintiff produced during discovery demonstrated that the value of the brokerage account, which was solely in plaintiff's name, totaled $1,163,652 as of the date of the marriage. This evidence is, under the circumstances, sufficient to rebut the presumption that $1,163,652 in the brokerage account is marital property (*see Sarafian v Sarafian*, 140 AD2d 801, 804 [1988]; *Heine v Heine*, 176 AD2d 77, 83-84 [1992], *lv denied* 80 NY2d 753 [1992]). The brokerage account's value as of this action's commencement was $1,691,673.51 -- an appreciation of $528,022. As a result, the trial court should have awarded defendant the same 30% share that it awarded him of the other marital property -- that is, $158,406.60, representing 30% of $528,022.

The majority is critical of this reasoning, and, to rebut it, refers to the majority opinion in *Fields v Fields* (65 AD3d 297 [2009]). In *Fields* -- an appeal for which I wrote the majority opinion -- this Court noted that a certain account at Citibank "was marital property because the husband commingled numerous marital funds in this account and failed to trace them sufficiently to delineate what might have been separate property" (*id.* at 302 n 3).

Fields, however, neither contradicts the reasoning that I have set forth above nor supports the current majority's conclusion. On the contrary, the majority ignores an important distinction between this case and *Fields*: in *Fields*, the plaintiff husband and his mother opened the Citibank account some 12 years after the parties' marriage and then, upon the parties' divorce, claimed that his portion of the account was his separate property. In marked contrast, plaintiff in this case, who was the monied spouse, entered the marriage with $1,691,673.51 in the brokerage account -- money that was, incontrovertibly, hers and hers alone. Neither party to this action disputes the amount contained in plaintiff's brokerage account at the beginning of the marriage; indeed, to do so would fly in the face of the documentary evidence. That plaintiff deposited marital funds into the brokerage account does not serve to automatically transform clearly separate property into marital property. To be

sure, as I have noted, no case that the majority cites stands for the proposition that placing marital funds into an account existing before the marriage destroys the separate character of preexisting premarital funds.

Finally, I agree with the majority that the trial court erred when it awarded defendant only five months' worth of the appreciation on the value of the New York townhouse, as defendant moved out of the house in April 2001, not, as the trial court mistakenly found, in December 2000. I also agree with the majority that because the parties owned only 85% of CDL, with the rest being owned by third parties, the distributive award to plaintiff should be reduced by $78,000.

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

ENTERED: MAY 13, 2010

CLERK

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

1694 Nikita L. Lazarus, Index 7898/06
Plaintiff-Appellant,

-against-

Rafael Perez, et al.,
Defendants-Respondents,

American Transit Insurance Company,
Defendant.

Pollack, Pollack, Isaac & DeCiccio, New York (Jillian Rosen of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Nelson S. Román, J.), entered on or about May 22, 2008, which, to the extent appealable, denied plaintiff's motion to renew a prior order granting the motion by defendants Perez and Best Auto for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In the absence of new facts not offered on the prior motion that might have led to a different result (CPLR 2221[e]), plaintiff's motion for renewal was properly denied (*see Rosado v Edmundo Castillo Inc.*, 54 AD3d 278, 279 [2008]). Even were we to consider the merits, we would find plaintiff's argument without substance. Although plaintiff's contemporaneous medical records and reports from South Africa were neither certified nor sworn, plaintiff could rely upon them because defendants referred to

these documents in support of their motion for summary judgment. Nevertheless, these doctors discerned no significant abnormalities and found plaintiff to be "free of any neurological signs." Nor do plaintiff's medical records contain any quantitative assessment of a loss of range of motion, spinal defects or other serious abnormalities. It is well settled that contemporaneous, objective proof of injury, such as an expert's designation of a numeric percentage loss of range of motion or the extent or degree of physical limitation, is necessary to satisfy the statutory serious injury threshold (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

Plaintiff's argument with regard to the 90/180 rule (Insurance Law § 5102[d]) is similarly unavailing. Despite plaintiff's contention that she missed some time from college as a result of her accident, she failed to submit medical evidence to show that she could not perform "substantially all of the material acts which constitute [her] usual and customary daily activities" (*id.*) for not less than 90 of the first 180 days following the accident.

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

ENTERED: MAY 13, 2010

CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2184N Interior Building Services, Inc., Index 100135/08
Plaintiff-Respondent,

-against-

Broadway 1384 LLC,
Defendant-Appellant,

In Gear Swimwear, LLC, etc., et al.,
Defendants,

S & J Entrance and Window Specialists, Inc.,
Defendant-Respondent.

Ceccarelli Weprin PLLC, New York (Joseph J. Ceccarelli and Erik J. Berglund of counsel), for appellant.

Edward M. Shapiro, New York, for Interior Building Services, Inc., respondent.

Gutman & Gutman LLP, Port Washington (S. Mac Gutman of counsel), for S & J Entrance and Window Specialists, Inc., respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 7, 2009, which denied defendant landlord Broadway 1384's motion for partial summary judgment dismissing the general contractor's third cause of action and the cross claim by defendant subcontractor S & J to foreclose on their mechanic's liens against the building, and declined to discharge the mechanic's liens of four non-appearing subcontractors, unanimously reversed, on the law, with costs, the landlord's motion for partial summary judgment granted, and the liens of the general contractor, subcontractor S & J, and the non-appearing subcontractors discharged.

There were no issues of fact concerning the liability of the landlord for improvements made to defendant tenant's demised premises under Lien Law § 3. The work in question was performed solely for the tenant's benefit and convenience. Plaintiff general contractor and all of the subcontractors dealt exclusively with the tenant but for the landlord's concerns that the renovation did not interfere with the other tenants in the building. The landlord was not a party to the contract between the general contractor and the tenant and any renovation expenses incurred by the tenant over and above the initial credit provided by the landlord were the sole responsibility of the tenant.

Furthermore, any consent provided by the landlord was that consent required under the lease. Thus, the landlord was entitled to summary judgment under Lien Law § 3 and a discharge of the liens in question (*Paul Mock, Inc. v 118 E. 25th St. Realty Co.*, 87 AD2d 756 [1982]).

The mechanic's liens filed by the subcontractors who have not appeared or answered should have also been discharged (*see* Lien Law § 44[5]; *Naber Elec. Corp. v George A. Fuller Co., Inc.*, 62 AD3d 971 [2009]).

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

ENTERED: MAY 13, 2010

CLERK

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

2560N Hector Perez, Index 107290/06
Plaintiff-Appellant,

-against-

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

Blank & Star, PLLC, Brooklyn (Scott Star of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondents.

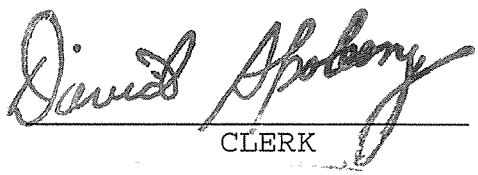
Order, Supreme Court, New York County (Harold B. Beeler, J.), entered on or about April 1, 2009, which denied plaintiff's motion to strike the answer, sanctioned defendant Transit Authority in the amount of $2,500, and directed that a negative inference be given at trial with regard to documents that were destroyed, unanimously modified, on the facts, to increase the sanction to $7,500, and otherwise affirmed, without costs.

The drastic sanction of striking a pleading is inappropriate without a showing that failure to comply with disclosure obligations was wilful, contumacious or in bad faith (*Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [2003]). While defendants did not timely comply with the court-ordered deadlines, there has been no clear showing that such failure was so motivated. Morever, plaintiff has failed to demonstrate how he is prejudiced by the absence of the destroyed documents.

However, in our view, and as defendants themselves acknowledge, the monetary sanction imposed for defendants' delay was inadequate as indicated.

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

ENTERED: MAY 13, 2010



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Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2575 Trustees of the Plumbers Local Union No. 1 Additional Security Benefit Fund, Plaintiffs-Respondents, Index 103822/08

-against-

City of New York, Defendant-Appellant.

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

Virginia & Ambinder, LLP, New York (Marc A. Tenenbaum of counsel), for respondents.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered February 23, 2009, which denied defendant City of New York's motion to dismiss the complaint, unanimously affirmed, without costs.

The sole cause of action in the complaint alleges that defendant is contractually liable for interest and liquidated damages for failing to make timely contributions to plaintiffs' trust fund. The agreement between the City and the nonparty union provided that the trust fund, to which the City was required to make pro rata contributions for its covered employees, was to be managed by plaintiffs under the terms of a trust agreement. Plaintiffs allege that the trust agreement, which pre-existed the agreement between the City and the union, gave plaintiffs authority to enforce payment of timely

contributions and to assess liquidated damages for delayed payments against employers like the City. In the context of a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide a plaintiff the benefit of every possible inference *(see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Applying this standard, it cannot be said as a matter of law that the union-City agreement is inconsistent with and does not incorporate by reference the terms of the trust agreement requiring timely contributions and assessing liquidated damages for delayed payments against employers like the defendant.

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

ENTERED: MAY 13, 2010

CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2784 The People of the State of New York, Ind. 3344/07
Respondent,

-against-

Dennis Almonte,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered October 9, 2007, convicting defendant, after a jury trial, of murder in the second degree, robbery in the first and second degrees, and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 17½ years to life, unanimously affirmed.

The admission of nine millimeter ammunition recovered from a room used by defendant immediately after the shooting does not warrant reversal. A .380 caliber casing was recovered from the crime scene, and an accomplice witness testified that defendant used a .380 caliber pistol. However, the People offered the nine millimeter cartridges under an alternative theory that the weapon might actually have been a nine millimeter, loaded with .380 caliber ammunition, so that the cartridges recovered tended to establish that defendant had access to a pistol capable of

firing the fatal shot (*see People v Del Vermo*, 192 NY 470, 478-482 [1908]). We conclude that any error by the People in failing to lay a foundation by calling a ballistics expert to explain the relationship between .380 caliber and nine millimeter ammunition was harmless, because the admission of the cartridges could not have affected the verdict (*see People v Crimmins*, 36 NY2d 230 [1975]). We have considered and rejected defendant's remaining arguments concerning this evidence.

The court properly declined to charge justification since there was no reasonable view of the evidence, when viewed most favorably to defendant, to support that defense. Defendant testified that at the time the pistol discharged, he had already acquired it from the deceased, leaving the deceased unarmed. Accordingly, any use of force at that time was clearly unjustifiable (*see People v Rodriguez*, 262 AD2d 140 [1999], *lv denied* 93 NY2d 1026 [1999]). In any event, the absence of a justification charge was harmless. Defendant was acquitted of intentional murder, but convicted of felony murder. Regardless of whether, in the abstract, the justification defense could ever apply to felony murder, it is clear, under the present facts, that the jury could not have reasonably found that defendant killed the deceased in the course of a robbery, but was nevertheless somehow justified within the meaning of Penal Law § 35.15.

The court properly denied defendant's CPL 330.30(2) motion to set aside the verdict on the ground of alleged juror misconduct. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), or its conclusion that there was no basis to set aside the verdict (*see People v Rodriguez*, 100 NY2d 30, 34-36).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 13, 2010

CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2786 Vanessa Khedouri, Index 115025/07
Plaintiff-Appellant,

-against-

Equinox,
Defendant-Respondent.

Jeffrey H. Schwartz, New York, for appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 8, 2008, which granted defendant's motion to dismiss the complaint and denied plaintiffs' cross motion for an extension of time to serve the complaint, nunc pro tunc, and for leave to file a supplemental summons and complaint, nunc pro tunc, unanimously affirmed, without costs.

Defendant's motion to dismiss plaintiff's summons and complaint and purported supplemental summons and amended complaint was timely made by notice of motion pursuant to CPLR 3211 (*see Kitkas v Windsor Place Corp.*, 49 AD3d 607 [2008]).

In this action alleging personal injury incurred during a fitness competition at a fitness center, plaintiff made no attempt to properly serve defendant within 120 days of filing the summons and complaint and no good cause was shown for an extension of time pursuant to CPLR 306-b (*see Valentin v Zaltsman*, 39 AD3d 852 [2007]). Moreover, the court properly

found that an extension in the interest of justice was not warranted based on the absence of any showing by plaintiff of a meritorious cause of action (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]), in light of plaintiff's voluntary assumption of the risks inherent in fitness training (*see Trupia v Lake George Cent. School Dist.*, __ NY3d __, 2010 NY Slip Op 2833 [2010]; *Joseph v New York Racing Assn.*, 28 AD3d 105 [2006]). Plaintiff also failed to establish that Equinox Columbus Center, Inc. ("ECCI") had any responsibility for the personnel at the subject fitness center.

The court also properly denied plaintiff leave to serve a supplemental summons and amended complaint. Plaintiff's amended complaint, served more than 20 days after service of defendant's answer, without leave of court, was a nullity pursuant to CPLR 3025(a) (*see Nikolic v Federation Empl. & Guidance Serv., Inc.*, 18 AD3d 522, 524 [2005]).

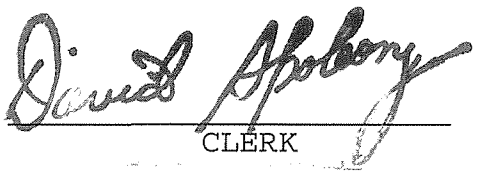
Moreover, since plaintiff failed to name and effectively serve defendant in the first instance, the predicate action could not be revived under CPLR 306-b since the statute of limitations had expired (*see Maldonado v Maryland Rail Commuter Serv Admin.*, 91 NY2d 467, 472 [1998]).

Further, the record established that ECCI was merely the lessee of the premises and did not operate, maintain or control the subject fitness center. Thus, based on the record, ECCI

could not have been intended as the defendant in the action and, therefore, such amendment of the summons and complaint is not authorized under CPLR 305(c) (*see Achtziger v Fuji Copian Corp.*, 299 AD2d 946 [2002], *lv dismissed* 100 NY2d 548 [2003]).

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

ENTERED: MAY 13, 2010



CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2787 In re Florin R.,

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

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for presentment agency.

Order, Family Court, New York County (George J. Silver, J.), entered on or about October 7, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in imposing a period of supervised probation rather than granting appellant's request for an adjournment in contemplation of dismissal (ACD). Probation was the least restrictive alternative consistent with appellant's needs and those of the community, given the violent nature of the offense, which involved an unprovoked attack on another boy who had allegedly given appellant a dirty look months before (*see e.g. Matter of Elias A.*, 61 AD3d 425 [2009]). The

evidence supported the conclusion that appellant would benefit from referral to counseling for anger management issues, and that he was in need of supervision for a longer period than six months, which would have been the maximum period available under an ACD (*see id.*).

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

ENTERED: MAY 13, 2010

CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2789 Dominique Cagliostro, Index 104704/07
Plaintiff-Respondent,

-against-

Madison Square Garden, Inc.,
Defendant-Appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Carmen A. Nicolaou of counsel), for appellant.

Mirman, Markovits & Landau, P.C., New York, (Lauren A. Hirschfeld of counsel) for respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 16, 2009, which, insofar as appealed from, denied defendant's motion to dismiss the complaint as time-barred, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff complaint and bill of particulars allege that the shoulder injury for which he seeks to recover was sustained when, attending a rock concert at defendant arena, he fell on a slippery floor that defendant negligently failed to maintain. Plaintiff's deposition testimony, however, was that after he slipped on a wet substance near his seat and hurt his back, he got up and was "walking it off" when he was approached by an employee of defendant, who, informed that plaintiff had hurt his back, told plaintiff to sit down in an empty aisle seat. Soon

thereafter, plaintiff was approached by a different employee of defendant, who, although informed by plaintiff that he was in a lot of pain and had been given the seat by another employee, started to yell at plaintiff and then grabbed and pulled him out of the seat, "manhandling" him and causing him to fall and hurt his shoulder. Nowhere in his deposition did plaintiff suggest that this second fall, in which he hurt his shoulder, was caused by beer or other liquid on the floor.

Defendant moved for summary judgment, arguing that contrary to the tenor of plaintiff's pleadings, his deposition showed that the action was for assault, and, as such, barred by the one-year statute of limitations (CPLR 215[3]). The motion court, after granting defendant leave to amend its answer to assert the statute of limitations, denied dismissal on that ground, stating that it could not find as a matter of law that plaintiff's negligence claim "has been completely supplanted by evidence only of an assault." This was error. The action is plainly for assault.

"It is well settled that once intentional offensive contact has been established, the actor is liable for assault and not negligence inasmuch as there is no such thing as a negligent assault" (*Smiley v North Gen. Hosp.*, 59 AD3d 179, 180 [2009] [internal quotation marks omitted]). This is so even if the

actor did not intend to cause injury (*see Trott v Merit Dept. Store*, 106 AD2d 158, 159-160 [1985]; *Mazzaferro v Albany Motel Enters.*, 127 AD2d 374 [1987]). Plaintiff's contention that there is nothing in the record to establish that the touching by defendant's employee was either offensive or intentional so as to amount to an assault is simply contrary to his testimony that he was "pushed," "grabbed," "pulled," and "manhandled."

We have considered plaintiff's argument, raised for the first time on appeal, that the record contains evidence sufficient to show a cause of action for negligent training, supervision, and retention of staff, and find it to be without merit.

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

ENTERED: MAY 13, 2010

CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2790 Frank Taylor III, etc., et al., Index 16847/06
Plaintiffs-Appellants,

-against-

Brooke Towers LLC, et al.,
Defendants-Respondents.

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

Goldberg & Carlton, PLLC, New York (Robert H. Goldberg of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered February 25, 2009, which denied plaintiffs' motion to set aside a prior order, same court and Justice, entered September 2, 2008, which, after inquest, awarded no damages and dismissed plaintiffs' complaint alleging a claim of infant lead poisoning, unanimously reversed, on the law, without costs, the complaint reinstated, and the matter remanded for further proceedings consistent with this decision.

As plaintiffs at the inquest presented evidence sufficient to set forth a prima facie case on their claim against defaulting defendants, the court's dismissal of the complaint based on a finding that they had failed to prove liability was erroneous (*see Christian v Hashmet Mgt. Corp.*, 189 AD2d 597 [1993]; *Lippman v Hines*, 138 AD2d 845, 846 [1988]). Moreover, since defendants, who did not appear at the inquest, neither took an appeal from

the order granting the default judgment nor moved to vacate it, their liability was law of the case, and it was improper for the inquest court to have revisited the issue (*see Cobb v City of New York*, 272 AD2d 117, 118-119 [2000], *lv denied* 95 NY2d 760 [2000]; *Christian v Hashmet Mgt. Corp.*, 189 AD2d at 598).

Accordingly, the court should have focused on the evidence of damages, and awarded plaintiff nominal damages, at least (*see McClelland v Climax Hosiery Mills*, 252 NY 347, 351 [1930]; *Suckenik v Levitt*, 177 AD2d 416 [1991]). As the court never considered the issue of damages, and the extent of the evidence on damages that was presented by plaintiffs is unclear from the limited record on appeal, the matter is remanded for a determination of damages, if any, based on the evidence presented by plaintiffs at the inquest.

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

ENTERED: MAY 13, 2010

CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2791 &
[M-1864] The People of the State of New York, Ind. 32/01
Respondent,

-against-

Thomasina Snow,
Defendant-Appellant.

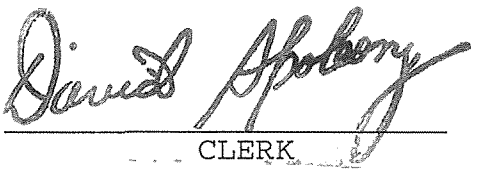
Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Appeal from judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered February 17, 2009, resentencing defendant to concurrent terms of 5 years, with 5 years' postrelease supervision, unanimously dismissed, as moot, in that Supreme Court has granted defendant's motion to set aside the resentence.

M-1864 Motion to dismiss appeal as moot granted.

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

ENTERED: MAY 13, 2010



CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2792-
2792A In re Natalie Maria D.,

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

Miguel D.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about December 4, 2007, which determined, after a fact-finding hearing, that respondent father permanently neglected the subject child, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about November 21, 2007, which, upon a fact-finding of permanent neglect, terminated respondent's parental rights and committed the custody and guardianship of the child to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously dismissed, without costs, as taken from a nonappealable paper.

Respondent failed to appear at the dispositional hearing,

his counsel did not participate, and he has not offered any explanation for his failure to appear. Thus, the order of disposition was entered upon respondent's default, and it is not appealable by him (*see Matter of Raymond Anthony S.*, 309 AD2d 520 [2003]).

The agency demonstrated by clear and convincing evidence that it made diligent efforts to assist respondent to reunite with the child and that respondent rejected assistance in obtaining housing, although he was continually unable on his own to find a suitable place to live with the child, and refused to plan for the return of the child separately from the mother, despite his stated understanding that the child was not safe in the mother's care (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368 [1984]; *Matter of Kimberly Rosemarie S.*, 211 AD2d 594 [1995], *lv denied* 85 NY2d 809 [1995]).

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

ENTERED: MAY 13, 2010

CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2794 The People of the State of New York, Ind. 1174/03
Respondent,

-against-

Anthony Sherard,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about July 25, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

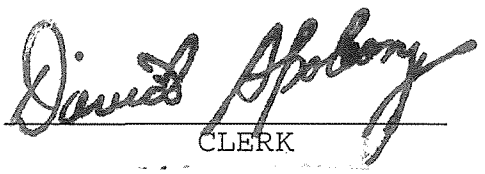
The court's discretionary upward departure was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument (*see e.g. People v Miller*, 48 AD3d 774 [2008], *lv denied* 10 NY3d 711 [2008]). The court properly based its upward departure on a combination of factors, including the level of force and aggression involved in the underlying crime, defendant's failure to accept responsibility, particularly by denying his guilt, and

his conduct while incarcerated. In addition, defendant's point score under the risk assessment instrument was nearly at level two.

The court properly exercised its discretion in denying defendant's request for a lengthy adjournment to obtain additional information about his prison record. The court also properly denied his request to waive his presence "at future adjournments," since there was no need for such adjournments. A court has considerable discretion to control its calendar (*see e.g. People v Coppez*, 93 NY2d 249, 252 [1999]), and defendant failed to demonstrate how delaying the hearing would permit him to obtain documents relevant to the determination of his sex offender level. In any event, defendant was not prejudiced by the denial of an adjournment. Even if defendant's prison record is disregarded as an aggravating factor, there was still ample basis for the court's upward departure.

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

ENTERED: MAY 13, 2010



CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2795 In re Thomas Winston, et al., Index 109389/08
Petitioners-Appellants,

-against-

Leslie Torres, Deputy Commissioner,
State of New York Division of Housing
and Community Renewal, etc.,
Respondent-Respondent.

Thomas Winston, New York, appellant pro se.

M.E. Greene-Cohen, appellant pro se.

Gary R. Connor, New York (Aida P. Reyes of counsel), for respondent.

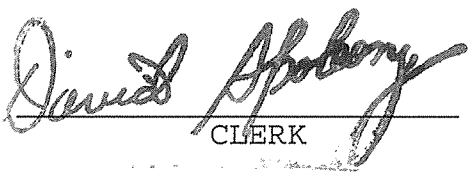
Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered April 9, 2009, dismissing this article 78 proceeding to challenge respondent's determination, dated May 9, 2008, which, inter alia, upheld the rent established for petitioners' apartment by the New York City Department of Housing Preservation and Development (HPD), unanimously affirmed, without costs.

Since HPD "set the initial rents for the subject apartment[] following renovations that were financed in part with a Private Housing Finance Law loan from HPD, respondent New York State Division of Housing and Community Renewal . . . was without authority to review petitioners' challenges to those rents . . . If petitioners wished to challenge the initial postrenovation rents set by HPD, . . . the proper course would have been to

proceed . . . against HPD" (*Matter of Ahmed v New York State Div. of Hous. & Community Renewal, Off. of Rent Control*, 15 AD3d 216 [2005]). The other relief sought by petitioners, such as a forensic accounting, was not requested before the agency and thus may not be requested from the courts (*see* CPLR 7803).

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

ENTERED: MAY 13, 2010



CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2796 Sky Top Farms, Inc., Index 310246/08
Plaintiff-Appellant,

-against-

Bilinski Sausage Mfg. Co., Inc.,
Defendant-Respondent.

Kevin Kerveng Tung, P.C., Flushing (Kevin Kerveng Tung of counsel), for appellant.

Cooper Erving & Savage LLP, Albany (David C. Rowley of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about June 15, 2009, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1), unanimously affirmed, without costs.

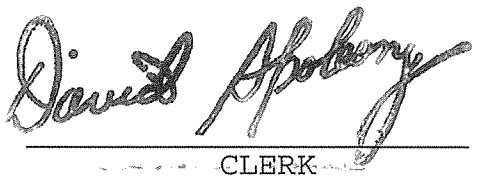
Dismissal of the complaint based upon the documentary evidence was appropriate, where the termination clause of the parties' contract allowed defendant to terminate the contract due to plaintiff's failure to purchase meat products from it for four consecutive time periods (*see e.g. Daeun Corp. v A & L 444 LLC*, 62 AD3d 479 [2009]), and plaintiff's claims that defendant acted in bad faith are contradicted by the evidence. Furthermore, the unambiguous language of the contract's integration clause, together with the parol evidence rule, precludes plaintiff's claim that the contract was subsequently modified with respect to

the purchasing requirements (*see Societe Financiere de Banque v Bitter-Larkin*, 248 AD2d 298 [1998]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476, 478 [1987]).

We have considered plaintiff's remaining contentions, including its alleged need for further discovery to show that defendant acted in bad faith in an attempt to back out of the contract, and find them unavailing.

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

ENTERED: MAY 13, 2010



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Andrias, J.P., Catterson, Renwick, Richter, Román JJ.

2799 Mildred DeJesus, Index 24463/06
Plaintiff-Respondent,

-against-

Julio Cruz, et al.,
Defendants-Appellants.

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

Litman & Litman, P.C., East Williston (Jeffrey E. Litman of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered December 7, 2009, which, in an action for personal injuries sustained when plaintiff pedestrian was struck by an automobile driven by defendant Cruz and owned by defendant Marte, denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants established their prima facie entitlement to summary judgment by submitting the report of their expert orthopedist, who, after examining plaintiff and reviewing her records, found that plaintiff had normal range of motion in her left knee and that there was no finding suggesting a traumatic

injury due to the accident. The expert further opined that plaintiff demonstrated normal range of motion in her cervical spine, and, with the exception of lateral movement, normal range of motion in her lumbar spine. Moreover, defendants' expert neurologist reported that all of plaintiff's complaints regarding her left knee and spine were due to preexisting, degenerative conditions unrelated to the accident (*see Lopez v Abdul-Wahab*, 67 AD3d 598 [2009]).

In opposition, plaintiff proffered insufficient objective medical evidence contemporaneous with the accident to reveal significant range of motion limitations in her knee or spine resulting from the accident (*see Ali v Khan*, 50 AD3d 454 [2008]). This evidentiary requirement exists even where, as here, there has been surgery on the knee (*see Jean v Kabaya*, 63 AD3d 509, 510 [2009]). Furthermore, plaintiff's expert physician failed to address the findings of defendants' experts that plaintiff's knee and spinal conditions were due to preexisting, degenerative changes unrelated to any traumatic injury attributable to the accident (*see Colon v Tavares*, 60 AD3d 419 [2009]).

The record also presents no triable issue of fact as to whether plaintiff sustained a "serious injury" under the 90/180-day prong of Insurance Law § 5102(d). Plaintiff's claim that following the accident she was limited in her ability to perform

her normal daily activities, is insufficient in the absence of objective medical evidence (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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

ENTERED: MAY 13, 2010

David Anthony

CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2801N Rigoberto Ortiz, et al., Index 14896/02
Plaintiffs-Appellants,

-against-

3115 Broadway Development Fund,
Defendant-Respondent,

LDM General Contracting, Inc., et al.,
Defendants.

[And Other Actions]

Shearer & Essner, LLP, New York (Jason M. Kobin of counsel), for appellants.

Kellner Herlihy Getty & Friedman, LLP, New York (Carol Anne Herlihy of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 12, 2008, which granted defendant 3115 Broadway Development Fund's motion to vacate the judgment, same court and Justice, entered June 12, 2008, after an inquest, unanimously reversed, on the law and the facts, without costs, the motion denied, and the judgment reinstated.

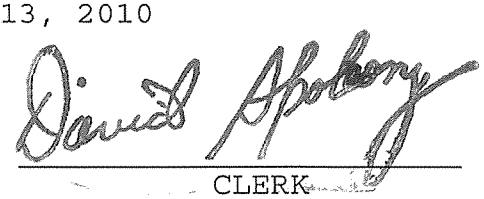
By order entered August 3, 2007, the court (Kenneth L. Thompson, Jr.) ordered that defendant's answer "is stricken unless said defendant produces employee Eddie Padilla for an EBT within 30 days." This conditional order, which followed a pattern of noncompliance with discovery orders on defendant's part, was self-executing, defendant's failure to produce Padilla for deposition rendered it "absolute," and defendant's answer was

stricken (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 830 [2008]). Defendant did not appeal from the conditional order or seek other relief and did not appear at the ensuing inquest.

Defendant failed to satisfy the requirements for vacating the judgment, i.e., to demonstrate a reasonable excuse for its failure to comply with the prior preclusion order and a meritorious defense to the cause of action (*see e.g. Tejeda v 750 Gerard Props. Corp.*, 272 AD2d 124 [2000]; *Dimitratos v City of New York*, 180 AD2d 414 [1992]). Defendant's conclusory claim that it received none of the several mailings and notices reflected in the record is insufficient to excuse its chronic noncompliance with discovery orders (*see generally Burr v Eveready Ins. Co.*, 253 AD2d 650, 651 [1998], *lv dismissed* 92 NY2d 1041 [1999]). Defendant's citing to a 63-page deposition without identifying any particular testimony is insufficient to satisfy its obligation to provide "the required evidentiary facts, in admissible form," that would establish a meritorious defense (*see generally James v Hoffman*, 158 AD2d 398 [1990]).

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

ENTERED: MAY 13, 2010



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MAY 13 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
John W. Sweeny, Jr.
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse, JJ.

1532
Index 350078/05

x

Leslie Elliot Strong,
Plaintiff-Appellant,

-against-

Madeline Dubin,
Defendant-Respondent.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Laura E. Drager, J.), entered on or about August 1, 2008, which, to the extent appealed from as limited by the briefs, granted defendant's motion for a declaratory judgment to the extent of ordering discovery and, if necessary, a hearing, on the issues of the value of the marital-property portion of plaintiff's retirement funds and its division in accordance with the prenuptial agreement, and whether marital assets were used to purchase the marital apartment.

Lee A. Rubenstein, New York, and Blank Rome, LLP, New York (Leonard G. Florescue of counsel), for appellant.

Law Offices of Denise Mortner Kranz & Associates, New York (Steven K. Meier and Denise Mortner Kranz of counsel), for respondent.

ANDRIAS, J.P.

The primary issue before us is whether the parties' prenuptial agreement contains an enforceable waiver of defendant wife's interest in the marital portion of plaintiff husband's retirement assets. In analyzing this issue, we consider principles of contract interpretation in the context of prenuptial agreements and revisit our determination in *Richards v Richards* (232 AD2d 303, 303 [1996]), where we found that under the Employee Retirement Income Security Act "only a spouse can waive spousal rights to employee plan benefits, that a fiancee is not a spouse, and that such rights, therefore, cannot be effectively waived in a prenuptial agreement."

After entering into a prenuptial agreement, the parties were married on April 6, 1992. In 2005, plaintiff commenced this matrimonial action and defendant moved to have the prenuptial agreement set aside. The trial court confirmed a Special Referee's report that found the agreement to be valid and enforceable and denied defendant's motion. Defendant appealed and we affirmed (48 AD3d 232, 233 [2008]), finding, among other things, that "[d]efendant admitted that she read the agreement before signing it, and while she did not understand the 'legalese' (i.e., statutory references), she did understand that the parties' properties would remain separate." We also found

that there was no attempt by plaintiff to conceal or misrepresent the nature or extent of his assets, with which defendant was personally acquainted.

While the prior appeal was pending, defendant moved for a declaratory judgment, or alternatively, discovery and a hearing, on her entitlement to certain assets, including plaintiff's retirement assets and the marital apartment. The motion court, relying on *Richards v Richards* (232 AD2d 303 [1995], *supra*), found that there was no enforceable waiver of defendant's interest in the retirement assets and granted defendant's motion to the extent of ordering discovery and, if necessary, a hearing to determine (a) the value of the marital-property portion of plaintiff's retirement funds, to be divided among the parties by the percentages laid out in the prenuptial agreement; and (b) whether marital assets were used to purchase the apartment, rendering it marital property. We now modify, finding, for the reasons set forth below, that contrary to the motion court's holding, the prenuptial agreement contained a valid waiver of defendant's interest in the marital portion of plaintiff's retirement assets.

Prenuptial agreements addressing the ownership, division or distribution of property must be read in conjunction with Domestic Relations Law § 236(B), which provides that, unless the

parties agree otherwise in a validly executed prenuptial agreement pursuant to section 236(B)(3), upon dissolution of the marriage, marital property must be distributed equitably between the parties, while separate property shall remain separate (*see* Domestic Relations Law § 236[B][5][a]-[c]). As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]). "[T]he intent to override the rules of equitable distribution - whether by express waiver, or by specifically designating as separate property assets that would otherwise be considered marital property under New York law - must be clearly evidenced by the writing" (*Tietjen v Tietjen*, 48 AD3d 789, 791 [2008]).

Still, when interpreting a prenuptial agreement "the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Matter of Schiano v Hirsch*, 22 AD3d 502, 502 [2005]; *see also Kass v Kass*, 91 NY2d 554, 566 [1998]; *Noach v Noach*, 53 AD3d 602 [2008]). "Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention

of the parties as manifested thereby" (*Kass v Kass*, 91 NY2d at 566 [internal quotation marks and citations omitted]). "A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect" (*Matter of John E. Andrus Mem. Home v DeBuono*, 260 AD2d 635, 636 [1999], *lv denied* 93 NY2d 813 [1999]).

Here, the parties' prenuptial agreement, read as a whole and giving effect to all provisions, expresses an intent to opt out of the statutory scheme governing equitable distribution, which encompasses plaintiff's retirement funds (*see Vendome v Vendome*, 41 AD3d 837 [2007]; *Moor-Jankowski v Moor-Jankowski*, 222 AD2d 422 [1995]). The recitals to the prenuptial agreement provide that "[t]he parties desire, in advance of their marriage, to settle their financial, property, and all other rights, privileges, obligations and matters with respect to each other *arising out of the marital relationship* and otherwise, as more particularly hereinafter provided" (emphasis added). Article I of the prenuptial agreement provides:

> "The parties, having considered their respective financial circumstances and the factors set forth for the equitable distribution of property in Section 236, Part B, Subdivision 5 of the Domestic Relations Law of the State of New York, hereby agree, *pursuant to Subdivision 3 of the said statute*, as follows with respect to the division of all marital and separate property *either now in existence or which is hereafter acquired* (emphasis added)."

Article 1, paragraph 1 of the prenuptial agreement provides that "it is the intention [of the parties] . . . that the property owned by each of them shall remain completely and wholly vested in each such person in whose ownership it presently exists." Article I, paragraphs 2 and 3 sets forth the parties' rights with respect to an apartment owned by plaintiff which was to serve as the marital residence. Article I, paragraph 4 sets forth the parties' rights with respect to furniture, silver and crystal which each party owned. Article I, paragraph 5 provides:

> "Notwithstanding the foregoing Paragraphs 1 through 4, inclusive, in the event that [the parties] maintain joint banking or savings accounts or joint investment accounts then, such accounts shall be deemed marital property. Any assets purchased by [the parties] from utilized proceeds of any such joint account shall, similarly, be deemed marital property. [The parties] agree that marital property shall, in the event of a termination of the marriage be divided seventy (70%) percent to [plaintiff] and thirty (30%) to [defendant]. If any property is not owned jointly but, becomes marital property by reason of this paragraph, then in such event, either [plaintiff or defendant], as the case may be, shall have the right to assert a claim under the spouses 'right of election' . . ."

While Article I is not artfully drawn, it expressly references Domestic Relations Law § 236(B)(3), which provides that a prenuptial agreement may include, among other things a "provision for the ownership, division or distribution of separate and marital property," and reflects an intent to opt out of equitable distribution "with respect to the division of all

marital and separate property *either now in existence or which is hereafter acquired"* (emphasis added), which encompasses the retirement funds at issue. To hold otherwise would render the reference to property that is "hereafter acquired" meaningless, leaving that provision without force or effect.

Indeed, the only assets specifically designated to be "marital property" are the prospective joint banking, savings or investment accounts or assets purchased from the proceeds of those joint accounts set forth in Article I, paragraph 5. The retirement assets in question were not held in joint names or funded with money from an account in the joint names of the parties and are not marital property within the meaning thereof.

This interpretation is consistent with Article IV, paragraph 8, which, read as a whole, resolves any ambiguity in Article I and confirms the parties' intent to waive equitable distribution rights (*see Kass v Kass*, 91 NY2d at 566-567; *MacAllister v MacAllister*, 275 AD2d 1015, 1016 [2000]). Paragraph 8 provides:

> "Except as otherwise expressly provided herein, each party hereby releases . . . the other, of and from all causes of action, claims, rights, or demands, whatsoever, in law or in equity (*including, but not limited to claims for equitable distribution, distributive award or claims against the separate property of the other spouse*) which either of the parties hereto ever had, or now has, against the other, except (a) nothing herein contained shall be deemed to prevent either party from enforcing the terms of this Agreement or from asserting such claims as are reserved

> by this Agreement to each party against the estate of the other; provided, however, that the claims so asserted arise out of a breach of this Agreement; and (b) nothing herein contained shall impair or waive or release any and all cause [*sic*] of action for divorce, annulment or separation, or any defenses which either may have to any divorce, annulment or separation action which may hereafter be brought by the other" (emphasis added).

The contention that this waiver clause encompasses only property which either of the parties held at the time the prenuptial agreement was executed, to the exclusion of after acquired property, is unsupportable. True, the waiver clause states that it is a release of all causes of action, claims, rights or demands whatsoever in law and in equity "which either of the parties hereto ever had, or now has against the other." However, the illustrative claims listed include, but are not "limited to claims for equitable distribution, distributive award or claims against the separate property of the other spouse." At the time the prenuptial agreement was signed, neither party had any of these delineated claims, all of which would accrue in the future, once the parties were married. Similarly the exceptions for breach of the antenuptial agreement and divorce demonstrate that the waiver clause was intended to apply to future causes of actions that would accrue after the marriage. In light of this language, to limit the claims to property that either party had at the time of the marriage would render the waiver clause

meaningless in that property owned by either party at the time the prenuptial agreement was entered into would already be separate property as to which there is no right to equitable distribution or a distributive award (Domestic Relations Law § 236[B][1][d][1]).

Insofar as this Court's determination in *Richards v Richards* (232 AD2d 303 [1996], *supra*) would preclude the waiver of pension rights in the event of divorce in a prenuptial agreement, it should not be followed in that it fails to recognize the distinction between waivers of survivor benefits and other pension benefits. For purposes of equitable distribution, a waiver of any interest in a pension as marital property by an otherwise valid prenuptial agreement is not prohibited by The Employee Retirement Income Security Act of 1974 (ERISA) (29 USC § 1001 *et seq.*), as amended by the Retirement Equity Act of 1984 (REA) *(see Moor-Jankowski*, 222 AD2d at 423; *Edmonds v Edmonds*, 184 Misc 2d 928 [Sup Ct, Onondaga County 2000]).

ERISA was amended by the REA "to ensure that a participant's spouse receives survivor benefits from a retirement plan even if

the participant dies before reaching retirement age" (*Hurwitz v Sher*, 982 F2d 778, 781 [2d Cir 1992], *cert denied* 508 US 912 [1993]), with REA setting forth the conditions on the waiver of survivor benefits (*see* 29 USC § 1055[c][1], [2]). Although a prenuptial agreement will not constitute an effective waiver of spousal survivorship benefits mandated by ERISA unless it conforms to those waiver requirements, ERISA does not preempt or preclude the recognition, implementation, or enforcement of an otherwise valid prenuptial agreement with regard to a divorce proceeding. As the court in *Edmonds* (184 Misc 2d at 931) persuasively explained:

> "Apart from the survivor benefit of REA, ERISA does not mandate that other benefits be provided to a participant's spouse. In fact, ERISA expressly prohibits alienation of benefits by the plan participant, except by a Qualified Domestic Relations Order(QDRO) issued by a State court in a matrimonial action under the State's domestic relations law (29 USC § 1056 [d]). ERISA creates no substantive rights in the case of divorce, but only accommodates, by the provisions governing QDROs, rights created by state matrimonial law. In New York, vested or matured rights in a pension plan are considered marital property subject to distribution in a divorce action to the extent that the benefits result from employment by the participant after the marriage and before the commencement of the divorce action. There is nothing in the matrimonial law of New York prohibiting a spouse from waiving his or her interest in such marital property by agreement made before or during the marriage in accordance with Domestic Relations Law § 236(B)(3)" [citation omitted].

(*See also Savage-Keough v Keough*, 373 NJ Super 198, 861 A2d 131 [2004]; *Sabad v Fessenden*, 2003 Pa Super 2002, 825 A2d 682 [2003] *appeal denied* 575 Pa 697, 836 A2d 122 [2003]; *Critchell v Critchell*, 746 A2d 282 [DC 2000]; *Stewart v Stewart*, 141 NCApp 236, 541 SE2d 209 [2000]; *In re Rahn*, 914 P2d 463 [Colo 1995]; *Ryan v Ryan*, 659 N.E.2d 1088 [Ind 1995]).

The motion court correctly directed discovery and a possible hearing on the issue of whether $50,000 of defendant's separate property was used to purchase the marital apartment held in plaintiff's name. The record shows that plaintiff had owned a separate apartment in the same building at the time of the marriage. That apartment was sold in 1995, at which time the new marital apartment was purchased in plaintiff's name. As to that purchase, defendant avers that she deposited $50,000 from her separate property into the parties' joint account, then drew a check from the joint account in that amount, which was deposited into the husband's business account and used for the purchase of the apartment. In support, defendant offered a document she claims is her check register for her separate bank account, which indicates that she transferred $50,000 to the joint account for a "closing" on July 7, 2005, and the bank statement for the joint account, which indicates a deposit of $50,000 on that date and a payment of $50,000 on July 11, 1995. Although plaintiff

challenged this proof as suspect and insufficient, this evidence was sufficient to warrant discovery and a hearing given plaintiff's failure to present evidence disproving defendant's claim.

Accordingly, the order of the Supreme Court, New York County (Laura E. Drager, J.), entered on or about August 1, 2008, which, to the extent appealed from as limited by the briefs, granted defendant's motion for a declaratory judgment to the extent of ordering discovery and, if necessary, a hearing, on the issues of the value of the marital-property portion of plaintiff's retirement funds, its division in accordance with the prenuptial agreement, and whether marital assets were used to purchase the marital apartment, should be modified, on the law, to deny defendant's motion with respect to plaintiff's retirement funds and declare that they are plaintiff's separate property in which defendant has no interest, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 13, 2010

CLERK