SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 18, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., McGuire, Acosta, Román, JJ.

1468 The People of the State of New York, Respondent, Ind. 797/01

-against-

Manuel Rodriguez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered October 7, 2008, resentencing defendant to a term of 25 years with 3 years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 20 years with 3 years' postrelease supervision, and otherwise affirmed.

This case was one of the cases consolidated with *People v Sparber* (10 NY3d 457 [2008]). The Court of Appeals directed "a resentencing hearing that will include the proper pronouncement of the relevant PRS term" (*id.* at 473). Defendant argues that the resentencing court was obligated to reconsider the length of

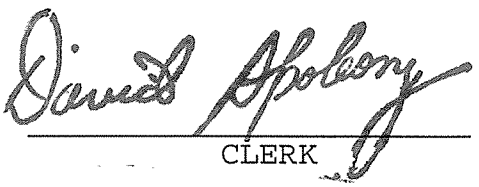
the original prison term, and requests that the case be remanded for another resentencing. This case presents the issue this Court found unnecessary to decide in *People v Edwards* (62 AD3d 467, 468 [2009], *lv denied* 12 NY3d 924 [2009]), "whether a proceeding conducted for the purpose of compliance with *Sparber* is a plenary resentencing that permits the court to reconsider the length of the prison component of the sentence." We now conclude that such a resentencing only involves PRS, and does not present the sentencing court with an occasion to revisit the original prison sentence. According to *Sparber*, a court's failure to include PRS in its oral pronouncement of sentence "amounts only to a procedural error, akin to a misstatement or clerical error, which the sentencing court could easily remedy" (10 NY3d at 472). Moreover, there was no legal error, whether procedural or substantive, in the imposition of the term of incarceration. The fact that the proceeding at issue was designated a resentencing does not necessarily imply that defendant was entitled to a completely de novo sentencing (*see e.g. People v Green*, 62 AD3d 1024, 1026 [2009], *lv denied* 13 NY3d 744 [2009] [limited-purpose resentencing does not require reconsideration of original sentence found to be validly imposed]; *People v Quinones*, 22 AD3d 218, 219 [2005], *lv denied* 6 NY3d 817 [2006] ["resentencing does not place a defendant, for all purposes, in the position of a person being sentenced for the

first time"]).

We have considered and rejected defendant's double jeopardy and due process challenges to the imposition of PRS. In the interest of justice, however, we find the sentence excessive to the extent indicated.

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

ENTERED: MAY 18, 2010



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Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2095 Neuberger Berman LLC, et al., Index 601880/097
Plaintiffs-Respondents,

-against-

EMM Group, LLC,
Defendant-Appellant.

Shapiro Forman Allen & Sava LLP, New York (Michael I. Allen of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Randi W. Singer of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 6, 2009, which, to the extent appealed from, denied defendant's motion to dismiss plaintiff's first cause of action for declaratory relief, unanimously reversed, on the law, with costs, the motion granted, and it is declared that pursuant to the subject Asset Purchase Agreement, defendant is not obligated to pay the two financial bonuses in question.

We agree with plaintiffs that we should not conclude that Supreme Court erroneously relied on parol evidence to create an ambiguity in section 5.7(a) of the Asset Purchase Agreement. But section 5.7(a) is unambiguous and Supreme Court should have granted defendant's motion to dismiss the first cause of action.

It is undisputed that pursuant to their written employment agreements, the two individuals (who are both employees and principals of defendant) collectively were entitled to a bonus of

approximately $1.8 million for the performance year ending November 30, 2008, and that plaintiff Neuberger became obligated to pay the bonus on or about January 31, 2009. It also is undisputed that defendant is obligated to pay the bonus only if the bonus is a "Reimbursable Business Expense" under section 5.7 of the Asset Purchase Agreement, which was executed on March 6, 2009.

In relevant part, section 5.7(a) states as follows:

> "(a) Purchaser shall be responsible for (i) in respect of the period commencing on December 1, 2008 and ending on the date hereof, Business expenses authorized or incurred by any of the Offerees [specified transferring employees, including the two in question], including any payments under the Lease Agreement and regularly scheduled payroll payments to the Offerees, and (ii) any severance, accrued unused vacation, accrued bonus and other separation payments owed to any of the individuals listed on Schedule 5.7(a) [a subset of the Offerees, including the two individuals in question] under his or her respective written employment agreement with the Sellers or their Affiliates in connection with the termination of such employment agreement (such expenses in (i) and (ii) collectively, the 'Reimbursable Business Expenses')."

Under the unambiguous language of clause (i), the bonus is not a Reimbursable Business Expense because it is not an expense that was "authorized or incurred" by either of the two individuals, but is instead an expense that was incurred by plaintiff Neuberger pursuant to the employment agreements; nor is it an expense that was authorized or incurred "in respect of the

period commencing on December 1, 2008 and ending on the date [of the Asset Purchase Agreement], but is instead an obligation that became due prior to December 1, 2008. Accordingly, we need not determine whether under any plausible reading of clause (i), the bonus could be considered a "regularly scheduled payroll payment[]." Similarly, the bonus is not a Reimbursable Business Expense under the unambiguous language of clause (ii). Because the bonus was earned by active, full-time employees on November 30, 2008 and was payable to active employees on or about January 31, 2009, it clearly is not a "separation payment[]" and just as clearly is not "owed in connection with the termination of [an] employment agreement."

Plaintiffs are correct that we must afford the pleadings a liberal construction, take the allegations of the complaint as true, and give them the benefit of every possible inference. But these settled precepts cannot render ambiguous the unambiguous language of section 5.7(a). Plaintiffs' allegations concerning the negotiations of the Asset Purchase Agreement and their contention that defendant's reading of the agreement makes no economic sense, are simply irrelevant to whether the contractual language is unambiguous (*see Marine Midland Bank-S. v Thurlow*, 53

NY2d 381, 387 [1981] [absent fraud or mutual mistake, parol evidence rule excludes evidence of all prior or contemporaneous negotiations between parties]).

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

ENTERED: MAY 18, 2010

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1410 Douglas DiPasquale, Index 602045/07
Plaintiff-Appellant,

-against-

Ronald Gutfleish, et al.,
Defendants-Respondents.

Schoeman, Updike & Kaufman, LLP, New York (David B. Gordon of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Rachel S. Fleishman of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered on or about September 8, 2008, which, to the extent appealed from as limited by the briefs, granted defendants' motion for partial summary judgment dismissing claims for damages (other than management fees) accruing after July 1, 2006, unanimously affirmed, with costs.

Before June 2005, plaintiff and defendant Gutfleish were co-managing members of two limited liability companies, defendants Elm Ridge Capital Management, LLC (ERCM) and Elm Ridge Value Advisors, LLC (ERVA), which were both engaged in advising or managing hedge funds controlled by Gutfleish. In June 2005, plaintiff, Gutfleish, ERCM and ERVA entered into a separation agreement pursuant to which plaintiff resigned as a managing member of ERCM and ERVA, and as head trader of ERCM, in exchange for payments to be made to him by ERVA and ERCM that were to

continue until December 31, 2007.

It is undisputed that June 30, 2006 constituted the "Cutoff Date" under the separation agreement, as defined by section 5.04(f) thereof, the contractual implications of which are discussed hereinafter. Effective the following day (July 1, 2006), Gutfleish caused ERVA to resign as a general partner of two of the hedge funds and, in addition, caused two newly formed entities controlled by him (defendants Elm Ridge Management, LLC and Elm Ridge Partners, LLC) to replace ERVA and ERCM as the recipients of the fees and profit allocations paid by the hedge funds to management. Based on these changes in the management structure of the hedge fund group, Gutfleish terminated the payments of management fees and profit allocations plaintiff had been receiving from ERVA and ERCM pursuant to the separation agreement, prompting plaintiff to commence this action.

After joinder of issue and discovery, Supreme Court granted defendants partial summary judgment dismissing all causes of action to the extent they seek damages alleged to have accrued since July 1, 2006, *other than* damages accruing since that date alleged to have arisen from the failure to pay plaintiff the share of the management fees paid by the hedge funds allocated to him by the separation agreement.[1] Stated otherwise, the court

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[1]Defendants conceded before Supreme Court that certain issues of fact preclude granting them summary judgment insofar as plaintiff seeks damages for the failure to pay him a share of the

dismissed all causes of action to the extent they seek post-July 1, 2006 damages allegedly arising from the failure to pay plaintiff the share of the hedge funds' profits allocated to him by the separation agreement.[2] We affirm.

Supreme Court correctly determined, as a matter of law, that section 5.04(d) of the separation agreement permitted Gutfleish to replace ERVA as general partner of two of the hedge funds with a new entity to perform the same role without causing the new entity to assume ERVA's obligation to pay plaintiff a percentage of the managers' profit allocation, so long as ERVA was replaced (as it actually was) on or after the Cutoff Date. Gutfleish's entitlement to replace ERVA after the Cutoff Date arises by necessary implication from the provision of section 5.04(d)[3] that, if ERVA were replaced "prior to the Cutoff Date," Gutfleish would be obligated to require the entity replacing ERVA to "agree, in writing, to assume the obligations of ERVA under this Agreement."[3] The specific requirement that Gutfleish cause the

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management fees paid by the hedge funds since July 1, 2006. Accordingly, the branch of defendants' summary judgment motion addressed to claims for those damages was withdrawn.

[2]It appears that plaintiff received all of his profit allocations through ERVA.

[3]Section 5.04(d) of the separation agreement provides in full as follows:

> "In the event that, prior to the Cutoff Date, (i) ERVA is terminated as general partner to either of the Value Fund or the Capital Fund [hedge funds organized

entity replacing ERVA to assume ERVA's obligations only in the event the replacement occurs "prior to the Cutoff Date" necessarily implies that Gutfleish has no such obligation if the replacement occurs *after* the Cutoff Date. A contrary interpretation would render the Cutoff Date meaningless surplusage. Since there is no ambiguity in this aspect of the separation agreement, we construe it as a matter of law.

We reject plaintiff's argument that there is an issue of fact as to whether ERVA was "terminated" within the meaning of section 5.04(d) of the separation agreement. Plaintiff asserts in his affidavit that this provision addresses only the event of ERVA being involuntarily terminated as general partner of the hedge funds, while in fact ERVA (acting through its managing member, Gutfleish) resigned those positions voluntarily. Reading the separation agreement as a whole, we see no basis for construing the word "terminated" in section 5.04(d) to exclude a termination of ERVA's role as general partner of a hedge fund that was voluntary on ERVA's part. "[C]lear contractual language does not become ambiguous simply because the parties to the

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> as limited partnerships], and (ii) such fund with which ERVA was so terminated appoints as the new general partner a person or entity controlled, directly or indirectly, by Gutfleish, then Gutfleish shall require that such entity agree, in writing to assume the obligations of ERVA under this Agreement."

litigation argue different interpretations" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [2008], *affd* 13 NY3d 398 [2009]).

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: MAY 18, 2010

CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1513 Eujoy Realty Corp., Index 116655/09
Plaintiff-Appellant,

-against-

Van Wagner Communications, LLC,
Defendant-Respondent.

Schnaufer & Metis, LLP, Hartsdale (John C. Schnaufer of counsel), for appellant.

Scheichet & Davis, P.C., New York (Victor P. Muskin of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 4, 2008, which, in an action for rent in the amount of $94,133.57 and counsel fees arising out of a terminated lease agreement, denied plaintiff landlord's motion for summary judgment, granted the part of defendant tenant's cross motion that sought summary judgment dismissing the complaint and denied the part that sought, in the alternative, leave to amend the answer to add the affirmative defense of estoppel, reversed, on the law, without costs, plaintiff's motion granted and defendant's motion denied in its entirety, and the matter remanded for an assessment of counsel fees.

Plaintiff is the owner of an advertising billboard that it leased to defendant pursuant to a 15-year written lease that commenced on December 1, 2000. When new construction undertaken at a nearby site substantially obstructed the view of the sign,

defendant invoked its right under paragraph 53 of the lease to terminate the agreement as of January 8, 2007. Due to an oversight by defendant's accounts payable department, a check for $96,243.00, the full year's rent for 2007, was sent to plaintiff. When defendant learned of the error, it notified plaintiff that it had stopped payment on the check. Defendant then forwarded a replacement check to plaintiff for $2,109.43, the rent prorated for the period of January 1, 2007 through January 8, 2007. Plaintiff accepted the prorated rent without protest and subsequently commenced this action, seeking recovery of the balance of the full year's rent, plus interest, counsel fees and costs.

Summary judgment in favor of plaintiff was warranted. Schedule A of the lease agreement prescribes the annual basic rent for each year and provides that the tenant shall pay in advance on January 1st of each year. The annual basic rent for the period January 1, 2007 through December 31, 2007 was $96,243.00, "which Tenant shall pay in advance on January 1, 2007." Section C of Schedule A provides, in relevant part, "Should this Lease be terminated for any reason prior to the date of its expiration, Tenant shall not be entitled to the return of any additional rent theretofore paid or any basic rent paid in advance and covering a period beyond the date on which the Lease is terminated."

Although it was obligated to pay the basic annual rent for 2007 on January 1, 2007 and did not do so, defendant asserts that it is not liable to plaintiff for the annual rent because, in 2006, there were discussions between defendant's principal and plaintiff regarding the obstruction of the sign, in which defendant purportedly told plaintiff that the lease would soon be terminated. Defendant claims that it had an alternate location available to use for its customers' advertising, but that, in consideration of its cordial relationship with plaintiff, it agreed to defer terminating the lease for as long as possible. Aside from plaintiff's denial of any such discussions, the lease includes "no oral modification" and "no waiver" clauses, and the record contains no evidence of partial performance by defendant that is "unequivocally referable to the alleged oral agreement" (*Teri-Nichols Inst. Food Merchants, LLC v Elk Horn Holding Corp.*, 64 AD3d 424, 425 [2009], *lv dismissed* 13 NY3d 904 [2009]). Rather, defendant continued to rent the structure as per the lease. Defendant's unilateral act of terminating the lease in early January and then deeming its rent obligation to be limited to a pro rata amount does not establish a modification, "since, if such unilateral conduct were sufficient, the requirement that modifications be in a writing signed by the landlord would be rendered a nullity" (*Joseph P. Day Realty Corp. v Lawrence Assoc.*, 270 AD2d 140, 142 [2000]).

Defendant's purported understanding that it could terminate the lease at any time after January 1, 2007 without being obligated to pay the full year's rent on January 1st as the lease required does not demonstrate that principles of equitable estoppel are applicable here, since plaintiff engaged in no conduct that was "otherwise . . . [in]compatible with the agreement as written" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 344 [1977]).

Defendant's reliance on Section C of Schedule A is misplaced. The lease provision that the tenant shall not be entitled to the return of any basic rent paid in advance of lease termination is separate and distinct from the lease requirement that the full year's rent be paid on January 1st. One provision simply makes clear that the rent paid in advance will not be returned upon termination of the lease, while the other plainly provides that the entire year's rent is due on January 1st. It is a contortion of these two provisions to argue, as defendant does here, that if defendant had paid the annual rent on January 1st it would not be entitled to a refund but that since defendant did not pay as required, plaintiff is not entitled to recover the full year's rent. While recovery of the full year's rent under these circumstances is a windfall to plaintiff, it is a result mandated by the lease.

Our dissenting colleague's concern that plaintiff has adopted a new theory of recovery not raised before the motion court and that we are therefore barred from considering it, is unfounded. Notably, defendant has not asserted in this appeal that plaintiff is raising a new theory that should not be considered by this Court. While plaintiff certainly did argue before the motion court that, notwithstanding that defendant had stopped payment on the check, defendant had paid the rent in advance and was not entitled to a refund, plaintiff also argued that it did not matter that the check was issued accidentally because defendant was obligated under the lease to pay the basic rent for the year on January 1, 2007. Where a lease requires the tenant to pay the rent in advance, the tenant is obligated to pay the entire amount even though the lease is subsequently terminated before the lease term expires (*see 1251 Ams. Assoc. II, L.P. v Rock 49 Rest. Corp*, 13 Misc 3d 142(A), 2006 NY Slip Op 52282[U] [2006]).

Nor does our holding run afoul of General Obligations Law § 7-103(1), which prohibits the commingling by a landlord of funds deposited by a tenant as security or prepaid rent, since that situation is not present here. *Matter of Perfection Tech. Servs. Press (Cherno-Dalecar Realty Corp.)* (22 AD2d 352 [1965], *affd* 18 NY2d 644 [1966]) and *Purfield v Kathrane* (73 Misc 2d 194 [1973]), cited by the dissent, involved the tenant's deposit with

the landlord of several months of advance rent, to be applied to each month's rent as it became due during the term. Here, in contrast, the terms of the lease provide that the entire year's base rent is due on the first of the year. Finally, we disagree with the dissent's position that in order to recover for the yearly rent due under the lease, the landlord was required to issue a default notice to the tenant since the tenant had already terminated the lease in writing.

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

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

TOM, J.P. (dissenting)

On this appeal, plaintiff landlord has abandoned the theory of recovery advanced before Supreme Court, adopting a new argument that this Court is barred from considering by well settled rules of appellate practice. As a result, there is before us no ruling assigned as error that might serve as a predicate for reversal. Moreover, the new theory that landlord has devised to support the recovery of rent after valid termination of the lease is devoid of merit and, even if it were cognizable, affords no basis for disturbing the judgment of dismissal.

In 2000, the parties entered into a 15-year lease for a billboard located on the roof of a building on Maurice Avenue in Maspeth, New York. The advertising space is valuable because it is visible from the Long Island Expressway, and the lease affords tenant a right of termination should construction "substantially obstruct" the view of the billboard from that highway. When the visibility of the sign was eventually obscured by construction that was begun in 2006, landlord received notice from defendant tenant, first orally and then in writing, that tenant was exercising its right to terminate the lease pursuant to Article 53 of the lease rider, effective January 8, 2007. Landlord does not dispute that the lease was validly terminated.

In the meantime, tenant's accounts payable department

inadvertently sent landlord a check for $96,243, representing a full year's rent for 2007, pursuant to schedule A of the lease rider. When tenant learned of the mistake, it duly notified landlord and stopped payment on the check. Tenant thereupon forwarded a replacement check to landlord in the amount of $2,109.43 for rent prorated through January 8, 2007, the date of the lease termination.

Landlord commenced this action by filing the summons and complaint on October 17, 2007. The complaint alleges that tenant "timely remitted the annual rent of $96,243.00 by check but thereafter wrongfully stopped payment on the check by reason of [its] termination of the Lease in accordance with Section 53 thereof." The first cause of action seeks to recover $94,133.57 for the "wrongfully stopped payment" (representing the difference between the annual rent and the prorated amount paid by tenant), and the second cause of action seeks reimbursement for the reasonable legal fees and costs incurred by landlord in maintaining the action. Landlord never sought to amend its complaint.

In support of its motion for summary judgment, landlord argued that, "[u]nder the common law, if rent is paid in advance, a tenant is not entitled to a refund of prepaid rent for any period following termination of the lease," and that "[t]he parties did not stipulate to apportion rent paid in advance."

Thus, landlord concluded, it is entitled to recover $94,133.57, the balance of the annual rent for 2007 purportedly prepaid by tenant, as well as legal fees and costs, as provided in the lease.

In support of its cross motion seeking dismissal of the complaint, tenant disputed landlord's propositions that the mere issuance of a check for the full year's rent constitutes the advanced payment of rent and that tenant's stop-payment order constitutes its recoupment.

Supreme Court rejected landlord's theory of recovery, as asserted in the complaint and in the moving papers, finding that the tender of a check, payment of which has been stopped, does not amount to the payment of advance rent.

On this appeal, landlord espouses a completely new theory of recovery predicated not on the tender of an instrument of payment asserted to have been improperly stopped, but upon the terms of the lease itself. Landlord now alleges that because the 2007 annual rent was due on January 1, 2007 and the lease was not terminated until later that month, the entire annual rent became a debt on the date it was payable (citing *Matter of Ryan,* 294 NY 85, 95 [1945]). Thus, while conceding that the lease was rightfully terminated as of January 8, 2007, landlord now claims that no part of the obligation to pay the annual rent when it

became due was discharged by tenant's exercise of its termination right.

As a matter of practice, an appeal cannot be exploited as a means to assert new arguments. The function of an appellate court is to determine whether an error was made in reaching a decision, not to render a de novo ruling on the basis of some novel ground. Thus, it is settled that a party may not interject, for the first time on appeal, a theory not advanced before the court of original instance (*see Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988]; *see also Cohn v Goldman*, 76 NY 284, 287 [1879] [questions not raised before the trial court cannot be asserted as error on appeal]). Since the basis of landlord's summary judgment motion was limited to the ground set forth in the complaint — that tenant, having paid the annual rent due under the lease, was not entitled to a refund of that amount — landlord cannot advance an alternative theory of recovery before this Court (*see Voorheesville Rod & Gun Club v Tompkins Co.*, 82 NY2d 564, 570 n 1 [1993]; *Lichtman v Grossbard*, 73 NY2d 792, 794 [1988]; *Mount Vernon Fire Ins. Co. v William & Georgia Corp.*, 194 AD2d 366 [1993]). Even this Court's substantial equitable powers "may not be exercised to grant relief on a new theory of recovery first introduced by the appellate court against a party who has had no notice or opportunity to defend against that theory" (*Collucci v Collucci*, 58 NY2d 834, 837

[1983]). Because landlord did not, on the motion, claim that it was entitled to recover the rent due for 2007 *under the lease*, it may not assert that theory of recovery before this Court.

The majority reasons that this Court should entertain landlord's novel argument on its merits because it was asserted in landlord's reply papers. They ignore the well established rule announced by this Court in *Ritt v Lenox Hill Hosp.* (182 AD2d 560, 562 [1992]) and its progeny that a theory asserted for the first time in reply is not cognizable, either by the motion court or on appeal. As we stated in *Lumbermens Mut. Cas. Co. v Morse Shoe Co.* (218 AD2d 624, 626 [1995], citing *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1993]; *Dannasch v Bifulco*, 184 AD2d 415 [1992]), "Arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion. This Court has and will require consistent application of the rule". By condoning recovery on a theory not stated in either the complaint or the moving papers, landlord "has been permitted to engage in precisely the sort of maneuvers specifically rejected in *Ritt v Lenox Hill Hosp.* (*supra*, at 562)" (*Azzopardi*, 192 AD2d at 454).

On this appeal, landlord resorts to a novel claim predicated upon a lease that is no longer in effect. Even if this new claim could be entertained, it is without merit. It is undisputed that the lease gave tenant a right of termination

should the view of the subject billboard become obscured, that this condition arose and that tenant properly terminated the lease. Landlord nevertheless claims that it is entitled to payment of the balance of the rent due for the 2007 calendar year, reasoning that (1) rent was due on January 1, 2007, while the lease was still in effect; (2) the rent became a "debt" when it was due; (3) the parties did not agree to apportion rent in the event tenant terminated the lease and (4) under both common law and the lease, tenant is not entitled to a refund of rent that has been paid.

Ignoring the question of whether the tender of a check, payment of which has been stopped, constitutes "payment," landlord quotes from *Werner v Padula* (49 App Div 135, 138 [1900], *affd* 167 NY 611 [1901]): "If by terms of his lease rent is to be paid in advance, the tenant comes under an absolute engagement to pay it on the day fixed and he is not relieved from that engagement . . ." Under the terms of the lease under review in *Werner*, more than half the annual rent was due and paid upon signing the lease. The premises were totally destroyed by fire some five weeks later. The court held that the tenant was not entitled to any refund of the rent advanced upon signing since the tenant was under "an absolute engagement to pay it on the day fixed" under the lease agreement and was not relieved from that engagement by the subsequent destruction of the premises by fire.

The harsh result reached in *Werner* has been abrogated by statute, both as to the destruction of leased premises, which landlord acknowledges, and advance payments in general. In 1935, Real Property Law § 233 (L 1935, ch 581), the precursor to General Obligations Law § 7-103 (L 1963, ch 576, § 1, as amended), was enacted, providing that a sum advanced under an agreement for the rental of real property continues to be the money of the payor and is held in trust by the payee until applied to payments under the agreement, when due (General Obligations Law § 7-103[1]; *see Glass v Janbach Props.*, 73 AD2d 106, 110 [1980]).[1] The provision is equally applicable to security deposits and prepaid rent (*see Matter of People v Booke*, 58 AD2d 142, 145 [1977] [security deposit]; *Matter of Perfection Tech. Servs. Press [Cherno-Dalecar Realty Corp.]*, 22 AD2d 352, 354 [1965], *affd* 18 NY2d 644 [1966] [advance rent]; *Purfield v Kathrane*, 73 Misc 2d 194, 200 [1973] [same]). Thus, any rent paid by a tenant in advance remains the tenant's property, held

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[1] General Obligations Law § 7-103(1) provides, in material part:

> "Whenever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made."

by the landlord as a trustee, until applied to the rent when it accrues. In 1937, Real Property Law § 227, the provision directly at issue in *Werner*, was amended to afford relief in the event leased premises are surrendered due to a casualty rendering them unusable, providing, "'Any rent paid in advance or which may have accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender'" (*Hoefler v Gallery*, 8 NY2d 369, 372-373 [1960], quoting L 1937, ch 100).

There is no question that the disputed lease requires an advance payment of rent that is subject to General Obligations Law § 7-103. The rider to the lease expressly provides, "The annual basic rent for the period January 1, 2007 through December 31, 2007 shall be $96,243.00 which Tenant shall pay in advance on January 1, 2007." Furthermore, it is beyond dispute that upon termination of the lease, tenant's obligation to pay rent ceased. "When a landlord accepts a surrender of the premises, this act operates to discharge the tenant from all liability for rent in the future" (*Herter v Mullen*, 159 NY 28, 33 [1899]; *see also Centurian Dev. v Kenford Co.*, 60 AD2d 96 [1977]). In *Matter of Ryan* (294 NY at 95), the Court of Appeals noted that a tenant's obligation to make payment under the rent covenant of a lease is *contingent* and that circumstances may arise under which "the stipulated rent payable in the future by a lessee for the right to occupy leased premises might never become due."

The *Ryan* Court cited with approval *In re Roth & Appel* (181 F 667, 669 [1910]), which states: "Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in praesenti solvendum in futuro*.[2] On the contrary, the obligation upon the rent covenant is altogether contingent."

A landlord's acceptance of the surrender of leased premises is inconsistent with the tenant's right of quiet enjoyment, implicating dominion and control over the premises by the

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[2] "A present debt (or obligation) to be paid at a future time; a debt or obligation complete when contracted, but of which the performance cannot be required until some future period" (Black's Law Dictionary 461 [9th ed]).

landlord or another holder of a superior title (*Sears, Roebuck & Co. v 9 Ave.-31 St. Corp.*, 274 NY 388, 398 [1937]). The act of a tenant in rightfully removing from the premises, thereby enabling the landlord to peaceably recover possession, "cancels the lease and annuls the relation of landlord and tenant as of the time of the removal" (*Cornwell v Sanford*, 222 NY 248, 253 [1918]; *cf. 56-70 58th St. Holding Corp. v Fedders-Quigan Corp.*, 5 NY2d 557, 564 [1959]), entitling the tenant to recover such rent as has been advanced (*Sears, Roebuck & Co.*, 274 NY at 404).

In sum, a tenant is obligated to pay rent, including advance rent, on the date stipulated in the lease. However, the obligation to pay is contingent on the tenant's right to use and occupy the premises, and when that right is terminated the rent obligation thereby ceases. Thus, rent is *due* at the time stipulated in the lease, but rent does not continue to *accrue* unless the tenant continues to enjoy the right to occupy the premises.

When landlord accepted tenant's surrender of the premises upon termination of the subject lease, rent ceased to accrue, removing any basis to apply the money advanced by tenant to further payments due under the lease. The inclusion of a no refund provision does not affect this result. While, in general, "the parties to a lease are not foreclosed from contracting as they please" (*Holy Props. v Cole Prods.*, 87 NY2d 130, 134

[1995]), General Obligations Law 7-103(3) states that any provision purporting to waive the protection of the statute is "absolutely void."

Money advanced under a lease "remains the property of tenant until there has been a default or breach of a covenant of the lease and at which time landlord may appropriate the deposit in accordance with the terms of the lease" (*Glass*, 73 AD2d at 110, quoting *Matter of State of New York v Parker*, 67 Misc 2d 36, 40 [1971], *revd on other grounds* 38 AD2d 542 [1971], *affd* 30 NY2d 964 [1972] [internal quotation marks omitted]). Since there was no default or breach of the subject lease, there was no basis under General Obligations Law § 7-103(1) for landlord to appropriate the money advanced by tenant (*see Glass*, 73 AD2d at 110).

Because tenant's obligation to pay rent ceased upon termination of the lease, landlord is relegated to a claim in quantum meruit (*see Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 227-228 [1993]) and is entitled to recover only the reasonable value of tenant's use and occupancy of the sign during the 2007 lease year. Since landlord concedes that it received payment for the eight days of the 2007 lease term during which tenant actually used the sign, landlord has no remaining claim against tenant arising out of its use of the leased premises, and Supreme Court properly dismissed the complaint.

The rationale for the motion court's ruling was correct. The delivery of a check upon which payment was subsequently stopped did not constitute payment of the annual rent for the billboard in question (*see Hutzler v Hertz Corp.*, 39 NY2d 209, 214 [1976] ["Payment by check, sometimes referred to as 'conditional payment', is not, by itself, payment of the underlying obligation. Only when the drawee bank pays on the check is payment actually effected" (citations omitted)]; *Mariano's Pizzeria Inc. v Associated Mut. Ins. Coop.*, 24 AD3d 206, 208 [2005] ["a check is merely a conditional payment which fails to satisfy the underlying obligation upon dishonor"], citing *Meiselman v McDonalds Rests.*, 305 AD2d 382 [2003]). Therefore, as a matter of law, defendant never paid the basic annual rent for 2007.

Moreover, the default provisions of Article 43 of the lease rider include the failure to pay rent as an "Event of Default," stating that if "default shall be made in the payment of basic rent and such default shall continue for a period of ten (10) days after notice thereof shall have been given to Tenant . . . Landlord may, at Landlord's option, give to Tenant a notice of election to end the term of this Lease . . . and Tenant will then quit and surrender the demised premises to Landlord, but Tenant shall remain liable as provided in Article 18 of this Lease." Article 18 affords remedies to landlord in the event of tenant's

default, providing that rent payable up to the time of landlord's reentry "shall become due thereupon" and provides for liquidated damages with respect to the remainder of the lease term.

It is clear that the default provisions of the lease rider require landlord to issue notice to tenant before a late rent payment is considered a default. However, no such notice was ever given by landlord with respect to the annual rent due January 1, 2007. Thus, tenant was not in default under the terms of the lease when it was terminated on January 8, 2007 so as to enable landlord to avail itself of its default remedies, including liquidated damages (*see Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 68 [2006]).

The majority avoids the application of General Obligations Law § 7-103(1) by construing the terms of the lease and the statute so as to render the statutory protection nugatory. According to the majority's analysis, the $96,243.00 annual rent, which the lease provides "Tenant shall pay in advance," is not an advance payment at all. Utilizing the premise that "the entire year's base rent is due on the first of the year," the majority transforms what is expressly described in the lease as an "advance" payment of rent into a current payment, thus offending the rule that a court may not "rewrite the terms of an agreement under the guise of interpretation" (*85th St. Rest. Corp. v Sanders*, 194 AD2d 324, 326 [1993]; *Halkedis v Two E. End Ave.*

Apt. Corp., 137 AD2d 452, 453 [1988], *affd for reasons stated below* 72 NY2d 933 [1988]).

Such a tortured construction invites all manner of mischief. For example, a landlord could structure a 10-year commercial lease to avoid the operation of the statute by providing for payment of the entire rent on the first day of the lease, funded by lessor financing that requires monthly payments over the duration of the lease term. Then, even if the lease were validly terminated, none of the money advanced could be recovered by the tenant because all rent would have been due and payable at the outset.

The majority's construction ignores another principle espoused by this Court. As stated in *Matter of Friedman-Kien v City of New York* (92 AD2d 827, 828-829 [1983], *affd for reasons stated below* 61 NY2d 923 [1984]), "The courts will not construe statutes, or rules and regulations of a government agency in such a manner as to thwart the obvious legislative intent and reach absurd and unexpected consequences" (citing *Matter of Chatlos v McGoldrick*, 302 NY 380, 387-388 [1951]; McKinney's Cons Laws of NY, Book 1, Statutes, §§ 92, 145, 147). General Obligations Law § 7-103(1) requires that advance payments be "held in trust" by the landlord. Interpretation of the statute to permit the confiscation of unearned rent thwarts the legislative intent to cast the landlord in a fiduciary capacity (*see Matter of*

Dial-N-Drive Rent A Car Network [Marvin], 62 AD2d 165, 167-168 [1978] [deposit of funds with a lessor creates a trust relationship]).

To embrace the result urged by landlord requires abrogating fundamental aspects of the lease, particularly the need for consideration (the right to occupy the premises as the quid pro quo for the tenant's payment of rent) and the covenant of quiet enjoyment (the right to possess the premises undisturbed by a claim of superior title, including that of the landlord). Moreover, it frustrates the salutary purpose of General Obligations Law § 7-103(1) by declining to apply a statute governing advance payments under a lease to what the lease expressly states to be an "advance payment." Finally, it requires affording landlord a right to proceed against tenant in the absence of any lease provision that preserves a right to recovery for unpaid rent. In short, a ruling favorable to landlord requires this Court to ignore controlling statute and case law as well as the terms of the lease for the sake of bestowing a mere windfall.

Accordingly, the order should be affirmed.

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

ENTERED: MAY 18, 2010

CLERK

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

1806 In re Gary D'Andrea, et al., Index 115599/08
Petitioners,

-against-

Raymond Kelly, as Police Commissioner
of the City of New York, et al.,
Respondents.

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioners.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondents.

Determination of respondent Police Commissioner, dated September 29, 2008, finding petitioners guilty of failing to report wrongful conduct by another member of the Police Department and imposing a forfeiture penalty of 30 vacation days, unanimously confirmed, the petition denied and the proceeding brought pursuant to article 78 (transferred to this Court by order of Supreme Court, New York County [Walter B. Tolub, J.], entered March 3, 2009) dismissed, without costs.

Substantial evidence supports the finding that petitioners, having improperly provided confidential information to a fellow officer, failed to notify proper authorities when they learned that the information had been leaked to a newspaper reporter. There is no basis in the record to disturb the agency's findings regarding witness credibility (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). We reject petitioners' contention

that the Department Advocate conceded that petitioners committed no misconduct when they provided the confidential information to the fellow officer. We also reject petitioners' argument that the determination should be annulled because "the fact that there was a leak of information was known to everyone at the [Applicant Processing Division] . . ., petitioners did not know the source of the leak . . . and . . . reasonably believed that the [Police Department] knew the source of the leak." Regardless of whether the argument is correct as a matter of fact, it is wanting as a matter of law because petitioners knew that the leak had occurred and did not report it even though they unquestionably had information relevant to the issue of who had committed the misconduct. The record reflects that the Assistant Deputy Commissioner who presided over the hearing in this matter considered "the otherwise fine service records" of petitioners in determining the appropriate penalty for this misconduct, and the penalty imposed does not shock our conscience (*cf. Matter of Rodriguez-Rivera v Kelly*, 2 NY3d 776 [2004]).

All concur except Manzanet-Daniels, J. who dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting in part)

The penalty imposed shocks the conscience and should be reduced (*see* CPLR 7803[3]).

On March 3, 2005, an article appeared in the Daily News entitled "Black Marks in Blue." The article asserted that NYPD "[b]rass" had "sign[ed] off on [a] rogues' gallery of hires," including recruits with prior arrests for robbery, weapons possession and assault. The article did not mention any of the recruits by name, though it noted that one had "admit[ted] he shot up anabolic steroids for years" and another had been "fired from Macy's for allegedly stealing." Petitioners herein had investigated these two recruits as candidates and found them not suitable, and, prior to the appearance of the Daily News article, turned over the case review sheets pertaining to these candidates to their union representative, Mr. Brosseau, as examples of what they considered to be inferior candidates.

Both petitioners were found not guilty of the first specification charging them with acting in concert to release confidential information to advance their private interest, in violation of the conflict of interest statute. They were found guilty of the second specification, failure to report serious misconduct by another member of the Department, specifically, that upon reading the Daily News article they became aware that confidential information they had improperly provided to another

member of the Department had been leaked, and failed to report same. Although both petitioners read the article, they testified that they believed the source of the leak was P.O. Baumgardt, a fellow officer in the Applicant Processing Division and the wife of former Sgt. Petroglia, who was quoted extensively in the article. Officer Baumgardt was in fact briefly transferred, indicating to both petitioners that Internal Affairs was aware of the misconduct and looking into it. Thus they did not believe it incumbent upon them to reveal that they had disclosed confidential information pertaining to the candidates to their union representative Brosseau. The Assistant Deputy Commissioner of Trials found no evidence indicating that either petitioner ever met with a reporter or anyone from the Daily News or the PBA, or knew that the information provided to Brosseau would appear in the newspaper.

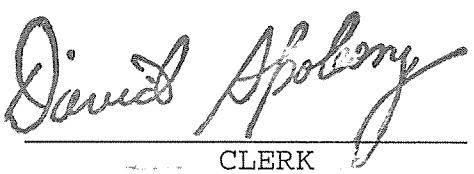
The cases cited by the Assistant Deputy Commissioner in recommending the penalty of forfeiture of 30 vacation days involved a failure to report objective misconduct. One case involved an officer cancelling a request for a tow truck to respond to an accident scene and failing to report that an off-duty member had been involved in a motor vehicle accident, with serious physical injury, where the member believed alcohol had been involved. Another case involved a failure to inform the Department that a family member had access to a vehicle that had

been involved in a hit-and-run, and intentionally withholding that information in an effort to protect the family member during a departmental investigation of the accident.

Petitioners' misconduct here is not of a similar caliber. Petitioners were accused of turning over confidential employee files to Officer Brosseau, their union representative. Their interest in doing so was solely to improve the quality of candidates approved to become police officers. Petitioners' excellent service records also provide reason to annul the harsh penalties imposed (*see Matter of Lagala v New York City Police Dept.*, 286 AD2d 205, 206, *lv denied* 97 NY2d 605 [2001]; *Matter of McAvoy v Ward*, 145 AD2d 378, 380 [1988], *lv denied* 74 NY2d 606 [1989]). The penalty imposed, forfeiture of 30 days, is excessive. Petitioners have already been punished. Both were transferred out of the Applicant Processing Division as a result of the charges. I would therefore reduce the penalty imposed to the forfeiture of 10 vacation days.

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

ENTERED: MAY 18, 2010



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

1991 Elizabeth Early, et al., Index 113419/06
Plaintiffs-Respondents,

-against-

Hilton Hotels Corporation, etc., et al.,
Defendants-Appellants.

Edward J. Guardaro, Jr., White Plains, for appellants.

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

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 14, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed against all defendants. The Clerk is directed to enter judgment accordingly.

Plaintiff Elizabeth Early allegedly tripped and fell on a plastic strap while traversing the sidewalk adjacent to the loading dock of defendants' premises. Plaintiffs allege that defendants were negligent in the maintenance of the sidewalk abutting their property and that this negligence caused the accident.

Defendants moved for summary judgment and the motion court denied the motion solely on grounds that questions of fact regarding whether defendants created the condition alleged precluded summary judgment. The motion court, implicitly finding

the issue of notice inapplicable, never addressed the same. We now reverse.

On September 14, 2003, with the passage of § 7-210 of the Administrative Code of the City of New York, the duty to maintain and repair public sidewalks, within the City of New York, and any liability for the failure to do so, was shifted, with certain exceptions, to owners, whose property abuts the sidewalk (*see Ortiz v City of New York*, 67 AD3d 21, 25 [2009], *revd on other grounds* 14 NY3d 779 [2010]; *Wu Zhou Wu v Korea Shuttle Express Corp.*, 23 AD3d 376, 377 [2005]; *Klotz v City of New York*, 9 AD3d 392, 393[2004]). Accordingly, owners of nonexempted properties must now keep the sidewalks abutting their properties in a reasonably safe condition, much in the same way they are obligated to maintain their respective premises. It is well settled that in order to hold an owner liable for a dangerous condition within a premises, it must be established that the owner created the dangerous condition alleged (*Wasserstrom v New York City Tr. Auth.*, 267 AD2d 36, 37 [1999], *lv denied* 94 NY2d 761 [2000]; *Allen v Pearson Pub.*, 256 AD2d 528, 529 [1998]; *Kraemer v K-Mart Corp.*, 226 AD2d 590, 590 [1996]) or failed to remedy the condition, despite having prior actual or constructive notice of it (*See Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v Woolworth Co.*, 24 NY2d 936, 937 [1969]; *Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373, 373 [2005]).

Therefore, pursuant to § 7-210, liability for an accident on a sidewalk abutting real property will arise when it is established that the owner of said property created the condition alleged or had prior notice.

A defendant owner is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the occurrence of an accident to permit the defendant to discover and remedy the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Irizarry* at 373). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2002]. *Lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575, 575 [2000]). Alternatively, a defendant may be charged with constructive notice of a hazardous condition if it is proven that the condition is one that recurs and about which the defendant has actual notice (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. Of N.Y.*, 305 AD2d 107, 107 [2003]). If such facts are proven, the defendant can then be charged with constructive notice of each condition's recurrence (*id.*; *Anderson* at 422).

In this case, the accident occurred subsequent to the

enactment of § 7-210. Thus, liability against defendants here may be premised not only upon whether they created the condition alleged by plaintiffs, but also upon proof that they had prior notice, actual or constructive, of the condition.

Defendants established the absence of actual notice inasmuch as Junior Foote, defendants' employee, whose duties included being present on defendant's loading dock while deliveries were made, testified that he never saw any straps on the sidewalk abutting defendants' property prior to the instant accident. The absence of actual notice is also established by Foote's testimony that prior to this accident, he had never received any complaints regarding accidents caused by straps on the sidewalk abutting defendants' property (*Rosa v Food Dynasty*, 307 AD2d 1031, 1031-1032 [2003]). Defendants also established the absence of constructive notice inasmuch as there is no record evidence as to how long the strap was on the sidewalk prior to her fall and plaintiff testified that she did not see the strap she alleges caused her to fall until after she fell (*see Anderson* at 423; *McDuffie* at 575).

Plaintiffs' contention that constructive notice can be imputed to defendants because the presence of straps on the sidewalk was a recurring condition is without merit. The injured plaintiff testified that prior to this accident she had not seen any straps at all on the sidewalk abutting defendants' property.

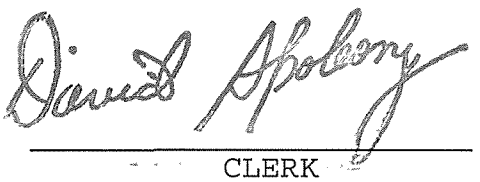
That she saw other straps in the defendant's loading dock, abutting the sidewalk, minutes after her fall and again months thereafter, is not proof that the presence of straps on the *sidewalk* was a recurring condition (*Gordon* at 838). More importantly, to the extent that the record is bereft of any evidence that defendants had actual notice of any straps on the sidewalk prior to the accident, plaintiffs have failed to prove constructive notice of a recurring condition (*see Chianese* at 278; *Uhlich* at 107).

Defendants also established that they did not create the condition alleged. Foote testified that with regard to packages delivered to defendants' premises via the loading dock, while the same would, in large part, be bound by plastic straps, the packages would always be brought inside the premises and only then were the straps removed by defendants and discarded in receptacles. Foote further asserted that defendants never removed straps from the packages within the loading dock. Thus, any straps within the loading dock or on the abutting sidewalk would not have been the result of defendants' acts or omissions (*Rosa* at 1031; *Hernandez v Menstown Stores.*, 289 AD2d 139, 139 [2001]; *Montalvo v Western Estates*, 240 AD2d 45, 47-48 [1998]). While it is true that Foote was unaware of what other employees might have done with regard to straps on packages delivered to the premises, an issue urged by plaintiffs, he nevertheless

stated that said employees would have had no need to remove the straps, and that he, whose duties required his presence on the loading dock, never witnessed conduct warranting any instruction proscribing the same. Thus, Foote established defendants' custom and practice and their adherence thereto.

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

ENTERED: MAY 18, 2010



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

2577-
2578 Index 301160/07

Zhijian Yang, etc.,
Plaintiff-Respondent,

-against-

Jerry D. Alston, et al.,
Defendants-Appellants.

Richard T. Lau & Associates, Jericho (Gene W. Wiggins of counsel), for appellants.

Ross Legan Rosenberg Zelan & Flaks, LLP, New York (Evan Ross of counsel), for respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered December 16, 2009, which to the extent appealed from, granted plaintiff's motion to renew a prior order, same court and Justice, entered June 11, 2009, granting defendants' motion for summary judgment, and upon renewal, vacated the June 11, 2009 order and denied defendants' motion for summary judgment, unanimously modified, on the law, vacatur denied, defendants' motion for summary judgment granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendants met their initial burden of establishing prima facie that plaintiff did not sustain a serious injury (Insurance Law § 5102[d]) by submitting the affirmed report of an orthopedic surgeon detailing the objective tests he had performed on examination, finding that plaintiff had full range of motion in

her left hip, cervical and lumbar spine, and right knee, and concluding that plaintiff had no ongoing impairment resulting from the accident. Defendants pointed to plaintiff's deposition testimony wherein she admitted having been injured in both a prior and a subsequent accident, as well as her verified bill of particulars wherein she admitted only a brief convalescence.

The burden then shifted to plaintiff. Initially, we find that in the absence of any prejudice to defendants, renewal was properly granted to plaintiff to correct a procedural oversight on the previous motion and allow the submission of her examining physician's report in admissible form (*see Cespedes v McNamee*, 308 AD2d 409 [2003]). However, upon renewal, Supreme Court should have adhered to its original determination granting defendants' motion for summary judgment because plaintiff failed to raise a triable issue of material fact as to whether she sustained a serious injury in this accident.

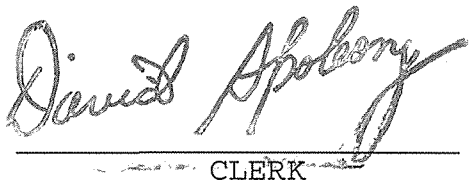
The affirmed report of plaintiff's expert, submitted in support of the motion to renew, was deficient in several respects. While in his report the examining physician attempted to set forth range-of-motion findings with respect to plaintiff's spine and shoulder, he did not compare those findings to the standards for normal ranges of motion (*see Johnson v Paulino*, 49 AD3d 379 [2008]). The range of motion testing for the hips and knees yielded normal results with no loss of range of motion. In

addition, the expert offered no explanation for plaintiff's two-year cessation of treatment; and he failed to mention, much less account for, plaintiff's prior and subsequent accidents, thus rendering speculative his conclusion that plaintiff's injuries were causally related to the subject accident (*see Style v Joseph*, 32 AD3d 212, 214-215 [2006]).

Plaintiff's serious-injury claim, predicated on an alleged inability to engage in substantially all of her daily activities for 90 of the first 180 days after the accident, was refuted by admissions in her verified bill of particulars that she was confined to bed for only two days and to home for one month. No competent medical proof was offered to substantiate her claim under the 90/180-day test (*see Rossi v Alhassan*, 48 AD3d 270 [2008]).

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

ENTERED: MAY 18, 2010



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

2673 Annette Lehr, et al., Index 109515/06
Plaintiffs-Appellants,

-against-

Mothers Work, Inc.,
Defendant-Respondent.

Billig Law, P.C., New York (Darin S. Billig of counsel), for appellants.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 31, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff Annette Lehr allegedly sustained personal injuries when she tripped over the leg of a clothing rack and fell into an adjacent rack of clothes in defendant's store. She contends that defendant created a dangerous condition by placing the racks too close together and that an additional hazard existed because clothing strewn haphazardly on the racks and floor obscured the legs and wheels of the racks. Plaintiffs' daughter, who was with her mother at the store that day, stated in her affidavit that she had complained to a sales clerk on two earlier visits about the racks being too close together to

navigate around, and that the racks were overloaded with clothes then strewn about.

The daughter's affidavit, coupled with Annette Lehr's testimony concerning the closeness of the racks, is sufficient to establish a triable issue as to whether defendant created a dangerous condition in the manner in which racks were placed on the day of the accident. The affidavit also provides evidence of notice of a recurring condition of garments strewn about and racks overloaded, which would also create an issue of fact as to whether there was an ongoing hazard at the store that was routinely ignored, and caused this accident (*see Mullin v 100 Church LLC*, 12 AD3d 263 [2004]; *Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107 [2003]; *David v New York City Hous. Auth.*, 284 AD2d 169 [2001]).

Although defendant argues it had sufficient maintenance procedures in place to make sure that clothing was removed from the floor and that the racks were properly placed, there are triable issues as to the condition of the store and the placement of the racks at the time of the accident. The record is

insufficient to establish entitlement to summary judgment as a matter of law (*see Cignarella v Anjoe-A.J. Mkt., Inc.*, 68 AD3d 560 [2009]).

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

ENTERED: MAY 18, 2010

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ

2802 The People of the State of New York, Ind. 1724/06
Respondent,

-against-

Robert Coakley,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered January 13, 2009, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The prosecutor referred in summation to evidence, received without objection, that the defense expert had been compensated for his testimony (*see Zimmer v Third Avenue R.R. Co.*, 36 App Div 273 [1899]). Although "[s]howing that an expert witness is testifying for a fee is a standard impeachment technique" (*see* Martin, Capra and Rossi, New York Evidence Handbook § 6.6, at 474 [2d ed]), defendant argues on appeal that this comment unconstitutionally burdened his right to call witnesses. However, since defendant made no objection during the summation, and since his mistrial motion addressed to this comment raised a different ground from the ground asserted on appeal, defendant

did not preserve his present claim, or any other constitutional argument, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The prosecutor properly commented on a matter bearing on a witness's credibility, and did not attempt to draw an impermissible inference of guilt (*see Portuondo v Agard*, 529 US 61, 65-73 [2000]). Moreover, defendant's reasoning cannot plausibly be confined to cases in which the accused is indigent. If the prosecutor's summation comments penalized defendant for having exercised his constitutional right to present a defense, the same comments would constitute a constitutional violation in a case in which a wealthy defendant paid a substantial sum to an expert testifying on his behalf.

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

ENTERED: MAY 18, 2010

CLERK

Tom, J.P., McGuire, Acosta, Freedman, JJ.

2805 Alvin Isacowitz doing business as Excellence in Plumbing, Plaintiff-Appellant, Index 604119/00

-against-

Halpern Construction, Inc., et al., Defendants-Respondents,

Savoy Little Neck Associates Limited Partnership, etc., et al., Defendants.

Robert Teitelbaum & Associates, P.C., Brooklyn (Robert Teitelbaum of counsel), for appellant.

Herrick, Feinstein, LLP, New York (William R. Fried of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 29, 2009, which denied plaintiff's motion for summary judgment on its claims for payment against defendants Halpern Construction, Inc. and General Accident Insurance Company of America and dismissing said defendants' counterclaims and affirmative defenses, unanimously affirmed, without costs.

Summary judgment is precluded by triable issues of fact including whether plaintiff breached its contracts with the construction manager by failing to pay its material suppliers; whether plaintiff failed to perform its contracts in accordance with their time-of-the essence provisions; whether the construction manager properly terminated plaintiff for untimely performance; and whether the construction manager's noncompliance

with the agreements' three-day notice to cure requirement was excusable on the ground of plaintiff's alleged abandonment of the project.

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

ENTERED: MAY 18, 2010

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2806 The People of the State of New York, Ind. 5779/06
Respondent,

-against-

Andre Belcon,
Defendant-Appellant.

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

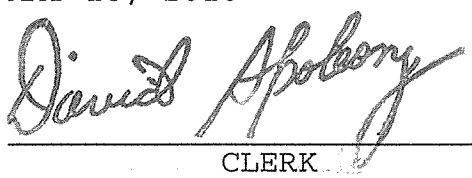
Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about November 30, 2007,

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

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

ENTERED: MAY 18, 2010



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

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2810 In re Jennifer A.,

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

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

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 4, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts which, if committed by an adult, would constitute the crimes of robbery in the third degree, assault in the third degree and menacing in the third degree, and placed her on probation for a period of 18 months and ordered her to pay $500 in restitution, unanimously affirmed, without costs.

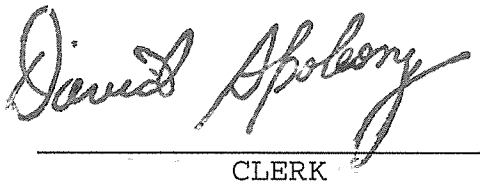
The court's finding as to robbery was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]. The evidence, including appellant's postarrest statement, supported the inference that during the course of an altercation with the victim, appellant formed the intent to deprive the

victim of property by force.

The court's calculation of the amount of restitution was supported by a victim impact statement specifying the approximate replacement cost of the jewelry (*see Matter of Joshua C.*, 65 AD3d 971 [2009]). Appellant did not avail herself of the court's offer to conduct a restitution hearing.

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

ENTERED: MAY 18, 2010



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Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2811 The People of the State of New York, Ind. 3967/01
Respondent,

-against-

Paul James,
Defendant-Appellant.

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

Appeal from judgment of resentence, Supreme Court, New York County (Charles Solomon, J.), rendered October 31, 2008, resentencing defendant to concurrent terms of 7 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-2047 - Motion to dismiss appeal as moot granted.

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

ENTERED: MAY 18, 2010

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2814 Margaret C., Index 350513/04
Plaintiff-Respondent,

-against-

Paul F. C.,
Defendant-Appellant.

George R. Hinckley, Jr., New York, for appellant.

Paul F. C., appellant pro se.

Elayne Kesselman, New York, for respondent.

Order, Supreme Court, New York County (Harold Beeler, J.), entered October 8, 2008, which denied defendant husband's motion to vacate the child support provisions contained in the parties' stipulation of settlement, incorporated but not merged into their judgment of divorce, unanimously affirmed, with costs.

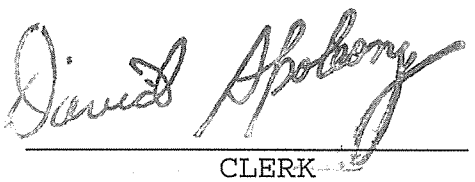
The stipulation satisfies the requirement of Domestic Relations Law § 240(1-b)(h) that it specify the parties' reasons for deviating from the guidelines of the Child Support Standards Act by stating that the parties "consider" its provisions relating to child support "to be fair and reasonable, based on many considerations," including their respective finances and the stipulation's other financial provisions, which were clearly articulated. This statement is less specific than the one we upheld in *Gallet v Wasserman* (280 AD2d 296, 297-298 [2001]). The husband relies on *Klein v Klein* (245 AD2d 195, 200 [1998]), which

held that an essentially identical statement was insufficient. As we stated in *Blaikie v Mortner* (274 AD2d 95, 100 [2000]), "the husband, an attorney, struck a bargain with which he is no longer satisfied, and he now parses the precise phrasing of some of the protective statutory acknowledgments as a means to invalidate an arrangement he freely and knowingly entered."

We have considered the husband's other arguments and find them to be without merit.

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

ENTERED: MAY 18, 2010



CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2815 Alice D. Montero, Index 13400/02
Plaintiff-Appellant,

-against-

Southern Boulevard Limited Partnership,
Defendant-Respondent.

Scott Baron & Associates, P.C., Howard Beach (W. Bradford Bernadt of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Christopher Gibbons of counsel), for respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered November 24, 2009, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, without costs.

Plaintiff visited the premises on April 12, 2001, to pick up her paycheck from her employer, a tenant on defendant's property, when she lost her footing on the top step as she was about to descend a stairway and fell, suffering injury. She acknowledged at deposition that she had never previously noticed a lump or crack in this step, nor was she aware of any witness who had. Under these circumstances, the record creates no triable issues of fact as to whether any hazardous condition existed sufficient to impose liability (*compare Taylor v New York City Tr. Auth.*, 48 NY2d 903 [1979]), or whether defendant had constructive notice of

any visible or apparent defect existing for a sufficient length of time prior to the accident to permit its discovery and repair (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *compare Alexander v New York City Tr.*, 34 AD3d 312 [2006]).

We have considered plaintiff's other contentions and find them unavailing.

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

ENTERED: MAY 18, 2010

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2817 The People of the State of New York, Ind. 4488/07
Respondent,

-against-

Ronald Luckey,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 29, 2008, as amended June 18, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 5 years, unanimously affirmed.

The court properly exercised its discretion in precluding a letter offered by defendant as a declaration against penal interest (*see People v Settles*, 46 NY2d 154, 167-170 [1978]). Defendant was charged with supplying drugs to another person in return for prerecorded buy money that the other person had obtained from an undercover officer minutes earlier. Defendant offered a letter from this person, in which she claimed the transfer of money had been the repayment of a debt, and that she

didn't know it was "marked." Defendant did not establish that the author of the letter could not be located, intended to invoke her Fifth Amendment privilege if called, or was otherwise unavailable as a witness (*see People v Coleman*, 69 AD3d 430 [2010]). Furthermore, the letter was not against the author's penal interest; on the contrary, it appeared to be crafted to avoid any admission of guilt. Finally, there was nothing to confirm the letter's reliability. Since this evidence was neither reliable nor critical to establish defendant's defense, we reject defendant's argument that he was constitutionally entitled to introduce it (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]).

Defendant did not preserve his claim that the court should have charged the jury on the principles governing the use of a defendant's allegedly false exculpatory statements as consciousness-of-guilt evidence, and we decline to review it in the interest of justice. As an alternative holding, we find there was no need for such an instruction, because the prosecutor never asked the jury to draw any such inference. Defendant's claim that his counsel rendered ineffective assistance by failing to request such a charge is unreviewable on the present record.

Defendant's attorney could have had a sound strategic reason for avoiding a charge that would have unnecessarily highlighted damaging evidence.

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

ENTERED: MAY 18, 2010

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2818-
2818A Index 113267/08

Jesus Farias,
Plaintiff-Respondent,

-against-

John Douglas Simon, Jr., et al.,
Defendants-Appellants,

"John Doe, Contractor,"
Defendant.

Savona, D'Erasmo & Hyer LLC, New York (Raymond M. D'Erasmo of counsel), for appellants.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondent.

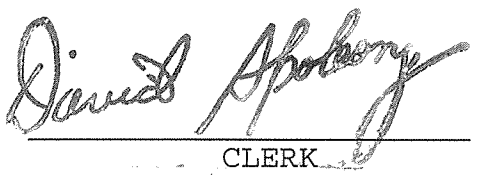
Order, Supreme Court, New York County (Paul G. Feinman, J.), entered April 22, 2009, which denied defendants-appellants' motion to dismiss the complaint for lack of jurisdiction, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 18, 2009, which, insofar as appealable, denied defendants' motion to renew, unanimously dismissed, without costs, as abandoned.

Plaintiff's process server's successive attempts to serve defendants personally at various times of the day when it could be reasonably expected that they would be at home satisfied the due diligence requirement of CPLR 308(4) so as to permit nail-and-mail service (*see Hochhauser v Bungeroth*, 179 AD2d 431 [1992]). As defendants do not dispute that the front door of

their apartment is accessible from the street, we reject their argument that the process server, before resorting to nail-and-mail, should have first attempted service pursuant to CPLR 308(2) by delivering the process to the doorman of their building (*cf. McCormack v Goldstein*, 204 AD2d 121 [1994], *lv denied* 85 NY2d 801 [1995]). Nor was it necessary that the process server, before resorting to nail-and-mail, attempt to serve defendants at their place of business (*see Brunson v Hill*, 191 AD2d 334 [1993]).

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

ENTERED: MAY 18, 2010



CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2819N- Index 602879/08
2819NA Benjamin J. Golub,
Plaintiff-Appellant,

-against-

Board of Managers of Greentree at Murray Hill,
Defendant-Respondent.

Koerner & Associates, LLP, New York (Gregory O. Koerner of counsel), for appellant.

Toptani Law Offices, New York (Edward Toptani of counsel), for respondent.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered March 11, 2009, which, to the extent appealed from as limited by the briefs, ordered plaintiff to post an undertaking for payment of certain attorney fees and costs previously awarded to defendant, denied plaintiff's motion to permanently stay any arbitration except to the extent of staying the arbitration to allow the parties to first attempt mediation, and denied plaintiff's motion to disqualify Edward Toptani as counsel for defendant, and order, same court and Justice, entered October 1, 2009, which denied renewal and reargument except to the extent it amended the prior order to reflect that payment of certain monies resulting from the JAMS session and Settlement Agreement was not an admission of liability on the part of defendant, unanimously affirmed, without costs.

The court did not abuse its discretion in requiring plaintiff to post an undertaking when granting the motion for a preliminary injunction to allow the parties to attempt mediation (*see Livas v Mitzner*, 303 AD2d 381, 383 [2003]).

The court also properly found that the stipulation in connection with the Homestead Action, which provided that "each party . . . bear its own costs and expenses," did not bar defendant's claims for legal fees, since the terms "costs" and "expenses" do not include attorney fees in the absence of express language to that effect in the contract or a statute (*see Royal Discount Corp. v Luxor Motor Sales Corp.*, 9 Misc 2d 307, 308 [App Term 1957]; *Nacional Financiera v Americom Airlease*, 803 F Supp 886, 893 [SD NY 1992]). Furthermore, as the court noted, the language of paragraph 5(iii) of the subsequent Settlement Agreement, which specifically preserved defendant's claims for legal fees related to the Homestead Action, superseded the earlier Homestead Stipulation.

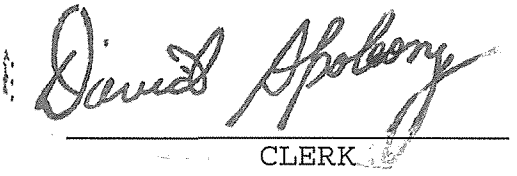
The court also correctly ruled that the judgment award fully resolved by Civil Court and Appellate Term could not be relitigated (*see Merrill Lynch, Pierce, Fenner & Smith v Benjamin*, 1 AD3d 39, 43-45 [2003]).

The court did not abuse its discretion in refusing to disqualify defendant's attorney.

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: MAY 18, 2010



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MAY 18 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.

1519-20-21-22-23
File 4037/99 &
2497/07

In re Estate of William Gottlieb,
Deceased.

Irving Bender, et al.,
Petitioners-Respondents,

Cheryl I. Dier, et al.,
Objectors-Appellants.

- - - - -

In re Mollie Bender,
Deceased.

Irving Bender, et al.,
Petitioners-Respondents,

Michael Corbett,
Objector-Appellant.

Objectors appeal from a decree of the Surrogate's Court, New York County (Renee Roth, S.), entered on or about March 13, 2008, which granted the motion of Irving Bender and Neil Bender for letters of letters of administration c.t.a. in the estate of William Gottlieb, dismissed the objections of Cheryl Dier and Michael

Corbett in all respects, and denied the objectors' cross petitions for letters of administration c.t.a., and the order of the same court and Surrogate, entered on or about March 20, 2008, which, to the extent appealed from, granted the motion of Irving Bender and Neil Bender to dismiss Corbett's objections to their appointment as preliminary executors of the estate of Mollie Bender.

Cheryl I. Dier, appellant pro se.

Law Office of Michael C. Rakower, P.C., New York (Michael C. Rakower, Harvey Stuart and David E. Miller of counsel), and Mayer Law Group, LLC, New York (Carl J. Mayer of counsel), for Michael Corbett, appellant.

Greenfield Stein & Senior, LLP, New York (Gary B. Freidman and Harvey Corn of counsel), and Simon, Eisenberg & Baum, LLP, New York (Joseph P. Gaffney, Edward Paul Alper and Eric Baum of counsel), for respondents.

NARDELLI, J.

This appeal involves challenges to the issuance of fiduciary letters in two related estates. In *Matter of Gottlieb*, objectors Cheryl I. Dier and Michael Corbett appeal from a decree of the Surrogate's Court, New York County which, inter alia, granted the motion of Irving Bender and Neil Bender, as preliminary executors of the estate of Mollie Bender, to dismiss the objections asserted by Dier and Corbett, and granted letters of administration c.t.a. in the Gottlieb estate to the Benders. In *Matter of Bender*, Michael Corbett, as objector, appeals from an order of the Surrogate, which granted the motion of the preliminary executors Irving Bender and Neil Bender to dismiss Corbett's objections because he lacked standing to challenge the issuance of letters.

William Gottlieb, a prominent realtor, died in 1999, survived by his sister, Mollie Bender, and his brother, Arnold Gottlieb. His will was admitted to probate on December 28, 1999, and letters testamentary were issued to Mollie Bender, the sole legatee. William's mother, Anna Gottlieb, the named successor executor, had predeceased William.

When Mollie Bender broke her hip, she petitioned to resign as executor and for the appointment of Neil Bender, her son, as

successor administrator. On July 21, 2007, however, prior to a decision on the petition, Mollie Bender died. She was survived by her husband Irving, her son Neil, and her daughter Cheryl Dier. Under a will executed November 4, 2005, Mollie had left her estate to her husband, her son Neil, and Neil's issue. Irving and Neil were designated as co-executors.

On July 19, 2007, Neil Bender filed a petition to be appointed as administrator c.t.a. for Gottlieb's estate. On August 21, 2007, Michael Corbett, Cheryl Dier's son, cross-petitioned for letters of administration c.t.a.

Neil Bender and Irving Bender also offered Mollie Bender's November 4, 2005 will for probate, and, contemporaneously, filed an application for preliminary letters testamentary. On or about July 23, 2007, an undated, printed document purporting to be a notice of appearance on behalf of Dier, Corbett and Mollie Bender's brother, Arnold Gottlieb, was filed by Carl Mayer, an attorney, in both the Bender probate proceedings and the proceeding to appoint Neil Bender as administrator c.t.a. of the Gottlieb estate. On July 24, 2007, Dier filed an affidavit disavowing Mayer's representation of her in either proceeding.

Dier, pro se, herself filed objections on July 24, 2007 to the Bender will, and also both to the appointment of the Benders

as preliminary executors and to Neil's application for letters of administration c.t.a. in the Gottlieb estate. She alleged that Neil was unfit to serve as fiduciary. Dier also cross-petitioned in the Gottlieb matter for the issuance to her of letters of administration c.t.a.

Corbett, represented by Mayer, filed an objection on August 8, 2007 to the granting of preliminary letters testamentary to the Benders in Mollie's estate. In connection with his objection to Neil's appointment, Corbett submitted, inter alia, evidence of two convictions more than 15 years old for driving while impaired by alcohol, a 13-year-old federal tax lien of less than $28,000 (which had been released in 1996), and a list of small civil judgments from the early 1990s. No objections were asserted to the probate of the Gottlieb will itself.

On September 25, 2007, the Surrogate issued an order rejecting the objections to the issuance of preliminary letters testamentary to the Benders. The Surrogate held that the allegations as to Neil Bender's eligibility, even if true, did not rise to a level that would warrant disqualification. No appeal was taken.

In October 2007 the Benders filed an amended petition for letters of administration c.t.a. in the Gottlieb estate on the

grounds that the statutory right to letters of administration c.t.a. emanated from their status as fiduciaries of Mollie Bender, the sole beneficiary under William Gottlieb's will. The Benders also moved to dismiss and to strike from the record the notices of appearance, objections and cross petitions filed by Dier and Corbett. In January 2008 the Benders also moved to be appointed temporary administrators c.t.a. for the Gottlieb estate.

By order entered February 21, 2008, the Surrogate held that neither Dier nor Corbett had standing under Surrogate's Court Procedure Act § 1418 to petition for letters of administration c.t.a., since they did not meet the criteria set forth in SCPA 1402, as they had not been named in any capacity in Gottlieb's will. The Surrogate further held that even if Dier and Corbett otherwise had standing, the Benders, as fiduciaries of Mollie Bender's estate, had priority to receive letters of administration c.t.a. The Surrogate also noted that the allegations regarding the Benders' eligibility to act as fiduciaries had been raised and addressed in the September 25, 2007 decision in the *Bender* proceeding, and the allegations were insufficient to require disqualification. Letters of administration c.t.a. were granted to the Benders.

In *Matter of Bender*, by motion dated December 26, 2007, the

Benders moved to dismiss all of Corbett's filings on the ground that he lacked standing under any of the applicable provisions of the SCPA. In his opposition papers, Corbett annexed a conformed copy of a 1991 will executed by Mollie Bender, in which he was named as a one-fourth beneficiary. Handwritten on the title page were the words "Will was executed on 1/8/91 [and] Client took original" with the initials "SRG," which the court later determined were those of an attesting witness.

In an order entered on or about March 20, 2008, the court granted the motion to the extent of dismissing the objections filed by Corbett. It observed that since, under SCPA 1407, a will last known to be in the possession of the testatrix is presumed to have been revoked, even if the 2005 will that was the subject of the Bender proceeding was denied probate and the copy of the 1991 will submitted as a lost will, the presumption that the 1991 will had been revoked would still apply. The court further stated, "The likelihood of rebutting this presumption is too remote to afford [Corbett] standing in the instant proceeding as an adversely-affected beneficiary of a prior will."

Dier's appeal is addressed first. Initially, Dier has only filed a notice of appeal from the February 21, 2008 order in which the Surrogate granted letters c.t.a. to the Benders in the

Gottlieb proceeding. She has not taken any appeal in the Bender probate proceeding, even though in her prayer for relief in her appellate brief she seeks the issuance of temporary letters in that estate. We also note that her objections to the probate of the Bender will, including Dier's claims that the will is the product of duress and undue influence, are not before us. Thus, our review of her appeal is limited to the denial of her request to seek letters c.t.a. in the Gottlieb estate, and, as well, to her challenge to the issuance of letters in the Gottlieb estate to the Benders.

Dier is a distributee of Mollie Bender. Under SCPA 1410 she is thus a person with an interest in the Bender estate, and an individual who possesses the right to challenge any portion of the Bender will. The challenges to the admission to probate of the Bender will itself have not been determined by the Surrogate's Court. Thus, in the interim, Dier possesses standing to challenge the issuance of letters c.t.a. to Neil in the Gottlieb estate. It is his status as sole fiduciary under Mollie Bender's will which gives Neil priority in staking a claim for letters c.t.a. in the Gottlieb estate, in which Mollie Bender is the sole beneficiary (*see* SCPA 1418(1)(a)).

Dier's attempt to have letters c.t.a. issued to herself

instead of Neil Bender presents a justiciable issue. Although we agree with the Surrogate's ultimate determination that Irving Bender and Neil Bender were entitled to letters c.t.a., we conclude that it was not because Cheryl lacked standing, but rather because Irving and Neil were entitled to priority.

As noted above, Dier is a person interested, as defined by statute, in Mollie's estate (SCPA 1410). Her challenge to the probate of the Bender will has not yet been adjudicated. If she were to be successful in her challenge, and the Bender estate administered under the laws of intestacy, instead of under the will, Neil would lose his status as fiduciary under the will of a sole beneficiary. Dier, as a distributee of Mollie's estate, could also then lay claim to being a fiduciary.

Since, however, there has not yet been a resolution of the challenge to the Bender will, and preliminary letters testamentary were issued in Mollie's estate to the Benders on September 18, 2007, from which order an appeal was not taken, Neil is presently the recognized fiduciary for the Bender estate. Consequently, he is entitled to priority in the issuance of letters c.t.a. in the Gottlieb estate. If and when Dier's challenge to the Bender will itself is resolved, the issue of who should be a fiduciary may be revisited. Until such time,

however, Neil has priority. This Court has made clear in *Matter of Boyle* (224 AD2d 374 [1996]), that the statutory priority for issuance of letters c.t.a. is "mandatory, and the court has no discretion to pass over one class in favor of another" (*id.* at 375). Absent a finding that Neil is ineligible to act as a fiduciary

because of character deficiencies, as will be discussed, he is entitled to priority in receiving letters.

Before Neil's qualifications to serve as fiduciary are addressed, however, the issue of Corbett's standing to raise any challenges must also be resolved. As Dier's son, Corbett is not a distributee of Mollie Bender. Thus, even if the Bender will were not admitted to probate, he would not have any standing, since under the laws of intestacy the entire estate would pass to Mollie's surviving spouse and children (EPTL 4-1.1).

He seeks to establish his standing, however, by claiming that since he was named as a beneficiary in a prior will, he had standing to object to the subsequent will in which he was not a named beneficiary. "Generally a person who is not a distributee of the decedent and who will receive no part of a decedent's estate if a will is denied probate, will not be permitted to file objections to probate" (*Matter of Wharton*, 114 Misc 2d 1017, 1018 [1982]). "The exception is when a person is named in a prior

will and his interest under the prior will is greater than under the propounded will" (*id.*).

In this case, however, the original will has not been discovered, and the only copy provided contains a handwritten notation indicating that the original had been physically given to the testator, Mollie Bender. As the Surrogate held, "'[w]hen a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator'" (*Matter of Fox*, 9 NY2d 400 [1961], quoting *Collyer v Collyer*, 110 NY 481, 486 [1888]; see *also Matter of Staiger*, 243 NY 468, 472 [1926]). To rebut the presumption a proponent must present more than mere speculation and suspicion, but must show facts and circumstances that the prior will was actually fraudulently destroyed (*Matter of Philbrook*, 185 AD2d 550 [1992]). If a prior will has been revoked by destruction, a beneficiary thereunder has no standing to contest the later will (*Matter of Rayner*, 93 App Div 114 [1904]).

Corbett has not established any facts which suggest that the will was fraudulently destroyed. Further, even if Dier's challenge to the probate of the 2005 Bender will is upheld, this would not negate the presumption that the 1991 will is deemed, as

a matter of law, to have been destroyed by the testator. Therefore, Corbett would still lack standing to raise any challenges, since he could not a person deemed interested under statute.

Corbett also argues that the Surrogate should have afforded him the opportunity to engage in discovery regarding the 1991 will. This request is raised for the first time on appeal, which failure would generally be sufficient to deny the request (*see Omansky v Whitacre*, 55 AD3d 373 [2008]). More to the point, however, he has not shown any circumstances suggesting that the first will was fraudulently destroyed. Indeed, this is not a situation where the only known will cannot be located. Rather, a subsequent will, 23 pages long, and prepared by an attorney, was executed, and would supplant the first will. While Dier's challenge to the second will clearly remains unresolved, the threshold issue on Corbett's challenge is whether there is any evidence to suggest that discovery would establish that the first will, which was in the possession of the testator, was fraudulently destroyed, and could be revived if the second will were found to be invalid as a result of, inter alia, undue influence or the lack of testamentary capacity. Since we cannot find any such evidence in this record, the request for further

discovery must be denied, and Corbett is found to be without standing.

Inasmuch, however, as Dier possesses standing to challenge Neil's credentials, her allegations, many of which overlap Corbett's, are now discussed. Pursuant to SCPA 707, with certain exceptions, letters testamentary may be issued to a natural person or a person authorized by law to be a fiduciary. However, the exceptions bar issuance of letters testamentary to "one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding or who is otherwise unfit for the execution of the office" (SCPA 707[1][e]). In the decision dated February 19, 2008, the Surrogate noted that the allegations concerning the Benders' unfitness to serve as fiduciaries had been previously raised and rejected in connection with Mollie's estate in the decision dated September 25, 2007, which resulted in the signing of an order issuing the Benders preliminary letters testamentary. In the September 2007 decision the Surrogate observed that Dier had not supported her allegations with any facts whatsoever, but that Corbett had alleged that Neil "lacks the capacity to execute the duties of executor" due to "substance abuse, dishonesty and improvidence in many matters." The Surrogate found that the "evidence" as to Neil consisted of two traffic violations more

than 15 years old, a 1994 federal tax lien of less than $30,000, and several small civil judgment from the early 1990s, and that these complaints did not rise to the level required for disqualification.

These allegations form, in part, the essence of Dier's present claim that Neil should not serve as a fiduciary. She contends that he is a habitual drunk, is financially irresponsible, and has failed to comply with court directives in other matters. Our review finds that these allegations are not sufficiently demonstrated so as to preclude the issuance of letters c.t.a. to Neil in the Gottlieb estate.

A testator's choice of executor is not lightly to be disregarded. As was noted long ago by the Court of Appeals, "the testator still enjoys the right to determine who is most suitable among those legally qualified to settle his affairs and execute his will, and his solemn selection is not lightly to be disregarded" (*Matter of Leland*, 219 NY 387, 393 [1916]). "Appointment is not to be refused merely because the testator's selection does not seem suitable to the judge" (*id.*).

A nominated executor's character failings may be offensive to others, but unless they, in the aggregate, clearly demonstrate unworthiness for the responsibilities to be undertaken, they cannot bar the appointment. As was stated in *Matter of Flood*

(236 NY 408 [1923]), in order for a nominated fiduciary's improvidence to preclude his appointment, it must be demonstrated that his habits of mind and conduct have become such a part of his character as to "'render him generally, and under all ordinary circumstances, unfit for the trust or employment in question'" (*id.* at 411, quoting *Emerson v Bowers*, 14 NY 449, 454 [1856]). "The dishonesty contemplated by the statute must be taken to mean dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor" (*Matter of Latham*, 145 App Div 849, 854 [1911]).

Dier complains that Neil repeatedly misrepresented himself in legal estate matters as "manager" or "executor" or "nominated administrator c.t.a." when this was not true, particularly in instigating numerous litigations. It appears, however, that the litigation to which Dier refers was a series of housing court proceedings in which the attorney erred in incorrectly stating Neil's title. No judicial finding was made that Neil was guilty of misrepresentation, and the incorrect titles were subsequently corrected.

Dier also points out that on June 19, 2007, this Court sanctioned Mollie Bender, at the time she was serving as executor of the Gottlieb estate, for failure to comply with directives

that a co-owner of a building be provided with access to the building. While Mollie was the nominal party, it cannot be overlooked that Neil was significantly involved in the litigation, likely because of her physical condition (she died approximately a month later). It is evident that the sanction resulted from willful misconduct, and bespeaks a willingness to ignore a court order. Taken at face value, however, and even ascribing the misconduct solely to Neil, we cannot conclude that the issuance of the order warrants deviating from the statutory scheme so as to preclude Neil from being appointed as administrator c.t.a. Even when viewed in conjunction with the other allegations of Neil's less than sterling character, it is not sufficient to find Neil unfit to serve as fiduciary. The possibility that Neil might have been assuming control of Mollie's affairs because of her physical condition may ultimately have significance in determining whether her 2005 will was the subject of undue influence, but that issue awaits adjudication at another time.

There are also allegations that the Gottlieb estate has been mismanaged by Neil, and that fines, as well as contempt sanctions, have been imposed for the failure of a corporate entity controlled by the estate to comply with repair obligations. Both the violations and the contempt sanction were

issued at a time when Neil was not the recognized fiduciary, so that the existence of these sanctions in and of themselves cannot support replacing Neil as fiduciary. Their relevance to Mollie's capacity, as with the sanctions imposed by this Court, await determination at another time.

Dier also alleges that Neil should be disqualified because he was a "habitual drunkard." There is no evidence, however, indicating that any purported substance abuse is so habitual as presently to affect his ability to handle estate affairs sufficiently. Indeed, the only evidence offered is an affidavit of a doctor of osteopathy who allegedly treated Neil no later than 2000.

In sum, the record does not demonstrate that on the limited justiciable issue before us, i.e., whether Neil is entitled to be appointed administrator c.t.a. of the Gottlieb estate, the Surrogate erred.

Accordingly, the decree of the Surrogate's Court, New York County (Renee Roth, S.), entered on or about March 13, 2008, which granted the motion of Irving Bender and Neil Bender for letters of administration c.t.a. in the estate of William Gottlieb, dismissed the objections of Cheryl Dier and Michael Corbett in all respects, and denied the objectors' cross petitions for letters of administration c.t.a., and the order of

the same court and Surrogate, entered on or about March 20, 2008, which, to the extent appealed from, granted the motion of Irving Bender and Neil Bender to dismiss Corbett's objections to their appointment as preliminary executors of the estate of Mollie Bender, should be affirmed, without costs.

All concur.

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

ENTERED: MAY 18, 2010

CLERK