SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 18, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5063 Isuf Atashi, Index 23257/05
Plaintiff-Appellant,

-against-

Fred-Doug 117 LLC, et al.,
Defendants-Respondents.

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Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Garcia & Stallone, Deer Park (Eric N. Bailey of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 12, 2010, which, upon reargument, vacated a prior order, same court and Justice, denying defendants' motion for summary judgment dismissing the complaint and granted defendants' motion for summary judgment, unanimously affirmed, without costs.

Plaintiff, while on duty as a security guard, tripped and fell over a large flatbed dolly, as he entered a long basement corridor that led to the building's garage. According to the managing agent, tenants sometimes borrowed the dollies from building staff.

Defendants established, prima facie, that they did not create the alleged dangerous condition or have actual or constructive notice thereof.

Actual notice may be found where a defendant either created the condition, or was aware of its existence prior to the accident (*see Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 [1984] *affd* 64 NY2d 670 [1984]). In order to constitute constructive notice, a defect must be visible and apparent for a sufficient length of time to permit the defendant's employees to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Here, dollies were used by tenants of the building and there is no evidence that defendants created the condition that allegedly caused plaintiff’s accident. Whereas the court on the original motion had held that defendants failed to provide sworn testimony from a person with knowledge as to when the area was last inspected before plaintiff's fall, plaintiff's own deposition testimony established that about five hours before the accident, he did not see any objects in the corridor where he alleges he later tripped and fell. Further, since the accident occurred on a Saturday, plaintiff would have been the only employee present at the building during the time of his shift to have inspected the accident location on defendants' behalf.

In opposition, plaintiff failed to raise an issue of fact that defendants created the condition or had a reasonable opportunity to become aware of and cure the alleged defect (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Plaintiff did not produce probative evidence either as to how long the condition existed prior to the accident, or as to what personnel, apart from himself, could have learned of and/or cured the condition.

In light of the foregoing, we need not address defendants' contentions that they are entitled to summary judgment because the large dolly in the small corridor was an open and obvious condition and not inherently dangerous.

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

ENTERED: AUGUST 18, 2011

CLERK

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

4625 The People of the State of New York, Ind. 1514/09
Respondent,

-against-

Antoine Gray,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), and Chadbourne & Parke LLP, New York (Marcelo Blackburn of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 16, 2009, 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 whose prior felony conviction was a violent felony, to a term of 7½ years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court deprived defendant of his right to a public trial when it ordered the courtroom closed to the public, including defendant's family and girlfriend, during the testimony of an undercover officer. As the Supreme Court held in *Presley v Georgia* (558 US__, __, 130 S Ct 721, 724 [2010]) and the New York Court of Appeals reiterated in *People v Martin* (16 NY3d 607, 612

[2011]), the trial courts are required to consider alternatives to closure even when they are not offered by the parties. Here, the court summarily rejected, without comment, defendant's request to allow the presence of interested family members, including his girlfriend, and the record does not otherwise show that the court considered whether there existed any reasonable accommodations that would have protected the public nature of the criminal proceedings (*see Presley* (558 US at 48-49, 130 S Ct at 724-725; *Waller v Georgia*, 467 US 39, 48-49 [1984]). Accordingly, reversal is warranted (*Presley*, 558 US at __, 130 SCt at 725; *Martin*, 16 NY3d at 609).

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

ENTERED: AUGUST 18, 2011

CLERK

Tom, J.P., Mazzarelli, Acosta, Renwick, Freedman, JJ.

4819 Republic Mortgage Insurance Company, et al., Plaintiffs-Appellants, Index 603915/09

-against-

Countrywide Financial Corporation, et al., Defendants-Respondents.

Butler Rubin Saltarelli & Boyd LLP, Chicago, IL (James I. Rubin of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (Leo T. Crowley of counsel), for The Bank of New York Mellon Trust Company, N.A., respondents.

Reed Smith LLP, New York (John N. Ellison and Jean M. Farrell of counsel), for Countrywide Financial Corporation, Countrywide Home Loans, Inc., BAC Home Loan Servicing LP and Bank of America, N.A., respondents.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered August 25, 2010, upon an order, same court and Justice, entered July 27, 2010, which granted defendants' motions to compel arbitration and to dismiss the amended complaint pursuant to CPLR 3211 (a)(1) and (7), and denied plaintiffs' cross motion to stay arbitration, unanimously affirmed, without costs.

Initially, to reach the merits of plaintiffs' appeal, we exercise our discretionary authority, pursuant to CPLR 5520(c), to deem the inaccurate notice of appeal as valid to correct the procedural problem created here by plaintiffs' appeal from the order and not the judgment (*Robertson v Greenstein*, 308 AD2d 381 [2003], *lv dismissed* 2 NY3d 759 [2004]).

On the merits, the issue before us is whether Supreme Court correctly construed the arbitration provision found in five mortgage insurance policies that were issued by plaintiff insurers and held by defendant insureds. The policies cover the insureds, who are residential mortgage lenders and their affiliates, against losses caused by their borrowers' loan defaults. Each policy provides that

> "[u]nless prohibited by applicable law, the insured [under the policy], at its option, may elect to settle by arbitration a controversy, dispute, or other assertion of liability or rights which it initiates arising out of or relating to this [p]olicy, including the breach, interpretation, or construction thereof."

Starting in 2008, a dispute arose when plaintiffs denied the insureds' claims with respect to about 1600 loan defaults, contending that coverage with respect to those claims had been rescinded pursuant to the policies' terms because of alleged misrepresentations that the insureds made when applying for coverage or the insureds' borrowers made when applying for loans. The specifics of the dispute and its underlying merits are not at issue here.

In December 2009, plaintiffs and the insureds were attempting to negotiate a settlement of their dispute and the insureds had requested that plaintiffs enter into a tolling agreement to facilitate discussions. However, on December 31, plaintiffs filed this action seeking a declaration that their rescissions of coverage were consistent with the terms of the policies.

In January 2010, the insureds filed a demand for arbitration before the American Arbitration Association raising the same issues as those found in the amended complaint, and in February 2010 all defendants moved for an order dismissing the amended complaint and compelling arbitration, or in the alternative staying this action pending the arbitration. Defendants argued that the insureds were exercising their contractual right to elect to arbitrate disputes arising from the policies.

In their opposition and cross motion for an order staying arbitration, plaintiffs did not dispute that the parties had made a valid agreement to arbitrate and that the issues that the insureds had raised in the arbitration demand fell within the scope of that agreement. Rather, plaintiffs contended that the arbitration provision "permits the insured to arbitrate disputes which it initiates and *does not permit the insured to require arbitration* of any dispute initiated by [plaintiffs]," and "[s]ince [plaintiffs] initiated all the disputes asserted in its

[c]omplaint, they are not arbitrable."

In granting defendants' motion and denying the cross motion, Supreme Court correctly reasoned that the insureds' "right to initiate arbitration is not dependent on which party filed suit first." The court rejected the idea that the arbitration provision conditioned the right to require arbitration upon the insured filing a demand before plaintiffs commenced a court action.

That interpretation reflects the intent of the parties, since the clear purpose of the provision is to give the insured the option of arbitrating disputes. The provision does not mention any right of the insurer and does not condition the insured's right to arbitration on anything other than making a demand.

Plaintiffs urge this Court to construe the phrase "which [the insured] initiates" as modifying the phrase "controversy, dispute, or other assertion of liability or rights," and to hold that plaintiffs "initiated" the "dispute" by filing this lawsuit. However, that interpretation frustrates the purpose of giving the insureds the option to arbitrate. It also confuses a "dispute" with a "dispute resolution proceeding," although a proceeding to resolve a dispute under a contract simply is not the same thing as the dispute itself. Moreover, in this context, one party cannot be said to initiate a dispute. Instead, the dispute arises among the parties.

If one were to construe the arbitration provision to mean that plaintiffs did not have to arbitrate "disputes" that they "initiated," then the real issue before a court enforcing the provision would not be which party filed a lawsuit or arbitration demand first, but rather which "initiated" the underlying "controversy, dispute, or other assertion of liability or rights" under the policy. That question is essentially meaningless and impossible to answer (*see Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [2003] [a contract interpretation should not lead to a result that is absurd or "contrary to the reasonable expectations of the parties"]).

Moreover, plaintiffs' interpretation is commercially unreasonable because it countenances procedural gamesmanship. The parties to the policies could not have intended that the insurers could thwart the insureds' right to arbitrate by winning a race to the courthouse to file a declaratory judgment action before the insureds could file a demand for arbitration.

Thus, for the reasons stated, the parties did not intend the phrase "which [the insured] initiates" to modify "controversy, dispute, or other assertion of liability or rights," because the only logical way to construe the provision is to read the phrase as modifying the word “arbitration.” Although the phrase seems misplaced in the sentence in which it appears, clearly the parties’ reason for including it was to specify that an insured must exercise its option to arbitrate by initiating the proceeding. Contrary to plaintiffs’ view that our interpretation gives no effect to the phrase “which [the insured] initiates,” it makes the insureds’ right to require arbitration conditioned on their demanding it.

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

ENTERED: AUGUST 18, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5006 Nanjing USA, Inc., Index 100500/09
Plaintiff-Appellant,

-against-

Salvatore LaMonica, as chapter 7
Trustee of the Block Corporation,
Defendant-Respondent.

Bartels and Feureisen, LLP, White Plains (David Feureisen of counsel), for appellant.

LaMonica Herbst & Maniscalco, LLP, Wantagh (David A. Blansky of counsel), for respondent.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered August 17, 2010, awarding defendant the escrow deposit as liquidated damages on his first counterclaim, and bringing up for review an order, same court and Justice, entered August 6, 2010, which denied plaintiff Nanjing USA, Inc.'s (Nanjing) motion for summary judgment, granted, sua sponte, defendant summary judgment on his first counterclaim and awarded defendant $250,000 as liquidated damages payable from plaintiff's escrow deposit, and referred the matter to a special referee for a determination of attorneys' fees, costs and disbursements payable by plaintiff to defendant, unanimously reversed, on the law, without costs, the judgment vacated, defendant's counterclaims dismissed, plaintiff's motion for summary judgment granted and it is declared that plaintiff is entitled to the return of its $250,000 escrow deposit, and the matter remanded for further proceedings to include a determination of attorneys' fees, costs and disbursements payable by defendant to plaintiff.

Nanjing and Block Corporation are both in the business of distributing men's and women's clothing to national retailers for sale to the public. In 2008, Block proposed a deal in which Nanjing would replace Block as the vendor for certain retailers for the production and supply of pants. Nanjing agreed to purchase approximately $4 million of Block's existing pants inventory and to assume certain inventory replenishment programs with specified retailers, including Sears.

On or about October 27, 2008, Nanjing and Block entered into a Transition and Inventory Purchase Agreement. Block and Nanjing agreed that Block would continue to act as the supplier of the pants until December 31, 2008 (the Transition Date), and that Nanjing would acquire Block's inventory for an agreed price and take physical possession of that inventory no later than January 5, 2009.

The purchase agreement provided for a due diligence period, whereby, up until November 17, 2008, Nanjing had full access to Block's financial records and inventory for inspection purposes. Nanjing could cancel the parties' agreement "for any reason" up to the last date of the due diligence period, after which time, it was provided that:

> "4(c) [e]ither party shall also be entitled to cancel any portion of this Agreement thereafter with respect to a Retailer which does not approve the terms of Purchaser's New Program with such Retailer *or Purchaser shall be entitled to cancel this Agreement in its entirety if Sears does not approve the terms of Purchaser's New Program with Sears*.
>
> 4(d) In the event the Purchaser cancels this Agreement in its entirety pursuant to this paragraph 4, *the Escrow Agent shall immediately return all sums, if any, held in escrow to Purchaser* and all rights [and] obligations of the parties hereunder shall terminate without any liability of any party to any other party. (emphasis added)."

Paragraph 3(f) of the purchase agreement provided that Nanjing would deposit $250,000 into escrow simultaneously with the execution of the agreement, and that if Nanjing failed to close on the purchase, Block would be entitled to the $250,000 in escrow "as liquidated damages."

Andrew Tuorto, Nanjing's vice-president, averred that in early December 2008, Nanjing learned that Sears had expressed concerns over several material aspects of Nanjing's new pants program, including the quantities and styles of inventory to be purchased and the pricing, and, in particular, a specific style of putter pants that were a "major component" of the new pants program with Sears, accounting for $300,000 of the inventory to be purchased by Nanjing from Block. Tuorto averred that "[a]s of December 19, 2008, Sears could not provide a definitive answer as to whether or not it would fully accept this major component of the inventory to be purchased."

Tuorto averred that when it became clear that Sears would not approve Nanjing's new pants program by December 31, 2008 and stated that it would not consider such program until a meeting scheduled for January 6, 2009,[1] Nanjing faced the prospect of breaching the terms of the purchase agreement by not taking over Block's business as of the Transition Date, and by not making the payment due to Block on January 2, 2009. Accordingly, on December 29, 2008, Nanjing requested an extension of the payment date from Block to at least January 12, 2009. Block denied the request, asserting that "there does not appear to be any reason for a delay in closing the agreement." Tuorto averred that when Block refused its good faith attempts to extend the approaching deadlines in order to await a determination by Sears, it had "no choice" but to cancel the purchase agreement.

On December 30, 2008, Nanjing sent written notice of its

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[1]On December 28, 2009, Sears representative Dean Ochotnicki allegedly e-mailed Block's vice president (Rich Fingerhut) and Tuorto, Nanjing's vice president, to advise that Sears's review of Nanjing's new pants program would not take place until January 6, 2009. The Sears e-mail stated, "We can let you know the outcome after that meeting."

cancellation of the purchase agreement, pursuant to paragraph 4 of the purchase agreement, and demanded a return of its deposit, stating "As you know, Sears has not approved Nan[j]ing's New Program for a substantial portion of the subject inventory." Block refused and instead retained Nanjing's escrow deposit.

In January 2009, Nanjing commenced this action against Block seeking damages for breach of contract and a judgment declaring that it had "properly exercised its right to cancel the Purchase Agreement . . . upon Sears's failure to approve [] Nanjing's New [Pants] Program."

The Trustee answered and interposed counterclaims for a declaration that Nanjing was not entitled to a return of its escrow deposit, and that the Trustee was entitled to the escrow deposit as liquidated damages on account of Nanjing's breach and repudiation of its obligations under the purchase agreement.

Nanjing moved for summary judgment on its claims and dismissal of Block's counterclaims, arguing that the clear terms of the Purchase Agreement (i.e., ¶¶ 4[c] and 4[d]) authorized Nanjing to cancel the agreement in its entirety in the event Sears did not approve any part of its new pants program.

The Trustee opposed Nanjing's motion, arguing that it was "clear" that Nanjing "[was not] in a position to finance the transaction prior to the Transition Date," and that Nanjing had relied on the Sears e-mail as a pretext to cancel the agreement. The Trustee argued, in any event, that Sears had not rejected the new pants program.

In its decision on the motion, the court reasoned that the clear terms of the purchase agreement placed the burden on Nanjing, as vendee, "to negotiate the terms and provisions of the New Program with Sears." The court found that Nanjing had not met its burden "since the fact that Sears held a pants review meeting does not establish that Sears failed to approve its New Program."

The court concluded:

> "Since Plaintiff offers no proof that Sears failed to approve its New Program, it had no right to cancel the Purchase Agreement pursuant to ¶ 4. Plaintiff, therefore, is not entitled to the return of its escrow deposit pursuant to that paragraph."

The court searched the record and held that Block was entitled to summary judgment on its first counterclaim.

We now reverse. The purchase agreement provided that Nanjing could cancel it in its entirety if Sears did not approve the new pants program. There is no dispute that as of the date Nanjing exercised its contractual right of cancellation pursuant to paragraph 4(c), Sears had not approved Nanjing's new pants program. Thus, Nanjing properly exercised its right to cancel pursuant to the clear and unambiguous terms of paragraph 4(c) and is entitled to the return of its escrow deposit of $250,000.

The dispositive issue is not, as the motion court construed, whether Sears "failed to approve" the new pants program, but whether Sears had affirmatively approved Nanjing's program as of the date of the notice of cancellation. The uncontroverted evidence offered by Nanjing clearly demonstrates that Sears had not approved of Nanjing's new pants program by then. No issue of fact is thus presented and plaintiff Nanjing is entitled to summary judgment in its favor.

Because the agreement unambiguously provides that Nanjing was entitled to cancel in the event Sears did not approve of the new pants program, it is unnecessary to consider the intent of the parties. However, our reading of the agreement also comports with commercial logic. There is no provision in the agreement that suggests the parties intended Nanjing to assume the risk of a post-Transition Date non-approval by Sears. Even the provision the Trustee relies upon (i.e., that Nanjing was to negotiate the terms and provisions of its new pants program with Sears, ¶ 1[e]), gives no indication that Nanjing was to assume the risk of a closing without a Sears commitment to a new pants program. Sears's acceptance of Nanjing's new pants program was a material term of the agreement. Nanjing had no reason to purchase inventory for a replenishment program if the inventory was not going to be accepted by the retailer for resale.

The relevant cancellation provision explicitly authorized Nanjing to cancel the agreement in its entirety in the event Sears did not approve of the news pants program. Nanjing exercised its right as a result of Sears's inability to provide Nanjing with a definitive answer as to whether or not it would approve of the inventory by the transition date. Nanjing's good faith, reasonable request for an extension to await Sears's decision was refused by Block. Had Block acceded to the request, the deal might have been salvaged. Having properly exercised its contractual right to cancel the agreement, Nanjing is now entitled to an order directing summary judgment in its favor.

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

ENTERED: AUGUST 18, 2011

CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5036 ETF International Associates, Inc., Index 112100/08
Plaintiff-Appellant,

-against-

American Stock Exchange LLC,
Defendant-Respondent.

David H. Singer, New York, for appellant.

Friedman & Wittenstein, New York (Ivan O. Kline of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 22, 2010, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the causes of action for damages and an accounting, unanimously affirmed, without costs.

We agree with the motion court that the parties' consulting agreement, specifically Schedule C to the second amendment to the agreement, precludes plaintiff's claim for entitlement to compensation arising out of exchange-traded funds (ETFs) sponsored by nonparty ProFunds Advisors LLC, an investment advisory firm, listed and traded on the American Stock Exchange (AMEX) that were not included in Schedule C. That schedule contains a complete and specific listing of the ProFunds-sponsored ETFs for which plaintiff was entitled to compensation, in the event they (or their successors) were listed and traded on AMEX. The motion court correctly rejected, as a matter of law, plaintiff's argument that the phrase "including successor funds" must be construed to mean any ProFunds-sponsored ETFs not included in Schedule C that might be developed in the future by ProFunds. Such an interpretation would make the listing of funds on Schedule C unnecessary. The agreement could have said "all ETFs sponsored by ProFunds," but instead it limited compensation for such funds to those listed on Schedule C, along with their successors. In our view, the term "successor funds" is not ambiguous, and we do not require extrinsic evidence of the parties' understanding of its meaning; it has a plain meaning under the law. As with successor corporations and other successors in interest, the word successor applies to one who takes over the obligations or rights of another (*see* Black's Law Dictionary 1446 [7th ed 1999]; http://www.BusinessDictionary.com [defining "successor"]).

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

ENTERED: AUGUST 18, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5183- Nuevo El Barrio Rehabilitación Index 602698/06
De Vivienda y Economía, Inc.,
Plaintiff-Respondent,

-against-

Moreight Realty Corp., et al.,
Defendants,

Dunwell Los Tres, Inc.,
Defendant-Appellant.

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5184-
5185 Nuevo El Barrio Rehabilitación
De Vivienda y Economía, Inc.,
Plaintiff-Respondent-Appellant,

-against-

Moreight Realty Corp., et al.,
Defendants-Appellants-Respondents,

John Does, etc., et al.,
Defendants.

Herrick, Feinstein LLP, New York (Grant R. Cornehls of counsel), for appellants-respondents.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (Roger Juan Maldonado and Steven N. Blivess of counsel), for respondent/respondent-appellant.

Rosenberg, Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for Dunwell Los Tres, Inc., appellant.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 20, 2009, which granted the motion of defendants Moreight Realty Corp. (Moreight) and Los

Tres Unidos Associates (Los Tres) for summary judgment dismissing the first cause of action in the original complaint, denied the motion as to the second through seventh causes of action, and denied plaintiff's cross motion for partial summary judgment on the first cause of action, unanimously modified, on the law, to the extent of dismissing the second through sixth causes of action, and the seventh cause of action insofar as it is premised on breaches of the Land Disposition Agreement and on breaches of contract that occurred prior to August 1, 2000, and otherwise affirmed, without costs. Order, same court and Justice, entered October 20, 2010, which denied the motion of defendant Dunwell Los Tres, Inc. (Dunwell) for summary judgment dismissing the amended complaint as against it, unanimously reversed, on the law, without costs, the motion granted, and, upon a search of the record, summary judgment granted dismissing the amended complaint against Los Tres as well. The Clerk is directed to enter judgment in favor of Dunwell dismissing the amended complaint as against it and in favor of Los Tres dismissing the original and the amended complaint as against it.

The first cause of action in the original complaint alleged that a June 18, 1981 agreement between plaintiff, Moreight, and nonparty Harlem Urban Development Corp. (the June 18 Agreement) was void due to failure to comply with Not-for-Profit Corporation

Law § 510 and § 511. On appeal, plaintiff contends that the partnership agreements of Los Tres and the conversion of plaintiff's general partnership interest in Los Tres into a limited partnership interest were also void for the same reason. This issue is academic because the amended complaint, which supersedes the original complaint, does not seek to void the agreements and conversion (*see O'Ferral v City of New York*, 8 AD3d 457, 459 [2004]). Furthermore, plaintiff may not void the June 1981 Agreement and partnership agreements while asserting rights under them (*see 328 Owners Corp. v 330 W. 86 Oaks Corp.*, 8 NY3d 372, 383 [2007] [a party "cannot retain what is beneficial in the transaction, while disclaiming what is onerous" (internal quotation marks and citation omitted)]).

The second through sixth causes of action in the original complaint and the first through third causes of action in the amended complaint should have been dismissed. Plaintiff's right of first refusal, which is contained in the June 18 Agreement and the Amended and Restated Agreement of Limited Partnership of Los Tres (Amended Partnership Agreement), is triggered when Los Tres "determines to sell the Project" and "receives a bona fide offer to purchase the Project." Supreme Court's determination on a prior motion that the right of first refusal is ambiguous does not bind us (*see e.g. Martin v City of Cohoes*, 37 NY2d 162, 165

[1975]). In any event, Supreme Court did not find that the word "Project" was ambiguous but, rather, that other terms in the right of first refusal were ambiguous. The term "Project" is clearly and unambiguously defined in both the June 18 Agreement and the Amended Partnership Agreement. Thus, the motion court erred in considering extrinsic evidence such as the conduct of the parties (*see e.g. South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]).

The sale of stock of Moreight – Los Tres's general partner – does not constitute a sale of the Project (*see e.g. 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 323 [1984]) and therefore did not trigger plaintiff's right of first refusal (*see Torrey Delivery v Chautauqua Truck Sales & Serv.*, 47 AD2d 279 [1975]). Plaintiff may not rely on a Land Disposition Agreement (LDA), to which it is not a party and of which it is not a third-party beneficiary (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786-787 [2006]), to contradict the clear and unambiguous terms of the June 18 Agreement and Amended Partnership Agreement.

The seventh cause of action in the original complaint and the fourth cause of action in the amended complaint are asserted against Moreight only; these causes of action allege breaches of the June 18 Agreement, Los Tres's partnership agreements, the

LDA, and the covenant of good faith and fair dealing. Plaintiff may not raise any breaches that occurred more than six years before it commenced this action (*see* CPLR 213[2]), and it lacks standing to assert claims under the LDA because it is neither a party thereto nor a third-party beneficiary thereof (*see Mendel v Henry Phipps Plaza W., Inc.*, 16 AD3d 112, 113 [2006], *affd* 6 NY3d 783 [2006]). Although Moreight failed to make these arguments below, a purely legal argument may be considered for the first time on appeal (*see e.g. Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]).

Moreight's argument that plaintiff had no right to be consulted is unavailing; section 8 of the June 18 Agreement states, "Moreight shall keep [plaintiff] advised with respect to management policies and decisions and shall seek [plaintiff]'s advice with respect thereto. Moreight will arrange to have meetings with representatives of [plaintiff] at least quarterly." The issue of whether plaintiff waived its rights under section 8 is not suited to summary disposition (*see Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 [1917]).

The allegations in the amended complaint that Dunwell breached the June 18 Agreement and Amended Partnership Agreement should be stricken. Dunwell is not a signatory to either agreement. Thus, "no cause of action for breach of contract can be asserted against" it (*Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193, 193 [2005]).

While it is true that Dunwell was Moreight's sole shareholder from November 23, 2004 to September 9, 2005, there is no reason to pierce Moreight's corporate veil; the record contains no evidence that Dunwell "exercised complete domination of [Moreight] in respect to the transaction attacked" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]) or that Dunwell "through [its] domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [plaintiff] such that a court in equity will intervene" (*id.* at 142). "An inference of abuse does not arise . . . where a corporation was formed for legal purposes or is engaged in legitimate business" (*TNS Holdings v MKI Sec. Corp.,* 92 NY2d 335, 339-40 [1998]). Moreight was formed for legal purposes and was engaged in a legitimate business.

Contrary to plaintiff's contention, it is not necessary to hold a trial before deciding whether the corporate veil should be pierced (see *e.g. East Hampton Union Free School Dist. v*

Sandpebble Bldrs., Inc., 16 NY3d 775, 776 [2011] [affirming dismissal of alter ego claim]).

In light of the above disposition, we need not reach the parties' remaining arguments.

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

ENTERED: AUGUST 18, 2011

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CLERK

Tom, J.P., Saxe, Acosta, Freedman, Abdus-Salaam, JJ.

5200- In re New York City Index 107211/08
5201- Asbestos Litigation 190078/08
5202

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Lawrence Bernard, et al.,
Plaintiffs-Respondents,

-against-

Brookfield Properties Corporation, etc.,
Defendant,

Colgate-Palmolive Company,
Defendant-Appellant.

_ _ _ _ _

Lori Konopka-Sauer, et al.,
Plaintiffs-Respondents,

-against-

Colgate-Palmolive Company,
Defendant-Appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Adam M. Abensohn of counsel), for appellant.

Levy, Phillips & Konigsberg, New York (James M. Kramer of counsel), for respondents.

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered July 9, 2010, which denied defendant Colgate-Palmolive's Company motion for a commission to depose nonparty Rachel Sanborn, M.D., treating physician of the decedent Karen

Tedrick, unanimously affirmed, without costs. Order, same court and Justice, entered October 20, 2010, which denied Colgate's motion to reverse the Special Master's ruling barring it from deposing certain of the decedent Karen Tedrick's treating physicians, unanimously affirmed, without costs. Order, same court and Justice, entered November 23, 2010, which denied Colgate's motion to depose pathologists who diagnosed the decedent Shelly Bernard, unanimously reversed, on the facts and in the exercise of discretion, without costs, and the motion granted.

Colgate seeks to question Dr. Sanborn about a hobby allegedly involving asbestos that she mentioned in her consultation note on Karen Tedrick. Dr. Sanborn wrote that "[Tedrick's] father had some sort of hobby activity or other project in the family basement as the patient was growing up, which the patient's brother reports did involve having asbestos in the basement." Tedrick's brother, Richard Konopka, has already been deposed, however, and testified that this hobby referred to a chemistry set that he owned as a teenager. Because the information sought from Dr. Sanborn is available from another source, we agree with the motion court that Dr. Sanborn's deposition should not be compelled (*see Ramsey v New York Univ. Hosp. Ctr.*, 14 AD3d 349 [2005]; CPLR 3101[a][3]; 3101[a][4]).

Colgate seeks testimony from Tedrick's physicians about what Tedrick's chances for a full recovery would have been with traditional "multimodality" treatment instead of the alternative, naturopathic treatment she appears to have pursued. However, the information sought relates directly to diagnosis and treatment (*see Ramsey*, 14 AD3d at 350). Moreover, the physicians' records are available for review by Colgate's experts, who can offer their own testimony as to Tedrick's chances with conventional medical treatment.

Colgate seeks information from Shelly Bernard's treating physicians about Bernard's initial diagnosis of ovarian cancer (peritoneal mesothelioma was subsequently diagnosed). However, this information is available not only in the physicians' records but also, and more directly, in the pathology records and tissue samples already in Colgate's possession.

Colgate seeks to depose the pathologists who diagnosed the ovarian cancer and peritoneal mesothelioma. While the pathologists' records and the tissue samples upon which they are based may constitute an adequate alternative to deposing the pathologists, the precise nature of Bernard's affliction appears central to the resolution of this dispute. In view of the particular circumstances of this matter, we exercise our discretion in favor of further disclosure into a potentially dispositive issue.

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

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

ENTERED: AUGUST 18, 2011

CLERK

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

5223 John Harris P.C., Index 100201/10
Plaintiff-Appellant,

-against-

William S. Krauss,
Defendant-Respondent.

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John Harris P.C., New York, (John Harris of counsel), for appellant.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 11, 2011, which granted defendant's motion to vacate a default judgment, unanimously reversed, on the law, without costs, and the motion denied.

The court erred in granting defendant's motion pursuant to CPLR 5015(a)(1). Defendant did not submit competent evidence to establish either a reasonable excuse for the default or a meritorious defense. Defendant's affidavit submitted in support of the motion was not properly notarized, and therefore none of the allegations therein should have been considered by the motion court. Though the affidavit purports to be notarized by one "William E. Morris, notary public," Department of State records submitted by plaintiff indicate that no such person is licensed in New York as a notary public.

Defendant's status as an attorney cannot salvage the affidavit. While an attorney is entitled to "serve and file an affirmation bearing his signature alone in lieu of and with the same force and effect as an affidavit" under CPLR 2106, this provision is unavailing here because "even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action" (*Slavenberg Corp. v Opus Apparel Inc.*, 53 NY2d 799, 801 n [1981]).

Even if defendant's papers were procedurally proper, they do not establish a reasonable excuse or a meritorious defense necessary to vacate a default judgment. His failure to respond to the summons with notice was evidently a tactical decision. Though defendant alleges, on this motion, that he had disputed plaintiff's billings, the record does not reflect this. Indeed, defendant confirmed that he would pay amounts owing, without registering any objection to the amount stated.

We have considered the remaining contentions and find them unavailing.

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

ENTERED: AUGUST 18, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5440- John Wirth, et al., Index 107636/07
5441- Plaintiffs-Appellants-Respondents,
5442-
5443 -against-

Chambers-Greenwich Tenants Corp., et al.,
Defendants-Respondents-Appellants.

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Schnaufer & Metis, LLP, Hartsdale (John C. Schnaufer of counsel), for appellants-respondents.

Samuel Friedman, New York, for respondents-appellants.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 7, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on their first, second, and tenth causes of action, granted defendants' motion for summary judgment dismissing the first, second, third, sixth, seventh, ninth, and tenth causes of action, and partly granted defendant Chambers-Greenwich Tenants Corp.'s motion for summary judgment on its first counterclaim, unanimously modified, on the law, to grant plaintiffs' motion as to their first cause of action to the extent of enjoining defendants from requiring, as a condition for processing any application for the sale of plaintiffs' unit, that the proposed buyer be told that he or she must be certified as an artist by the New York City Department of Cultural Affairs, and to deny defendants' motion as to the first cause of action (to the extent indicated above), as to the second and third causes of action to the extent the board required the proposed buyers for plaintiffs' unit be certified artists, and as to the ninth and tenth causes of action, and otherwise affirmed, without costs. Order, same court and Justice, entered December 13, 2010, which, to the extent appealed from, granted plaintiffs' motion to reargue and, upon reargument, denied so much of defendants' motion for summary judgment as sought to dismiss the thirteenth cause of action and denied the co-op board's motion for summary judgment on its fifth counterclaim, unanimously affirmed, without costs. Appeal from so much of the order as denied plaintiffs' motion to renew, unanimously dismissed, without costs, as academic.

This action stems from a protracted dispute between plaintiffs cooperative shareholders and the board of directors of a five-story cooperative building located in lower Manhattan. In the late 1970's, the five-story building was converted from commercial to a residential cooperative. Plaintiffs, who are husband and wife, reside in Unit 5, which has exclusive use of the roof -- the root of the acrimonious relationship among the parties.

In early 2005, plaintiffs purchased shares for the unit from nonparty Paul Wallich, who had performed alterations to the roof for personal use that the co-op board deemed improper. As a result, in exchange for gaining the board's consent to Wallich's sale of his shares to plaintiffs, the seller agreed to place $20,000 in escrow to cover the cost of corrections of the improper alterations of the roof. At the same time, plaintiffs, as the buyers of the shares for unit 5, entered into an escrow agreement with the board with regard to the disbursement of the $20,000. Further, plaintiff agreed not to permit use of the roof until certain additional protective measures were undertaken on the roof to be pre-approved by both the co-op and the co-op's engineer, at plaintiffs' expense.

The relationship between plaintiffs and the board had an unauspicious beginning when the former placed astroturf on the roof without seeking the latter's approval. They also placed furniture and entertained guests on the roof without installing carry treads or taking other protective measures. Their relationship became increasingly strained when the board allegedly refused to review plaintiffs' apartment alterations plan, and plaintiffs refused to grant their consent to the release of the $20,000.

Meanwhile, in March 2007 plaintiffs received an offer from nonparty Chris Hoffman to purchase their shares for $1,485,000. No contract was signed, and in May 2007 Hoffman withdrew the offer when his lawyer learned that there was a plethora of problems between plaintiffs and the board that might have caused an inordinate delay of the closing. The lawyer also learned that the building may be used only for joint living-work quarters for artists (JAR).

Later, in October 2007, plaintiffs entered into a contract to sell their shares to nonparty Timothy Merrel for $1,485,000. The contract was conditioned upon a resolution by plaintiffs, by a certain date, of their disputes with the board. In November 2007, the board informed counsel that it would not process any application for the sale of the shares of unit 5 until certain conditions were met, including the resolution of the roof dispute and getting assurance from plaintiffs that the prospective buyer had been informed of the JAR residency requirement. In July 2008, Werrel cancelled the contract.

Eventually, plaintiffs resorted to litigation of these disputes by commencing this action alleging thirteen causes of action against the co-op and/or board members. The claims relevant to this appeal are as follows: The first cause of action seeks to enjoin defendants from imposing certain conditions before processing any future purchase application for the sale of plaintiffs' co-op shares, including the aforementioned JAR residence requirement. The second and third cause of actions similarly allege that defendants breached their fiduciary duty in that each of the defendants acted in bad faith with regard to plaintiffs' prospective purchasers (Merrel and Hoffman). The sixth and seventh causes of action similarly allege that defendant board members tortiously interfered with plaintiffs' prospective contracts with Hoffman and Merrel. The ninth cause of action seeks an injunction ordering defendants "to approve Plaintiffs' plans, as revised, for renovations to Unit 5." The tenth cause of action seeks, inter alia, to enjoin the use of Unit 3 as a dance studio. The thirteenth cause of action seeks "the reasonable counsel fees and expenses which Plaintiffs have incurred in prosecuting this action and defending against the Co-op's counterclaims."

Defendants aver several counterclaims against plaintiffs. The counterclaims relevant to this appeal are as follows. The first counterclaim seeks to compel plaintiffs to release the escrow funds, a declaration that the Co-op is entitled to enter and examine the roof, and an injunction against plaintiffs from interfering with such access. The fifth counterclaim seeks attorneys' fees.

With regard to plaintiffs' first cause of action, plaintiffs submitted irrefutable proof that defendant co-op board had no authority to require them to sell their unit as JARs. The business judgment doctrine does not apply when a co-op board acts outside the scope of its authority (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 153-154 [2003]; *Auerbach v Bennett*, 47 NY2d 619, 631 [1979]). The proprietary lease states, "The Lessee (except the Lessee of the ground floor unit) shall not occupy or use the unit . . . for any purpose other than residential purposes" (*Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 565 [1985] [The business judgment doctrine does not empower a co-op board to make a decision that the proprietary lease does not authorize it to make]).

Defendants' reliance on article 7-B of the Multiple Dwelling Law and *Saul v 476 Broadway Realty Corp.* (290 AD2d 254 [2002]) is misplaced. That statute provides that a building that at any time before January 1, 1977 was occupied for loft, commercial or manufacturing purposes may be used for joint living-work quarters for artists *or* general residential purposes (Multiple Dwelling Law § 277; *see also* § 277(7)(b). Unlike the building in *Saul*, the subject building has a certificate of occupancy for residential use. In addition, the building in *Saul* was in zoning district M1-5B, which allows only manufacturing uses, and the subject building is in zoning district M1-5, which allows both residential and nonresidential uses. Thus, Supreme Court should have granted plaintiff summary judgment on the first cause of action to the extent of enjoining defendants from requiring, as a condition for processing any application for the sale of plaintiffs' unit, that the proposed buyer be told that he or she must be certified as a JAR by the City Department of Cultural Affairs.

The court correctly granted defendants' motion for summary judgment dismissing the second and third causes of action to the extent they allege that the board's imposition of various conditions before it would process any application for the sale of plaintiffs' unit constituted a breach of fiduciary duty. Except for the JAR, these conditions are covered by the business judgment rule. However, since the board's decision on the JAR issue was clearly erroneous, the court improperly granted defendants' motion for summary judgment on their second and third causes of action to the extent plaintiffs seek damages for breach of fiduciary duty on the basis of defendants' imposition of such condition for their approval of the sale of plaintiffs' shares. There is at least a triable issue of fact whether it was made in good faith, since the board president relied on the advice of the building's architect (*see Matter of Folic*, 139 AD2d 456, 457-458 [1988]).

However, the third cause of action was properly dismissed to the extent it alleges breach of fiduciary on the president's statements. The statements do not amount to a tort separate from the disapproval of the sale (*see Kravtsov v Thwaites Terrace House Owners Corp.*, 267 AD2d 154, 155 [1999]). As for the board, plaintiffs failed to raise a triable issue of fact whether the board (through its president) acted in bad faith by making certain statements to the prospective buyer's attorney.

With regard to plaintiffs' tenth cause of action, plaintiffs' submissions on their initial summary judgment motion raised an issue of fact whether defendant president's use of her unit as a ballet studio should be enjoined: While dance studios are in zoning use group 8, the certificate of occupancy for the subject building states that it is in zoning use group 2 (residential use). Therefore, the court should not have granted defendants' motion for summary judgment dismissing the tenth cause of action. However, it correctly denied plaintiffs' motion for summary judgment on that cause of action, since defendants submitted some evidence that a ballet studio constitutes JAR use.

The court should not have granted defendants' motion for summary judgment dismissing the ninth cause of action, which alleges that they breached their fiduciary duty by refusing to approve plaintiffs' plans to renovate their unit. Plaintiffs raised triable issues of fact whether defendants withheld their consent due to malice or vendetta and whether they discriminated against plaintiffs (*see 40 W. 67th St.*, 100 NY2d at 157).

The court properly reinstated, upon reargument, plaintiffs' thirteenth cause of action (*see Foley v Roche*, 68 AD2d 558, 567 [1979]). In its original decision, the court said there was no basis for plaintiffs to seek attorneys' fees (the thirteenth cause of action) because, according to paragraph 28 of the proprietary lease, only the board was entitled to such fees. However, a basis is provided by the complaint, which plaintiffs submitted on their motion for partial summary judgment. It specifically mentions Real Property Law § 234, which provides for reciprocal rights for attorneys' fees. It alleges that the use of the president's unit as a dance studio is not permitted by the proprietary lease and it implies that the board is unreasonably withholding its consent for plaintiffs' renovation, a breach of lease section 21(a). As for the board's motion for summary judgment on its fifth counterclaim (for attorneys' fees), at this point it is premature to decide if the board is the prevailing party (*see e.g. Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279 [2004]).

Finally, the court properly found that the board was entitled to partial summary judgment on its first counterclaim. The court properly denied the portion of the first counterclaim seeking to compel plaintiffs to release the escrow funds because material questions of fact exist as to what, if any, obligations are imposed on plaintiffs with respect to the release of said funds. However, the court properly granted the part of the first counterclaim seeking a declaration that the co-op is entitled to enter and examine the roof and an injunction against plaintiffs from interfering with such access.

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

ENTERED: AUGUST 18, 2011

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5501 The People of the State of New York, Ind. 2082/09
Appellant,

-against-

Bonelly Fernandez,
Defendant-Respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for appellant.

Raymond J. Aab, New York, for respondent.

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about July 20, 2010, which granted defendant's motion to suppress physical evidence and statements, unanimously affirmed.

On April 25, 2009, at about 11:00 P.M., Police Officers Diaz, Walters and Bektashaj were on patrol in plainclothes in an unmarked car. While driving, Diaz's attention was drawn to defendant because, even though it was an unusually warm night, he was wearing a brown sweatshirt with the hood over his head, and he was crouching behind an SUV and looking at two men.

Diaz saw that defendant was holding something near his waistband, and suspected it was a gun. However, he could not see defendant's hand and did not see a weapon. Walters thought that defendant was holding something, inside the pocket of his sweatshirt, that may have been a weapon. However, when asked why defendant's particular hand position suggested a weapon, Walters said he did not know. Bektashaj thought that defendant was holding something in the pocket of his sweatshirt.

Based on these observations, the officers exited the car to investigate. With their shields displayed, Diaz and Bektashaj approached defendant from the front, and Walters approached from behind. When Diaz made eye contact, defendant turned away towards Walters and "basically walked into [him]."

Walters testified that he stopped defendant, whose hands were in the pocket of his sweatshirt, and asked him if he had any weapons on him. Defendant, who, Walters acknowledged, was not free to leave, said no, and Walters patted down the area where he saw defendant's hands. He felt a hard object and lifted up defendant's sweatshirt and removed a gun that was tucked into defendant's waistband. According to Bektashaj, who had not heard Walters ask defendant any questions, Walters reached for the gun as soon as he stopped defendant.

On this record, the officers, at most, had a common law right to inquire based on a "founded suspicion that criminal activity [was] afoot" (*see People v De Bour,* 40 NY2d 210, 223 [1976]), i.e., to ask defendant whether he had any weapons on him (*see People v Ward*, 22 AD3d 368 [2005], *lv denied* 6 NY3d 782]). They also had a right to ask him to remove his hands from his pockets as a precautionary measure (*see Matter of Anthony S.*, 181 AD2d 682 [1992], *lv denied* 80 NY2d 753 [1992]).

However, they did not have the reasonable suspicion that defendant had committed, was committing or was about to commit a crime that was required to justify forcibly stopping and detaining him (*see De Bour,* 40 NY2d at 223). And they did not have the additional reasonable suspicion that defendant was armed and dangerous that was required to justify frisking him (*see People v Batista*, 88 NY2d 650, 654 [1996]). The officers were on routine patrol and were not responding to a report of a crime. Walters testified that at the time he approached defendant, defendant was not breaking the law, and he did not see what was in defendant's sweatshirt pocket. Nor is there any testimony that defendant made any suspicious or threatening gestures towards the officers.

The fact that defendant’s hand was near his waistband or in his sweatshirt pocket, absent any indication of a weapon, such as the visible outline of a gun, did not create a reasonable suspicion that defendant had committed or was about to commit a crime (*see People v Sierra*, 83 NY2d 928, 930 [1994]; *People v Riddick*, 70 AD3d 1421, 1422-23 [2010], *lv denied* 14 NY3d 844 [2010]; *People v Santiago*, 64 AD2d 355, 361 [1978]). Nor does the fact that defendant was located in an alleged high crime area supply that requisite reasonable suspicion, in the absence of "other objective indicia of criminality" (*see People v Powell*, 246 AD2d 366, 369-370 [1998], *appeal dismissed* 92 NY2d 886 [1998]).

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

ENTERED: AUGUST 18, 2011

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

4344 Cora Cahan Gersten, et al., Index 603878/09
Plaintiffs-Appellants,

-against-

56 7th Avenue LLC, et al.,
Defendants-Respondents,

56 Seventh Avenue Corporation, et al.,
Defendants.

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Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (William J. Gribben of counsel), for appellants.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered July 15, 2010, modified, to declare that the 1999 luxury decontrol order is final, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Dianne T. Renwick
Sallie Manzanet-Daniels, JJ.

4344
Ind. 603878/09

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Cora Cahan Gersten, et al.,
Plaintiffs-Appellants,

-against-

56 7th Avenue LLC, et al.,
Defendants-Respondents,

56 Seventh Avenue Corporation, et al.,
Defendants.

____x

Plaintiffs appeal from an order and judgment of the Supreme Court, New York County (Louis B. York, J.), entered July 15, 2010, which granted defendants 56 7th Avenue LLC and Northbrook Management LLC's motion to dismiss the complaint.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (William J. Gribben and Ronald S. Languedoc of counsel), for appellants.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondents.

RENWICK, J.

The Court of Appeals recently rendered a decision with significant ramifications for the real estate industry in New York City. In affirming this court's decision in *Roberts v Tishman Speyer Prop. L.P. (*13 NY3d 270 [2009], *affg* 62 AD3d 71 [2009], *revg* 2007 NYSlip Op 32639[u] [2007]), the Court held that thousands of unregulated "market" apartments, at two Manhattan building complexes (Stuyvesant Town and Peter Cooper Village), were improperly removed from rent stabilization while the owners, Tishman Speyer and MetLife, received benefits under the City's J-51 Tax Abatement and Exemption Program.[1] The Court agreed with our statutory interpretation, thereby rejecting the Division of Housing and Community Renewal's (DHCR) regulation, which interpreted the Luxury Decontrol Statute[2] as permitting deregulation of rent stabilized apartments in buildings receiving J-51 benefits provided the building was already subject to rent regulation before the receipt of such benefits.

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[1] Under the Administrative Code of the City of New York § 11-243 (previously J-51), landlords receive tax benefits to offset the costs of renovations. Pursuant to the J-51 program, a landlord's receipt of tax benefits is conditioned on maintaining apartments as rent-stabilized (*see* 28 RCNY 5-03[f]).

[2] The Rent Stabilization Law of 1969 (RSL) provides for deregulation when the rent for a vacant apartment reaches $2000 (vacancy deregulation) or when the household income is $175,000 or more for two consecutive years and the legal regulated rent is $2000 or more (high income rent deregulation) (see RSL [Administrative Code of City of NY] §§ 26-504.1, 26-504.2).

The ramifications of *Roberts*, however, remain uncertain; the case left unresolved a number of issues, including those explicitly noted by the Court: "retroactivity, class classification, the statute of limitations and other defenses that may be applicable to particular tenants" (13 NY3d at 287). In this unrelated case, we are faced with some of these issues. They arise in a dispute between cotenants and a building owner. The owner took over the subject property in 2009, a decade after the former owner had deregulated the apartment pursuant to a 1999 DHCR luxury decontrol order. Plaintiffs, who are not the typical tenants intended to be protected by rent regulation, commenced this action seeking a declaration that the 1999 DHCR luxury decontrol order is void ab initio pursuant to *Roberts*. The answer depends on whether *Roberts* should be applied retroactively, and if so, whether the defense of statute of limitations or administrative finality may be invoked to give preclusive effect to the 1999 DHCR luxury decontrol order.

Factual and Procedural Background

The pertinent facts are essentially undisputed. Plaintiffs have lived on the 20th floor of a West Village apartment building since 1968. The first apartment they rented, #20H, was then rent controlled. Eleven years later, in 1979, plaintiffs rented an adjacent apartment, #20J, under a rent-stabilized lease. For 16 years, from 1979 to 1995, they occupied both apartments, and, in the 1980s, they combined the two apartments into one unit. In 1995, plaintiffs rented a third apartment, 20A, under another rent-stabilized lease. With the owner's consent, they combined all three apartments into one, creating an apartment that took up the building's entire 20th floor. The 20th floor apartment is 3,259 square feet in size, and contains four bedrooms, five bathrooms, an office, an eat-in kitchen, separate dining room, and a 20 foot by 34 foot living room. The combined rent for the apartment, under all three leases, was more than $2,000 per month.

In 1990, the building's prior owner began to receive J-51 tax benefits, which were to last 20 years. Such benefits officially remained in effect until June 30, 2009. In 1998, the building's prior owner filed a luxury deregulation petition with DHCR with respect to the combined 20th floor apartment. On the Income Certification Form that the predecessor owner sent plaintiffs, plaintiffs acknowledged that the collective rent for the combined 20th floor apartment was more than $2,000 per month, and that their annual household income was more than $175,000 for each of the two years preceding the petition. As noted above, at the time of the filing of the petition, the prior owner was receiving J-51 tax benefits.

In September 1999, DHCR issued an order deregulating the combined 20th floor apartment. Accordingly, once the rent-regulation terms of each of the three leases and the rental agreement expired, the 20th floor apartment became deregulated based on the DHCR decontrol order finding that the collective legal regulated rent exceeded $2,000 per month, and that the tenants' income exceeded the statutory threshold (RSL [Administrative Code of City of New York] 26-504.3[c][2]). Notably, plaintiffs never appealed the DHCR decontrol order through an administrative appeal; nor did they commence an article 78 proceeding.

On September 30, 1999, plaintiffs and the predecessor owner entered into a four-year lease for the 20th floor apartment. The initial rent was $5,000 per month, for a term ending on November 30, 2003. In September 2002, near the expiration of the four-year lease, plaintiffs and the predecessor owner negotiated terms for an extension of the lease; this next lease was for a nine-year term, beginning on December 1, 2003 and ending on November 30, 2012, with an initial rent of $6,000 per month.

In January 2008, defendant 56 7th Avenue LLC acquired the building, and defendant Northbrook Management LLC became the new managing agent (hereinafter defendants). When the new owner bought the building, no tax benefits under the J-51 program were in effect, and the new owner has never applied for any J-51 tax benefits.

In December 2009, after the Court of Appeals issued *Roberts*, plaintiffs commenced this action, seeking a declaration that the 1999 DHCR luxury deregulation order was invalid and demanding reimbursement for alleged rent overcharges for the past eleven years. Plaintiffs claimed that their lease should be rescinded, and that in its place, defendants should give them a new rent-stabilized lease. Plaintiffs claimed that because the building was receiving J-51 tax benefits in 1999, the predecessor owner was not entitled to deregulate the 20th floor apartment.

On July 15, 2010, Supreme Court granted defendants' motion to dismiss the action. The court held that DHCR's deregulation order was binding and that the court had no jurisdiction to set it aside 11 years after its issuance. The court stated, "Despite the decision in *Roberts* this court is without jurisdiction to grant [the] declaratory relief as the statute of limitations for Article 78 proceedings has expired and the court must respect the decision of DHCR in this type of proceeding." This appeal ensued.

<u>Interplay of J-51 Benefits and RSL</u>

To place this matter within its proper context, we must first examine the interplay of J-51 benefits and RSL. The City's J-51 tax incentive program allows property owners who complete qualifying multiple dwelling improvements to receive tax exemptions and abatements for a period of years. In exchange for receiving such benefits, the landlords subject their properties to the RSL (Administrative Code § 11-243). Accordingly, units not otherwise subject to rent stabilization become rent stabilized.

For example, section 5(a)(5) of the Emergency Tenant Protection Act of 1974 (as added by L. 1974, ch. 576, § 4) exempts from stabilization "housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after" January 1, 1974. A building that has been completely renovated for residential use after December 31, 1973, is therefore exempt from stabilization coverage (*see e.g. Wilson v One Ten Duane St. Realty Co.*, 123 AD2d 198, 201 [1987]). Where an owner, however, receives J-51 benefits in connection with such a renovation, the building will indeed be rent stabilized, for a period of time, by virtue of RSL (Administrative Code) § 26-504(c), which covers "[d]welling units in a building or structure receiving the benefits of section 11-243." (*see e.g. Matter of Eastern Pork Prods. Co. v New York State Div. of Hous. & Community Renewal*, 187 AD2d 320 [1992]).

Where the building only became subject to rent regulation due to its participation in the J-51 program, RSL [Administrative Code] § 26-504(c) expressly provides that once the tax benefits terminate, the units may be deregulated in one of two ways. One way is for the owner to include a J-51 rider in the lease informing the occupant that the apartment will be deregulated upon the termination of the benefit (*id.*; Rent Stabilization Code (RSC) [9 NYCRR § 2520.11[o]. If the lease does not contain the requisite notice, occupied units remain subject to rent stabilization until a vacancy occurs after the expiration of the J-51 benefits (*see East Renovating Co. v New York State Div. Of Hous & Community Renewal,* 16 AD3d 166 [2005]; *Matter of Lomagno v Division of Hous. & Community Renewal*, 38 AD3d 897 [2007]).

Owners of rent regulated buildings also frequently apply for and receive J-51 benefits for such routine work as boiler installations, new windows, elevator upgrades and the like. The receipt of J-51 benefits under such circumstances has no effect on the building's rent-regulated status. That is, a rent stabilized building will be rent stabilized before, during and after the receipt of J-51 benefits. This much was clear before *Roberts*.

What was unclear before *Roberts was* whether individual rent-stabilized units may be subject to high-rent/high-income deregulation in buildings receiving J-51 benefits. In 1993, the legislature enacted the Rent Regulation Reform Act (RRRA [as added by L 1993, Ch 253]), which provided for the luxury decontrol or deregulation of rent stabilized apartments if the regulated monthly rent was at least $2,000 and the apartments were either vacant or occupied by occupants with a combined annual income of more than $250,000 (former RSL [Administrative

Code] § 26-504.3). The income threshold was later lowered to $175,000 (RSL [Administrative Code] § 26-504.1). The RRRA, however, also provided that luxury decontrol would not apply to units which "became or become" subject to rent stabilization "by virtue of receiving" J-51 tax benefits (RSL [Administrative Code] §§ 26-504.1, 26-504.2[a]).

In 1996, DHCR issued an advisory opinion that participation in the J-51 program precluded luxury decontrol *only* where the receipt of J-51 benefits was the *sole reason* for the imposition of rent regulation *(Roberts,* 13 NY3d at 281 [internal quotation marks omitted]). In 2000, DHCR incorporated that position into the Rent Stabilization Code, stating that luxury decontrol shall not apply to housing units which "became or become" subject to rent stabilization "*solely* by virtue of the receipt" of J-51 tax benefits (*id*. at 282 [internal quotation marks omitted]).

At some point after the enactment of the RRRA, according to *Roberts*, MetLife began charging market-rate rents in units in the Stuyvesant Town and Peter Cooper Village properties where the conditions for high rent/high income luxury decontrol were met (13 NY3d at 282). In January 2007, nine individuals residing in these apartment complexes sued MetLife on behalf of a putative class of all current and former tenants who were, or would be, charged rents exceeding the rent stabilization limits for any period during which the landlord received J-51 benefits (*id.*).

The plaintiffs sought a declaration that units in the properties would remain rent stabilized as long as J-51 benefits were received, along with rental overcharges totaling $215 million and attorneys' fees (*id.*).

Supreme Court dismissed the complaint, agreeing with DHCR's position that the exception to luxury decontrol did not apply because the properties "did not become subject to rent stabilization by virtue of receiving" J-51 benefits (2007 NY Slip Op 32639[u]). This Court, however, reversed and reinstated the complaint, concluding that owners who receive J-51 benefits forfeit their luxury decontrol rights even if their buildings were already subject to the RSL (62 AD3d at 71). On appeal, the Court of Appeals affirmed, reasoning "that [DHCR's] interpretation of the exception to luxury decontrol for units that 'became or become' subject to rent stabilization 'by virtue of receiving' J-51 benefits conflicts with the most natural reading of the statute's language" (13 NY3d at 286). Such an interpretation, the Court explained, would essentially recognize two categories of J-51 buildings -- those that were already rent stabilized and those that "became rent stabilized as a condition of receiving J-51 benefits" (*id.*). "But there is no language anywhere in the statute delineating these two supposed categories, and we see no indication that the Legislature ever intended such a distinction," the Court said (*id.*). Moreover, turning to the legislative history, the Court pointed to the RRRA's sponsor's statement that "at no point" would luxury decontrol be available to buildings receiving J-51 tax benefits (*id.*).

Discussion

On this appeal, plaintiffs argue — and defendants do not dispute — that the 20th floor apartment was deregulated in 1999, while the predecessor owner was still receiving J-51 benefits. According to plaintiffs, under *Roberts*, that deregulation was actually illegal. Thus, plaintiffs argue, the DHCR order is void ab initio.

A. Retroactivity

Defendants, however, urge this Court to apply *Roberts* prospectively only, which we decline to do. In the seminal case of *Gurnee v Aetna Life & Cas. Co.* (55 NY2d 184 [1982], *cert denied* 459 US 837 [1982]), the Court of Appeals adopted the three-pronged test announced by the U.S. Supreme Court in *Chevron Oil Co. v Hudson* (404 US 97 [1971]), for determining whether a ruling should be applied prospectively only. "'First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed'" (*id*. at 192, quoting *Chevron Oil Co.*, 404 US at 106). Second, a court should consider the history of the prior rule and examine the impact of retroactive application on the rule's purpose (*id.* at 192). Third, any inequity that would result from retroactive application should be considered (*id.*).

The facts of *Roberts* do not satisfy even the first prong of the *Gurnee* three-prong analysis. Courts have consistently held that judicial statutory construction does not create a new principle of law (*see e.g. Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 192 [1982]; *Ramirez v Mansions Catering, Inc.*, 74 AD3d 490, 492 [2010]). For example, in *Gurnee*, the Court of Appeals held that its decision in *Kurcsics v Merchants Mut. Ins. Co.* (49 NY2d 451 [1980]), construing Insurance Law § 671, should apply to pending cases (55 NY2d at 194). Insurance Law § 671 provided that a person injured in a car accident could recover first-party benefits of 80% of lost salary to a maximum of $1,000. In *Kurcsics,* the Superintendent of Insurance's reading of the statute was that recovery was limited to $800, 80% of a maximum of $1,000 (49 NY2d at 458-459). The Court of Appeals disagreed, holding that the language of the statute permitted recoveries of up to $1,000 if that amount represented 80% of an injured person's lost salary (*id.* at 458).

The *Gurnee* Court explained that *Kurcsics* did not represent an "abrupt shift" in controlling case law; it merely represented the Court's first opportunity to interpret the language of the statute (*Gurnee*, 55 NY2d at 191). Noting that the State Insurance Department had adopted regulations taking a contrary view to the one it adopted in *Kurcsics*, the Court stated that a decision construing statutory language "does not constitute the creation of a new legal principle" (55 NY2d at 192). Finally, the Court found that "the definitional language of section 671 itself foreshadowed the conclusion this court first had the opportunity to express in *Kurcsics*" (*id.*).

The facts of *Roberts* are indistinguishable from *Gurnee*. Although *Roberts's* interpretation of the statute is inconsistent with regulations promulgated by DHCR, the Court has not enunciated a new principle of law. Instead, as in *Gurnee*, the decision in *Roberts* was based on a pure statutory analysis, "dependent only on [an] accurate apprehension of legislative intent" (*Roberts*, 13 NY3d at 285, quoting *Kurcsics*, 49 NY2d at 459 [1980]). As such, *Roberts* did not establish a new legal principle, but rather "merely construed a statute that had been in effect for a number of years" (*Gurnee,* 55 NY2d at 192).

Since no "new rule" was pronounced in *Roberts*, *Gurnee* mandates that *Roberts* must be applied retroactively (see *72A Realty Associates v. Lucas,* 28 Misc 3d 585 [Civil Court of the City of New York, New York County] *affd* 2011 NY Slip Op 21188 [App Term, 1st Dept. 2011] [holding that *Roberts* must be applied retroactively because "[a] judicial decision construing the words of a statute [] does not constitute the creation of a new legal principle" quoting *Gurnee*, 55 NY2d at 192]). Nor has defendant presented any basis here for disturbing the presumption that the *Roberts* holding be accorded retroactive effect (*see People v Favor*, 82 NY2d 254, 262-263 [1993]). On the contrary, as in *Gurnee*, the ruling in *Roberts* was clearly foreshadowed in view of the clear language of the statute. Moreover, the equities do not favor only prospective application of *Roberts*. The impact of retroactive application of Roberts would be to protect, where applicable, tenants from rent increases in excess of those allowed by the RSL. A contrary ruling would essentially allow landlords throughout the City to collect rent in excess of those allowed by the RSL based upon a faulty statutory interpretation.

B. Statute of Limitations

Alternatively, defendants argue that under statute of limitations principles this Court must still preclude the 1999 DHCR luxury decontrol order. Specifically, defendants argue that a challenge to the deregulated status of an apartment is subject to the six-year statute of limitations period set forth in CPLR 213[2], which is applicable to "an action upon a contractual obligation or liability." Characterizing plaintiffs' claim as essentially seeking a rescission of a contract — the 1999 lease — defendants argue that the action is time-barred as having been commenced more than six years after the inception of the lease.

In support of its position, defendants rely exclusively on this Court’s decision in *Oxford Towers Co., LLC v Wagner* (58 AD3d 422 [2009]), which we find inapposite.

Oxford Towers involved the application of the six-year statute of limitations to a lease agreement of an apartment that became deregulated. Specifically, the plaintiff-landlord sought to rescind a 1995 written agreement it had entered with the defendant-tenant that provided for successive renewals of the parties’ residential lease in the event the apartment became deregulated by operation of the RSL (58 AD3d at 422). The tenant moved to dismiss the complaint arguing that the six-year statute of limitations applied. The landlord countered that the agreement was void ab initio as against public policy (*id.*). We affirmed the Supreme Court’s dismissal of the action as barred by the six-year statute of limitations and rejected the landlord’s public policy argument (*id.*). We held that the 1995 agreement was not void ab initio as against public policy because the parties did not deregulate the apartment by the private agreement (*id.* at 422-423).

Here, however, the tenant-landlord dispute arises out of a rent-stabilized lease, and not out of a written agreement outside the lease. A landlord-tenant relationship under a rent-stabilized lease is principally defined and governed by statute. When a rent-stabilized tenant's initial lease expires, the tenant becomes a so-called "statutory tenant." By law, every provision of a tenant's original rental agreement remains part of the landlord-tenant relationship imposed on the parties for the remainder of the tenant's occupancy of the unit. Thus, pursuant to RSL, the rent regulated status of an apartment is a continuous circumstance that remains until different facts or events occur that change the status of the apartment. This Court considers such legislative mandate so sacrosanct as to be impervious to waiver. Accordingly, this Court has held that parties to a rent-stabilized lease may not "contract out of rent stabilization," even where their agreement bestows obvious advantages on the tenant (*Drucker v Mauro*, 30 AD3d 37, 42 [2006], *appeal dismissed* 7 NY3d 844 [2006]).

Under the circumstances, a tenant should be able to challenge the deregulated status of an apartment at any time during the tenancy. Indeed, courts have uniformly held that landlords must prove the change in an apartment's status from rent stabilized to unregulated even beyond the four-year statute of limitations for rent overcharge claims. *East Renovating (16 AD3d at 166)* illustrates the point (16 AD3d 166). In *East Renovating*, the apartment became subject to rent stabilization when the owner began to receive J-51 tax benefits. Subsequently, on October 1, 1992, the tenant signed a one-year lease. Because the J-51 benefits were not going to expire until June 30, 1993, the law required that the lease include a J-51 notice that the apartment was to become deregulated on or about June 30, 1993 (16 AD3d at 166). After 1993, the tenant entered into various deregulated leases for the apartment. Eight years later, in 2000, the tenant filed a rent overcharge complaint. The owner responded by stating that the apartment had become deregulated when J-51 benefits expired in 1993, more than four years before the overcharge complaint was filed. DHCR found that the landlord failed to prove that it had provided the tenant the J-51 notice. As a result, DHCR found that the apartment did not become destabilized after expiration of the J-51 benefits, and that petitioner willfully overcharged the tenants a free market rent (*id*. at 167).

The landlord then brought an article 78 proceeding to challenge DHCR's determination, asserting primarily the defense that the four-year statute of limitations against rent overcharge complaints barred DHCR from reaching the issue of whether the apartment became destabilized after expiration of the J-51 benefits. Supreme Court dismissed the petition. On appeal, this Court affirmed the dismissal, concluding that the record amply supported DHCR's finding that the landlord failed to provide the J-51 notice that the apartment was to become deregulated (16 AD3d at 167). As for the statute of limitations defense, this Court held:

> "In fixing the overcharge, DHCR set a base date of January 20, 1996, four years prior to the filing of the overcharge complaint, and calculated the lawful increases forward from that date based on the free market rent that the tenants were paying immediately prior to the base date. We reject petitioner's argument that by so doing, DHCR improperly considered events surrounding the execution of the 1992 lease more than four years prior to the filing of the rent overcharge complaint in January 2000 in violation of Rent Stabilization Law [Administrative Code of City of NY] §26-516(a)(2). DHCR's consideration of events beyond the four-year period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is deregulated [*id*.]."

While the statute of limitations defense rejected in *East Renovating* was the four-year statute applicable to rent overcharge claims, the reasoning for its inapplicability to a rent regulatory status claim extends with equal force to the six-year statute of limitations applicable to breach of contract actions. In our view, imposing such limitations on determining rent regulatory status subverts the protection afforded by the rent stabilization scheme described above. Indeed, except as to limit rent overcharge claims, the legislature has not imposed a limitations period for determining the rent regulatory status of an apartment.

C. <u>Finality of DHCR Order Deregulating Apartment</u>

Notwithstanding our retroactive application of *Roberts* and rejection of the six-year statute of limitations defense, defendants argue that we must still give preclusive effect to the 1999 DHCR deregulation order under administrative finality principles. On this issue, we agree with defendants.

We must give preclusive effect to the 1999 DHCR luxury decontrol order to the extent we find that collateral estoppel precludes plaintiffs from raising the issue of whether the 20th floor apartment was improperly removed from rent stabilization under the luxury decontrol statute 11 years prior to the commencement of this action.

Collateral estoppel applies when (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 [1984]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Collateral estoppel is equally applicable to confer conclusive effect to the quasi-judicial determination of an administrative agency (*Ryan*, *supra*, 62 NY2d at 499). While the proponent of collateral estoppel has the burden of demonstrating that the issue in question is identical and decisive, it is the opponent's burden to show the absence of a full and fair opportunity to litigate the issue in the prior determination (*id.* at 501).

Three of the elements necessary for the application of collateral estoppel cannot be seriously disputed here because (1) the issue before DHCR, whether the subject apartment was properly removed from rent stabilization by luxury decontrol, is identical to the issue before the motion court and this Court, and (2) the issue was fully litigated and (3) decided in the DHCR proceeding.

Significantly, courts have consistently held that, unless a party can demonstrate the absence of a full and fair opportunity to litigate the issue of the rent-stabilized status of an apartment before DHCR, the agency's determination on this issue is entitled to collateral estoppel effect precluding the relitigation in court of the same issue determined before the agency (*see e.g. 9-10 Alden Place v Chen*, 279 AD2d 618 [2001]; *Grassini v Paravalos*, 270 AD2d 52 [2000]; *see also Lorcorp, Inc. v Burke*, 185 Misc 2d 720, 722-723 [2000]). That is precisely the finding of *Grassini* where this Court held that Supreme Court had properly invoked collateral estoppel to resolve the plaintiff's claim that she was entitled to possession of an apartment as a rent-stabilized tenant, since the defendant failed to show that it did not have a full and fair opportunity to litigate the plaintiff's status as a rent-stabilized tenant in the prior rent overcharge proceeding before DHCR (270 AD2d 52-53).

Similarly, in *9-10 Alden Place (*279 AD2d at 628-619*)* the

Second Department held that the DHCR determination, that the defendant tenant's lease for a rent-stabilized apartment was not the product of fraud, was entitled to collateral estoppel effect since the plaintiff landlord failed to establish that it did not have a full and fair opportunity to litigate the fraud issue before DHCR (279 AD2d 618). Accordingly, the Second Department affirmed the motion court's dismissal of the complaint on the ground that the action was barred by the doctrine of collateral estoppel (*id.*).

Collateral estoppel is also proper in the instant case because we are convinced that plaintiffs had a full and fair opportunity to litigate before DHCR whether their apartment was subject to luxury decontrol. The RSL sets forth an elaborate procedure for luxury deregulation (*see* RSL [Administrative Code of City of NY] § 26-504.3). The deregulation process begins when the owner of a rent-stabilized apartment, having a legal regulated rent of at least $2,000 per month, furnishes the tenant with an income certification form, triggering the tenant's duty to certify whether the combined household income was above $175,000 for each of the two previous years (*id.* at § 26-504.3[b]). If the tenant certifies that the income was below the threshold amount and the owner contests such certification, the owner may ask DHCR to verify the household income (*id.* at § 26-504.3[c][1]). DHCR must then request the necessary information from the tenant to allow NY State Department of Taxation and Finance (DTF) to verify the household income (*id.*). In the event DTF determines that the income surpasses $175,000 for each of the two previous years, DHCR must notify the parties and allow them 30 days to comment on the results (*see* § 26-504.3[c][2]). Thereafter, "[w]ithin forty-five days after the expiration of the comment period, the division shall, where appropriate, issue an order providing that such housing accommodation shall not be subject to the provisions of this law upon the expiration of the existing lease" (*id.*) A tenant aggrieved by a DHCR deregulation order may challenge it first in a Petition for Administrative Review (PAR) before DHCR, and if still dissatisfied with the result, the tenant may seek review before Supreme Court in a proceeding under article 78 of the CPLR.

In light of this elaborate statutory scheme, it is abundantly clear that plaintiffs here had ample opportunity to challenge the prior owner's application for luxury decontrol as being precluded by the receipt of J-51 benefits. That DHCR never held a hearing on the luxury decontrol application is of no moment. While the Rent Administrator had the authority to order a hearing (RSC [9 NYCRR] § 2107.5[h]), plaintiffs never asked DHCR for one. Thus, it can reasonably be inferred that the decision by DHCR not to hold a hearing was the result of plaintiffs' failure to raise factual issues regarding the prior owner's luxury decontrol application. Nor can plaintiffs now shift the blame to defendants for any lack of knowledge of the J-51 benefits. The receipt of J-51 benefits is a matter of public record. In addition, landlords have no affirmative duty to provide such written disclosure except to tenants who are subject to rent stabilization *solely* because of the receipt of J-51 benefits (RSL [Administrative Code] § 26-504[c]; RSC [9 NYCRR] § 2520.11[o]), which is not the situation here. In any event, DHCR made public its policy on the issue — namely that J-51 benefits had no bearing on a landlord's right to apply for luxury decontrol – when it issued an advisory opinion in 1996, which it incorporated into the RSC in 2000. Thus, since it appears that nothing prevented plaintiffs from raising the J-51 benefits issue before DHCR, plaintiffs are now estopped from relitigating the issue 11 years later.

We are, however, mindful of the fact that, notwithstanding the general rule of administrative finality — giving res judicata or collateral estoppel effect to an administrative agency ruling — DHCR has the discretion to reconsider its determinations under certain circumstances. For instance, RSC (9 NYCRR) § 2527.8 provides that "[t]he DHCR, on application of either party, or on its own initiative, and upon notice to all parties affected, may issue a superseding order modifying or revoking any order issued by it under this or any previous Code where the DHCR finds that such order was the result of illegality, irregularity in vital matters or fraud." The Court of Appeals has confirmed DHCR's broad powers and authority to alter its prior determinations on remission (*see e.g. Matter of Alamac Estates v McGoldrick*, 2 NY2d 87, 89-90 [1956]; *Matter of Yasser v McGoldrick*, 306 NY 924 [1954]; *see also Matter of Alcoma Corp. v New York State Div. of Hous. & Community Renewal*, 170 AD2d 324 [1991], affd 79 NY2d 834 [1992]). "In addition, this Court has held that the DHCR may reverse a prior determination, even long after the time to appeal has expired, where the initial order resulted from 'illegality, irregularity in vital matters, or fraud'" (*Matter of Sherwood 34 Assoc. v New York State Div. of Hous. & Community Renewal*, 309 AD2d 529, 531 [2003] quoting *Luchetti v Office of Rent Control, Dept. of Rent & Hous. Maintenance, Hous. & Dev. Admin. of City of NY*, 49 AD2d 532, 532 [1975]).

However, "[o]nce an administrative agency has decided a matter, based upon a proper factual showing and the application of its own regulations and precedent, the parties to that matter are entitled to have the determination treated as final" (*Matter of Peckham v Calogero*, 54 AD3d 27 [2008], *affd* 12 NY3d 424 [2009]). Although, as noted above, a remand may be appropriate where the agency has made the type of substantial error that constitutes an "irregularity in vital matters" (*Matter of Porter* *v New York State Div. of Hous. & Community Renewal*, 51 AD3d 417 [2008], *lv denied* 11 NY3d 703 [2008] [internal quotation marks omitted]), a final administrative determination cannot be reopened to give a party an opportunity to make a new argument based on the existing administrative record (*Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 43 AD3d 314, 315 [2007], *affd* 10 NY3d 846 [2008] [no remand is appropriate where a party is "merely seeking a second chance to reach a different determination on the merits"] [internal quotation marks omitted]). That is simply not one of the recognized exceptions to the principle of administrative finality. Thus, having failed to raise the new legal challenge to the former owner's initial application with DHCR, that theory cannot be made the basis of an administrative reconsideration eleven years later.

The Court of Appeals made this exact point more than 30 years ago in *Matter of 54/55 Sixth Realty Corp. v Leventhal* (42 NY2d 935 [1977]), a case with facts strikingly similar to this case. In *Matter of 54/55 Sixth Realty Corp,* the Court affirmed the annulment of respondent's determination to revoke a prior administrative order decontrolling the rent on an entire penthouse apartment pursuant to the "luxury" apartment rent decontrol provisions of the New York City Rent, Eviction and Rehabilitation Regulations (42 NY2d at 935-936). The stated basis for the respondent's revocation of the rent decontrol order was the landlord's failure to disclose that for 30 years the penthouse had been separately occupied as two self-contained apartments, in conflict with the certificate of occupancy (42 NY2d at 360. Under the express provisions of the Administrative Code of the City of New York and the Rent, Eviction and Rehabilitation Regulations then in force, luxury apartment rent decontrol was only available to premises occupied for single-family occupancy and thus, as the respondent argued, the original decontrol order was violative of the law. Here, plaintiffs similarly argue that the DHCR luxury decontrol order should be revoked as the landlord's receipt of J-51 benefits was not previously revealed.

The rent control regulations in effect in *Matter of 54/55 Sixth Realty Corp.* incorporated the New York common-law standard of finality of administrative determinations, previously discussed, permitting revocation of a prior order only upon a showing of "illegality, irregularity in vital matters, or fraud" (51 AD2d at 715 [internal quotations omitted]). In that case, the majority in the Appellate Division held that the "[r]espondent's failure to discover facts [regarding the dual occupancy of the penthouse apartment] within its own files" did not amount to such "illegality, irregularity in vital matters, or fraud" (*id.* at 715 [internal quotations omitted]). The Court of Appeals agreed that the belated discovery of facts within the agency’s own files was “not the type of irregularity contemplated by . . . the regulations" (42 NY2d at 937).

In our view, *Matter of 54/55 Sixth Realty Corp.* is, a fortiori, controlling. Here, as in *Matter of 54/55 Sixth Realty Corp.,* the facts required for revocation of the original DHCR determination (the receipt of J-51 benefits) were available from the public record, and explicitly disregarded by DHCR as irrelevant to luxury decontrol because, pursuant to the DHCR policy discussed above, the receipt of J-51 benefits was not the “sole reason” for the imposition of rent regulation. Consequently, we find no inherent power on the part of DHCR, in the instant case, to revoke its previous acceptance of the former owner’s petition for luxury decontrol.

Most recently, in *Matter of Peckham v Calogero* (12 NY3d 424 [2009], *affg* 54 AD3d 27 [2008], *revg* 2007 NY Slip Op 32087[u] [2007]), the Court of Appeals reiterated the point applicable here -- that where the administrative record is complete, the courts may not order a remand in order to provide the agency with a second chance to reach a different decision on the merits. In *Peckham*, the predecessor landlord filed an application with DHCR requesting permission not to renew the tenant’s rent stabilized lease because it was going to demolish the building (12 NY3d at 428). The Rent Administrator granted the landlord’s application and DHCR denied the tenant’s PAR (*id.* at 428-429). The tenant argued before the Rent Administrator that the landlord's project was not a demolition because its application with Department of Buildings listed it as a reconstruction or alteration rather than a demolition (54 AD3d at 429). In his PAR, petitioner-tenant abandoned this argument; his only demolition-related argument was that the landlord had performed demolition before its application was approved. In his article 78 proceeding, the tenant made a legal argument, for the first time, that DHCR lacked appropriate standards for what constitutes a demolition (12 NY3d at 429). Supreme Court granted the petition to the extent of remanding the matter to DHCR "to clarify the standard used to determine a 'demolition' and whether this project is a 'demolition,' and to clarify the financial ability of Chelsea [Partners] to complete the project" (2007 NY Slip Op 32087[u]).

In a split decision, the Appellate Division reversed (54 AD3d at 28). We found that the record before DHCR was quite sufficient to permit it to determine whether the owner had demonstrated financial ability to complete the project and whether the planned work constituted a demolition (id.). In addition, this Court found that the agency's determinations of those issues were rational and completely in accord with well established principles (*id*). Under the circumstances, this Court found, there was no legitimate ground for the remand by the motion court (*id*. at 29). The Court of Appeals agreed, explaining, inter alia, that the role of a court in an article 78 proceeding is simply to determine whether DHCR's action is arbitrary and capricious, that is, whether it is taken without sound basis in reason or regard to the facts (12 NY3d at 431). "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*id.*). Here, similarly, a remand to DHCR is inappropriate for it would be tantamount to allowing plaintiffs to seek a different result than the one reached by DHCR on a new legal theory never advanced before the agency prior to the commencement of this action.

Conclusion

The outcome of this case hinges on whether *Roberts* renders the 1999 DHCR luxury decontrol order void ab initio. Preliminarily, we reject defendants' argument that *Roberts* should be given only prospective application. Nor do we find any merit to defendants' argument that we must give preclusive effect to the 1999 DHCR luxury decontrol order because the action was commenced well beyond the six-year statute of limitations applicable to claims arising from strictly contractual obligations. Nevertheless, we do find meritorious and dispositive defendants' argument that we must treat the 1999 DHCR luxury decontrol order as final under collateral estoppel principles. Finally, we find a remand to DHCR inappropriate here because a final administrative determination cannot be reopened to give a party an opportunity to make a new argument, based on the existing administrative record, 11 years later. We modify solely to declare in defendants' favor (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *app dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]).

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Louis B. York, J.), entered July 15, 2010, which granted defendant's motion to dismiss the complaint, should be modified, on the law, to declare that the 1999 luxury decontrol order is final, and otherwise affirmed, without costs.

All concur.

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

ENTERED: AUGUST 18, 2011

CLERK