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COURT OF APPEALS

STATE OF NEW YORK

THERESA MADDICKS, ET AL.,

Respondents,

-against-

NO. 67

BIG CITY PROPERTIES, LLC, ET AL.,

Appellants.

20 Eagle Street
Albany, New York
September 4, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

SIMCHA D. SCHONFELD, ESQ.
KOSS & SCHONFELD, LLP
Attorney for Appellants
90 John Street, Suite 503
New York, NY 10038

ROGER SACHAR, ESQ.
NEWMAN FERRARA, LLP
Attorney for Respondents
1250 Broadway, 27th Floor
New York, NY 10001

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 67, Maddicks v. Big
3 City Properties.

4 Counsel?

5 MR. SCHONFELD: Good afternoon, Your Honors.
6 Simcha Schonfeld of Koss & Schonfeld. And with the court's
7 permission, I'd like to reserve two minutes for rebuttal?

8 CHIEF JUDGE DIFIORE: Two minutes?

9 MR. SCHONFELD: Yes.

10 CHIEF JUDGE DIFIORE: Yes, sir.

11 MR. SCHONFELD: Thank you.

12 May it please the court, this action is a - - -
13 and the matter before the court today is essentially really
14 a broader question of whether CPLR 3211 should be
15 applicable in any context to a class action complaint. And
16 it's the position, essentially of the plaintiffs, and
17 certainly of their amicus, that the motion to dismiss,
18 pursuant to 3211, should have been denied merely for being
19 premature.

20 As the dissent, Justice Friedman correctly stated
21 on page 311 of the record, and he wrote as follows, "To be
22 clear the point I am making is not that the common
23 questions will not predominate; it is that questions common
24 to the class, predominant or otherwise, simply do not
25 exist."



1 JUDGE RIVERA: So - - - so - - - so Counsel, if -
 2 - - if a plaintiff, former or current tenant, claims that
 3 the landowner has pursued a scheme to violate the law for
 4 purposes of profit, and gives examples that apply to the
 5 plaintiff and the other plaintiffs who are named, what - -
 6 - what is missing from that? What - - - you know, it
 7 strikes me, your position is that one can never set out a
 8 class action, based on a - - - on an illegal scheme or a
 9 scheme to undermine the law.

10 MR. SCHONFELD: No, respectfully, Judge Rivera,
 11 that's not my position. In fact, there's case law allowing
 12 class actions to proceed in J-51 cases.

13 JUDGE RIVERA: Okay, so what's wrong - - - I know
 14 you've already conceded that. What's wrong in this case?

15 MR. SCHONFELD: This - - -

16 JUDGE RIVERA: What's wrong with this amended
 17 complaint?

18 MR. SCHONFELD: Because this amended complaint
 19 alleges at least four unrelated, disconnected bases for
 20 liability, that include violation of J-51, improper
 21 registration - - -

22 JUDGE RIVERA: But isn't that why the legislature
 23 has provided for subclasses?

24 MR. SCHONFELD: Well, there - - - there - - - the
 25 sub - - -



1 JUDGE RIVERA: What would be the point of a
2 subclass if not to address the concern that you raise, that
3 somehow some of the plaintiffs only represent these
4 problems and not the other, when the overarching argument
5 of the plaintiffs is that there is a scheme. The scheme
6 plays itself out in different ways, but there is one
7 particular scheme.

8 MR. SCHONFELD: Because the one particular scheme
9 would be akin to suing landlords for violating federal law,
10 without specifying what it is. Then you'd have to set up a
11 class for a case - - -

12 JUDGE RIVERA: Oh, no, they specify what it is.

13 MR. SCHONFELD: No, but the class is - - -

14 JUDGE RIVERA: I'm asking you what - - - what's
15 the deficiency in the specification.

16 MR. SCHONFELD: The deficiency - - -

17 JUDGE RIVERA: You're - - - you're just
18 complaining that they've specified different ways that this
19 happens.

20 MR. SCHONFELD: No, I'm complaining that by the
21 nature of the way they specified it, and the class that
22 they define in the complaint, in the four corners of the
23 complaint, which is what's subject to the 3211 motion,
24 there is not a single common question that can apply to the
25 class.



1 JUDGE STEIN: Counselor - - -

2 JUDGE FEINMAN: But also it - - - I'm sorry.

3 JUDGE STEIN: Well, I - - - just what - - - what
4 do you say is the harm in the trial court deciding the
5 certification question after the defense have answered.
6 You see what their defense is, which may play into whether
7 or not there is a commonality or not. And - - - and then
8 allowing for the process of a CPLR 902 motion to certify,
9 which appears to be the way the legislature intended it to
10 happen in most cases, at least, maybe not in every case.
11 But certainly given the number of cases that we have where
12 the two statutes intertwine, it would seem that - - - that
13 it would be an unusual case.

14 So what - - - what's the harm in allowing at
15 least that initial process to play out?

16 MR. SCHONFELD: Well, Judge Stein, I would argue
17 that the harm - - - that same question could be asked about
18 any pre-answer motion to dismiss. What's the harm in going
19 through discovery and let's see if there's a substantive
20 case here? The purpose of 3211 is to dismiss at the
21 pleading stage a pleading that is on its face - - -

22 JUDGE WILSON: Well, let - - - let me - - - let
23 me slow you down for a second. Isn't it a fair reading of
24 902 that the legislature has said for class certification
25 issues, there's going to be a rel - - - relatively short



1 sixty-day period for discovery? And it - - - and wouldn't
2 it be a fair reading of 3711 (sic) and 902 together that
3 3711 allows you to make a motion to dismiss on any grounds
4 if you'd like, except if what you're complaining about is a
5 failure to meet one of the requirements for class
6 certification. That isn't really going to get the - - -
7 the claim dismissed, because the individual claim will
8 still exist. So that has to wait, the legislature said,
9 for sixty days for the plaintiff to make a motion and the
10 court to rule on it.

11 MR. SCHONFELD: One - - -

12 JUDGE WILSON: Why isn't that a fair
13 reconciliation of the statutes?

14 MR. SCHONFELD: Because, Judge Wilson, our
15 situation here is not that they failed to satisfy the
16 criteria. That's the appropriate standard of review on a
17 motion for class certification. Our argument is here - - -
18 here is that they failed to plead it in the first place.
19 The pleading itself, the four corners of the complaint
20 itself, does not set forth - - -

21 JUDGE WILSON: But that doesn't get you a
22 dismissal, though, right?

23 JUDGE FEINMAN: So let's look - - - I'm sorry.

24 JUDGE WILSON: That - - - that doesn't get you a
25 dismissal because the individual claims are still pleaded



1 properly.

2 MR. SCHONFELD: The - - - the individual claims
3 are actually proceeding right now in this action. But - -
4 -

5 JUDGE FAHEY: If you're - - - if you're going to
6 focus on one element of the five class action, who would -
7 - - would you focus on commonality?

8 MR. SCHONFELD: Absolutely, Your Honor, yes.

9 JUDGE FAHEY: Okay, so tell me why in commonality
10 you would say that that's the weakest of - - - of the - - -

11 MR. SCHONFELD: Very simple.

12 JUDGE FAHEY: - - - petitioners' arguments?

13 MR. SCHONFELD: We have, let's say, a class of
14 claimants who are claiming a violation of J-51, a class of
15 claimants who are claiming improper or inadequate IAIs.
16 What is the same question that could be asked to both of
17 them? There isn't one.

18 JUDGE FAHEY: So - - - so before - - - before you
19 - - - you go into the elements of them, tell me why they
20 aren't subclasses of an overall fraud claim?

21 MR. SCHONFELD: They haven't been pled that way.
22 That's why.

23 JUDGE WILSON: Oh, so you're saying - - - I'm
24 sorry, just so I understand what you're saying. If they
25 had pleaded just the IAI claim and nothing else, you would



1 concede that that's a - - - a common issue?

2 MR. SCHONFELD: No, I would not. I don't think
3 we have to reach that, because - - -

4 JUDGE WILSON: Okay, then that goes back to Judge
5 Fahey's question.

6 MR. SCHONFELD: I - - - I don't think we have to
7 reach that question on this appeal. But with respect to
8 IAIs, each - - - and that - - - each apartment is a
9 separate and distinct analysis of whether IAI is redundant.

10 JUDGE FAHEY: You see, that - - - that argument -
11 - - I - - - I have trouble with that argument, because I
12 think then once you move beyond the subclass question, then
13 you're really talking about the measure of damages that
14 would apply to the overall class, and not - - - not to
15 whether or not the specific elements are met. In - - - in
16 other words, you know, whatever it costs to put in drywall
17 in - - - in 200 different apartments, those are measures of
18 damages. And - - - and - - - or what - - - that's not - -
19 - that's not what we're talking about here.

20 I think that - - - I think really we're talking
21 about whether or not the subclass classification is
22 relevant to the claim.

23 MR. SCHONFELD: Well, Judge Fahey, respectfully,
24 I would submit that it's actually not exactly the - - - the
25 way you presented it, because with respect to IAIs, the



1 first question you have to actually ask is, are you in the
2 class? We need to do an analysis to determine who is in
3 the class in the first place.

4 JUDGE FAHEY: I saw - - -

5 JUDGE FEINMAN: So - - -

6 JUDGE FAHEY: - - - the statute of limit - - - go
7 ahead, Judge, go ahead.

8 JUDGE FEINMAN: I want to look at record page 53,
9 paragraph 213 of the complaint, all right. It's getting
10 into the four corners of the complaint. What's
11 insufficient about that to satisfy at - - - at least the
12 standard as enunciated in Maul?

13 MR. SCHONFELD: Because none of these alleged
14 facts common to the class apply to the entire class. They
15 apply - - - some to some claimants and some to others. And
16 with respect to the IAIs, I would - - -

17 JUDGE STEIN: But isn't that what article 9
18 allows the trial judge to do? To say, okay, maybe these
19 people don't all belong in one class, but - - - but, I, the
20 judge, can separate that out into subclasses? I think that
21 - - -

22 MR. SCHONFELD: That's if the pleading is
23 sufficient to survive a 3211 motion in the first place.

24 JUDGE STEIN: Yeah, but what - - - so back to
25 Judge Feinman's question. Why isn't the pleading



1 satisfactory here?

2 MR. SCHONFELD: Because the pleading lists very
3 specifically what the two classes are. They appear - - -
4 the classes appear on page 51 of the record, paragraph 200
5 and 202.

6 JUDGE GARCIA: Are they current and former
7 renters? Is that the class' name?

8 MR. SCHONFELD: Yeah, across the board.

9 JUDGE GARCIA: Right. And those are how they're
10 pleaded in the counts, right?

11 MR. SCHONFELD: Right.

12 JUDGE GARCIA: So there's I think three counts on
13 behalf of the class, and three counts, I think, on behalf
14 of that specific subclass.

15 MR. SCHONFELD: That's correct. And J-51 is not
16 even separately pleaded. I just - - - I see my time is
17 expired. Just a few more seconds, if I may?

18 CHIEF JUDGE DIFIORE: You may.

19 MR. SCHONFELD: With respect to IAIs itself, the
20 pleading itself is insufficient as a matter of law, class
21 action or no class action, because what the complaint
22 alleges repeatedly and consistently throughout the
23 complaint, and the first time is paragraph 12 on page 30,
24 is that an inspection of the partment - - - apartment, and
25 I quote "suggests" that IAIs were not completed.



1 If a mortgage lender were to foreclose and state
2 in their complaint that the evidence suggests that the
3 borrower - - -

4 JUDGE RIVERA: But the law requires that you read
5 the entire complaint, and there's other language in the
6 complaint that - - - that cuts completely against this
7 argument, which is, you're saying they're speculating
8 whether or not indeed the - - - the - - -

9 MR. SCHONFELD: I'm not saying they're - - -

10 JUDGE RIVERA: Excuse me. That they're
11 speculating as to whether or not there hasn't din - - -
12 been a violation, when it's very clear, that is exactly
13 what they're alleging.

14 MR. SCHONFELD: Respectfully, Your Honor, I'm not
15 saying they're speculating. I'm saying they're being very
16 clear. They're clear is that there is a suggestion. There
17 is no affirmative statement that IAIs were not properly
18 done. Thank you.

19 CHIEF JUDGE DIFIIORE: Thank you, Counsel.
20 Counsel?

21 MR. SACHAR: Good afternoon, Your Honors. Roger
22 Sachar, Newman Ferrara. We represent the respondents. May
23 it please the court - - -

24 JUDGE FEINMAN: So - - - so is it your position
25 that such a motion is always premature as your adversary



1 says your position is?

2 MR. SACHAR: No, it's not always premature.
3 First, you can always make a 3211 motion and just simply
4 attack the representative plaintiffs' claim. If they have
5 no claim, they have no standing. Here, for example, they
6 could have put forth proof of 81,000 dollars in IAIs, to
7 demonstrate that Ms. Piro had no claim. If they
8 demonstrate that, you can't go forward. That's the first
9 instance.

10 Second instance is if you can't actually ever
11 have a class action. And that applies - - - that's the
12 Downing opinion. In Downing, the question before Judge
13 Ramos at the trial court level was whether or not you could
14 waive the treble damages penalty. And that case went all
15 the way up here to Borden. Now if - - - it had in fact
16 been the case, they could - - - you were required to seek
17 treble damages, you couldn't have a class action. That's
18 okay to dismiss.

19 The issue here is whether or not you can dismiss
20 for failure to establish in a complaint, the 901(a)
21 prerequisites. And I would posit that you can't. First
22 off, you know, we were talking about commonality, well, in
23 a 906 class action, you don't even have to have
24 commonality. 906(1) you don't need it. There's no
25 requirement for commonality.



1 What my adversary is trying to have us do is put
2 the cart before the horse. And he's saying, Mr. Sachar, in
3 your complaint, you have to decide how you are going to
4 certify the class. And I don't think that's proper,
5 because you all - - - you do class discovery, that we
6 talked about with the sixty-day period. You do class
7 discovery; you decide how you're going to certify the
8 class. Here it may be a 901(a) class for the failure to
9 register claims, and a 906(1) issue class for the IAI
10 claims.

11 JUDGE GARCIA: So why if you're doing that - - -
12 it seems to me this a subclass action, then. In a class
13 action, do you need one overarching predominant common law
14 issue or a common issue of fact?

15 MR. SACHAR: In a 901(a) case, the subclasses
16 themselves can have common issues. You do not - - -
17 although we do have one here, the common scheme to evade
18 the rent regulations.

19 JUDGE GARCIA: So you could just put four
20 different subclasses together, you know, against one
21 defendant, have nothing to do with each other, and get that
22 certified, because you have four subclasses that have
23 common issue - - - predominant common issues of law or
24 fact.

25 MR. SACHAR: If - - - if you establish the other



1 prerequisites for each subclass, yes. And remember - - -

2 JUDGE GARCIA: What does that get you? I - - - I
3 don't understand how that fits in with the purpose of class
4 actions. That you're bringing this class action - - - I'm
5 having a hard time seeing any issue common across these
6 different categories. So what you're asking for, it seems,
7 is a certification of four subcategories - - - four
8 subclasses. What - - - what is - - - why would that be
9 part of a class action proceeding against this one
10 defendant? I don't understand that.

11 MR. SACHAR: Well, because you - - - you're
12 looking at superiority in that case. And a - - - and a
13 court can decide, yeah, this is not superior for the - - -
14 these four claims are not superior to be tried together,
15 and at that point, at the certification stage, is when that
16 should be measured, and the court should make that
17 decision. We're not there yet.

18 JUDGE GARCIA: So your view is, you do not need
19 an issue that's common across every class here.

20 MR. SACHAR: You need - - -

21 JUDGE GARCIA: You know, J-51s, the IAIs, the
22 failure to register. They can all have completely separate
23 and independent factual and legal issues, and what - - -
24 can you do that, and then you could get certification here.

25 MR. SACHAR: Conceivably, the - - - the answer is



1 no. There are circumstances in which you wouldn't have
2 commonality, and I'll give you an example. If you were
3 suing Joe's Drive-In and Steve's Burger-Shack, both for
4 different cases of food poisoning. And you try to, you
5 know, certify them in one class. Well, those cases - - -
6 the two have nothing to do with each other.

7 JUDGE GARCIA: What if you - - - you're suing
8 Joe's for food poisoning and some labor dispute?

9 MR. SACHAR: Right, that - - -

10 JUDGE GARCIA: And you've got one defendant.

11 MR. SACHAR: Arguably, you should split those
12 claims. That - - -

13 JUDGE STEIN: Well, I thought - - - I thought
14 your - - - your - - - your claim was that the overarching
15 common issue is that these landlords were engaging in a
16 scheme to overcharge tenants by violating the rent
17 stabilization law, but that some of them did it in
18 different ways.

19 MR. SACHAR: Precisely, and that's why we had
20 actually - - -

21 JUDGE FAHEY: That's - - - that's the way I - - -

22 JUDGE RIVERA: Or did it multiple ways.

23 JUDGE FAHEY: - - - that's the way I understood
24 it also, the way Judge Stein articulated it.

25 JUDGE RIVERA: That - - - that was my question to



1 your adversary. Was he challenging that one could ever
2 argue for a class action status based on a scheme that has
3 multiple characteristics?

4 MR. SACHAR: Right, and that's where we get the
5 difference between Joe's Drive-In with a labor dispute, and
6 food poisoning. Here - - -

7 JUDGE FEINMAN: So - - - so just to tie this up,
8 how would you articulate the common question of law and
9 fact?

10 MR. SACHAR: You have a common scheme by a real
11 estate portfolio, owned by the same holding company and run
12 by the same management company, to evade the rent
13 regulations.

14 JUDGE GARCIA: What does the legal or factual
15 issue there? That's like saying you're not paying your
16 workers enough. You're charging too much rent. What's the
17 common legal or factual issue. In one case, the facts
18 depend on whether improvements were made and the costs of
19 those improvements. In another subclass, it's J-51.
20 There's no common legal issue there. So it's you're
21 breaking the law? You're charging too much rent?

22 MR. SACHAR: It's - - - you're violating the rent
23 stabilization law and rent stabilization code. That's the
24 scheme. It goes - - - stretches throughout this portfolio.
25 It's different ways, in the same way that Maul was



1 different ways, in the same way that Weinberg v. Hertz was
2 different ways. In one case they're charging too much for
3 a rental, in the other case they're charging too much for
4 gas.

5 It's a common scheme of evading the rent
6 regulations. That's the tie. That's our difference
7 between Joe's Drive-In labor dispute, Joe's Drive-In food
8 poisoning. That's your difference.

9 JUDGE WILSON: And your position, I take it, is
10 that even if you're wrong about that, the court could
11 certify four subclasses or three - - - whatever number it
12 decided on. One for the J-51 issue, let's say, one for the
13 IAI issue, et cetera. Or could choose to certify one but
14 not another of those, and those classes might have
15 different members - - - you know, maybe none in common, and
16 that would still be permissible under the rules?

17 MR. SACHAR: Absolutely. If the court says - - -
18 if we get to the stage where we are talking about IAI
19 claims at the certification stage, and a court says, look,
20 I've read Borden. Borden says I have to certify a J-51
21 class. You've satisfied the criteria in Borden. I'm going
22 to do that under 901. You don't have it, Mr. Sachar, on
23 the IAI claims. I'm sorry, you can't do it under 901, you
24 can't do it under 906. Those claims need to proceed
25 individually. Okay. Well, that's what happens with those



1 claims.

2 The issue here is, that the court made that
3 determination before I had even asked the court to do it.
4 I hadn't put - - - I hadn't got to put forth a pleading.
5 We hadn't got - - - had - - - had the ability to tell the
6 court, this is our plan, and then based on discovery - - -

7 JUDGE WILSON: And the Appellate Division - - -
8 if I'm right, the Appellate Division dismissed eight
9 defendants from the suit?

10 MR. SACHAR: No, oh - - - so there were - - -
11 there - - - in - - - in the real estate portfolio, there's
12 sixteen different LLCs that are the single purpose LLCs.
13 At the trial court level, the - - - the - - - Justice
14 Edwards dismissed eight of the LLCs for who we had no
15 plaintiffs. And we're not challenging that.

16 JUDGE WILSON: That's all I was going to ask.

17 MR. SACHAR: Yeah.

18 JUDGE WILSON: That you're not challenging - - -

19 MR. SACHAR: We're not challenging that. She
20 then sua sponte did the remaining eight plaintiffs.

21 The only other thing that I would point out is in
22 the amicae's briefing, I just want to quickly note that
23 they talk about cases that are - - - the majority of cases
24 allow you to analyze class cert at the motion to dismiss
25 stage. The cases they're citing to are fair labor



1 standards act cases.

2 And those cases, because they have a conditional
3 certification requirement, also have an ascertainability
4 question that has to be assessed at the initial stage. So
5 those cases - - - and I think there's six of them in total.
6 Two are FLSA cases and a few more of them have to deal with
7 ascertainability generally. That's a different question.

8 JUDGE FAHEY: I just - - - I - - - on a different
9 topic, just briefly. Exhaustion of administrative
10 remedies. It - - - has that issue been abandoned?

11 MR. SACHAR: No, it's dead. It's dead. Our - -
12 - our legislature on June 14th, 2019 stated - - -

13 JUDGE FAHEY: Because of the change in the law,
14 you're saying - - -

15 MR. SACHAR: A change in the law. And in any
16 event, you can't send - - -

17 JUDGE FAHEY: And you mean, just so we're clear
18 for the record, that - - - that you could go to either
19 court or - - - or go to DHCR.

20 MR. SACHAR: Yes, the legislature - - - the - - -
21 the new rent laws say the - - - a court of competent
22 jurisdiction or the Agency, subject to the tenants' choice
23 of forum. So that - - - that claim, to the extent it ever
24 was proper in a class action, is - - - is long gone now.

25 Thank you.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.

2 Counsel?

3 MR. SCHONFELD: I think the analogy that Mr.
4 Sachar gave about - - - I don't remember if it was Bob's or
5 Joe's or whatever the two different shops is - - - is
6 actually quite relevant here. With respect to the J-51s,
7 use that as an example, those claims are made only with
8 respect to four of the properties in the - - - in the
9 remaining - - - in this portfolio. There are seven to
10 which there's no allegation of J - - - of J-51 violation.

11 If a class were to be certified, including them
12 as a defendant, they would be defendants in a class action,
13 making allegations that have nothing to do with them. And
14 in fact, for that matter, the eight properties that were
15 dismissed by lower court and affirmed by the Appellate
16 Division and - - - and as Mr. Sachar said, are not before
17 this court, why shouldn't they be defendants too? If you
18 can be a defendant in a class action for a claim that is
19 not made against you, then why not include everybody in the
20 portfolio as well, and that - - -

21 JUDGE WILSON: Yes, but doesn't - - - but doesn't
22 the court - - - if it, let's say, it thought that
23 certification as to J-51, the conditions for certification
24 had been met, why couldn't it certify a subclass of people
25 in the four buildings, and excuse, dismiss the other



1 defendants as to whom there's no claim?

2 MR. SCHONFELD: Your Honor, that would be
3 something to be considered on a motion for class
4 certification. Whether the court has the authority to do
5 that is a separate question. But here, in the context of a
6 3211 motion, we don't get to speculate what a trial court
7 may do. The question is, within the four corners of this
8 complaint, is a class action adequately pled.

9 And one - - - just one final point, throughout
10 their papers and - - - and during Mr. Sachar's argument
11 today, the - - - plaintiffs have - - - have - - - have
12 continuously stated that it's our position that they failed
13 to establish or to satisfy, et cetera. It's not. Our
14 position has been from day one, this is a deficiency at the
15 pleading stage. The pleadings aren't sufficient. Not a
16 lack of proof. Not a lack of evidence. Not a lack of
17 proof of defense. None of that. It's that the - - - the
18 complaint, on its face, fails to state a claim, both for
19 class action relief and with respect to IAIs, even for
20 individual relief.

21 Thank you very much.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Maddicks v. Big City Properties, LLC, No. 67 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: September 09, 2019

