SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 5, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2485 Ruskin Associates, LLC, Index 116295/08
Petitioner-Appellant,

-against-

The State of New York Division of
Housing and Community Renewal,
Respondent-Respondent.

Kucker & Bruh, LLP, New York (Alan D. Kucker of counsel), for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 10, 2009, which, inter alia, denied as untimely the petition seeking an order directing respondent to determine a rent overcharge complaint that had been brought 30 years earlier, and granted respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In response to tenant Sylvain Gilary's overcharge complaint, the Conciliation and Appeals Board (CAB) advised him in a letter dated August 28, 1979 that "[a] preliminary check of the records . . . failed to reveal an enrollment for your dwelling unit" with

the Rent Stabilization Association (RSA). Lack of enrollment, the letter explained, meant that CAB lacked jurisdiction over the matter, which would have to be referred to the New York City Department of Housing Preservation and Development (HPD). This letter was also forwarded to the owner of the building, Stephen Cox/GAEA Realty. Subsequently, by letter dated November 1, 1979, CAB forwarded Gilary's complaint to HPD for appropriate action, stating, "A check of the records indicates that this premises is [*sic*] not enrolled with [RSA]." As before, a copy of the letter was sent to the owner. In September 1980, a new owner bought the building.

HPD's Office of Rent Control, by order dated April 1, 1981, determined that Gilary's apartment was rent-controlled and established a maximum base rent for it. The landlord protested, claiming that the building was commercial rather than residential. In support of that claim, he submitted a 1972 certificate of occupancy for the building showing that its usage was for 10 offices, as well as the subject apartment's 1977 lease with a provision that it be used only for professional purposes. The owner contended further that, even if the apartment was residential, it was not rent-regulated because the building had fewer than six residential units.

Gilary, on the other hand, contended that the building contained 10 apartments, all with kitchens and bathrooms, of

which six had residential tenants, two had commercial tenants, and two were vacant. Gilary submitted a 1974 residential lease between the prior tenant and the prior owner and a 1976 residential sublease between the prior tenant and himself.

As to the past history of the subject building, HPD records reflected that prior owners had been granted MBR increases in 1972, 1976 and 1978. The owner's 1972 application for rent increases indicated that the building contained six apartments, while on the 1978 application the owner listed the building as having 10 apartments. The 1980 application was denied because the landlord failed to properly certify and remove violations. A July 1980 inspection of the building found that two apartments were still occupied by the tenants listed on the l972 application, which meant that they were still rent-controlled. A March 1981 inspection of Gilary's apartment found that at least 95% of the space was being used for residential purposes.

By order dated April 29, 1983, HPD denied the owner's protest, stating:

> "The Rent Stabilization Law of 1969 applies to multiple dwellings containing six or more dwelling units and requires such buildings to be registered with the [RSA]. Section 3 of the Rent Stabilization Regulations provides that upon a determination that the owner of a dwelling unit subject to the rent stabilization law has not joined the association, such dwelling units become subject to rent control.

> "In the instant case, the evidence establishes that the subject building contains at least six dwelling units and is therefore within the definition of buildings required to be registered with the [RSA]. . . . [A]s a consequence of the failure to so register . . . the subject accommodation became subject to rent control as of January 1, 1980."

The above determination was not judicially challenged in any way, and nothing further transpired for the next 25 years. However, by letter dated June 30, 2008, petitioner herein, a successor owner of the premises, asked DHCR, as the successor agency of HPD and CAB, to reconsider the April 29, 1983 order. Petitioner maintained that the order was a nullity because only CAB had jurisdiction to determine whether a building was subject to the Rent Stabilization Law, and here, while CAB found that the building was not enrolled with the RSA, which was undisputed, it was HPD that determined that it had six or more dwelling units and therefore should have been enrolled. Petitioner asserted that this determination was a nullity on the ground that it was in excess of HPD's jurisdiction. By letter dated August 27, 2008, DHCR denied petitioner's request, noting that HPD had jurisdiction because the proceeding was commenced on November 1, 1979, when CAB, having determined that the premises were not enrolled with the RSA, referred the matter to HPD for appropriate action.

In December 2008, petitioner, arguing that Gilary's 1979 rent overcharge complaint had never been resolved because HPD lacked jurisdiction to decide it, commenced this mandamus proceeding to compel DHCR, as successor to CAB under the Omnibus Housing Act of 1983, to determine or dismiss the rent overcharge complaint, which at that point was nearly 30 years old. Supreme Court granted DHCR's motion to dismiss the proceeding as untimely, and we affirm.

A CPLR article 78 proceeding seeking mandamus to compel accrues even in the absence of a final determination (*see Academy St. Assoc., Inc. v Spitzer,* 44 AD3d 592 [2007]). Hence, the statute of limitations for such a proceeding runs not from the final determination by the agency but from the date upon which the agency refuses to act (*see Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 442 [1959]). CAB unequivocally declared its refusal to act in its November 1, 1979 letter referring Gilary's complaint to HPD. Accordingly, the statute of limitations on a proceeding seeking to compel CAB to determine that complaint began to run on or about November 1, 1979. There is no question that a proceeding brought nearly 30 years later to compel CAB or its successor, DHCR, to determine or dismiss Gilary's complaint is untimely.

In view of this conclusion, we find it unnecessary to address the other contentions raised by the parties.

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

ENTERED: OCTOBER 5, 2010

CLERK

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

3002 Kimeth McClelland, Index 302525/08
Plaintiff-Respondent,

-against-

Jose R. Estevez,
Defendant-Appellant.

_____

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

Steven Adam Rubin & Associates, PLLC, New York (Steven Adam Rubin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered on or about October 8, 2009, which, in an action for personal injuries sustained in a motor vehicle accident, denied defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, the motion granted to the extent of dismissing plaintiff's claim based on the 90/180-day provision of Insurance Law § 5102(d), and otherwise affirmed, without costs.

Defendant established his prima facie entitlement to summary judgment by submitting evidence, including the affirmed reports of an orthopedist and neurologist, who determined, based upon their examinations of plaintiff and objective tests conducted, that he did not sustain a serious injury. Defendant also submitted the deposition testimony of plaintiff, who stated that

he missed three days of work after the subject accident.

In opposition, plaintiff raised a triable issue of fact as to whether he sustained a serious injury to his lumbar spine. Plaintiff's expert offered objective medical proof of limited range of motion in plaintiff's lumbar spine; the MRI of plaintiff's lumbar spine showed disc herniation at L5/S1; and plaintiff's expert affirmed that the injury was caused by the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352-353 [2002]). Furthermore, although plaintiff's evidence regarding his injuries to his cervical spine and right elbow is limited, where "plaintiff establishe[s] that at least some of his injuries meet the 'No Fault' threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant[']s motion for summary judgment" (*Linton v Nawaz*, __ NY3d __, 2010 NY Slip Op 02835, *2 [2010]; *see also Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [2010] ["[o]nce a prima facie case of serious injury has been established and the trier of fact determines that a serious injury has been sustained, plaintiff is entitled to recover for all injuries incurred as a result of the accident" (internal quotation marks and citations omitted)]).

However, plaintiff's claim under the 90/180-day category of Insurance Law § 5102(d) is dismissed in light of his testimony

that he only missed three days of work after the accident (*see Day v Santos*, 58 AD3d 447 [2009]).

We have considered defendant's other arguments and find them unavailing.

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3287 The People of the State of New York, Respondent, Ind. 5529/07

-against-

D'Juan Collins, Defendant-Appellant.

Patrick Michael Megaro, Hempstead, for appellant.

D'Juan Collins, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at hearings and waiver of counsel; Lewis Bart Stone, J. at jury trial and sentence), rendered August 15, 2008, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 8 years, unanimously affirmed.

Before permitting defendant to waive his right to counsel, the hearing court conducted a thorough inquiry, ensuring that defendant was aware of the disadvantages and risks of representing himself and of the important role of a lawyer (*see People v Arroyo*, 98 NY2d 101 [2002]; *People v Smith*, 92 NY2d 516, 520 [1998]). Moreover, even though defendant had no right to

hybrid representation (*see People v Rodriguez*, 95 NY2d 497, 501 [2000]), the court permitted defense counsel to remain as a legal advisor and to conduct portions of the trial. There is nothing in the record to indicate that the court should have inquired into defendant's mental condition. To the extent that defendant is arguing that he had insufficient time to consult with counsel before deciding to represent himself, that counsel was unprepared, or that the court should have assigned new counsel, those contentions are without merit.

The trial court did not shift the burden of proof when, during defendant's pro se cross-examination of a detective, it admonished defendant to stop making unsworn statements of fact based on his asserted personal knowledge. Defendant was not entitled to use his pro se status to violate rules of evidence and procedure (*see Faretta v California*, 422 US at 834, n 46). The court's admonitions were responsive to defendant's attempt to be an unsworn witness, and were not prejudicial. Even if the jury understood the court to have suggested, while addressing defendant in the jury's presence, that defendant would be testifying, any error was harmless in view of the court's thorough instructions to the jury on the burden of proof. Moreover, defendant did testify.

Defendant's challenges to the constitutionality of the court's interested witness charge are unpreserved and we decline

to review them in the interest of justice. As an alternative holding, we also find there was no constitutional deficiency in the charge (*see Reagan v United States*, 157 US 301, 305-311 [1895]; *Hicks v United States*, 150 US 442, 451-52 [1893]; *People v Blake*, 39 AD3d 402, 403 [2007], *lv denied* 9 NY3d 873 [2007]).

We have considered and rejected the claims contained in defendant's pro se supplemental brief.

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3288 The People of the State of New York, Ind. 6588/06
Respondent,

-against-

Joseph Garner,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Julina J. Hudson of counsel), for appellant.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about March 12, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 5, 2010

CLERK

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Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3290 The People of the State of New York, Ind. 4817C/07
Respondent,

-against-

Daniel Baez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Order, Supreme Court, Bronx County (Darcel D. Clark, J.), entered on or about August 14, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although defendant challenges a particular 15-point assessment, even without that assessment he would remain a level two offender, and we find no basis for a discretionary downward departure from defendant's presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). The mitigating circumstances cited by

defendant were adequately taken into account by the risk assessment instrument.

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3291-
3291A The People of the State of New York, Respondent, Ind. 1987/06 6129/07

-against-

Kerry Jordan,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

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

Judgments, Supreme Court, New York County (Bruce Allen, J.), rendered May 19, 2008, convicting defendant, after a nonjury trial, of aggravated criminal contempt, criminal contempt in the first degree (five counts), assault in the third degree and criminal mischief in the fourth degree and sentencing him to an aggregate term of 3 to 9 years, unanimously affirmed.

Defendant's arguments concerning the sufficiency and weight of the evidence are limited to his conviction of one count of criminal contempt in the first degree arising from letters he sent to the victim from prison in violation of an order of protection. The evidence supports the conclusion that the letters were intended to place the victim "in reasonable fear of physical injury, serious physical injury or death" (Penal Law § 215.51[b][ii]), as they contained numerous references to death

and violence, and were made after defendant had already engaged in a pattern of violent conduct against the victim. Accordingly, we find that this verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Since defendant never articulated a specific double jeopardy argument, he did not preserve his present claim that his conviction of three counts of criminal contempt in the first degree arising from events that occurred on March 14, 2006 constituted multiple punishments for the same offense, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, because each of these counts required proof of a fact that the others did not (*see Blockburger v United States*, 284 US 299, 304 [1932]).

Defendant's challenge to his conviction of assault in the third degree is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3294-
3295 The People of the State of New York, Ind. 434/04
Respondent,

-against-

Nydia Santiago,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc S. Sherman of counsel), for respondent.

Order, Supreme Court, Bronx County (John P. Collins, J.), entered February 11, 2010, which denied, on the ground of ineligibility, defendant's CPL 440.46 motion to be resentenced, unanimously affirmed.

Since defendant has been released on parole and is not in custody, she is not presently eligible for resentencing (*see* CPL 440.46[1]).

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3296-
3297 The People of the State of New York, Docket 46397C/06
Respondent,

-against-

Eddy Kuhwaien,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 19, 2007, convicting defendant, after a nonjury trial, of attempted forcible touching and attempted unlawful imprisonment in the second degree, and sentencing him to concurrent terms of 45 days, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of medical evidence and conflicting testimony. The verdict as to each charge comports with the weight of the evidence.

Defendant's remaining arguments are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3298 In re Gianna C-E,

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

Alonso E.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

Lawyers for Children, Inc., New York (Michael Moorman of counsel), Law Guardian.

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Order, Family Court, New York County (Jody Adams, J.), entered on or about April 1, 2009, which, insofar as appealed from, found that respondent neglected the subject child, unanimously affirmed, without costs.

The finding that the two-month-old infant was in imminent danger of physical injury as a result of respondent father's failure to exercise a minimum degree of care is supported by a preponderance of the evidence showing that respondent had engaged in a violent altercation with the infant's mother, punching her repeatedly in the face and head, while she was only three feet away from the infant. At that time, the infant was receiving oxygen while lying on a bed and connected to a heart monitor,

having been released from the hospital days earlier (*see generally Nicholson v Scoppetta*, 3 NY3d 357, 368-370 [2004]; *cf. Matter of Pedro C.*, 1 AD3d 267, 268 [2003]).

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3299-
3300 The People of the State of New York, Docket 66753C/05
Respondent,

-against-

Edward Winston,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered May 31, 2007, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the fourth degree, and sentencing him to a conditional discharge, unanimously affirmed.

The court properly denied defendant's suppression motion. The People established by clear and convincing evidence that defendant voluntarily consented to the search of his apartment by agents of the United States Secret Service (*see generally People v Gonzalez*, 39 NY2d 122 [1976]). There was no threatening behavior by the agents or the accompanying police officers, defendant was never handcuffed or physically restrained, an agent expressly advised defendant of his right to refuse to consent to the search, and defendant signed a consent form.

Defendant's remaining arguments are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Adbus-Salaam, JJ.

3302 The People of the State of New York, Ind. 4589/07
Respondent,

-against-

Nouchie Vellon,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about October 14, 2008,

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

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

ENTERED: OCTOBER 5, 2010

CLERK

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

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3303 The People of the State of New York, Ind. 1480/08
Respondent,

-against-

Donnella White,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene R. Silverman, J. at hearing; Bruce Allen, J. at jury trial and sentence), rendered April 20, 2009, convicting defendant of grand larceny in the third degree and two counts of offering a false instrument for filing, and sentencing her to an aggregate term of 5 years' probation with 100 hours of community service, unanimously affirmed.

The court properly denied defendant's motion to suppress statements she made to investigators with the New York City Housing Authority Inspector General's Office regarding her reporting of income. No *Miranda* warnings were necessary, because a reasonable innocent person in defendant's position would not have thought that she was in custody at the time of the interview

(*see People v Yukl*, 25 NY2d 585, 590-592 [1969], *cert denied* 400 US 851 [1970]). Evidence at the suppression hearing, which included a tape recording of the interview, established that defendant appeared at the office in response to a written request and sat in an unlocked room with the investigators, who repeatedly told her she did not have to participate in the interview and was free to leave, and never questioned her in a threatening manner. Moreover, after only 12 minutes, she ended the interview and left the office.

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

ENTERED: OCTOBER 5, 2010

CLERK

Saxe, J.P., Nardelli, McGuire, Freedman, Abdus-Salaam, JJ.

3304-
3305N Edelfin Cintron, et al., Index 118093/04
Plaintiffs-Appellants/Respondents,

-against-

The New York City Transit Authority,
Defendant-Respondent,

EOP Worldwide Plaza, LLC, et al.,
Defendants-Respondents/Appellants,

Temco Service Industries, Inc.,
Defendant.

_____

Stuart R. Goldstein, Ridgewood, for appellants/respondents.

Curan, Ahlers, Fiden & Norris, LLP, White Plains (Charles B. Norris of counsel), for respondents/appellants.

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

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered January 12, 2009, which, in an action for personal injuries sustained in a slip and fall down stairs, denied plaintiffs' motion for leave to amend the bill of particulars, unanimously affirmed, without costs. Order, Supreme Court, New York County (Harold B. Beeler, J.), entered February 11, 2009, which, to the extent appealed from as limited by the briefs, denied the cross motion of defendants EOP Worldwide Plaza, LLC and Equity Office Properties Management Corp. (collectively EOP)

for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment accordingly.

The motion court properly exercised its discretion in denying the motion to amend the bill of particulars, where the delay in making the motion was unreasonable given that it was made four months following the filing of the note of issue and four years after the commencement of the action (*see e.g. Keene v Columbia-Presbyterian Med. Ctr.*, 214 AD2d 430 [1995]). The claim of plaintiffs' counsel that he relied on his client's statement that the subject stairs were being renovated, and thus did not inspect them until four years after the accident, does not constitute a reasonable excuse. Furthermore, the code violations plaintiffs sought to add to the bill of particulars did not merely embellish their initial claims, but constituted substantive changes and additions to the theory of the case, which would require defendants to reorient their defense strategy to focus on these violations (*see Markarian v Hundert*, 262 AD2d 369 [1999]).

The record demonstrates that dismissal of the complaint as against EOP is warranted, since EOP established its prima facie entitlement to judgment as a matter of law and plaintiffs' opposition failed to raise a triable issue of fact (*see e.g.*

Alvarez v Prospect Hosp., 68 NY2d 320, 325 [1986]). Regarding the existence of a dangerous condition, EOP demonstrated that plaintiffs made only unsupported allegations about the stairs, never responded to the demand for expert witness disclosure, and had not provided any other proof regarding a defect in the stairs. In response, plaintiffs, for the first time, produced an expert affidavit setting forth findings regarding the stairs. However, these findings were not probative of the condition of the stairs at the time of the accident since the expert did not inspect the stairs until four years after the accident (*see Garcia v The Jesuits of Fordham*, 6 AD3d 163, 166 [2004]; *Kruimer v National Cleaning Contrs.*, 256 AD2d 1 [1998]). The expert also improperly relied on the various code violations which had not been pleaded, apparently on the assumption that plaintiffs would be permitted to amend the bill of particulars.

EOP also demonstrated that they neither created nor had notice of any defect in the staircase. There was no evidence of any complaints received or of any violations or citations issued regarding the staircase. Furthermore, EOP's witness testified that he informally inspected the stairs on a weekly basis and did so formally once a month, and he never noticed any defect or dangerous condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Plaintiffs' opposition failed to raise a triable issue as the injured plaintiff testified that he

never used the staircase before the accident and could not state how long the alleged condition existed. Nor did plaintiffs produce any other evidence indicating how long the condition existed (*see Montero v Southern Blvd. Ltd. Partnership*, 73 AD3d 568 [2010]).

The record further demonstrates that the complaint as against EOP should have been dismissed because the alleged condition of the stair was too trivial to be actionable. The injured plaintiff claimed only that the stair was slippery and appeared a little bit worn, while denying that any substance on the stairs caused him to fall, and the photographs of the stairs at the time of the accident do not reveal a trap or major defect (*see Sulca v Barry Hers Realty, Inc.*, 29 AD3d 779 [2006]; *Santiago v United Artists Communications,* 263 AD2d 407, 408 [1999]).

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

ENTERED: OCTOBER 5, 2010

CLERK

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

2116 Robert Naldi, Index 600707/08
Plaintiff-Respondent,

-against-

Michael Grunberg,
Defendant,

Grunberg 55 LLC,
Defendant-Appellant.

_____

Tarter Krinsky & Drogin, LLP, New York (Linda S. Roth of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for respondent.

_____

Order, Supreme Court, New York County (Herman Cahn, J.), entered December 15, 2008, reversed, on the law, with costs, and the motion of defendant-appellant Grunberg 55 LLC to dismiss the complaint as against it granted.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David Friedman
Eugene Nardelli
James M. Catterson, JJ.

2116
Index 600707/08

_____x

Robert Naldi,
Plaintiff-Respondent,

-against-

Michael Grunberg,
Defendant,

Grunberg 55 LLC,
Defendant-Appellant.

_____x

Defendant Grunberg 55 LLC appeals from an order of the Supreme Court, New York County (Herman Cahn, J.), entered December 15, 2008, which, to the extent appealed from, denied its motion to dismiss the complaint as against it.

Tarter Krinsky & Drogin, LLP, New York (Linda S. Roth, Andrew N. Krinsky and Rachel S. Fleishman of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle and Kevin J. Nash of counsel), for respondent.

FRIEDMAN, J.

The complaint in this action seeks enforcement of a right of first refusal that plaintiff claims he held for 30 days while conducting due diligence in contemplation of entering into a contract to purchase real property. Defendant Grunberg 55 LLC, appealing from the denial of its motion to dismiss, argues, among other things, that the alleged right of first refusal is not enforceable under the applicable statute of frauds (General Obligations Law [GOL] § 5-703) because it was memorialized in an e-mail only.[1] We reject this argument, reaffirming our prior decisions that have held (albeit without extensive discussion) that an e-mail will satisfy the statute of frauds so long as its contents and subscription meet all requirements of the governing statute. In this case, however, the record -- including plaintiff's admissions in the complaint, the undisputed documentary evidence of the parties' dealings, and the affidavit of plaintiff's representative in the negotiations -- establishes as a matter of law that plaintiff never accepted the right of first refusal proposed in the e-mail. The right to match "any legitimate, better offer" proffered by the e-mail was tied to the

[1]The dismissal of the complaint as against the individual defendant (the principal of Grunberg 55 LLC) is not at issue on this appeal. Accordingly, we hereinafter use the term "defendant" to refer to Grunberg 55 LLC only.

asking price of $52 million. Given that the parties did not tentatively agree on the price term linked to the right of first refusal proposed in the e-mail, there was never any meeting of the minds between the parties as to that right of first refusal. Although plaintiff apparently alleges that the parties subsequently reached an oral or implied-in-fact agreement that plaintiff would have a right of first refusal based on a different price term ($50 million), any such unwritten right of first refusal is unenforceable under GOL § 5-703. Accordingly, defendant's motion to dismiss the complaint should have been granted.

The complaint alleges that, on February 9, 2007, plaintiff, a citizen and resident of Italy, offered, through his broker, to purchase the property owned by defendant at 15-19 West 55th Street in Manhattan for $50 million. Three days later, on February 12, defendant's broker, Mark Spinelli of Massey Knakal Realty Services, responded to plaintiff's broker with an e-mail that stated in pertinent part:

> "Below is a response to your customer's offer for 15-19 West 55th Street. Please review with your customer and let me know how you would like to proceed.
>
> "Counteroffer: $52 million

> "DD: No due diligence period although complete unfettered access and first right of refusal on any legitimate, better offer during a 30 day period[.]
>
> "Deposit: 10% deposit hard in escrow in the US upon signing of contract that the ownership will furnish to them forthwith. Negotiations will take place during their due diligence.
>
> "The ownership will not take the property off the market for anyone without a signed contract and hard money.
>
> "Mark J. Spinelli
>
> "Director of Sales
>
> "Massey Knakal Realty Services[.]"

The complaint does not allege, and conspicuously omits from its partial quotation of the above e-mail, the price term ($52 million) contained in defendant's counteroffer. Instead, the complaint alleges that Spinelli's February 12 e-mail "duly acknowledged Plaintiff's offer and made a counterproposal, while providing Plaintiff with the subject Right of First Refusal in consideration for his continuing interest in the property." The complaint further alleges: "Based upon the actual, constructive and/or apparent authority of Massey Knakal, the Right of First Refusal was immediately binding and enforceable and provided Plaintiff with specific and definite rights in the Property."

After receiving the above e-mail, plaintiff allegedly began conducting costly due diligence on the property. The record shows that the parties exchanged e-mail concerning this due diligence, which required defendant's cooperation. For example, an e-mail from plaintiff's counsel to defendant's counsel, dated February 26, 2007, states: "[W]e [plaintiff's counsel] would like to send 2 people on Wednesday to review Seller's records/files in regard to the property. Please advise where the files are located and whether Seller is able to accommodate the Wednesday request."

Despite the $52 million counteroffer set forth in Spinelli's e-mail, on or about February 16, 2007, defendant's attorney forwarded to plaintiff's attorney a draft of a contract for sale of the property for $50 million, the amount of plaintiff's original offer. Notably, far from alleging that the $50 million price term in the draft contract was a mistake, the complaint affirmatively relies on the draft contract as evidence of an alleged tentative agreement in principal that the property would be sold for $50 million. In this regard, the complaint alleges: "Significantly, the contract forwarded by [defendant's attorney] provided for a $50 million purchase price consistent with Plaintiff's offer without any indication that the contract was not to be considered a definitive offer to sell the Property for

$50 million." To like effect, plaintiff's representative in this matter, Federico Santini, stated in his affidavit opposing the motion to dismiss:

> "Defendants fail to explain why the proposed contract contains a purchase price of $50 million (not $52 million). The dissemination of a $50 million contract, prepared by Defendants' own counsel, not only suggests that the purported $52 million counterproposal was not seriously pursued by Defendants, but also completely undermines Defendants' argument that Plaintiff rejected the counteroffer of $52 million. In view of the subsequent [draft] contract, Massey Knakal's email [*sic*] must be read to simply mean that a counteroffer was potentially under discussion by the parties' [*sic*] subject, of course, to Plaintiff's right of first refusal."

Neither the draft contract nor the cover letter transmitting it (which are in the record) contains any reference to a right of first refusal.

The complaint further alleges that plaintiff subsequently learned that defendant was pursuing a sale with a third party in the amount of $52 million. In March, plaintiff sent defendant a letter purporting to exercise the "first right of refusal" referenced in Spinelli's February 12 e-mail, stating:

> "Pursuant to the first right you granted me as per above [*sic*; nothing appears above], I hereby offer to purchase the properties for a cash consideration of $52,000,000 . . . . I am ready to sign the sale contract and to deposit 10% in escrow on [*sic*] your

> attorney's account within [*sic*] 9:00 p.m. of Monday 12th March, 2007."

Defendant rejected the foregoing offer and went forward with the sale of the property to another purchaser.

The complaint asserts a single cause of action against defendant for breach of contract, based on defendant's refusal to honor the right of first refusal allegedly granted to plaintiff in the February 12 e-mail of defendant's broker. In lieu of answering, defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7), arguing: (1) that there was never any meeting of the minds as to the right of first refusal; (2) that the right of first refusal was barred by the statute of frauds because it was memorialized only in an e-mail; (3) that, even if it is possible for an e-mail to satisfy the applicable statute of frauds, the e-mail in question contained only the automatically generated identification block of the brokerage firm from which it was sent and therefore was not properly subscribed; and (4) that neither Spinelli, the broker for defendant whose e-mail referred to the right of first refusal, nor his firm (Massey Knakal) had authority under the firm's listing agreement to contractually bind defendant. As previously stated, we reverse on the ground that there was no meeting of the minds on the right of first refusal embodied in Spinelli's e-mail counterproposal to

sell the property for $52 million, and any oral or implied-in-fact agreement on a right of first refusal with reference to a different price term is barred by the statute of frauds.

At the outset of our analysis, we reject defendant's argument that an e-mail can never constitute a writing that satisfies the statute of frauds of GOL § 5-703 ("Conveyances and contracts concerning real property required to be in writing").[2] Again, this Court has held in other contexts that e-mails may

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[2]Each of the first three subdivisions of GOL § 5-703 sets forth a writing requirement applicable in specified circumstances. Defendant relies on GOL § 5-703(3), which provides:

> "A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent."

However, there is authority treating GOL § 5-703(2) as the provision applicable to a contract creating a right of first refusal as to real property (*see Pfeil v Cappiello*, 29 AD3d 1187, 1188 [2006]). GOL § 5-703(2) provides:

> "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing."

Under either subdivision, our analysis of whether the writing requirement may be satisfied by an e-mail would be the same.

satisfy the statute of frauds (*see Williamson v Delsener*, 59 AD3d 291 [2009] [stipulation settling litigation]; *Stevens v Publicis, S.A.*, 50 AD3d 253, 254-255 [2008], *lv dismissed* 10 NY3d 930 [2008] [modification of written agreement barring oral changes], citing *Rosenfeld v Zerneck*, 4 Misc 3d 193 [Sup Ct, Kings County 2004] [stating, in dicta, that an e-mail reflecting an agreement to sell real property may satisfy the statute of frauds, although the e-mail at issue failed to state all essential terms]; *see also Bazak Intl. Corp. v Tarrant Apparel Group*, 378 F Supp 2d 377, 383-386 [SD NY 2005] [holding that e-mail satisfied the requirement of a "writing in confirmation of the contract" under New York UCC § 2-201(2)]).[3] We reaffirm the holdings of *Williamson* and *Stevens*.

Somewhat paradoxically, in support of its argument that an e-mail is not a writing for these purposes, defendant relies on a 1994 amendment of the general statute of frauds (GOL § 5-701[b], enacted by L 1994, ch 467, as amended by L 2002, ch 286) specifically providing that, as to certain "qualified financial

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[3] *Cf. MP Innovations, Inc. v Atlantic Horizon Intl., Inc.*, 72 AD3d 571, 572 (2010)(e-mail did not satisfy the statute of frauds because it failed to "identify a number of material terms" of the alleged agreement); *Page v Muze, Inc.*, 270 AD2d 401, 401 (2000)(e-mail did not satisfy the statute of frauds where it "made only an equivocal reference" to the right claimed by plaintiff and "was not shown to have satisfied the subscription requirement").

contracts" defined in the legislation (*see* GOL § 5-701[b][2]), the record of an "electronic communication" (GOL § 5-701[b][3][a]), such as a retrieved e-mail, satisfies the statute of frauds (*see* GOL § 5-701[b][1]; *see also* GOL § 5-701[b][4] ["For purposes of this subdivision (b), the tangible written text produced by . . . computer retrieval or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing"]). In essence, defendant argues that, since the Legislature specifically amended only GOL § 5-701 (which does not apply to "contracts concerning real property" covered by GOL § 5-703) to specify that an e-mail or other electronic communication constitutes a writing -- and even then only as to a specifically defined subset of the transactions covered by GOL § 5-701 -- the implication is that an electronic communication cannot satisfy the statute of frauds for contracts outside the scope of the amendment. This argument might have had some plausibility as a matter of statutory construction when GOL § 5-701(b) was first enacted.[4] Sixteen years later, however,

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[4]*See* McKinney's Cons Laws of NY, Book 1, Statutes, § 74 ["the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended"]; § 197, at 368 ["that two independent statutes contain similar provisions does not require that an amendment of one be incorporated as an amendment to the other," since "(t)he Legislature can amend one or both, in its discretion"]; § 240, at 411 ["the specific mention of one person

with e-mail omnipresent in both business and personal affairs, it is too late in the day to accept it.[5]

In 1994, when GOL § 5-701(b) was enacted, electronic communication was still relatively novel.[6] The legislative history of the original amendment indicates that the background of the bill was that, by 1994, institutions entering into certain complex financial agreements (such as foreign exchange contracts, financial and commodity swaps, and other derivatives) had come to rely on e-mail and other electronic means of communication, rather than paper writings, to memorialize those transactions. As noted in one of the relevant legislative memoranda, "[i]n the

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or thing implies the exclusion of other persons or thing(s)"]; *but see* § 76, at 169 ["rules of construction for a statute are to be invoked only where its language leaves its purpose and intent uncertain"]; § 91, at 174 ["The object of these (rules of statutory construction) is not to lay down inflexible principles . . . but to render assistance in determining the legislative intent," and "(r)esort is had to the rules . . . only when it is necessary to apply them to ascertain the meaning of a statute"]).

[5]We thus disagree with *Vista Devs. Corp. v VFP Realty LLC* (17 Misc 3d 914 [Sup Ct, Queens County 2007]), which essentially accepted the argument made by defendant here (*see id.* at 919-921).

[6]That electronic communications were still relatively novel in 1994 is illustrated by the fact that a New York federal court, in a decision issued that year, deemed it advisable to explain what the Internet was and how it worked (*see MTV Networks v Curry*, 867 F Supp 202, 203-204 nn 1, 2 [SD NY 1994]). The court noted that, at the time, "[a]n estimated 25 million individuals have some form of Internet access, and this audience is doubling each year" (*id.* at 203 n 1).

marketplace, these agreements are considered binding from the moment agreement is reached" (Mem of Assembly Rules Comm on L 1994, ch 467, 1994 NY Legis Ann, at 317). At that time, however, there was a perceived uncertainty whether such agreements were immediately enforceable under the statute of frauds if the parties entered into them through electronic means of communication (*see id.* ["under current law there is a 'gap' in that the agreement is not legally binding on a party unless and until the other party receives 'a note or memorandum subscribed by the party to be charged therewith,' if to be performed over a period in excess of one year"]).[7] To remove this uncertainty, the Legislature amended GOL § 5-701 to make clear that a

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[7]The scholarly literature of the early 1990s recognized that whether the record of an electronic communication could satisfy the statute of frauds was an open question as of that time (*see* DiPaolo, Note and Comment, *The Application of the Uniform Commercial Code Section 2-201 Statute of Frauds to Electronic Commerce*, 13 J L & Com 143 [1993]; Wilkerson, Comment, *Electronic Commerce under the U.C.C. Section 2-201 Statute of Frauds: Are Electronic Messages Enforceable?*, 41 U Kan L Rev 403 [1992]; Electronic Messaging Services Task Force, *The Commercial Use of Electronic Data Interchange -- A Report and Model Trading Partner Agreement*, 45 Bus Law 1645, 1682-1689 [1990]). The uncertainty persisted as late as 1998 (*see* Robertson, *Electronic Commerce on the Internet and the Statute of Frauds*, 49 SC L Rev 787, 807-809 [1998]). According to the last cited article, as of the time of its writing, "no court has yet determined whether a computer-stored or computer-generated record satisfies the Statute of Frauds" (*id.* at 804; *but see Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 390 [1994] [holding in the alternative that "documentary evidence in defendant's own files, including . . . computer records," satisfied the writing requirement of GOL § 5-1105]).

"qualified financial contract [as defined] . . . is legally binding from the moment agreement is reached" (Senate Introducer Mem in Support, Bill Jacket, L 1994, ch 467, at 10).

Today, a decade into the twenty-first century, e-mail is no longer a novelty. Although not enacted by New York, the Uniform Electronic Transactions Act (7A [part I] ULA 211 [1999] [UETA]), which was promulgated in 1999 and has been enacted by 47 states, the District of Columbia, and the Virgin Islands (*see* 2010 Pocket Part to 7A [part I] ULA, at 146), provides, inter alia, that "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation" (UETA § 7[b]) and that "[i]f a law requires a record to be in writing, an electronic record satisfies the law" (UETA § 7[c]).[8] Moreover, in 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act (15 USC § 7001 *et seq.*, as added by Pub L 106-229, 114 US Stat 464 [E-SIGN]), which provides in pertinent part:

> "Notwithstanding any statute, regulation, or other rule of law . . . , with respect to any transaction in or affecting interstate or foreign commerce --

[8] *See also* UETA § 7, Official Comment 1 (the "fundamental premise" of the UETA is "that the medium in which a record, signature, or contract is created, presented or retained does not affect [its] legal significance").

> "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
>
> "(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation" (15 USC § 7001[a]).

It could be argued (although plaintiff has not done so) that E-SIGN applies here based on plaintiff's Italian nationality, and perhaps on other grounds as well (*see* 12 Lawrence's Anderson on the Uniform Commercial Code, E-SIGN § 101:2 [3d ed]). However, we need not determine whether the transaction at issue here was one "in or affecting interstate or foreign commerce" for purposes of E-SIGN. Any uncertainty that existed in 1994 as to whether the record of an electronic communication satisfied the statute of frauds under New York state law has long since been resolved.

In 1999, the New York Legislature enacted the Electronic Signatures and Records Act (ESRA), now article III (formerly article I) of the State Technology Law (L 1999, ch 4, § 2, as amended by L 2002, ch 314, and by L 2004, ch 437). ESRA does not specifically address whether an "electronic record" constitutes a

writing for purposes of the statute of frauds.[9] However, ESRA does provide, in pertinent part:

> "In accordance with this section [directing the state Office for Technology to establish rules and regulations governing the use of electronic signatures and authentication] unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand" (ESRA § 304[2]).[10]

In 2002, the Legislature enacted certain amendments to ESRA.

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[9]ESRA defines "electronic record" to mean "information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities" (ESRA § 302[2]). E-SIGN defines the same term as "a contract or other record created, generated, sent, communicated, received, or stored by electronic means" (15 USC § 7006[4]).

[10]While the applicable statute of frauds requires a signature or other subscription by the party to be charged or its duly authorized agent (*see* GOL § 5-703[2], [3]) -- a matter apparently addressed by ESRA § 304(2) -- ESRA, as codified, does not directly address whether an electronic record constitutes a writing for purposes of the statute of frauds. ESRA § 305(3) provides that "[a]n electronic record shall have the same force and effect as those records not produced by electronic means," but, viewed in the context of the remainder of section 305, this provision appears to be addressed to government records. The regulation promulgated by the Office of Technology providing that "[a]n electronic record used by a person shall have the same force and effect as those records not produced by electronic means" (9 NYCRR § 540.5[a]) also appears, in the context of the remainder of section 540.5, to be addressed to documents filed with the government.

Among other things, the 2002 legislation amended ESRA's definition of the term "electronic signature" to conform to E-SIGN's definition of the same term (*see* L 2002, ch 314, § 2).[11] Section 1 of chapter 314 of the Laws of 2002 sets forth the Legislature's intent in amending ESRA as follows:

> "Legislative intent. [ESRA] is intended to support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signature and paper documents. Subsequent to the adoption of ESRA, [E-SIGN] was adopted [by Congress] to permit and encourage the expansion of electronic commerce in interstate and foreign commercial transactions. Like ESRA, this federal law authorizes the use and acceptance of electronic signatures and electronic records in the context of these commercial transactions. It is the intent of this bill to ensure that these laws continue to complement each other in achieving their stated purposes. Rather than seeking to modify, limit or supercede [*sic*] federal law [as E-SIGN permits states to do to a defined extent], the legislature finds that it is in the best interest of the state of New York, its citizens, businesses and government entities for State and federal law to work in tandem to promote the use of electronic technology in the everyday lives and transactions of such individuals and entities. It is with this finding in mind

[11]ESRA § 302(3) now defines "electronic signature" to mean "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." This substantially conforms to the definition of "electronic signature" set forth in E-SIGN (15 USC § 7006[5]).

> that the following amendments are made to the state technology law" (2002 McKinney's Session Laws of NY, at 1034).

By adopting the foregoing statement of legislative intent, New York's lawmakers appear to have chosen to incorporate the substantive terms of E-SIGN into New York state law.[12] Thus, we conclude that E-SIGN's requirement that an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper (15 USC § 7001[a]; *see* 12 Lawrence's Anderson on the Uniform Commercial Code, E-SIGN §§ 101:4, 101.6; Nimmer, Law of Computer Technology, §§ 13:13, 13:15) is part of New York law, whether or not the transaction at issue is a matter "in or affecting interstate or foreign commerce."[13]

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[12]An alternative approach, which the Legislature evidently chose not to take, would have been to adopt UETA, as most states have done. E-SIGN permits states to supersede the federal act by enacting UETA (*see* 15 USC § 7002[a]).

[13]In this regard, the legislative memorandum in support of the 2002 amendments to ESRA demonstrates that the bill was motivated by a desire to eliminate possible inconsistencies between ESRA and E-SIGN. The report states: "It is essential . . . to the success and promotion of electronic commerce and electronic government for both laws to be interpreted and applied consistently. Determining which law applies to particular transactions has caused confusion in the business community and thereby has an inhibiting effect on the expansion of electronic commerce in New York. Consequently, [the Office for Technology] is proposing that ESRA be amended to eliminate some of the definitional differences between ESRA and [E-SIGN]" (Senate Mem in Support of L 2002, Ch 314, 2002 McKinney's Session Laws of NY,

Even in the absence of E-SIGN and the 2002 statement of legislative intent, given the vast growth in the last decade and a half in the number of people and entities regularly using e-mail, we would conclude that the terms "writing" and "subscribed" in GOL § 5-703 should now be construed to include, respectively, records of electronic communications and electronic signatures, notwithstanding the limited scope of the 1994 amendment of the general statute of frauds.[14] As one scholar has observed, "In most cases, . . . definitions of a 'writing' or a 'signature' are transferable to the electronic context and the primary issue is whether the writing contains the relevant, required content" (Nimmer, Law of Computer Technology, § 13:12). As much as a communication originally written or typed on paper, an e-mail retrievable from computer storage serves the purpose of the statute of frauds by providing "'some objective guaranty, other

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at 1881).

[14]This approach seems to be consistent with the current weight of authority nationwide (*see* John E. Theuman, Annotation, *Satisfaction of the Statute of Frauds by E-Mail*, 110 ALR5th 277, 283, § 2 ["Courts addressing this question . . . have . . . determined on a case-by-case basis whether the particular e-mail messages . . . satisfy the elements of the applicable Statute of Frauds provision, an approach which may imply acceptance of the general proposition that e-mails can satisfy the Statute of Frauds in a proper case"]).

than word of mouth, that there really has been some deal'" (*Bazak Intl. Corp. v Mast Indus.*, 73 NY2d 113, 120 [1989], quoting 1954 Report of NY Law Rev Commn, at 119; *see also Bazak Intl. Corp. v Tarrant Apparel Group*, 378 F Supp 2d at 383-384 ["because 'under any computer storage method, the computer system "remembers" the message even after being turned off,' whether or not the e-mail is eventually printed on paper or saved on the server, it remains an objectively observable and tangible record that such a confirmation exists"], quoting Wilkerson, 41 U Kan L Rev at 412). The writing and subscription requirements of the statute of frauds have been held flexible enough to accommodate earlier innovations in communications technology, such as the telegram, the telex, and the fax (*see* Robertson, 49 SC L Rev at 797-803; Wilkerson, 41 U Kan L Rev at 409-414), and the same logic used to reach those results "justif[ies] a rule that permits e-mail or other electronic media to constitute an acceptable memorandum, so long as the other requirements of a valid memorandum are met" (10 Lord, Williston on Contracts § 29:23, at 592 [4th ed]; *see also Shattuck v Klotzbach*, 14 Mass L Rptr 360, 2001 WL 1839720, *4, 2001 Mass Super LEXIS 642, *9-10 [Mass Super 2001] [decided before state's adoption of UETA]; Maker, *Of Keystrokes and Ballpoints: Real Estate and the Statute of Frauds in the Electronic Age*, 80 NY St BJ 46, 47 [July/Aug. 2008] [the

"similarity between telegrams and e-mails cogently argues for the importation of 'telegram jurisprudence' into the world of e-mails"]).

Notwithstanding that an e-mail may satisfy the statute of frauds, we conclude that the motion should have been granted and the complaint dismissed. Even if the e-mail on which plaintiff relies would satisfy GOL § 5-703, the allegations of the complaint itself, together with plaintiff's admissions and undisputed documentary evidence in the record, establish, as a matter of law, that there was never a meeting of the minds between the parties on the terms of the proposed right of first refusal set forth in the February 12, 2007 e-mail sent by Spinelli, defendant's broker. Again, the e-mail, in response to plaintiff's prior offer to purchase the property for $50 million, made a "[c]ounteroffer" to sell the property for $52 million and, during the period of plaintiff's anticipated pre-contractual due diligence, to subject the property to a "first right of refusal on any legitimate, *better* offer during a 30 day period" (emphasis added). Thus, the offer of a right of first refusal was inextricably linked to the proposed purchase price of $52 million; without at least an agreement in principle on price, the words "better offer" would be meaningless. As discussed below, plaintiff's own allegations, as well as the undisputed

documentary evidence, make plain that there was never any tentative agreement on the $52 million figure set forth in the e-mail.

The draft contract sent by defendant's counsel to plaintiff's counsel on or about February 16, 2007 contained a price term of $50 million. Standing alone, this might raise a question of whether a mistake was made in the preparation of the draft contract, and, if so, whether the conduct of plaintiff's agents in contacting defendant to conduct due diligence constituted an acceptance of the right of first refusal set forth in Spinelli's e-mail. Plaintiff himself, however, has eliminated any such question by making clear, through admissions in his complaint and in his agent's affidavit opposing the motion to dismiss, that he never agreed to the $52 million figure. The complaint alleges that, "[s]ignificantly," the $50 million draft contract was "consistent with Plaintiff's offer without any indication that the contract was not to be considered a definitive offer to sell the Property for $50 million." Similarly, plaintiff's representative in the negotiations, Federico Santini, states in his affidavit that "[t]he dissemination of the $50 million contract, prepared by Defendants' own counsel," meant that Spinelli's e-mail "must be read to simply mean that a counteroffer was potentially under

discussion" -- in other words, that there was no meeting of the minds on the $52 million figure, which plaintiff, by his own account, rejected (*see Gram v Mutual Life Ins. Co. of N.Y.*, 300 NY 375, 382 [1950] ["It is a fundamental rule of contract law that an acceptance must comply with the terms of the offer"]; *Homayouni v Banque Paribas*, 241 AD2d 375, 376 [1997] ["whenever a purported acceptance is even slightly at variance with the terms of an offer, the qualified response operates as a rejection and termination of -- and substitution for -- the initially offered terms"]).[15]

Thus, plaintiff himself avers that his suit is not based on any agreement that he would enjoy the right of first refusal set

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[15]If the foregoing left any room for doubt as to the terms of the alleged agreement on which plaintiff is suing, nowhere in his appellate brief does plaintiff even mention that the same e-mail he invokes to satisfy the statute of frauds offered to sell him the property for $52 million, not $50 million. Indeed, plaintiff's brief frankly takes the position that the parties agreed on a price of $50 million:

> "In Mr. Spinelli's email [*sic*], [defendant] duly acknowledged [plaintiff's] offer to purchase the Property for $50 million and provided [plaintiff] with a 'first right of refusal on any legitimate, better offer during a 30 day period.' Thereafter, [defendant] forwarded a Contract to [plaintiff] unambiguously incorporating the terms of the Email [*sic*] between Mr. Spinelli and [plaintiff's broker] and the agreement between [defendant] and [plaintiff] for the purchase and sale of the Property for $50 million" (Brief for Plaintiff-Respondent at 7 [record citations omitted]).

forth in Spinelli's e-mail -- which, to reiterate, was linked to the $52 million counteroffer contained in the same e-mail -- but on an alleged agreement that he would enjoy a right of first refusal linked to a contemplated purchase price of $50 million. It may be that the parties did reach such an agreement but, if they did, that agreement was oral or implied-in-fact, as it is not documented by the writings in the record, whether those writings are viewed individually or in aggregate. In this regard, it bears emphasis that a right to match any offer "better" than $52 million -- as set forth in the e-mail on which plaintiff relies -- is entirely different from a right to match any offer at all or any offer better than $50 million -- the latter being the undocumented right plaintiff apparently claims he was granted.[16] It follows that the latter alleged right of first refusal cannot be pieced together from the Spinelli e-mail (offering a right of first refusal linked to a $52 million price term) and the subsequently forwarded draft contract (containing a $50 million price term but silent as to any right of first refusal). Since the essential terms of the right of first refusal plaintiff seeks to enforce are not set forth in any

[16]Indeed, the alleged third-party offer of $52 million would not have triggered the right to match an offer "better" than $52 million set forth in Spinelli's e-mail.

writing or group of writings, the applicable statute of frauds (GOL § 5-703) bars this action.[17]

Finally, as previously noted, defendant makes two additional arguments. The first of these is that the "signature block" at the bottom of the Spinelli e-mail (identifying the writer and his title, firm, address, and telephone and fax numbers) was automatically generated by the e-mail system rather than deliberately typed and therefore does not qualify as an intentional subscription for purposes of the statute of frauds (*see Parma Tile Mosaic & Marble Co. v Estate of Short*, 87 NY2d 524 [1996]). Defendant's remaining argument is that, even if Spinelli "subscribed" the e-mail within the meaning of GOL § 5-703, neither he nor his brokerage firm, Massey Knakal, had authority to enter into binding contracts on defendant's behalf. Given that the complaint must be dismissed for the reason already discussed, we need not resolve whether either of these additional arguments would furnish independent grounds for dismissing the complaint on a pre-answer, pre-discovery motion.

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[17]Plaintiff does not argue that he may avoid the bar of the statute of frauds to the extent his due diligence efforts constitute "part performance" under GOL § 5-703(4). In any event, plaintiff's due diligence efforts would not qualify as "part performance" for these purposes because such conduct was not unequivocally referable to the alleged right of first refusal sought to be enforced (*see Chan v Shew Foo Chin*, 62 AD3d 471 [2009]).

Accordingly, the order of the Supreme Court, New York County (Herman Cahn, J.), entered December 15, 2008, which, to the extent appealed from, denied the motion of defendant-appellant Grunberg 55 LLC to dismiss the complaint as against it, should be reversed, on the law, with costs, and the motion granted.

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

ENTERED: OCTOBER 5, 2010

CLERK