

presented at the hearing was substantially similar to the trial evidence recounted in our prior decision. The hearing evidence also established that defendant was sweating very heavily as he frantically banged on the door. Although defendant's clothing differed from any of the clothing descriptions the police had received regarding an armed man, the police were also aware of reports that the dispute involved multiple armed men, and they reasonably suspected that defendant was one of them. Defendant's behavior, and, in particular, his direction of flight as compared with that of other persons at the scene, suggested that, unlike the others, he was fleeing from the police rather than escaping from danger. Accordingly, the police were entitled to forcibly detain defendant (*see People v Casado*, 43 AD3d 758 [2007], *lv denied* 9 NY3d 1005 [2007]). Once defendant reached for his waistband, the officers' suspicions became even more elevated, providing them with further justification for conducting a patdown.

Turning to the issues defendant raised on his original appeal, which we held in abeyance pending a suppression hearing, we find no basis for reversal. The trial court properly exercised its discretion in precluding, on the ground of excessive remoteness, evidence offered to establish a motive for the police to fabricate (*see People v Thomas*, 46 NY2d 100, 105 [1978], *appeal dismissed* 444 US 891 [1979]), and this ruling did

not deprive defendant of any constitutional right (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). Although the trial court erred in ruling that defendant's testimony opened the door to a modification of its prior ruling that had precluded the prosecutor from questioning defendant about uncharged drug crimes, the error was harmless in light of the overwhelming evidence of defendant's guilt (see *People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence. Defendant's remaining claims relating to his sentence are without merit.

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

ENTERED: MAY 13, 2008



CLERK

Andrias, J.P., Friedman, Sweeny, McGuire, JJ.

1407 In re Brian L., also known as Mariah L.,
Petitioner-Respondent,

-against-

The Administration for Children's Services,
Respondent-Appellant.

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American Civil Liberties Union;
Gay & Lesbian Advocates & Defenders;
The National Center for Lesbian Rights;
The National Center for Transgender Equality;
The New York Civil Liberties Union;
The Transgender Law and Policy Institute;
The Association of Gay and Lesbian
Psychiatrists; George Brown, M.D.;
Michael Brownstein, M.D.; Callen-Lorde
Community Health Center; Ann Danoff, M.D.;
Laura Ellis, M.D.; Fenway Community Health;
James Franicevich, N.P.; R. Nick Gorton, M.D.;
Hispanic Aids Forum; Housing Works, Inc.;
Lyon-Martin Women's Health Services;
Linette Martinez, M.D.; Charles Moser, Ph.D., M.D.;
Gary Remafedi, M.D., M.P.H.; Eugene Schrang, M.D.;
Joellen Vormohr, M.D.; The World Professional
Association for Transgender Health, Inc.;
Children's Law Center for Los Angeles;
The Youth Law Center, San Francisco, CA;
Prof. Libby Adler, Northeastern University,
Boston, MA; Advocates for Children's Services,
Legal Aid of North Carolina, Durham, NC;
Children's Advocacy Institute, San Diego and
Sacramento, CA; Children's Law Center of Minnesota,
St. Paul, MN; Prof. Michael Dale, Ft. Lauderdale, FL;
Justice for Children Project, Columbus, OH; Juvenile
Law Center, Philadelphia, PA; Lawyers for Children;
Legal Services for Children, San Francisco, CA;
National Association of Counsel for Children;
National Center for Youth Law, Oakland, CA;
National Health Law Program, Chapel Hill, NC;
Pegasus Legal Services for Children, Albuquerque, NM;
Public Interest Law Project, Oakland, CA;
Public Justice Center, Baltimore, MD; and
Suffolk University Law School, Child Advocacy Clinic,
Boston, MA,
Amici Curiae.

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

Palyn Hung, New York, for American Civil Liberties Union, Gay & Lesbian Advocates & Defenders, National Center for Lesbian Rights, National Center for Transgender Equality, New York Civil Liberties Union and Transgender Law and Policy Institute, amici curiae.

Lambda Legal Defense & Education Fund, Inc., New York (Hayley Gorenberg of counsel), for The Association of Gay and Lesbian Psychiatrists, George Brown, M.D., Michael Brownstein, M.D., Callen-Lorde Community Health Center, Ann Danoff, M.D., Laura Ellis, M.D., Fenway Community Health, James Franicevich, N.P., R. Nick Gorton, M.D., Hispanic Aids Forum, Housing Works, Inc., Lyon-Martin Women's Health Services, Linette Martinez, M.D., Charles Moser, Ph.D., M.D., Gary Remafedi, M.D., M.P.H., Eugene Schrang, M.D., Joellen Vormohr, M.D., and The World Professional Association for Transgender Health, Inc., amici curiae.

Martha Matthews, Monterey Park, CA, for Children's Law Center for Los Angeles, The Youth Law Center, San Francisco, CA; Prof. Libby Adler, Northeastern University, Boston, MA; Advocates for Children's Services, Legal Aid of North Carolina, Durham, NC; Children's Advocacy Institute, San Diego and Sacramento, CA; Children's Law Center of Minnesota, St. Paul, MN; Prof. Michael Dale, Ft. Lauderdale, FL; Justice for Children Project, Columbus, OH; Juvenile Law Center, Philadelphia, PA; Lawyers for Children; Legal Services for Children, San Francisco, CA; National Association of Counsel for Children; National Center for Youth Law, Oakland, CA; National Health Law Program, Chapel Hill, NC; Pegasus Legal Services for Children, Albuquerque, NM; Public Interest Law Project, Oakland, CA; Public Justice Center, Baltimore, MD; and Suffolk University Law School, Child Advocacy Clinic, Boston, MA, amici curiae.

Order, Family Court, New York County (Sheldon M. Rand, J.H.O.), entered on or about February 21, 2007, which granted the Law Guardian's motion for an order directing the Administration

for Children's Services (ACS) to arrange for petitioner to have sex reassignment surgery and denied ACS' cross motion to dismiss the proceeding, unanimously reversed, on the law, without costs, the motion denied, the cross motion granted and the proceeding dismissed.

Petitioner was born a biological male but at some point during adolescence was diagnosed with gender identity disorder (GID), "which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity" (*Smith v City of Salem, Ohio*, 378 F3d 566, 568 [6th Cir 2004], citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 576-582 [4th ed 2000]).¹ Petitioner began receiving mental health and medical care for GID, including psychological and psychiatric treatment and hormone therapy aimed at developing secondary female sex characteristics. ACS was responsible for arranging and paying for petitioner's medical care since she was in foster care between 1995 and April 2006.²

In December 2005, petitioner, through her former law guardian, made a motion in Family Court seeking to compel ACS to

¹In accordance with petitioner's preference, we refer to her using feminine pronouns.

²In April 2006, after she commenced this proceeding, petitioner turned 21 years old and was discharged from foster care. ACS does not contend, however, that this proceeding has been rendered moot by those events.

provide her with all medical treatment recommended by her doctors for GID, including sex reassignment surgery, which for male-to-female individuals “involves the removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics,’ such as breast development” (*Ulane v Eastern Airlines, Inc.*, 742 F2d 1081, 1083 n4 [7th Cir 1984], *cert denied* 471 US 1017 [1985], quoting Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L Rev 963, 970 n 37 [1971]).

The motion was supported by the written reports of a psychologist, a psychotherapist and two medical doctors, each of whom had evaluated petitioner to determine whether she was a suitable candidate and ready for sex reassignment surgery. The psychologist, Rachlin, who specialized in treating GID, stated that, under the Standards of Care for GID published by the Harry Benjamin International Gender Dysphoria Association (the Harry Benjamin standards),³ petitioner was both eligible and ready for sex reassignment surgery. Rachlin also stated that the surgery was necessary for petitioner’s emotional well being. Wheeler, the psychotherapist, who specialized in diagnosing and treating

³Both the medical professionals and ACS Assistant Commissioner Pratt rely upon and discuss the Harry Benjamin standards, which articulate standards regarding the psychiatric, psychological, medical and surgical management of GID.

GID, also concluded that, based upon the Harry Benjamin standards, petitioner was eligible and ready for sex reassignment surgery. Wheeler averred that sex reassignment surgery was medically necessary to alleviate petitioner's depression, anxiety disorder and post-traumatic stress disorder. Kreditor, a medical doctor, determined that sex reassignment surgery was indicated for petitioner because without it her emotional and behavioral problems, e.g., anxiety, borderline personality disorder, would "deteriorat[e]," thereby "hinder[ing] further relationship, adjustment, personal and professional growth." Lastly, Bartalos, an internist who provided petitioner with medical gender reassignment treatment, i.e., hormones, stated that sex reassignment surgery would provide petitioner with "[a] more perfect alignment of the appearance of [her] body and [her] mental gender," and was the "next needed step" in the course of her treatment.

ACS opposed the motion on the ground that it was only permitted to pay for medical treatments approved by Medicaid law and that Medicaid law prohibited payment for sex reassignment surgery. No evidence was submitted in support of the agency's opposition. Family Court granted the motion and directed ACS to arrange for petitioner to have the surgery, and ACS appealed.

A prior panel of this Court reversed the order and remanded the matter to ACS for further proceedings (32 AD3d 325 [2006]).

The panel stated that “[w]hile the record contains evidence that the operation is the generally recognized successful treatment for gender identity disorder, the record is incomplete, and, therefore, this issue is not yet ripe for determination” (*id.* at 326). The panel directed ACS to provide Family Court “with a clear statement of the reasons for denial of this surgery” to facilitate meaningful judicial review of ACS’ determination (*id.*).

Upon remand, ACS supplemented the record before Family Court with the affidavit of Pratt, its assistant commissioner in charge of matters related to the provision of medical services to foster children under ACS’ care. Pratt explained that petitioner was a foster child who received medical care pursuant to article 5, title 11 of the Social Services Law, the state Medicaid law, and that “her [medical] coverage is defined by and limited by the Medicaid statute and regulations.” Pratt further explained that state Medicaid law prohibited ACS from paying for sex reassignment surgery.

Pratt stated that, even assuming that ACS could legally pay for the surgery, it would not do so as a matter of discretion, because petitioner had not satisfied certain eligibility requirements for sex reassignment surgery under the Harry Benjamin standards. Specifically, petitioner did not have a psychological evaluation and psychotherapy if required or

recommended, and she lacked demonstrable knowledge of costs, procedures, complications of various surgical procedures and an awareness of different competent surgeons. Pratt also stated that petitioner had not evinced that she was ready for the surgery under the criteria set forth in the Harry Benjamin standards; petitioner, according to Pratt, did not demonstrate that she had a stable, enduring and comfortable gender identity, and she did not show progress in dealing with work, family and interpersonal issues. Pratt averred, based upon multiple conversations with petitioner and information imparted to her by foster care staff, that petitioner "simply has not demonstrated the kind of serious, thoughtful, and committed approach that would, as a matter of basic logic, be expected of anyone appropriately planning for this type of fundamental and serious surgical process. Rather, she has behaved in a manner that is indecisive, unstable, and self-defeating, and has been all but impossible to engage in meaningful planning on this or any other vital issue."

With respect to the recommendations of the medical professionals submitted by petitioner indicating that she was a suitable candidate for sex reassignment surgery, Pratt stated that none of the recommendations "indicate that [petitioner] has either knowledge of the costs, procedures, and complications of various surgical approaches to the surgery . . . , or that she has

given any thought or showed any awareness of different competent surgeons."

Petitioner moved for summary judgment directing ACS to arrange for her sex reassignment surgery, and ACS cross-moved for summary judgment declaring that it had no such obligation. Family Court granted the motion, denied the cross motion and directed ACS to make arrangements for petitioner to have the surgery. This appeal by ACS ensued.

Contrary to petitioner's contention, ACS is not barred from pressing its claim that, pursuant to Medicaid law, it is precluded from paying for sex reassignment surgery. ACS did raise this argument before Family Court in opposition to petitioner's initial motion and before this Court on ACS' appeal from the order deciding that motion. In reversing that order and remanding for further proceedings, however, we did not expressly or implicitly pass on the merits of that argument. Rather, we concluded that ACS "should have provided the Family Court with a clear statement of the reasons for denial of this surgery, and, consequently, we remand[ed] for that purpose" (32 AD3d at 326 [citation omitted]). Thus, the law of the case doctrine does not bar ACS from asserting on this appeal that it is precluded under Medicaid law from paying for sex reassignment surgery (see *Metropolitan Package Store Assn. v Koch*, 89 AD2d 317, 321-322 [1982] [law of the case doctrine "is not inflexible, and applies

only to issues decided, directly or by implication, at an earlier stage of the action" (citation omitted)], *appeal dismissed* 58 NY2d 1112 [1983], *appeal dismissed* 464 US 802 [1983]; see also *People v Evans*, 94 NY2d 499, 503-504 [2000]).

With respect to the substance of that assertion, petitioner and ACS agree that ACS was obligated to provide petitioner with medical and surgical care under Social Services Law § 398(6)(c). That provision requires local governmental officials responsible for certain classes of children to:

"Provide necessary medical or surgical care in a suitable hospital, sanatorium, preventorium or other institution or in his [or her] own home for any child needing such care and pay for such care from public funds, if necessary. However, in the case of a child or minor who is eligible to receive care as medical assistance for needy persons pursuant to title eleven of article five of this chapter, such care shall be provided pursuant to the provisions of that title."

In essence, ACS asserts that Social Services Law § 398(6)(c) creates two tiers of health care for children under ACS' care -- one tier for children who, like petitioner, are entitled to receive medical assistance for needy persons pursuant to title 11 of article 5 of the Social Services Law, the state Medicaid law, and another tier for all other children under ACS' care. Pointing to the second sentence of Social Services Law § 398(6)(c), ACS maintains that the scope of the medical and surgical care available to children in the former tier is limited to the care that is authorized by state Medicaid law, which

precludes payment "for care, services, drugs, or supplies rendered for the purpose of gender reassignment . . . or any care, services, drugs, or supplies intended to promote such treatment" (18 NYCRR 505.2[1]; see NY State Register, July 16, 1997, at 26; NY State Register, March 25, 1998, at 5). Children in the other tier, i.e., all those children in ACS' care who are not entitled to receive medical assistance under Medicaid law, receive the health care authorized in the first sentence of Social Services Law § 398(6)(c) -- "[all] necessary medical or surgical care in a suitable hospital, sanatorium, preventorium or other institution or in his [or her] own home."

Petitioner argues that Social Services Law § 398(6)(c) does not create separate health care schemes for children in ACS' care based on the children's eligibility for Medicaid benefits. Rather, petitioner asserts that ACS is required under Social Services Law § 398(6)(c) to provide all children under its care with all necessary medical and surgical treatment. The second sentence of § 398(6)(c), in petitioner's view, merely stipulates that when a child is eligible for Medicaid and the treatment needed by the child is covered by that program, Medicaid funds must be used to pay for the treatment. Thus, when Medicaid will not cover the costs of a necessary treatment for a child eligible for Medicaid, ACS must pay for the treatment.

"A court must consider a statute as a whole, reading and

construing all parts of an act together to determine legislative intent, and, where possible, should harmonize all parts of a statute with each other and give effect and meaning to the entire statute and every part and word thereof" (*Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d 105, 115 [2007] [internal quotation marks, citation, ellipses and brackets omitted]). Moreover, clear and unambiguous statutory language should be construed so as to give effect to the plain meaning of the words used (see *People v Finnegan*, 85 NY2d 53, 58 [1995], cert denied 516 US 919 [1995]).

The first sentence of Social Services Law § 398(6)(c), in clear and unambiguous terms, states that ACS must "[p]rovide necessary medical or surgical care in a suitable hospital, sanatorium, preventorium or other institution or in his [or her] own home for any child needing such care and pay for such care from public funds, if necessary" (emphasis added). The plain meaning of that sentence -- and the one that gives it effect -- is that ACS has a duty to provide necessary medical and surgical care to all of the children in its care and must, if necessary, pay for that care. The second sentence of that section, read in a manner that gives it effect and places it in harmony with the first, identifies the source from which certain medical expenditures must be paid; that sentence does not mean that children in ACS' care who are eligible for Medicaid are limited

to the medical and surgical care covered by that program.

While ACS has a duty to provide necessary medical and surgical care to all of the children in its care and must, if necessary, pay for that care, the question remains whether ACS can be judicially compelled to pay for petitioner's sex reassignment surgery. ACS' position is that Family Court does not have the power to order ACS to arrange for the surgery and that Family Court's order encroaches upon ACS' authority to provide medical and surgical care to children under ACS' care. Thus, ACS asserts that it has discretion to determine whether a particular medical treatment is necessary and that this determination may not be disturbed unless it lacks a rational basis. Citing Pratt's affidavit, ACS urges that its decision not to arrange for petitioner's sex reassignment surgery has a rational basis. Petitioner argues that ACS has an obligation under Social Services Law § 398(6)(c) to arrange for her to have the surgery, that ACS failed to articulate a reasonable basis for its decision not to arrange it, and, thus, Family Court had the authority to order ACS to do so.⁴

⁴Petitioner, by way of a motion to supplement her 66-page brief made one day before oral argument, attempts to assert the argument that ACS was required under federal Medicaid law to arrange for her sex reassignment surgery. This argument was never previously raised in this proceeding, and we decline to consider it. Moreover, petitioner does not assert that ACS was required to arrange for the surgery pursuant to Social Services Law § 365-a (state Medicaid law). To the contrary, petitioner waived any such argument in both her papers submitted to Family

Petitioner identifies two provisions of the Family Court Act that authorize Family Court to direct ACS to provide services to a person in foster care, Family Court Act § 255 and § 1015-a.

Family Court Act § 255 states, in pertinent part, that:

"It is hereby made the duty of, and the family court or a judge thereof may order, any state, county, municipal and school district officer and employee to render such assistance and cooperation as shall be within his [or her] legal authority, as may be required, to further the objects of this act It is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act."

In *Matter of Lorie C.* (49 NY2d 161 [1980]), the Court of Appeals discussed the scope of Family Court's authority to direct governmental agencies to act under Family Court Act § 255. The petitioner in *Lorie C.* was adjudged a person in need of supervision, and placed in the custody of the St. Lawrence County Department of Social Services and under the supervision of that county's probation department. While the petitioner was to be placed in foster care, the probation department insisted that she

Court and her brief in this Court ("ACS is correct that [Social Service Law § 365-a] is limited to procedures covered by Medicaid and therefore is not applicable here"). Similarly, no argument has been advanced that Family Court was authorized to order the surgery under Family Court Act § 233 ("Whenever a child within the jurisdiction of the court appears to the court to be in need of medical, surgical, therapeutic, or hospital care or treatment, a suitable order may be made therefor").

be placed in a home within a school district in which the department of social services had exhausted its resources. Thus, the department of social services wanted to place the petitioner in another district. At an informal hearing to resolve the issue of the petitioner's placement, Family Court inquired whether a program for reserve foster home accommodations that the department of social services had previously been directed to establish had in fact been implemented. After the petitioner was placed in a foster home, Family Court continued the proceeding and held hearings regarding whether the department of social services should be ordered to maintain a reserve of potential foster homes to eliminate delay in placing children such as the petitioner. Family Court ultimately entered an order, over the department of social services' objection, approving a plan that allocated responsibilities between that department and the probation department with respect to the placement of children in foster homes. The plan also established standards and procedures for such placements, and required that the plan be implemented and followed by the department of social services and the probation department.

The Court of Appeals affirmed an order of the Third Department reversing the order. Noting that Social Services Law § 398(6)(h) provided commissioners of public welfare with the responsibility to supervise certain classes of children until

they become 21 years old, are discharged or are adopted, the Court concluded that the plan set forth in Family Court's order impermissibly treaded upon the department of social services' statutory authority. Thus, the Court stated that while "section 255 authorizes an order requiring the doing of an act within the legal authority of the official to whom the order is directed the power to order 'assistance and cooperation' cannot be read as permitting an order which denigrates from that officer's statutory authority, any more than it can be read as expanding such an official's authority into areas not granted by statute" (49 NY2d at 171). Relatedly, the Court observed that "courts do not normally have overview of the lawful acts of appointive and elective officials involving questions of judgment, discretion, allocation of resources and priorities," and that "it is a fundamental of the doctrine of distribution of powers that each department should be free from interference" (*id.* [internal quotation marks omitted]; see *Matter of Ronald W.*, 25 AD3d 4 [2005]).

Like the authority to supervise certain classes of children, the authority to provide necessary medical and surgical care to such children is conferred in clear and unambiguous language upon commissioners of public welfare and city public welfare officers, such as the Commissioner of ACS, by Social Services Law § 398(6) (see *Matter of Arlene L.*, 187 Misc 2d 356, 357 [Fam Ct, NY County

2001] ["the Commissioner [of ACS] has a nondelegable statutory duty to provide all necessary medical care and treatment for children placed in the care of [ACS]"]).⁵ Thus, Family Court Act § 255 cannot be read as permitting Family Court to order ACS to arrange for a child in its care to receive specific medical or surgical care, since such an order would denigrate from ACS' statutory authority (see *Matter of Lorie C.*, 49 NY2d at 171; see also *Matter of Ronald W.*, *supra* [Family Court Act § 255 does not give Family Court power to order New York State Office of Mental Retardation and Developmental Disabilities, which has statutory responsibility for providing services for the mentally retarded and developmentally disabled, to re-evaluate person for eligibility for services provided by the Office]; *Matter of Enrique R.*, 126 AD2d 169 [1987] [Family Court Act § 255 does not authorize Family Court to direct Commissioner of Social Services to commence special proceeding against New York City Housing Authority on behalf of foster child and his grandmother]).

Petitioner's assertion that 18 NYCRR 441.22, when read in

⁵While reference to the relevant statutory headings is not necessary since Social Services Law § 398(6) is unambiguous (see McKinney's Cons Laws of NY, Book 1, Statutes § 123[b] [headings may be considered where statute ambiguous]), the headings of both the title of the article within which § 398 falls ("Powers and Duties of Public Welfare Officials") and of § 398 itself ("Additional powers and duties of commissioners of public welfare and certain city public welfare officers in relation to children") buttress the conclusion that the Legislature conferred upon ACS the authority to provide necessary medical and surgical care to children under its care.

conjunction with Social Services Law § 398(6)(c), imposes upon ACS "an unqualified and nondiscretionary obligation" to arrange for her to have sex reassignment surgery, such that Family Court had the authority under Family Court Act § 255 to order ACS to arrange for the surgery, is without merit.

Subdivision (a) of section 441.22 states that "[e]ach authorized agency[, such as ACS,] is responsible for providing comprehensive medical and health services for every foster child in its care." Subdivision (f) of that section directs that children in foster care must have "periodic individualized medical examinations" and sets forth the intervals at which such examinations must take place. Paragraph (2) of subdivision (f) states that the examinations must include:

- "(i) a comprehensive health and developmental history;
- (ii) a comprehensive unclothed physical examination;
- (iii) an assessment of immunization status and provision of immunizations as necessary;
- (iv) each periodic medical examination of a child that occurs after the initial assessment of the child for risk factors related to HIV infection in accordance with subdivision (b) of this section, must include an assessment by designated agency staff of whether HIV-related testing of the child is recommended . . . ;
- (v) an appropriate vision assessment;
- (vi) an appropriate hearing assessment;
- (vii) laboratory tests as appropriate for specific

age groups or because the child presents a history or symptoms indicating such tests are necessary;

(viii) dental care screening and/or referral; and

(ix) observation for child abuse and maltreatment which, if suspected, must be reported to the State central register of child abuse and maltreatment as mandated by section 413 of the Social Services Law."

Subdivision (g) of 441.22, the linchpin of petitioner's argument, provides that "[w]hen the medical examination indicates a condition requiring follow-up care as determined by the child's physician, the agency responsible for the child's care must provide or arrange for such follow-up care as recommended by the child's physician."

Subdivision (g) does not apply to petitioner's situation. That subdivision applies "[w]hen *the medical examination* indicates a condition requiring follow-up care as determined by the child's physician" (emphasis added). "[T]he medical examination" is a reference to one of the periodic medical examinations required by subdivision (f). Concomitantly, under the language of subdivision (g), an agency responsible for a child's medical care must provide follow-up care as recommended by the child's physician for conditions detected or diagnosed during periodic medical examinations. Here, however, a periodic medical examination did not indicate a condition requiring follow-up care.

Rather, in 2004 ACS arranged for petitioner to be evaluated by Rachlin, a psychologist, because petitioner had expressed an interest in having sex reassignment surgery; petitioner was subsequently evaluated by Wheeler, a psychotherapist, and Drs. Kreditor and Bartalos.

Even assuming that section 441.22(g) is applicable (i.e., a periodic medical examination indicated that petitioner required follow-up care and petitioner's physician recommended a specific course of action), it could not be given the effect petitioner urges. As discussed above, the Legislature conferred upon commissioners of public welfare and city public welfare officers, including the Commissioner of ACS, the authority and responsibility to provide necessary medical and surgical care to children under their care (Social Services Law § 398[6][c]; see *Arlene L.*, 187 Misc 2d at 357). Thus, a regulation cannot restrict or impair those officers' authority (see *Weiss v City of New York*, 95 NY2d 1, 4 [2000] ["It is a fundamental principle of administrative law that an agency cannot promulgate rules or regulations that contravene the will of the Legislature"]; *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480 [1978] ["Of course, the Board is without power to promulgate rules in contravention of the will of the Legislature.

Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute" [internal quotation marks omitted]). As section 441.22(g) would be "out of harmony" with Social Services Law § 398(6)(c) to the extent the regulation purported to substitute the discretion of a foster child's physician for that of the public officer charged with responsibility for ensuring that the child receives necessary medical and surgical care, the statute prevails and the regulation does not require the public officer to provide or arrange for whatever follow-up care may be recommended by the child's physician (see *Weiss*, 95 NY2d at 5).

Petitioner, with a brief reference to the statute, also asserts that Family Court had the power to order ACS to arrange for her sex reassignment surgery under Family Court Act § 1015-a. That section states that:

"In any proceeding under . . . article [10 of the Family Court Act], the court may order a social services official to provide or arrange for the provision of services or assistance to the child and his or her family to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care. Such order shall not include the provision of any service or assistance to the child and his or her family which is not authorized or required to be made available pursuant to the comprehensive annual services program plan then in effect."

Thus, in limited and defined circumstances, Family Court has discretion to order a social services official to provide or arrange for services for a child. Family Court cannot order a social services official to provide a service or assistance that "is not authorized or required to be made available pursuant to the comprehensive annual services program plan then in effect" (*id.*; see Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1015-a [1999 ed] ["[Section 1015-a] authorizes the court to order social services officials to provide or arrange for needed services -- *but only if the services are 'authorized or required to be made available pursuant to a comprehensive annual services program plan then in effect'*"] (emphasis added)]).

In its memorandum of law submitted to Family Court (and again on appeal), ACS asserted that medical services are not part of the effective comprehensive annual services program plan; rather, medical services are provided to foster children by ACS in accordance with a "local medical plan" (18 NYCRR 501.1). Thus, a surgical procedure falls outside the scope of the comprehensive annual services program plan and Family Court cannot order ACS under Family Court Act § 1015-a to arrange for petitioner to have sex reassignment surgery. In opposition to ACS' prima facie showing that Family Court did not have the power under Family Court Act § 1015-a to direct ACS to arrange for

petitioner's surgery, petitioner failed to raise a triable issue of fact. Neither before Family Court nor in her brief on this appeal did petitioner cite to any provision or section of the effective comprehensive annual services program plan authorizing or requiring ACS to arrange for her sex reassignment surgery. In fact, petitioner has not even asserted that the effective comprehensive annual services program plan authorizes or requires sex assignment surgery to be made available to her. We therefore conclude that no triable issue of fact exists as to whether Family Court had the power under Family Court Act § 1015-a to direct ACS to arrange for petitioner's surgery.

Lastly, while the parties devote extensive attention to the question of whether ACS' refusal to arrange for the surgery was arbitrary and capricious, i.e., did not have a rational basis, that question is not a proper subject of this proceeding. To obtain review of the determination of an administrative agency made in the absence of a hearing required by law, a party must commence a CPLR article 78 proceeding seeking mandamus to review (see CPLR 7801; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C7801:3, at 32 [1994 ed]). An article 78 proceeding must be commenced in Supreme Court (CPLR 7804 [b]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY,

Book 7B, C7804:2, at 647); it cannot be prosecuted in Family Court (*Matter of Bowers v Bowers*, 266 AD2d 741, 742-743 [1999]; *Matter of Leonora M.*, 104 AD2d 755, 756 [1984]; *Matter of Naima C.*, 39 AD2d 964, 965 [1972]). Thus, Family Court does not have subject matter jurisdiction to review ACS' refusal to arrange for petitioner to have sex reassignment surgery.⁶ Rather, this proceeding involves the question of whether Family Court has the power to order ACS to arrange for petitioner to have the surgery, a question that is separate and distinct from whether that court has the jurisdiction to review an administrative determination of ACS.

Accordingly, we reverse the order directing ACS to arrange for petitioner to have sex reassignment surgery, deny petitioner's motion, grant ACS' cross motion and dismiss the proceeding.

⁶While neither of the parties raise the issue of whether Family Court lacked subject matter jurisdiction to review the administrative determination of ACS, we may reach it on our own volition (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997] ["a court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action, and the court may, *ex mero motu* (on its own motion), at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action"] [internal quotation marks omitted]).

M-2654

M-2686

M-2920 *In re Brian L., etc. v Administration for
Children's Services*

Motions seeking leave to file amici curiae
briefs granted and for leave to file
supplemental brief denied.

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

ENTERED: MAY 13, 2008


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defendant admitted that he was not a drug user. The jury had no basis on which to selectively credit those portions of police testimony that supported simple possession while discrediting those portions that supported possession with intent to sell (compare *People v Olivera*, 45 AD3d 154 [2007] [reasonable view that defendant was innocent of sale but guilty of possessing five heroin envelopes for own use]).

The prosecutor's questioning of an expert witness was permissible under *People v Hicks* (2 NY3d 750 [2004]), and, to the extent the expert's response exceeded the bounds set forth in *Hicks*, any claim of error was not preserved for review and we decline to review it in the interest of justice. As an alternative holding, we find that even assuming that there was any error it was harmless (see *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

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

ENTERED: MAY 13, 2008


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

3652 In re Felicia McM.,
 Petitioner-Appellant,

-against-

 Jerrold L.W.,
 Respondent-Respondent.

John J. Marafino, Mount Vernon, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V.
Merkine of counsel), Law Guardian.

Order, Family Court, Bronx County (Gayle P. Roberts, J.),
entered on or about September 26, 2006, which, insofar as
appealed from, dismissed the petition seeking modification of a
prior order of custody and visitation for lack of jurisdiction,
unanimously affirmed, without costs.

The court properly dismissed the petition on the ground that
it lacked jurisdiction over this custody matter. The evidence
establishes that in 2001, the subject child's father, who resided
in North Carolina, was awarded custody, and that in 2002, the
child was placed with a paternal aunt in Georgia where he goes to
school and has his special needs attended to by his aunt, a
special education teacher. It is apparent that the child does
not have a significant connection to New York, and that
"substantial evidence is no longer available in this state

concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76-a[1][a]; see *Matter of Zippo v Zippo*, 41 AD3d 915 [2007]). That petitioner continues to reside in New York does not require a different conclusion (see *Matter of King v King*, 15 AD3d 999, 1001 [2005]).

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

ENTERED: MAY 13, 2008



CLERK

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

3655 In re Edward Gerena,
Petitioner,

Index 404040/07

-against-

Shaun Donovan, as Commissioner
of the New York City Department of
Housing Preservation and Development, et al.,
Respondents.

Lenox Hill Neighborhood House, New York (Kimberly Mosolf of
counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris
of counsel), for municipal respondents.

Gutman, Mintz, Baker & Sonnenfeldt, P.C., New Hyde Park (Gary D.
Friedman of counsel), for Frawley Plaza, L.L.C., respondent.

Determination of respondent Department of Housing
Preservation and Development, dated February 2, 2007, which,
inter alia, denied petitioner's application for an enhanced
Section 8 rent subsidy, unanimously confirmed, the petition
denied, and the proceeding brought pursuant to CPLR article 78
(transferred to this Court by order of the Supreme Court, New
York County [Nicholas Figueroa, J.], entered July 23, 2007),
dismissed, without costs.

Termination of petitioner's subsidy for violation of the
Section 8 Housing Choice Voucher Program regulations due to his
failure to notify respondent that his wife was living in the
subject residence with him and his children was supported by

substantial evidence (see *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). We do not find the penalty imposed was so disproportionate to the offense as to be shocking to one's sense of fairness.

We have considered petitioner's remaining arguments and find them unavailing.

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

ENTERED: MAY 13, 2008



CLERK

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

3658 Joel Murray,
Plaintiff-Appellant,

Index 403178/05

-against-

The City of New York, et al.,
Defendants-Respondents.

Joel Murray, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 2, 2007, which granted defendants' motion to amend their answer to include the affirmative defense of collateral estoppel, and granted their motion to dismiss the complaint on that ground, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in granting defendants' motion for leave to amend their answer to include the affirmative defense of collateral estoppel. "Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" (*Fahey v Ontario County*, 44 NY2d 934, 935 [1978] [internal quotation marks omitted]). Plaintiff demonstrated no prejudice -- the loss of some special right, some change of position or some significant trouble or expense that could have been avoided had the original answer contained the defense -- resulting directly from

defendants' delay in seeking the amendment (*see Barbour v Hospital for Special Surgery*, 169 AD2d 385, 386 [1991]). In light of his participation in the prior federal action, plaintiff can claim no surprise that defendants would seek to assert the defense of issue preclusion (*see Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207 [2006]).

In his prior federal action, plaintiff asserted numerous causes of action under 42 USC § 1983 against the defendants in the present action. Plaintiff's claims stemmed from a policy adopted and enforced by defendants that required certain prisoners, including plaintiff, to be handcuffed behind their backs when transported from prison. The District Court granted defendants' motion for summary judgment dismissing the complaint, finding, among other things, that: plaintiff's equal protection claim was meritless because the Department of Corrections' policy to which he objected had a legitimate basis; his Eighth Amendment claim premised on deliberate indifference to serious medical needs was "baseless"; and his substantive due process claim based on defendants' alleged use of excessive force was without merit because he admitted that defendants used no such force (2005 WL 1863729 [SD NY]).

Plaintiff's present claim under the New York State Constitution's equal protection clause is barred by the doctrine of collateral estoppel since "the breadth of coverage under the

equal protection clauses of the federal and state constitutions is equal" (*Pinnacle Nursing Home v Axelrod*, 928 F2d 1306, 1317 [2d Cir 1991]) and the District Court rejected plaintiff's equal protection claim under the federal constitution. Similarly, the District Court's findings that plaintiff was not denied appropriate medical care and that defendants did not use excessive force on plaintiff fatally undermine plaintiff's negligence and substantive due process claims under the state constitution. Lastly, the Magistrate Judge who reviewed the motion and issued a report to the District Court recommended that plaintiff's procedural due process claim under the federal constitution should be dismissed because plaintiff offered no evidence that he was denied a procedure to challenge his classification as an inmate subject to the policy. District Court adopted the Magistrate Judge's report in its entirety. Thus, plaintiff's procedural due process claim under the state constitution, which asserts that he was denied the right to protest his classification, is barred by collateral estoppel.

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

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

ENTERED: MAY 13, 2008



CLERK

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

3660 35 City Island, LLC,
 Plaintiff-Respondent,

Index 15142/06

-against-

Banco Popular,
 Defendant-Appellant,

North Fork Bank,
 Defendant-Respondent,

Vera Westin Restaurant, Inc., et al.,
 Defendants.

Jeffrey F. Cohen, Bronx, for appellant.

Abraham, Lerner & Arnold, LLP, New York (James M. O'Connor of counsel), for 35 City Island, LLC, respondent.

Certilman Balin Adler & Hyman, LLP, East Meadow (Matthew J. Bizzaro of counsel), for North Fork Bank, respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 9, 2007, which, in an action for conversion of a check, granted plaintiff's motion for summary judgment on the issue of defendant-appellant depository bank's liability, and granted defendant-respondent payor bank's cross motion for summary judgment on its cross claim against appellant for indemnification, unanimously affirmed, with costs.

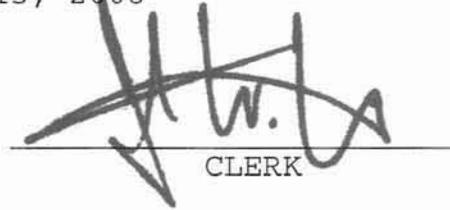
The subject check was made payable to "VeraWestin Restaurant Corp. dba Neptune Inn & 35 City Island Avenue LLC." The check was endorsed and deposited with appellant by a principal of VeraWestin, who absconded. The motion court correctly held that

the check was a two-party check that required the endorsement of plaintiff as well as VeraWestin (UCC 3-116[b]). We reject appellant's argument that the ampersand equally joined Neptune Inn and 35 City Island LLC as one entity that reflected an assumed name for VeraWestin, or at least created an ambiguity in that regard such that its handling of the check satisfied reasonable commercial standards. "An assumed name shall contain no indicator of organizational form (e.g., . . . limited liability company)" (19 NYCRR 1156.4[c][1]), and, if the check was ambiguous, appellant was required to treat it as a two-party check (*Kryten Iron Works v Ultra-Tech Fabricators*, 228 AD2d 416, 417 [1996]). To accept appellant's argument that its employees were not required to know that an assumed name may not contain any indicator of organizational form would encourage ignorance, rather than knowledge, of the law, which would be particularly inappropriate given the obligation of appellant to inspect the check for proper endorsement (*cf. Costello v Oneida Natl. Bank & Trust Co. of Cent. N.Y.*, 109 AD2d 1085 [1985]; *affd* 66 NY2d 619 [1985]). The payor bank was properly awarded indemnification against appellant for breach of transfer warranties (UCC 4-207;

see Leonard Smith, Inc. v Merrill Lynch, Pierce, Fenner & Smith,
129 AD2d 397, 399 [1987]).

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

ENTERED: MAY 13, 2008



CLERK

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

3662 AJW Partners, LLC, et al., Index 600993/05
Plaintiffs-Respondents,

-against-

Peak Entertainment Holdings, Inc.,
Defendant-Appellant.

Law Offices of Dan Brecher, New York (Kimberly P. Reilly of
counsel), for appellant.

Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York
(Christine W. Wong of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York
County (Bernard J. Fried, J.), entered April 24, 2007, as amended
July 18, 2007, which, after a nonjury trial, declared that
defendant breached the parties' settlement agreement and, inter
alia, directed defendant to purchase its stock held by plaintiff
as required by the agreement, unanimously affirmed, with costs.

Defendant's challenges to the admissibility of a deposition
transcript transcribed in London and an e-mail were waived by the
failure to raise the specific objections now urged (*see Matter of
New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 188
AD2d 214, 225-226 [1993], *affd* 82 NY2d 821 [1993]; *Short v Short*,
142 AD2d 947, 948 [1988]).

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

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

ENTERED: MAY 13, 2008

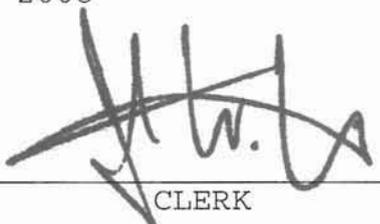


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judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 13, 2008



A handwritten signature in black ink, appearing to be "J. W. La", is written over a horizontal line. Below the line, the word "CLERK" is printed in a simple, sans-serif font.

defendant's responses during the allocution (see *People v McGowen*, 42 NY2d 905 [1977]; see also *People v Seeber*, 4 NY3d 780, 781 [2005]). Even if statements defendant made at sentencing in an effort to obtain further leniency could be construed as asserting his innocence, there was no need for the court to conduct a sua sponte inquiry into those remarks in the absence of a motion to withdraw the plea (see e.g. *People v Sands*, 45 AD3d 414 [2007]; *People v Riley*, 264 AD2d 689 [1999], lv denied 94 NY2d 906 [2000]).

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

ENTERED: MAY 13, 2008


CLERK

Saxe, J.P., Gonzalez, Sweeny, Renwick, JJ.

3665 The Vanderbilt Group, LLC,
 Plaintiff-Appellant,

Index 115130/01

-against-

The Dormitory Authority of the
State of New York,
Defendant-Respondent.

Robert J. Del Col, Huntington, for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (Thomas P. McLish of
counsel), for respondent.

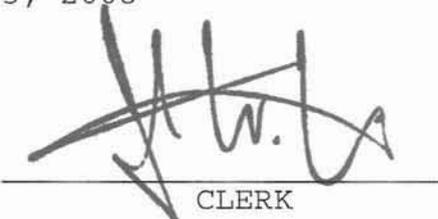
Order, Supreme Court, New York County (Richard B. Lowe III,
J.), entered November 30, 2006, which granted defendant's motion
for summary judgment dismissing the complaint, unanimously
reversed, on the law, without costs, the motion denied and the
complaint reinstated.

Plaintiff seeks to enforce a contract with defendant for the
construction of a residence hall complex at the State University
of New York at Old Westbury. Defendant established prima facie,
based on plaintiff's criminal conviction for offering a false
instrument for filing in connection with said contract, that it
was induced to enter into the contract by plaintiff's false
statements. However, plaintiff submitted evidence that raised an
inference that defendant was aware of the false statements made
by plaintiff in its response to defendant's request for proposals
and investigated them before executing the contract. Since such

evidence was precluded at the trial resulting in plaintiff's criminal conviction, the doctrine of collateral estoppel does not bar the instant action (see *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 [1985]). If defendant was aware of and investigated plaintiff's false representations and chose nevertheless to execute the contract, it waived its defense of fraud and its contractual right to terminate the contract on the basis of the misrepresentations (see *Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469-470 [1978]; *Barrier Sys. v A.F.C. Enters.*, 264 AD2d 432, 433 [1999]; *Lumber Indus. v Woodlawn Furniture Corp.*, 26 AD2d 924 [1966]).

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

ENTERED: MAY 13, 2008



CLERK

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

3666-

3666A

The People of the State of New York,
Respondent,

Ind. 1923/06
2494/06

-against-

Arthur Blake,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Melissa
Pennington of counsel), for respondent.

Judgments, Supreme Court, New York County (Renee A. White,
J.), rendered on or about December 19, 2006, unanimously
affirmed. No opinion. Order filed.

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

3667N-

3667NA Eighty Eight Bleecker Co., LLC,
Petitioner-Respondent,

Index 601621/06

-against-

88 Bleecker Street Owners, Inc.,
Respondent-Appellant.

Anderson & Ochs, LLP, New York (Mitchel H. Ochs of counsel), for
appellant.

Krim & Krim, P.C., New York (Gary M. Krim of counsel), for
respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.),
entered April 5, 2007, which, upon reargument, granted
petitioner's motion to confirm an arbitration award and denied
respondent's cross petition to vacate the award, unanimously
affirmed, with costs. Appeal from order, same court and Justice,
entered October 31, 2006, which, to the extent appealed from,
denied respondent's cross petition to vacate the award except to
the extent of vacating the arbitrator's exclusion of any amount
of real estate taxes from the calculation of petitioner's renewal
rent, unanimously dismissed, without costs, as superseded by the
appeal from the April 5, 2007 order.

Respondent contends that the arbitrator gave a totally
irrational construction to the parties' lease agreement,
effectively rewriting the contract, and thus exceeding her powers

(see CPLR 7511[b][1][3]; *Matter of National Cash Register Co. (Wilson)*, 8 NY2d 377, 383 [1960]; *Matter of Riverbay Corp. (Local 32-E, S.E.I.V., AFL-CIO)*, 91 AD2d 509, 510 [1982]). However, "[t]he mere fact that a different construction could have been accorded the provisions concerned and a different conclusion reached does not mean that the arbitrators so misread those provisions as to empower a court to set aside the award" (*National Cash Register*, 8 NY2d at 383). We find that the lease agreement can reasonably be construed as the arbitrator construed it. Thus, since an arbitration award will not be set aside even where the arbitrator "erred in judgment either upon the facts or the law" (*Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 [1986]), any mistake the arbitrator may have made in construing the lease agreement is not a basis for vacating the award.

We have considered respondent's remaining arguments and find them unavailing.

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

ENTERED: MAY 13, 2008


CLERK

Mazzarelli, J.P., Saxe, Gonzalez, Acosta, JJ.

3000-

3000A J. Christopher Flowers, et al., Index 603768/04
Plaintiffs-Appellants-Respondents,

-against-

73rd Townhouse, LLC,
Defendant-Respondent-Appellant.

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of
counsel), for appellants-respondents.

Hartman & Craven LLP, New York (Donald L. Rosenthal of counsel),
for respondent-appellant.

Order, Supreme Court, New York County (Jane S. Solomon, J.),
entered October 20, 2006, modified, on the law, to the extent
that the matter is remanded for a hearing on the issue of the
amount of price abatement to which plaintiffs are entitled for
the cost of completing the renovation work contemplated by the
contract, and as so modified, affirmed, without costs. Appeal
from order, same court and Justice, entered on or about September
29, 2006, dismissed, without costs, as superseded by the appeal
from the order of October 20, 2006.

Opinion by Saxe, J. All concur.

Order filed.

At a term of the Appellate Division of the
Supreme Court held in and for the First
Judicial Department in the County of
New York, entered on May 13, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Luis A. Gonzalez
Eugene Nardelli, Justices.
James M. McGuire,

The People of the State of New York, Ind. 1219/07
Respondent,

-against- 3656

Elbert Powell,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named
appellant from a judgment of the Supreme Court, Bronx County
(John Byrne, J.), rendered on or about May 1, 2007,

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

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

ENTER:


Clerk.

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 13, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Luis A. Gonzalez
Eugene Nardelli
James M. McGuire, Justices.

The People of the State of New York, Ind. 1923/06
Respondent, 2494/06

-against- 3666
3666A

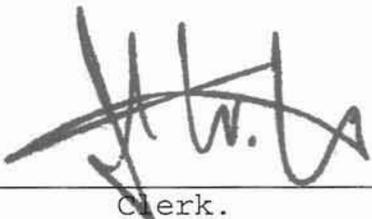
Arthur Blake,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Renee A. White, J.), rendered on or about December 19, 2006,

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 judgments so appealed from be and the same are hereby affirmed.

ENTER:



Clerk.

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