SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 21, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Buckley, Sweeny, Catterson, JJ.

5053 The People of the State of New York, Respondent, Ind. 3491/04

-against-

Anthony Guardino, Defendant-Appellant.

Peluso & Touger, LLP, New York (David Touger of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Amyjane Rettew of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered February 6, 2007, as amended February 7, 2007, convicting defendant, after a jury trial, of enterprise corruption, combination in restraint of trade and competition in violation of General Business Law 340 and 341, bribe receiving by a labor official (13 counts), grand larceny in the third degree (6 counts) and grand larceny in the fourth degree, and sentencing him to an aggregate term of 6 to 18 years, affirmed.

Defendant and eight co-defendants, including Local Union No. 8 of the United Union of Roofers, Waterproofers & Allied Workers (Local 8), were charged in a 54 count indictment with, inter

alia, enterprise corruption, combination in restraint of trade, bribe receiving by a labor official, grand larceny in the third degree, and grand larceny in the fourth degree. Defendant was the business manager or chief executive of Local 8, and four other codefendants were also labor officials. Two of the codefendants are allegedly members of the Genovese Organized Crime Family.

The enterprise corruption count alleged that, from September 2001 to the date of the indictment, defendants and others, including members of the Genovese Crime Family, were part of a criminal enterprise referred to as the "Local 8 Group." This group allegedly accepted bribes and extortion payments from roofing contractors in exchange for "labor peace and lenient treatment by union officials who failed to enforce the union collective bargaining agreements on union projects." The alleged pattern of criminal activity included 113 acts of possession of stolen property, money laundering, falsifying business records, labor bribery, extortion, and combination in restraint of trade in violation of the Donnelly Act.

Local 8 and four other defendants entered guilty pleas prior to trial. The remaining defendants, including appellant, proceeded to trial on October 16, 2006. The jury commenced deliberations on December 12, 2006 and reached a verdict on December 18. The jury convicted defendant of enterprise

corruption and 21 other felony counts.

Defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]) was properly denied. Defendant's argument before the trial court was limited to a numerical argument, i.e., that four of the six black female prospective jurors had been stricken by the prosecutor[1]. The dissent contends this numerical showing was sufficient to meet defendant's initial burden of demonstrating that these potential jurors may have been challenged for impermissible reasons. A review of the record, however, does not support this conclusion.

Of the six black women in question, four were peremptorily challenged by the People, one was stricken by the defense and one was seated. While a purely numerical argument may give rise to a prima facie showing of discrimination (*see e.g. People v Rosado*, 45 AD3d 508 [2007] [where the prosecutor exercised a peremptory challenge against all four Hispanic panelists remaining in the venire]), numbers alone may not automatically establish such a showing. Even though a prima facie showing of discrimination "may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination" (*People v*

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[1]Although defendant makes additional arguments concerning age and other background characteristics similar to the black women peremptorily excused by the People, these arguments were not preserved and we decline to review them (*see People v* James, 99 NY2d 264, 270 [2002]; People *v Solares,* 309 AD2d 502, 503 [2003], *lv denied* 1 NY3d 581 [2003]).

Smocum, 99 NY2d 418, 422 [2003]), if a numerical argument, in and of itself, fails to raise an inference of discrimination the party raising a Batson claim must present "other facts or circumstances suggesting intentional discrimination" *(People v Harris*, 55 AD3d 503, 504 [2008], *lv denied* 11 NY3d 425 [2009]) in order to meet the first requirement of the three-prong *Batson* analysis.

Here, defendant presented no other factors which would give rise to a suggestion that those jurors were peremptorily challenged for impermissible reasons. His numerical argument "was not so compelling as to warrant a finding of a prima facie case" (*People v Solares,* 309 AD2d at 503) and was "unsupported by factual assertions or comparisons that would serve as a basis for a prima facie case of impermissible discrimination" (*People v Brown*, 97 NY2d 500, 508 [2002]).

The court properly exercised its discretion in denying defendant's requests for a mistrial during the fourth and final day of jury deliberations, following a six-week trial involving complex evidence and charges (*see People v Baptiste*, 72 NY2d 356, 360 [1988]; *Matter of Plummer v Rothwax*, 63 NY2d 243, 250 [1984]). The court properly responded to a series of jury notes, which variously reported a deadlock and asked for additional instructions, by first giving a modified *Allen* charge encouraging a verdict, then a full *Allen* charge, and finally asking the jury

to report whether or not, in light of additional instructions concerning applicable law, it wanted to continue deliberating or not. The court cautioned the jurors not to surrender their conscientiously held beliefs, and there was nothing coercive in any of its instructions (*see People v Ford*, 78 NY2d 878, 880 [1991]; *People v Pagan*, 45 NY2d 725 [1978]).

Even though, according to the jury's notes, one juror was unwilling to apply the law to the facts, there was no basis for finding the juror grossly unqualified (*see* CPL 270.35[1]) simply on the basis of the notes, without making an inquiry. However, defendant never requested any inquiry, but merely reiterated his request for a mistrial. In any event, the apparent problem was resolved after further instructions concerning the law were given to the jury.

A court officer's advice to the jury that a requested item was not available for review because it was not in evidence constituted a ministerial function, and defendant's presence was therefore not required (*see People v Bonaparte*, 78 NY2d 26 [1991]).

The "criminal enterprise" element of the enterprise corruption charge (Penal Law 460.10[3]) was supported by ample evidence of labor racketeering committed for a period of over a year by union officials including defendant (*see People v Cantarella*, 160 Misc 2d 8, 14 [Sup Ct, NY County 1993]). Although

the enterprise ended upon the arrests of its members, the continuity requirement was satisfied by evidence that defendant committed predicate criminal acts while "operating as part of a long-term association that exist[ed] for criminal purposes," and had no obvious preplanned termination date (*H.J. Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 243 [1989]; *see also United States v Coiro*, 922 F2d 1008 [2d Cir 1991], *cert denied* 501 US 1217 [1991]). The enterprise, if undetected by law enforcement, could have continued indefinitely.

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

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

Because I believe that the defendant made a prima facie showing of discrimination pursuant to Batson v. Kentucky (476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)), I respectfully dissent.

On July 15, 2004, a grand jury issued a 54-count indictment against the defendant and eight co-defendants. Allegedly, from September 2001 to the date of the indictment, the defendants and others, including members of the Genovese Organized Crime Family, were part of a criminal enterprise, referred to as the "Local 8 Group." The alleged purpose of the Local 8 Group was to make money by accepting bribes and extortion payments from roofing contractors, in exchange for "labor peace and lenient treatment by union officials who failed to enforce the union collective bargaining agreements on union projects."

Jury selection began with a preliminary screening process. The court read the indictment and explained the nature of the case. Potential jurors completed lengthy questionnaires. Individuals who believed they could not be fair or could not serve due to the nature of the case were eliminated. The court then ruled on motions to dismiss jurors for cause.

Out of the remaining pool, a panel of 26 individuals were chosen at random for oral questioning. Peremptory challenges were exercised resulting in elimination of 18 jurors and

selection of 8 jurors.

A second panel of 26 potential jurors was then questioned. After one potential juror was excused for cause by the court, and 11 additional jurors had come up for possible peremptory challenges, the defendant made a Batson challenge to the People's use of a peremptory challenge to strike a black female juror. Defense counsel stated, "they bounced every African American female" or "ethnic female," keeping only one black female, who was actually from Surinam in South America.

The court reviewed the peremptory challenges, finding that the People had exercised a total of 11 perempts, 10 against women, with 4 being against black women. In response to the defendant's further charge that the People's exercise of perempts had resulted in a virtually all white jury, the court noted that defense counsel had challenged two Hispanic women, an Asian male and a black woman. The record reflects that, of the 11 jurors selected at that point, 5 were women.

The record further shows that a total of six black females had been on the panels, of which four were peremptorily challenged by the People, one was peremptorily challenged by the defense, and one was empaneled. The court, after ascertaining that the Batson challenge was based on a "female black" class, observed that the "case law on the subject is interesting," and ruled that the defense had not presented sufficient facts to make

out a pattern of the purposeful use of peremptory challenges against a "recognizable group."

On appeal, the defendant claims that, among other things, the People systematically excluded potential jurors based solely on the fact that they were African American females and that the trial court violated his right to equal protection by failing to request that the People provide a race-neutral reason for their challenges.[1]

The People argue that the trial court correctly denied the Batson motion because the defense failed to meet the threshold requirement of a prima facie showing of discriminatory challenges. Moreover, the People assert that the defendant's claims are unreliable because they are purely statistical and are based on an intersectional status (race and gender).

For the reasons set forth below, I believe that the defendant made out a prima facie case of racial discrimination which required the prosecutor to give racially-neutral reasons for peremptorily excluding four out of the six black female panelists.

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[1]On appeal, the defendant argues that the Batson challenge was based on a class of African-American females, not black females, so that one potential juror, the South American woman, who was seated on the jury, could be excluded from the statistical analysis of the prosecution's use of peremptories. In other words, the defendant asserts that the ratio between challenged jurors and accepted jurors is four to one - not four to two. However, the defendant failed to preserve this argument for appeal. As such, I would decline to review the claim.

The Criminal Procedure Law provides a method (CPL 270.20) for both the prosecution and defense counsel to challenge for cause the selection of a potential juror if it can be shown that bias may prevent that juror from deciding the case impartially. Additionally, each party may exercise a limited number of peremptory challenges whereby potential jurors are excused without the party having to state a reason. CPL 270.25; People v. Hernandez, 75 N.Y.2d 350, 355, 553 N.Y.S.2d 85, 86, 552 N.E.2d 621, 622 (1990), aff'd, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

In Batson v. Kentucky, the United States Supreme Court held that the equal protection clause prohibits a prosecutor from exercising peremptory challenges to strike prospective jurors on the basis of race. 476 U.S. at 89, 106 S.Ct. at 1719. The Supreme Court has extended the Batson rationale to gender. J.E.B. v. Alabama, 511 U.S. 127, 130-31, 114 S.Ct. 1419, 1422, 128 L.Ed.2d 89, 98 (1994). In New York, the Court of Appeals has broadly stated "[e]limination of a potential juror because of generalizations based on race, gender or other status that implicates equal protection concerns is an abuse of peremptory strikes." People v. Allen, 86 N.Y.2d 101, 108, 629 N.Y.S.2d 1003, 1007, 653 N.E.2d 1173, 1177 (1995).

In any case involving a Batson challenge, the court must follow a three-step process in determining whether peremptory

challenges have been exercised in a discriminatory manner. See People v. Allen, 86 N.Y.2d at 104; 629 N.Y.S.2d at 1004. First, the defendant "must allege sufficient facts to raise an inference that the prosecution has exercised peremptory challenges for discriminatory purposes." Id. If defendant makes a prima facie showing, the "burden shifts to the prosecution to articulate a neutral explanation for striking the jurors in question," and, finally, the trial court must determine whether the proffered reasons are pretextual. Id.

There are no "fixed rules" for determining whether a prima facie case has been established. People v. Bolling, 79 N.Y.2d 317, 323-324, 582 N.Y.S.2d 950, 955, 591 N.E.2d 1136, 1141 (1992). The court may consider whether there has been a "pattern of strikes or questions and statements," whether "members of the cognizable group were excluded while others with the same relevant characteristics were not," and whether stricken members of the cognizable group possess background and experience which might otherwise be expected to favorably dispose them to the prosecution. People v. Childress, 81 N.Y.2d 263, 267, 598 N.Y.S.2d 146, 148, 614 N.E.2d 709, 711 (1993).

As an initial matter, it is necessary to address whether a group of black females is a "cognizable racial group," for the purposes of a Batson challenge. In my view, the spirit of Batson and its progeny requires this Court to recognize peremptory

challenges exercised against individuals because of *both* their race and their sex.

The test courts apply to determine whether a class may be cognizable under Batson is the test applied in Castaneda v. Partida (430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977)). Such a group is "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." Castaneda, 430 U.S. at 494, 97 S.Ct. at 1280.

In J.E.B. v. Alabama, the Supreme Court recognized that discriminatory laws historically targeted women and racial and ethnic minorities. The Court stated:

> "'[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children [. . .] And although blacks were guaranteed the right to vote in 1870, women were denied even that right-which is itself "preservative of other basic civil and political rights"-until adoption of the Nineteenth Amendment half a century later.'" J.E.B, 511 U.S. at 136, 114 S.Ct. at 1425, quoting Frontiero v. Richardson, 411 U.S. 677, 685, 93 S.Ct. 1764, 1769-1770 (1973).

These discriminatory laws undeniably have created social cross-currents as old as the laws themselves. Consequently, I believe that the intersectional status at issue here should be treated the same way race and gender are treated under equal

protection analysis. See People v. Garcia, 217 A.D.2d 119, 120-122, 636 N.Y.S.2d 370, 372 (2nd Dept. 1995) (holding that black females are protected from being peremptorily challenged on a discriminatory basis under Batson); see also People v. Jerome, 34 A.D.3d 835, 828 N.Y.S.2d 78 (2nd Dept. 2006) (recognizing hybrid class of black males).

I agree with the defendant that a "pattern of strikes" against black females was established prima facie. It is well-settled that numerical evidence of discrimination is sufficient to raise a prima facie case under Batson. See People v. Hawthorne, 80 N.Y.2d 873, 874, 587 N.Y.S.2d 600, 601, 600 N.E.2d 231, 232 (1992) (where the prosecutor peremptorily challenged four of the six African-American members of the venire and the court determined that the defendant made a prima facie showing that the prosecution exercised its peremptory challenges in a racially discriminatory manner); People v. Jenkins, 75 N.Y.2d 550, 556, 555 N.Y.S.2d 10, 13, 554 N.E.2d 47, 50 (1990) (prima facie "pattern of strikes" established where the prosecutor used only ten peremptory challenges, seven of which were used to strike seven of the ten blacks on the venire); People v. Harris, 283 A.D.2d 520, 520, 726 N.Y.S.2d 672, 672 (2001) (the People "established a prima facie case of discrimination" when the "defense counsel peremptorily challenged four of the five remaining white venirepersons in the second round of jury

selection"); People v. Vega, 198 A.D.2d 56, 56, 603 N.Y.S.2d 147, 147 (1st Dept. 1993), lv. denied, 82 N.Y.2d 932, 610 N.Y.S.2d 184, 632 N.E.2d 494 (1994) (where the People "established a prima facie case of purposeful racial discrimination in the use of peremptory challenges when they established that the defense used seven of its eight challenges to exclude all but one of the white persons on the panel of sixteen); See also People v. Rosado, 45 A.D.3d 508, 846 N.Y.S.2d 165 (1st Dept. 2007) (stating that defendant's numerical argument was sufficient to raise an inference of discrimination even though it was not accompanied by any other evidence).

In any event, a prima facie showing of discrimination "'may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination'" (People v. McCloud, 50 A.D.3d 379, 381, 855 N.Y.S.2d 113, 115 (2008), quoting People v. Smocum, 99 N.Y.2d 418, 422, 757 N.Y.S.2d 239, 241, 786 N.E.2d 1275, 1277 (2003)), and the discriminatory exclusion of even a single juror is objectionable. See J.E.B. v. Alabama, 511 U.S. at 142; 114 S.Ct. at 1428.

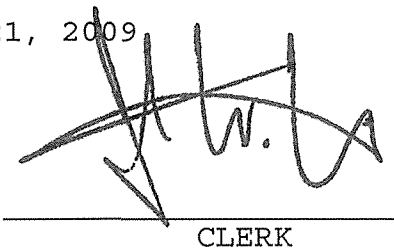
Here, the defense counsel raised a Batson challenge during the second round of jury selection. At that point, the prosecutor had made a total of 11 challenges, 10 of which were made against females and 4 of which were made against black females. In other words, four of the six black females that were

on the panels were challenged by the prosecution. I believe that these numbers alone are sufficient to raise a prima facie case of jury discrimination requiring some explanation from the prosecutor.

Accordingly, I believe that the appeal should be held in abeyance and the matter should be remitted to the trial court for the prosecution to provide race neutral reasons for their challenges, and if the prosecution cannot do so, the judgment of conviction should be vacated.

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

ENTERED: MAY 21, 2009



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Gonzalez, P.J., Mazzarelli, Andrias, Moskowitz, Renwick, JJ.

67 In re Daniel P. Lund, Index 121799/01
Petitioner-Respondent,

-against-

Krass Snow & Schmutter, P.C., etc., et al.,
Respondents-Appellants.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for appellants.

Samuel N. Reiken, Montville, NJ, for respondent.

Judgment, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered May 5, 2008, awarding petitioner $569,010, plus, inter alia, interest at the rate of 9% per annum, unanimously modified, on the law and the facts, to find that the Pension Answer Book is not a firm asset, and otherwise affirmed, without costs, and the matter remanded for recalculation of the firm's value without that asset. Payment of any judgment awarded shall be conditioned upon petitioner's formal release of his equity interest in respondent law firm.

The finding that respondents were guilty of oppressive actions against petitioner was substantiated by corporate tax records of respondent law firm reflecting the uncompensated disgorgement of petitioner's 39 percent equity interest in the

firm during his last year as a member (*see* Business Corporation Law § 1104-a[a][1]; *Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 72-73 [1984]; *Matter of Williamson v Williamson, Picket, Gross*, 259 AD2d 362 [1999]).

The finding as to the fair value of petitioner's equity share in the firm was substantiated by the evidence offered by petitioner's expert appraiser, which included his report, with supporting documentation, and testimony. The asset values recommended by the expert were based on a cost/asset analysis, and the basis for the final values proposed by the expert can be gleaned from the record. Respondents elected not to submit a counter appraisal.

However, petitioner's expert's inclusion of the Pension Answer Book, that was co-written by Stephen J. Krass, one of the respondent partners, prior to formation of the firm, as an asset of the firm is unsupported by the record. The Referee found that while, during their 1984 discussion about merging their firms and forming a new law firm, petitioner and Mr. Krass discussed the book becoming an asset of the firm, that was never reflected in the firm's financial records. Krass not only owned and controlled the royalties paid on the book, and was taxed individually for the book's earnings but, although the royalties were listed on internal firm documents as a line of fee income, the firm's distributions to him were reduced by the amount of

royalties he received. The fact that several of the firm's lawyers contributed legal work (on firm time) to subsequent revisions of the book, which was deemed a marketing tool for the firm, does not render it a firm asset.

Additional cash assets of the firm that allegedly had been earmarked for bonus compensation and other incentive payments to be distributed within a month after the filing of the petition on November 20, 2001 were properly treated as assets of the firm and subject to valuation. These cash assets remained within the firm's control to dispose of as necessary.

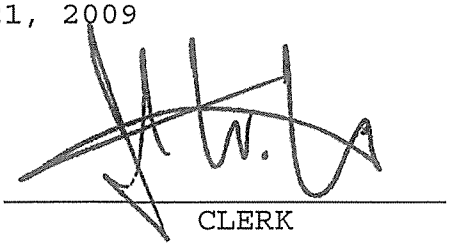
The imposition of a 9% interest rate on the judgment award was appropriate under the circumstances (*see* Business Corporation Law § 1118; CPLR 5001[a]; *Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 43 AD3d 790, 795 [2007]).

Respondents' obligation to pay the judgment award should have been conditioned upon petitioner's formal release of his equity interest in the firm (*see* Business Corporation Law § 1118; *Matter of Kemp*, 64 NY2d at 74).

We have considered appellants' remaining arguments and find them without merit.

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

ENTERED: MAY 21, 2009



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Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5027 Paul Urban,
Plaintiff-Respondent-Appellant,

-against-

No. 5 Times Square Development, LLC, et al.,
Defendants-Respondents-Appellants,

Ernst & Young U.S. LLP, et al.,
Defendants,

AMEC Construction Management, Inc., et al.,
Defendants-Appellants-Respondents.

[And Other Actions]

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Harrington, Ocko & Monk, LLP, White Plains (Adam G. Greenberg of counsel), for Amec Construction Management, Inc., appellant/respondent.

Fabiani Cohen & Hall, LLP, New York (Lisa A. Sokoloff of counsel), for Maximum Security Products Corp., appellant/respondent.

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for Paul Urban, respondent/appellant.

Kaplan, von Ohlen & Massamillo, LLC, New York (Jennifer Huang of counsel), for No. 5 Times Square Development, LLC and Boston Properties Limited Partnership, respondents/appellants.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered February 29, 2008, that to the extent appealed from, as limited by the briefs, granted the motion of defendants No. 5 Times Square Development and Boston Properties (No. 5/Boston) for summary judgment dismissing the common-law negligence and Labor Law § 200 and § 241(6) claims against them, granted the motions of defendants AMEC Construction Management and Maximum Security

Products d/b/a Hillside Ironworks (Hillside) for summary judgment dismissing the Labor Law § 241(6) claim against them but denied relief as to the common-law negligence and section 200 claims against them, dismissed the cross claims by No. 5/Boston against AMEC and Hillside for contractual and common-law indemnity, and denied the motion by No. 5/Boston for summary judgment against AMEC and Hillside for breach of contract to procure insurance, unanimously modified, on the law, summary judgment granted to Hillside dismissing all claims against it based on section 200, summary judgment denied to No. 5/Boston on the section 200 and common-law negligence claims, as well as on their contractual and common law indemnification cross claims, and otherwise affirmed, without costs.

Plaintiff, an electrician, was injured on September 17, 2002, after stepping into a gap between the entrance to a catwalk and the catwalk itself. Defendant Boston owned the building and defendant No. 5 developed it. Subcontractor Hillside designed, constructed and installed the catwalk pursuant to a change order with general contractor/construction manager AMEC. Hillside finished its work in March or April 2002 and did not return to the job site thereafter. Plaintiff's employer (OHM Electric Corp.) contracted directly with No. 5, not with AMEC. Neither No. 5/Boston nor AMEC controlled plaintiff's work. About three weeks before his accident, plaintiff complained to his OHM

foreman about the 10 to 12-inch gap, but no action was taken in response.

I. Hillside

The court should have dismissed all claims against Hillside based on Labor Law § 200. Hillside was neither an owner nor a general contractor (*see Ryder v Mount Loretto Nursing Home*, 290 AD2d 892, 894 [2002]). Hillside was in an entirely different trade and had left the job site months before plaintiff commenced work (*see Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 718 [2007]). Hillside did have authority and control over the construction and installation of the catwalk, allegedly the instrumentality giving rise to plaintiff's injury. However, this is insufficient for a section 200 claim, although it is sufficient for a common-law negligence claim (*see e.g. Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 481 [2007]).

The court properly denied summary judgment to Hillside on plaintiff's common-law negligence claim because there was a triable issue of fact as to whether Hillside had ever installed a cover plate over the gap (*see generally Urbina v 26 Ct. St. Assoc., LLC*, 12 AD3d 225, 226 [2004]). Even though Hillside's witness testified that Hillside had welded a plate to the catwalk, there was no plate present at the time of plaintiff's accident. Hillside's witness admitted that it would have been evident if there was a broken weld and plaintiff stated under

oath that there was no indication that the plate had been welded and then removed. A representative of Boston stated under oath that Boston never removed the plate. Further, there is no reason why anyone would have removed a cover plate had there been one.

II. No 5/Boston

The motion court should have denied No.5/Boston's motion for summary judgment on the Labor Law § 200 claim. Plaintiff's injury did not arise from the method or manner that OHM or plaintiff used to perform his work. Rather, his injury arose from a defective condition of the workplace because liability derives from the defective condition of the catwalk from where plaintiff was attempting to work (*see Hernandez v Colombus Ctr. LLC*, 50 AD3d 597 598 [2008] [opening in plank that buckled]). Therefore, on his Labor Law § 200 claim, plaintiff need not show that No. 5/Boston, the owner and developer, controlled or directed the manner of his work (*see e.g. Griffin v New York City Tr. Auth.*, 16 AD3d 202 [2005]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [2004]; *Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149, 150 [2000]). However, for purposes of the motions at issue on appeal, plaintiff must demonstrate a triable issue of fact as to No. 5/Boston's actual or constructive notice. There was no evidence that No. 5/Boston had actual notice of the gap between the building and the catwalk. By contrast, there is a triable issue of fact as to whether these defendants had

constructive notice (*see generally Griffin*, 16 AD3d at 203). If one views the evidence in the light most favorable to plaintiff, the gap was 10 to 12 inches wide and 6 feet, 8 inches long, and it existed for 5 to 6 months before his accident. A trier of fact could therefore conclude that the property owner should have been aware of this potentially dangerous condition.

The motion court should also have denied No. 5/Boston's motion for summary judgment dismissing the common law negligence claims against them. "A landowner must act as a reasonable [entity] in maintaining [its] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury" (*Basso v Miller*, 40 NY2d 233, 241 [1976], quoting *Smith v Arbaugh's Rest.*, 469 F2d 97, 100 [DC Cir 1972], *cert denied* 412 US 939 [1973]). In addition, both an owner and a general contractor have a duty to furnish a safe place to work (*see e.g. Monroe v City of New York*, 67 AD2d 89, 96 [1979]; *Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco Concrete Constr. Corp.*, 9 AD2d 379, 383 [1959]). "[T]he duty . . . to provide a safe place to work encompasses the duty to make reasonable inspections to detect unsafe conditions" (*DaBolt v Bethlehem Steel Corp.*, 92 AD2d 70, 73 [1983], *lv dismissed & appeal dismissed* 60 NY2d 701 [1983]; *see also Employers Mut. Liab. Ins. Co. of Wis.*, 9 AD2d at 382). "[W]hether the danger should have been apparent upon visual inspection" is a

"question[] of fact bearing on [defendant's] liability" (*DaBolt*, 92 AD2d at 73).

III AMEC

The motion court was correct to deny AMEC's motion for summary judgment on the section 200 and common-law negligence claims against it. Unlike injuries arising out of the method of work, where the injury arises from a condition of the workplace, it is "not necessary to prove [the general contractor's] supervision and control over plaintiff" (*Murphy*, 4 AD3d at 202; *see also Hernandez v Columbus Ctr., LLC*, 50 AD3d at 598). Rather, where a plaintiff's injuries stem from a dangerous condition on the premises, "a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2007]; *see also Murphy*, 4 AD3d at 201-202; *Hernandez* 50 AD3d at 598). In the case of a general contractor, this standard makes sense because a general contractor is unlikely to have notice without some control or supervision over the work site.

Here, there are issues of fact as to whether and to what extent AMEC controlled the work site and whether AMEC knew or should have known about the unsafe condition of the work site that gave rise to plaintiff's injury. For example, AMEC's contract with No. 5/Boston placed the responsibility for

supervising the work site on AMEC. AMEC's project managers were expected to and did walk through the catwalk. There is also evidence that AMEC had the responsibility to coordinate the work of the various subcontractors on the site, was in charge of site safety and had a site safety director on the work site. These factors, coupled with the length of time the gap existed before the accident, certainly are enough to raise an issue of fact whether AMEC had at least constructive notice of the dangerous condition.

IV Labor Law § 241(6)

The court properly dismissed plaintiff's Labor Law § 241(6) claim in its entirety. Insofar as it was based on 12 NYCRR 23-1.7(b)(1)(i), a 10 to 12-inch gap is not a "hazardous opening" for purposes of that regulation (*see e.g. Messina v City of New York*, 300 AD2d 121, 123-124 [2002]). Nor is 12 NYCRR 23-1.7(e)(1) applicable to this case. The gap between the building and the catwalk is a not a "condition" that "could cause tripping."

V Indemnification

The motion court dismissed No. 5/Boston's cross claims for contractual indemnification and common-law indemnification because it had dismissed the complaint against these entities in its entirety. It therefore did not reach the question of whether and to what extent No. 5/Boston were entitled to summary judgment

on their claims for contractual and common law indemnity.

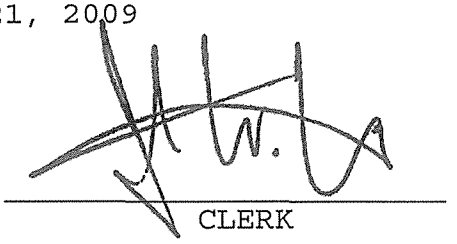
Here, because questions of fact exist as to whether No. 5/Boston had constructive notice regarding the gap between the building and the catwalk, summary judgment to No. 5/Boston on indemnification cannot be granted at this juncture. It is also unclear whether Hillside and AMEC will ultimately be found negligent. Hillside's witness testified that it had installed a cover plate, while various witnesses testified that they did not notice any gap. Thus, factual issues as to constructive notice and negligence exist that preclude summary judgment on contractual indemnification and common law indemnification at this juncture.

The court properly denied No. 5/Boston's summary judgment motion on their cross claims against AMEC and Hillside for breach of contract for failure to procure insurance. In their motion, No. 5/Boston did not mention failure to procure insurance. Therefore, it is hardly surprising that AMEC failed to produce an insurance policy in opposition to the motion. As for Hillside, it produced an insurance policy naming "Boston Properties, Inc. (Owner) and No. 5 Times Square Development, LLC (Developer)" as insureds.

We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: MAY 21, 2009



CLERK

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5076 Greenwich Insurance Company, etc.,
Plaintiff-Appellant,

-against-

Volunteers of America-Greater New York, Inc.,
Defendant-Respondent.

Index 601048/06

Gennet, Kallmann, Antin & Robinson, PC, New York (Brian J. Bolan of counsel), for appellant.

Law Offices of Harvey & Vandamme, New York (Hendrick Vandamme of counsel), for respondent.

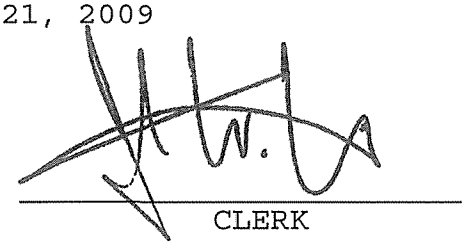
Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 8, 2007, which, in a subrogation action to recover damages caused by a fire in premises leased to defendant by plaintiff insurer's subrogor, granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, without costs.

Paragraph 12 of the lease, which obligates defendant to pay for damages specifically caused by fire only if the fire was "caused by [defendant's] actions," controls over paragraph 13, which generally obligates defendant to pay for any damages "caused by [defendant] or any occupant or visitor" (*see Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1998]). Since the fire was allegedly caused by defendant's

subtenant smoking in bed, and not by defendant's own actions, defendant cannot be held responsible for the cost of repairing the damage under the terms of the lease. We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: MAY 21, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5202 Lo-Ho LLC, c/o Estate of William Gottlieb, by Molly Bender, as Executrix, Plaintiff-Appellant, Index 106780/06

-against-

Santiago Batista, Defendant,

Jose DeLeon, Defendant-Respondent.

Lawrence P. Wolf, Chappaqua, for appellant.

The Law Offices of Howard Poch, P.C., New York (Howard Poch of counsel), for respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered January 10, 2008, which, in an action arising out of a breach of a commercial lease, after a nonjury trial, dismissed plaintiff landlord's cause of action against defendant-respondent guarantor, unanimously affirmed, with costs.

In this action to recover on a personal guaranty, plaintiff Lo-Ho LLC, and defendant Santiago Batista[1] entered into a commercial lease agreement (April 2000 Lease), for a five-year term. The monthly rent started at $1,950 for the first year, with the last year's rent at $2,714 per month. In addition, Batista agreed to pay 35% of the real estate taxes as rent. On

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[1]Batista defaulted in the instant action and is not a party to this appeal.

April 3, 2000, defendant Jose DeLeon (defendant), Batista's cousin, signed a personal guaranty for Batista's obligations under the April 2000 Lease.

The relevant provision of the guaranty is as follows:

> "The undersigned Guarantor guarantees to Owner . . . the full performance and observance of all the agreements to be performed and observed by Tenant *in the attached Lease* . . . without requiring any notice to the Guarantor of nonpayment, or nonperformance, or proof, or notice of demand to hold the [Guarantor] responsible under this guaranty, all of which the [Guarantor] hereby expressly waives and expressly agrees . . . *The Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the Lease.*" (emphasis added).

The lease expired on March 31, 2005. On or about April 25, 2005, plaintiff and Batista entered into a subsequent lease agreement, effective as of April 1, 2005, designated as an "Extension of Lease" (April 2005 Lease). The April 2005 Lease purported to extend the terms of the April 2000 Lease for an additional five-year term, until March 31, 2010, "on the same terms and conditions" except with respect to the rent which effectively increased approximately $200 annually from $2,500 beginning April 1, 2005 to $3,400 beginning April 1, 2009. It also required the tenant to pay the real estate taxes in equal installments on a monthly basis. Further, the new lease provided that the tenant would have August 2005 rent-free on condition that he undertook substantial renovations including new marble

flooring for the store, new glass display and painting, and installation of 15 feet of marble kitchen counter.

Batista defaulted under the terms of the April 2005 Lease and plaintiff brought a nonpayment proceeding against him. Plaintiff was awarded $24,995.91 in rent arrears and real estate taxes. In May 2006, plaintiff commenced this action against Batista for breach of the April 2005 Lease, and against defendant Jose DeLeon to enforce the guaranty for rent through March 31, 2010. Following joinder of issue, plaintiff moved for summary judgment. In opposition, respondent argued that he was not responsible for the rent arrears or real estate taxes due after March 31, 2005, when the April 2000 Lease expired, along with his guaranty. The court denied plaintiff's motion on the grounds that there were triable issues of fact as to whether the April 2005 Lease was a new lease or merely an extension of the April 2000 Lease. A bench trial was held in November 2007.

The court dismissed the action, finding that what was denominated as an extension was in reality a new lease and that the guaranty did not carry over to the April 2005 Lease. Rather, the court found that the "amounts of money in the new lease," including the real estate taxes, were different; and there were too many changes made to the agreement to consider it a modification or an extension.

On appeal, plaintiff argues that the court erred by

concluding that the guaranty did not apply to the April 2005 Lease. Plaintiff contends that the terms of the guaranty were broad enough to encompass the extended lease. For the reasons set forth below, we disagree, and affirm Supreme Court.

It is well established that "[a] guaranty is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]), particularly in favor of a private guarantor (*see 665-75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 [1999]), and cannot be altered without the guarantor's consent (*see White Rose Food v Saleh*, 99 NY2d at 591). In this regard, a "guarantor should not be bound beyond the express terms of his guarantee" (*665-75 Eleventh Ave. Realty Corp.*, 265 AD2d at 271 [internal quotation marks and citation omitted]).

In this case, the guaranty expressly stated that the defendant was guaranteeing "the full performance and observance of all the agreements to be performed and observed by the Tenant *in the attached Lease*" (emphasis added). It is undisputed that the phrase "attached lease" refers to the lease signed in April 2000.

The guaranty further stated that it would "*remain and continue in full force and effect as to any renewal, change or extension of the Lease.*" (emphasis added). Hence, as the trial court correctly found, the sole question is whether the lease of

April 2005 qualifies as an "extension" of the lease under the terms of the guaranty.

Interpreting the guaranty in the strictest manner, we agree with the trial court that the lease signed in April 2005 was not an extension of the lease as would permit plaintiff to recover from defendant guarantor. First, there was no option to renew or extend included in the April 2000 Lease. Thus, the lease effectively expired on March 31, 2005. Plaintiff's argument that because the tenant remained in possession during the negotiations "there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument" (*City of New York v Pennsylvania R.R.Co.*, 37 NY2d 278, 300 [1975]), is erroneous. In fact, the rider to the lease explicitly provides that such a rule would not apply. The holdover provision in the April 2000 Lease states that if defendant Batista remained in possession of the premises after the expiration of the lease, "such holding over shall not be deemed to extend the term or renew the Lease, but such holding over thereafter shall continue upon the terms and conditions herein set forth," which included an increase in the rent. Finally, even if plaintiff's position is correct, a mere holdover tenancy could not operate in and of itself, to extend a personal guarantee in the absence of such provision in the guaranty.

In any event, the second lease states unequivocally, "Lease

dated April 1, 2000 . . . expired on March 31, 2005." Regardless of the contract stating in the next paragraph, "[s]aid lease is further extended. . .", plaintiff cannot have it both ways. An expired lease cannot be extended.

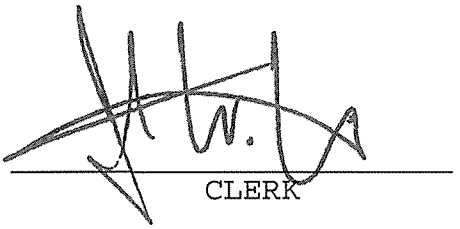
More significantly for defendant-guarantor in this case, the lease of April 2005 could not be the type of extension of lease contemplated in the guaranty because it did not extend the terms and conditions of the April 2000 Lease. The April 2005 Lease contained new terms and conditions including an incrementally higher rent. The increased rent would have substantially and impermissibly changed the guarantor's obligations under the original agreement *(see Dime Sav. Bank of N.Y. v Montague St. Realty* Assoc., 90 NY2d 539, 542-543 [1997]) and thus, impermissibly increased defendant's risk without his consent (*see White Rose Food*, 99 NY2d at 591; *Arlona Ltd. Partnership v 8th of Jan. Corp.*, 50 AD3d 933, 934 [2008]). Hence, the second lease did not obligate the guarantor (*see Elite Gold, Inc. v TT Jewelry Outlet Corp.*, 31 AD3d 338, 340 [2006] [where a guaranty obligates a guarantor as to any "renewal, change or extension of the lease," upon the expiration of the lease, the guaranty lapses and can no longer bind defendant]).

Although plaintiff attempts to distinguish this case from well-established precedent, it correctly concedes in its brief: "True, the usual rule is that the guarant[y] lapses at the end of

a lease term, or where a change is made that increases the guarantor's risk." There is no legal support or authority for making an exception to the "usual rule" in this case.

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

ENTERED: MAY 21, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5409 Spectra Audio Research, Inc., Index 110073/05
Plaintiff-Appellant,

-against-

Steve S. Chon, etc., et al.,
Defendants,

Tiffany Nails at Madison Corp.,
Defendant-Respondent.

White and Williams LLP, Philadelphia, PA (J. Michael Kvetan of the bar of the state of Pennsylvania, admitted pro hac vice of counsel), for appellant.

Thomas Torto, New York for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 14, 2008, brought up for review pursuant to CPLR 5517(b), the appeal from the prior order, same court and judge, entered December 17, 2007, which granted reargument and adhered to the prior order that had granted, inter alia, the cross motion of defendant Tiffany Nails at Madison Corp. for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, the cross motion denied and the complaint reinstated as against that defendant.

Spectra Audio Research, Inc. ("Spectra"),[1] executed a lease dated February 7, 1997 with Madison & 72nd Street Corporation

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[1] Although Spectra subrogated its claims to its insurer, Hanover Insurance Company, Hanover, the real party in interest, is bringing the claim in Spectra's name pursuant to CPLR 1004.

("Madison") to lease the first floor of 903 Madison Avenue. On February 28, 2001, Tiffany Nails at Madison Corp. ("Tiffany") leased space on the second floor of that building and hired defendants Nova Plumbing and Heating, Inc. ("Nova") and Chon Engineering, P.C. ("Chon") to install an auxiliary water line. On January 12, 2004, the line burst causing water to leak into Spectra's first-floor space.

Spectra's insurer, Hanover Insurance Company ("Hanover"), paid $376,066 to Spectra in satisfaction of its $540,195 insurance claim for the damages sustained as a result of the leak. On April 8, 2004 and January 14, 2005, Michael Goodrich, Spectra's President, executed subrogation receipts evidencing payment by Hanover in the amounts of $246,714 and $129,352 respectively. The receipts stated:

> "In consideration of and to the extent of said payment [Spectra] hereby subrogates [Hanover], to all of the rights, claims and interest which [Spectra] may have against any person or corporation liable for the loss mentioned above, and authorizes [Hanover] to sue, compromise or settle in [Spectra's] name . . . all such claims . . ."

Spectra served a summons and complaint on February 7, 2006 against each of the defendants individually, Madison, Tiffany, Nova, and Chon, alleging negligence and damages in the amount of $561,230. The complaint specifically listed claims by Spectra against Madison, Spectra against Chon, Hanover against Nova, and Hanover against Tiffany.

On March 6, 2006, Madison answered the complaint and then, on January 24, 2007, moved for summary judgment to dismiss on the grounds that Spectra had not shown that Madison was negligent and hence, by the terms of its lease, Spectra waived liability for damages covered by insurance. In addition, Madison asserted that Spectra waived Hanover's subrogation rights against it in the anti-subrogation clause of its lease. On May 15, 2006, Tiffany answered the complaint and, on February 7, 2007, cross-moved for partial summary judgment on the basis that the claim amount was speculative and unsupported.

A hearing was held on July 17, 2007 and in a decision on December 17, 2007, the motion court granted summary judgment severing the action as against Madison and Tiffany and dismissing the complaint against them stating that Spectra could not establish losses beyond $68,036. On January 3, 2008, Spectra moved to reargue the December 17 order to the extent the court dismissed the complaint as against Tiffany, emphasizing that Hanover was the party bringing the suit pursuant to CPLR 1004. It asserted that it was seeking its subrogated interests as well as Spectra's uninsured loss. Following the reargument hearing on March 11, 2008, the court issued an order granting reargument and adhering to its December 17, 2007 decision and order.

On appeal, Spectra argues that the motion court erred in concluding that Hanover may not bring a suit for Spectra's

uninsured loss as well as compensation for the subrogated property damage claims.

The doctrine of subrogation "'allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse'" (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 232 [2006], quoting *Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). Further, CPLR 1004 authorizes Hanover to sue in Spectra's name as an exception to the "real party in interest" rule (*CNA Ins. Co. v Cacioppo Elec. Contrs.*, 206 AD2d 399, 400 [1994], citing *Point Tennis Co. v Irvin Indus. Corp.*, 63 AD2d 967 [1978]; *see McGuigan v Carillo*, 165 AD2d 811, 812 [1990]). The policy reason behind allowing an insurer to bring the case in the insured's name is to prevent "the prejudicial effect . . . which often results when it is disclosed to the jury that the loss was covered by insurance" (*CNA Ins. Co.*, 206 AD2d at 400, citing *Point Tennis Co. v Irvin Indus. Corp.*, 63 AD2d at 967; *see Krieger v Insurance Co. of N. Am.*, 66 AD2d 1025, 1026 [1978]).

As a threshold matter, we note that the anti-subrogation clause and the holding in *Duane Reade* relied upon by the motion court are only applicable to Spectra's subrogated claims against Madison and not Spectra's claim against Tiffany because Tiffany is not a party to the lease between Madison and Spectra. *Duane*

Reade involved a suit brought by a tenant against its landlord where the court held that the anti-subrogation clause in the lease agreement between the two parties did not prevent "[the tenant] from suing the . . . [landlord] to recover for a loss to the extent that such loss is not required by the parties' agreement to be covered - and, in fact, is not covered - by insurance" (*id.* at 233). Because there is no anti-subrogation agreement between Spectra and Tiffany, *Duane Reade* does not preclude Spectra from seeking its uninsured losses from Tiffany for damages above those paid by Hanover.

Spectra does not appeal that portion of the order severing and dismissing the complaint against Madison; therefore, we do not address the issue of *Duane Reade*'s effect on Spectra's claim against Madison.

Despite the inordinate confusion apparent in the transcripts and order concerning the identity of the plaintiff, this is a subrogation claim properly brought by Hanover. Thus, the issue is simply whether Hanover may bring the claim for the total amount of damages including the $376,066 paid to Spectra and Spectra's uncompensated damages.

The subrogation receipts issued by Spectra to Hanover, clearly assign "all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss" and authorizes Hanover to "sue, compromise or settle in

the undersigned's name." Thus, contrary to Tiffany's assertion, this receipt does not limit the assignment to the amount paid by Hanover to Spectra.

Tiffany's reliance on *Winkelmann v Hockins* (204 AD2d 623 [1994]) is misplaced. In that case, the court concluded, as a matter of contract construction, that the insured had not assigned all of his claims to his insurer and therefore remained a real party in interest as to his uncompensated damages (*id.* at 624 [stating that the insurer did "not have the authority to settle those claims which had not been paid by it" because the plaintiffs "*did not assign all of their claims* against the defendant"] [emphasis added]). Here, however, Spectra did assign all of its claims to Hanover, and Hanover may seek all of the compensation to which Spectra is entitled.

Spectra also asserts that the motion court erred in dismissing Spectra's claim against Tiffany on the grounds that Spectra did not produce sufficient proof that it was damaged above the amount it was paid by Hanover. We agree.

It is well settled that where there is a triable issue of fact, summary judgment should not be granted and the issue should be resolved at trial (*Trupo v Preferred Mut. Ins. Co.*, 59 AD3d 1044, 1045 [2009] [affirming that a triable issue of fact regarding damages precluded summary judgment]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Moreover,

"'[w]hile damages may not be determined by mere speculation or guess, evidence that, 'as a matter of just and reasonable inference,' shows their existence and the extent thereof will suffice, even though the result is only an approximation [citation omitted]'" (*Hirschfeld v IC Sec.*, 132 AD2d 332, 336-337 [1987], *lv dismissed* 72 NY2d 841 [1988], quoting *Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 295 [1986]).

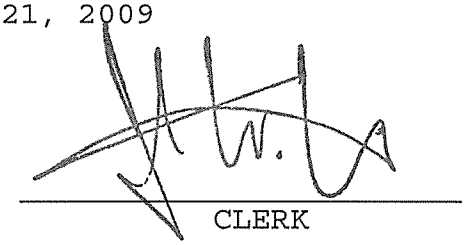
There are three separate assessments of Spectra's damages. The motion court concluded that the plaintiff's experts had established losses of "only $68,036.43." However, the record reveals no explanation as to how the court arrived at that figure. Tiffany's accountant, Peter Kahn, who did not inspect the Spectra site to view the damage, prepared an affidavit estimating Spectra's losses at $95,003.

In opposition, Spectra submitted sworn affidavits assessing its losses as follows: Paul Mazzola, a professional salvor, for damaged inventory in the amount of $254,351; John Conlon, a professional insurance adjuster, for business personal property at $6,107, tools and small equipment at $1,030, computer equipment at $32,474, property of others at $10,249, emergency repairs at $14,965, debris removal at $3,210; and Joseph Balkunas, an accountant who calculated the loss of business income at $129,352. Spectra also produced the sworn testimony of Michael Goodrich, its president, which indicates that the cost to

rebuild the store was $80,000. Since these losses of $531,738 total well in excess of Tiffany's estimate of only $95,003, Spectra has produced evidence in admissible form requiring trial on an issue of material fact (*Zuckerman*, 49 NY2d at 562).

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

610 The People of the State of New York, Ind. 871/06
Respondent,

-against-

Willard Grant,
Defendant-Appellant.

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (David P. Stromes of counsel), for respondent.

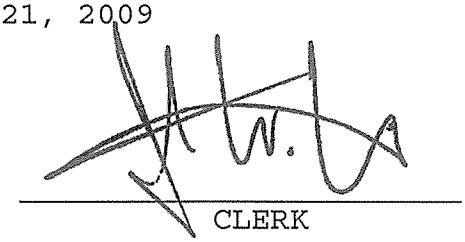
Judgment, Supreme Court, New York County (John Cataldo, J.), rendered August 3, 2006, as amended October 19, 2006, convicting defendant, after a jury trial, of attempted rape in the first degree, sexual abuse in the first degree and stalking in the third degree, and sentencing him to an aggregate term of 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim's testimony was plausible, and her testimony that the sexual assault stopped when defendant believed she had been injured strongly supports the inference that she was not vindictively fabricating serious criminal charges. Although the sexual

assault itself was not corroborated, we note that other portions of the victim's account were corroborated by other evidence.

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

611 Orix Financial Services, Inc., etc., Plaintiff-Respondent, Index 602846/06

-against-

Terry L. McMullen, et al., Defendants-Appellants.

Eric W. Berry, New York, for appellants.

Stein & Stein, LLP, Haverstraw (William M. Stein of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered October 30, 2007, which granted the motion of defendant Orix Financial Services, Inc. (Orix) for summary judgment as to individual defendant Terry McMullen, severed the complaint and otherwise denied Orix's motion for summary judgment, and denied defendants' cross motion for summary judgment, unanimously affirmed, with costs.

Defendant Terry McMullen (the borrower) executed a Conditional Sale Contract Note (the note) in conjunction with his purchase of a tractor-trailer from a dealer, who assigned all of its rights under the note to Orix. Orix had engaged in two prior financing transactions with the borrower. In the latter transaction, entered seven months prior to the note at issue, Orix also obtained a signed and notarized personal guaranty from Connie Smith a/k/a Connie McMullen (the guarantor) for

obligations due Orix from the borrower. The guaranty expressly states that it is a "continuing guaranty" which remains in effect until terminated. When the borrower defaulted on the note, Orix repossessed the tractor-trailer and sold it at auction. Orix then commenced this action against the borrower for the balance due on the note and joined a claim against the guarantor.

Here, as in *Orix Fin. Servs., Inc. v Precision Charters, Inc.* (2007 WL 2042499, *2 [SD NY 2007]) and *James Talcott, Inc. v Bloom* (29 AD2d 390, 391 [1968]), the language of the guaranty unambiguously contemplated future agreements between Orix and the borrower. This language cannot be read to limit the guarantor's liability to amounts owed under the March 1999 note (*see Chemical Bank v Sepler*, 60 NY2d 289, 294 [1983]). As the guarantor has never denied that she signed the guaranty, her challenges to the validity of the notarization are irrelevant.

We also reject defendants' argument that the purported "falsification" of the verification tainted the entire transaction and precluded Orix from recovering from the borrower, as the borrower's agreement with Orix would remain valid even if

the guaranty were void (*see Midland Steel Warehouse Corp. v Godinger Silver Art Ltd.*, 276 AD2d 341, 343 [2000]; *National Union Fire Ins. Co. of Pittsburgh v Clairmont*, 231 AD2d 239, 241-242 [1997], *lv dismissed* 92 NY2d 868 [1998]).

THIS CONSTITUTES THE DECISION AND ORDER
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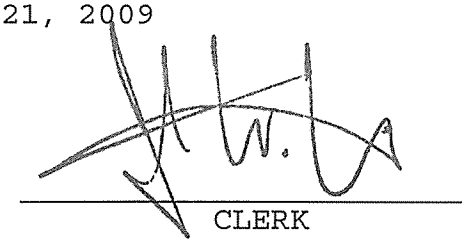


CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

612 In re Bruce L.,
Petitioner-Respondent,

-against-

Patricia C.,
Respondent-Appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Douglas R. Rothkopf, Garden City, for respondent.

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about May 7, 2008, which denied respondent mother's objections to the Support Magistrate's order, dated February 29, 2008, inter alia, directing her to pay $442 per month in child support, unanimously affirmed, without costs.

The Support Magistrate properly imputed income to respondent based on the disparity between her admitted monthly expenses and her documented monthly Social Security disability benefits (*see Matter of Childress v Samuel*, 27 AD3d 295 [2006]). The Magistrate's credibility findings, which are to be accorded great deference, are amply supported by the record, which demonstrates respondent's inability to explain how she was able to pay expenses so much greater than her stated income, her evasiveness and failure to provide documentation of how she spent a lump sum Social Security disability payment, which she testified she deposited into a joint account with another person in another

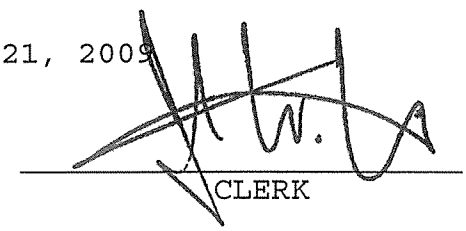
state, and her denial of the receipt of proceeds of the settlement of a personal injury lawsuit that court records show was settled for $45,000.

Respondent failed to establish that her pro rata share of the total support obligation is unjust or inappropriate (*see* Family Court Act § 413[1][f])[7]). While she contends that her income is substantially less than petitioner's, she failed not only to document her own income but also to produce evidence to support her claim that petitioner's income exceeded the amount imputed to him. Moreover, although respondent failed to document her extraordinary visitation expenses (Family Court Act § 413[1][f])[9]), the Magistrate considered those expenses in excluding the portion of the combined parental income that exceeds $80,000 from its calculation of the basic support obligation (*see* Family Court Act § 413[1][c][3]).

Contrary to respondent's contention, the payment of the basic support obligation and arrears does not reduce her income below the applicable poverty income guidelines amount (*see* Family Court Act § 413[1][d]), even if only her 2007 disability income is considered.

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

613-
613A Van Tulco, Inc., Index 100243/95
Plaintiff-Respondent,

-against-

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

New York Telephone Company, et al.,
Defendants-Appellants.

Greenberg Traurig, LLP, New York (Eric S. Aronson of counsel), for New York Telephone Company, appellant.

Richard W. Babinecz, New York (Helman R. Brook of counsel), for Consolidated Edison Company of New York, Inc., appellant.

Peckar & Abramson, P.C., New York (Paul Monte of counsel), for respondent.

Orders, Supreme Court, New York County (Karen S. Smith, J.), entered April 17 and 22, 2008, which denied the respective motions by defendant public utilities for summary judgment, and, upon search of the record, granted partial summary judgment in plaintiff's favor on the issue of adequacy of notice triggering the statutory duty to "remove or protect" facilities interfering with a public works project, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in favor of defendants-appellants public utilities dismissing the complaint as against them.

Plaintiff, a contractor retained by the City of New York in 1990 to rebuild a bridge in Long Island City, sought delay

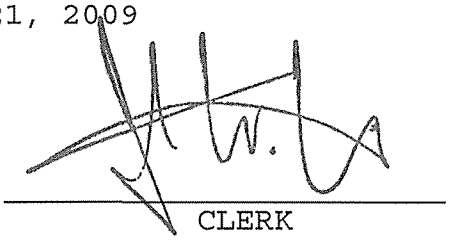
damages allegedly caused by the defendant public utility companies' failure to timely move a gas main and telephone conduits after receiving notice from plaintiff that those facilities were impeding progress. While it is undisputed that public utilities have a longstanding common-law and statutory "obligation to move their facilities when they interfere with municipal work projects" (*City of New York v Verizon N.Y., Inc.*, 4 NY3d 255, 258 [2005]), there is no basis for plaintiff's claim that it could unilaterally require defendants to move their facilities simply by giving notice of the project. The common-law obligation (codified in Administrative Code § 19-143) requires public utilities, upon receipt of such notice from a contractor, to "remove or otherwise protect and replace their pipes, mains and conduits . . . where necessary, under the direction of the commissioner" of the New York City Department of Transportation.

Consistent with the statutory language, the practice at the time this project was undertaken was for the contractor and utility companies to negotiate the cost of the work, and only upon the City's issuance of a "work out" notice directing removal would the utility company be required to "immediately relocate" its facility (*see generally Matter of General Contrs. Assn. of N.Y. v Tormenta*, 259 AD2d 177, 179-180 [1999], *lv denied* 95 NY2d 754 [2000]). In this case, since the utilities established there

was never a determination that removal of their facilities was necessary, or any direction from the City requiring their removal, these defendants were entitled to summary judgment dismissing the complaint.

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

614 The People of the State of New York, Ind. 4545N/05
Respondent,

-against-

Reyes Rodriguez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

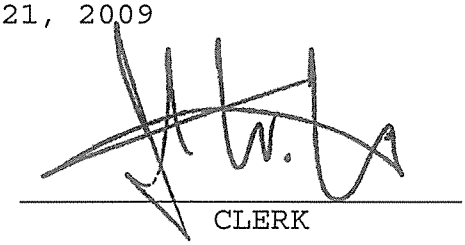
Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered November 3, 2006, convicting defendant, after a jury trial, of conspiracy in the fourth degree, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was no innocent explanation for defendant's course of conduct, including his coordinated activity

with the other conspirators and the presence in his van of equipment suitable for use in committing the intended robbery.

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

615 The People of the State of New York, Ind. 4545N/05
Respondent,

-against-

Jovanny Rodriguez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Mugambi Jouet of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

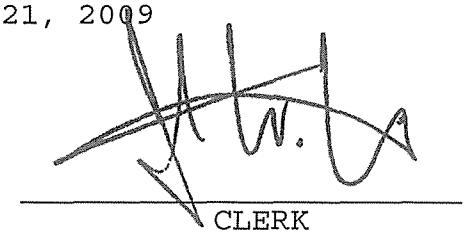
Judgment, Supreme Court, New York County (William A. Wetzel, J. at motion; Michael J. Obus, J. at jury trial and sentence), rendered November 3, 2006, convicting defendant of conspiracy in the fourth degree, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment since there were no errors in the grand jury presentation that rose to the level of impairing the integrity of the proceeding (*see People v Huston*, 88 NY2d 400, 409 [1996]). The prosecutor did not impair the integrity of the proceeding by telling the grand jury that some unspecified defendants in this

11-defendant case might be testifying or were considering testifying.

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

616-
616A In re Jaiheem M.S., etc.,
and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Sharon H.,
Respondent-Appellant,

Children's Aid Society,
Petitioner-Respondent.

Michael S. Bromberg, Sag Harbor, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

Orders of disposition, Family Court, New York County (Jody Adams, J.), entered January 30, 2008, which terminated respondent mother's parental rights to her two sons after a fact-finding determination that she had permanently neglected them, and transferred custody to petitioner and the New York City Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The determination of permanent neglect was supported by clear and convincing evidence that respondent failed to plan for her children's future (Social Services Law § 384-b[7]; *see Matter of Star Leslie W.*, 63 NY2d 136 [1984]) by demonstrating the ability to address adequately their medical and emotional needs

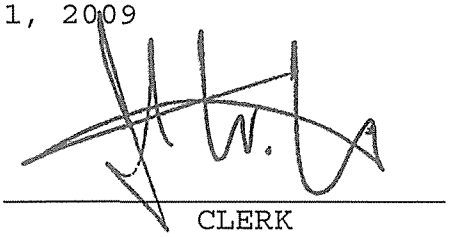
(*see Matter of Antonia Mykala P.*, 52 AD3d 224, 225 [2008], *lv denied* 11 NY3d 705 [2008]), or availing herself of parenting classes addressed to the special needs of one of them (*see Matter of Elizabeth Amanda T.*, 52 AD3d 376 [2008], *lv denied* 11 NY3d 714 [2008]). The fact that she completed some of the programs does not indicate, under these circumstances, that she properly planned for her children's return (*see Matter of Wilfredo A.M.*, 56 AD3d 338 [2008]; *Matter of Violeta P.*, 45 AD3d 352 [2007]).

A preponderance of the evidence supports the determination that termination of parental rights to facilitate the adoptive process is in the best interests of both of these children (*see Star Leslie W.*, 63 NY2d at 147-148]. Jaiheem is in a stable and caring environment provided by foster parents with whom he has lived his entire life, while Shavar is in the home of foster parents with whom he has lived since 2006 and who have addressed his special needs (*Matter of Wilfredo A.M.*, 56 AD3d 338, *supra*; *Matter of Angel P.*, 44 AD3d 448 [2007]). Both sets of foster parents wish to adopt, and there is every indication that they will continue to facilitate visits between the children after

their adoptions (*see Matter of Victoria Marie P.*, 57 AD3d 282, 283 [2008]).

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

618 The People of the State of New York, Respondent, Ind. 3444/05

-against-

Earl Reyes,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J. at suppression hearing; Michael J. Obus, J. at jury trial and sentence), rendered December 14, 2007, convicting defendant of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress a statement. After arresting defendant for a homicide involving a firearm, but prior to giving him *Miranda* warnings, the police asked defendant the location of the weapon. Defendant gestured toward a bookcase, where the police found a revolver whose cylinder was missing. The officer asked defendant the whereabouts of the cylinder, and defendant said he threw it out the window. Defendant concedes that the question about the weapon was permissible under the public safety exception to the

requirement of *Miranda* warnings (*see New York v Quarles*, 467 US 649 [1984], but argues that once the inoperable weapon was located there was no longer any safety concern warranting the question about the cylinder. However, we conclude that this simple followup question was prompted by objectively reasonable safety concerns, particularly since other people were in the apartment. The police needed to determine whether this evidently inoperable weapon was actually the weapon used in the homicide, or whether another weapon was present. In addition, there were foreseeable circumstances under which a detached, but loaded cylinder could be dangerous. In any event, any error in admitting defendant's response that he discarded the cylinder was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). At trial there was no question that defendant possessed a firearm; defendant, who asserted a justification defense, testified that he shot the victim. Although the trial prosecutor argued that defendant's disposal of the cylinder evinced a consciousness of guilt, that argument added little or nothing to the prosecution's case, and the dismantled weapon itself formed a basis for the argument even without the challenged statement.

When defendant, after consulting with but rejecting the advice of his attorney, personally made the decision to forgo submission of any lesser included offenses, "this did not constitute self-representation requiring the court to warn him of

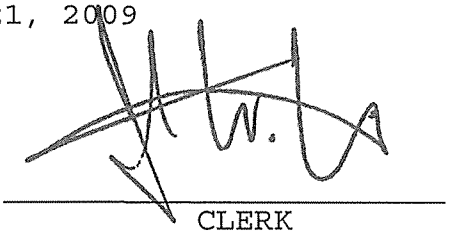
the risks of proceeding pro se" (*People v Blak*, 6 AD3d 301, 302 [2004], *lv denied* 3 NY3d 637 [2004]). Although such a strategic decision is normally made by counsel, it does not follow that when counsel acceded to his client's wish, defendant was then effectively proceeding pro se. Defendant was still represented by counsel, whose advice he chose to reject. Defendant's participation in the trial, consisting only of making a particular decision, was less than that of the defendant in *People v Cabassa* (79 NY2d 722, 730-731 [1992], *cert denied sub nom. Lind v New York*, 506 US 1011 [1992]) who delivered his own summation but was held not to have relinquished the right to counsel. Finally, although we do not decide that such a colloquy was necessary, we note that the court engaged in a thorough inquiry into defendant's understanding of the consequences of forgoing any submission of lesser included offenses.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record concerning counsel's summation strategy and any consultations he may have had with defendant concerning that strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective

assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: MAY 21, 2009



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McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

619 The People of the State of New York, Respondent, Ind. 17/01

-against-

Jahan Norman, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Order, Supreme Court, New York County (William Leibovitz, J. at plea and sentence; Eduardo Padro, J. at re-sentence), entered on or about October 22, 2007, 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.

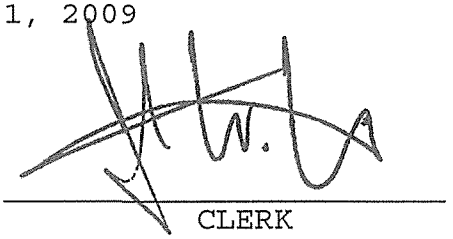
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

620-
621 Nancy Lamot, etc., Index 25930/97
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant,

La Peninsula Community Organization,
Inc., etc.,
Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for appellant.

Madeline Lee Bryer, P.C., New York (Steve S. Efron of counsel), for respondent.

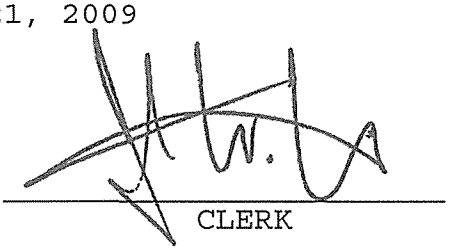
Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about December 21, 2006, upon a jury verdict awarding plaintiff $2 million for past pain and suffering as against defendant City of New York, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment dismissing the complaint as against the City.

Defendant's alleged failure to carry out its obligations under title 6 of the Social Services Law is not actionable (*Mark G. v Sabol*, 93 NY2d 710, 722 [1999]). Nor, to the extent defendant's actions are discretionary, does the failure to act give rise to a claim for common-law negligence (*McLean v City of New York*, __ NY3d __, 2009 NY Slip Op 02449, *6 [2009]). To the

extent defendant's actions are ministerial, there can be no liability because plaintiff failed to show that defendant owed a special duty to her apart from any it owed to the public in general (*id.*).

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

622 Alida Rodriguez, Index 15703/99
Plaintiff-Appellant,

-against-

Ford Motor Company,
Defendant-Respondent,

Betty F. Gerendasy, etc., et al.,
Defendants.

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

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Elliot J. Zucker of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 15, 2007, which denied plaintiff's motion to restore the case to the trial calendar, and granted defendant Ford Motor Company's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, plaintiff's motion granted and Ford's cross motion denied.

Plaintiff originally based her products liability claim against Ford on a "transient signal" theory postulating that the Ford vehicle that struck her had a design defect by which electromagnetic signals from unknown sources and for unknown reasons caused the vehicle's cruise control to fully open the throttle, in turn causing the vehicle to suddenly accelerate without the driver manipulating the gas pedal, and also causing the steering and brakes to stop functioning. The trial court,

after a lengthy *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]), precluded this theory on the ground that it has no support in the scientific community, and also precluded plaintiff's expert. At plaintiff's request, the trial court then removed the case from the trial calendar pending plaintiff's appeal. After the appeal was dismissed (17 AD3d 159 [2005]), plaintiff sought to restore the case to the calendar, asserting that she would proceed against Ford on a negligence theory based on circumstantial evidence. Ford opposed the motion and cross-moved for summary judgment. The court denied plaintiff's motion to restore and granted Ford's cross motion for summary judgment, finding that plaintiff's circumstantial evidence theory "is inextricably intertwined with, and dependent upon, the precluded theory of 'transient signals.'"

Preliminarily, the court properly considered Ford's cross motion since good cause existed for Ford's delay in making it (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]), namely, the eve-of-trial order precluding plaintiff's then sole transient-signal theory of liability, as well as her expert, and the subsequent unsuccessful appeal. Further, the motion practice that resulted in dismissal began with plaintiff seeking to restore the action to the calendar; Ford's motion for summary judgment was, in effect, merely opposition to that motion. While Ford should have attached a copy of the pleadings to its cross

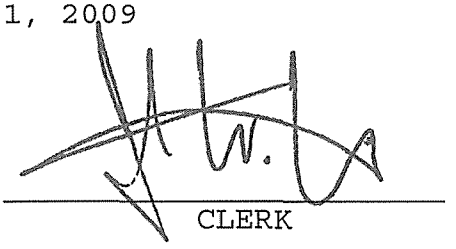
motion (CPLR 3212[b]), the defect was properly overlooked (*see Breytman v Olinville Realty, LLC*, 46 AD3d 484, 485 [2007], *lv dismissed in part and denied in part* 11 NY3d 768 [2008]).

"In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants" (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]). Assuming, without deciding, that Ford met its initial burden, thus shifting the burden to plaintiff to come forward with competent evidence tending to show that the driver, Nyiri, was not intoxicated or negligent, we hold that plaintiff did come forward with such evidence, specifically, Nyiri's deposition testimony that he had only had one glass of wine in an hour and a half and was not intoxicated, that the car accelerated when he put it in reverse without stepping on the gas, and that the steering wheel froze and the brakes did not work. This testimony suffices to raise a triable issue of fact since, if credited, the jury could conclude that the vehicle did not perform as intended and that plaintiff excluded all other causes of the accident not

attributable to Ford (*see Speller*, 100 NY2d at 44; *Jarvis v Ford Motor Co.*, 283 F3d 33, 46 [2d Cir 2002], *cert denied* 537 US 1019 [2002]).

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

ENTERED: MAY 21, 2009



CLERK

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

623 The People of the State of New York, Respondent, Ind. 1187/03

-against-

Hector Rincon, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Ruth Pickholz, J.), rendered April 3, 2008, resentencing defendant upon his conviction of criminal sale of a controlled substance in the second degree, as a second felony offender, to a term of 8 years, unanimously affirmed.

Defendant argues that he is entitled to a hearing regarding his claim that the attorney who represented him at his underlying conviction in 2004 rendered ineffective assistance by failing to challenge the constitutionality of defendant's 1994 predicate conviction. We find this argument to be procedurally barred as well as without merit.

Defendant previously appealed from his 2004 conviction, as well as from the sentencing court's subsequent order which specified and informed defendant that the court would resentence him pursuant to the Drug Law Reform Act (L 2005, ch 643), to a

term of eight years. A panel of this Court (40 AD3d 538 [2007], *lv denied* 9 NY3d 880 [2007]) affirmed the judgment and order, and remanded for resentencing. At resentencing, defendant did not exercise his right to withdraw his resentencing application. He asserted, however, that he should not be sentenced as a second felony offender based on his 1994 conviction because the plea allocution in that case was constitutionally defective. He also asserted that the statutory bar to such an untimely claim (*see* CPL 400.21[7][b];[8]) should not apply because the attorney who represented him in 2004 was ineffective for failing to raise the issue.

Initially, we conclude that this ineffective assistance claim is unreviewable on direct appeal because the record does not explain counsel's reasons for declining to challenge the predicate conviction (*see People v Love*, 57 NY2d 998 [1982]). Defendant made a pro se CPL 440.10 motion to vacate the judgment in which he alleged ineffective assistance, but since he did not obtain leave to appeal to this Court, the issues raised on that motion are not reviewable (*see* CPL 450.15[1]; 460.15; *People v Villegas*, 298 AD2d 122, 123 [2002], *lv denied* 99 NY2d 565 [2002]).

Furthermore, even to the extent the existing record permits review of this claim, it is still procedurally defective. To the extent reviewable on direct appeal, defendant could have raised

this issue on his prior appeal to this Court. Instead, defendant challenged his second felony offender adjudication on different grounds, and raised an ineffective assistance claim limited to another aspect of counsel's performance. Moreover, the pertinent portion of the DRLA (L 2005, ch 643, § 1) provides that an appeal from a new sentence imposed under this provision "may be based on the grounds that (i) the term of the new sentence is harsh or excessive; or (ii) that the term of the new sentence is unauthorized as a matter of law." Although we need not decide whether this provision permits a defendant, on an appeal from a resentence, to claim ineffective assistance at *resentencing*, there is no reason to believe it permits such a defendant to claim ineffective assistance at the *original* sentencing (*cf. People v Winthrow*, 38 AD3d 323 [2007] [DRLA resentencing does not permit defendant to relitigate predicate felony status]).

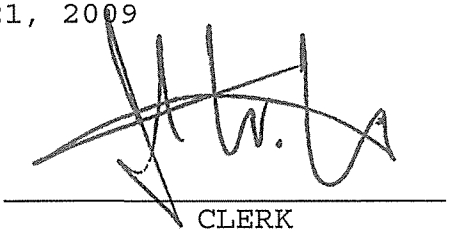
As an alternative holding, we also reject defendant's ineffective assistance claim on the merits (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). A challenge to the constitutionality of the 1994 plea would have been futile (*see People v Harris*, 61 NY2d 9, 15-16 [1983]), because the minutes of the allocution cast no doubt on defendant's guilt or the voluntariness of his plea (*see People v Toxey*, 86 NY2d 725 [1995]; *People v Moore*, 71 NY2d 1002 [1988]). Accordingly, it

was objectively reasonable for counsel to let the predicate felony conviction go unchallenged (*see People v Lane*, 60 NY2d 748, 751 [1983]).

On the present appeal, defendant also argues that the new sentence of eight years is excessive and should be reduced as an exercise of discretion in the interest of justice. Since the identical claim was rejected on the prior appeal from the proposed sentence, the present claim is barred by the doctrine of res judicata (*see People v Walker*, 265 AD2d 254 [1999], *lv denied* 94 NY2d 908 [2000]), and there is nothing in the above-quoted section of the DRLA to suggest that a defendant is entitled to raise the same excessiveness issue twice. As an alternative holding, we perceive no basis for reducing the new sentence.

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

ENTERED: MAY 21, 2009



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McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

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629NB-
629NC

CDR Créances S.A.S., as successor to Societe de Banque Occidentale,
Plaintiff-Respondent,

-against-

Maurice Cohen, et al.,
Defendants-Appellants,

Summerson International Establishment, et al.,
Defendants.

Index 109565/03
600448/06

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CDR Créances S.A.S., as successor to Societe de Banque Occidentale,
Plaintiff-Respondent-Appellant,

-against-

Leon Cohen, etc., et al.,
Defendants-Appellants,

Iderval Holding, Ltd., et al.,
Defendants.

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel), for Maurice Cohen, Leon Cohen, Sonia Cohen and Joelle Habib, appellants.

Marc Bogatin, New York, for World Business Center, Inc., appellant.

Simon & Partners LLP, New York (Bradley D. Simon of counsel), for Robert Maraboeuf, Allegria Acour Aich and Patricia Habib Petetin, appellants.

Kellner Herlihy Getty & Friedman, LLP, New York (Douglas A. Kellner of counsel), for CDR Créances S.A.S., respondent/appellant.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered August 29, 2008, directing defendants Maraboeuf, Aich and Petetin to pay plaintiff $265,865,120.81, unanimously reversed, on the law and the facts, without costs, and vacated. Appeal from order, same court and Justice, entered August 13, 2008, unanimously dismissed, without costs, as subsumed in appeals from ensuing order and judgment. Order, same court and Justice, entered December 1, 2008, to the extent it denied the cross motions of defendants Cohen and Habib, and the subsequent motion of Maraboeuf, Aich and Petetin, to renew the August 13 order and vacate the default judgments entered against those defendants by that order, unanimously reversed, on the law and the facts, without costs, renewal granted, the answers of those parties reinstated, and the restraining orders, entered December 24, 2008, vacated. Judgments, same court and Justice, entered September 25, 2008, awarding plaintiff $268,067,132.33 and $268,067,157.33 against defendant World Business Center, inter alia, unanimously reversed, on the law and the facts, without costs, and vacated. Appeals from orders, same court and Justice, entered January 30, 2009, which denied World Business Center's motions to renew or vacate default judgments against it by order entered August 13, 2008, unanimously dismissed, without costs.

While a court is vested with broad discretion to control its calendar and supervise disclosure in order to facilitate the

resolution of cases, and the imposition of sanctions for discovery misfeasance is generally a matter best left to the trial court's discretion, the IAS court nonetheless improvidently exercised its discretion in granting default judgments against defendants-appellants. In view of the brief period between the first discovery order and the granting of the defaults (*see Castillo v Garzon-Ruiz*, 290 AD2d 288 [2002]), the magnitude of the judgments (*New York Annual Conference of United Methodist Church v Preusch*, 51 AD2d 711, 712 [1976]), and the lack of any specific prejudice to plaintiff (*Sosa v Kasim*, 48 AD3d 320 [2008]), reasonable latitude should have been afforded before imposing the ultimate sanction (*see Bassett v Bando Sangsa Co.*, 103 AD2d 728 [1984]). Moreover, given the sworn statements on behalf of these defendants that their prior counsel had failed to advise them of the need to appear for depositions, as well as their foreign residence and the facial merit of their defenses, the court erred in finding that their failure to comply was willful, contumacious or due to bad faith (*see Weissman v 20 E. 9th St. Corp.*, 48 AD3d 242 [2008]).

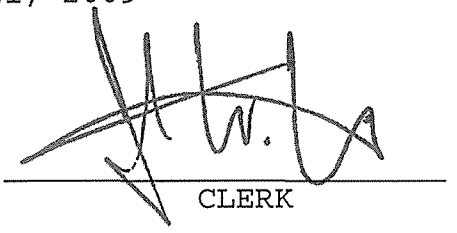
Plaintiff's contention on cross appeal that the inquest court erred in failing to award it punitive damages against Maraboeuf, Aich and Petetin is rendered academic by our vacatur of that judgment, and in any event is unavailing, since plaintiff failed to present clear, unequivocal and convincing evidence of

willful conduct that was morally culpable, or was actuated by evil and reprehensible motives (*Munoz v Puretz*, 301 AD2d 382, 384-385 [2003]). The claimed entitlement to summary judgment is not properly before us, based on plaintiff's limited notice of appeal, and in any event is without merit *(see generally Sadkin v Raskin & Rappoport*, 271 AD2d 272, 273 [2000]).

Our disposition is without prejudice to the imposition of such other sanctions as the court deems appropriate.

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

ENTERED: MAY 21, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela A. Mazzarelli
Richard T. Andrias
Karla Moskowitz
Dianne T. Renwick, JJ.

68-69

Index 22026/05
85253/06

x

Children's Corner Learning Center,
Plaintiff-Respondent,

-against-

A. Miranda Contracting Corp., et al.,
Defendants.

- - - -

Henry Loheac, P.C.,
Third-Party Plaintiff-Respondent,

-against-

MF Electrical Service Co., Inc., et al.,
Third-Party Defendants,

George E. Berger & Associates, LLC, et al.,
Third-Party Defendants-Appellants.

x

Third-party defendants George E. Berger & Associates, LLC and JAM Consultants, Inc., appeal from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered July 16, 2007, which, to the extent appealed from, denied their cross motions for summary judgment dismissing defendant-third-party plaintiff-respondent's common-law claims for contribution and/or indemnification.

Gogick, Byrne & O'Neill, LLP, New York (Anthony W. Vaughn, Jr. of counsel), for George E. Berger & Associates, LLC, appellant.

Zeichner Ellman & Krause LLP, New York (Bryan D. Leinbach and Barry J. Glickman of counsel), for JAM Consultants, Inc., appellant.

Ellen Rothstein, New York, for Children's Corner Learning Center, respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Sarah M. Ziolkowski and Lorin A. Donnelly of counsel), for Henry Loheac, P.C., respondent.

MAZZARELLI, J.

In March 2004, plaintiff retained defendant Henry Loheac, P.C. to provide architectural services for plaintiff's planned conversion of premises it leased into a day care center. Plaintiff alleges that it advised Loheac that it intended to begin operating the day care center in January 2005. Plaintiff also claims that Loheac assured it that all necessary construction permits and licenses would be obtained by November 2004. Construction was delayed, causing the day care center to open approximately six months later than the target date of January 2005.

Thereafter, plaintiff commenced this action against Loheac, A. Miranda Contracting Corp. (plaintiff's general contractor), Newman Design Group (the architect retained by the building's owner), MF Electrical Service Co., Inc. (the electrical subcontractor hired by the general contractor) and High Rise Fire Protection Corp. (the fire alarm installer allegedly hired by either the general contractor or the electrical subcontractor). Plaintiff's claims against Loheac are found in the fourth, fifth and sixth causes of action in the complaint. In the fourth cause of action, plaintiff asserts Loheac breached its contract by, generally, failing to perform its work in a timely fashion. As a result, plaintiff alleges it was unable to obtain the licenses

necessary to open a fully operational day care center in January 2005. Plaintiff says it was damaged because it:

> "was caused to incur additional expenses to help correct the defective, faulty, improper and inadequate work caused by Loheac's breach of contract so that Plaintiff could open and operate as a fully licensed day care center..."

The fifth cause of action also sounds in breach of contract. Plaintiff claims that Loheac caused it "unanticipated, uncontemplated and/or unreasonable delay and disruption" by not obtaining the necessary licenses and permits for, and otherwise failing to properly supervise the installation of, a fire alarm system. In the fifth cause of action, plaintiff maintains it was damaged to the extent that it:

> "has incurred, expended or has been deprived of payment and damaged for all consequential and inconsequential damages, including, but not limited to, those incurred for additional labor, supervision, supplies, material, equipment, and losses for rent and additional rent, loss of operating expenses, and lost profits..."

Plaintiff asserts in the sixth cause of action that Loheac was negligent in the performance of its duties, and that its acts and omissions constituted professional malpractice. The factual allegations supporting this cause of action are substantially similar to those underlying both the fourth and fifth causes of

action. In the sixth cause of action, plaintiff claims that it was damaged to the extent that:

> "opening of the day care center was severely disrupted and impeded and was rendered uneconomical and costly beyond its anticipation or reasonable expectation; among other things, Plaintiff was delayed from opening for six months, or more than 100% of the original contract period; Plaintiff's planned opening was delayed into seasons contrary to the original schedule; Plaintiff was forced to incur additional expenses to be able to open the day care center on an interim basis and on a full time basis; Plaintiff's initial advertising and initial operating costs were rendered a loss, as Plaintiff was unable to open as scheduled; Plaintiff was deprived of the benefit of its bargain with its landlord in that Plaintiff was unable to fully operate during the initial six month lease period in which Plaintiff had been given a 100% rent abatement; Plaintiff was deprived of the ability to collect revenues from which to pay, among other things, operating expenses; Plaintiff was deprived of its profits to be derived from the fully operational the day care center (*sic*) for approximately six months; the value of the Premises was diminished based upon Plaintiff's inability to utilize same in the manner intended, at the capacity intended and of which defendant was fully aware for approximately six months."

Loheac commenced a third-party action against, among others, appellants George E. Berger and Associates and JAM Consultants, Inc. The third-party complaint identified both Berger and JAM as having been retained by plaintiff, the building owner or the

property manager "as an expediter with respect to the filing of applications, to obtain permits, licenses and other approvals of the work performed at the subject building including but not limited to the electrical system, fire sprinkler system and alarm system." Loheac alleges in the third-party complaint that Berger and JAM "failed to possess the requisite skill, knowledge and ability to obtain such permits" and that their "fail[ure] to obtain the necessary permits, approvals and licenses within a reasonable time period result[ed] in the delayed opening of the daycare center by the plaintiff and the alleged damages sustained as a result thereof." Loheac therefore seeks "common law contribution or indemnification" from Berger and JAM in the event it is found liable to plaintiff. In the third-party complaint Loheac also pleaded claims for contractual contribution or indemnification against Berger and JAM as well as damages based on the alleged failure of Berger and JAM to procure insurance on Loheac's behalf.

Defendant Newman Design Group moved, pursuant to CPLR 3211(a)(7), to dismiss plaintiff's complaint as against it. Berger and JAM separately cross-moved, under CPLR 3211(a)(7) and 3212, to dismiss the third-party complaint as against them. Berger argued that because plaintiff's complaint only sought economic loss damages from Loheac, no claim for common-law

contribution or indemnification was available. Berger further stated that no agreements existed between it and Loheac that required it to indemnify Loheac or to procure insurance. JAM made the same arguments as Berger. However, it also argued that Loheac was precluded from seeking common-law indemnity because plaintiff had alleged active wrongdoing against Loheac.

In opposition to the cross motions by Berger and JAM, Loheac stressed that the claims made by plaintiff against it included a claim for professional malpractice, in addition to those for breach of contract. The possibility it might be found liable in tort, Loheac asserted, permitted it to make claims for common-law contribution and indemnity. In opposing the cross motions, Loheac did not identify any agreements between it and either Berger or JAM that supported its claims against them for contractual indemnification and breach of contract.

The motion court granted the cross motions of Berger and JAM only to the extent of dismissing Loheac's third-party claims for contractual indemnification and breach of contract. This was based on Loheac's failure to oppose those parts of the cross motions which addressed those claims. However, the court refused to dismiss the claims for common-law contribution and indemnification. Relying on *Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.* (295 AD2d 229 [2002]), the court held that

plaintiff's claim for professional malpractice against Loheac supported Loheac's third-party claims against Berger and JAM. The court further held that Loheac stated valid causes of action against Berger and JAM for common-law indemnification by alleging that Loheac's failure to obtain permits in a timely fashion was solely the result of the negligence of Berger and JAM.

Loheac's claim for common-law contribution against both Berger and JAM should have been dismissed. Where, as here, the underlying claim seeks purely economic damages, a claim for common-law contribution is not available. CPLR 1401 codified the concept of common-law contribution recognized by the Court of Appeals in *Dole v Dow Chem. Co.* (30 NY2d 143 [1972]). That section spells out the circumstances in which a party may seek contribution from another party. They are as follows:

> "Except as provided in sections 15-108 and 18-201 of the general obligations law, sections eleven and twenty-nine of the workers' compensation law, or the workers' compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

In the cases which have followed since the Court of Appeals

decided *Dole v Dow Chem. Co.* and this statute was enacted, it is well established that "purely economic loss resulting from a breach of contract does not constitute 'injury to property'" (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). In *Sargent*, a case similar to this, the plaintiff, a school district, commenced a breach of contract action against the architectural firm that designed a school construction project and the general contractor that built the school. The school's roof began to leak shortly after construction was completed. The school district claimed that the architects breached their contract with the district by not obtaining proper approval of the roofing subcontractor and by failing to secure a guarantee from the roof manufacturer. The architects sought contribution from the general contractor. In that case, the Court of Appeals, after reviewing *Dole v Dow Chem. Co.* and the legislative history of CPLR 1401, did not allow contribution. It stated that:

> "To permit apportionment of liability, pursuant to CPLR 1401, arising solely from breach of contract would not only be at odds with the statute's legislative history, but also do violence to settled principles of contract law which limit a contracting party's liability to those damages that are reasonably foreseeable at the time the contract is formed" (71 NY2d at 28).

Loheac tries to distinguish the present matter from *Sargent*. It argues that, unlike here, there was no claim for professional malpractice in *Sargent,* asserting that the presence of a tort claim against it in this action permits a claim for contribution. While claims for professional malpractice and breach of contract may co-exist, even though both arise out of the professional's contractual obligations (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]; *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 83 [1999]), Loheac's argument must be rejected. This is because the touchstone for purposes of whether one can seek contribution is not the nature of the claim in the underlying complaint but the measure of damages sought therein (*see Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 897 [2003], *lv denied* 1 NY3d 504 [2003]; *Rothberg v Reichelt,* 270 AD2d 760, 762 [2000]; *Rockefeller Univ. v Tishman Constr. Corp. of N.Y.*, 240 AD2d 341, 343 [1997], *lv denied* 91 NY2d 803 [1997]). Here, the damages sought from Loheac are economic only. That is, plaintiff seeks only to be returned "to the point at which the breach arose and to [be placed] in as good a position as it would have been" had Loheac secured the permits in a timely fashion (*Brushton-Moira Cent. School Dist. v Thomas Assoc., P.C.*, 91 NY2d 256, 261 [1998]). That Loheac seeks the same measure of damages for breach of contract as for

professional malpractice is confirmed by the fact that the specific damages sought in the fifth cause of action for breach of contract are substantially similar to the specific damages sought in the sixth cause of action for professional malpractice.

In arguing to the contrary, Loheac relies, as did the motion court, on *Tower Bldg. Restoration v 20 East 9th St. Apt. Corp.* (295 AD2d 229 [2002], *supra*). However, that case is distinguishable. Although the decision in *Tower Bldg. Restoration* did not specify the nature of the damages sought against the fourth-party plaintiff architect, a review of the briefs does. They reveal that the third-party plaintiff there, a cooperative apartment corporation, sought traditional tort damages from the architect in connection with the architect's alleged damaging of the floor and roof of one of the apartments in the building. In this case, plaintiff does not claim any damages that seek traditional tort remediation.

Loheac's reliance on *Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.* (58 AD3d 178 [2008]) is also misplaced. The claim there against the third-party plaintiff engineering firm was that its malpractice directly led to the collapse of a retaining wall. The plaintiff sought traditional tort damages in connection with the collapse, and not just the benefit of its bargain with the engineering firm. As a result, this Court upheld the firm's

contribution claim against the engineers whom it had hired to design and implement certain corrective measures for the stability of the wall.

Loheac also looks to the Third Department's decision in *Robinson Redevelopment Co. v Anderson* (155 AD2d 755 [1989]) for support. In that case, the Third Department held that contribution is available even where the plaintiff seeks purely economic damages as a result of professional malpractice. However, this Court has expressly declined to follow *Robinson* (*see Rockefeller Univ. v Tishman Constr. Corp. of N.Y.*, 240 AD2d at 343). Moreover, the Third Department has implicitly overruled *Robinson* (*see Rothberg v Reichelt*, 270 AD2d at 762 [2000] [citing *Rockefeller University* in dismissing common-law contribution claim where plaintiff's underlying complaint sought only the benefit of a contractual bargain]).

Loheac's common-law indemnification claim against JAM should also have been dismissed pursuant to CPLR 3212. In support of its motion, JAM submitted the affidavit of a project manager who stated that JAM's duties on the project were limited to "pre-fil[ing]" an application concerning, among other things, the sprinkler system, with the Department of Buildings on behalf of Loheac. He asserted that he did this "promptly, in good faith and in accordance with the reasonable commercial standards of its

business." The project manager further averred that after he learned that the Department would not approve the application before the premises were approved for use as a day care center, he communicated that information to Loheac. Finally, the project manager claimed that JAM had no involvement with the process that ultimately resulted in plaintiff becoming approved to operate a day care center. Loheac failed to refute any of the foregoing. Thus, its claim for common-law indemnification against JAM should have been dismissed.

However, Loheac's claim for common-law indemnification against Berger should continue. On a motion pursuant to CPLR 3211(a)(7) we accept all factual allegations in the pleading as true. Loheac unquestionably pleaded that plaintiff (or, alternatively, the building owner or property manager) hired Berger as an expediter, and that it was responsible for obtaining permits and licenses. If plaintiff did indeed retain Berger to timely obtain necessary licenses and permits, then the possibility exists that an ultimate finding of liability against Loheac could have been solely due to Berger's negligence (*see 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d at 83; *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1985]). To the extent that Berger moved to dismiss the common-law indemnification claims against it pursuant

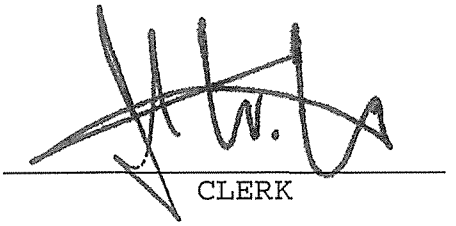
to CPLR 3212, it, unlike JAM, failed to tender evidence sufficient to negate that possibility as a matter of law.

Accordingly, the order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered July 16, 2007, which, to the extent appealed from, denied the cross motions of third-party defendants-appellants for summary judgment dismissing defendant-third-party plaintiff-respondent's common-law claims for contribution and/or indemnification, should be modified, on the law, to grant summary judgment to third-party defendant-appellant JAM Consultants, Inc. dismissing the third-party complaint as against it, and to grant summary judgment to third-party defendant-appellant George E. Berger & Associates, LLC dismissing defendant-third-party plaintiff-respondent's common-law claim for contribution, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 21, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
James M. Catterson
Karla Moskowitz
Leland G. DeGrasse, JJ.

4880
Index 105195/08

In re 47 Ave. B. East Inc.,
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

In this CPLR article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Sheila Abdus-Salaam, J.], entered on or about May 8, 2008), petitioner challenges the determination of respondent New York State Liquor Authority, dated March 20, 2008, which, upon a finding that petitioner violated State Liquor Authority Rules 54.2 (9 NYCRR 48.2) and 54.3 (9 NYCRR 48.3), revoked petitioner's on-premises liquor license.

Mehler & Buscemi, New York (Martin P. Mehler of counsel), for petitioner.

Thomas J. Donohue, New York (Scott A. Weiner of counsel), for respondent.

CATTERSON, J.

The principal issue presented on this appeal is whether there is substantial evidence to support the finding that the petitioner permitted overcrowding on the premises in violation of State Liquor Authority Rules 54.2 (9 NYCRR) § 48.2 (hereinafter referred to as "Rule 48.2") (failure to exercise adequate supervision over the conduct of the licensed establishment), and Rule 54.3(9 NYCRR) § 48.3 (failure to conform with all occupancy level regulations) (hereinafter referred to as "Rule 48.3"). Furthermore, this appeal necessarily brings up for review the issue of whether the respondent, the New York State Liquor Authority (hereinafter referred to as the "SLA"), exceeded its authority in promulgating rules in excess of the power delegated to it by explicit state law.

We find that testimony that patrons were standing "shoulder to shoulder," the only evidence proffered by the SLA that the premises were overcrowded, is insufficient to support the findings that the petitioner violated Rule 48.2 and Rule 48.3. Furthermore, we find that the SLA exceeded its authority in determining that the petitioner was guilty of violating the occupancy law where the underlying charges were dismissed in Criminal Court. Moreover, we find that Rules 48.2 and 48.3 are ultra vires as applied here because the enforcement of the rules

is contrary to the legislative requirements contained in their statutory predicate (Alcoholic Beverage Control Law § 106[6]) (hereinafter referred to as the "ABC Law").

On January 13, 2007, as a result of a joint task force investigation of various premises in downtown Manhattan, several New York City police officers and SLA investigators descended on the petitioner's premises, a large restaurant/bar located in the area commonly known as Alphabet City.[1] Five charges were brought against the petitioner by the SLA: (1) Allowing the premises to become disorderly in violation of section 106(6) of the ABC Law; (2) Failure to exercise adequate supervision over the premises on January 13, 2007 in violation of Rule 48.2; (3) Failure to comply with occupancy level regulations on January 13, 2007 in violation of Rule 48.3 and SLA Rule 36.1(f) (9 NYCRR) § 53.1(f) (hereinafter referred to as "Rule 53.1(f)"); (4) Failure to conform with governmental regulations regarding employment of security guards on January 13, 2007 also in violation of Rules 48.3 and 53.1(f); (5) Failure to conform with building codes and/or other regulations on January 13, 2007 in violation of Rules 48.3 and 53(1)(f). According to the SLA, all 5 charges were cause for revocation, cancellation or suspension of the

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[1]The name Alphabet City comes from Avenues A, B, C and D, the only avenues in Manhattan to have single-letter names.

petitioner's liquor license in accordance with Rule 53.1(f).

On October 30, 2007, a hearing was held before an Administrative Law Judge. At the hearing, a senior SLA investigator testified that on January 13, 2007, he went to the petitioner's premises as part of a joint inspection with the New York City Police Department. The investigator stated that he entered through the cellar entrance with two other investigators and observed people standing "pretty much shoulder to shoulder." He further testified that he pushed his way through the crowd and walked up to the first floor with the two other investigators. At that point, he met several other investigators and police officers who had entered the restaurant on that level. The group exited through a service corridor because it was too crowded on the first floor to "plow [their] way to the back in the front."

While the SLA investigator was outside, he observed a police lieutenant talking with the owner of the petitioner, who had produced the certificate of occupancy for the premises allowing for 61 people in the cellar and 135 on the first floor. The investigator stated that he heard the lieutenant tell the owner that the premises were overcrowded and instructed him to get the place under legal capacity. The investigator testified that he observed what he estimated to be between 75 and 100 people in the cellar. He could not say how many people were on the first floor

of the premises. On cross-examination, the investigator conceded that he did not use a counting device to determine the number of people at the premises nor did he conduct any headcount while inside the premises. He also conceded that it was not unlawful for people to be standing "shoulder to shoulder."

The SLA introduced into evidence its investigator's report, which noted, inter alia, that the petitioner was issued a summons for overcrowding (New York City Administrative Code § 15-227(a)) and for hiring an unlicensed security guard (see General Business Law § 89-g(1)(a)). The security guard was also issued a summons for not being able to produce a New York Department of State registration card upon request. General Business Law § 89-f(6).

The owner testified without contradiction that the summonses issued that night were later dismissed and that he fully cooperated with the police in getting the place under legal capacity. The owner also testified that there was no overcrowding and that one of his employees had a counter showing that the premises were within the legal limits. He stated that after the police told him to reduce the number of people inside the premises he complied immediately.

Following the hearing, the Administrative Law Judge dismissed the charges that the petitioner failed to conform with governmental regulations regarding employment of security guards.

She also found that there was "no evidence" that the licensee "suffer[ed] or permit[ed]" the premises to become disorderly in violation of section 106(6) of the ABC Law. However, the ALJ determined that the licensee failed to exercise adequate supervision over the premises in violation of Rule 48.2 and failed to comply with occupancy levels in violation of Rule 48.3. She stated that it was "clear from the substantial evidence presented that the premises were in fact overcrowded [...] and that the premises were allowed to become disorderly." The ALJ dismissed the charge that the petitioner failed to "conform with all building codes, and/or fire, health, safety and governmental regulations" because it was duplicative of the charge that the petitioner failed to "conform with all applicable building codes and/or fire regulations regarding occupancy level[s]."

On March 20, 2008, the SLA sustained the findings of the ALJ and, referencing the petitioner's extensive adverse history, cancelled its on-premises liquor license.[2]

The petitioner then commenced this article 78 proceeding against the SLA alleging that the cancellation of its liquor license was arbitrary, capricious, contrary to law and an abuse

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[2]The word "cancellation" as applied to the termination and surrender of a liquor license is merely a form of revocation. Matter of Glenram Wine & Liq. Corp. v. O'Connell, 295 N.Y. 336, 67 N.E.2d 570 (1946).

of discretion. In addition to arguing that the determination was not supported by substantial evidence and that the penalty was excessive, the petitioner contends that the promulgation of Rules 48.2 and 48.3 is ultra vires and has no basis in the ABC Law. Specifically, the petitioner contends that both rules fail to meet the legislative requirements contained in their statutory predicate, ABC Law § 106(6).

As a threshold matter, we perceive it to be an inherent contradiction to dismiss a charge that a licensee has "suffer[ed] or permitt[ed]" the premises to become "disorderly" in violation of section 106(6) of the ABC Law while at the same time find substantial evidence that the premises was "in fact overcrowded [...] and allowed to become disorderly" under a SLA Rule. Even if we were to accept, as the SLA urges, that overcrowding constitutes disorderly conduct per se, we disagree that there was sufficient evidence that there was overcrowding in the subject premises. Therefore, for the reasons set forth below, we find that neither the violation of Rule 48.2 nor Rule 48.3 can be sustained.

"Judicial review of the determination made by an administrative agency [...] is limited to a consideration of whether that resolution was supported by substantial evidence

upon the whole record." See 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 181, 408 N.Y.S.2d 54, 57, 379 N.E.2d 1183, 1187 (1978). Substantial evidence "is less than a preponderance of evidence" and requires only that there be enough "relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." 300 Gramatan Ave. Assoc., 45 N.Y.2d at 180, 408 N.Y.S.2d at 56. The test "relates to whether a particular action should have been taken or is justified [...] and whether the administrative action is without foundation in fact". Matter of Pell v. Board of Ed. of Union Free School Dist. No 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839, 313 N.E.2d 321, 325 (1974) (internal quotation marks and citations omitted).

It is beyond dispute that the credibility determinations of the Administrative Law Judge are entitled to great weight. See Matter of Albany Manor Inc. v. New York State Liq. Auth., 57 A.D.3d 142, 144, 867 N.Y.S.2d 380, 382 (1st Dept. 2008). Indeed, for purposes of this appeal we accept as *true* all of SLA's allegations concerning the investigator's observations of conditions on the premises on the night of January 13, 2007. It is uncontroverted, however, that the investigator did not perform a headcount in the basement and merely observed that the patrons

were standing "shoulder to shoulder." Nor did the investigator conduct a headcount on the main floor where he only spent a brief time observing the scene.

As for the SLA officer's testimony that there were between 75 and 100 persons in the basement, we reject that as a "guesstimate" that cannot constitute substantial evidence. No matter how much lower the standard, substantial evidence of a violation of occupancy limits cannot be based on testimony that cavalierly assesses groups of people on a "give or take" of 25 persons, which is a 33.3 percent margin of error. Indeed, were we to apply the 33.3 percent margin of error to the guess of 75 persons, it is doubtful how anyone could ascribe overcrowding to a premises with a legal maximum occupancy of 61 persons.

We disagree with the dissent's finding of substantial evidence of overcrowding in the summons that stated there were "approximately 300 hundred patrons." It is beyond dispute that an unsigned, unverified and unsworn statement scribbled on a summons that was eventually dismissed is worthless as evidence of any kind. Moreover, the investigator's testimony is directly controverted by that of the owner who stated that his employee had used a counting device to ensure that the restaurant was within the legal occupancy limit and that there was no overcrowding on the night in question. It does not warrant

further conjecture as to the consequences of finding every bar/restaurant in Manhattan to be in violation of the SLA Law based solely upon evidence that patrons were standing "shoulder to shoulder."

Accordingly, because there is inadequate evidence that the petitioner permitted the premises to become overcrowded, the underlying basis for both violations, we conclude that neither charge can be sustained.

Furthermore, we find that the SLA exceeded its authority in determining that the petitioner violated the occupancy law. The SLA based its cancellation of the petitioner's license on Rule 53.1(f), which states:

> "Any license or permit issued pursuant to the [ABC Law] may be revoked, cancelled or suspended for [...] [f]ailure or refusal of the licensee or permittee to comply with any provision of the [ABC Law] or any rule or regulation of the [SLA] [...]"

The SLA argues that the petitioner violated Rules 48.2 and Rule 48.3 and thus, cancellation is permissible pursuant to Rule 53.1(f). Rule 48.3 states that "The [SLA] expects all on-premises licensees, regardless of type of premises, to conform with all applicable building codes, fire, health, safety and governmental regulations." Pointing to the summons issued on January 13, 2007

for an alleged violation of Administrative Code § 15-227(a),[3] the SLA found that the petitioner failed to conform with the occupancy law and thus violated Rule 48.3. Because the record is clear that the summons for violating Administrative Code § 15-227(a) was dismissed in Criminal Court we cannot possibly find that there was substantial evidence that the petitioner violated Rule 48.3.

To hold otherwise, would, in effect, permit the SLA to make an independent determination that the petitioner was in violation of the occupancy law as contained in the Administrative Code. However, the SLA does not have jurisdiction to determine whether the petitioner is in conformance with or in violation of the New York City Administrative Code. See Administrative Code § 28-103.1 (stating the Administrative Code shall be enforced by the commissioner of buildings and under certain limited circumstances it may also be enforced by the commissioner of small business

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[3] Administrative Code § 15-227(a) states:

"Violations; order to vacate building. a. Any building, structure, enclosure, vessel, place or premises perilous to life or property in case of fire therein or adjacent thereto, by reason of the nature or condition of its contents, its use, the overcrowding of persons therein [...] is a public nuisance within the meaning of the code and the penal law. The commissioner is empowered to abate any such public nuisance."

services and the fire commissioner); see also Matter of Tze Chun Liao v. New York State Banking Dept., 74 N.Y.2d 505, 549 N.Y.S.2d 373, 548 N.E.2d 911 (1989) (an administrative agency can act only to implement its charter as it is written; it cannot create rules not contemplated or authorized by the legislature and thereby, in effect, empower itself to rewrite or add substantially to the administrative charter itself). Accordingly, we find that the SLA exceeded its authority in determining that the petitioner violated the Administrative Code and through such violation ran afoul of Rule 48.3.

We note that Matter of Cris Place, Inc. v. New York State Liq. Auth. (56 A.D.3d 339, 868 N.Y.S.2d 33 (1st Dept. 2008)), Matter of Dawkins v. New York State Liq Auth. (47 A.D.3d 440, 849 N.Y.S.2d 241 (1st Dept. 2008)) and Matter of Moonwalkers Rest. Corp. V. New York State Liq. Auth. (250 A.D.2d 429, 673 N.Y.S.2d 16 (1st Dept. 1998)) are inapplicable to the instant case. In each of the memorandum decisions, we declared that there was substantial evidence to support the SLA's findings that the licensees had violated some other governmental agency's regulations.

Citing these three cases, the dissent concludes that "[t]his Court has upheld the [SLA's] independent determination of regulatory violations on numerous occasions." We have not.

There is no indication in these decisions as to what exactly we found constituted the substantial evidence. Certainly, there is no suggestion that we permitted a finding of a violation based on the SLA's independent determination rather than on a valid summons issued by the underlying regulatory agency.

In any event, we find that Rules 48.2 and 48.3 are ultra vires as applied because the SLA failed to adhere to the legislative requirements contained in the statutory predicate. It is a fundamental principle of administrative law that an administrative agency has no authority to create rules and regulations without a statutory predicate. Rotunno v. City of Rochester, 120 A.D.2d 160, 163, 507 N.Y.S.2d 924, 926 (4th Dept. 1986) aff'd, 71 N.Y.2d 995, 529 N.Y.S.2d 275, 524 N.E.2d 876 (1988). Under the ABC Law, the Legislature has granted the SLA only specific and particular, rather than general and substantive, rule-making authority to effectuate the purpose of the ABC Law. Id. When the SLA has acted ultra vires by exercising impermissible substantive rule making, the courts have

declared those rules null and void. See Matter of Beer Garden v. New York State Liq. Auth., 79 N.Y.2d 266, 582 N.Y.S.2d 65, 590 N.E.2d 1193 (1992) (Rule 53.1(q) struck down); Matter of La Trieste Rest. & Cabaret v. New York State Liq. Auth., 228 A.D.2d 172, 644 N.Y.S.2d 7 (1st Dept. 1996) (Rule 53.1(s) struck down); Jay-Jay Cabaret v. State of New York, 215 A.D.2d 172, 626 N.Y.S.2d 130 (1st Dept. 1995), lv. denied, 87 N.Y.2d 802, 641 N.Y.S.2d 600, 664 N.E.2d 511 (1995) (Rule 53.1(s) struck down).

It is undisputed that the statutory predicate to Rule 48.2 and 48.3 is section 106(6) of the ABC Law.[4] ABC Law 106(6) provides that "[n]o person licensed to sell alcoholic beverages shall [...] suffer or permit [the licensed] premises to become disorderly."

The Court of Appeals has held "that conduct is not suffered or permitted unless the licensee or his manager knew or should have known of the asserted disorderly condition on the premises and tolerated its existence." Matter of Playboy Club of N.Y. v. State Liq. Auth. of State of N.Y., 23 N.Y.2d 544, 550, 297 N.Y.S.2d 926, 931, 245 N.E.2d 697, 700 (1969) (internal quotation marks and citation omitted). In determining whether petitioner

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[4]The SLA also relies on ABC Law 2. However, it is settled that section 2 "cannot be relied upon, as a matter of law, by the SLA for substantive rule-making." Jay-Jay Cabaret, 215 A.D.2d at 172, 626 N.Y.S.2d at 131.

"suffered or permitted" its premises to become disorderly in violation of ABC Law 106(6), the issue is not merely whether exposure occurred, but whether the licensee took timely and appropriate action or simply stood by and permitted the disorderly conduct to continue.

In Matter of Beer Garden, the Court of Appeals applied ABC Law 106(6) and struck down Rule 53.1(q) on the grounds that the SLA had acted without statutory authority in promulgating a "no fault" rule that did not contain the requisite "suffer or permit" awareness element.[5] 79 N.Y.2d at 275, 582 N.Y.S.2d at 68 (1992). The Court held that "[w]hatever power the SLA may have to delineate 'for cause' grounds for revocation not specified in the statute, that general authority cannot override the specific mandate of an awareness element in section 106 governing disorderly conduct." Matter of Beer Garden, 79 N.Y.2d at 276-277; 582 N.Y.S.2d at 69 (internal citations omitted).

In Jay-Jay Cabaret, this Court, following Matter of Beer Garden, held that Rule 53.1(s) was invalid, because it imposed a "'no-fault' proximity rule requiring no element of 'disorder' to

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[5]Rule 53.1(q) authorizes revocation, cancellation, or suspension of a liquor license if "any noise, disturbance, misconduct, disorder, act or activity occurs in the licensed premises [...] or results in the licensed premises becoming a focal point for police attention."

establish a violation" (215 A.D.2d at 173, 626 N.Y.S.2d at 131).[6] We determined that SLA had no authority to promulgate Rule 53.1(s) because it was, in effect, a categorical, no-fault blanket proximity prohibition banning topless dancing within six feet of patrons regardless of how orderly the licensed premises may otherwise have been. In other words, we determined that a regulation promulgated pursuant to ABC Law 106(6) must contain "disorder" as an independent element, and before certain conduct can be subject to regulation, it must necessarily lead to "disorder."

Here, just as in Matter of Beer Garden, we find that Rule 48.2 was promulgated as a "no fault" rule without the requisite element of awareness. Rule 48.2 states that "It shall be the obligation of each [licensee] to insure that a high degree of supervision is exercised over the conduct of the licensed

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[6]Rule 53.1(s) states:

> "Any license or permit issued pursuant to the Alcoholic Beverage Control Law may be revoked, cancelled or suspended for [...] suffering or permitting any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof. The provisions of this subdivision shall not apply to any female entertainer performing on a stage or platform which is at least 18 inches above the immediate floor level and which is removed at least six feet from the nearest patron."

establishment at all times in order to safeguard against abuses of the license privilege [...]" It continues by stating that each licensee "will be held strictly accountable for all violations that occur in the licensed premises and are committed by or suffered and permitted by any *manager, agent or employee* or such licensee" (emphasis added).

A plain reading of Rule 48.2 makes patent that the petitioner can be held "strictly accountable" for failing to maintain "a high degree of supervision" even though there was no finding of anyone in a managerial position being aware of any occurrence of disorder on the premises. In other words, the Rule improperly imputes an employee's knowledge of improper activity to the petitioner. Matter of Island Mermaid Rest. Corp. v. New York State Liq. Auth., 52 A.D.3d 603, 859 N.Y.S.2d 732 (2d Dept. 2008) (absent evidence that a liquor licensee or someone vested with managerial or supervisory authority whose knowledge could be imputed to licensee knew or should have known of improper activity on licensed premises, a finding that the licensee "suffered or permitted" improper conduct, in violation of the ABC Law, cannot be sustained). As such, Rule 48.2 is beyond the rule-making authority of the SLA because section 106(6) of the ABC Law requires that *the licensee* (or someone vested with

managerial authority) "suffer or permit" the "disorder." See Matter of McNulty v. New York State Tax Commn., 70 N.Y.2d 788, 522 N.Y.S.2d 103, 516 N.E.2d 1217 (1987) (a state agency does not have the authority to create a rule that is not in harmony with the spirit and letter of the enabling statute).

Furthermore, we find that Rule 48.3 is also ultra vires as applied. Rule 48.3 requires licensees "to conform with all applicable building codes, fire, health, safety and governmental regulations." A plain reading of the Rule makes clear that there is no requirement the licensee "suffer or permit" a violation of a governmental regulation. Matter of Beer Garden, 79 N.Y.2d at 276-277; 582 N.Y.S.2d at 69. In other words, a licensee can be found to be in violation of Rule 48.3 without any evidence that the licensee was aware that he lacked conformance with any one of a multitude of applicable governmental regulations. Moreover, simply because a licensee may not be in conformance with "all applicable governmental regulations" does not require the conclusion that he or she has permitted "disorderly" conduct to occur on the premises. Jay-Jay Cabaret, 215 A.D.2d at 172-173, 626 N.Y.S.2d at 131.

We reject the dissent's contention that this case does not fall within the ambit of Matter of Beer Garden. The dissent would allow an inference of "culpable mental state" by positing

that the petitioner's owner was on the premises, observed the condition of overcrowding and did nothing to alleviate it. However, this view presumes the validity of the ad hoc and unsubstantiated determination of overcrowding made by an SLA officer and the anonymous statement scribbled on a dismissed summons, while dismissing that what the petitioner's owner observed was, in fact, not overcrowding. In other words, the dissent imputes, to the licensee's detriment, not facts but base assumptions proferred by the SLA without any evidence that the assumptions on overcrowding were correct.

Accordingly, in this proceeding, brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Sheila Abdus-Salaam, J.], entered on or about May 8, 2008), the petition, challenging the determination of respondent New York State Liquor Authority, dated March 20, 2008, which, upon a finding that petitioner violated State Liquor Authority Rules 54.2 (9 NYCRR 48.2) and 54.3 (9 NYCRR 48.3), revoked petitioner's on-premises liquor license, should be granted and the determination annulled, without costs.

All concur except Tom, J.P. and Moskowitz, J. who dissent in an opinion by Tom, J.P.

TOM, J.P. (dissenting)

Substantial evidence supports respondent's determination that the licensed establishment was permitted to become overcrowded in violation of State Liquor Authority Rules 54.2 (9 NYCRR 48.2) (failure to exercise adequate supervision over the conduct of the licensed establishment) and 54.3 (9 NYCRR 48.3) (failure to comply with all applicable governmental regulations). The imposition of sanctions against petitioner for such violations is consistent with the precedent of this Department (*Matter of Cris Place, Inc. v New York State Liq. Auth.*, 56 AD3d 339 [2008] [locked exits, cabaret activity, overcrowding and hazardous conditions]; *Matter of Hogs & Heifers v New York State Liq. Auth.*, 294 AD2d 137, 138 [2002], *lv denied* 98 NY2d 612 [2002] [health regulations]). Since no compelling need to depart from established case law is demonstrated, I respectfully dissent.

Testimony was received from a senior investigator for respondent that he observed approximately 75 to 100 people in the cellar of the premises, with patrons "standing shoulder to shoulder" throughout the establishment. A summons was issued to petitioner for an "overcrowded bar" based on a police officer's

observation of "approximately 300 patrons inside [the licensed establishment]" (*see Matter of 7th Ave. & Grove St. Corp. v New York State Liq. Auth.*, 215 AD2d 107, 108 [1995]). The certificate of occupancy, produced by petitioner's owner at the direction of police, permits a maximum occupancy of only 61 people in the cellar and 135 on the first floor. Furthermore, petitioner's owner testified that the establishment's security guard tracked the number of admitted patrons by use of a counting device and that the police alleviated the overcrowding by directing the guard to deny entry to additional persons while inducing patrons to leave the premises by virtue of the obvious police presence.

As this Court has recently noted, review of an administrative determination is governed by the rather low threshold of substantial evidence, which is less than even a preponderance of the evidence, and may be predicated on both hearsay and circumstantial evidence (*see generally Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 280-281 [2007]). The findings of an Administrative Law Judge (ALJ) involve the assessment of credibility and the drawing of reasonable inferences, "and the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists" (*id.* at 281).

The testimony of respondent's investigator that people in the licensed establishment were "standing shoulder to shoulder" and the summons issued by a police officer stating that there were approximately 300 people on the premises constitute substantial evidence of overcrowding. Contrary to the majority's intimation, petitioner's owner, Sameh Jakob, never testified that the count maintained by the club's door man showed that the premises were within occupancy limits. Jakob's bald denial of overcrowding merely raised a question of fact for resolution by the ALJ, whose determination is supported by the record of the proceedings (*see Matter of Menick v Bruckman*, 279 NY 795 [1939], *revg* 255 AD 810 [1939]; *cf. Matter of Culture Club of NYC v New York State Liq. Auth.*, 294 AD2d 204 [2002]).

Although the summons for overcrowding was ultimately dismissed for failure to prosecute, this disposition has no preclusive effect.[1] As respondent's counsel explained, "the police officers never showed up to court," and the dismissal was not on the merits.

The majority's hypothesis that the ALJ lacked authority to determine that the premises were overcrowded is not supported by

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[1] A violation of the Alcoholic Beverage Control Law may be prosecuted in Criminal Court as a misdemeanor (Alcoholic Beverage Control Law § 130[3]).

case law. While respondent may rely on violations issued by another agency to support a finding that its own regulations have been violated (*see e.g. Matter of Jericho Pub v New York State Liq. Auth.*, 4 AD3d 228 [2004] [signage]), there is no requirement that it do so. This Court has upheld the Liquor Authority's independent determination of regulatory violations on numerous occasions (*see e.g. Matter of Cris Place, Inc.*, 56 AD3d at 339 [inter alia, overcrowding]; *Matter of Dawkins v New York State Liq. Auth.*, 47 AD3d 440 [2008] [signage]; *Matter of Moonwalkers Rest. Corp. v New York State Liq. Auth.*, 250 AD2d 428 [1998] [overcrowding]; *cf. Matter of Culture Club of NYC*, 294 AD2d at 204 [insufficient evidence of excessive noise to sustain violation of Alcohol Beverage Control Law § 106(6)]).

As to the contention that respondent lacks authority to promulgate a rule requiring licensed premises to comply with occupancy restrictions, the simple answer is that such requirement is imposed not by State Liquor Authority regulations but by the certificate of occupancy issued for the premises. The Court of Appeals, while according preclusive effect to the Alcoholic Beverage Control Law, has noted that "establishments selling alcoholic beverages are not exempt from local laws of

general application" (*Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74 NY2d 761, 763 [1989]). Thus, respondent did not impermissibly *create* a rule not contemplated by its enabling legislation (*see Matter of Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505, 511 [1989]) or in excess of the authority conferred under Alcoholic Beverage Control Law § 106(6), as the majority reasons; rather, it found that petitioner violated the occupancy limits imposed on the premises under the certificate of occupancy issued by the Buildings Department.

Petitioner has tried very hard to bring this matter within the ambit of *Matter of Beer Garden v New York State Liq. Auth.* (79 NY2d 266, 275 [1992]), in which the Court of Appeals held that a rule making any disorder on or about the licensed premises a basis for adverse action exceeds the prohibition of Alcoholic Beverage Control Law § 106(6) that no licensee "'suffer or permit [the licensed] premises to become disorderly.'" The basis of the decision is that the agency could not remove the statutory requirement of a "culpable mental state on the part of the licensee" (*id.* at 276).

The present matter is clearly distinguishable. First, as discussed, the regulation violated is not one issued by respondent. Second, the record contains substantial evidence

that petitioner's owner, Sameh Jakob, was on the premises at the time of the overcrowding, had observed the condition and did nothing to alleviate it until instructed by police to restrict entry by patrons. Furthermore, Jakob failed to supervise the club's doorman, who concededly kept a count of the number of persons admitted, so as to avoid exceeding the rated capacity of the premises, as provided in the certificate of occupancy. Thus, to the extent that *Matter of Beer Garden* is applicable, the evidence demonstrates the requisite culpable mental state on behalf of petitioner's principal.

In view of petitioner's extensive prior history of sustained violations, including two for overcrowding and three for disorderliness, the penalty of cancellation is not shocking to the sense of fairness (*see Matter of Monessar v New York State Liq. Auth.*, 266 AD2d 123 [1999]).

Accordingly, the order should be affirmed.

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

ENTERED: MAY 21, 2009

CLERK