

=====
This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 122 SSM 10
61 West 62 Owners Corp.,
Respondent,
v.
CGM EMP LLC, et al.,
Appellants,
West 63 Empire Associates LLC,
Respondent,
The Chetrit Group LLC,
Defendant.

Submitted by Bruce F. Bronster, for appellants.
Submitted by Steven D. Sladkus, for respondent 61 West
62 Owners Corp.
Submitted by Michael C. Schmidt, for respondent West 63
Empire Associates LLC.

MEMORANDUM:

The order of the Appellate Division should be modified,
without costs, by remitting to the Appellate Division for further
proceedings in accordance with this memorandum and, as so
modified, affirmed. The certified question should be answered in
the negative.

The failure of authorities to issue a violation of the New York City Noise Control Code (see Administrative Code of City of NY § 24-201 et seq.), by itself, does not preclude plaintiff from establishing that it is likely to succeed on the merits. However, it cannot be said on this record that the imposition of a provisional remedy is required as a matter of law. Therefore, the case should be remitted to the Appellate Division for the exercise of its discretion.

We have considered appellants' other contention, and determine that it lacks merit.*

* * * * *
 On review of submissions pursuant to section 500.11 of the Rules, order modified, without costs, by remitting to the Appellate Division, First Department, for further proceedings in accordance with the memorandum herein and, as so modified, affirmed. Certified question answered in the negative. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided March 31, 2011

* Respondent West 63 Empire Associates, LLC, is not eligible for affirmative relief in this appeal and we express no view on the arguments it has made in that regard (see *Visiting Nurse Service v New York State Dept. of Health*, 5 NY3d 499, 507 [2005]).