SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 2, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

2867 546-552 West 146th Street LLC, et al., Index 603041/06
Plaintiffs-Appellants,

2000 Davidson Avenue LLC,
Plaintiff,

-against-

Rachel L. Arfa, et al.,
Defendants-Respondents,

Harlem Acquisition LLC, et al.,
Defendants.

Balber Pickard Maldonado & Van Der Tuin, PC, New York (John Van Der Tuin of counsel), for appellants.

Michael C. Marcus, Long Beach, for Rachel L. Arfa, Alexander Shpigel and American Elite Properties, Inc., respondents.

Wolf Haldenstein Adler Freeman & Herz, LLP, New York (Eric B. Levine of counsel), for Gadi Zamir, respondent.

Kantor, Davidoff, Wolfe, Mandelker & Kass, P.C., New York (Lawrence A. Mandelker of counsel), for Harlem Holdings, LLC, respondent.

Simpson Thacher & Bartlett LLP, New York (Mark G. Cunha of counsel), for Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., respondent.

Petroff & Bellin, LLP, New York (Aytan Y. Bellin of counsel), for Edward Lukashok, Aubrey Realty Co. and 42nd Street Realty, LLC, respondents.

Order, Supreme Court, New York County (Charles E. Ramos,

J.), entered May 31, 2007, which denied plaintiffs' motion for leave to file and serve a second amended complaint and granted defendants' motion and cross motions to dismiss the action with prejudice, unanimously affirmed, with costs.

Plaintiffs are limited liability companies (LLCs) that purchased various properties between October 4, 2002 and February 25, 2005. The purchase agreements for the properties, with accompanying brokerage agreements, were entered into prior to formation of the LLCs, which, after their formation, were assigned the purchasers' rights and obligations. This sequence of events is established by copies of the brokerage agreements and of Department of State records of the formation of the LLCs, and was not disputed at oral argument before the motion court. When the LLCs were formed, defendants Arfa, Shpigel and Zamir were their sole members, with Shpigel, Zamir and defendant Harlem Holdings (owned by Arfa, Shpigel and Zamir) acting as their sole managers. Outside investors were solicited to purchase interests in the LLCs, and the amounts the investors paid for their interests in the LLCs were used to fund the closings of the property acquisitions. The brokerage commissions were paid at the closings. Defendants Mintz Levin and Lukashok represented the LLCs in the transactions. Lukashok, either directly or through defendant Aubrey Realty, was also the broker in the three transactions in which he was the attorney.

It is alleged that Arfa, Shpigel, Zamir and Harlem Holdings received commissions from the sellers in connection with the purchases, thereby inflating the total prices of the properties by at least $6.5 million. It is further alleged that defendants failed to disclose the aforementioned commissions to the LLCs or to the prospective investors at the time their investments were solicited.

While these allegations may set forth a cognizable injury (*see generally Caprer v Nussbaum*, 36 AD3d 176, 183 [2006]), the motion court correctly found that plaintiffs lack standing to bring them. The alleged malefactors were the only members and managers of the LLCs at the time the agreements for the payment of the undisclosed commissions were entered into, and, therefore, their acts and knowledge are imputed to the LLCs (*see Center v Hampton Affiliates*, 66 NY2d 782 [1985]). Notably, the individual investors in the LLCS have brought a parallel action, in which the question of whether such investors were wronged when their investments were solicited will be determined.

Contrary to plaintiffs' contention, there is no issue of fact as to whether the usual presumption imputing the acts of agents to their principal is rebutted by the adverse interest exception. This exception arises if the principal's interests have been totally abandoned, and cannot be invoked merely because the agents have a conflict of interest or are not acting

primarily for their principal (*id.* at 784-785); the exception has been properly described as "narrow" (*see Wight v BankAmerica Corp.*, 219 F3d 79, 87 [2000]; *In re Mediators, Inc.*, 105 F3d 822, 827 [1997]).

Here, the issue is the content of the pleading. The proposed second amended complaint does not allege, nor may it be reasonably inferred therefrom, that the original owners and managers of the LLCs totally abandoned the interests of the LLCs (*see Buechner v Avery*, 38 AD3d 443, 444 [2007]); they accomplished the LLCs' main business purpose of acquiring the properties, and did not merely prolong the existence of the entities (*cf. Capital Wireless Corp. v Deloitte & Touche*, 216 AD2d 663, 666 [1995]).

The authorities plaintiffs rely upon are distinguishable. In *Capital Wireless Corp. v Deloitte & Touche* (*supra*), denial of a pre-answer dismissal motion was upheld where the corporate plaintiff had submitted affidavits, exhibits and excerpts from deposition testimony tending to show that the fraud by its president sought its "obliteration," i.e., there was evidence of a total abandonment of the corporation's interests. The similar result on summary judgment regarding third party counterclaims in *Dinerstein v Anchin, Block & Anchin, LLP* (41 AD3d 167 [2007]) was also based on an evidentiary showing.

Even if there were an issue of fact regarding the adverse

interest exception, application of the exception would be barred here as a matter of law. We agree with the federal courts' articulation of the "sole actor" rule, that the adverse interest exception does not apply if the alleged wrongdoers were, at the time of their misconduct, either the sole managers or the sole owners of the plaintiff (*see In re Mediators*, 105 F3d at 827 [1997]; *In re Grumman Olson Indus., Inc.*, 329 BR 411, 425-426 [2005]). Here, they were both (*cf. Morgado Family Partners, LP v Lipper*, 6 Misc 3d 1014A, 2004 NY Slip Op 51791[U] [2004], *affd* 19 AD3d 262 [2005]).

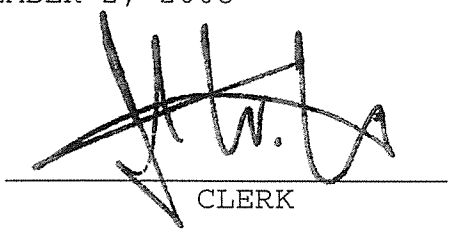
Plaintiffs did not contend before the motion court that Arfa, Shpigel, Zamir and Harlem Holdings should be subject to liability as promoters, but the argument is one of law that may be raised for the first time at this juncture (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). However, the argument lacks merit. The instant circumstance, where the allegedly objectionable agreements were entered into before the formation of the LLCs so the promoters could not have then owed the non-existent entities any fiduciary obligations, differs from that in *Northridge Coop. Section No. 1 v 32nd Ave. Constr. Corp.* (2 NY2d 514 [1957]), where it was stated, in dicta, that promoters, who had allegedly engaged in self-dealing after the plaintiff cooperative corporation had been formed, must account to it.

In view of the foregoing, we need not address the parties' contentions regarding the viability of each cause of action.

We have considered plaintiffs' other contentions and find them unavailing.

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

ENTERED: SEPTEMBER 2, 2008



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Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3171-
3172-
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3175A Yvette Rivera, Index 120381/00
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

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Lisa M. Ingrisano, Index 110956/01
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

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Donald Puglisi, Index 121101/00
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

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Wei De Fan, Index 101573/01
Plaintiff-Appellant,

-against-

Manhattan and Bronx Surface Transit
Operating Authority, et al.
Defendants-Respondents.

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Odette Bobb, Index 123255/00
Plaintiff-Appellant,

-against-

Antonio Batista, et al.,
Defendants-Respondents.

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Damika Brehon, Index 109625/01
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

Perry Pazer, New York, for appellants.

David Samel, New York, for respondents.

Judgments, Supreme Court, New York County (Robert D. Lippmann, J.), entered May 24, 2006, which, upon a jury verdict, dismissed the complaint in each of the above-captioned actions, unanimously reversed, on the law, without costs, the complaints reinstated, and the matters remanded for a new trial. Appeals from order, same court and Justice, entered on or about February 27, 2006, which, inter alia, denied a motion and cross motion for judgment notwithstanding the verdict or for a new trial, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

Plaintiffs in these actions allege that they were injured in an accident that occurred when the individual defendant, an employee of defendant New York City Transit Authority (NYCTA),

passed out while operating a bus. Plaintiffs' actions, along with others arising from the same incident, were consolidated for trial on the issue of liability. The sole question put to the jury was as follows: "Did the defendant [bus driver] . . . have a sudden, unanticipated, medical emergency before causing the accident?" The jury returned a verdict answering the question in the affirmative.

Plaintiffs now appeal from the judgments dismissing their respective complaints pursuant to the jury's verdict. They argue, inter alia, that the trial court erred in permitting defense counsel, over plaintiffs' objection, to read into evidence portions of the pretrial testimony given at depositions or General Municipal Law (GML) § 50-h hearings by nine plaintiffs, six of whom had settled before trial. Plaintiffs point out that none of them received notice of, or was represented at, the depositions and GML § 50-h hearings in other actions, and, on that basis, contend that each deposition or GML § 50-h hearing transcript is hearsay as to the plaintiffs in the other actions. For the reasons set forth below, we agree.

CPLR 3117(a)(2) provides that "the deposition testimony of a party or of any person who was a party when the testimony was given . . . may be used [at trial] for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition

testimony is offered in evidence." The statute expressly provides, however, that the use of a deposition is authorized only "*so far as admissible under the rules of evidence*" (CPLR 3117[a] [emphasis added]). Thus, even assuming (without deciding) that CPLR 3117(a)(2), unlike CPLR 3117(a)(3) (setting forth the conditions for the use of "the deposition of any person"), permits the use of the deposition of a party against another party who did not receive notice of the deposition and was not present or represented at its taking (*see Bianchi v Federal Ins. Co.*, 142 Misc 2d 82 [Sup Ct, NY County 1988]; *but see Andrusziewicz v Atlas*, 13 AD3d 325 [2004]; *Siniscalchi v Central Gen. Hosp.*, 80 AD2d 849 [1981]; Weinstein-Korn-Miller, NY Civ Prac ¶ 3117.05 [2d ed]), deposition testimony otherwise satisfying the requirements of CPLR 3117(a)(2) still is not admissible unless it is shown that, as to each party against whom the deposition is to be used, it falls within an exception to the rule against hearsay (*see United Bank v Cambridge Sporting Goods Corp.*, 41 NY2d 254, 264 [1976]). No such showing was made here.

While the deposition testimony of each plaintiff was admissible against that plaintiff as an admission (*see* Prince, Richardson on Evidence, §§ 8-201, 8-202 [Farrell 11th ed]), the status of such testimony as an admission of the plaintiff who testified did not render it admissible against the other

plaintiffs (*id.* § 8-203; *see also Claypool v City of New York*, 267 AD2d 33, 35 [1999] [GML § 50-h testimony was not admissible at trial against parties who "were not notified and were not present at the hearing"]).[1] Neither were the depositions admissible under the hearsay exception for declarations against the declarant's interest, since none of the deponents was shown to have been unavailable to testify at trial (*see* Prince, Richardson, *supra*, § 8-404). Further, since none of the deponents testified at trial before his or her deposition was read into evidence, the deposition testimony was not admissible as a trial witness's prior inconsistent statement (*cf. Letendre v Hartford Acc. & Indem. Co.*, 21 NY2d 518 [1968]; *Campbell v City of Elmira*, 198 AD2d 736, 738 [1993], *affd* 84 NY2d 505 [1994]; Prince, Richardson, *supra*, § 8-104).

We reject defendants' argument that plaintiffs stipulated to the admissibility at trial of testimony given by any plaintiff at a deposition or GML § 50-h hearing. In October 2004, counsel in all actions arising from the subject incident (nine of which were then pending) entered into a stipulation providing that all actions would be consolidated for a single trial on the issue of

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[1]Thus, while each of plaintiffs-appellants Puglisi, Ingrisano and Brehon is not aggrieved by the admission into evidence of his or her own deposition testimony, each of them is entitled to complain of the admission against him or her of the deposition testimony of the other two and of the deposition testimony of the six plaintiffs who settled before trial.

liability and that two of the eight law firms that then represented plaintiffs in those actions would represent all plaintiffs at the liability trial. The stipulation further provided:

> "If the Transit Authority intends to call any of the Plaintiffs or read the testimony of any of those plaintiffs from either a 50-H hearing or a deposition[,] the attorney representing that individual plaintiff will also be allowed to participate in the trial."

Nothing in the above-quoted provision indicates an intention to expand the admissibility at trial of a plaintiff's deposition or GML § 50-h hearing testimony beyond what would have been the case in the absence of the stipulation.

A new trial is required because, on this record, the admission of the deposition and GML § 50-h testimony cannot be considered harmless error. At trial, three plaintiffs testified that, as they boarded the bus before the accident, they observed that the defendant bus driver appeared to be in physical distress of some sort. In contrast, the pretrial testimony read into the record by defendants included statements by several plaintiffs (none of whom testified at trial) to the effect that they did not notice anything unusual about the driver from the time they boarded the bus until the accident occurred. In his closing argument at trial, defense counsel referred the jury to this pretrial testimony as a basis for finding that the driver's loss of consciousness had been sudden and unanticipated. Indeed,

defendants' appellate brief, in arguing that the verdict is supported by sufficient evidence, specifically points out that the jury may have been influenced by the pretrial testimony of the witnesses who did not notice anything amiss with the driver before the accident.

We reject plaintiffs' argument that the trial court erred in giving the jury an emergency charge based on PJI 2:14. As we stated in deciding a prior appeal in one of these actions, the issue to be tried was "whether defendant bus driver's loss of vehicular control was attributable to an unforeseeable medical emergency" (*Rivera v New York City Tr. Auth.*, 11 AD3d 333 [2004]). It is of no moment that the bus driver's loss of consciousness did not arise from circumstances external to the driver himself, since evidence was presented from which the jury could find that his loss of consciousness was "a sudden and unforeseen emergency not of the actor's own making" (*Caristo v Sanzone*, 96 NY2d 172, 175 [2001]; *see also McGinn v New York City Tr. Auth.*, 240 AD2d 378, 379 [1997] [a vehicle operator "who experiences a sudden medical emergency will not be chargeable with negligence provided that the medical emergency was unforeseen"] [internal quotation marks and citations omitted]). For this reason, plaintiffs' argument that they were entitled to judgment notwithstanding the verdict is without merit.

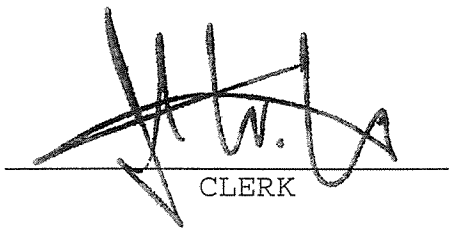
Finally, the record does not support plaintiffs' claims of

judicial misconduct.

Since a new trial is required, we need not reach plaintiffs' remaining claims of error.

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

ENTERED: SEPTEMBER 2, 2008



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Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3185 William Bautista, Index 112421/04
Plaintiff-Appellant,

-against-

David Frankel Realty, Inc.,
Defendant-Respondent.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about April 25, 2007, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion denied and the complaint reinstated.

Plaintiff, who worked as a porter at a building owned by 55 East 66th Street Corporation (the Corporation), fell from a ladder while painting an exterior staircase of the building. Plaintiff commenced this action against defendant, the managing agent of the building, asserting causes of action under Labor Law §§ 200, 240(1) and 241(6). Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff, who received workers' compensation benefits from his employer, the Corporation, was defendant's special employee and thus this action is barred by the exclusive remedy provisions of the

Workers' Compensation Law. Defendant also asserted that it was entitled to summary judgment because plaintiff's own actions were the sole proximate cause of his injuries. Supreme Court granted the motion on the ground that plaintiff was defendant's special employee, and this appeal by plaintiff ensued.

> "[A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits. A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991] [citations omitted]).

Essential to a special employment relationship "is a working relationship with the injured plaintiff sufficient in kind and degree so that the [putative special employer] may be deemed plaintiff's employer" (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007]). Notably, "a 'significant' and 'weighty feature' in deciding whether a special employment relationship exists is 'who controls and directs the manner, details and ultimate result of the employee's work' -- in other words, who determines 'all essential, locational and commonly recognizable components of the [employee's] work relationship'" (*id.*, quoting *Thompson*, 78 NY2d at 558). The question of whether a special employment relationship exists is fact-laden and generally

presents an issue for the trier of fact (*see Thompson*, 78 NY2d at 557; *Bellamy v Columbia Univ.*, 50 AD3d 160 [2008]).

In support of its motion, defendant submitted the management agreement between it and the Corporation, pursuant to which the Corporation retained defendant to perform certain services at the building. The agreement stated that, while defendant was responsible for "[c]aus[ing] to be hired, paid and supervised, all persons necessary . . . to properly maintain and operate the [building]," the persons so hired would be the employees of the Corporation, not defendant. The agreement also stated that defendant was responsible for "[c]aus[ing] the Building to be maintained in such condition as may be directed by [the Corporation]."

Defendant also submitted the deposition testimony of plaintiff and the superintendent of the building, Albert Abreu. Plaintiff testified that he had been hired by the Corporation and that entity paid his wages. Plaintiff also testified that the only person he reported to and received assignments from was Abreu, who directed plaintiff to paint the staircase on the morning of the accident.

While Abreu testified that he was hired and employed by defendant, he also testified that he was paid by the Corporation and that his W-2 forms listed that entity as his employer. Moreover, defendant's counsel tacitly conceded in defendant's

reply papers before Supreme Court that Abreu was employed by the Corporation. Abreu lived in the building and was responsible for supervising the seven other men who worked in the building, including plaintiff. Specifically, Abreu stated that "[m]y duties were to oversee that each man did [his] job; they had certain routines to do, and I would follow through and make sure these duties were done. I would give them specific instructions, and that was mainly it."

Abreu also testified that he would speak to Suz Landi, an employee of defendant who served as the property manager of the building, approximately three times per week. Every Wednesday, Abreu would report to defendant's office and meet with Landi to "drop off the payroll" and review purchase orders, tenants' requests and complaints, and proposals from contractors to perform work at the building. Abreu would speak on the telephone with Landi approximately two other days per week to review the status of projects at the building and tenants' requests and complaints. Notably, Abreu answered "yes" to the following question: "Would you deal with, as best as you could, *on your own, in the autonomous position that you had*, the complaints and requests of the . . . tenants?" (emphasis added). Relatedly, the following colloquy occurred between counsel for plaintiff and Abreu:

> Q: "Were you, with respect to your duties as the [superintendent], pretty much autonomous in your

position? Would you like me to explain that? I don't want to use a phrase that you might not be comfortable with. You were the boss of everyone else there; is that a fair statement?

A: Yes, it is.

Q: You told the other employees what to do?

A: That is correct.

Q: What you told them to do is based upon, not only your title, but your experience as someone who had been in the business a good part of your life?

A: Yes.

. . .

Q: So, is it fair to say that, for example, in 2004, you had a pretty set schedule, and pretty firm understanding of what you wanted the other . . . employees to do?

A: Yes.

. . .

Q: You would certainly know what to do, unless it was some extraordinary request or complaint; is that a fair statement?

A: Yes, it is."

While Abreu testified as to his interaction with Landi and delineated what he and Landi would discuss when they spoke, Abreu never testified that Landi instructed him as to what tasks to perform, let alone how to perform them.

Defendant also relied on the affidavit of Landi, who averred that she was Abreu's supervisor and "[i]n that capacity, [she] assigned, supervised, instructed, oversaw, monitored and directed [Abreu's] work duties on a daily basis." Landi further averred

that "plaintiff reported directly to . . . Abreu[, who] assigned, supervised, instructed, oversaw, monitored and directed . . . plaintiff's work duties on a daily basis." Thus, according to Landi, defendant "directed [Abreu], who in turn directed the maintenance staff and gave them their daily assignments." Landi concluded that defendant "had comprehensive and exclusive daily control over the work of all the maintenance staff of the . . . building through the building's superintendent [i.e., Abreu]. Defendant had the authority and exercised the right to control all facets of the daily operation of the building and its workers."

Defendant's assertion that plaintiff was its special employee rests on its claim that, as the managing agent of the building, it controlled Abreu's work and Abreu in turn controlled plaintiff's work. The evidence adduced by defendant in support of its motion established that Abreu controlled plaintiff's work. Thus, the resolution of this appeal turns on whether a triable issue of fact exists regarding whether defendant controlled Abreu's work. We conclude that such an issue does exist.

Even assuming the affidavit of Landi would otherwise be sufficient to satisfy defendant's burden on its motion, that affidavit is undermined by Abreu's deposition testimony, which demonstrates the existence of a triable issue of fact with respect to whether defendant controlled and directed the manner,

details and ultimate result of Abreu's work. Abreu gave no testimony to the effect that defendant instructed him to paint the staircase, let alone that defendant dictated to him the manner in which that task was to be performed. In fact, Abreu gave no testimony to the effect that defendant controlled and directed the manner and details of his work generally. To the contrary, Abreu testified that he had autonomy in performing his job and supervising the men who worked at the building; the precise extent of that autonomy is not clear from the record, precluding us from determining *as a matter of law* whether defendant controlled and directed the manner, details and ultimate result of Abreu's work.

We disagree with our dissenting colleague's conclusion that, because Abreu referred to Landi as his "boss" and the Merriam-Webster's Collegiate Dictionary defines "boss" as "a person who exercises control or authority; *specif*: one who directs or supervises workers," Abreu's deposition testimony that he had autonomy in performing his job and supervising the men who worked at the building does not demonstrate the existence of a triable issue of fact. The dictionary definition of the word "boss" is not synonymous with the legal term of art "special employer." That Landi exercised general supervisory authority over Abreu from time to time is not sufficient to establish, as a matter of law, that defendant was Abreu's special employer; "a significant

and weighty feature in deciding whether a special employment relationship exists is who controls and directs *the manner, details and ultimate result of the employee's work*" (*Fung*, 9 NY3d at 359 [internal quotation marks deleted, emphasis added]).

Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co. (37 AD3d 155 [2007]), on which the dissent relies, is distinguishable. In *Villanueva* the plaintiff, an employee of a building that defendant management company managed pursuant to an agreement with the building's owner, was injured when he fell from a ladder while working at the building. The plaintiff commenced an action to recover damages against, among others, the management company, and the management company moved for summary judgment dismissing the complaint as against it on the ground that the plaintiff was its special employee. In determining that the management company made a prima facie showing of entitlement to judgment as a matter of law, we noted that the affidavit of the management company's president "established that [the management company] was exclusively responsible for the maintenance and repair of the premises" (*id.* at 156). Our determination in *Villanueva* that the management company made a prima facie showing that it was the plaintiff's special employer also rested in part on deposition testimony by the management company's president that "he supervised maintenance employees and the superintendent and manager at the premises" (*id.*). Moreover,

under the management agreement, the superintendent, who supervised the work plaintiff was performing at the time of his accident, was an employee of the management company (*id.* at 156-157).

Here, however, as noted above, Abreu testified that he had autonomy in performing his job and supervising the men who worked at the building. Additionally, albeit not decisively, contrary to the agreement in *Villanueva* the management agreement between defendant and the Corporation expressly states that maintenance personnel are the employees of the Corporation, not defendant.[1]

Our dissenting colleague believes that, in addition to *Villanueva*, *Ramirez v Miller* (41 AD3d 298 [2007], *lv dismissed* 10 NY3d 784 [2008]), *Ayala v Mutual Hous. Assn., Inc.* (33 AD3d 343 [2006]), *Erazo v 136 E. Mgt.* (302 AD2d 282 [2003]), and *Brunetti v City of New York* (286 AD2d 253 [2001]) compel the conclusion that summary judgment must be granted to defendant. To be sure, each of these decisions holds that the defendant was entitled to summary judgment dismissing the complaint as against it on the ground that it was the plaintiff's special employer. The absence of triable issues of fact on the issue of special employment in

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[1]Of course, the presence of this provision is not dispositive on the issue of whether defendant was plaintiff's special employer (*see Thompson*, 78 NY2d at 559). Such a provision, however, contrary to the assertion of our dissenting colleague, is a factor that we must consider in determining whether a triable issue of fact exists on that score.

these cases, however, certainly does not mean that no triable issue of fact exists in this case; the issue of whether a worker is the special employee of a putative special employer is a "highly fact-sensitive" inquiry (*Bellamy*, 50 AD3d at 169). In light of Abreu's testimony that he exercised autonomy (the extent of which cannot be discerned on this record) in performing his job and supervising the men who worked at the building -- and the absence of any indication in any of the decisions relied upon by our dissenting colleague of similar evidence in those cases -- we conclude that those cases do not control the outcome of this appeal (*see Matter of Seelig v Koehler*, 76 NY2d 87, 92 [1990] [distinguishing prior decisions and observing that "the identification and weighing of all the unique and particular facts of each case governs"], *cert denied* 498 US 847 [1990]; *Roosa v Harrington*, 171 NY 341, 350 [1902] ["each case, as it arises, must be viewed and decided according to its own particular facts and circumstances, and will become a controlling precedent, only, where the facts are the same"]). Needless to say, we regret that our dissenting colleague believes we evince a "breathtaking disregard" for precedent and seek to "conjure" a triable issue of fact.

In short, because this Court has determined in other cases that a particular building manager was the special employer of a particular employee of a building it hardly follows that

defendant is, as a matter of law, the special employer of plaintiff. To so hold would be to adopt a rule that affords all building managers the status of special employers of the employees of the buildings the building managers operate. Such a rule would offend the well-settled principle that the title of the putative special employer, e.g., a managing agent, is not controlling, but rather the actual working relationship between the putative special employer and the purported special employee (*Fung*, 9 NY3d at 360).

With respect to the conclusion of our dissenting colleague that defendant is entitled to summary judgment, we note that, even assuming that a reasonable inference can be drawn that defendant controlled and directed the manner and detail of Abreu's work and thus that defendant controlled and directed the manner and detail of plaintiff's work, that inference is not the *only* reasonable inference that can be drawn from the record. Rather, a reasonable inference also can be drawn that defendant did not control and direct the manner and detail of Abreu's work and concomitantly that defendant did not, through Abreu, control and direct the manner and detail of plaintiff's work. Stated differently, a reasonable inference can be drawn that Abreu, an employee of the Corporation, exercising the autonomy he had in doing his job and supervising the men, controlled and directed

the manner and detail of plaintiff's work.[3] In light of the principles that general employment is presumed to continue and the question of whether a special employment relationship exists is generally one for the trier of fact, and the requirement that we draw all reasonable inferences in favor of the party opposing summary judgment (*see Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Sodexho Management v Nassau Health Care Corp.*, 23 AD3d 370, 371 [2005]), defendant failed to demonstrate its entitlement to judgment as a matter of law.

Defendant also asserts that "the delegation [pursuant to the management agreement] by the [Corporation] to [defendant] of the exclusive management and control of the building . . . constitutes the requisite degree of control" necessary to create a special employment relationship between plaintiff and defendant. First, plaintiff was not a party to the management agreement and the agreement "does not purport to define or resolve the issue of [plaintiff's] special employment status"

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[3]To answer our dissenting colleague's query regarding who, if not Landi, controlled Abreu's work, one need only look to the well-established rule that, absent a clear showing of the surrender of control by the general employer *and the assumption of sufficient control by the special employer*, general employment is presumed to continue. Moreover, our dissenting colleague implicitly assumes that Abreu's work always was controlled by someone, i.e., Landi. As is indicated by Abreu's testimony about the autonomy he sometimes exercised, that simply is not so. Furthermore, defendant must establish that it affirmatively exercised sufficient control over Abreu (*see Thompson*, 78 NY2d at 557; *Sanfilippo v City of New York*, 239 AD2d 296 [1997]).

(*Thompson*, 78 NY2d at 560). The agreement, therefore, regardless of its terms, is not determinative of the issue of whether plaintiff was defendant's special employee (*id.*). Second, assuming defendant did have the exclusive right to manage and control the building, such a right standing alone would be insufficient to support summary judgment in defendant's favor. To rebut the presumption of general employment the putative special employer must clearly demonstrate that the general employer surrendered control over the employee *and that the putative special employer assumed such control* (*Thompson*, 78 NY2d at 557; *see Sanfilippo*, *supra*). Here, as discussed above, defendant failed to demonstrate clearly that it assumed complete and exclusive control over Abreu and thus failed to demonstrate that it assumed complete and exclusive control over plaintiff.

At bottom, we hold only that, under the particular facts of this case, defendant failed to make a prima facie showing that it was plaintiff's special employer. Of course, defendant *may* have been plaintiff's special employer and our dissenting colleague has marshaled arguments in support of that conclusion. Our function at this juncture, however, is not to decide an issue of fact but to determine whether one exists (*see Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404 [1957] ["issue-finding, rather than issue-determination, is the key to [reviewing a motion for summary judgment]"] [internal quotation marks and

citation omitted]). Since defendant failed to make a prima facie showing of entitlement to judgment as a matter of law, its motion must be denied regardless of the sufficiency of plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1984]).

Defendant's contention that it is entitled to summary judgment on the ground that plaintiff's actions were the sole proximate cause of his injuries is without merit. "Where a plaintiff's actions are the sole proximate cause of his injuries, liability under Labor Law § 240(1) does not attach. Instead, the owner or contractor must breach the statutory duty under section 240(1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [internal quotation marks, citations and ellipses omitted]). As defendant submitted no evidence that adequate safety devices were available to plaintiff or that plaintiff was directed to use such devices, it failed to make a prima facie showing that plaintiff's actions were the sole proximate cause of his injuries (*see Ferluckaj v Goldman Sachs & Co.*, 50 AD3d 359, 362 [2008]; *Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 375-376 [2008]; *see also De Jara v 44-14 Newtown Rd. Apt. Corp.*,

307 AD2d 948, 950 [2003]; *cf. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Defendant's argument that it is entitled to summary judgment dismissing plaintiff's cause of action under Labor Law § 240(1) on the ground that plaintiff was not engaged in an activity protected by that statute was not raised before Supreme Court and we decline to consider it.

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

FRIEDMAN, J.P. (dissenting)

As set forth later in this dissent, this Court has considered the issue of special employment in the building management context in at least eight recent decisions. In those cases, decided by benches that included members of the present majority, we found that a special employment relationship between the defendant managing agent and the plaintiff employee had been established as a matter of law. With breathtaking disregard for our precedents, the majority declines to follow these decisions without making a serious effort to distinguish them factually, while failing to cite a single decision of this Court in which a triable issue as to special employment was held to exist on a comparable record. The foregoing is all the more remarkable because plaintiff has presented no evidence to controvert defendant's evidence that a special employment relationship existed between the parties.

Plaintiff, a porter at a residential building owned by nonparty 55 East 66th Street Corporation (55 East), suffered an on-the-job injury, for which he collected workers' compensation benefits. It is undisputed that 55 East was the general employer of the building staff, including plaintiff and the building superintendent, plaintiff's "boss." The record also contains uncontroverted evidence establishing that the entity 55 East hired to act as the building's managing agent -- defendant David

Frankel Realty, Inc. (DFR) -- was the "boss" of plaintiff's boss, the building superintendent (as the latter testified), and that DFR, pursuant to its contract with 55 East, made decisions concerning the hiring and firing of members of the building staff and otherwise "control[led] and direct[ed] the manner, details and ultimate result of the . . . work" of the building staff, including plaintiff (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007], quoting *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 [1991] [internal quotation marks omitted]). Although plaintiff has not come forward with an iota of evidence rebutting DFR's proof that he was DFR's special employee, the majority holds that Supreme Court erred in dismissing this action against DFR pursuant to the bar of Workers' Compensation Law §§ 11 and 29(6). Because I believe that the majority's decision is contrary to well-settled law, I respectfully dissent.

The majority agrees with me that, contrary to plaintiff's contentions, the record establishes that the building superintendent, Albert Abreu -- whom plaintiff described as his "boss" and his "supervisor" -- controlled plaintiff's work. The majority and I also agree that, if DFR, the managing agent, was the special employer of Abreu, plaintiff's supervisor, then DFR also would have to be deemed plaintiff's special employer, consistent with prior decisions this Court has rendered in cases

with similar fact patterns (*see Ramirez v Miller*, 41 AD3d 298, 298-299 [2007], *lv dismissed* 10 NY3d 784 [2008]; *Ayala v Mutual Hous. Assn., Inc.*, 33 AD3d 343, 344 [2006]; *Erazo v 136 E. Mgt.*, 302 AD2d 282 [2003]; *Brunetti v City of New York*, 286 AD2d 253 [2001]). Where the majority and I disagree is on whether the record establishes that Abreu, although a general employee of 55 East, was himself a special employee of DFR. In my view, the evidence set forth below -- which has not been disputed or controverted in any way by plaintiff -- eliminates any triable issue as to the relationship between Abreu and DFR. Plainly, Abreu was a special employee of DFR.

Abreu's testimony about his relationship with DFR was clear enough. Abreu testified that he "*had* to appear at [DFR's] office on Wednesday" each week, at which time he would "report to [his] *boss*" (emphasis added), a DFR vice-president named Suz Landi. Abreu testified that, when he went to his Wednesday meetings with Landi at DFR, he would "bring purchase orders" and "reports of tenants' questions," "bring over proposals from contractors," "drop off the payroll," and "report to [Landi] the existing overall problems in the building." In addition, Abreu filed a report about plaintiff's accident with Landi at DFR, which he said was "mandatory."

In her affidavit in support of DFR's motion for summary judgment, Suz Landi averred:

"[DFR] is a managing agent for numerous residential apartment buildings in New York City including the building located at 55 East 66th Street, New York, New York. That building is owned by [55 East]. I am the property manager for the apartment building owned by [55 East].

. . .

"In my capacity as property manager for 55 East 66th Street, I was the direct supervisor of Albert Abreu, the superintendent of the apartment building on June 3, 2004 [the date of plaintiff's accident]. In that capacity, I assigned, supervised, instructed, oversaw, monitored and directed his work duties on a daily basis.

"The plaintiff herein was a porter in the building. The plaintiff reported directly to Mr. Abreu. Albert Abreu assigned, supervised, instructed, oversaw, monitored and directed the plaintiff's work duties on a daily basis.

"[DFR], the managing agent, hired, supervised and paid the maintenance staff, and terminated workers if necessary. The managing agent directed the superintendent, who in turn directed the maintenance staff and gave them their daily assignments.

"[DFR] collected maintenance payments from shareholders and paid the workers wages from the building account; provided the plaintiff's paycheck, carried workers compensation, liability and unemployment insurance, and withheld Social Security.

"[DFR] had comprehensive and exclusive daily control over the work of all the maintenance staff of the apartment building through the building's superintendent. [DFR] had the authority and exercised the right to control all facets of the daily operation of the building and its workers.

"The maintenance people were not directly supervised or directed by [55 East]."

The management agreement between DFR and 55 East provided, inter alia, that DFR would "[c]ause to be hired, paid and supervised, all persons necessary or desirable in order to properly maintain and operate the Premises who, in each instance,

shall be [55 East's] and not [DFR's] employees, and cause to be discharged all persons unnecessary or undesirable." The management agreement also provided that DFR would "[c]ause the Building to be maintained in such condition as may be directed by [55 East]."

Special employment is demonstrated by evidence of the "surrender of control by the general employer and assumption of control by the special employer" (*Thompson*, 78 NY2d at 557). "[A] 'significant' and 'weighty feature' in deciding whether a special employment relationship exists is 'who controls and directs the manner, details and ultimate result of the employee's work' -- in other words, who determines 'all essential, locational and commonly recognizable components of the [employee's] work relationship'" (*Fung*, 9 NY3d at 359, quoting *Thompson*, 78 NY2d at 558). Another principal factor in the analysis is which entity holds the power of "hiring and discharging" the employee (*Fung*, 9 NY3d at 359, citing *Ugijanin v 2 W. 45th St. Joint Venture*, 43 AD3d 911, 913 [2007]). The general employer's retention of "responsibility for payment of wages and for maintaining workers' compensation and other employee benefits" is not inconsistent with the existence of a special employment relationship (*Thompson*, 78 NY2d at 557). Further, "the determination of special employment status may be made as a matter of law where the particular, undisputed critical

facts compel that conclusion and present no triable issue of fact" (*id.* at 557-558).

In this case, DFR made a prima facie showing that it was the special employer of Abreu, plaintiff's supervisor, and therefore the special employer of plaintiff himself, notwithstanding that 55 East, which paid both men's wages, was their general employer. Abreu testified that his "boss" was Suz Landi, the DFR vice-president who served as the property manager of the building, and that he was required to file a report about plaintiff's accident with Landi. That DFR directed and controlled the work of the building staff is confirmed by Landi's affidavit, as well by the management agreement between 55 East and DFR, which gave DFR the power and responsibility to hire, fire, and supervise 55 East's employees engaged in the maintenance and operation of the building. Since plaintiff has not come forward with any countervailing evidence, DFR is entitled to summary judgment dismissing the complaint as barred by the Workers' Compensation Law.

The conclusion that the record establishes that DFR was plaintiff's special employer is consistent with numerous decisions this Court has rendered in the building management context, in which we have held that a managing agent with the undisputed power to hire, fire and supervise the building staff is the special employer of the staff members as a matter of law

(*see Gomez v Penmark Realty Corp.*, 50 AD3d 607 [2008]; *Ramirez v Miller*, 41 AD3d 298, *supra*; *Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.*, 37 AD3d 155 [2007]; *Ayala v Mutual Hous. Assn., Inc.*, 33 AD3d 343, *supra*; *Gherghinoiu v ATCO Props. & Mgt., Inc.*, 32 AD3d 314 [2006], *lv denied* 7 NY3d 716 [2006]; *Hughes v Solovieff Realty Co., L.L.C.*, 19 AD3d 142 [2005]; *Erazo v 136 E. Mgt.*, 302 AD2d 282, *supra*; *Evans v Citicorp*, 276 AD2d 370 [2000]). The majority fails to identify a single precedent of this Court decided in the building management context that supports the result it reaches here.

Contrary to the majority's claim, I do not propose that we adopt a rule under which "all building managers [are afforded] the status of special employers of the employees of the buildings the building managers operate." I do, however, believe that we should adhere to this Court's own precedents holding that clear and uncontroverted evidence that a building manager directed and supervised the building staff -- such as we have in the record before us -- establishes the existence of a special employment relationship between the building manager and the building staff as a matter of law. The majority departs from this line of precedent without explanation or justification.

While basically ignoring the foregoing case law, the majority asserts that Abreu's deposition testimony somehow creates an issue of fact as to whether DFR was his special

employer. This position is baffling. Abreu, without any prompting by the lawyer examining him, characterized Landi of DFR as his "boss," a common English word defined as "a person who exercises control or authority; *specif*: one who directs or supervises workers" (Merriam-Webster's Collegiate Dictionary 133 [10th ed]). Abreu further testified that he was required to "report" to Landi once a week to discuss all aspects of the building's operations, and that he was required to file a report about plaintiff's accident with Landi. If more than this uncontroverted evidence were needed, it is certainly supplied by the description of DFR's authority over the building's staff in Landi's affidavit, and by DFR's management agreement, which gave DFR the power and responsibility to hire, pay, supervise and discharge all members of the building staff. Not a word of Abreu's testimony contradicts the picture of the extent of DFR's authority given by Landi's affidavit and the management agreement.

While the majority gives short shrift to Landi's affidavit, that affidavit is no less factually detailed than the affidavits on which this Court granted special employers summary judgment in two prior unanimous decisions in which a member of the majority of the instant panel participated.

In *Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.* (*supra*), we granted the defendant management company

(Residential) summary judgment on the special employment issue based on the affidavit of its president (John Cameron). We found that Cameron's affidavit "established that [Residential] was exclusively responsible for the maintenance and repair of the premises" (37 AD2d at 156). The relevant portions of Cameron's affidavit read as follows (paragraph numbers omitted):

> "That at the time of the accident herein, as per the management agreement, Residential . . . was exclusively responsible for the maintenance and repair of the premises . . . . The site superintendent . . . and the site manager . . . were employed by [the owner] but they and all of the other site employees reported directly to and were supervised by myself at the time of the accident herein.
>
> "That the site owner . . . had no direct involvement in the day-to-day operation, control, maintenance and supervision of the premises at the time of the accident herein.
>
> "That Residential . . . and myself had the ultimate authority and responsibility for the hiring, disciplining and/or firing of site personnel at the time of the accident herein."

Similarly, in *Gherghinoiu v ATCO Props. & Mgt., Inc.* (*supra*), we granted the defendant managing agent of a property summary judgment on the special employment issue based on the affidavit of its treasurer, Leonard Bernacke (32 AD3d at 315). The entire discussion of direction and control over the plaintiff's work in Bernacke's affidavit was as follows (paragraph number omitted):

> "That though [the owner] was listed as the plaintiff's employer, it was the employees and/or executives of [the managing agent] that utilized, directed and controlled the manner and methods of [the owner's] maintenance workers,

> including the plaintiff. Further, it was solely [the managing agent] that had the ability to hire and/or fire the maintenance workers that worked at [the property]."

Notably, the record of the *Gherghinoiu* decision does not contain any deposition transcript, indicating that our holding on the special employment issue in that case was based entirely on the Bernacke affidavit.

If we were correct in rendering summary judgment on the special employment issue in *Villanueva* and *Gherghinoiu* based on the above-quoted affidavits, I do not understand why we should not rely on the Landi affidavit (to the extent such reliance may be necessary) in affirming the grant of summary judgment on the special employment issue in this case.

I see no merit in the majority's suggestion that *Villanueva* can be distinguished from this case based on the provision in DFR's management agreement that members of the building staff "shall be [55 East's] and not [DFR's] employees." Although the majority concedes that this provision is not "decisive[]" of the special employment issue, it would be more accurate to say that the provision is essentially irrelevant. In addressing a similar contractual provision in the seminal decision on this issue, the Court of Appeals stated:

> "While the ATS-Grumman contract provides that ATS is to be considered Thompson's employer, that provision alone is insufficient to establish as a matter of law that Thompson was *not* also a special employee of Grumman. Moreover, in the context of this record, it fails to raise a question of fact as to his special employment status . . ." (*Thompson*,

78 NY2d at 559).

This Court, following *Thompson*, held to the same effect in *Maldonado v Canac Intl.* (258 AD2d 415 [1999]):

> "Even if the contract . . . provided that employees of A&A assigned to work under Canac's direction 'shall at all times be employees of A&A and not of Canac', the application of the law as set forth in *Thompson v Grumman Aerospace Corp.* (*supra*) would still require that summary judgment be granted to the special employer [Canac]."

In addition, the record of our 2007 decision in *Ramirez v Miller* (*supra*) shows that the building management agreement in that case contained a provision substantially identical to the one here, requiring the managing agent to "[c]ause to be hired, paid and supervised, all persons necessary to be employed in order to properly maintain and operate the Building, *who, in each instance, shall be the Owner's and not the Agent's employees*, and cause to be discharged all persons unnecessary or undesirable" (emphasis added). Consistent with *Thompson* and *Maldonado*, we affirmed summary judgment for the managing agent on the special employment issue in *Ramirez* notwithstanding the above-quoted contractual provision.

In the end, the sole basis for the majority's attempt to conjure a triable issue out of the simple and undisputed facts of this case is Abreu's affirmative answer to a clumsily constructed question by plaintiff's counsel that included the assertion that Abreu held an "autonomous position." That Abreu, as the resident building superintendent, exercised some degree of autonomy in

carrying out his day-to-day duties is neither surprising nor in any way inconsistent with his having been a special employee of DFR. Far from claiming to be an independent contractor, Abreu referred to Landi as his "boss"; he acknowledged that he filed his income tax returns with a W2 form; and -- most tellingly -- he initially testified that it was his understanding that he was "employed by [DFR]."[1] Since it is undisputed Abreu was an employee -- one who works subject to the direction and control of another -- some entity must have exercised that direction and control. The only entity the record evidence identifies as exercising direction and control over Abreu is DFR, through Landi. In other words, if the majority is correct that a reasonable inference could be drawn that Landi was not controlling Abreu's work, the question is, who was? Plaintiff has offered nothing to show that Abreu's work was controlled by someone other than Landi, and certainly has not come forward with a sliver of evidence to show that Abreu reported to any officer or employee of 55 East, the general employer. Indeed, neither plaintiff nor the majority identifies any evidence in the record that would support an inference that Abreu (and, therefore,

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[1]It is striking that the majority completely ignores Abreu's testimony that his own understanding was that DFR was his employer. While Abreu subsequently acknowledged that 55 East was his employer after it was brought to his attention that 55 East signed his paychecks and issued his W2 form, not a word of his testimony casts doubt on DFR's authority over his work.

plaintiff) was *not* a special employee of DFR.

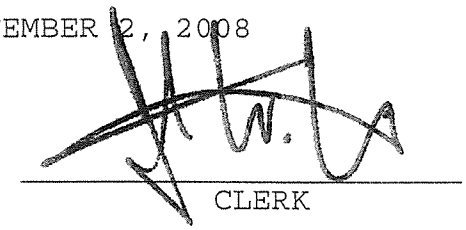
In view of the majority's focus on Abreu's exercise of some autonomy in carrying out his day-to-day duties, it should also be noted that a person's having some degree of autonomy in performing his job is not inconsistent with his being subject to another's control for purposes of employment law. For example, a medical resident treating patients at a hospital, an associate attorney conducting a deposition, a police officer on patrol, and a foreman at a factory are all considered employees. Thus, in asking who, if not Landi, was controlling Abreu's work, I do not make the inapt assumption the majority apparently ascribes to me that some supervisor had to be constantly hovering over Abreu as he performed his job. As a person who held a position of some responsibility, Abreu presumably performed his job without an overseer looking over his shoulder every minute, but this does not mean that no one had "control" over his work within the contemplation of *Thompson* and its progeny.

For the foregoing reasons, I believe that plaintiff's action against DFR is barred by the Workers' Compensation Law, and, on that ground, I would affirm Supreme Court's grant of summary

judgment dismissing the complaint. I therefore find it unnecessary to reach the parties' remaining arguments.

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

ENTERED: SEPTEMBER 2, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 2, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
Milton L. Williams
James M. Catterson
Karla Moskowitz, Justices.

Alboroy Bartley,
Plaintiff-Respondent-Appellant, Index 8031/99

-against- 3228

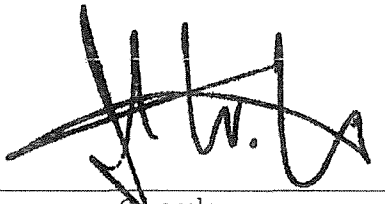
New York City Board of Education,
Defendant-Appellant-Respondent.

Cross appeals having been taken to this Court by the above-named parties from an order of the Supreme Court, Bronx County (John A. Barone, J.), entered on or about September 18, 2006,

And said cross appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 7, 2008,

It is unanimously ordered that said cross appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:



Clerk.

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3807 Grace Alava, Index 103339/04
Plaintiff-Respondent,

-against-

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

Victor Rivera,
Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for appellants.

Mkrtchian and Broderick PLLC, Forest Hills (Kenneth R. Berman of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered April 25, 2007, which, to the extent appealed from as limited by the municipal defendants' briefs, denied their cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs and the cross motion granted. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing the complaint against them.

Defendant Victor Rivera assaulted plaintiff, an employee of a private company that performs data entry for the New York City Department of Homeless Services, as she was registering him for services as a prospective shelter client. The issue on appeal is whether the municipal defendants owed plaintiff a special duty of protection. We hold these defendants are entitled to summary judgment, because plaintiff failed to raise a triable issue of

fact that they assumed a special duty to protect her, or that she justifiably relied on defendants' alleged affirmative undertaking to provide her with protection.

A municipal defendant is immune from liability for negligence claims arising from the performance of its governmental functions unless the injured party can establish the existence of a special relationship (*see Mastroianni v County of Suffolk*, 91 NY2d 198 [1997]; *Kircher v City of Jamestown*, 74 NY2d 251 [1989]). The elements of such a relationship are: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

Here, plaintiff did not demonstrate that she communicated any information to defendants, prior to the attack, concerning her assailant or inadequate security, or that defendants ever made a direct promise to her on which she relied. Plaintiff infers justifiable reliance solely from the usual security defendants provided. Plaintiff testified at her General Municipal Law § 50-h hearing that while there was always one, and

sometimes two or three, officers at a table outside the intake office where she worked, none were outside when the incident occurred. Plaintiff similarly testified at her examination before trial that while there were usually security guards outside the intake office where she worked, none were there on that day. She also testified that the officers would go on rounds. There was no testimony that officers were ever in the intake office with her. Thus, given that plaintiff was aware that no guard was present and that the guards would rove, she can not show reliance (cf. *Florence v Goldberg*, 44 NY2d 189 [1978] mother unaware that there was no crossing guard on the day in question]).

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

ENTERED: SEPTEMBER 2[illegible] 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3828-
3829 The People of the State of New York, Ind. 3465/05
Respondent,

-against-

David McMath,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Dennis Rambaud of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered April 11, 2006, as amended April 20, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of marijuana in the fourth degree, and sentencing him, as a second felony drug offender, to an aggregate term of 3½ years, unanimously affirmed.

In the mid-afternoon of June 13, 2005, defendant was selling miniature porcelain trees from a sidewalk stand in the vicinity of 150 Fulton Street in Manhattan. He was approached by two undercover officers, who were participating in a buy-and-bust operation. When one of the officers told defendant she "was looking for another kind of trees" and informed defendant that she had $60, he told her, "I could take care of you." Defendant then left the two officers to watch his table and walked east

along Fulton Street, where he was joined by another man. When defendant was out of sight, the officer used her radio to broadcast defendant's description. A detective sitting in an unmarked car with a police sergeant heard the transmission and recognized defendant, who crossed Fulton Street and entered a fast-food restaurant with his companion, later identified as Joe Crawford. Following them inside, the detective observed defendant hand Crawford "two tins" in exchange for cash, after which the two left by the back exit. They then entered a pizza shop at 44 Ann Street, where Crawford purchased a soda while defendant left by another exit. Once inside, the detective arrested Crawford, recovering the two "tinfoils" of crack cocaine and over $750 in cash from his person.

Defendant, meanwhile, returned to his sidewalk stand holding several ziplock bags of marijuana, which he placed in a black plastic bag and handed to one of the undercover officers in exchange for cash. When the officers were well clear of the scene, police arrested defendant, recovering a small bag of marijuana and $133, $40 of which was in prerecorded bills.

Defendant argues that the court inadequately protected his Sixth Amendment right to counsel by permitting him to proceed pro se and deprived him of his right to present a defense by denying his late request to call two witnesses, namely, Joe Crawford and Samuel Simms, a pastor. These contentions are without merit.

Although represented by appointed counsel, defendant pro se interposed several pretrial motions. He expressed dissatisfaction with counsel and made a request to the motion court to represent himself. In the absence of any objection by defendant, the court disposed of the application by appointing a new 18B attorney for defendant. Upon appearing with newly appointed counsel, defendant asked if he could act as "co-counsel," a request the court denied, stating, "You have your lawyer." The next day, at jury selection, defendant told the court that he did not want his new attorney to represent him. Defendant professed, "We can't communicate. He's a very busy man. The only time I see him is when I come to court." When the court noted that defendant would have an opportunity to spend time with counsel the following morning, defendant reiterated that he would rather be co-counsel.

The court elicited that defendant was 52 years old and a high school graduate with two years of college. Amid discussions of other matters, the court twice asked defendant if he was sure he wanted to represent himself and, upon receiving an affirmative response, designated counsel as defendant's legal advisor. On the following day, as jury selection proceeded, defendant again reaffirmed his decision to represent himself.

A defendant may not be denied the right to waive counsel even if he is acting contrary to his best interests (*see People v McIntyre*, 36 NY2d 10, 15 [1974]) or out of ignorance of applicable law and courtroom procedure (*see People v Ryan*, 82 NY2d 497, 507 [1993]). Defendant's request to proceed pro se was unequivocal (*see McIntyre*, 36 NY2d at 17), and the court duly advised him of the perils and disadvantages of his chosen course (*see People v Smith*, 92 NY2d 516, 520 [1998]). On the record as a whole, defendant made a clear and definitive choice, which he expressed on several occasions (*see generally People v Hayes*, 293 AD2d 393 [2002], *lv denied* 98 NY2d 768 [2002]). Defendant's multiple pro se pretrial motions, which exhibited a familiarity with issues of criminal law, demonstrated that he could capably represent himself and that his decision was definite, knowing and voluntary, requiring the court to honor his request (*see Faretta v California*, 422 US 806, 835-836 [1975]; *People v Gillian*, 8 NY3d 85, 88 [2006]).

As to the attendance of witnesses, since defendant never protested that the court's failure to compel their attendance at trial violated his constitutional right to present a defense, the issue is unpreserved for review, and we decline to reach it in the interest of justice. As an alternative holding, we reject those arguments because defendant failed to disclose the content of the testimony either witness was expected to provide so as to

permit the trial court to assess the merit of his application.

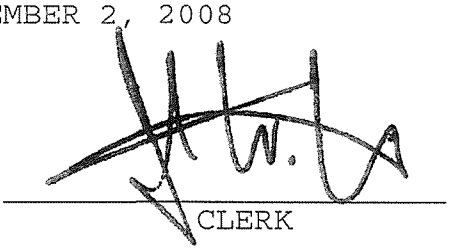
As to Crawford, who was a resident of New Jersey, it is the burden of a defendant seeking to compel the attendance of an out-of-state witness under CPL 640.10 to demonstrate that the testimony sought to be elicited is "material and necessary," that is, "relevant, admissible and of significance to his case" (*People v McCartney*, 38 NY2d 618, 622 [1976]). While Crawford's testimony would have been relevant, defendant did not demonstrate that it would have been material to his defense. Significantly, defendant did not explain how Crawford, who communicated to counsel that defendant had indeed sold him cocaine, might support his case. As to Pastor Simms, defendant gave absolutely no indication of the substance of the witness's expected testimony; thus, defendant provided the court with no basis upon which to assess whether the testimony would be material, noncumulative and favorable to the defense (*see Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]; *People v Acevedo*, 295 AD2d 141 [2002], *lv denied* 98 NY2d 918 [2002]).

Finally, defendant was well aware of his right to testify, as indicated by his pro se *Sandoval* motion. The record is

replete with instances in which the court addressed defendant's right to take the stand, and there is no basis upon which this Court might find that his right to testify was infringed.

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

ENTERED: SEPTEMBER 2, 2008



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Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3837 Carolyn Charley, Index 102276/05
Plaintiff-Appellant,

-against-

Margaret E. Goss, et al.,
Defendants-Respondents,

Bennett Nelson,
Defendant.

Kahn Gordon Timko & Rodriques, P.C., New York (Thomas B. Grunfeld of counsel), for appellant.

Law Offices of Brian J. McGovern, LLC, New York (Alison M. K. Lee of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 9, 2007, which granted defendants Goss and Conroy's motion for summary judgment dismissing the complaint as against them, affirmed, without costs.

This is a personal injury action which arises out of a motor vehicle accident that occurred on February 14, 2004 at the intersection of West 31st Street and Dyer Avenue in Manhattan. Plaintiff asserts that she was the front-seat passenger in a vehicle owned and operated by defendant Nelson when it came into contact with a vehicle owned by defendant Conroy and operated by defendant Goss.[5] Plaintiff declined medical treatment at the scene and first sought medical attention, according to her

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[5]The New York City Police Department Accident Report indicates that both drivers claimed the other ran a red light.

deposition testimony, "a few days after" the incident.

Plaintiff subsequently commenced this action in February 2005, alleging that she had sustained a serious injury as defined in Insurance Law § 5102(d). Defendants Goss and Conroy, after issue was joined and discovery conducted, moved for summary judgment dismissing the complaint as against them on the ground that plaintiff failed to meet the serious injury threshold. The motion court, in a decision and order entered on May 9, 2007, granted the motion and dismissed the complaint against the moving defendants, holding, inter alia, that "the plaintiff has failed to demonstrate an inability to perform substantially all of the material acts that constituted her usual and customary duties for 90 of the 180 days following the accident [and] offers contradictory reasons for her cessation of or gap in treatment." Plaintiff testified that she stopped treatment because she could no longer afford it, as emphasized by the dissent, but subsequently seems to have reported to Dr. Post, who submitted a medical report in opposition to defendants' motion, that there had been some improvement in her condition at the time treatment was discontinued, although some discomfort persisted. Plaintiff appeals, and we now affirm.

The Court of Appeals has often stated that the "'legislative intent underlying the No-Fault Law was to weed out frivolous

claims and limit recovery to significant injuries'" (*Toure v Avis Rent-A-Car Sys.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). In that vein, the Court of Appeals has rejected the contention that the question of whether a plaintiff has sustained a serious injury is always a question of fact for the jury and, instead, has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [2006]).

Once the proponent of a motion for summary judgment has set forth a prima facie case that the injury is not serious, the burden then shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she did sustain such an injury, or that there are questions of fact as to whether the purported injury was "serious" (*Toure*, 98 NY2d at 350; *Cortez v Manhattan Bible Church*, 14 AD3d 466 [2005]). Moreover, "even where there is medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury - *such as a gap in treatment*, an intervening medical problem *or a preexisting*

condition - summary dismissal of the complaint may be appropriate" (emphasis added) (*Pommells v Perez*, 4 NY3d 566, 572 [2005]; *see Perez v Rodriguez*, 25 AD3d 506, 508 [2006]).

Initially, we find that defendants shouldered their burden of establishing, prima facie, that plaintiff did not sustain a serious injury within the statutory definition. Defendants submitted the affirmed report of Dr. Charles Totero, a board certified orthopedic surgeon, who conducted an independent medical examination of plaintiff, during which he viewed various ranges of motion and performed a number of objective tests. Dr. Totero also viewed plaintiff's prior medical records, including MRI films, and concluded, among other things, that "[m]otor and sensory are grossly intact . . . [t]here is negative Hawkins, negative drop arm, and negative impingement sign. Negative Neer sign. Motor and sensory to the upper extremities are intact." Dr. Totero further opined that:

> "MRIs, of the cervical and lumbar spines documented minimal *degenerative changes* with bulging discs only. No herniations or nerve root impingement was documented. Electrodiagnostic studies of the upper and lower extremities showed no evidence of lumbar or cervical radiculopathy. An MRI of the right shoulder documented pre-existing hypertrophic changes of the AC joint with a tendonitis present (emphasis added).
>
> "The above orthopedic physical examination documents no objective orthopedic findings at this time. The claimant is currently working in her prior capacity. She is undergoing no active treatment at this time.

> "It is my opinion, based on the objective evidence in this case, that no disability exists at this time as it pertains to the incident of 2/14/04 and the above diagnoses. She requires no further diagnostic testing and/or treatment, and may carry on normal work and daily activities, without restrictions."

Defendants also rely on plaintiff's deposition testimony, in which she claims to have missed only two weeks of work (in contrast to her verified bill of particulars, which states she returned to work after only six days), and that she stopped all medical treatment after approximately four months.

Plaintiff, in response to defendants' motion, submitted the affirmed medical report of Dr. Paul Post, who had one "orthopedic consultation" with plaintiff on December 11, 2006, almost three years after the accident. Initially, we find a review of Dr. Post's report to be revealing in that Dr. Post, unlike Dr. Totero, reviewed only the narrative reports of plaintiff's MRI studies, and not the films themselves. Moreover, whereas Dr. Totero was provided with numerous medical records - including ultrasound and EKG reports, doctors' files and summaries and medical records from Valerie Conner Acupuncture - which he incorporated into his conclusions, Dr. Post was apparently not given the benefit of that background information.

More importantly, Dr. Post's report addresses plaintiff's subjective complaints of recurring discomfort, tenderness and pain, but fails to list any objective orthopedic tests performed,

and neglects to adequately, or in some cases, even peripherally explain plaintiff's cessation of treatment, or the preexisting degenerative changes to plaintiff's cervical and lumbar spine and right shoulder delineated in Dr. Totero's report. Dr. Post also fails to list any activity plaintiff was specifically prevented from performing which, in view of the fact that she returned to work approximately one week after the accident, demonstrates that she also had failed to satisfy the 90/180 limitation set forth in Insurance Law § 5102(d).

All concur except Tom, J.P. and Renwick, J. who dissent in a memorandum by Renwick, J. as follows:

RENWICK, J. (dissenting)

I disagree with the majority's conclusion that dismissal was warranted because plaintiff allegedly failed to meet her burden of raising triable issues of fact on the threshold issue of serious injury. Plaintiff alleged in her bill of particulars that she suffered a "permanent consequential limitation of a body organ or member" and "significant limitation of use of a body function." (Insurance Law § 5102(d)). In this case the burden never shifted to plaintiff. A proper analysis of defendants' proof reveals that defendants failed to meet the initial burden for entitlement to summary judgment. Accordingly, I respectfully dissent.

On a motion for summary judgment dismissing the complaint, the defendant bears the initial burden to demonstrate that the plaintiff did not sustain serious injury (*see Pommells v Perez*, 4 NY3d 566 [2005]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956 [1992]). If the defendant meets this burden by showing that the plaintiff did not suffer "permanent loss," a "consequential" or "significant" limitation under Insurance Law § 5102 (d), the plaintiff can provide a medical expert's designation of a numeric percentage of a loss of range of motion or an expert's qualitative assessment of the plaintiff's condition to raise a triable issue of fact as

to whether the plaintiff sustained a serious injury (*see Perez v Rodriguez*, 25 AD3d 506, 507-508 [2006]). When either party fails to do so, the court is deprived of an indispensable tool for determinating whether a party met its respective burden on the legal question of whether a claim of serious injury is "significant" or "consequential" (*Toure*, 98 NY2d at 353).

"[W]hether a limitation of use or function is 'significant' or 'consequential'(i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part." (*Toure*, 98 NY2d at 353, quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]. As the Court of Appeals explained:

> "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily insignificant injuries or frivolous claims"

(*Toure*, 98 NY2d at 350-351 [internal citations omitted]).

A defendant fails to meet his or her initial burden when he or she relies upon an examining physician's report which identifies limitations or restrictions (or lack thereof) in a part of the body where the plaintiff claims to have sustained a consequential or significant injury, but which does not sufficiently quantify or qualify the resulting limitations so as to establish that they are permanent or significant. For instance, courts have found a defendant's medical expert's report setting forth numerical ranges of motion of a plaintiff's cervical and/or lumbar spine deficient where it fails to compare those findings to the normal range of motion (*see e.g. Spektor v Dichy*, 34 AD3d 557 [2006]). Failure to provide a comparison to the normal range of motion requires speculation concerning the significance of the numerical results (*cf. Vasquez v Reluzco*, 28 AD3d 365 [2006]). A medical expert's report describing a decrease of ranges of motion of a plaintiff's cervical and/or lumbar spine as "mild" or "insignificant" are similarly deficient where no quantitative percentage or qualitative assessment of the degree of restriction of the range of motion is provided (*see e.g. Yashayev v Rodriguez*, 28 AD3d 651 [2006]; *Kelly v Rehfeld*, 26 AD2d 469 [2006]). Absent such comparative qualification, courts cannot assess whether the described decrease of movements of the cervical and lumbar spine are insignificant in comparison

to the normal range of motion expected in a healthy person of the same age, weight and height (*id.*; *cf. Milazzo v Gesner*, 33 AD3d 317 [2006]).

In support of their motion for summary judgment, defendants submitted various records of plaintiff and an affirmed report from Dr. Charles M. Totero, M.D., a board certified orthopedic surgeon. Dr. Totero conducted a physical examination of plaintiff and reviewed her medical records, including reports from her treating physicians and MRI reports of her shoulder and back.

Dr. Totero's report falls short of meeting the principles set forth in *Toure*. He noted the existence of "limited flexion of [plaintiff's] lumbar spine," and "mild to moderate decreased of range of motion" in plaintiff's cervical spine. However, the doctor failed to set forth numerical values for his observations with respect to plaintiff's lumbar and cervical spine or provide the normal range of motion so as to permit meaningful comparison. Nor did Dr. Totero provide a qualitative assessment of plaintiff's condition. Absent such comparative quantification or qualitative assessment, this Court can only speculate as to the significance of the findings. As such, we cannot conclude as a matter of law that such limitations of the lumbar and cervical

spine were "minor, mild or slight" within the meaning of the No-Fault Law (*Yashayev*, 28 AD3d at 652, quoting *Licari v Elliot*, 59 NY2d 230, 236 [1982]).

Furthermore, contrary to the majority's contention, Dr. Totero failed to specify what objective tests were used to reach his conclusions, or the result of such tests, a fatal flaw to defendants' summary judgment motion (*see e.g.* Offman v Singh, 27 AD3d 284, 285 [2006] [examining neurologist's reports failed to indicate what, if any, objective tests were employed to examine plaintiff]; *see also Dzaferovic v Polonia*, 36 AD3d 652, 653 [2007] [limitation in the range of motion "was not sufficiently quantified or qualified to establish the absence of a significant limitation of motion"]; *cf. Taylor v Terrigno*, 27 AD3d 316 [2006] [while it set forth measurements for loss of range of motions, affirmation of plaintiff's physician was deficient where it failed to identify the objective tests performed in deriving such results]; *Rivera v Benaroti*, 29 AD3d 340, 342 [2006] [same]).

Finally, plaintiff explained that she discontinued treatment in or about June 2004 due to lapse of insurance coverage and her inability to pay for further treatment (*see Wadford v Gruz*, 35 AD3d 258 [2006]; *Jones v Budhwa*, 23 AD3d 154 [2005]; *Francovig v Senekis Cab Corp.*, 41 AD3d 643 [2007]; *Williams v New York City Tr. Auth.*, 12 AD3d 365 [2004]; *Black v Robinson*, 305 AD2d 438, 439-440 [2003]; *cf. Pommells*, 4 NY3d at 577 [2005]; *Brown v Achy*,

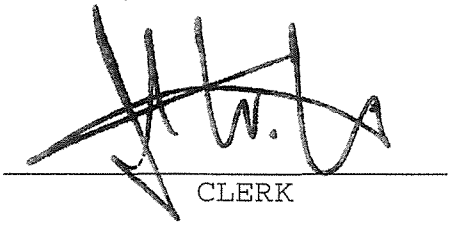
9 AD3d 30, 33-34 [2004]). It is clear from the majority's writing that plaintiff's explanation is consistent with subsequent statements to Dr. Post.

Since defendants failed to meet their initial burden of establishing a prima facie case that plaintiff's injuries did not meet the threshold "serious injury," it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 307 [2008]).

Accordingly, defendants' motion for summary judgment should have been denied and the complaint reinstated.

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

ENTERED: SEPTEMBER 2, 2008



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
James M. Catterson
Karla Moskowitz,
Rolando T. Acosta, JJ.

3145
Index 405987/01

x

In re Ancillary Receivership
of Reliance Insurance Company

- - - - - - - -

The Yale Club of New York City, Inc.,
Plaintiff-Respondent,

-against-

Reliance Insurance Company in
Liquidation,
Defendant-Appellant.

x

Defendant appeals from an order and judgment (one paper) of the Supreme Court, New York County (Michael D. Stallman, J.), entered February 23, 2007, which confirmed a Referee's report finding coverage under the subject policy, and awarded damages in favor of plaintiff insured and against defendant.

Herzfeld & Rubin, PC, New York (David B. Hamm and Abraham David of counsel), for appellant.

Cone & Kilbourn, Mount Kisco (Joseph A. Kilbourn of counsel), for respondent.

TOM, J.P.

At issue is whether a letter received by an insured constitutes a "claim" within the meaning of a claims-made insurance policy. Although the term is undefined in the insurance contract, defendant Superintendent of Insurance, as Ancillary Receiver for Reliance Insurance Company, contends that case law dictates that the letter be treated as a claim. Since there is an ambiguity as to what constitutes a claim under the Reliance policy, such ambiguity must be construed against the insurer under the doctrine of contra proferentum. In the context of ongoing attempts by the union representing the insured's employees to resolve the parties' dispute, the letter, which neither makes any demand for payment nor advises that legal action will be forthcoming, is insufficient to state a claim.

Plaintiff Yale Club of New York was the insured under two "claims-made" insurance policies issued by Lloyds, London and Reliance, providing directors and officers liability coverage for the years ending on November 23, 1993 and November 23, 1994, respectively. In August 1993, while plaintiff was insured under the Lloyds policy, it received a letter from an attorney representing certain waiters and other employees at the Yale Club who alleged to have been "deprived of tips and bonuses." The letter requested information to enable compliance with counsel's

stated "obligation to make a reasonable inquiry into the facts before filing a pleading with the courts." There is no evidence that plaintiff ever notified Lloyds about the letter. In February 1994, after coverage had commenced under the Reliance policy, the attorney instituted an action against plaintiff on behalf of 13 Yale Club employees represented by his firm.[1] Plaintiff notified the insurer of the claim the following month. Reliance disclaimed coverage in April 1994 on the ground that the August 1993 letter (which defendant terms "The Originating Letter") constituted notice of a claim made. After Reliance went into liquidation, defendant, as Ancillary Receiver on behalf of the Liquidation Bureau of the New York State Insurance Department (Insurance Law § 7404), resisted payment of plaintiff's claim for indemnification of its litigation expenses.

The issue of the August 1993 letter's effect on the insurer's liability to plaintiff was submitted to a Referee, who found that "the letter was merely a request for information; the claim was properly filed after the Reliance coverage began." In opposition to plaintiff's motion to confirm the Referee's report, defendant took the same position as he does on appeal: "The

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[1] Counsel also commenced a 1996 action in Bronx Supreme Court and a 1999 action in Federal District Court for the Southern District of New York.

waiters' claims against The Club here were first made in The Originating Letter, three months prior to and completely outside of the policy period and were therefore clearly outside of the policy coverage." Defendant relied on the limitation contained in Section I of the Reliance policy and in a notice printed at the top of the policy endorsements, which states, "Except as may be otherwise provided herein, the coverage of this policy is limited to liability for acts for which claims are first made against the insured while the policy is in force." Defendant also invoked Section VII of the policy, entitled "Notice of Claim," which provides:

> "A. If, during the Policy Period . . . the Company or the Directors and Officers:
>
> "(1) shall receive written or oral notice from any party that it is the intention of each [*sic*] party to hold the Directors and Officers, or any of them, responsible for a Wrongful Act; or
>
> "(2) shall become aware of any occurrence which may subsequently give rise to a claim being made against the Directors and Officers, or any of them, for a Wrongful Act;
>
> "and if the Company or Directors and Officers shall in either case during such period give written notice as soon as practicable to the Insurer . . . then any claim which may subsequently be made against the Directors or Officers arising out of such Wrongful Act, shall, for the purpose of this policy, be treated as a claim made during the Policy Year."

Defendant contended that the August 1993 letter constitutes a claim made against the Yale Club's officers and directors. Noting that, at the time counsel's letter was received by plaintiff, the employees' union had accused the Club of financial improprieties, defendant argued that in context the letter "could not have been viewed in any other light than as a claim." Defendant concluded that because the letter was received prior to the date the policy commenced, the claim arose outside the policy period, and the insurer was under no obligation to reimburse plaintiff for its defense and settlement costs.

As the Court of Appeals has observed, "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Where the meaning of the contract language is clear and unambiguous, it is determined by the court as a matter of law (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172 [1973]). Courts must neither add, excise nor modify the terms of an agreement; nor may a court distort the meaning of an agreement under the guise of interpretation (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Where the contract at issue is an insurance policy, any exclusion from coverage must be stated unambiguously (*see Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 69 [1998]), and any ambiguity must be resolved

against the insurer as drafter of the policy's language (*see Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326 [1996]).

The operative question before this Court is the meaning to be ascribed to the word "claim," a term that defendant concedes is undefined in the Reliance policy. While the disputed letter certainly conveys the suggestion that a lawsuit was being contemplated, it also states unequivocally that counsel was seeking information in connection with his obligation to determine whether legal action was warranted. Moreover, the letter does not even state that the purpose of any such action would be the recovery of civil damages, merely alleging that the Yale Club's actions variously "constitute criminal violations, as well as civil violations of RICO and the New York State Labor Law, and fraud and conversion."

The failure of the Reliance policy to provide any definition of "claim" presents an ambiguity that defendant invites this Court to resolve by speculating as to the parties' intent. This approach must be rejected because New York law ascribes no generally accepted meaning to the term in the context of a claims-made policy (*see Andy Warhol Found. for Visual Arts, Inc. v Federal Ins. Co.*, 189 F3d 208, 215 [1999] [purporting to resolve the ambiguity by formulating a definition "gleaned" from

federal case law]). In those New York cases involving the issue of when a claim arose for the purposes of coverage, the term has been defined in the policy as, for instance, "a demand received by the Insured . . . for money or services" (*Evanston Ins. Co. v GAB Business Servs.*, 132 AD2d 180, 185 [1987]; *see also Purcigliotti v Risk Enter. Mgt. Ltd.*, 240 AD2d 205, 206 [1997]; *Heen & Flint Assoc. v Travelers Indem. Co.*, 93 Misc 2d 1, 4 [1977] ["'Claim' includes a judgment, arbitration award or any demand for money or services resulting from an actual or alleged act or omission covered hereunder"]).

Counsel's letter to plaintiff falls far short of a demand for money or services (*Retirement Fund of the Fur Mfg. Indus. v Republic Ins. Co.*, 755 F Supp 625 [SD NY 1991], *affd* 948 F2d 1275 [2d Cir 1991]), or even the expression of a present intent to initiate legal proceedings (*see In re Ambassador Group, Inc. Litig.*, 830 F Supp 147, 155 [ED NY 1993]). Any action that might have been contemplated in pursuit of the employees' claim is implicitly conditioned upon the outcome of counsel's investigation of its merit. Thus, the letter received by plaintiff is not "an assertion of a legally cognizable damage, . . . a type of demand that can be defended, settled and paid by the insurer" (*Evanston Ins. Co.*, 132 AD2d at 185).

Supreme Court properly confirmed the Referee's finding that

Section VII of the Reliance policy is immaterial to the question of whether the letter constitutes a claim. Since the Notice of Claim provision of Section VII(A)(1) is expressly limited to "written or oral notice" received "during the Policy Period," and it is undisputed that the letter was received *prior* to the effective date of the policy, subsection (1) is inapposite by its express terms.

Arguably, the letter was sufficient to make plaintiff aware of "occurrence[s] which may subsequently give rise to a claim being made," thereby obliging plaintiff to give Reliance notice of the potential claim "as soon as practicable." Thus, as the dissenters argue, it could be said that plaintiff, having been in possession of purported notice of the potential claim at the inception of the policy period on November 23, 1993, but having failed to give notice of the claim to Reliance until March 1994, defaulted on its obligation to give the insurer notice "as soon as practicable" under Section VII(A)(2) of the notice provision. However, defendant did not advance this basis for avoiding liability under the policy before Supreme Court; nor does defendant raise it on appeal, confining his argument in both instances to the assertion that the claim arose outside the policy period. Thus, the issue of the timeliness of the notice of claim is not preserved for appellate review (*see Telaro v*

Telaro, 25 NY2d 433, 438 [1969]; *Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988], citing *Huston v County of Chenango*, 253 App Div 56, 60-61 [1937], *affd* 278 NY 646 [1938]), and defendant is barred from raising it (*see Oot*, 244 AD2d at 71).

Defendant does not contend that coverage is precluded by any exclusion contained in the Reliance policy. As pertinent to this dispute, Section V excludes any loss "which is insured by another valid policy" or "for which the Directors and Officers are entitled to indemnity and/or payment by reason of having given notice of any circumstances which might give rise to a claim under any policy or policies the term of which has expired prior to the inception date of this policy." Since there is no indication that plaintiff gave notice to Lloyds of the employees' claim and since neither the Lloyds policy nor any other affords coverage, these exclusions are inapplicable. Defendant's sole basis for seeking reversal of the judgment against the Liquidation Bureau is his contention that the claim arose prior to the inception of the Reliance policy and, thus, outside the scope of its coverage.

Defendant's contention lacks a sound factual predicate. To sustain his attack on the judgment would require this Court to assign an expansive meaning to the term "claim" under uncertain

and contentious circumstances. It is uncontested that the workers on whose behalf the letter sought information were represented by a union, and it is apparent that the union was engaged in efforts to resolve the dispute on their behalf and on behalf of the rest of its members employed at the Yale Club. Plaintiff's mere awareness that an action was being contemplated by the attorney for the 13 Yale Club employees was hardly tantamount to notice that an action would be brought, since his investigation could have revealed that suit was unwarranted or subsequent events could have rendered an action unnecessary. The mere awareness of alleged wrongdoing is not a "claim" within the meaning of the typical claims-made policy (*see Purcigliotti*, 240 AD2d at 206).

Defendant's contention that the letter is a claim relies on the happenstance that an action was ultimately commenced, and it depends wholly on *post hoc ergo propter hoc* reasoning.[2] Without the advantage of hindsight, defendant's contention that the "letter must be recognized as containing a claim first made prior to the policy period, rendering subsequent pleading of that claim outside the coverage of the policy," must be rejected as

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[2] In fact, several actions were commenced asserting most of the grounds mentioned in the letter. The merit of the various causes of action was never judicially determined since the parties entered into a stipulation resolving the litigation.

speculative.

While, at the time of the August 1993 letter, plaintiff was aware of facts that might possibly have led to litigation, it was equally aware of, and participating in, ongoing negotiations with the employees' union, which included alternative dispute resolution. As defendant conceded in opposition to plaintiff's motion, the claim purportedly communicated in counsel's letter was asserted only on behalf of certain Yale Club employees who "did not want to be represented by Local 6," the Hotel, Restaurant & Club Employees and Bartenders Union. In view of the union's participation in efforts to resolve the dispute, it was by no means clear that independent legal action by some of its members would be necessary, appropriate or even permissible under the terms of the governing collective bargaining agreement.[3] Even if plaintiff could be said to have been aware of the viability of an action limited to those employees disaffected by the union's representation of their interests, a fact not in evidence, settlement of the dispute or legal action undertaken by the union itself would have obviated any such independent lawsuit. Under these circumstances, the subject letter

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[3] A federal lawsuit was brought by the union alleging deficiencies in plaintiff's contribution to various union funds. It was discontinued with prejudice by stipulation dated August 4, 1993 in favor of alternative dispute resolution.

requesting documents and information in support of counsel's "inquiry into the facts" does not suffice to state a demand for payment so as to warrant the conclusion that a claim arose at such time (*Evanston Ins. Co.*, 132 AD2d at 185).

American Ins. Co. v Fairchild Indus., Inc. (56 F3d 435 [2d Cir 1995]), relied upon by the dissenters, does not require a contrary result. In that case, involving insurance coverage for an environmental violation, discussions conducted well before the manufacturer received the letter alleged to constitute a claim made it clear that the New York State Department of Environmental Conservation intended to require Fairchild Industries to remedy the environmental hazard. The court specifically declined to hold the letter to be a "claim" (a term similarly undefined in the policy) "because no New York case has as of yet addressed that precise issue" (*id.* at 440).

The Circuit Court presumed to draw a distinction between the effect of a notice of "claim" and a notice of "occurrence" with respect to the insured's obligation to notify the carrier. This approach was specifically rejected in *Reynolds Metal Co. v Aetna Cas. & Sur. Co.* (259 AD2d 195 [1999] [involving primary liability insurance policies]), in which the Third Department stated:

> "we perceive no reason why a failure to give a timely notice of claim should not be excused by an insured's good-faith belief in

> nonliability or noncoverage. It appears illogical that insureds should be required to promptly notify insurers of every claim no matter how remote the possibility of liability or coverage but be excused from doing so if a reasonable evaluation of an occurrence yields the same conclusion" (*id.* at 201).

As a final point, the language of the Reliance policy's notice of claim provision does not assist defendant's attempt to exclude plaintiff's loss from coverage. The provision only applies if the insured, "during the policy period . . . *shall become aware* of any occurrence which may subsequently give rise to a claim being made" (emphasis added). It does not by its terms exclude a claim of which the insured *had become aware* prior to the effective date of the policy (*cf. Fogelson v Home Ins. Co.*, 129 AD2d 508, 509 [1987] [explicitly excluding "any acts or omissions occurring prior to the effective date of this policy if the Insured at the effective date knew or could have reasonably foreseen that such acts or omissions might be expected to be the basis of a claim or suit"]). "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]). The notice of claim provision is not an exclusion, does

not apply by its express language and is therefore subject to a contrary interpretation.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Michael D. Stallman, J.), entered February 23, 2007, which confirmed a Referee's report finding coverage under the subject policy, and awarded damages in favor of plaintiff insured and against defendant, should be affirmed, without costs.

All concur except Friedman and Catterson, JJ.
who dissent in an Opinion by Catterson, J.

CATTERSON, J. (dissenting)

Because in my opinion the attorney's letter of August 12, 1993, on behalf of the non-party Yale Club waiters constituted a claim, and that claim was made outside the subject policy period, I respectfully dissent. I believe that disclaimer of coverage by Reliance was warranted, and that therefore the order appealed should be reversed.

The issues in this case arise out of a "claims-made" insurance policy (hereinafter referred to as "the policy") issued by Reliance Insurance Company (hereinafter referred to as "Reliance") to The Yale Club of New York City, Inc. (hereinafter referred to as "the Yale Club"). The policy's effective dates were from November 23, 1993 through November 23, 1994. It covered only "claims first made during the policy period."

In the policy, the term "claim" was not defined. "Loss" was defined as "any amount which the directors and officers [were] legally obligated to pay" because of their "[w]rongful [a]cts." Reliance obligated itself to pay "all Loss" that arose from the directors'/ officers' wrongful acts associated with claims that were "first made during the policy period." Section VII of the Policy, entitled "Notice of Claim," provided in relevant part that:

"A. If, during the [p]olicy [p]eriod or

> [d]iscovery [p]eriod, the [c]ompany or [d]irectors and [o]fficers:
>
> "(1) shall receive written or oral notice from any party that it is the intention of each party to hold the [d]irectors and [o]fficers, or any of them, responsible for a [w]rongful [a]ct; or
>
> "(2) shall become aware of any occurrence which may subsequently give rise to a claim being made against the [d]irectors and [o]fficers, or any of them, for a [w]rongful [a]ct,
>
> "and if the [c]ompany or [d]irectors and [o]fficers shall in either case during such period give written notice as soon as practicable to the [i]nsurer... then any claim which may subsequently be made against the [d]irectors or [o]fficers arising out of such [w]rongful [a]ct, shall, for the purpose of this policy, be treated as a claim made during the [p]olicy [y]ear."

On August 12, 1993, more than three months prior to the Reliance policy period, the Yale Club received a letter (hereinafter referred to as "the Letter") from an attorney representing 11 Yale Club waiters "with respect to wage claims."[1]

The Letter arrived after a series of conversations between the Yale Club and the waiters' union regarding allegations made by the waiters concerning wrongfully distributed commissions. The Letter was sent on behalf of a group of waiters who had

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[1]At the time the Letter was received in August 1993, the Yale Club had a one-year insurance policy with non-party Lloyds, London, effective November 23, 1992 through November 23, 1993.

declined union representation regarding their individual claims.[2]

From its very first sentence, the Letter could not have been a plainer statement that its subject matter was the claim being made on behalf of certain named employees of the Yale Club. The sentence read: "Please be advised that our office represents the above named employees of the Yale Club with respect to wage claims..." In the Letter, the waiters claimed, among other things, "that they [had] been deprived of tips and bonuses which amount to hundreds of thousands, and probably, millions, of dollars." The Letter further alleges that "[t]he deprivation of these monies constitute[s] criminal violations, as well as civil violations of RICO and the New York State Labor Law, and fraud and conversion." It requests 13 sets of relevant documents and information, as well as insurance information.

Significantly, the Letter states that pursuant to court rules "counsel is under an obligation to make a reasonable inquiry into the facts before filing a pleading with the courts." It is reasonable to assume that were it not for "court rules", counsel would have already filed the summons and complaint.

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[2]It is clear that the Yale Club was aware that these waiters had declined union representation by virtue of a letter sent by the Yale Club to the vice president of the waiter's union on May 5, 1993 which acknowledged that several waiters "did not want to be represented by [the union]."

Subsequently, on February 14, 1994, the waiters commenced an action in the District Court for the Southern District of New York alleging tip withholding, denial of wages, nonpayment of overtime, RICO violations and racial discrimination. On February 22, 1994, upon receipt of the summons and complaint, the Yale Club notified Reliance. On April 12, 1994, Reliance denied coverage on the grounds that the claims against the Yale Club were first made in the Letter and therefore were made prior to the policy period.

On April 7, 2000, the Yale Club settled with the waiters for $370,000. Shortly thereafter Reliance went into liquidation and the Yale Club submitted a proof of loss to its Ancillary Receiver for the sum of the $370,000 settlement, plus $405,005.07 in attorney fees, as well as interest at 9% from May 2000. Like Reliance, the Ancillary Receiver of Reliance asserted that the date of the Yale Club's receipt of the Letter constituted the date upon which the waiters' claims were first made, and, since this date occurred prior to the policy period, denied coverage.

The Yale Club and the Ancillary Receiver attended a hearing on June 13, 2006, which culminated in a written decision dated August 17, 2006. In the decision, the referee determined that the Yale Club's claim was covered by the Reliance Policy. Specifically, the referee determined that the Letter "was merely

a request for information" and that the claim was properly filed after the Reliance coverage began.

Upon the Yale Club's motion to confirm, the court upheld the referee's decision. The court did not determine whether the Letter constituted a claim. Rather, the court determined "that the [L]etter might have otherwise constituted a notice of claim under Section VII had it been sent during the policy period does not lead to the flawed conclusion that it was a notice of claim outside the policy period."

On appeal, the Ancillary Receiver maintains that the content of the Letter supports a finding that the Letter was "a claim" made, and that such claim predated the Reliance Policy and, thus, fell outside its coverage. The Club, relying on In re Ambassador Group, Inc. Litig. (830 F. Supp 147 (E.D.N.Y. 1993)), argues that the Letter was not "a claim" because the Letter did not make a demand for specific relief. Rather, the Yale Club asserts that the Letter "merely requested some documents and information." While indicating indirectly that there was a possibility of a future lawsuit, the Letter was, essentially, a mere inquiry. The Yale Club argues that it properly gave notice of "a claim" to Reliance upon its receipt of a summons and complaint, which was after the policy period had started to run and thus, it is entitled to recovery from Reliance.

For the reasons set forth below, I agree with the position taken by the Ancillary Receiver on behalf of Reliance. It is well settled that an insurance policy is a contract between the insurer and the insured and governs the agreement between them. See White v. Continental Cas. Co., 9 N.Y.3d 264, 267, 848 N.Y.S.2d 603, 605, 878 N.E.2d 1019, 1021 (2007) (equating insurance policies with other written contracts) citing Teichman v. Community Hosp. of W. Suffolk, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474, 663 N.E.2d 628, 630 (1996). Thus, Reliance, pursuant to the terms laid out in the policy, contractually obligated itself to cover only those claims that were first made within the policy period.

The majority's assertion that the only issue on this appeal is whether there was a claim made during the policy period, is incorrect. That would be a facile analysis since it is uncontested that the Yale Club informed Reliance of the summons and complaint during the policy period. The relevant question, however, is whether there was a claim made *prior to* the Reliance policy period such that Reliance may properly deny coverage because a claim was *first* made outside of the policy period. In my opinion, there was just such a claim made prior to the policy period in the Letter.

Courts have long recognized that undefined, unambiguous

terms in insurance policy are given their ordinary meaning. White, 9 N.Y.2d at 267, 848 N.Y.S.2d at 605, 878 N.E.2d at 1021. Here, even though the word "claim" is not specifically defined in the Reliance policy, "claim" should be given its ordinary understanding of a demand by a third party against the insured for money damages or other relief owed. See e.g. American Ins. Co v. Fairchild Indus., Inc. 56 F.3d 435 (2d Cir. 1995) (where the court interpreted a standard New York claim provision as being "an assertion by a third party that in the opinion of that party the insured may be liable to it for damages within the risk covered by policy" and stated that "[a claim] 'must relate to an assertion of legally cognizable damage, and must be a type of demand that can be defended, settled and paid by the insurer,'" quoting Evanston Ins. Co.v.GAB Bus. Servs., 132 A.D.2d 180, 185, 521 N.Y.S.2d 692, 695(1st Dept. 1987) (where "a claim" was specifically defined in the agreement); see also Home Ins. Co. of Illinois v. Spectrum Info. Tech., Inc., 930 F. Supp 825, 846 (E.D.N.Y. 1996) citing In re Ambassador Group, 830 F. Supp. at 155 (stating that "the term 'claim' as used in liability insurance policies is unambiguous and generally means a demand by a third party against the insured for money damages or other relief owed").

In my view, to treat the Letter as anything other than a

"claim" would require this Court to ignore the entire substance of the Letter. The second paragraph of the Letter commences: "They claim, among other things, that they have been deprived of tips and bonuses which amount to hundreds of thousands, and probably, millions, of dollars." The paragraph continues to enumerate four ways the third-party waiters suspected that their wages and tips were being improperly withheld. The Letter continues with the claim that "[t]he deprivation of these monies constitute[s] criminal violations... and fraud and conversion."

The fact that the waiters claimed that the Yale Club was guilty of conversion of their tips is necessarily the equivalent of demanding remuneration for those tips. See PJI 3:10 ("A person who, without authority, intentionally exercises control over the property of another person and thereby interferes with the other person's right of possession has committed a conversion and is liable for the value of the property.")

Moreover, the Letter did not arrive in a vacuum: it arrived after a meeting between the Yale Club and the waiters' union, after an attempted arbitration and after a discontinued lawsuit all regarding matters that were clearly related to the claims asserted in the Letter. Finally, the Letter describes itself as a mere court-mandated precursor to a lawsuit.

Further, I contend that both the Yale Club and the majority

improperly cite to the nonbinding U.S. District Court opinion in Ambassador to support their contention that the Letter was not a claim because it was not a "demand for money or services." In Ambassador, the state insurance commissioner sent two letters to the insurer stating that it "had uncovered facts which [led] him to conclude that certain former directors and officers were guilty of acts falling within the scope of coverage afforded by the ... policy."[3] In re Ambassador Group, Inc. Litig., 830 F. Supp. at 151 (E.D.N.Y. 1993). The policy did not define the term "claim" and the District Court held that neither of the two letters in question constituted a claim as the term is normally viewed. Id.

In reaching its decision, the Ambassador court relied heavily upon the fact that the policy characterized the reporting

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[3]More specifically, the first letter stated that the "Commissioner ha[d] uncovered facts which [led] him to conclude that certain former directors and officers were guilty of acts falling within the scope of coverage afforded by the ... policy, resulting in losses to the estate of the Ambassador." The letter concluded that National Union was thereby "given notice of a claim." The second letter stated, "[L]et me assure you that we have read carefully and researched thoroughly the coverages available under the subject policy. We are also aware that claims pressed against directors and officers on behalf of the Commissioner as receiver are to be presented directly to those directors and officers. We have written you in accordance with the policy provision regarding notice of occurrence and to allow you an opportunity to commence any investigation you feel necessary." Id. at 151-152.

of a "claim" to the insurer as *giving notice* and the reporting of a "claim" directly to the directors and officers as the *making* of a claim. Id. at 154. The court also relied upon the fact that the letters under evaluation did not specify an alleged wrongdoing nor did they contain a demand for relief. Id. at 155. Thus, the Ambassador court found that the letters in question did not constitute a claim. Id. at 156.

Notwithstanding, Ambassador is distinguishable from the instant case insofar as in this case, the Letter very clearly alleges wrongdoing. Furthermore, in Ambassador, the letters were sent to the insurance company and here, the Letter was sent *directly* to the directors and the officers of the Yale Club who had knowledge of the ongoing dispute with the wait staff over tips. This fact clearly undercuts the majority's characterization that the Letter constituted merely a notice of a potential claim. See also Retirement Fund of the Fur. Mfg. Indus. v. Republic Ins. Co., 755 F. Supp. 625 (S.D.N.Y. 1991), aff'd, 948 F.2d 1275 (2d Cir. 1991) (disputed letter was not found to be a "claim" in part because the letter was sent to the insurer and not the party against whom a claim was later made).

Finally, in my opinion, the majority is mistaken in taking its analysis no further than the determination that the summons and complaint filed during the policy period are the only

relevant "claim." Under the majority's interpretation of the contract, since the summons and complaint constitute the claim, then the Letter would have triggered an obligation of notice of claim to Reliance pursuant to section VII (A)(1) had it arrived during the policy period. Obligation to give notice of a claim "as soon as practicable" would also have been triggered by the Club's officers and directors *becoming aware* [during the policy period] *of an occurrence* that could give rise to a claim. The majority's position is that neither eventuality occurred here.

However, the Club's officers and directors were certainly aware by the time they received the Letter that the dispute with the waiters would give rise to a lawsuit. The fact that they were aware of this by the first day of the policy period rather than *becoming* aware of it on the first day of the policy period is a metaphysical distinction that should not be argued here and should not foreclose the insurer's right to disclaim coverage. It would be the height of absurdity to differentiate between the acts of *becoming* aware and *being* aware of an occurrence as of the policy period. It is undisputed that as of the start of the policy period with Reliance, the Yale Club was aware that a lawsuit was pending on the grounds of alleged wrongdoings by its officers and directors. This triggered the obligation pursuant to the terms of the policy to give the insurer notice as soon as

practicable, that is on the first day of the policy period, thus allowing the insurer the option of rescinding or cancelling the policy or excluding the event from coverage.

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

ENTERED: SEPTEMBER 2, 2008

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CLERK

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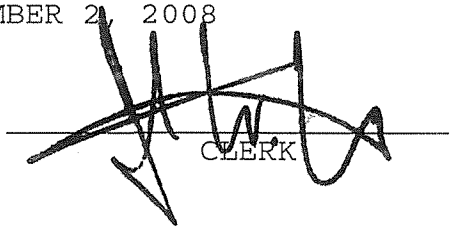

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