SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 15, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4767 In re Tacos Ricos Corp., Petitioner, Index 104240/08

-against-

New York State Liquor Authority, Respondent.

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

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

Petition in this Article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Shirley Warner Kornreich, J.], entered on or about June 19, 2008), unanimously granted, the administrative order of respondent, dated March 17, 2008, which approved a determination to cancel petitioner's liquor license, direct forfeiture of its $1,000 bond and exact a $5,000 civil penalty, and the decision dated March 24, 2008, which rejected petitioner's license renewal application on procedural grounds, annulled, without costs, and the matter remanded to respondent for further proceedings.

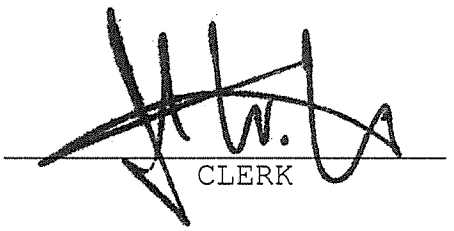
Substantial evidence did not support the finding that petitioner had suffered or permitted the premises to become

disorderly, in violation of Alcoholic Beverage Control Law § 106(6). Respondent did not adduce more than a scintilla of evidence as to how the importation of women to dance with patrons and serve as waitresses led to disorderly premises within the meaning of the statute and rules promulgated thereunder (*see* 9 NYCRR 53.1[q]; *Matter of Mal Rest. v New York State Liq. Auth.*, 74 AD2d 750 [1980], *lv denied* 54 NY2d 602 [1981]). Respondent failed to demonstrate that the one reported incident was more than an isolated event.

In the light of the revocation of petitioner's license, the matter is remanded for reconsideration of the renewal application in accordance with Alcoholic Beverage Control Law § 109.

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

ENTERED: JANUARY 15, 2009



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

5035-
5036 The People of the State of New York, Ind. 4622/05
Respondent,

-against-

Harry West,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), and Milbank Tweed, Hadley & McCloy LLP, New York (Mehrnoush Bigloo of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Michael J. Obus, J. at jury trial and sentence), rendered August 23, 2006, convicting defendant of robbery in the first and second degrees and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of 15 years, and order, same court (Michael J. Obus, J.), entered on or about September 12, 2007, which denied defendant's CPL 440.20 motion to set aside the sentence, unanimously affirmed.

Defendant's contention that the police improperly searched a closed bag he was wearing at the time of his arrest is unpreserved and we decline to review it in the interest of justice. We reject defendant's argument that the court "expressly decided" the closed-container issue (CPL 470.05[2]);

on the contrary, it was never litigated or fully developed in testimony, and the court never addressed it (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]). As an alternative holding, we also reject defendant's claim on the merits because, to the extent the record permits review, it reveals that the search was proper as incident to a lawful arrest (*see People v Smith*, 59 NY2d 454 [1983]; *People v Wylie*, 244 AD2d 247 [1997], *lv denied* 91 NY2d 946 [1998]).

Defendant was properly adjudicated a second felony offender based upon his New Jersey conviction (NJ Stat Ann § 2C:35-7). We find that resort to the New Jersey accusatory instrument is appropriate, and that such instrument establishes that the New Jersey crime involved possession of heroin and not marijuana (*see People v Williams*, 7 AD3d 344, 345 [2004], *lv denied* 3 NY3d 663 [2004]; *People v Bell*, 259 AD2d 429 [1999], *lv denied* 93 NY2d 992 [1999]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 15, 2009

CLERK

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

5037-
5037A Charles Baldwin, Index 23027/05
Plaintiff-Respondent,

-against-

Gerard Avenue, LLC, et al.,
Defendants,

Austin Brothers, Inc.,
Defendant-Appellant.

Penino & Moynihan, LLP, White Plains (Matthew Rego of counsel), for appellant.

Bader, Yakaitis & Nonnenmacher, LLP, New York (John J. Nonnenmacher of counsel), for respondent.

Orders, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered March 28, 2008, which precluded defendant Austin Brothers from contesting the existence of certain files considered material, directed a spoliation charge at trial with respect thereto, and precluded Austin from contesting the efficacy of repairs to stairs where the accident took place and from offering the testimony of its project manager at trial, unanimously affirmed, with costs.

Austin has offered no excuse for repeated noncompliance with the court's disclosure orders, conduct that was dilatory and "ultimately contumacious" (*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 [1990]). All Austin needed to do, in order to comply with the court's July 16, 2007 discovery order, was to

contact its former landlord and simply ask what had been done with the records. During deposition, Austin admitted that those records may have been sent to its storage facility in New Jersey, yet no effort was made to contact and inquire of that facility.

A party seeking a sanction such as preclusion or dismissal (CPLR 3126) is required to demonstrate that "a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . in [connection with] an accident before the adversary ha[d] an opportunity to inspect them" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1997], thus depriving the party seeking the sanction of the means for proving his claim (*see Kirschen v Marino*, 16 AD3d 555, 556 [2005]). Necessary to this burden is a showing of prejudice. Plaintiff has made the requisite showing, as these records were crucial to his action. While Austin correctly argues that plaintiff has most of the records through pre-trial discovery, the most important data -- the name of the employee who made the repairs and any reports as to how they may have been made -- remain missing.

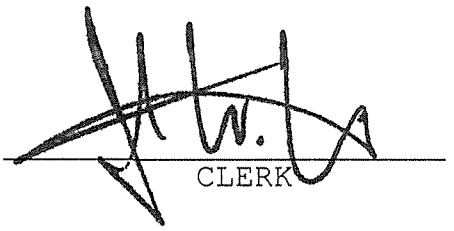
Although Austin's conduct was sufficiently dilatory and contumacious to warrant a CPLR 3126 sanction, the court, instead of striking the answer, issued a more lenient sanction, precluding Austin from contesting the existence of the missing file and the fact that repairs were made, and from offering the testimony of the project manager. The order was appropriately

tailored to restore balance to the matter (*see Balaskonis v HRH Constr. Corp.*, 1 AD3d 120, 121 [2003]). Austin was not precluded from offering any evidence as to the condition of the stairway at the time of the accident, nor was it absolutely precluded from offering the project manager's testimony. Instead, the possibility of such testimony was held open to "further order of the court." Austin was thus precluded only from using plaintiff's lack of evidence to its own advantage (*see Jackson v City of New York*, 185 AD2d 768, 770 [1992]).

The order directing a spoliation charge at trial was appropriate, given plaintiff's October 11, 2005 letter that clearly put Austin on notice of the claim for personal injuries.

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

ENTERED: JANUARY 15, 2009



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

5038 American Standard, Inc., Index 601031/06
Plaintiff-Appellant-Respondent,

-against-

Oakfabco, Inc., formerly known as
Kewanee Boiler Corp.,
Defendant-Respondent-Appellant.

McGuire Woods LLP, New York (Yvette Harmon of counsel), for appellant-respondent.

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), respondent-appellant.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered February 20, 2008, which, in a declaratory judgment action involving whether, by virtue of a 1970 agreement in which defendant's predecessor purchased plaintiff's Kewanee Boiler Division, defendant assumed plaintiff's obligations to persons claiming personal injury as a result of exposure to Kewanee boilers manufactured before 1970, and also seeking a permanent injunction prohibiting defendant from disclaiming such assumption of obligations "in any forum," granted plaintiff's motion for summary judgment to the extent of declaring that "in this jurisdiction, [defendant] is liable for injuries sustained as a result of tortious conduct in connection with Kewanee boilers installed prior to 1970," and granted defendant's cross motion for summary judgment declaring that, notwithstanding any

assumption by defendant of the aforementioned obligations, plaintiff remained directly liable to personal injury plaintiffs for injuries caused by Kewanee boilers installed before 1970, unanimously modified, on the law, to add the words, "sold, leased or" immediately before the word "installed" in the declaration, to delete the phrase "in this jurisdiction" from the declaration, to permanently enjoin defendant from relitigating its assumption of the aforementioned obligations in any forum, and to deny defendant's cross motion, and otherwise affirmed, with costs in favor of plaintiff.

The subject 1970 agreement, by its terms, is governed by and to be construed in accordance with New York law, and involved the purchase of all of Kewanee's assets. With respect to the assumption of liabilities, it provides, insofar as pertinent:

> "Buyer does hereby assume and agree to pay, perform and discharge, and to indemnify Seller with respect to, all obligations, liabilities, debts and commitments (fixed or contingent), connected with or attributable to Kewanee, existing and outstanding at the date hereof."

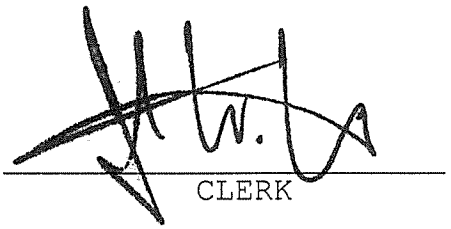
We reject defendant's argument that the "existing and outstanding" language limits the assumed liabilities to tort claims that had been actually asserted before the date of the agreement. Given the all-encompassing scope of the asset purchase agreement and the potential for future tort claims, we

find that obligations and commitments to a potential tort claimant became "existing and outstanding" when the boiler that injured the claimant was sold or installed, not when the claimant brought his or her claim at a later time. Nor should this interpretation of the agreement be limited to New York. The application of res judicata is a question of law and does not rest in the discretion of the court (*see Bannon v Bannon*, 270 NY 484, 490 [1936]). We note that our interpretation is in accord with rulings in New Jersey and Minnesota in which both plaintiff and defendant were parties. Further, in light of the long history of litigating this matter in many different states, and in order to give plaintiff complete relief, defendant is permanently enjoined from relitigting whether it assumed liability to tort plaintiffs injured by Kewanee boilers sold or installed before 1970 (*see* CPLR 3017[b]). Defendant's cross motion should have been denied because defendant did not plead any counterclaims for declaratory relief. In any event, the cross motion does not present a justiciable controversy. The meaning of the 1970 agreement as it relates to tort claimants is the only issue raised in the complaint, and any ruling on that issue can have no effect on the parties' respective potential obligations to hypothetical nonparty tort claimants. Plaintiff's potential future liability to tort claimants can only

be determined case by case, on the basis of the facts presented and the governing law, which may vary from state to state.

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

ENTERED: JANUARY 15, 2009



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

5039 Chet W. Kern, Esq., Index 600483/07
Plaintiff-Respondent, 600739/07

-against-

Shandell, Blitz, Blitz & Bookson, L.L.P., et al.,
Defendants.
- - - - -
Shandell, Blitz, Blitz & Bookson, L.L.P.,
Plaintiff-Appellant,

-against-

Sandra Ruth Schiff, Esq.,
Defendant-Respondent.

Shandell, Blitz, Blitz & Bookson, L.L.P., New York (Stewart G. Milch of counsel), for appellant.

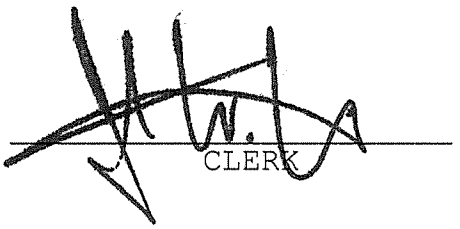
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 29, 2007, which, in actions between attorneys involving payment of referral fees, granted defendant Schiff's motion to consolidate action No. 2, brought against her by the law firm SSSB, with action No. 1, brought against SSSB by Kern, and denied SSSB's motion for summary judgment in action No. 2, unanimously affirmed, without costs.

Common questions of law and fact warranting consolidation include: Kern's entitlement to share in fees derived from the "referral list" of cases set forth in his agreement with SSSB upon joining that firm; the amount of that entitlement; the amount of the fees realized by Schiff from referral list cases; and the amount of referral list fees already paid by Schiff to

SSSB. As the motion court succinctly put it: "both actions concern a dispute over legal fees from cases arising from Kern's Referral List that SSSB claims it either is owed (the SSSB Action) or does not owe (the Kern Action)." These common issues also require denial of SSSB's motion for summary judgment against Schiff in action No. 2. Schiff, who claims to be a stakeholder in Kern's action No. 1 against SSSB, cannot be held liable to SSSB for referral fees until action No. 1 resolves SSSB's liability to Kern for the very same fees.

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

ENTERED: JANUARY 15, 2009



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

5040 In re Noma Gray, Index 407280/07
Petitioner-Appellant,

-against-

Shaun Donovan, as Commissioner of
the Department of Housing Preservation
and Development of the City of New York,
Respondent-Respondent.

The Legal Aid Society, New York (Steven Banks of counsel), and Stroock & Stroock & Lavan LLP, New York (Katherine I. Puzone of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 12, 2008, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78, unanimously vacated, and the proceeding treated as if it had been transferred to this Court for de novo review pursuant to CPLR 7804(g), and, upon such review, the determination of respondent Department of Housing Preservation and Development (HPD), dated September 17, 2007, terminating petitioner's housing subsidy on the ground that she failed to report income earned by her two adult children, unanimously modified, on the law, to the extent of vacating the penalty, and the matter remanded to HPD for

calculation of the amount of excess subsidy, if any, and the imposition of a lesser penalty, and the proceeding otherwise disposed of by confirming the remainder of HPD's determination, without costs.

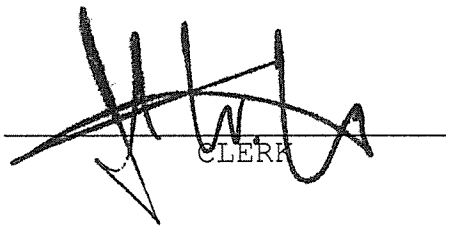
The determination that petitioner failed to report income earned by her two adult children is supported by substantial evidence, and has a rational basis in the record (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]).

However, we find that the penalty of termination of petitioner's housing subsidy to be shockingly disproportionate to the offense (*see e.g. Matter of Peoples v New York City Hous. Auth.*, 281 AD2d 259 [2001]; *Matter of Spand v Franco*, 242 AD2d 210 [1997], *lv denied* 92 NY2d 802 [1998]). Petitioner has lived in the subject building for more than 30 years with no record of any prior offenses, and the record suggests that termination of the subsidy will likely lead to homelessness for petitioner and her 13-year-old son. Furthermore, there is no indication in HPD's determination, nor anywhere else in the record, of the impact that petitioner's failure to report her adult children's income had, if any, on the amount of her housing subsidy.

Accordingly, on remand, HPD should calculate the precise amount of excess subsidy received by petitioner, if any, and then determine an appropriate lesser penalty.

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

ENTERED: JANUARY 15, 2009



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

5041 John M. Peterson, et al., Index 604424/06
Plaintiffs-Appellants,

Margaret R. Polito, et al.,
Plaintiffs,

-against-

Martin J. Neville, et al.,
Defendants-Respondents.

John M. Peterson, appellant pro se.

George W. Thompson, appellant pro se.

Reed Smith LLP, New York (Casey D. Laffey of counsel), for Martin J. Neville, respondent.

Benowich Law, LLP, White Plains (Leonard Benowich of counsel), for David C. Williams, respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 1, 2007, which, insofar as appealed from as limited by the briefs, granted defendants' motions to dismiss the complaint to the extent of dismissing the first and second causes of action seeking an accounting of the partnerships of Neville, Peterson & Williams, and Neville Peterson LLP, unanimously affirmed, with costs.

The causes of action seeking an accounting of the partnerships on the basis that defendants (former partners) withdrew excess profits, were properly dismissed as the tax returns of the respective partnerships state that defendants had positive capital account balances. Plaintiffs are bound by the

representations that were made in the partnerships' tax returns (*see Acme Am. Repairs, Inc. v Uretsky*, 39 AD3d 675, 677 [2007], *lv dismissed* 9 NY3d 979 [2007]; *Naghavi v New York Life Ins. Co.*, 260 AD2d 252 [1999]).

We have considered plaintiffs' remaining contentions, including that the motion court's application of the doctrine of judicial estoppel in this case violates the Supremacy Clause of the US Constitution, and find them unavailing.

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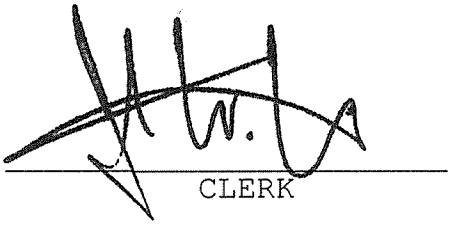
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 15, 2009



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

5042 The People of the State of New York, Ind. 5249/05
Respondent,

-against-

Gregory Starnes,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Bryan Cave, LLP, New York (Rachel E. Barber Schwartz of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Edward A. Jayetileke of counsel), for respondent.

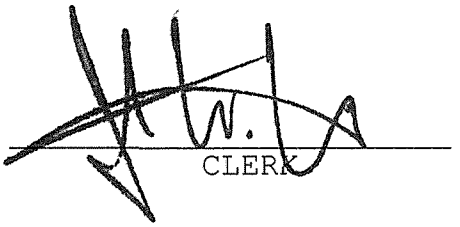
Judgment, Supreme Court, New York County (Renee A. White, J.), rendered August 29, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third and fourth degrees, and unlawful possession of marijuana, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 6 years and a fine of $50, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its evaluation of minor discrepancies in the accounts of the People's witnesses, and its rejection of

defendant's account of how he came into possession of a bag containing a supply of drugs.

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

ENTERED: JANUARY 15, 2009



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

5043 The People of the State of New York, Ind. 2960/04
Respondent,

-against-

Jorge Velez,
Defendant-Appellant.

Stephen C. Filler, Tarrytown, for appellant.

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

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered April 7, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the second degree, and sentencing him to a term of 3 years to life, unanimously affirmed.

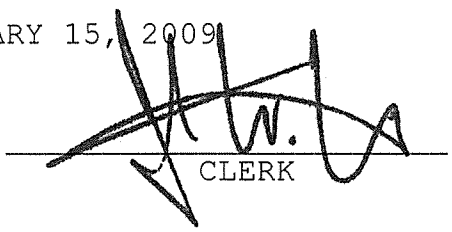
The People made a sufficiently particularized showing of an overriding interest justifying the court's exclusion of the general public from the courtroom during the undercover officers' testimony in order to protect their safety and effectiveness. The officers had numerous other cases pending in the courthouse, continued to work undercover in the vicinity of defendant's arrest, and took specific precautions upon entering the courthouse because they feared being recognized as police officers (*see People v Ramos*, 90 NY2d 490, 498-499 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). The court also accorded any members of defendant's family who wished to

attend a suitable opportunity to do so, and defendant's argument to the contrary is without merit.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supported the conclusion that defendant acted in concert in the drug transaction by, among other things, appearing at the seller's apartment shortly before the scheduled time of the sale, staying in close proximity to the undercover officer making the buy, leaving that apartment and riding in a car with the seller and the undercover officer to the location at which the seller obtained the drugs, telling the undercover officer to advise people looking for the seller that he would be back in half an hour, and looking out of the car windows when the seller brought the narcotics to the undercover officer's car. The evidence did not support any innocent explanation for defendant's course of conduct, which went farbeyond mere presence (*see e.g. People v Rodriguez*, 52 AD3d 249 [2008], *lv denied* 11 NY3d 741 [2008]; *People v Chatanova*, 37 AD3d 178 [2007], *lv denied* 8 NY3d 983 [2007]; *People v Williams*, 172 AD2d 448 [1991], *affd* 79 NY2d 803 [1991]).

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

ENTERED: JANUARY 15, 2009



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 January 15, 2009.

Present - Hon. Peter Tom, Justice Presiding
Luis A. Gonzalez
John T. Buckley
John W. Sweeny, Jr.
James M. Catterson, Justices.

Storeboard Media LLC, et al.,
Plaintiffs-Appellants,

Index 603739/07
590049/08

-against-

5045

The Tori Group Inc., et al.,
Defendants-Respondents.

[And a Third-Party Action]

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Charles Edward Ramos, J.), entered June 24, 2008,

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

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Ramos, J., with costs and disbursements.

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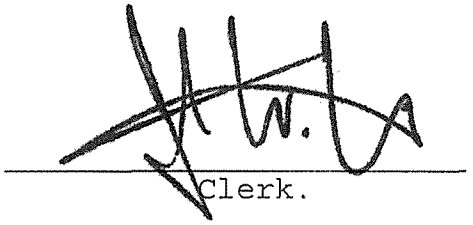


Clerk.

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

5046-
5047-
5047A Emanuel Yerushalmi, et al., Index 25531/04
Plaintiffs-Respondents,

-against-

Abed Realty Corp., et al.,
Defendants-Appellants.

Greenberg Traurig, LLP, New York (Israel Rubin and Michael P. Manning of counsel), for appellants.

Ginsburg & Misk, Queens Village (Hal R. Ginsburg of counsel), for respondents.

Appeal from order, Supreme Court, Bronx County (Barry Salman, J.), entered July 2, 2008, to the extent it denied defendants' renewal motion to vacate an order, and order and judgment (one paper), same court (Dianne T. Renwick, J.), entered April 7, 2006 and on or about May 7, 2007, which respectively declared the fair market value of premises at 729-731 Bruckner Boulevard in the Bronx to be $2.5 million and directed defendants to deliver a deed for this property in exchange for said payment, unanimously dismissed, without costs. Appeal from the 2007 order and judgment (one paper), to the extent it denied defendants' motion to renew and reargue the 2006 order, unanimously dismissed, without costs.

With respect to the 2008 order, the issues raised on the motion were identical to those defendants raised in their notice

of appeal from the 2006 order, which appeal was dismissed for failure to prosecute (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750 [1999]). The court treated that motion as one for reargument, but even if it had been considered as one for renewal, it would properly have been denied because the new evidence upon which the motion was predicated -- an appraisal in which the prospective lender valued the premises at $4,830,000 (more than 93% higher than the $2.5 million value set in the 2006 order) -- was prepared on June 14, 2007, more than a year after the original motion was decided and more than two years after the operative date in the lease, and thus was not "in existence [but] unknown" at the time of the original motion (*see Tishman Constr. Corp. v City of New York*, 280 AD2d 374, 376 [2001]). These new facts would not have changed the prior determination in any event (*see Peycke v Newport Media Acquisition II, Inc.*, 40 AD3d 722 [2007]).

With respect to the 2007 order and judgment, to the extent that appeal seeks review of earlier orders incorporating a ruling that declined to vacate a 2005 in-court stipulation, that disposition is not subject to challenge on appeal for the same reasons set forth above. This latest appeal seeks review of the same issues underlying the 2006 order, which appeal was dismissed for failure to prosecute (*see Emanvilova v Pallotta*, 49 AD3d 413, 414 [2008], *lv dismissed* 11 NY3d 826 [2008]). To the extent it

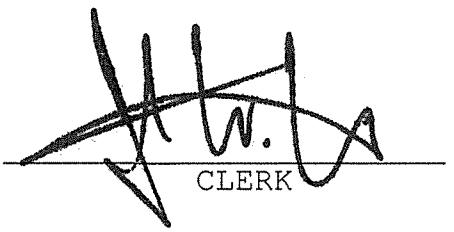
seeks review of the denial of reargument of the 2006 order, it is not appealable (*see Salgado v Ring*, 21 AD3d 363 [2005]).

The March 7, 2005 in-court stipulation, by which defendants agreed to waive certain defaults of the lease by plaintiffs and permit the court to determine the fair market value of the premises, was binding and enforceable (*see Public Adm'r of County of N.Y. v Bankers Trust Co.*, 182 AD2d 592 [1992]). Justice Renwick recited the terms of the agreement, namely, that the court would determine the fair market value of the premises and defendants would waive any outstanding defaults under the lease so as to permit plaintiffs to exercise the option if they were able to meet the price as determined. Those terms were then recorded by the court stenographer and thereby memorialized in the official court record (*Sontag v Sontag*, 114 AD2d 892, 893 [1985], *lv dismissed* 66 NY2d 554 [1986]). Nor has there been any contention that the stipulation was a product of fraud, collusion, mistake or accident (*see Matter of Evelyn P.*, 135 AD2d 716, 717 [1987]). Indeed, a principal of defendant corporation was present at all times (*see Hallock v State of New York*, 64 NY2d 224, 231-232 [1984]), and there is no indication that she misunderstood or objected to the proposed terms. Contrary to defendants' contention, there is no requirement that the court individually question the parties as to their understanding of the proposed terms of the stipulation for it to be binding.

In any event, we find no merit to defendants' argument that the court's determination of fair market value as of January 1, 2005 was erroneous or deprived them of their contractual right to make that determination. Justice Renwick construed her role in light of the 2005 stipulation as substituting her judgment for that of the landlord in determining the fair market value of the premises as of January 1, 2005. In furtherance of this role, she heard the evidence offered by the appraisers from both sides and concluded that the comparable sales approach, which is the generally preferred method of valuation (*see Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277 [1975]), was more appropriate under the circumstances than the income approach proposed by defendants' appraiser. Using this approach, Justice Renwick analyzed the sales of various buildings in the area during approximately the same time period, and concluded that $2.5 million, which was the selling price of the most similarly situated, recently sold property, was the best approximation of the fair market value of the premises as of January 1, 2005. There is no reason to disturb this determination.

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

ENTERED: JANUARY 15, 2009



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

5048 The People of the State of New York, Ind. 4028/87
Respondent,

-against-

Joseph Perry, also known as William Johnson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

Order, Supreme Court, New York County (Arlene R. Silverman, J.), entered on or about March 22, 2006, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in denying defendant a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). The court had assessed 105 points, which is nearly enough for a level-three adjudication. Furthermore, the underlying sex crime was very serious, and although defendant has not been convicted of

additional sex crimes, he has since been convicted of significant drug crimes.

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

ENTERED: JANUARY 15, 2009

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

5049 In re Darren F.,
Petitioner-Respondent,

-against-

Marie-Amina T.,
Respondent-Appellant.

Marie-Amina T., appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

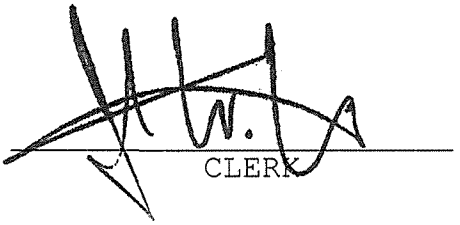
Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about April 28, 2008, which denied respondent Marie-Amina T.'s objection to a Magistrate's final order of support that obligated her to pay continuing support for her two children in the amount of $194 per week, in addition to $15,630.86 in retroactive support, unanimously affirmed, without costs.

Respondent failed to rebut the presumption that the standard of support as calculated under Family Court Act § 413(1)(c) was reasonable and appropriate (*see Matter of Andre v Warren*, 192 AD2d 491 [1993]). In a hearing where credibility was a crucial consideration, respondent was not forthright about -- and presented insufficient evidence regarding -- the amount of her gross income, thus authorizing the Magistrate to base the support obligation on the children's needs, pursuant to Family Court Act § 413(1)(k) (*see Merchant v Hicks*, 15 AD3d 266 [2005]).

Respondent's unsubstantiated claim that her current employment income is insufficient to enable her to support herself and also meet her child-support obligation is unavailing. The record establishes that based on her education and background, respondent's earning potential and capacity are more than adequate (*see* Family Ct Act § 413[1][b][5][v]; *Matter of Richards v Bailey*, 296 AD2d 412 [2002]; *Polite v Polite*, 127 AD2d 465, 467 [1987]).

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

ENTERED: JANUARY 15, 2009



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

5050 The People of the State of New York, Ind. 5415/95
Respondent,

-against-

Pablo Fernandez,
Defendant-Appellant.

David Samel, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about June 13, 2006, which denied defendant's CPL 440.10 motion to vacate a judgment, same court (Leslie Crocker Snyder, J.), rendered June 21, 1996, convicting him, after a jury trial, of murder in the second degree, unanimously affirmed.

The portion of defendant's motion alleging ineffective assistance of counsel is without merit. Defendant received effective assistance at trial under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Contrary to defendant's argument, his trial counsel extensively exploited the differences between defendant's appearance and the description of the gunman provided by certain witnesses. Among other things, trial counsel introduced three photographs of defendant in order to establish his appearance at the time of the incident. Counsel acted reasonably in declining to place in

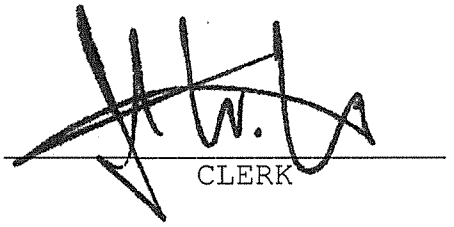
evidence the photo array from which defendant was identified prior to the lineup identifications. Defendant argues that his attorney should have introduced the array to highlight the difference in skin tone between the persons in the array, including himself, and the described gunman. However, defendant would have gained little or nothing by such a tactic, and any gain would have been outweighed by such disadvantages as introducing prior consistent identifications that would otherwise have been excluded under the rule against photographic identifications, demonstrating to the jury that the witnesses were able to pick defendant out of a nonsuggestive array, and implying that defendant had a prior record.

The other branches of defendant's motion, including his remaining constitutional claims, turn on the credibility of a recanting witness who essentially recanted his recantation and then recanted all over again, and of a person wounded during the homicidal attack, who first came forward to exculpate defendant 10 years after the crime when relatives of defendant visited him in prison. The hearing court, which saw and heard these witnesses, found them both to be completely incredible, and there is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Furthermore, even if these witnesses, and another witness who recanted by affidavit only,

were to exculpate defendant at a new trial, and all other evidence remained the same, the evidence of defendant's guilt would remain overwhelming, as we found on defendant's direct appeal (249 AD2d 3 [1998], *lv denied* 92 NY2d 897 [1998]). Defendant's claim to the contrary rests primarily on the discrepancies between his appearance and that of the described gunman. A jury could find that these discrepancies are explainable, and, in any event, we ascribe much greater significance to the fact that, despite the brevity of their observations, two untainted, nonrecanting witnesses independently identified the same person, i.e. defendant, who was also the very same person implicated by two other witnesses, who were defendant's fellow drug traffickers.

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

ENTERED: JANUARY 15, 2009



CLERK

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

5051 Tower Insurance Company of New York, Index 113448/06
Plaintiff-Appellant,

-against-

Segundo Diaz, Jr., et al.,
Defendants-Respondents,

Rafael Pacheco, et al.,
Defendants.

Max W. Gershweir, New York, for appellant.

Weber & Pullin, LLP, Woodbury (Allan L. Pullin of counsel), for respondents.

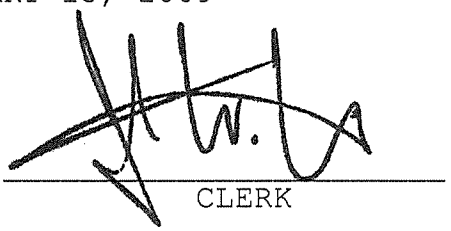
Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 15, 2008, which, inter alia, denied plaintiff's motion for summary judgment on its first cause of action seeking a declaration that it has no duty to defend or indemnify defendants Segundo Diaz, Jr. and Christina Diaz in the underlying personal injury action, and upon a search of the record, granted summary judgment in favor of said defendants on that cause of action, unanimously affirmed, with costs.

We agree with the motion court that the property on which occurred the accident that gave rise to the underlying action is an "[i]nsured location" within the meaning of the subject policy, which defines that term as, inter alia, "[v]acant land, other than farm land, owned by or rented to an 'insured,'" and "[l]and owned by or rented to an 'insured' on which a one or two family

dwelling is being built as a residence for an 'insured'" (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). We also agree that the word "built" encompasses the work being done here, i.e., the addition of a second floor to the building located on the property. In any event, to the extent that that term is ambiguous, the ambiguity must be resolved in defendants' favor (*id.*).

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

ENTERED: JANUARY 15, 2009



CLERK

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

5052-
5052A George Henry Bryant, etc., Index 34A/02
Plaintiff-Respondent,

-against-

Dennis Bryant,
Defendant-Appellant.

Peckar & Abramson, P.C., New York (Charles E. Williams, III of counsel), for appellant.

Lucas & Lucas, New York (Carl Lucas of counsel), for respondent.

Decree, Surrogate's Court, Bronx County (Lee L. Holzman, S.), entered January 18, 2008, which, after a nonjury trial in an action to set aside a deed, declared the New York deed at issue null and void and cancelled the deed, unanimously affirmed, without costs. Appeal from decision, same court and Surrogate, entered on or about January 18, 2008, unanimously dismissed, without costs, as taken from a nonappealable paper.

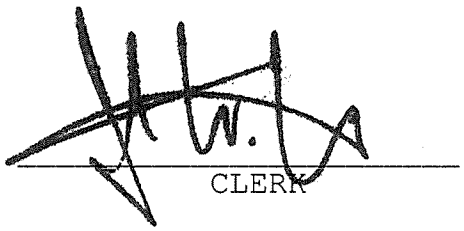
Plaintiff demonstrated by clear and convincing evidence that the New York deed purportedly conveying the decedent's (the parties' mother) interest in property to defendant was a forgery (*see Albany County Sav. Bank*, 149 NY 71, 80 [1896]; *Song Fong Lum v Antonelli*, 102 AD2d 258, 260-261 [1984], *affd* 64 NY2d 1158 [1985]; *see also Winfield Capital Corp. v Green Point Sav. Bank*, 261 AD2d 539, 540-541 [1999]). Indeed, plaintiff's forensic document expert presented detailed testimony explaining that the

signature on the subject deed was not made by the same writer as those on the exemplars in evidence. The court was presented with further testimony and documentary evidence indicating that the deed was not legitimately executed, acknowledged, and delivered. There exists no basis to disturb the court's credibility determinations (*see e.g. Saperstein v Lewenberg*, 11 AD3d 289 [2004]).

We have considered defendant's remaining contentions, including that plaintiff failed to produce a material witness, and find them unavailing.

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

ENTERED: JANUARY 15, 2009



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

5054N The Dermot Company, Inc., Index 105566/05
Plaintiff-Respondent, 601098/06

-against-

200 Haven Company,
Defendant,

200 Haven LLC,
Defendant-Appellant.

Pryor Cashman LLP, New York (Eric D. Sherman and Todd E. Soloway of counsel), for appellant.

Hartman & Craven LLP, New York (Victor M. Metsch of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 29, 2008, which, to the extent appealed from, denied defendant 220 Haven LLC's motion to amend its answer, unanimously affirmed, without costs.

Defendant LLC waived any objection to the standing of plaintiff, the proposed purchaser, by failing to raise that affirmative defense in its answer or in a pre-answer motion to dismiss (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278 [2006], *appeal dismissed* 8 NY3d 837 [2007]). Even absent such a waiver, plaintiff had a bona fide economic interest in seeking specific performance on a contract of sale that predated the contract of sale LLC subsequently entered into with defendant

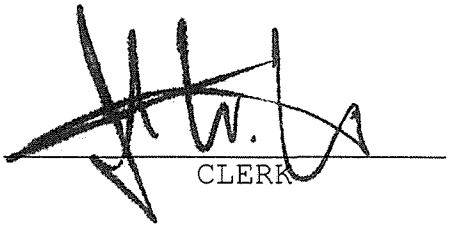
seller (200 Haven Company) to purchase the same property. In reviewing the IAS court's rulings on the parties' prior motions for summary judgment, we found issues of fact as to whether the seller had properly cancelled the contract with plaintiff (41 AD3d 188). As such, plaintiff had standing to commence the instant action to pursue its viable claim.

The court also properly denied LLC's request to amend its answer to include a counterclaim for tortious interference with contract, which was predicated on an allegation that plaintiff's commencement of the instant action (including the filing of a notice of pendency) wrongfully interfered with LLC's contract to purchase the subject property from 200 Haven Company. The proposed counterclaim is without merit (*see Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *Raven El. Corp. v City of New York*, 291 AD2d 355 [2002]). A claim of tortious interference with contract requires, inter alia, facts showing a defendant's intentional procurement of a breach of contract without justification (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Here, LLC has not alleged any facts indicating that

plaintiff commenced this action without justification. Indeed, this Court has already found that triable issues exist as to the merit of plaintiff's claims.

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

ENTERED: JANUARY 15, 2009



CLERK

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

5055N-
5056N Gryphon Domestic VI, LLC, et al., Index 603315/02
Plaintiffs-Respondents,

Warner Mansion Fund,
Plaintiff,

-against-

APP International Finance Company, et al.,
Defendants-Appellants.

Schnader Harrison Segal & Lewis LLP, New York (Kenneth R. Puhala and Benjamin P. Deutsch of counsel), for appellants.

Siller Wilk LLP, New York (Jay S. Auslander of counsel), for respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered October 11, 2005, which denied defendants' motion to compel plaintiffs to notify certain nonparties concerning a ruling of this Court in connection with plaintiffs' collection efforts, and order, same court and Justice, entered May 16, 2008, which enjoined defendants from disbursing funds in furtherance of the Master Restructuring Agreement (MRA), directed those funds to be turned over to plaintiffs, and adjudged the Indah Kiat defendants in civil contempt, unanimously affirmed, with separate bills of costs.

This action arises from a default in the payment of approximately $14 billion worth of notes. Defendants, which are affiliated entities, entered into an MRA with certain creditors,

not including plaintiffs. After plaintiffs obtained a judgment against defendants, they sent out restraining notices and judgment enforcement subpoenas to various nonparties. This Court subsequently modified the judgment with respect to defendants APP International Finance, Asia Pulp & Paper and P.T. Lontar Papyrus Pulp & Paper (18 AD3d 286). Defendants sought an order requiring plaintiffs to notify the nonparty recipients of the restraining notices and subpoenas that this Court had modified the judgment.

Courts have broad discretionary power, under CPLR Article 52, to control and regulate the enforcement of a money judgment in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice (*Guardian Loan Co. v Early*, 47 NY2d 515, 519 [1979]; *see e.g. Paz v Long Is. R.R.*, 241 AD2d 486 [1997]). Defendants have not demonstrated how the failure to notify the nonparties prejudices them. The subpoenas were all satisfied, withdrawn or abandoned, and the nonparty that received the sole remaining restraining notice was aware of the ruling from related proceedings. Accordingly, the court properly denied the motion.

Defendants also appeal the motion court's grant of an injunction against their depositing of funds into MRA accounts in Indonesia, and the order that these funds be paid to plaintiffs in satisfaction of the judgment, in accordance with the April 17, 2007 order of this Court (41 AD3d 25). They argue that the

motion court erred in restraining them from paying creditors under the MRA because the accounts are located in Indonesia and cannot be attached by a New York court, that the MRA creditors have priority, and that if they paid plaintiffs' judgment or transferred assets to plaintiffs it would violate Indonesian law.

Each of these arguments has been raised by defendants on a prior appeal, and was rejected by this Court in its April 17, 2007 order. The court properly granted the injunction.

Defendants also challenge the motion court's order holding the Indah Kiat judgment debtors in civil contempt for failure to comply with our April 17, 2007 order. A civil contempt is where the rights of an individual have been harmed by the contemnor's failure to obey a court order. To sustain a finding of civil contempt based on alleged violation of a court order, it is necessary to establish that a lawful order of the court was in effect, clearly expressing an unequivocal mandate. It must also appear with reasonable certainty that the order has been disobeyed and that the party had knowledge of its mandate (*see Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]).

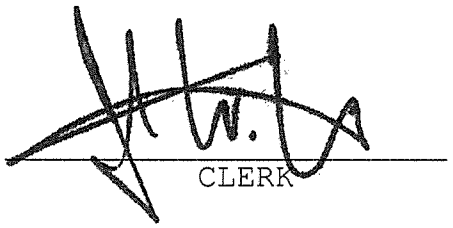
Our April 17, 2007 mandate was clear. The Indah Kiat judgment debtors have provided no evidence that they obeyed it. All they have done is rehash arguments previously made and

rejected by this Court. Plaintiffs have been harmed by the repeated failure of those debtors to comply with court orders.

The Indah Kiat judgment debtors were given 90 days to purge themselves of the contempt. Since there is no evidence they have paid the judgment, and more than 90 days have elapsed, the finding of contempt is affirmed.

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

ENTERED: JANUARY 15, 2009



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 January 15, 2009.

Present - Hon. Peter Tom, Justice Presiding
Luis A. Gonzalez
John T. Buckley
John W. Sweeny, Jr.
James M. Catterson, Justices.

In re Paul Simmons
Petitioner,

-against-

Hon. William Mogulescu, etc.,
Respondent.

Ind. 5690/06

5057
[M-5415]

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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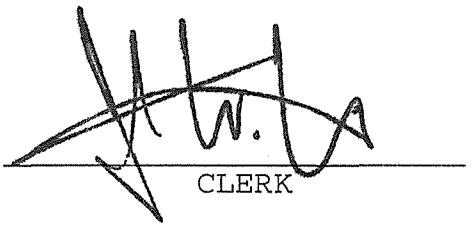

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse
Helen E. Freedman, JJ.

4816
Index 14806/00

Merrick Mahoney,
Plaintiff,

-against-

Turner Construction Co., et al.,
Defendants-Respondents,

Williams Machinery Movers, Inc., et al.,
Defendants-Appellants.

The Williams defendants appeal from the order of the Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about July 2, 2008, which denied so much of their motion for disclosure of the terms of a settlement agreement between plaintiff and the remaining defendants other than the amount.

Dillon Horowitz & Goldstein, New York (Michael M. Horowitz and Thomas Dillon of counsel), for appellants.

London Fischer LLP, New York (Michael J. Carro and John E. Sparling of counsel), for respondents.

McGUIRE, J.

The order denying that portion of the Williams defendants' motion to compel defendant Turner Construction Co. and defendant FDA Queens, L.P., to provide the Williams defendants with a copy of a settlement agreement (or a sworn statement reciting the terms of the agreement) entered into between Turner and FDA and plaintiff must be reversed. Because the law on the disclosure of settlement agreements to nonsettling parties is unclear and presents a thorny issue with which the trial courts are required to grapple (*see* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3101:18A, at 35), we take this opportunity to review that law and offer guidance to the trial courts in dealing with requests by nonsettling parties for disclosure of settlement agreements.

Plaintiff sustained injuries in a construction site accident and commenced an action against Turner, the general contractor, and FDA, the owner of the site. Plaintiff also commenced the action against the Williams defendants, subcontractors on the project at the site. Turner and FDA, represented by the same counsel, interposed an answer asserting a cross claim against the Williams defendants for contribution and indemnification; Turner and FDA subsequently commenced a third-party action against the Williams defendants for contribution, indemnification and breach

of contract. The Williams defendants and both Turner and FDA impleaded certain insurers for breach of contract, and plaintiff's employer and a company that provided equipment at the site for negligence.

Supreme Court granted plaintiff summary judgment on the issue of liability on his Labor Law § 240(1) cause of action and severed the main action from the impleader actions.[1] Thereafter, plaintiff and Turner and FDA entered into a stipulation of discontinuance and filed it with the Bronx County Clerk. While the stipulation stated that those parties had settled the matter as between them, none of the terms of the settlement were provided.[2]

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[1]In their brief, the Williams defendants assert that "the case against [them] and [plaintiff] is presently pending for trial. Additional causes of action for contribution, indemnification, and insurance declaratory judgment by and among the Williams [defendants] and additional parties which were severed in the Order of Justice Tuitt are in the pre-note of issue phase, and are proceeding under a separate index number." Indeed, in an order dated August 17, 2005, Justice Tuitt severed plaintiff's action from the impleader actions. It is not clear whether Supreme Court has severed from plaintiff's action Turner's and FDA's cross claims for contribution and indemnification against the Williams defendants. Nor is it clear why Turner and FDA also brought the same claims against the Williams defendants in their third-party action.

[2]CPLR 2104 states: "With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the *terms* of such stipulation shall be filed by the defendant with the county clerk" (emphasis added). The Williams defendants do not argue that the stipulation of discontinuance

Approximately four months after the stipulation was filed, the Williams defendants served on plaintiff and Turner and FDA a request for admissions regarding whether they settled the action as between them and whether plaintiff released Turner and FDA from the action. The Williams defendants also served on plaintiff and Turner and FDA a demand for a copy of the settlement agreement. Turner and FDA responded to the demand for admissions by acknowledging that plaintiff had agreed to release Turner and FDA but they refused to provide any further details of the settlement.

The Williams defendants moved, among other things, to compel Turner and FDA to provide the Williams defendants with a copy of the settlement agreement or a sworn statement setting out its terms. The Williams defendants brought the motion because they viewed the content of the settlement agreement as "material and relevant to the issues pending between plaintiff and the Williams

---

filed with the Bronx County Clerk failed to comply with CPLR 2104. What the statute may require with respect to the disclosure of the terms of a stipulation of settlement is not clear (*see* Alexander, 2003 Supp. Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2104:2, 2008 Pocket Part, at 304-305; Connors, Practice Commentaries, *supra*, C3101:18H, at 36; Siegel, NY Prac § 204, at 339 [4th ed]; 140 Siegel's Practice Review 1, *Tracking the New Law on Filing Settlements Still Most Controversial Issue: Seeking Ways of Filing Settlements Without Revealing Underlying Details* [Oct. 2003]).

defendants." Specifically, the Williams defendants voiced their concern that plaintiff and Turner and FDA were "improperly colluding," and stated that the content of the settlement agreement is relevant under General Obligations Law § 15-108. Turner and FDA opposed the motion, arguing that the settlement agreement contained a confidentiality provision. Turner and FDA, however, stated that they are "willing ... to submit a copy of the settlement agreement for in camera review by [Supreme] Court. However, in the event [Supreme Court] deems it necessary to disclose any of the terms of the agreement, counsel for the Williams [defendants] and their clients should be asked to execute a similar confidentiality agreement." The agreement was never provided to Supreme Court for in camera inspection. The court subsequently granted the motion to the extent of directing Turner and FDA to disclose the amount of the settlement. Turner and FDA have disclosed the amount of the settlement but have not provided any other details concerning it.

The touchstone for determining whether information is discoverable in an action is whether the information is "material and necessary" (CPLR 3101[a]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] ["The words, 'material and necessary', are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy

which will assist preparation for trial by sharpening the issues and reducing delay and prolixity"]). Thus, disclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are "material and necessary" to the nonsettling party's case (*Masterwear Corp. v Bernard*, 298 AD2d 249, 250 [2002]; *see* Connors, Practice Commentaries, *supra*, C3101:18A, at 35 ["The central inquiry in resolving ... disclosure requests [regarding settlement agreements] should focus on relevance"]; *see generally Stiles v Batavia Atomic Horseshoes*, 174 AD2d 287, 292 [1992], *revd on other grounds* 81 NY2d 950 [1993] [observing with respect to a "Mary Carter" agreement that "[s]uch an agreement is a contract by which one or more defendants in a multiparty case secretly conspires with the plaintiff to feign an active role in the litigation in exchange for assurances that its own liability will be diminished proportionately by increasing the liability of the nonagreeing defendant(s). If such an agreement is established, it may be void per se, and the failure to disclose it may require a new trial"] [internal citations omitted]). Conversely, where the terms of a settlement agreement have no bearing on the issues in the case, the terms are not discoverable

by a nonsettling party (*see Matter of New York County Data Entry Worker Prod. Liab. Litig.*, 222 AD2d 381 [1995], *affg* 162 Misc 2d 263 [Sup Ct, New York County, Crane, J., 1994]; *see also Allegretti-Freeman v Baltis*, 205 AD2d 859 [1994]). "Any doubt as to the relevance [of the terms of the settlement] may be resolved by an in camera inspection" of the settlement agreement and "the settling parties' remaining interest in confidentiality may be protected by an order limiting the disclosure of the settlement agreement to [the nonsettling defendants] and [their] counsel or by such other manner as Supreme Court directs" (*Masterwear Corp.*, 298 AD2d at 250-251).

Here, Supreme Court was not provided with the settlement agreement for in camera inspection and the agreement has not been provided to us. Thus, like Supreme Court, we have no idea of the contents of the agreement and are unable to gauge whether it contains information that is "material and necessary" to the Williams defendants' defense of the underlying personal injury action, the cross claims and third-party claims asserted against them by Turner and FDA, or both. Notably, the Williams defendants contend -- and Turner and FDA do not dispute -- that Turner and FDA plan on participating in the trial of the underlying action, which at this point will apparently be only between plaintiff and the Williams defendants. It is not obvious

why Turner and FDA would want to participate in that trial or whether Supreme Court should allow them to do so since they and plaintiff have settled the action as between them (*see Meleo v Rochester Gas & Elec. Corp.*, 72 AD2d 83, 97 [1979], *lv dismissed* 49 NY2d 703 [1980] ["because after a settlement under section 15-108 of the General Obligations Law the true adversaries in the trial become the plaintiff and the nonsettling defendant, the presence of the settling defendants for even a limited participation in the trial against the nonsettling defendant would seem to be totally unwarranted"]). The uncertainty about whether Turner and FDA plan on participating in that trial and, if they do plan to do so, the reason for their continued participation, are at least cause for concern (*see Matter of Eighth Jud. Dist. Asbestos Litig.*, 8 NY3d 717, 721 [2007] ["secretive agreements may result in prejudice to the nonagreeing defendant at trial, distort the true adversarial nature of the litigation process, and cast a cloud over the judicial system"]; *id.* at 722-723 ["whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action *which requires the agreeing defendant to remain a party to the litigation*, the parties must disclose the existence of that agreement and its terms to the court and the nonagreeing defendant(s)" [emphasis added]).

Accordingly, the appropriate course of action is to reverse the order appealed and remand the matter to Supreme Court for an in camera inspection of the settlement agreement and a new determination of the Williams defendants' motion (*see Masterwear Corp.*, 298 AD2d at 249). We recognize that "[s]trong public policy considerations favor settlements, which avoid costly litigation and preserve scarce judicial resources" (Connors, Practice Commentaries, *supra*, CPLR C3101:18A, at 35). However, "[t]hese public policy concerns can be accommodated short of denying a non-settling defendant information that is material and relevant to its case. The court can allow disclosure [of a settlement agreement] while protecting the confidential nature of the settlement agreement through a CPLR 3103[a] protective order" (*id.* [citation omitted]).[3] Supreme Court, "[i]n exercising its discretion regarding whether and to what degree a protective order under CPLR 3103 should issue, ... must strike a balance by weighing the[] [parties'] conflicting interests in light of the facts of the particular case before it" (*Cynthia B. v New*

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[3]CPLR 3103 states that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Rochelle Hosp. Med. Ctr., 60 NY2d 452, 461 [1983]). Thus, the court may direct the disclosure of those portions of the agreement that it finds are "material and necessary," while shielding from disclosure those portions of it that are not, and "limiting the disclosure of the settlement agreement to [the nonsettling defendants] and [their] counsel or by such other manner as Supreme Court directs" (*Masterwear Corp.*, 298 AD2d at 250-251).

Accordingly, the order of Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about July 2, 2008, which denied so much of the Williams defendants' motion for disclosure of the terms of a settlement agreement between plaintiff and the remaining defendants other than the amount, should be reversed, on the law, without costs, and the matter remanded for reconsideration of the motion after in camera inspection of the settlement agreement.

All concur.

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

ENTERED: JANUARY 15, 2009

CLERK