SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 29, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4857 In re John F. Marchisotto, Petitioner-Appellant, Index 111880/05

-against-

Raymond Kelly, Police Commissioner, et al., Respondents-Respondents.

Rosemary Carroll, Clermont, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for respondents.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered January 24, 2008, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul respondents' determination, which denied petitioner's application for accidental disability retirement benefits by virtue of a tie vote of respondent Board of Trustees (Board), unanimously affirmed, without costs.

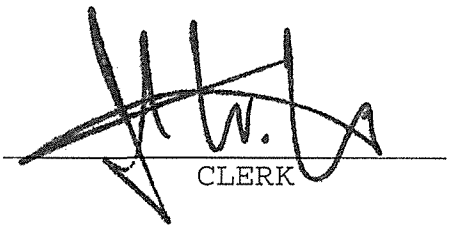
Petitioner sustained a fracture of the middle phalanx of the fourth digit of his left hand when he attempted to unclog an overflowing toilet using a plumber's snake. The Board denied him an accident disability pension on the ground that use of the tool was not among his ordinary job duties, finding that petitioner

"knew the proper procedure was to call maintenance for a professional to handle the job," and concluding that "the incident does not fit the criteria for accidental disability."

There is substantial evidence in the record to support the Board's conclusion that the activity in which petitioner was engaged at the time of injury was not "undertaken in the performance of ordinary employment duties" (*Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010, 1012 [1982]). Because the determination of which activities constitute the regular duties of a police officer is a matter within the particular expertise of the Board, its findings are entitled to deference (*see Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]), and because the record contains substantial evidence supporting the Board's findings, its decision must be upheld (*see Matter of Salvati v Eimicke*, 72 NY2d 784, 792 [1988]).

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

ENTERED:



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

3180-
3180A-
3180B Ishmel Peguero, et al., Index 118078/02
Plaintiffs-Respondents,

-against-

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

Mauro Goldberg & Lilling LLP, Great Neck (Caryn L. Lilling and Katherine Herr Solomon of counsel), for appellants.

Levy Phillips & Konigsberg, LLP, New York (Daniel J. Woodard of counsel), for respondents.

Amended judgment, Supreme Court, New York County (Sherry Klein Heitler, J.), entered June 27, 2007, after a jury verdict and stipulated reduction, apportioning fault 75% against defendant 601 Realty Corp. and 25% against defendant Jeffrey Farkas, and awarding plaintiffs $4,235,464.76, modified, on the facts and in the exercise of discretion, that portion of the judgment imposing personal liability on defendant Jeffrey Farkas is vacated and the matter remanded for a new trial on the issue of his liability, the awards for future pain and suffering as to both plaintiffs vacated and the matter remanded for a new trial as to those damages only, and otherwise affirmed, without costs, unless plaintiffs stipulate, within 20 days of service of a copy of this order, to accept reduced awards for future pain and suffering of $1,000,000 for plaintiff Ishmel Peguero and $750,000

for plaintiff Emmanuel Peguero, and the entry of an amended judgment in accordance therewith. Appeal from order, same court and Justice, entered October 5, 2006, which partially granted defendants' posttrial motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the amended judgment. Appeal from order, same court and Justice, entered April 11, 2007, which denied defendants' motion to reargue the October 5, 2006 order, unanimously dismissed, without costs.

The infant plaintiffs Ishmel and Emmanuel Peguero are brothers who lived with their mother in a building owned by defendant 601 Realty Corp. (the Corporation). Defendant Jeffrey Farkas was a 50% shareholder and president of the Corporation and defendant Sidney Farkas was the managing agent of the building. Plaintiffs commenced this action seeking damages for personal injuries they sustained as a result of their exposure to lead paint in the apartment they occupied in the building. Their complaint, as amplified by their bill of particulars, alleged that defendants (1) knew both that the infant plaintiffs resided in the apartment and that the apartment contained hazardous lead paint to which plaintiffs were being exposed, and (2) negligently failed to abate the hazardous lead paint conditions. In defendants' answer, Jeffrey Farkas asserted as an affirmative defense that he was acting on behalf of the Corporation and thus

could not be held personally liable.

At trial, Jeffrey Farkas moved at the close of plaintiffs' proof to dismiss the action as against him on the ground that, with respect to his involvement with the building, he acted on behalf of the Corporation and could not be held personally liable for its negligence. Supreme Court reserved decision on that motion, which Jeffrey Farkas renewed after the close of defendants' proof. While Supreme Court did not expressly rule on Jeffrey Farkas' renewed motion to dismiss the action as against him, it did so implicitly by submitting the issue of whether he was negligent to the jury.

The jury returned a verdict in favor of plaintiffs against the Corporation and Jeffrey Farkas, apportioning 75% of the liability to the Corporation and 25% to Jeffrey Farkas; the jury also determined that Sidney Farkas was not negligent. The jury awarded Ishmel $350,000 for past pain and suffering and $3,000,000 for future pain and suffering, and Emmanuel $250,000 for past pain and suffering and $2,500,000 for future pain and suffering. Supreme Court partially granted defendants' posttrial motion to set aside the verdict, directing a new trial on the issue of damages unless plaintiffs stipulated to reduce the awards for Ishmel to $200,000 for past pain and suffering and $2,000,000 for future pain and suffering, and for Emmanuel to $100,000 for past pain and suffering and $1,000,000 for future

pain and suffering. Plaintiffs so stipulated and an amended judgment was entered. Defendants' appeal from, among other things, the amended judgment ensued.

Jeffrey Farkas asserts that the court erred in submitting the issue of his negligence to the jury and that it should have dismissed the complaint as against him because he acted in his capacity as an officer of the Corporation and thus could not be held personally liable. Even assuming that Jeffrey Farkas is correct that he was acting solely in his capacity as an officer of the Corporation, he would not be entitled to dismissal of the complaint as against him on that ground. That he acted solely in his capacity as an officer of the Corporation is not a sufficient ground for dismissal. Rather, "a corporate officer who participates in the commission of a tort may be held individually liable, *regardless of whether the officer acted on behalf of the corporation in the course of official duties* and regardless of whether the corporate veil is pierced" (*Espinosa v Rand*, 24 AD3d 102, 102 [2005] [emphasis added, internal quotation marks omitted]; *see W. Joseph McPhillips, Inc. v Ellis*, 278 AD2d 682 [2000]). The "commission of a tort" doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for

nonfeasance, i.e., a failure to act (*Michaels v Lispenard Holding Corp.*, 11 AD2d 12, 14 [1960]; *see MLM LLC v Karamouzis*, 2 AD3d 161 [2003]).

Jeffrey Farkas, who bore the burden of proof on his affirmative defense that he was not personally liable because he acted as an officer of the Corporation (*see generally Brignoli v Balch, Hardy & Scheinman*, 178 AD2d 290, 290 [1991]), did not assert before Supreme Court that his alleged negligence consisted merely of nonfeasance and instead argued only inaccurately and more generally that personal liability could not be imposed upon him because he acted in his capacity as an officer of the Corporation (*see 220-52 Assoc. v Edelman*, 18 AD3d 313, 315 [2005] [for argument to be preserved for appellate review it must have been fully articulated before the court of original jurisdiction]; *see also Robillard v Robbins*, 78 NY2d 1105, 1106 [1991]). As a result of Jeffrey Farkas' failure to argue before Supreme Court that his alleged negligence consisted merely of nonfeasance, the issue of whether he engaged in affirmative acts of negligence or negligently failed to act was not submitted to the jury and, as discussed below, the sufficiency of the evidence must be gauged in light of the charge as given to the jury.

The court's charge regarding the principles of negligence on which the jury was to base its verdict did not differentiate between affirmative acts of negligence and negligent failures to

act. Because Jeffrey Farkas did not object to this portion of the charge or request contrary instructions, "the law as stated in that charge became the law applicable to the determination of the rights of the parties in this litigation . . . and thus established the legal standard by which the sufficiency of the evidence to support the verdict must be judged" (*Harris v Armstrong*, 64 NY2d 700, 702 [1984], citing *Up-Front Indus. v US Indus.*, 63 NY2d 1004 [1984]; *Rajeev Sindhwani, M.D., PLLC v Coe Bus. Serv., Inc.*, 52 AD3d 674, 676-677 [2008]; *see Loughry v Lincoln First Bank, NA*, 67 NY2d 369, 376-377 [1986]). The law stated in that portion of the charge was as follows:

> "In this case the plaintiff[s'] claim is that the defendants did not act reasonably and that the infants suffered damages as a result. The defendant[s] claim that they did act reasonably and as such are not liable. The plaintiff[s] ha[ve] the burden of proving that the defendant[s] w[ere] negligent and the defendant[s'] negligence was a substantial factor in causing lead poisoning damages to the children. The defendant[s] ha[ve] the burden of proving that the plaintiff[s] w[ere] negligent and that the plaintiff[s'] negligence was a substantial factor in causing the damage to the children.
>
> "Negligence is the lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the circumstances."

Evaluating the evidence according to the charge as given, we conclude that it is sufficient to support the jury's

determination that Jeffrey Farkas was negligent. Notably, plaintiffs adduced evidence that a lead paint hazard existed in their apartment, that Jeffrey Farkas was responsible for inspecting the apartments in the building, that he was in plaintiffs' apartment on numerous occasions, that he had notice of the lead paint hazard in the apartment, and that he ultimately hired workers to abate the hazard.

We disagree with our dissenting colleague's conclusion that Jeffrey Farkas preserved for appellate review his argument that the complaint should be dismissed as against him because the evidence was legally insufficient to establish that he should be held personally liable. As noted above, because Jeffrey Farkas did not object to this portion of the charge or request contrary instructions, the law as stated in the charge became the law applicable to the determination of the rights of the parties.

To be sure, plaintiffs do not argue in their brief that the failure of Jeffrey Farkas to object to the court's charge requires that the sufficiency of the evidence be assessed in light of the charge as it actually was given. But the dissent cites no authority for the proposition that we nonetheless should or are required to assess the sufficiency of the evidence in accordance with a different legal standard. Moreover, as the appellant on this appeal, Jeffrey Farkas bears the burden of

establishing that he is entitled to relief (*see Appleby v Erie County Sav. Bank*, 62 NY 12, 18 [1875]). Accordingly, plaintiffs' failure to argue preservation is of no moment. For the same reason, our dissenting colleague misses the point with his characterization of our position on preservation as "newly minted."

Nor does our dissenting colleague cite any authority supporting his contention that, "[b]y moving to dismiss the claim against him before the case was submitted to the jury, [Jeffrey] Farkas effectively objected to all of the court's subsequent instructions *as applied to him.*" In fact, that contention is undercut by the governing statute, CPLR 4110-b,[1] and case law (*see Hunt v Bankers & Shippers Ins. Co. of N.Y.*, 50 NY2d 938 [1980] ["other than restating requests to charge that had previously been submitted to the court (which requests themselves

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[1]CPLR 4110-b states that

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection*" (emphasis added).

were erroneous in significant detail), defendant took no sufficient exception to the charge as given and did not otherwise assist the Trial Judge in clarifying or distilling the legal issues as to which it now seeks our review. In consequence of its failure to address the charge with particularity, appellant has failed to preserve legal issues"]; *Carrasquillo v American Type Founders Co.*, 183 AD2d 410, 410 [1992], *lv denied* 81 NY2d 703 [1993]). At bottom, what is required is a sufficient objection to the charge that assists the trial judge in clarifying or distilling the legal issues in the charge (*see Hunt, supra*) and Jeffrey Farkas made no such objection.

The dissent's reliance on *Loughry v Lincoln First Bank* (*supra*) is misplaced and does not support its conclusion that we should evaluate the sufficiency of the evidence in accordance with the actual legal standard governing the liability of officers of a corporation instead of the legal standard stated in the charge. In *Loughry*, the Court determined that the issue of whether a particular employee was a "superior officer" for the purpose of ascertaining whether his employer could be held liable for punitive damages for that employee's conduct was preserved for appellate review. In this regard, the Court wrote

> "[a]fter the jury's verdict, proof was taken on damages . . . and the jury was charged with respect to compensatory and punitive damages. The court instructed the jury that punitive damages could be assessed against each defendant based on the earlier findings on liability: 'You have already determined by

> your answers to the questions submitted to you on Monday that the Defendants did act with malice, the individual Defendants. You may award under those circumstances punitive damages, and you may fix as punitive damages, the amount you fix need bear no relationship to the amount you award for compensatory damages.' But malice for one purpose is not malice for every purpose. The court's *error* -- equating an agent's malice sufficient under the doctrine of respondeat superior for compensatory damages against the employer, with the employer's own complicity necessary for punitive damages -- *drew timely objection* from defense counsel, who protested that there was no basis for punitive damages against the bank. Counsel *objected, first*, because a finding that malice solely motivated Lee and Dovidio [i.e., the individual defendants] necessarily precluded a finding that they acted in the scope of employment and, *second*, because 'there's nothing showing sufficient proof of authorization, ratification or condonation of the acts of Lee and Dovidio.' While the *first objection* was properly rejected -- 'culpable recklessness' (which was charged to the jury) being one form of malice that can be fully consistent with scope of employment -- the *second* should have alerted the trial court to the need for *further instruction* regarding a predicate for punitive damages against the bank, but the court declined to give any" (67 NY2d at 379 [emphasis added]).

Thus, defense counsel made a specific objection to the portion of the charge with which he took issue after the charge was given. Here, of course, no objection (or request to charge) was lodged by Jeffrey Farkas *at any point* to the relevant portion of the charge. What was present in *Loughry* -- a sufficient objection to the charge that should have assisted the trial judge in clarifying or distilling the legal issues in the charge (*Hunt, supra*) -- is not present here. Far from demonstrating a "striking parallel to this case," *Loughry* is distinguishable in

this key respect.[2]

Similarly misplaced is our dissenting colleague's reliance on *Greelish v New York Cent. R.R. Co.* (29 AD2d 159 [3d Dept 1968], *affd* 23 NY2d 903 [1969]) and *Gallagher v Citizens Water Works of Town of Highlands* (278 App Div 792 [2d Dept 1951], *affd* 303 NY 805 [1952]). In both of these cases the defendant moved to dismiss an action at the close of the plaintiff's case or the close of the evidence, and in both the Appellate Division held that because the motion should have been granted, the defendant was entitled to dismissal of the complaint regardless of the content of the charge to which no objection was made.[3] Critically, however, nothing in either decision suggests that the motions to dismiss did not raise the same specific objection that the defendant pressed on appeal. Accordingly, neither decision is at odds with the wealth of precedent holding that, when no timely and specific objection is taken to a charge, "the law as stated in th[e] charge became the law applicable to the determination of the rights of the parties in th[e] litigation *and thus established the legal standard by which the sufficiency*

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[2]Accordingly, our dissenting colleague is wrong in claiming that our quotation from *Loughry* "abruptly" ends before the relevant passages.

[3]Neither *Greelish* nor *Gallagher* cited any authority supporting that conclusion and neither appears to have been cited for that proposition.

of the evidence to support the verdict must be judged" (*Harris*, 64 NY2d at 702 [emphasis added]; *see Cohen v St. Regis Paper Co.*, 64 NY2d 656 [1984], *affg* 99 AD2d 659, 660 [1984]; *Ramos v New York City Hous. Auth.*, 249 AD2d 59 [1998]; *Kroupova v Hill*, 242 AD2d 218 [1997], *lv dismissed in part and denied in part* 92 NY2d 1013 [1998]; *Rodriguez v Davis Equip. Corp.*, 235 AD2d 222 [1997]).

Jeffrey Farkas also argues that Supreme Court should have directed the jury to determine whether, on the occasions he engaged in the negligent conduct alleged by plaintiffs, he was acting outside the scope of his authority as a corporate officer. According to Jeffrey Farkas, had the jury been so directed and had it determined that he was not acting outside the scope of his authority as an officer of the Corporation, no personal liability could be imposed on him. This argument is not preserved for our review since Jeffrey Farkas neither sought jury instructions on that issue nor objected to the court's charge on the ground that it did not contain such instructions (*see* CPLR 4110-b; *Harris*, *supra*; *CBB Entertainment v Korn*, 240 AD2d 184 [1997]; *Carrasquillo*, *supra*). In any event, as discussed above, this argument is based on an inaccurate statement of the law.

Notwithstanding Jeffrey Farkas' failure to preserve his argument that the charge was erroneous because it failed to articulate the correct legal standard regarding his personal

liability, we reach the issue in the interests of justice. "[W]here [an] error is so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded, the court may, in the interests of justice, proceed to review the issue even in the absence of objection or request [to charge]" (*Pivar v Graduate School of Figurative Art of the N.Y. Academy of Art*, 290 AD2d 212, 213 [2002]). Here, the central issue on which plaintiffs' claim of liability against Jeffrey Farkas was founded is whether any basis exists for holding him personally liable for actions he took as an officer of the corporation, and the court's charge precluded the jury from considering that issue.

Although we can review Jeffrey Farkas' claim in the interests of justice, we of course are not required to do so. For two reasons, however, we conclude that we should review it in the interests of justice. First, although it is possible that Jeffrey Farkas was prompted by strategic considerations not to press at trial the specific contention that he could not be held liable because his alleged negligence consisted solely of nonfeasance, we think it more likely that this failure represented nothing more than an omission that was inadvertent or ignorant. Second, we think it unlikely that plaintiffs could have responded to a specific objection by offering additional evidence against Jeffrey Farkas that would have established a

proper basis for holding him personally liable. Thus, Jeffrey Farkas should have a new trial on the issue of liability (*see id.*; *see also Clark v Interlaken Owners*, 2 AD3d 338 [2003]; *Breitug v Canzano*, 238 AD2d 901 [1997]; *Kelly v Tarnowski*, 213 AD2d 1054 [1995]; *Aragon v A & L Refrig. Corp.*, 209 AD2d 268 [1994]; *Kearse v Food Fair Stores*, 104 AD2d 582 [1984]; *Rivera v Bronx-Lebanon Hosp. Ctr.*, 70 AD2d 794 [1979]). The case law regarding the remedy for a fundamental error in the charge is clear and consistent -- the matter should be remanded for a new trial.[4] In light of that case law, we cannot agree with our dissenting colleague's contention that, because the charging error was fundamental, we can dismiss the complaint as against him. We reach Jeffrey Farkas' argument in the interests of justice, but that does not warrant a finding that plaintiffs could not offer any additional relevant evidence. They may well be unable to do so, but we cannot lawfully so assume.

Supreme Court providently exercised its discretion in precluding defendants from calling their liability expert since they served their expert disclosure only a few days before the start of the trial, failed to provide the substance of the expert's anticipated testimony with the requisite "reasonable

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[4]Indeed, our dissenting colleague cites to no case where, in reversing a judgment in the interests of justice based on a fundamental error in the charge, the Appellate Division afforded the appellant any remedy other than a new trial.

detail" mandated by CPLR 3101(d)(1)(i), and failed to demonstrate good cause for their failure to comply with that statute (*see Lissak v Cerabona*, 10 AD3d 308, 309 [2004]; *Hudson v Manhattan & Bronx Surface Tr. Operating Auth.*, 188 AD2d 355 [1992]).

Both plaintiffs sustained the following injuries as a result of their exposure to lead paint in the apartment: permanent cognitive, attentional and behavioral deficits, learning disabilities, attention deficit disorder, hyperactivity, and diminished IQ. Ishmel was awarded future pain and suffering damages for a period of 65 years and Emmanuel was awarded such damages for a period of 67. The awards for past pain and suffering, as reduced by Supreme Court, are reasonable compensation for plaintiffs' past physical and emotional injuries. However, the awards for future pain and suffering as to both plaintiffs, even as reduced by Supreme Court, deviate materially from reasonable compensation to the extent indicated above (*see* CPLR 5501[c]; *see generally Woolfalk v New York City Hous. Auth.*, 10 AD3d 524 [2004], *lv denied* 4 NY3d 711 [2005]; *Jiminez v City of New York*, 7 AD3d 268 [2004]; *Mayi v 1551 St. Nicholas*, 6 AD3d 219 [2004]; *Seay v Greenidge*, 292 AD2d 173 [2002]; *Sampson v New York City Hous. Auth.*, 256 AD2d 19 [1998], *lv denied* 93 NY2d 808 [1999]).

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

FRIEDMAN, J.P. (dissenting in part)

I respectfully dissent insofar as the majority remands the matter for a new trial as to the liability of defendant Jeffrey Farkas, a shareholder and officer of defendant 601 Realty Corp.[1] On this record, I would dismiss the complaint as against Farkas. I concur with the majority's decision in all other respects, including the affirmance of the judgment as to liability against 601 Realty.

Plaintiffs, having been injured by a lead paint condition in their former apartment, brought this action against 601 Realty, the corporate landlord, and Farkas, who, as indicated above, is a shareholder and officer of 601 Realty. Plaintiffs' claims are based entirely on tortious nonfeasance, specifically, the failure to abate the lead paint condition, a duty that, on this record, was owed by 601 Realty only, not by Farkas as an individual. Twice during trial, at the close of plaintiffs' case and again at the close of all of the evidence, Farkas unsuccessfully moved to dismiss the complaint as against himself on the ground that the evidence afforded no basis for imposing liability on him as an individual. The dismissal motions were denied, and the jury returned a verdict against both 601 Realty and Farkas individually.

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[1]The jury exonerated the other individual defendant, Sidney Farkas. In the remainder of this writing, the name "Farkas" refers to Jeffrey Farkas only.

The majority agrees with me on the "actual legal standard governing the liability of officers of a corporation," and does not suggest that the record discloses any basis for holding Farkas personally liable, under that "actual legal standard," for 601 Realty's failure to perform a corporate duty. Nonetheless, the majority deems itself powerless to dismiss the claim against Farkas because, in the majority's view, Farkas failed to preserve his objection to the submission of the claim against him, notwithstanding the two dismissal motions he made during trial, each one on the specific ground that any cause of action that had been proven lay against the corporation only. The majority further argues that the point is unpreserved because, after the denial of the dismissal motions, Farkas did not object to the jury charge. Having thus constructed its own rationale for affirming the judgment against Farkas, the majority splits the difference between plaintiffs and Farkas by vacating the judgment as against the latter, and remanding for a new trial on the issue of his liability, on the ground that the trial court committed fundamental error in instructing the jury that Farkas could be held liable for corporate nonfeasance.

For several reasons, I decline to join the majority in keeping alive a claim the trial record establishes to be legally insufficient. To begin, I am astonished by the majority's view that the two dismissal motions Farkas made during trial failed to

preserve for appellate review his argument -- a correct one on the merits, as the majority concedes -- that plaintiffs failed to make out a prima facie case against him individually. Plaintiffs themselves have never asserted that Farkas failed to preserve his objection to being held personally liable; it is the majority, rather, that has fashioned this contention from a strained and artificial reading of the record, and has done so at its own initiative. Moreover, the majority's position that the trial court committed fundamental error in instructing the jury that Farkas could be held liable for the corporation's failure to act is wholly at odds with the majority's position that the motions to dismiss, although expressly predicated on the legal distinction between Farkas and the corporation, were somehow too "general" to alert the IAS court to the principle that Farkas could not be held liable for corporate nonfeasance. The point here is that the trial court's error, both in denying the motions to dismiss and in framing the jury charge, consisted in its overlooking precisely the same legal principle. If this principle is fundamental (and I agree that it is), does it not follow that the motions to dismiss, which were expressly based on the corporate/individual distinction, should have sufficed to bring that fundamental principle to the trial court's attention? The majority's additional contention that any point Farkas may have preserved by moving to dismiss was retroactively waived by

his subsequent failure to object to the jury charge is not only without support in either case law or logic, it is contrary to two Appellate Division decisions, each affirmed by the Court of Appeals. Finally, it is pointless to send this matter back for a new trial when plaintiffs make no claim that they have any evidence not in the existing record that would support imposing liability on Farkas individually.

As stated above, the majority and I are in agreement on the relevant point of substantive law. The majority acknowledges that, under "the actual legal standard governing the liability of officers of a corporation," a corporate officer, while liable for personal participation in the corporation's affirmative commission of a tortious act by malfeasance or misfeasance (*see e.g. Espinosa v Rand*, 24 AD3d 102 [2005]), cannot be held personally liable for the corporation's tortious nonfeasance, i.e., failure to act (*see MLM LLC v Karamouzis*, 2 AD3d 161 [2003], citing *Michaels v Lispenard Holding Corp.*, 11 AD2d 12, 14 [1960]). In this case, the tort at issue -- failure to abate a preexisting lead paint condition in plaintiffs' apartment -- is plainly one of nonfeasance, for which only the corporate landlord, 601 Realty, may be held liable, absent special circumstances not present here.[2]

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[2]In the trial court, plaintiffs argued that Farkas could be held personally liable for the failure to address the lead condition based on New York City Administrative Code § 27-

At the close of plaintiff's case at trial, Farkas preserved the issue of whether he could be held liable for the failure to abate the lead paint condition by moving to dismiss the complaint as against himself individually. In moving, defense counsel stated that "there has been no evidence submitted by plaintiff[s] that [Farkas] does have personal responsibility" for the alleged wrongdoing. The motion was renewed, and implicitly denied, at the close of the defense case.

The oral motions by Farkas's counsel at trial plainly placed at issue the propriety of holding Farkas personally liable for the allegedly tortious conduct of his corporation.[3] In response to each motion, it was the obligation of plaintiffs' counsel to identify any possible basis in the record for imposing personal liability on Farkas. Plaintiffs' counsel did not identify, and does not succeed in identifying now, a single instance of

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2114(e), which expands liability to officers, directors and certain shareholders of a corporate landlord "[w]henever a multiple dwelling shall have been *declared a public nuisance . . . pursuant to subdivision b of this section*" (emphasis added). On appeal, plaintiffs have abandoned this argument, apparently recognizing that § 27-2114(e) is inapplicable because the building in question was never declared a public nuisance through the procedures (including notice and hearing) prescribed by § 27-2114(b). Instead, plaintiffs attempt on appeal to cast Farkas as having actively committed a tort against them. This attempt fails so completely that the majority does not even deem it worthy of discussion.

[3]The same is true of the fourth affirmative defense pleaded in defendants' answer, which, on behalf of Farkas, "denie[d] ownership . . . of the premises in question."

Farkas's active commission of an affirmatively tortious act.

In essence, the majority holds that Farkas failed to preserve the dispositive legal issue in the case against him because his counsel stated the rule protecting corporate shareholders and officers from liability for corporate torts in what the majority considers a somewhat overbroad manner that perhaps fell short of the precision one would expect of a law school seminar. The purpose of a trial, however, is to achieve substantial justice between the parties, not to produce a law review article. Plaintiffs undeniably received notice from the dismissal motion at the conclusion of their case that Farkas was denying that they had proven any grounds for holding him personally liable for 601 Realty's alleged torts. Thus, that motion afforded plaintiffs an opportunity to come forward with any additional evidence in their possession of active wrongdoing by Farkas that would have supported holding him personally liable. Plaintiffs have never suggested that they possessed but failed to present any such evidence in their case at trial. Indeed, it defies reason to imagine that plaintiffs' experienced counsel would have withheld evidence of Farkas's active wrongdoing from trial if they had it.

In fact, one of the Court of Appeals decisions cited by the majority supports my view that an objection to the submission of a claim to the jury, even if imprecisely stated, suffices to

preserve an issue for appellate review so long as the objection was stated in a way that reasonably should have alerted the court and the adverse party to the issue sought to be reviewed. In *Loughry v Lincoln First Bank* (67 NY2d 369 [1986]), a defamation case, one of the issues was whether the defendant bank had preserved for appellate review its contention that neither of the two individual defendants -- bank employees who actually defamed the plaintiff -- was a "superior officer" whose conduct could provide a predicate for an award of punitive damages against the bank. At the damages phase of a bifurcated trial, the bank timely "protested that there was no basis for punitive damages against [it]," arguing, inter alia, "'there's nothing showing sufficient proof of authorization, ratification or condonation of the acts of [the individual defendants]'" (*id.* at 379). The bank did not, however, specifically argue that neither individual defendant was a "superior officer," and failed to request that the jury be given a "superior officer" charge. The Court of Appeals nonetheless held that the issue of whether the higher ranking individual defendant was a "superior officer" was preserved for appellate review. The Court held that the bank's objection that there was insufficient evidence of "'authorization, ratification or condonation'" of the individual defendants' maliciously defamatory conduct

> "should have alerted the trial court to the need for further instruction regarding a predicate for punitive damages

against the bank, but the court declined to give any. *Had plaintiff at that point perceived that a 'superior officer' finding in particular furnished the necessary predicate for punitive damages against the bank, he might have sought such an instruction; his theory, however -- like that of the trial court at the time the charge was given -- was that punitive damages could be awarded against the bank on the showing of malice already made as to the individuals. In these circumstances, the failure to request a 'superior officer' charge cannot be laid at [the bank's] door, or place the issue beyond our review"* (*id.* at 379-380 [emphasis added]).[4]

Loughry makes for a striking parallel to this case. In *Loughry*, to reiterate, the Court of Appeals held that the "superior officer" issue had been preserved by the bank's argument that there was "'[in]sufficient proof of [the bank's] authorization, ratification or condonation'" (67 NY2d at 379) of the employees' malicious conduct, notwithstanding that the bank had not argued specifically that only the malice of a "superior officer" could be imputed to the bank for purposes of the punitive damages claim. The bank's argument sufficed to preserve the "superior officer" issue because it "should have alerted"

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[4]The majority abruptly cuts off its extended quotation from *Loughry* immediately before the language italicized above. The language omitted by the majority makes it plain that the Court of Appeals regarded the bank's objection that there was no showing of its "'authorization, ratification or condonation'" of the employees' conduct as sufficient to "have alerted" (67 NY2d at 379) the trial court and plaintiff to the need for proof of the involvement of a "superior officer," notwithstanding that counsel did not specifically refer to the "superior officer" issue. Indeed, the Court of Appeals specifically concluded that, under the circumstances presented, "*the failure to request a 'superior officer' charge* cannot be laid at [the bank's] door, or place the issue beyond our review" (*id.* at 379-380 [emphasis added]).

(*id.*) the plaintiff and the trial court to that issue. Here, by a parity of reasoning, the objection defense counsel articulated to the submission of the claim against Farkas, on the specific ground that no evidence had been presented on which liability for 601 Realty's failure to abate the lead condition could be imposed on him as an individual, "should have alerted" plaintiffs and the trial court to the need for evidence that Farkas had personally engaged in affirmative tortious conduct by malfeasance or misfeasance as a predicate for holding him individually liable. While the argument could have been made in the manner preferred by the majority, the key point -- that any liability was that of the corporation, not the corporate officer -- was expressed. Thus, this is not a case in which defense counsel merely voiced "general objections" (*Robillard v Robbins*, 78 NY2d 1105, 1106 [1991]) to the submission of the claim against Farkas to the jury. To paraphrase *Loughry*, "[i]n these circumstances, the failure to request a . . . charge [differentiating between affirmative acts of negligence and negligent failures to act] cannot be laid at [Farkas's] door, or place the issue beyond our review" (*id.* at 379-380).

In seeking to distinguish *Loughry* on the ground that "a sufficient objection" was raised in that case, the majority begs the question of what standard is used to determine whether an objection was "sufficient." *Loughry*, to reiterate, clarifies

that the standard for a "sufficient" objection is one that, even if not articulated with the precision of a legal treatise, "should have alerted" (67 NY2d at 379) the court and opposing counsel to the issue sought to be reviewed. The majority also seeks to distinguish *Loughry* on the additional ground that (as the majority would have it) the bank was excepting to the punitive damages charge, rather than moving to dismiss a claim (as Farkas did here). Contrary to the majority's reading of the case, however, the bank's motion in *Loughry* was addressed, not to the contents of the charge, but to whether the claim for punitive damages against the bank should have been submitted to the jury at all (*see id.* ["defense counsel . . . protested that there was *no basis for punitive damages against the bank*" on the ground, inter alia, that "'there's *nothing showing sufficient proof* of authorization, ratification or condonation of the (defamatory) acts'"] [emphasis added]). In any event, even if (as the majority claims) the bank in *Loughry* was excepting to the charge rather than seeking dismissal of the claim, the majority adduces no reason, and cites no authority, for holding a motion to dismiss to a standard of sufficiency higher than the standard applied to an exception to a charge.

Relatedly, the majority, making another point plaintiffs themselves have not made, argues that an additional ground for deeming the argument for dismissal of the claim against Farkas

unpreserved, notwithstanding his motions to dismiss at trial, is his subsequent failure to object to the form of the court's negligence instruction. However, the law is that "the failure of the defendant to except to the charge of the [trial] court is neither binding nor controlling on [an appellate] court [where] the action should have been dismissed on the motion made at the end of the plaintiff's case and renewed at the close of all of the evidence" (*Greelish v New York Cent. R.R. Co.*, 29 AD2d 159, 161 [1968], *affd* 23 NY2d 903 [1969] [reversing a judgment upon a jury verdict in a negligence action and dismissing the complaint, where defendant, although it failed to except to the jury charge, had moved for a trial order of dismissal, and the evidence established plaintiff's contributory negligence, which was then an absolute bar to recovery, as a matter of law]; *see also Gallagher v Citizens Water Works of Town of Highlands*, 278 App Div 792, 792-793 [1951], *affd* 303 NY 805 [1952] ["The question as to the sufficiency of the proof of negligence, presented by defendant's motions to dismiss the complaint and for a directed verdict, made at the close of the case, survived the court's charge; and, under the circumstances, the portions of the charge to which no exceptions were taken by defendant may not be considered as establishing the law of the case"]; 4 NY Jur 2d, Appellate Review § 612, at 565 n 5; 8A Carmody-Waite 2d § 57:53, at 65 n 2; 10 Carmody-Waite 2d § 70:102, at 310 n 6; 1 Newman,

New York Appellate Practice § 2.05[6], at 2-72 to 2-73 n 107 [2008]).

In the present case, by the time the jury was instructed, Farkas, like the defendant in *Greelish*, had already twice moved to dismiss the claim against him on the ground of insufficient evidence, first requesting dismissal "at the end of the plaintiff's case and [then] renew[ing] [the motion] at the close of all of the evidence" (29 AD2d at 161). By moving to dismiss the claim against him before the case was submitted to the jury, Farkas effectively objected to all of the court's subsequent instructions *as applied to him*, inasmuch as he argued that the claim against him should not be submitted to the jury at all. Any failure by Farkas to object to the particular *instructions* the jury received on the claim against him did not retroactively nullify the objection he had already interposed to the *submission* of that claim to the jury, and the majority cites no authority supporting the proposition that it did. Contrary to the argument the majority makes on plaintiff's behalf, Farkas's motions to dismiss the claim against him were, in effect, objections in advance to the portion of the charge that submitted the claim against him to the jury, which is, for purposes of this appeal, "the relevant portion of the charge" (to use the majority's

phrase).[5]

By the majority's own admission, none of the appellate decisions cited in support of its argument based on the failure to object to the jury charge is inconsistent with *Greelish* or *Gallagher*. Essentially, the majority concedes that *Greelish and Gallagher* establish that a party, having timely but unsuccessfully moved to dismiss a claim before its submission to the jury, does not thereafter forfeit the right to appellate review of the denial of the dismissal motion by failing to object to the charge given on the claim, a proposition entirely consistent with CPLR 4110-b. While the majority seeks to distinguish *Greelish* and *Gallagher* from this case on the ground that "nothing in either decision suggests that the motions to dismiss [in *Greelish* and *Gallagher*] did not raise the same specific objection that the defendant pressed on appeal," this argument is not persuasive. As previously discussed, Farkas's motions to dismiss in this case did raise the same specific objection that he presses on appeal, namely, the lack of any

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[5]If, as the majority says, "what is required is a sufficient objection to the charge that assists the trial judge in clarifying or distilling the legal issues in the charge," Farkas met this standard. For purposes of this appeal, the key legal issue in the charge was whether the court should submit to the jury any claim at all against Farkas as an individual. Farkas sufficiently "clarif[ied]" and "distill[ed]" that issue by moving, before the submission of the case to the jury, to dismiss the claim against himself on the ground that plaintiffs' causes of action, if any, lay against the corporation only.

evidentiary basis for holding him personally liable for a corporate tort.

The majority takes the position that Farkas's failure to object to the charge precludes our reviewing the sufficiency of the evidence against him under any standard other than that set forth in the trial court's erroneous charge to the jury. Nonetheless, the majority, recognizing that the error in the charge was fundamental, vacates the judgment against Farkas and remands for a new trial as to his liability, to be determined under the correct legal standard. I agree, of course, that the trial court committed fundamental error in charging the jury as it did, but the majority's action raises several questions. First, if the error in the charge was fundamental, was not the error in denying the motions to dismiss also fundamental? If so, would it not be equally appropriate to dismiss the complaint as against Farkas on the ground of fundamental error in the denial of his motions to dismiss, even if he technically failed to preserve his argument regarding the legal sufficiency of the evidence against him?[6] Further, as I previously suggested, if

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[6]The majority does not cite any case holding that the Appellate Division, in reversing a judgment based on fundamental error, has no power to dismiss a claim that lacks legally sufficient support in the trial record, even where the proponent of the claim has had an opportunity to present all available evidence supporting it and gives no indication that any additional evidence in support of the claim would be forthcoming at a new trial.

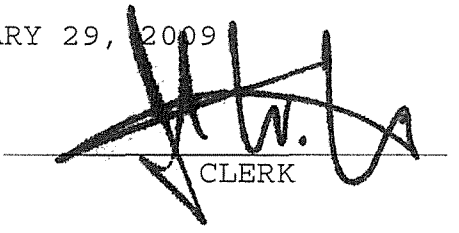
the principles governing when a corporate officer may be held personally liable for a corporate tort are fundamental to this case (as the majority and I agree they are), does it not follow that Farkas's motions to dismiss, by focusing on the distinction between the corporation and the individual, "should have alerted" (*Loughry*, 67 NY2d at 379) the trial court and plaintiffs' counsel to those fundamental principles, thereby preserving the issue for appellate review as a matter of law? And, to reiterate, plaintiffs, who have already had an opportunity to make their case against both 601 Realty and Farkas at the prior trial, give no indication that they have any additional evidence that could support a verdict imposing liability on Farkas as an individual. Indeed, even the majority "think[s] it unlikely that plaintiffs could have responded to a [more] specific objection by offering additional evidence against Jeffrey Farkas that would have established a proper basis for holding him personally liable." This being the case, what purpose is served by ordering a new trial?

To recapitulate, the record reflects that Farkas denied any personal liability in his answer and at trial, a position he again maintains on appeal. In response, plaintiffs contend that there is evidence supporting imposition of personal liability, a contention so lacking in merit that the majority does not even address it. The majority nevertheless declines to dismiss the

claim against Farkas, contrary to the dictates of the substantive law (as to which the majority and I are in agreement), and not for any reason ever mentioned by plaintiffs, but instead based on the newly minted theory that the issue is not preserved. The lack of preservation is said to consist in Farkas's failure to state that the matters complained of were entirely instances of nonfeasance, and his failure to request a charge that he could be held liable only for personally participating in affirmative acts of misfeasance and malfeasance. It is patently unfair, however, to recast this appeal as turning on a preservation theory never even hinted at by plaintiffs, where (as the majority concedes) there is no evidence to support holding Farkas personally liable under established legal principles, and there is no suggestion by plaintiffs that they would have offered any additional evidence even if Farkas had phrased the objection in the precise manner the majority says was required. Accordingly, as the record shows that plaintiffs failed to make out a prima facie case against Farkas individually and that Farkas preserved this issue at trial, I would modify the judgment to dismiss the complaint as against him.

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

ENTERED: JANUARY 29, 2009



CLERK

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

4583-
4583A Century Indemnity Company, Index 603405/01
Plaintiff-Appellant, 403087/02

-against-

Brooklyn Union Gas Company,
Defendant-Respondent,

Keyspan Corporation, et al.,
Defendants.

- - - - - -

Brooklyn Union Gas Company,
Plaintiff-Respondent,

-against-

Century Indemnity Company,
Defendant-Appellant,

American Home Assurance Company, et al.,
Defendants.

Boutin & Altieri, P.L.L.C., Fairfield, CT (John L. Altieri, Jr. of counsel), for appellant.

Dickstein Shapiro LLP, Washington, DC (David L. Elkind of counsel), for respondent.

Orders, Supreme Court, New York County (Michael D. Stallman, J.), entered May 21, 2007 and November 5, 2007, which denied Century Indemnity Company's motions for summary judgment and for renewal, respectively, unanimously affirmed, with costs.

These are actions to determine the validity of an excess insurer's disclaimer of coverage for contamination remediation and related costs based on the lack of timely notice of an occurrence. The court correctly found an issue of fact whether

the insured's duty to give notice had arisen before the City of New York advised the insured in January 1993 that it intended to bring a federal environmental action with respect to one of the insured's sites. Unlike policies that require notice if an occurrence "may result" in a claim, where the duty arises when the insured can "glean a reasonable possibility of the policy's involvement" (*see Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [2002]; *see also Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 338 [2005]), the subject policies require notice if an occurrence - in this instance, hazardous waste contamination - is "reasonably likely" to implicate the excess coverage. Giving the insured the benefit of the inferences as opponent of the motion, it cannot be determined as a matter of law that the insured's duty to provide notice had arisen from its knowledge of consultant reports, which were not definitive as to the extent of the contamination, the degree of remediation needed or the actual rather than the generalized projected remediation costs, and regulatory agency involvement that did not mandate any significant action (*see Reynolds Metals Co. v Aetna Cas. & Sur. Co.*, 259 AD2d 195, 203-204 [1999]).

Contrary to Century's contention, the insured did not elect coverage provided by Associated Electric & Gas Insurance Services (AEGIS) by exclusively notifying that carrier, by letter of June 2001, of the potential for regulatory action. The coverage and

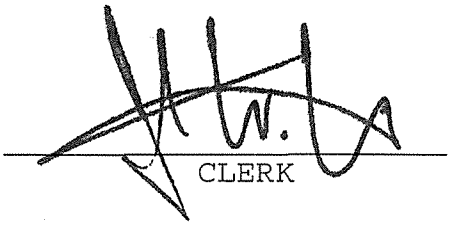
notice provisions of the respective insurers' policies differ materially (*cf. Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336, 341 [1986]). Particularly, the excess liability coverage provided by AEGIS is afforded under a claims-first-made policy and extends only to an occurrence of which the company is given notice of the circumstances. The insured's letter to AEGIS expressly states that no claim is presently being made under the policy but, rather, that the communication is intended to give the carrier "NOTICE OF CIRCUMSTANCES," as the contract of insurance requires. Nor did the court improperly shift the burden of showing pro rata allocation to the insurer since the issue is notice with respect to undetermined costs, not reimbursement for known costs (*cf. Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208 [2002]).

While the court had discretion to allow renewal even if the "newly discovered" evidence was previously available (*see Mejia v Nanni*, 307 AD2d 870 [2003]), it properly recognized that such relief is not a remedy for a litigant's strategic choices.

We have considered Century's other contentions and find them unavailing.

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

ENTERED: JANUARY 29, 2009



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 29, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
Eugene Nardelli
John T. Buckley
Helen E. Freedman, Justices.

Gerald Salustri,
Plaintiff-Appellant-Respondent,

-against-

Ahearn Holtzman, Inc., etc.,
Defendant-Respondent-Appellant,

The Wildlife Conservation Society, etc., Index 49252/02
Defendant.
- - - - - 4675-
Ahearn Holtzman, Inc., etc., 4676
Third-Party Plaintiff-Respondent-Appellant,

-against-

R.J. Bruno Roofing, Inc.,
Third-Party Defendant-Respondent.

Cross appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about July 9, 2007,

And said appeal 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 November 25, 2008 and December 2, 2008,

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

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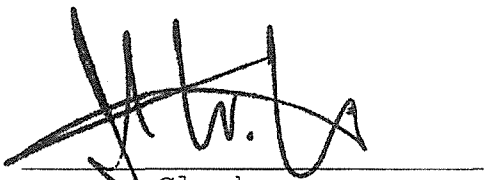

Clerk.

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4710N In re Probate Proceeding in the Estate of Boris Lurie, Deceased.

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Daniel Z. Rapoport, Petitioner-Appellant, Index 666/08

Richard Nadelman, et al., Petitioners,

-against-

Bank of New York, Respondent-Respondent.

Marino & Chambers, P.C., White Plains (Frank P. Marino and Susan M. Damplo of counsel), for appellant.

Seyfarth & Shaw LLP, New York (William B. Norden of counsel), for respondent.

Order, Surrogate's Court, New York County (Renee R. Roth, S.), entered April 16, 2008, which, insofar as appealed from, denied petitioner-appellant's application for preliminary letters testamentary, and instead granted letters of temporary administration to the Bank of New York, unanimously reversed, on the law, without costs, the letters granted to the Bank of New York vacated, and appellant's application granted.

In a petition dated February 14, 2008, appellant Daniel Z. Rapoport and petitioners Richard Nadelman and Gertrude Stein sought to probate the December 28, 2005 Will of Boris Lurie and requested that preliminary letters testamentary be issued to them. In April 2008, the Surrogate issued an order denying the

requests for preliminary letters testamentary and appointed the Bank of New York as the temporary administrator of the estate. Only Mr. Rapoport appeals here.

Although a Surrogate has discretion to deny preliminary letters even to a nominated executor where process has not yet issued (SCPA 1412[3][a]), in our view there was no viable basis to do so here. There is no reason to suppose that the distant cousin of the testator who remained to be served in this matter will have any information or impact on the administration of the testator's estate, and the question of the validity of the will remains, as always, to be dealt with in the context of the proceeding. The possibility there will be a challenge to the testator's testamentary capacity does not militate in favor of appointing the Bank of New York rather than the nominated executor.

Petitioner was a nominated executor, and as such his petition should have been granted "unless there are serious and bona fide allegations of misconduct or wrongdoing" (*Matter of Mandelbaum*, 7 Misc 3d 539, 541 [2005]). The information presented to the Surrogate does not establish any such ground to deny the petition.

The information contained in the record does not establish that petitioner is unfit by reason of "want of understanding" (*see* SCPA 707[1][e]). Indeed, there is no particular reason to

doubt his qualifications, or the qualifications of those he would employ to assist him in the task of uncovering and handling the decedent's oversees assets and the existence or identity of distributees, any more than there is reason to doubt the qualifications of the Bank of New York employees who will be assigned those tasks.

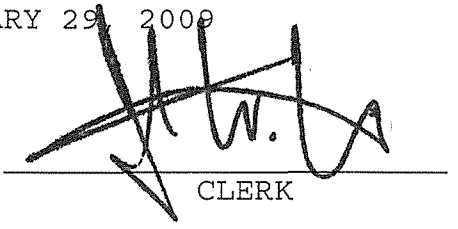
The asserted business relationship between petitioner and the decedent does not constitute such a conflict as could disqualify him as nominated executor (*see Matter of Marsh*, 179 AD2d 578, 580 [1992]; *Matter of Foss*, 282 App Div 509, 513 [1953]). Nor does his inability to present the court with complete information at this time regarding the decedent's $30 million bequest to a purported Liechtenstein foundation cast doubt on the propriety of his nomination as executor.

Finally, the perceived need for a bond, at the estate's expense, did not justify denying petitioner's application for temporary letters. Under SCPA 1412(5) the court may order a bond solely upon a finding of "extraordinary circumstances," while the Surrogate found only "problematic facts underlying the propounded

instrument." Indeed, to the extent that the Surrogate was concerned about Rapoport serving without a bond, she could have appointed the bank as a second temporary administrator.

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

ENTERED: JANUARY 29, 2009



CLERK

Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5123 Justin Mitchell, Index 114876/07
Plaintiff-Appellant,

-against-

FBM, LLC,
Defendant-Respondent.

Gabriel Fischbarg, New York, for appellant.

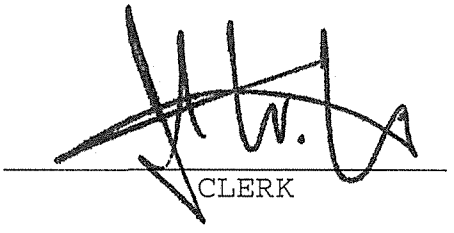
Baram & Kaiser, Garden City (Martin I. Saperstein of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 22, 2008, which denied, with leave to renew, plaintiff's motion for summary judgment on his first cause of action seeking a declaration that defendant is the successor in interest or alter corporate entity to nonparty Fidelity Borrowing, LLC, unanimously affirmed, with costs.

The court correctly found that plaintiff's motion, brought before discovery had begun, was premature.

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

ENTERED: JANUARY 29, 2009



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Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5124 In re Dante B.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for Presentment Agency.

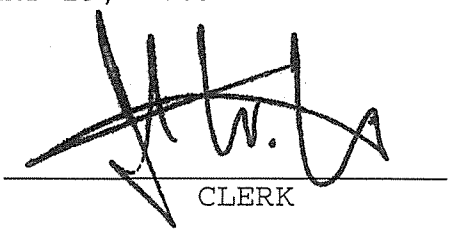
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on January 17, 2008, which adjudicated respondent a juvenile delinquent, upon his admission that he had committed an act which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The arresting officer heard shots fired and then saw defendant in extremely close temporal and spatial proximity to the gunfire. Defendant had a bulge in his waistband suggestive of a firearm, and was making adjustments to that area. These circumstances

clearly provided reasonable suspicion, justifying a patdown of the bulge area (*see People v Sanders*, 235 AD2d 507 [1997], *lv denied* 89 NY2d 1015 [1997]).

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

ENTERED: JANUARY 29, 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 29, 2009.

Present - Hon. David B. Saxe, Justice Presiding
David Friedman
Eugene Nardelli
John W. Sweeny, Jr.
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 5600/99
Respondent,

-against- 5125

Oman Gutierrez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered on or about February 10, 2000,

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

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

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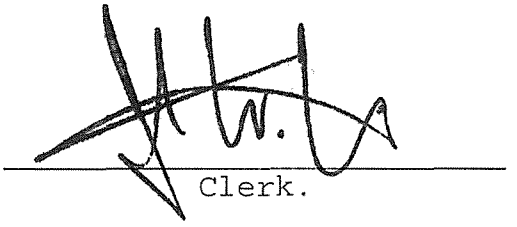


Clerk.

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

Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5126 Mark Mancuso, Index 17381/05
Plaintiff-Respondent,

-against-

J & Velco Co., L.P., et al.,
Defendants-Appellants,

Grandma's Kitchen, et al.,
Defendants.

Wade Clark Mulcahy, New York (Nicole Brown of counsel), for J & Velco Co., L.P., appellant.

White & McSpedon, P.C., New York (Tracey Lyn Jarzombek of counsel), for James Ray and Racine Hocine, appellants.

Daniel P. Buttafuoco & Associates, PLLC, Woodbury (Jason Murphy of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 11, 2007, which, in an action for personal injuries sustained on premises owned by defendant Velco and operated as a restaurant by defendants Ray and Hocine either individually or as principals of defendant East 166 Rest., Inc., denied Velco's motion for summary judgment dismissing the complaint as against it and for summary judgment on its cross claims for contractual indemnification against East 166, Ray and Hocine, and denied Ray and Hocine's cross motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

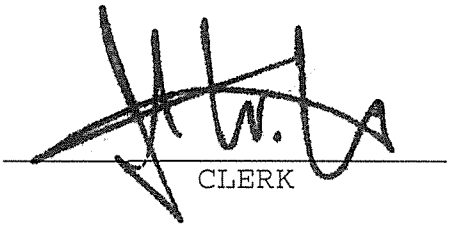
In support of its claim that it is an out-of-possession

landlord with no maintenance or repair obligations, Velco submits an unsigned lease between itself as landlord and defendants Ray and Hocine as tenant. While Ray and Hocine admit that they signed a lease, the latter asserts that he signed only on behalf of East 166, and the former asserts that he does not recognize the unsigned lease proffered by Velco or recall in what capacity he signed the lease that he did sign. Neither East 166's name, nor its d/b/a, Grandma's Kitchen, is noted anywhere on the unsigned lease. These circumstances raise triable issues of fact that preclude summary judgment in favor of Velco, including, with respect to the complaint, whether it agreed to keep the premises in good repair (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]; *Kreimer v Rockefeller Group, Inc.*, 2 AD3d 407,408 [2003]), and, with respect to its cross claims, exactly who its tenants are. The same circumstances also raise triable issues of fact that preclude summary judgment dismissing the complaint as against Ray and Hocine, including whether their alleged principal, defendant East 166, is the lessee of the premises. In this regard, we note that the unsigned lease is dated May 27, 2003, several months prior to the filing of East 166's certificate of incorporation on August 12, 2003. We also

note Ray's testimony that he signed a lease in January or February 2003.

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

ENTERED: JANUARY 29, 2009



CLERK

Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5127 Daniel Gonzalez, Index 100596/07
Plaintiff-Respondent,

-against-

Eugenia Kaye,
Defendant-Appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (O. Andrew F. Wilson of counsel), for appellant.

Scott A. Korenbaum, New York, for respondent.

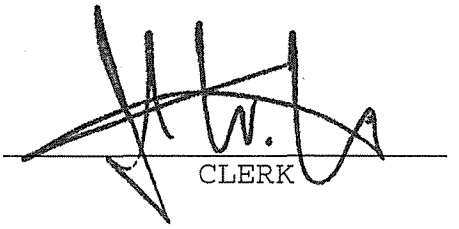
Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 8, 2008, which, inter alia, granted plaintiff's motion to voluntarily discontinue the action, unanimously affirmed, with costs.

Defendant claims no prejudice arising from the discontinuance of the action (*see Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31, 32-33 [2001]). She contends that plaintiff sought the discontinuance to avoid an adverse determination on defendant's motion for summary judgment (*see e.g. Matter of Baltia Air Lines v CIBC Oppenheimer Corp.*, 273 AD2d 55, 57 [2000], *lv denied* 95 NY2d 767 [2000]). However, the record reflects that plaintiff sought a discontinuance on several occasions before defendant made her motion. Moreover, we cannot conclude that defendant would have prevailed on the

motion, since, although she sought summary judgment on the merits, discovery was not complete and no depositions had been taken.

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

ENTERED: JANUARY 29, 2009



Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5128 Eugenia Kaye, Index 116572/07
Plaintiff-Appellant,

-against-

Donald Trump, et al.,
Defendants-Respondents.

Emery Celli Brinckerhoff & Abady LLP, New York (Andrew G. Celli, Jr. of counsel), for appellant.

Phillips Nizer LLP, New York (George Berger of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 9, 2008, which granted defendants' motion to dismiss the complaint and denied plaintiff's application for leave to amend, unanimously affirmed, with costs.

The complaint fails to state a cause of action for intentional infliction of emotional distress. Plaintiff alleges that defendants variously made rude remarks to and about her, commenced two baseless lawsuits and filed a criminal complaint against her, and frightened her and her daughter by attempting to instigate her arrest. This conduct, while not to be condoned, is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983] [internal quotation marks and citation omitted]). Moreover, many

of the alleged statements and actions occurred in the context of adversarial litigation and therefore cannot provide a foundation for the claim *(see Yalkowsky v Century Apts. Assoc.*, 215 AD2d 214, 215 [1995]).

Nor does the complaint state a cause of action for either malicious prosecution or defamation. As to malicious prosecution, plaintiff failed to allege facts that would establish special injury, i.e., "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" *(Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [2005] [internal quotation marks and citation omitted]). Plaintiff alleges conclusorily that she was forced by defendants' "acts" to sell her condominium unit and move from the building; she asserts no facts that would establish that the two civil actions or the filing of a criminal complaint, or the rude remarks, caused her to move. Moreover, since none of the lawsuits brought against her were disposed of on the merits, plaintiff has not sufficiently alleged the requisite lack of probable cause (*see id.*).

As to defamation, the statements allegedly made to or about plaintiff were "[l]oose, figurative or hyperbolic statements, [which] even if deprecating the plaintiff, are not actionable" (*Dillon v City of New York*, 261 AD2d 34, 39 [1999]); the statements made in the complaints in the actions instituted

against plaintiff are absolutely privileged *(see Lacher v Engel*, 33 AD3d 10, 13 [2006]).

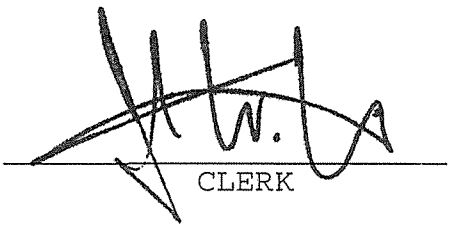
The motion court properly denied plaintiff's application for leave to amend the complaint. Contrary to plaintiff's contention, the nature of the allegations in her complaint and the supporting record do not establish that she has a viable claim.

M-4840 ***Eugenia Kaye v Donald Trump, et al.***

Motion seeking leave to strike portions of appellant's brief and for other related relief denied.

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

ENTERED: JANUARY 29, 2009



CLERK

Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5129-
5130 In re Tamia J., and Another,

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

Lawrence J.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

Patricia W. Jellen, Eastchester, for appellant.

Law Office of Jeremiah Quinlan, Hastings-on-Hudson (Daniel Gartenstein of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Michael D. Scherz of counsel), Law Guardian.

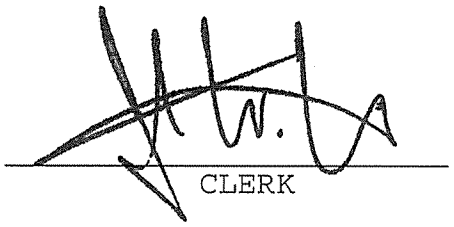
Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about October 17, 2007, which, to the extent appealed from, committed the guardianship and custody of the subject children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

While respondent argues that he is available to care for his children, the finding that adoption is in the children's best interests was supported by a preponderance of the evidence showing that he had not formed a viable plan for them, that the children had been living with their foster mother from a very young age and had bonded with her, and that the foster mother

wished to adopt the children (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: JANUARY 29, 2009



CLERK

Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5137 In re Civil Service Technical Guild, Local 375, AFSCME,
Petitioner-Appellant,

-against-

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

Index 109626/07

Rachel J. Minter, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for The City of New York, respondent.

Steven C. Decosta, Office of Collective Bargaining, New York (John F. Wirenius of counsel), for New York City Office of Collective Bargaining, Board of Collective Bargaining and Marlene A. Gold, respondents.

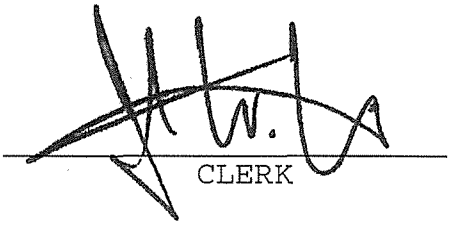
Appeal from order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about August 29, 2007, which denied petitioner labor union's application pursuant to Civil Service Law § 209-a(5) and CPLR article 78 for preliminary injunctive relief enjoining respondent City from implementing a new timekeeping system pending a final determination by respondent Board of Collective Bargaining of improper employer practice charges filed by the union, and granted the City's cross motion to dismiss the petition in its entirety, unanimously dismissed as moot and Supreme Court's order vacated, without costs.

The union effectively concedes that its appeal has been rendered moot by the Board's final decision on the underlying improper practice charges (Civil Service Law § 209-a[5][d]), but

represents in its brief that it "nonetheless assumed the cost of an appeal because of the disproportionate precedential value this erroneous opinion will have." As the City's response to the prospect of a mootness dismissal is simply to defer to our discretion to vacate the underlying order "in order to prevent [it] . . . from spawning any legal consequences or precedent" (*Hearst Corp.*, *id.* at 718), we vacate Supreme Court's order.

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

ENTERED: JANUARY 29, 2009



CLERK

Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5138 The People of the State of New York, Ind. 4387/05
Respondent,

-against-

Larry Mynin,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Mark Dwyer of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered February 20, 2007, convicting defendant, after a jury trial, of gang assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

The crime of second-degree gang assault (Penal Law § 120.06) requires, among other things, that a defendant be "aided by two or more persons actually present." Defendant was jointly tried with three codefendants, each of whom was acquitted of all charges.

The court correctly instructed the jury that in order to convict a defendant of gang assault it was not obligated to convict any other defendants of that crime, and that a person may be "aided by two or more persons actually present" even if those persons lack the mental culpability to be guilty as accomplices

under Penal Law § 20.00 (*see People v Sanchez*, 57 AD3d 1 [2008]). The court's instructions, viewed as a whole, properly distinguished between the concepts of "aiding" and "acting in concert," and were not confusing.

Defendant did not preserve his contention that the verdict finding him guilty of gang assault while acquitting all the codefendants was repugnant (*see People v Stahl*, 53 NY2d 1048, 1050 [1981]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The issue of repugnancy is evaluated solely by reference to the court's charge (*see People v Tucker*, 55 NY2d 1 [1981]), which clearly permitted the mixed verdict at issue. Furthermore, the fact pattern permitted the jury to conclude that the codefendants, who were "actually present" at the scene, "aided" defendant's assault of the victim for purposes of satisfying the gang assault statute, even if the codefendants were not themselves guilty of participating in the assault either as principals or as accomplices. Moreover, the jury could have found that there were multiple participants, while also finding, "however illogically," (*id.* at 8), a lack of proof of the identity of the particular codefendants as being those participants (*see People v Maldonado*, 11 AD3d 114, 118 n [2004], *lv denied* 3 NY3d 758 [2004]).

Defendant's complaints as to the prosecutor's summation are

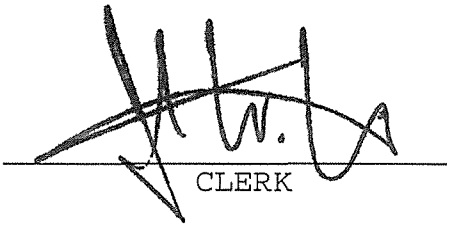
unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We have considered and rejected defendant's ineffective assistance of counsel claims (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 29, 2009



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Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5140-
5140A Louise Robinson, Index 25347/04
Plaintiff-Respondent,

-against-

Cambridge Realty Co., LLC, et al.,
Defendants-Appellants.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellants.

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

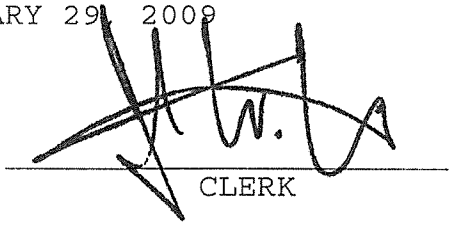
Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered September 25, 2008, upon a jury verdict, awarding plaintiff, inter alia, damages in the principal amount of $350,000 for past pain and suffering and $350,000 for future pain and suffering, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 11, 2008, which denied defendants' motion to set aside or modify the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

No basis exists to disturb the jury's finding that the alleged dangerous condition -- a hole about six inches long, four to five inches wide, and two inches deep located on the sidewalk portion of the driveway leading into the garage near the rear entrance of the apartment building, managed by defendants, in

which plaintiff resides -- was not a trivial defect (*see Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). Defendants' challenge to the jury charge on triviality is not preserved and we decline to review it. Nor should the jury's finding of no comparative negligence be disturbed on the basis of plaintiff's testimony that she had previously traversed the area. Given plaintiff's additional testimony that the accident occurred while it was dark outside in a dimly lit area and that there were many defects in the driveway, and given no evidence that the portion of the sidewalk/driveway with the defect was visible at night, the jury could have found that plaintiff could not have been expected to remember the location of all of the defects on this nine-foot wide sidewalk/driveway. The $350,000 awards for each of past and future pain and suffering are not excessive, where plaintiff suffered a comminuted shoulder fracture, underwent shoulder replacement surgery, was unable to care for herself for several months, and complained of pain from the 2003 accident through the 2008 trial (*cf. Baez v New York City Tr. Auth.*, 15 AD3d 309 [2005]).

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

ENTERED: JANUARY 29, 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 29, 2009.

Present - Hon. David B. Saxe, Justice Presiding
David Friedman
Eugene Nardelli
John W. Sweeny, Jr.
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 11646/91
Respondent,

-against- 5141

Manny Cabassa,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (John Cataldo, J.), rendered on or about June 26, 2006,

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

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

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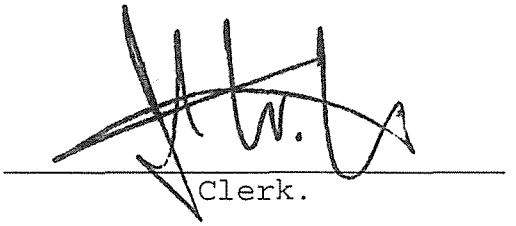


Clerk.

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

Saxe, J.P., Friedman, Nardelli, Sweeny, JJ.

5143N-
5143NA-
5143NB Ruby Emanuel, etc., Index 1437/06
Plaintiff,

-against-

Sheridan Transportation Corp., et al.,
Defendants.
- - - - -
Kenneth Heller,
Appellant,

-against-

Jacoby & Meyers, LLP,
Respondent.

Kenneth Heller, appellant pro se and Susan Harmon, New York, for appellant.

Finkelstein & Partners, L.L.P., Newburgh (Terry D. Horner of counsel), for respondent.

Orders, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about January 26, 2007, March 9, 2007 and April 26, 2007, which, inter alia, held appellant, plaintiff's former attorney, in contempt for failing to turn over his file to plaintiff's successor attorney, authorized the seizure of the subject file, and sentenced appellant to 30 days in prison and a $10,000 fine, unanimously affirmed, with costs.

The finding of contempt and subsequent punishment and seizure order were warranted by appellant's disobedience of successive court orders unequivocally directing him to turn over

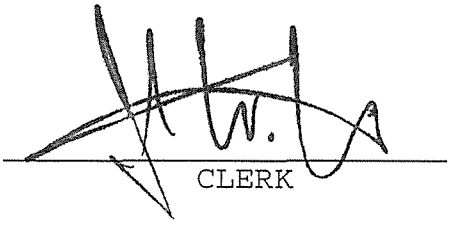
his file to plaintiff's new attorney and the resulting prejudice to plaintiff's right to a new trial in this action for maritime wrongful death (10 AD3d 46 [2004]; Judiciary Law § 753[A][1]; *see Matter of McCain v Dinkins*, 84 NY2d 216, 226 [1994]). We note that motions by appellant asserting a retaining lien and seeking payment of his fee and disbursements prior to his turning over the file were denied in orders that were not challenged in a timely and proper manner and constitute law of the case. We have considered and rejected appellant's other arguments.

M-6073 ***Emanuel, etc. v Sheridan Transportation Corp., et al.***

Motion seeking leave to adjourn appeal and enlarge record denied.

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

ENTERED: JANUARY 29, 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 29, 2009.

Present - Hon. David B. Saxe, Justice Presiding
David Friedman
Eugene Nardelli
John W. Sweeny, Jr.
Leland G. DeGrasse, Justices.

In re Jose Figueroa,
Petitioner,

Ind. 9167/96

5145
[M-5826]

-against-

Hon. John Byrne, etc.,
Respondent.

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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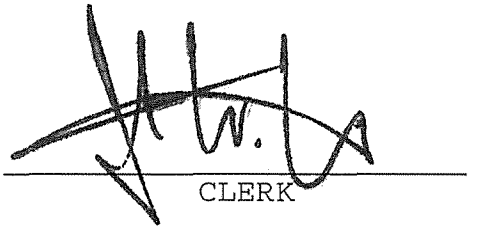

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
John T. Buckley
James M. Catterson
Rolando T. Acosta, JJ.

3423
Ind. 406350/07

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

-against-

330 Continental LLC, et al.,
Defendants-Appellants.

Defendants appeal from an order of the Supreme Court, New York County (Michael D. Stallman, J.), entered November 1, 2007, which, insofar as appealed from, as limited by the briefs, granted plaintiffs' motion for a preliminary injunction to the extent of enjoining defendants, pending final determination of this action, (1) from making any new reservations for transient occupancy of units in the three buildings located in Manhattan and (2) as of January 8, 2008, from using or occupying or permitting the use or occupancy of any of the units of such buildings for transient use and/or as transient hotels and hostels, other than units so occupied on that date, and denied defendants' cross motion to dismiss the first, second and fourth causes of action in the verified complaint.

Loeb & Loeb LLP, New York (David M. Satnick and Helen Gavaris of counsel), and Cozen O'Connor, New York (Menachem J. Kastner of counsel), for 330 Continental LLC, Lee Sam LLC, Belt LLC, RB Estates LLC, 316 Pennington LLC, Parkway LLC, Fitos Neophytou, Sharon Olsen, George Dfouni, 330-336 West 95th Street, 315 West 94th Street, 316 West 95th Street, "John Doe" and "Jane Doe," appellants.

Herrick, Feinstein LLP, New York (Scott E. Mollen and John P. Sheridan of counsel), and Miller and Barondess, LLP, Los Angeles, CA (Robert H. Freilich of counsel), for 315 Montroyal LLC, appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner, Barry P. Schwartz, Deborah Rand and Mary O'Sullivan of counsel), for respondent.

FRIEDMAN, J.

For the better part of a century, some of the units in three single room occupancy apartment hotels on the Upper West Side of Manhattan have been rented out as short-term accommodations for tourists and others temporarily staying in the City of New York. This appeal requires us to consider how this practice is affected by the complex web of rules formed by the City's zoning resolutions dating back to 1916, the Multiple Dwelling Law, and the City's Administrative Code. The City is seeking to put an end to the rental of rooms in the subject buildings for short-term occupancy, arguing that the use of any portion of the buildings for this purpose violates current zoning restrictions and the buildings' certificates of occupancy. We conclude that the City has not demonstrated an entitlement to a preliminary injunction stopping this activity.

The three subject buildings are seven-story single room occupancy (SRO) apartment hotels (*see* Multiple Dwelling Law [MDL] § 4[16] [defining "single room occupancy"]). The Continental, located at 330 West 95th Street, has 207 SRO units; the Montroyal, located at 315 West 94th Street, has 200 SRO units; and the Pennington, located at 316 West 95th Street, has 184 SRO units. The record reflects that, in each of the three buildings, certain SRO units are rented to tenants for permanent occupancy,

and other SRO units are rented to tourists on a short-term basis. Defendants, the owners and managers of the buildings, advertise the buildings as offering short-term accommodations to tourists on travel-oriented Web sites such as Orbitz.com, Expedia.com, Hotels.com and Yahoo Travel.

The record establishes that the rental of units within the buildings for short-term, nonpermanent occupancy is a practice with a long history, dating back to the 1940s, if not earlier. The longstanding practice of renting rooms in the buildings for short-term occupancy, including to overnight lodgers, is documented by such contemporaneous evidence in the record as the daily registers that were maintained for the buildings for the years 1941, 1945, 1948 and 1950, and by the buildings' listings and advertisements in the Manhattan "Yellow Pages" during the same time period.

The buildings are situated in an area designated by the City's Zoning Resolution of 1961, as amended (the ZR), as an R8 general residence district (*see* City of New York Zoning Map 5d, incorporated by ZR § 11-14). Each building's certificate of occupancy provides, either expressly or by implication, that the building is a class A multiple dwelling.[1] A class A multiple

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[1]The Continental and the Montroyal each has a certificate of occupancy describing it as a class A multiple dwelling. While

dwelling is defined by the MDL as "a multiple dwelling which is occupied, as a rule, for permanent residence purposes" (MDL § 4[8][a]; *see also* MDL § 4[16] ["When a class A multiple dwelling is used wholly or in part for single room occupancy, it remains a class A multiple dwelling"]; *compare* MDL § 4[9] [defining a class B multiple dwelling as one "which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals"]).

Plaintiffs (the City, its Department of Buildings and its Department of Housing Preservation and Development [collectively, the City]) brought this action seeking, inter alia, to enjoin defendants from renting any units within the buildings for periods of less than 30 days. The City refers to occupancies of less than 30 days as "transient occupancy," a phrase that apparently is not defined in any statute, ordinance, resolution, regulation, advisory opinion or administrative notice. The City argues that the rental of units within the buildings for "transient occupancy" (i.e., occupancy of less than 30 days) violates the ZR. Under the ZR, "apartment hotels" (defined as

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the Pennington's certificate of occupancy describes it as a "New Law Tenement Single Room Occupancy," without specifying the building's class, MDL § 4(8)(a) provides that "tenements" are included within the category of class A multiple dwellings. In any event, defendants do not dispute that all three buildings are class A multiple dwellings.

buildings in which "the dwelling units or rooming units are used primarily for permanent occupancy" [ZR § 12-10]) are permitted within a general residence district, but "transient hotels" (defined as buildings in which "living or sleeping accommodations are used primarily for transient occupancy, and may be rented on a daily basis" [*id.*]) are not.[2] The City also argues that the rental of units within each of the buildings for "transient occupancy" (again, as defined by the City) violates that building's status as a class A multiple dwelling under its certificate of occupancy, in that, as previously noted, a class A multiple dwelling is defined by statute as "a multiple dwelling which is occupied, as a rule, for permanent residence purposes" (MDL § 4[8][a]).

Contending that a violation of the ZR or of a building's certificate of occupancy constitutes a public nuisance (*see* Administrative Code of City of NY [hereinafter, Administrative Code] § 7-703[d], [k]; *see also City of New York v Bilynn Realty Corp.*, 118 AD2d 511, 513 [1986]), the City moved for a preliminary injunction (*see* Administrative Code § 7-707) against, inter alia, rental of any units in the subject buildings for

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[2]*See* ZR § 22-00 (permitting Use Groups 1, 2, 3, and 4 in general residence districts); ZR § 22-12 (providing that apartment hotels are within Use Group 2); ZR § 32-14 (providing that transient hotels are within Use Group 5).

periods of less than 30 days, and for appointment of a temporary receiver. Defendants opposed the City's motion and cross moved to dismiss the first, second and fourth causes of action pleaded in the City's complaint, which are predicated on the contention that it is unlawful to rent any unit within the buildings for a period of less than 30 days. The motion court granted the City the requested preliminary injunction, denied the motion for appointment of a temporary receiver, and denied defendants' cross motion to dismiss (18 Misc 3d 381 [2007]). On defendants' appeal, we modify the motion court's order (enforcement of which was stayed pending appeal by order of this Court entered December 6, 2007) to deny the preliminary injunctive relief challenged by defendants.[3]

To be entitled to a preliminary injunction, the City was required to demonstrate a likelihood of ultimate success on the merits, irreparable injury in the absence of provisional relief, and a balancing of the equities in its favor (*see City of New York v Love Shack*, 286 AD2d 240, 242 [2001], citing *W.T. Grant Co. v Srogi*, 52 NY2d 496 [1981]). Although, as the motion court

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[3]Defendants' briefs do not address the portions of the motion court's order that preliminarily enjoined them from altering the buildings "unless and until" the City has issued them a Certificate of No Harassment and a permit for such work; accordingly, we do not disturb those portions of the order.

correctly observed, irreparable injury is presumed from the continuing existence of an unremedied public nuisance (*see Love Shack*, 286 AD2d at 242 ["the irreparable injury is based upon the harm to the general public if the nuisance is not immediately abated"]; *see also Bilynn Realty*, 118 AD2d at 512-513), here the City failed to demonstrate a likelihood that it will ultimately succeed in proving that defendants' rental of some units within each of the buildings for periods of less than 30 days constitutes a violation either of the ZR or of the certificate of occupancy and, as such, a public nuisance.[4] This is because, even if it is assumed that an occupancy of less than 30 days is "transient" for purposes of the MDL and the ZR, the City failed to demonstrate that *most* of the units in any of the buildings are rented for such short-term occupancy. As explained below, the rental of a minority of a building's units for nonpermanent occupancy would violate neither the ZR nor the certificate of occupancy.

There is no requirement under either the ZR or the certificates of occupancy that the subject buildings be used exclusively for permanent occupancy. To reiterate, the ZR

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[4]The City failed to establish the requisite likelihood of ultimate success on the merits whether the standard of proof is a preponderance of the evidence or clear and convincing evidence.

permits "apartment hotels" (such as the buildings in question) in general residential districts, and the ZR defines an "apartment hotel" as a building whose units "are used *primarily* for permanent occupancy" (ZR § 12-10 [emphasis added]).[5] The use of the word "primarily" in the ZR's definition of "apartment hotel" indicates that a *secondary* use of a building, other than "permanent occupancy," is consistent with the status of an "apartment hotel."[6] As to the certificates of occupancy, which designate the buildings as class A multiple dwellings, MDL § 4(8)(a) requires that a class A multiple dwelling be "occupied, *as a rule*, for permanent residence purposes" (emphasis added). Here again, the statute's use of the phrase "as a rule" indicates that a secondary use of the building, different from the specified primary use, is permitted.[7] Thus, when the relevant

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[5]Conversely, as previously noted, the ZR defines a "transient hotel" as a building whose units "are used *primarily* for transient occupancy" (ZR § 12-10 [emphasis added]).

[6]*See* American Heritage Dictionary 1393 (4th ed 2000) (defining "primarily" in pertinent part to mean "[c]hiefly; mainly"); New Oxford American Dictionary 1345 (2d ed 2005) (defining "primarily" to mean "for the most part; mainly"); Random House Webster's Unabridged Dictionary 1537 (2d ed 2001) (defining "primarily" in pertinent part to mean "essentially; mostly; chiefly; principally"); Webster's Third New International Dictionary 1800 (2002) (defining "primarily" in pertinent part to mean "first of all: FUNDAMENTALLY, PRINCIPALLY").

[7]*See* American Heritage Dictionary 1522 (defining "as a rule" to mean "[i]n general; for the most part"); New Oxford American

provisions of the MDL and the ZR are interpreted in accordance with "the obvious and fundamental rule of construction that words of common usage are to be given their ordinary meaning" (*Matter of Manhattan Pizza Hut v New York State Human Rights Appeal Bd.*, 51 NY2d 506, 511 [1980]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes §§ 94, 232), it follows that no violation either of the ZR or of the certificate of occupancy would result from the use of a minority of the units in one of the buildings for nonpermanent or transient occupancy.[8]

While the City's evidence demonstrates -- indeed, defendants readily admit -- that a significant number of units in each building are (and have been for many decades) rented to tourists for periods of less than 30 days, the City made no showing that

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Dictionary 1482 (defining "as a rule" to mean "usually, but not always"); Random House Webster's Unabridged Dictionary 1680 (defining "as a rule" to mean "generally; usually"); Webster's Third New International Dictionary 1986 (defining "as a rule" to mean "as a general thing: ORDINARILY, USUALLY").

[8]That it is permissible under the MDL to rent some units of a class A SRO for short-term occupancy is also evidenced by MDL § 248(16), which makes it "unlawful to rent any room in any such [SRO] dwelling for a period of less than a week," thereby implying that rentals of a week or more are lawful. Further evidence that it is permissible to rent some units of a class A SRO for short-term occupancy is furnished by MDL § 248(17), which provides that "[i]n each such [SRO] dwelling a register shall be kept, which shall show the name, signature, residence, date of arrival and date of departure of each occupant and the room occupied by him."

most of the units in any of the buildings are rented for such short-term occupancy. In fact, the City made no effort at all to quantify the proportion of each building's units that defendants rent for short-term occupancy.[9] As the party moving for a preliminary injunction, the City, not defendants, had the burden of showing that the buildings were not being "used primarily for permanent occupancy" (ZR § 12-10) or were not "occupied, as a rule, for permanent residence purposes" (MDL § 4[8][a]) for the purpose of demonstrating a likelihood that a public nuisance would ultimately be proven. The City simply failed to carry this burden.

The motion court understood that the qualifying language of MDL § 4(8)(a) ("as a rule") and ZR § 12-10 ("primarily") indicates that there is no absolute prohibition on transient occupancy in class A apartment hotels. We see no support, however, for the motion court's view that this qualifying language permits only "minimal" transient use of the subject buildings but not the use of "a significant portion of each of the buildings . . . for transient occupancy" (18 Misc 3d at 393).

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[9]Although such evidence was not before the motion court, we note that defendants, in support of their motion for a stay of the order appealed from, have submitted an affidavit indicating that, on average, no more than 30% of the units in the buildings are rented out for short-term occupancy.

Under the plain meaning of the MDL and the ZR, the use of a significant portion of a class A apartment hotel for transient occupancy (however defined) is permissible so long as it remains true that the building is "occupied, as a rule, for permanent residence purposes" (MDL § 4[8][a]) and that the building is "used primarily for permanent occupancy" (ZR § 12-10). The City is not entitled to the challenged preliminary injunction because it failed to demonstrate a likelihood that it ultimately will succeed in proving that the foregoing statements are *not* true of the three buildings at issue.

In reversing the grant of the preliminary injunction, we are also influenced by the vagueness and ambiguity of the relevant language of the MDL and the ZR, language that the City's arguments do little to clarify. In particular, as previously noted, the words "transient" and "permanent" are not defined in either the MDL or the ZR. Thus, even if all "transient" occupancy of the subject buildings were unlawful (as the City claims), it would not be clear where an injunction should draw the line between permitted and proscribed occupancies.[10]

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[10]While MDL § 248(16) makes it unlawful to rent an SRO unit "for a period of less than a week," the City does not ask, even in the alternative, that defendants be enjoined from renting units in the subject buildings for periods of less than one week. Since this remedy is not requested, we do not address whether the City would be entitled to it, either provisionally or as ultimate relief.

Although the City asserts that any occupancy of less than 30 days should be deemed "transient" and enjoined as such, it identifies nothing in the MDL or the ZR that supports this position. Instead, the City relies on the following assertion in the affidavit of James P. Colgate, an Executive Architect employed by plaintiff Department of Buildings (DOB):

> "DOB has, for almost forty years, consistently interpreted transient or the Class B occupancy requirements of the [MDL] to allow for occupancies of less than 30 days' duration, and permanent or Class A occupancy requirements to allow for occupancies of 30 days or longer" (footnotes omitted).

The only support Mr. Colgate offered for this statement were two sections of the City's Building Code (adopted in 1968) that define, respectively, residential occupancy group J-1 as buildings "primarily occupied . . . [by] individuals on a day-to-day or week-to-week basis" (Administrative Code § 27-264) and residential occupancy group J-2 as buildings "with three or more dwelling units that are primarily occupied . . . [by] individuals on a month-to-month or longer-term basis" (Administrative Code § 27-265). The City, however, does not identify any indication that the above-cited Building Code sections either implement or interpret the MDL or the ZR. Thus, contrary to the motion court's view (18 Misc 3d at 391 n 5), the cited Building Code sections (which, as legislative enactments, were not promulgated by DOB) are of no assistance in interpreting the words

"transient" and "permanent" as used in the MDL and ZR, and the City does not identify any other legal authority (whether legislative, administrative or judicial) that might provide such assistance.

Additional uncertainty is created by the phrase "as a rule" in the MDL's definition of a class A multiple dwelling (MDL § 4[8][a]) and by the word "primarily" in the ZR's definition of an apartment hotel (ZR § 12-10). The City points to nothing that would assist us in determining at what point the proportion of the units of a class A multiple dwelling rented to permanent residents becomes large enough for the building to be deemed to be "occupied, *as a rule*, for permanent residence purposes" (MDL § 4[8][a] [emphasis added]). Nor does the City direct our attention to any authority that would provide guidance in determining the minimum proportion of an apartment hotel's units that must be rented to permanent occupants for the building to be deemed to be used "primarily" for that purpose.

In view of the as-yet unresolved vagueness and ambiguity of the language of the MDL and the ZR that the City seeks to enforce, it cannot be said that the City has demonstrated a clear

right to the drastic remedy of a preliminary injunction (*see e.g. Peterson v Corbin*, 275 AD2d 35, 37 [2000], *appeal dismissed* 95 NY2d 919 [2000] [preliminary injunction is a drastic remedy that should not be granted unless the movant establishes a clear right to such relief]; *see also City of New York v Les Hommes*, 94 NY2d 267, 273 [1999] [a zoning restriction should be "construed in favor of the property owner and against the municipality which adopted and seeks to enforce it"]; *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 421 [1996] ["zoning restrictions, being in derogation of common-law property rights, should be strictly construed and any ambiguity resolved in favor of the property owner"], citing *Matter of Allen v Adami*, 39 NY2d 275, 277 [1976]). On this ground, as well, the granting of the City's preliminary injunction motion was, at a minimum, premature.

Defendants also argue that, even if the rental of some units in the subject buildings for transient occupancy is contrary to the current ZR, this kind of use was permitted, before the 1961 adoption of the current ZR, under the previously effective Zoning Resolution of 1916, as amended (the 1916 ZR), and therefore remains a lawful "nonconforming use" by operation of ZR § 52-11,

the current ZR's "grandfathering" provision.[11] The City concedes that all hotels (including what the current ZR terms "transient hotels") were permitted in residential districts under the 1916 ZR. The City argues, however, that transient occupancy of the subject buildings is not grandfathered under the current ZR because, even before the current ZR was adopted, the certificates of occupancy designated the buildings as class A multiple dwellings, which (in the City's view) rendered transient occupancy unlawful.[12] The parties' dispute over the applicability of the grandfathering provision is rendered academic by our finding that, without regard to the pre-1961 use of the buildings, the City has not demonstrated a likelihood that it will succeed in proving a violation of the current ZR.[13]

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[11]In substance, ZR § 52-11 permits the continuation of a "non-conforming use" (defined in ZR § 12-10), notwithstanding the inconsistency of that use with the current ZR, if the use lawfully existed before the adoption of the current ZR. The benefit of ZR § 52-11 is lost if the use in question has been discontinued for two years or more (ZR § 52-61).

[12]In this regard, we note that the statutory language defining a class A multiple dwelling as one "occupied, as a rule, for permanent residence purposes" (MDL § 4[8][a]) was originally enacted by L 1946, ch 950, about 15 years before the adoption of the current ZR in 1961.

[13]For the same reason, we need not determine the effect, if any, of the "I-Cards" recording the City's pre-1961 inspections of the buildings. These I-Cards, insofar as they describe certain apartments in the buildings as "Class B" units, reflect that the City was aware that such units were being used for

Still, we note that the City's argument against the application of the grandfathering provision (which the motion court accepted [18 Misc 3d at 391-392]) is predicated on the theory that a secondary use of the buildings for transient occupancy is inconsistent with the buildings' status as class A multiple dwellings. That theory, as we have already explained, is erroneous.

Finally, we affirm the order appealed from insofar as it denied defendants' pre-answer cross motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss the City's first, second and fourth causes of action. Like the preliminary injunction motion, these causes of action are predicated on the contention that defendants' rental of units in the buildings for transient occupancy violates the ZR and the certificates of occupancy. While the City failed to establish an entitlement to a preliminary injunction against such use of the buildings, it cannot be said, as a matter of law, that there is no state of facts the City could prove that would establish a right to ultimate relief based on the challenged causes of action. In other words, these claims, as pleaded, state causes of action

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transient occupancy, consistent with the statutory definition of a class B multiple dwelling (*see* MDL § 4[9], enacted by L 1946, ch 950]).

based on the alleged failure to use the buildings "primarily" (ZR § 12-10) or "as a rule" (MDL § 4[8][a]) for permanent occupancy. Further, the documentary evidence in the record does not establish, as a matter of law, that the City will be unable to prevail on the first, second and fourth causes of action. Accordingly, while we recognize that the City may face a daunting burden, the determination of whether it is entitled to any relief on those claims must await further proceedings.

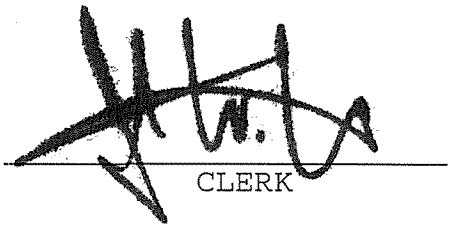
Accordingly, the order of the Supreme Court, New York County (Michael D. Stallman, J.), entered November 1, 2007, which, insofar as appealed from, as limited by the briefs, granted plaintiffs' motion for a preliminary injunction to the extent of enjoining defendants, pending final determination of this action, (1) from making any new reservations for transient occupancy ("transient" being defined as less than 30 days) of units in the three buildings located in Manhattan at, respectively, 315 West 94th Street (the Montroyal), 316 West 95th Street (the Pennington) and 330 West 95th Street (the Continental) and (2), as of January 8, 2008, from using or occupying or permitting the use or occupancy of any of the units of such buildings for transient use and/or as transient hotels and hostels, other than units so occupied on that date, and denied defendants' cross motion to dismiss the first, second and fourth causes of action

in the verified complaint, should be modified, on the law and the facts, to deny plaintiffs' motion to the extent it sought the above-described injunctive relief, and to vacate such relief, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JANUARY 29, 2009



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