SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 5, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4868 Yolanda Escobar, Index 20753/05
Plaintiff-Respondent,

-against-

Alberto Guzman, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Colin F. Morrissey of counsel), for appellants.

The Edelsteins, Faegenburg & Brown, LLP, New York (Evan M. Landa of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about December 11, 2007, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

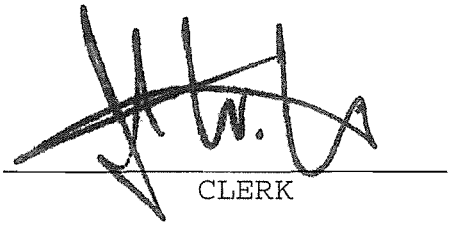
Defendants met their initial burden of establishing prima facie that plaintiff's alleged injuries did not satisfy the no-fault serious injury threshold (Insurance Law § 5102[d]). Defendants' expert concluded that plaintiff suffered from degenerative disc disease. This was based on his review of the MRI performed at the facility of plaintiff's expert, Dr. Roskin, on June 7, 2004. Although defendants failed to address the latter's contemporaneous MRI examination report of herniated

discs, a finding of degenerative disc disease is not inconsistent with the claimed herniations.

Plaintiff in opposition raised a triable issue of fact through the affirmed report of Dr. Augustyniak and the MRI report of Dr. Roskin (*see Prestol v McKissock*, 50 AD3d 600 [2008]). Similarly, the affirmed letters of Dr. Patel as to plaintiff's inability to resume work until September 2005 sufficiently raised a factual issue as to the 90/180 category.

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

ENTERED: MARCH 5, 2009



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Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

4994-
4995 DDJ Management, LLC, et al., Index 601832/07
Plaintiffs-Respondents,

-against-

Rhone Group L.L.C., et al.,
Defendants-Appellants,

Larry A. Pavey, et al.,
Defendants.

- - - - -

DDJ Management, LLC, et. al.,
Plaintiffs-Appellants,

-against-

Rhone Group L.L.C., et. al.,
Defendants,

PriceWaterhouseCoopers, LLP,
Defendant-Respondent.

Wachtell, Lipton, Rosen & Katz, New York (Herbert M. Wachtell of counsel), for Rhone Group L.L.C., Rhone Capital I L.L.C., Rhone Offshore Partners L.P., Rhone Partners L.P., CCT Loan Acquisition L.L.C., Car Component Technologies Delaware Holdings, L.L.C., Rhone Capital L.L.C., M. Steven Langman, Robert W. Chambers, Alexander Dulac, Three Cities Research, Inc., Three Cities Fund II, L.P., Three Cities Offshore II, C.V., Willem F.P. De Vogel and J. William Uhrig, appellants.

Dorsey & Whitney LLP, New York (Marc S. Reiner of counsel), for Scott Duncan, appellant.

Nixon Peabody LLP, New York (Christopher M. Mason of counsel), for Quilvest S.A., Quilvest American Equity Ltd, and Three Cities Holdings Limited, appellants.

Holland and Knight LLP, New York (Christelette A. Hoey of counsel), for John Jendrzejewski appellant.

Law Offices of Arnold M. Weiner, Baltimore, MA (Arnold M. Weiner of the Bar of Maryland, admitted pro hac vice, of counsel), for DDJ Capital Management, LLC, DDJ Total Return Loan Fund, L.P.,

Gmam Investment Funds Trust II, and Airlie Opportunity Master Fund, Ltd., respondents/appellants.

Schulte Roth & Zabel, LLP, New York (Martin L. Perschetz of counsel), for PricewaterhouseCoopers LLP, respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered April 28, 2008, which, insofar as appealed from by defendants, denied the motions of defendants-appellants to dismiss plaintiffs' fraud cause of action as against them, unanimously reversed, without costs, the motions granted, and the fraud cause of action dismissed. Judgment, same court and Justice, entered May 5, 2008, dismissing the complaint as against defendant PriceWaterhouseCoopers (PwC) pursuant to the above order, which, inter alia, granted PwC's motion to dismiss the complaint, unanimously affirmed, without costs. Plaintiffs' appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs are a group of investors that in March 2005 loaned $40 million to the now-defunct American Remanufacturers Holdings, Inc. (ARI). Defendant PwC performed an audit on ARI's 2003 financial statements, which was not certified as "unqualified" until 2005, and the remaining defendants are officers, owners, and shareholders of and entities related to ARI.

It is uncontested that a condition of plaintiffs' loan was that the PwC 2003 audit be "unqualified." However, prior to the

issuance of the unqualified audit report, ARI issued financial statements, unaudited and unfootnoted, for 2004, showing that earnings before interest, taxes, depreciation and amortization (EBITDA) had dramatically improved from the 2003 financial statements. This EBITDA was also a determinative factor in plaintiffs' decision to loan ARI the requested $40 million. However, the improved EBITDA was the result of ARI's decision not to take reserves for inventory which remained unsold for one year, and only take reserves for items which remained unsold for two years. Thus, the improved EBITDA was a bookkeeping improvement, which did not improve ARI's cash position, and plaintiffs were not informed that this bookkeeping device had changed since the 2003 financial statements. PwC also reviewed ARI's unaudited and unfootnoted financial statements for 2004 prior to completing the unqualified audit of the 2003 financial statements, but did not do a "subsequent events" footnote in the final 2003 unqualified audit, or conduct a "going concern" analysis relating to the 2004 financial statements. Shortly after plaintiffs loaned the money to ARI, ARI went bankrupt, and plaintiffs lost the entire $40 million.

Plaintiffs allege that PwC's 2003 audit report was improper because it stated that PwC had conducted an "independent" audit of the 2003 financial statements, and that the audit was conducted in accordance with Generally Accepted Accounting

Standards (GAAS). According to plaintiffs, this was incorrect because PwC had succumbed to pressure from the borrower defendants not to resign from the audit, and thus, it was no longer independent, and it did not conduct the audit according to GAAS because it did not include a "going concern" analysis or a "subsequent events" note, which should have allegedly required it to discover the falsity in ARI's books and reported on them, noting that ARI was on the verge of collapse.

The motion court properly dismissed the complaint as against PwC. Mere allegations that PwC was no longer independent, or that the audit was not conducted in accordance with GAAS, alone, are insufficient to state a cause of action against PwC because the alleged misrepresentations or misconduct must have done more than induced plaintiffs to enter into the transaction; they must have also been a proximate cause of plaintiffs' loss (*see Laub v Faessel*, 297 AD2d 28, 30-31 [2002]; *see also Friedman v Anderson*, 23 AD3d 163, 167 [2005]). Here, the alleged errors do not go to the financial condition of ARI, and plaintiffs cite nothing in the 2003 audit report which was inaccurate or incorrect (*see In re Ramp Corp. Sec. Litig.*, 2006 WL 2037913, *8, 2006 US Dist LEXIS 49579, *23-24 [SD NY 2006]). Moreover, PwC's failure to perform a "going concern" analysis does not allege a cause of action, because PwC's audit was only for ARI's 2003 financial statements, and the codification of GAAS, at US Auditing

Standards (AU) § 341.02, provides "[t]he auditor has a responsibility to evaluate whether there is substantial doubt about the entity's ability to continue as a going concern for a reasonable period of time, not to exceed one year beyond the date of the financial statements being audited." By the time PwC issued its final unqualified 2003 audit report, ARI had already continued as a going concern for more than one year (*see Pew v Cardarelli*, 2005 WL 3817472, *9, 2005 US Dist LEXIS 40018, *27 [ND NY 2005], *affd* 164 Fed Appx 41 [2d Cir 2006] [since company continued as a going concern for over one year, failure to include a going concern qualification cannot have constituted a material omission]; *Schick v Ernst & Young*, 808 F Supp 1097, 1103 [SD NY 1992]), and plaintiffs cite no authority obliging PwC to conduct an audit of ARI's unaudited 2004 financial statements to determine its viability as a going concern past one year from the 2003 financial statements. Nor was PwC obliged to include a "subsequent events" note in the 2003 audit report, discovering and revealing the changed accounting in ARI's 2004 financial statements, as it did not affect any part of the 2003 financial statements (AU 560.01).

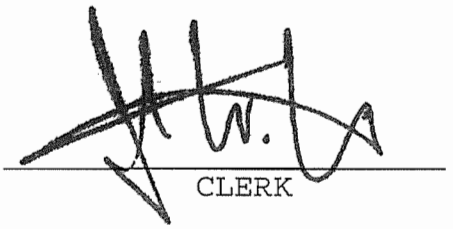
Furthermore, contrary to the determination of the motion court, dismissal of plaintiffs' fraud claim as against the remaining defendants was warranted. "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an

arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it" (*UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [2001]). To sustain a claim for fraud, sophisticated investors, as here, must have discharged their own affirmative duty to exercise ordinary intelligence and conduct an independent appraisal of the risks they are assuming (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [2006], *lv denied* 8 NY3d 804 [2007]; *Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234 [1996]). Here, plaintiffs never conducted any due diligence as it related to ARI's 2004 financial statements, on which plaintiffs primarily relied in making the loan to ARI. That is, plaintiffs never looked at ARI's books and records, as was expressly their right under the loan agreement, and even if there was no such express right, plaintiffs could have insisted on the right to review the books and records prior to making the loan. Having failed to make any such effort to evaluate the risk for

themselves, they cannot now properly allege reasonable reliance on the purported misrepresentations (*see Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352 [2005]).

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

ENTERED: MARCH 5, 2009



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Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5312 Gary Null, Index 118552/06
Plaintiff-Appellant,

-against-

Pacifica Foundation, et al.,
Defendants-Respondents,

Bernard White, et al.,
Defendants.

Ralph Gerstein, Flushing, for appellant.

Jeremy Rosenbaum, Brooklyn, and Daniel Silverman, New York, for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 24, 2007, which granted the motion of defendants WBAI and Pacifica Foundation to dismiss the complaint against them as untimely, unanimously affirmed, without costs.

The motion court properly found that plaintiff had reason to know that the union would not be pursuing his grievance; consequently, the complaint, filed more than six months after his last unanswered communication with the union, was untimely (*see White v White Rose Food*, 128 F3d 110, 114 [1997]). There was no basis for tolling the limitations period or barring its assertion, in the absence of any claim of fraudulent concealment

(*see Cohen v Flushing Hospital and Medical Center*, 68 F3d 64, 69 [1995]).

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

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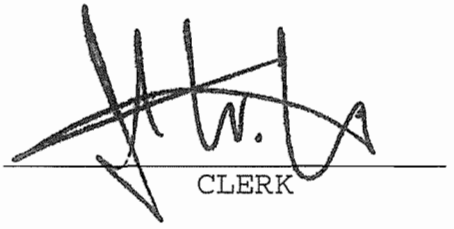

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Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5341 The People of the State of New York, Ind. 4833/94
Respondent,

-against-

James Johnson,
Defendant-Appellant.

Joseph Carbonaro, New York, for appellant.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 22, 1995, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 7½ to 15 years, unanimously affirmed.

Defendant did not preserve his challenge to the sufficiency of the evidence concerning the use of force, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. One of defendant's accomplices used extensive force against the victim, to a degree that was more than enough to satisfy the statute (*see* Penal Law § 160.00).

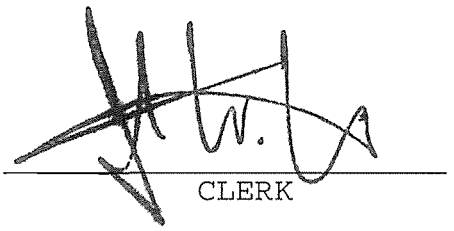
Defendant's objection to the receipt in evidence of a nontestifying codefendant's plea allocution was insufficiently specific to preserve defendant's present Confrontation Clause claim, and we decline to review it in the interest of justice. As an alternative holding, we find that although the allocution

was inadmissible under *Crawford v Washington* (541 US 36 [2004]), the error was harmless under the standard for constitutional error (*see People v Crimmins*, 36 NY2d 230, 241 [1975]). In this case where defendant was arrested at the scene of a robbery that had been witnessed by a police officer, there was overwhelming evidence of defendant's guilt and the inadmissible allocution added little to the People's case.

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 5, 2009



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Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5424 The People of the State of New York, Ind. 6080/01
Respondent,

-against-

Craig Lewis,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 23, 2008, resentencing defendant to a term of 5 years with 5 years' post-release supervision, unanimously affirmed.

After defendant completed his prison sentence and began serving a term of PRS that was improperly imposed in the absence of an oral pronouncement at sentencing, the court conducted a resentencing proceeding (*see* Correction Law § 601-d) and properly imposed PRS. We reject defendant's double jeopardy argument, as

well as his other challenges to the resentencing (*see People v Hernandez*, __ AD3d __, 2009 NY Slip Op 631).

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

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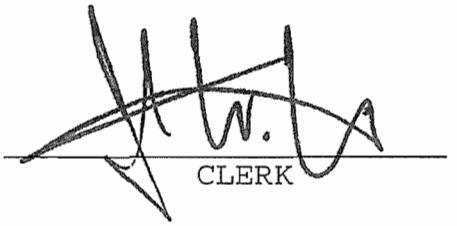


Tom, J.P., Moskowitz, Renwick, DeGrasse, JJ.

5425 Dion Friedland, Index 600141/99
Plaintiff-Appellant,

-against-

Charles C. Hickox, et al.,
Defendants-Respondents.

Kravet & Vogel, LLP, New York (Donald J. Kravet of counsel), for appellant.

Hughes Hubbard & Reed LLP, New York (Hagit Elul of counsel), for respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered March 19, 2008, which granted defendants' motion to dismiss the complaint for failure to join necessary parties and denied plaintiff's cross motion to amend the seventh cause of action to pierce the corporate veil, unanimously reversed, on the law, without costs, defendants' motion denied, nonparties Robert Sillerman, Robert Bean and Nancy Bean joined as defendants, plaintiff directed to serve all pleadings on these parties, the denial of the cross motion vacated, and the matter remanded to Supreme Court for further proceedings consistent herewith.

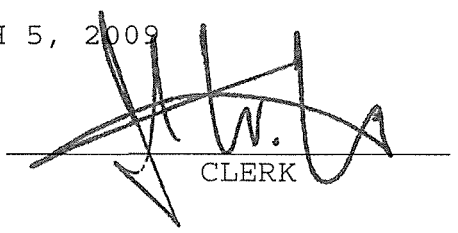
Although the court correctly found that Sillerman and the Beans were necessary parties to plaintiff's first six causes of action (CPLR 1001), it incorrectly held that they could not be joined because the statute of limitations had run. CPLR 1001(b) provides that "[w]hen a person who should be joined under

subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned." After they are joined as parties, Sillerman and the Beans may, if they are so advised, assert the defense of the statute of limitations. The Court of Appeals clarified this procedure in *Windy Ridge Farm v Assessor of Town of Shandaken* (11 NY3d 725 [2008]) decided five months after the appealed determination.

As plaintiff's seventh cause of action is not affected by the determination that Sillerman and the Beans are necessary parties to the first six causes of action, his cross motion to amend that cause of action so as no longer to seek to pierce the corporate veils of Leeward Isles Resort, Limited (LIR) and Maundays Bay Management, Limited (MBM) should not have been denied as moot. The court should have determined whether LIR and MBM are necessary parties to the seventh cause of action and, upon a determination that they are necessary parties and cannot be joined for lack of jurisdiction, whether the matter may go forward without them (CPLR 1001[b]), and, upon a determination that the matter may not go forward without them, whether plaintiff's proposed amendment cured the defect.

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

ENTERED: MARCH 5, 2009



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Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5428 In re Kirk V.,

A Dependent Child Under
the Age of Eighteen Years, etc.,

Providencia V., et al.,
Respondents-Respondents,

Commissioner of the Administration
for Children's Services,
Petitioner-Appellant.

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

Lansner & Kubitshek, New York (Christopher S. Weddle of counsel), for Providencia V., respondent.

Wendy Abels, New York, for Ricardo V., respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), Law Guardian.

Order, Family Court, New York County (Jody Adams, J.), entered on or about October 15, 2007, which, after a fact-finding hearing on remand, dismissed the neglect petition of the Administration for Children's Services on the ground that the aid of the court was not required, unanimously affirmed, without costs.

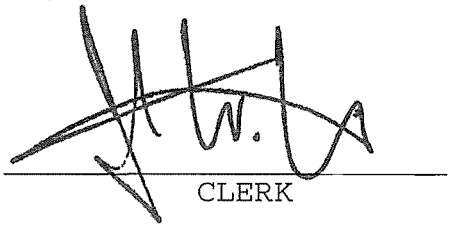
The Family Court properly determined that the aid of the court was not required (*see* Family Court Act § 1051 [c]). At the time of the fact-finding, the person alleged to be a danger to the child had not lived or visited the family home for over four years before the court's decision was issued, and petitioner

failed to articulate what disposition it was seeking and what court action would be required for Kirk's safety.

Were we to consider the charges, we would find that petitioner failed to establish by a preponderance of the evidence its allegation that respondent parents neglected Kirk V. by failing to protect him from sexual abuse by his older brother.

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

ENTERED: MARCH 5, 2009



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Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5429 Lenora Alvarado, Index 20245/06
Plaintiff-Appellant,

-against-

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

Arnold E. DiJoseph, III, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about September 14, 2007, which, insofar as appealed from as limited by the briefs, in this action for personal injuries allegedly sustained as the result of a lack of police protection, granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff alleges that while acting as an interpreter for defendant police department during the course of an investigation into a complaint of domestic violence, she was assaulted by a knife-wielding individual who was involved in a dispute with his girlfriend. Plaintiff alleges that the injuries she sustained during the attack were the result of the failure of the police to protect her from a man who was known to be violent and dangerous.

"[M]unicipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents,

except when plaintiffs establish a 'special relationship' with the municipality" (*Kovit v Estate of Hallums*, 4 NY3d 499, 505 [2005]). On this motion to dismiss, where "the pleading is to be afforded a liberal construction" and where the court is only to determine "whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that plaintiff sufficiently set forth the elements of a "special relationship" (*see Cuffy v City of New York*, 69 NY2d 255, 260 [1987]), and that the complaint was improperly dismissed.

The record shows that plaintiff was not simply a member of the public at large, but was a translator whose services had been requested by defendant police department to aid officers in the investigation of a complaint of domestic violence. Under these circumstances, the police department assumed an affirmative duty to avoid placing plaintiff in a dangerous position and at the mercy of a person the officers suspected was capable of violence. It also cannot be said, as a matter of law, that the police were unaware that inaction on their part might cause harm to someone in the suspect's vicinity. Furthermore, there was direct contact between plaintiff and the police, and as someone who was summoned by the police to a possible crime scene, plaintiff had a right to expect that she would receive protection from the individual suspected of domestic violence, thereby satisfying the element of

justifiable reliance on the municipality's affirmative undertaking (*see Mastroianni v County of Suffolk*, 91 NY2d 198 [1997]).

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

ENTERED: MARCH 5, 2009

CLERK

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5430 Andre Romanelli, Inc., et al., Plaintiffs-Appellants, Index 109293/05

-against-

Citibank, N.A., formerly known as European American Bank, et al., Defendants,

J.P. Morgan Chase Bank, N.A., et al., Defendants-Respondents.

Law Offices of Steven E. Rosenfeld, P.C., New York (Steven E. Rosenfeld and Martin Zuckerbrod of counsel), for appellants.

Levi Lubarsky & Feigenbaum LLP, New York (Andrea Likwornik Weiss of counsel), for J.P. Morgan Chase Bank, N.A., respondent.

Thompson Hine LLP, New York (Norman A. Bloch of counsel), for Susan Goodman, respondent.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered April 16, 2008, which, to the extent appealed from as limited by the briefs, granted the motions of defendants J.P. Morgan Chase Bank, N.A. and Susan Goodman for summary judgment dismissing the amended complaint, unanimously affirmed, without costs.

Plaintiffs allege that defendant Stephen Schor, their accountant and financial advisor, suggested that they open accounts at defendant Chase in order to obtain a lower interest rate on a line of credit. Plaintiffs' principal signed a business account application, corporate resolution and signature card for Romanelli and gave it to the accountant. However, he

failed to cross out the unused signature boxes on the card as directed by the instructions on the signature card. Plaintiffs allege that the accountant later told them he could not get a more favorable interest rate so they instructed him not to open the account.

Unbeknownst to the principal, the accountant signed on one of the blank lines of the signature card and opened an account for Romanelli at Chase. He also allegedly opened an account a year later in the name of Van Gils. The accountant also changed the mailing address on the forms to his office address.

Plaintiffs allege that sometime later the accountant suggested that they write checks payable to themselves which he would use to pay taxes in order to convince a lender that plaintiffs had sufficient assets to support an outstanding line of credit. Plaintiffs agreed and the accountant prepared a list of checks for each plaintiff to write payable to themselves. Plaintiffs wrote checks totaling approximately $4.5 million between 2000 and 2004 payable to themselves and gave them to the accountant. The accountant endorsed the checks, deposited them into the accounts at Chase and then withdrew the funds for his personal use. Plaintiffs allege he embezzled almost the entire amount. Plaintiffs allege that defendant Goodman, a Chase employee, received "gifts" from the accountant during this period to disregard these transactions.

The risk of loss from the unauthorized acts of a dishonest agent falls on the principal that selected the agent (*see Sybedon Corp. v Bank Leumi Trust Co. of N.Y.*, 224 AD2d 320 [1996]). Plaintiffs' principal testified that he hired the accountant to act as a financial advisor for plaintiffs and gave him the checks to pay plaintiffs' taxes. The accountant, therefore, was plaintiffs' agent and was authorized to endorse the checks payable to plaintiffs and issue checks payable to the taxing authorities. The bank properly cashed the checks since the endorsement by the accountant was authorized by the principal (*see Rohrbacher v BancOhio Natl. Bank*, 171 AD2d 533, 535 [1991]).

Moreover, UCC 3-405(1) provides a complete defense to plaintiffs' claims against the bank and its employee. It creates an exception to the general principle that a drawer is not liable on an unauthorized endorsement. Under this section, an endorsement by any person in the name of the payee is effective if the maker or drawer did not intend the payee to have an interest in the instrument or an agent or employee of the maker supplied the maker with the name of the payee intending the latter to have no interest in the instrument. In the specific factual circumstances described by this section, the endorsement is treated as effective even though it was technically

unauthorized, and the loss is allocated to the drawer-employer (*see Prudential-Bache Securities, Inc. v Citibank, N.A.*, 73 NY2d 263, 270 [1989]).

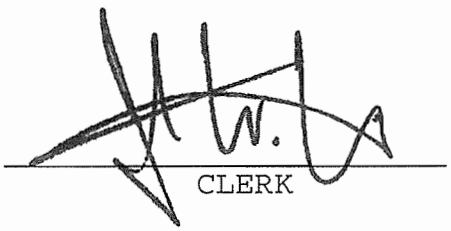
Plaintiffs' principal signed checks payable to plaintiffs based on the accountant's list which detailed the amount of each check and the payee. It is undisputed that plaintiffs were not the intended beneficiaries of the checks since plaintiffs intended that Schor use the checks to pay taxes. Thus, pursuant to UCC 3-405(1), the accountant's endorsement was effective and Chase and its employee are not liable for the accountant's alleged defalcations.

Plaintiffs' claims of conversion and fraud are fatally defective because they have failed to raise a triable issue of fact concerning knowledge by Chase and its employee of the accountant's alleged misconduct. Although plaintiffs characterize the gifts given to the bank employee as bribes, there was evidence that she was a friend of the accountant who was known to give overly generous gifts to acquaintances and the first gift was given two years after the first account was opened. Moreover, very few of the checks were presented by the accountant for payment at the branch where she worked. Plaintiffs also failed to provide any evidence of a quid pro quo for the gifts.

We have reviewed plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: MARCH 5, 2009



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Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5431 Kirkiles & Kotiadis, LLP, Index 600698/02
Plaintiff-Respondent,

-against-

Twin Donut, Inc., et al.,
Defendants-Appellants.

Paul D. Jaffe, White Plains, for appellants.

Socrates Scott L. Nicholas, New York, for respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered March 21, 2008, which denied defendants' motion to correct and resettle a judgment entered February 27, 2004, unanimously affirmed, with costs.

Defendants have not sought to set aside the parties' stipulation of settlement, which superseded the subject judgment. In any event, the record presents no basis therefor (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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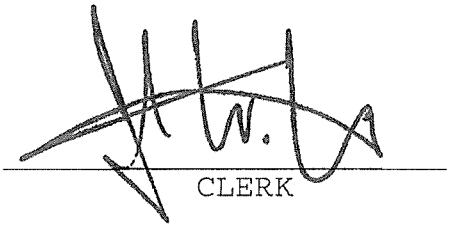

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Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5432-
5432A Lourdes Cruz, Index 13155/06
Plaintiff-Appellant,

-against-

Rosendo Aponte,
Defendant-Respondent.

Belovin & Franzblau, LLP, Bronx (Fernando M. Leal of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 18, 2007, which granted defendant's motion for summary judgment dismissing the complaint on the issue of threshold injury, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about December 17, 2007, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously dismissed, without costs, as academic.

Defendant met his initial burden of demonstrating absence of any permanent or significant consequential physical limitations to plaintiff's right knee by submitting the affirmed reports of a radiologist who opined that no meniscal tears were shown in the MRI, and an orthopedist who found no significant limitation in range of motion. The radiologist did observe a "vague linear signal change . . . in the posterior horn of the lateral

meniscus" that was "most likely indicative of grade II mucoid degenerative signal change," and the orthopedist noted that a minor limitation in range of motion was attributable to plaintiff's obesity.

In opposition, plaintiff submitted the affirmation of a physician who, relying on an MRI report prepared shortly after the accident, found multiple meniscal tears of the right knee, for which surgery would be indicated if plaintiff could lose weight, and opined that the tears and limitations were traumatic in origin. The physician also concluded, based on an examination conducted more than three years after the accident, that objective tests demonstrated significantly limited range of motion. However, his examination, unaccompanied by the requisite quantitative assessment of range-of-motion limitations based on objective testing contemporaneous to the time of the accident, was insufficient to raise an issue of fact as to serious injury (*Lopez v Simpson*, 39 AD3d 420 [2007]). Nor did he address the findings of degenerative change in the knee made by both defendant's radiologist and a radiographer who reported to the clinic that treated plaintiff after the accident (*Style v Joseph*, 32 AD3d 212 [2006]; *see Mullings v Huntwork*, 26 AD3d 214, 216 [2006]). Accordingly, plaintiff failed to raise an issue of fact as to whether she suffered the type of injury from the 2004 accident that constituted a permanent consequential limitation of

the use of her right knee.

With respect to the 90/180-day serious-injury claim, defendant met his initial burden by relying on plaintiff's deposition testimony that she was unable to perform her usual and customary activities for just five weeks following the accident. In opposition, plaintiff submitted an affidavit stating she was so restricted for five *months*, but the affidavit clearly contradicts her deposition testimony, and appears to have been tailored to avoid its consequences (*see Blackmon v Dinstuhl*, 27 AD3d 241 [2006]). Even assuming the deposition testimony was in error, plaintiff's affidavit was unsupported by "competent medical proof that directly substantiated the claim" that she could not perform substantially all her daily activities for 90 of the first 180 days following the accident due to a non-permanent injury or impairment as a result of the accident (*see Uddin v Cooper*, 32 AD3d 270, 272 [2006], *lv denied* 8 NY3d 808 [2007]). Therefore, the alternate serious injury claim was also properly dismissed, rendering the issue of liability academic.

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

ENTERED: MARCH 5, 2009

CLERK

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5433 The People of the State of New York, Ind. 508/06
Respondent,

-against-

Rodney Grace,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 25, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Defendant possessed a single package containing numerous fragments of a rock-like material. The police chemist weighed this material as a whole, and found that it weighed more than the statutory threshold for fourth-degree possession. The chemist also ground the fragments into a powder, and found that the powder contained an unspecified amount of cocaine.

This was all that was necessary to establish fourth-degree possession. Defendant was convicted under Penal Law § 220.09(1),

which requires possession of a preparation, compound, mixture or substance containing an aggregate weight of one-eighth ounce or more. Under an aggregate weight standard, "[t]he weight of the mixture containing the narcotic, rather than the weight of the actual narcotic content of the mixture, determines the degree of the crime." (*People v Gonzalez*, 57 AD3d 1477, 1477 [2008]), and "[n]onprohibited substances mixed with a proscribed substance can be included in determining the aggregate weight of the proscribed substance for the purpose of defining the degree of the crime." (*People v McCurdy*, 25 AD3d 571, 571 [2006], *lv denied* 7 NY3d 759 [2006]).

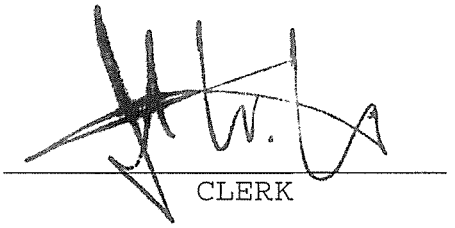
Defendant argues that the chemist's method was insufficient because it only determined that at least one fragment contained cocaine, while failing to ascertain how many, if any, other fragments contained cocaine. However, since the material recovered from defendant constituted a single package, the chemist's procedures sufficed. Even in the unlikely event that only one of the fragments contained cocaine, defendant would still be guilty of fourth-degree possession under the aggregate weight standard. The chemist did not need to estimate anything, or use the type of random sampling method that might have been required had there been a quantity of individual packets (*cf. People v Hill*, 85 NY2d 256, 261 [1995]).

The court properly exercised its discretion in imposing

reasonable limits on defendant's cross-examination of the chemist, and there was no violation of defendant's right to confront witnesses and present a defense. The precluded questions, such as inquiries into what "portion" of the fragments was tested for cocaine and whether the chemist believed all the fragments contained cocaine, were improper because they were irrelevant to the above-discussed aggregate weight standard, as applied to the facts of this case (*see People v Francis*, 172 AD2d 342, 344 [1991], *revd on other grounds* 79 NY2d 925 [1992]). The precluded line of inquiry would have tended to confuse or mislead the jury as to the aggregate weight standard, or invite consideration of matters outside the jury's province, such as the fairness of that standard.

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

ENTERED: MARCH 5, 2009



CLERK

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5434 Meridian Capital Partners, Inc., Index 600660/07
Plaintiff-Appellant,

-against-

Fifth Avenue 58/59 Acquisition Co. LP,
Defendant-Respondent,

Fifth Avenue 58/59 Acquisition
Co. GP Corp., et al.,
Defendants.

Derfner & Gillett, LLP, New York (Donald A. Derfner of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 27, 2007, which, insofar as appealed from as limited by the briefs, granted defendant landlord's motion to dismiss plaintiff tenant's tenth cause of action for "intentional and malicious infliction of injury to business," unanimously affirmed, without costs.

The tenth cause of action alleges that landlord's unreasonable interference with tenant's use of the leased premises was intended to coerce tenant into surrendering its valuable commercial leasehold and paying an exorbitant termination fee; that "disinterested malevolence" motivated defendant landlord's interference; that interference was to further a plan of "malicious retribution" to punish tenant for

refusing to agree to an early surrender of the lease that would have permitted landlord to lease the space "at a substantially greater profit"; and that tenant's rent for the space, the most valuable on the floor, is "substantially below the level at which [landlord] is currently leasing comparable space" in the building.

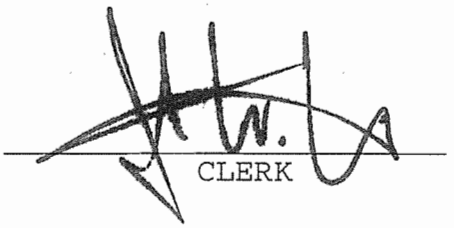
Contrary to tenant's contention, *Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.* (47 AD3d 239 [2007]) did not recognize a new tort of intentional infliction of economic harm (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 93, n 1 [1993] ["Intentional infliction of economic harm has not been recognized in New York"]). Our inquiry in *Banc of Am. Sec.* was limited to whether, in connection with a cause of action for breach of contract, the landlord's alleged acts constituted the type of intentional wrongdoing, unrelated to any legitimate economic self-interest, that could render an exculpatory clause in the lease unenforceable as a matter of public policy. We held that a trier of fact could so perceive the landlord's acts, in which event the exculpatory clause would be unenforceable, and that the tenant therefore had a cause of action for breach of contract.

Nor does the tenth cause of action plead prima facie tort. Tenant's allegation of landlord's "disinterested malevolence" is contrary to its allegation of landlord's profit motive in coercing surrender of the lease (*see Squire Records v Vanguard*

Recording Socy., 25 AD2d 190, 191-192 [1966], *affd* 19 NY2d 797 [1967]). Moreover, tenant has a cause of action for breach of contract for the acts allegedly committed (*see Effective Communications W. v Board of Coop. Educ. Servs.*, 57 AD2d 485, 490 [1977]). Dismissal of the tenth cause of action requires dismissal of the accompanying demand for punitive damages (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616-617 [1994]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: MARCH 5, 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 March 5, 2009.

Present - Hon. Peter Tom, Justice Presiding
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 127/07
Respondent,

-against- 5435

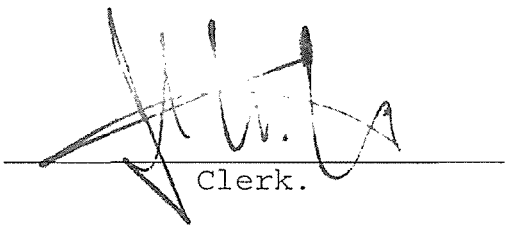
Larry Hunt,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edwin Torres, J.), rendered on or about May 22, 2007,

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.

ENTER:



Clerk.

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

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 March 5, 2009.

Present - Hon. Peter Tom, Justice Presiding
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

x

In re Milagros Luna,
Petitioner-Appellant,

-against-

The New York City Department of Housing Preservation and Development, et al.,
Respondents-Respondents,

Heywood Towers Associates,
Respondent.

x

Index 401046/08

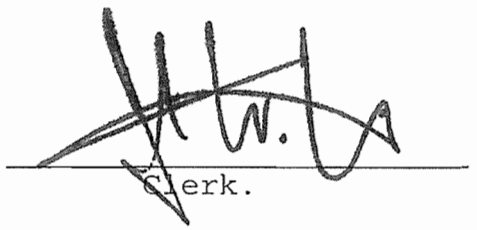
5436

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on or about July 28, 2008,

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 February 6, 2009,

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

ENTER:



Clerk.

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5437 Ramona Perdomo, Index 400626/07
Plaintiff-Respondent,

-against-

Robert Morgenthau, in his capacity as District Attorney,
Defendant-Appellant,

601 West 177th Street LLC,
Defendant.

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Alan Canner of counsel), for respondent.

Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered December 5, 2007, insofar as appealed from, granting plaintiff's motion for a declaration that defendant District Attorney does not have the authority to mandate his approval of a settlement agreement between a landlord and tenant in an illegal use eviction proceeding brought pursuant to RPAPL 715 at the direction of the District Attorney, unanimously affirmed, without costs.

A court's primary consideration "when presented with a question of statutory interpretation...is to ascertain and give effect to the intention of the Legislature" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006] [internal quotation marks and citation omitted]). Legislative intent, in

turn, is most clearly indicated by unambiguous statutory text, which courts will construe "to give effect to its plain meaning" (*id.*).

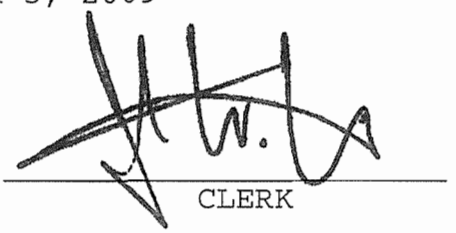
Although the District Attorney, when acting under RPAPL 715, is serving the public welfare, he may not do so in a manner that exceeds his statutory grant of authority. The plain meaning of RPAPL 715 does not provide the District Attorney the authority to supervise or veto settlements between the parties to an illegal use holdover proceeding brought under that statute. Nor is such authority granted by implication, as it is not necessary to the performance of those acts by the District Attorney which the statute does sanction (*see* McKinney's, Cons Laws of NY, Book 1 Statutes § 364, at 530; *cf. Matter of Doe v Axelrod*, 71 NY2d 484, 490 [1988]). To find otherwise, we would have to add language to the legislative enactment, which we decline to do (see *Bender v Jamaica Hosp.*, 40 NY2d 560, 562 [1976]).

Furthermore, contrary to the District Attorney's contention that unless he is granted supervisory authority over stipulations of settlement the parties to an RPAPL 715 illegal use eviction proceeding will be free to collude with one another, section 715 already allows for a remedy in such circumstances. The statute authorizes the District Attorney to institute his own holdover

proceeding where he believes a landlord or owner is not diligently prosecuting the proceeding in good faith (*see* RPAPL 715[1]).

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

ENTERED: MARCH 5, 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 March 5, 2009.

Present - Hon. Peter Tom, Justice Presiding
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 724/06
Respondent,

-against- 5438

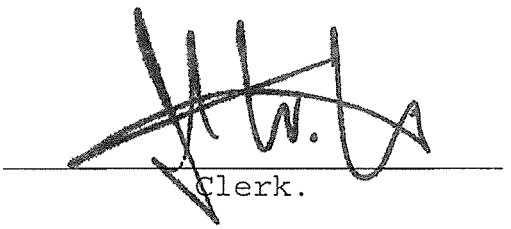
Sharmecka Evans, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles J. Tejada, J.), rendered on or about March 2, 2007,

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.

ENTER:



Clerk.

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

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5440 The People of the State of New York, Ind. 3453/06
Respondent,

-against-

Juan Aboy,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), and Chadbourne & Parke LLP, New York (Afiya M. Jordan of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

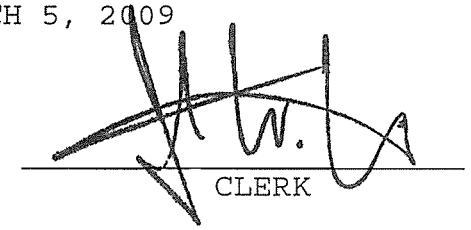
Order, Supreme Court, New York County (Renee A. White, J.), entered on or about January 23, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant did not establish special circumstances warranting a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). The mitigating factors cited by defendant were generally taken into account by the risk

assessment instrument. Furthermore, defendant engaged in sex acts with a particularly vulnerable victim.

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

ENTERED: MARCH 5, 2009



CLERK

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5441 The People of the State of New York, Ind. 5871/05
Respondent,

-against-

William West,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Jeffrey Dellheim of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

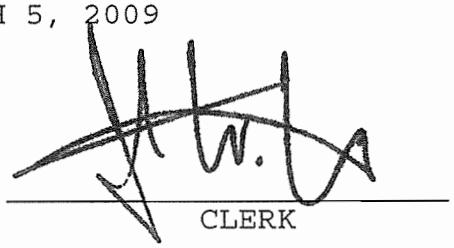
Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered December 4, 2006, convicting defendant, after a jury trial, of petit larceny and criminal possession of stolen property in the fifth degree, and sentencing him to concurrent terms of 1 year, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant attempted to flee from a shoe store while holding a customer's handbag under his jacket, as the screaming customer pursued him. We find unpersuasive defendant's assertion that he may have believed the bag to be store merchandise and that he may have intended to purchase it. In any event, even if he thought the bag was merchandise, his

actions manifested an intent to steal it (*see People v Olivo*, 52 NY2d 309 [1981]; *People v Stapkowitz*, 40 AD3d 435 [2007], *lv denied* 9 NY3d 882 [2007]).

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

ENTERED: MARCH 5, 2009



CLERK

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5442 Frances Trinidad, Index 112454/05
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Steve S. Efron, New York, for appellant.

Arnold E. DiJoseph, III, New York, for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 26, 2007, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Contrary to defendant's argument, plaintiff consistently testified that his foot got stuck in a crack in the stairs.

Due to the poor quality of the photographs it submitted, defendant failed to demonstrate as a matter of law that the crack in the stairs was so trivial as to be nonactionable (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210 [1998]; *see also Revis v City of New York*, 18 AD3d 290 [2005]).

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

ENTERED: MARCH 5, 2009

CLERK

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

5443N Anthony Harris, Index 124210/97
Plaintiff-Appellant,

-against-

Officer "John" Bliss, et al.,
Defendants-Respondents.

Joseph Fleming, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondents.

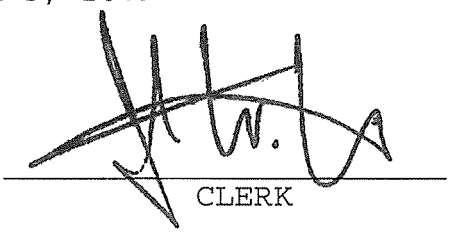
Order, Supreme Court, New York County (Karen S. Smith, J.), entered October 2, 2007, which denied plaintiff's motion to vacate the dismissal of this action and to restore it to the trial calendar, unanimously affirmed, without costs.

The court properly exercised its discretion in dismissing the complaint pursuant to 22 NYCRR 202.27(b) (*see Saunders v Riverbay Corp.*, 17 AD3d 137 [2005]). Plaintiff failed to provide a reasonable excuse for his failure to appear on the July 16, 2007 trial start date, given the parties' explicit May 1, 2007 stipulation to the firm trial date with no further adjournments. We note the inadequacy of the proffered excuse (i.e., the week scheduled for trial, plaintiff was able to get time off work to

attend a family event, but not for the trial), and the lengthy history of this case, which includes several prior motions to restore.

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

ENTERED: MARCH 5, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, J.P.
Eugene Nardelli
Rolando T. Acosta
Leland G. DeGrasse, JJ.

4165
Index 100956/07

x

Amy L. Roberts, et al.,
Plaintiffs-Appellants,

-against-

Tishman Speyer Properties, L.P., et al.,
Defendants-Respondents.

- - - - -

Community Housing Improvement Program, Inc., Small Property Owners of New York, Inc., Rent Stabilization Association of NYC, Inc., The Legal Aid Society, Office of the Manhattan Borough President,
Amici Curiae.

x

Plaintiffs appeal from a judgment of the Supreme Court, New York County (Richard B. Lowe III, J.), entered August 24, 2007, which dismissed the complaint.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Alexander H. Schmidt, Daniel W. Krasner and Eric B. Levine of counsel), for Amy L. Roberts, Thomas I. Shamy, David and Annmarie Hunter, Kelley and Tony Lanni, Evan Horisk and Beth Rosner Giokas, appellants.

Bernstein Liebhard & Lifshitz, LLP, New York (Robert J. Berg, Ronald J. Aranoff, and Hanna R. Neier of counsel), for Margaret Carroll, appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jay B. Kasner, Scott D. Musoff and Christopher R. Gette of counsel), and Belkin Burden Wenig & Goldman LLP, New York (Sherwin Belkin and Magda Cruz of counsel), for Tishman Speyer Properties, L.P. and PCV ST Owner LP, respondents.

Greenberg Traurig, LLP, New York (Daniel J. Ansell and Steven Kirkpatrick of counsel), for Metropolitan Insurance and Annuity Company and Metropolitan Tower Life Insurance Company, respondents.

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Jeffrey R. Metz of counsel), for Community Housing Improvement Program, Inc. and Small Property Owners of New York, Inc., amici curiae.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for Rent Stabilization Association of NYC, Inc., amicus curiae.

Steven Banks, The Legal Aid Society, New York (Alan Canner of counsel), for Legal Aid Society, amicus curiae.

Jimmy Yan, New York, for Office of the Manhattan Borough President, amicus curiae.

NARDELLI, J.

This appeal raises an issue of statutory construction regarding the luxury decontrol provisions of the Rent Stabilization Law (Administrative Code of City of NY §§ 26-504.1 and 26-504.2) and, specifically, whether the motion court properly determined that the phrase "by virtue of" is equivalent in meaning to "*solely* by virtue of," thereby leading to the incongruous result of prohibiting landlords from decontrolling certain regulated units if they are subject to rent stabilization solely by virtue of New York City's J-51 tax abatement program (*see* Administrative Code § 11-243 [formerly § J-51]) but, on the other hand, allowing landlords to decontrol the same category of units which are subject to rent stabilization for one or more reasons in addition to their participation in the J-51 program.

Overview

Plaintiffs, current and former tenants of apartments in the Peter Cooper Village/Stuyvesant Town Complex (the Complex), commenced this putative class action in January 2007, asserting that their apartments, which had been subject to the protections afforded by the Rent Stabilization Law (Administrative Code of City of NY, tit 26, ch 4), had been improperly deregulated. Two months prior to the commencement of this action, the Complex had been purchased, for approximately $5.4 billion, by defendant PCV

ST Owner Corp., the general partner of which is defendant Tishman Speyer Properties, L.P. (the Tishman defendants), from defendant Metropolitan Tower Life Insurance Company, the successor by merger to defendant Metropolitan Insurance and Annuity Company (the Met Life defendants).

The Complex was originally developed in the 1940s by Met Life with the laudable goal of providing affordable housing for middle-income families. The Complex, the largest of its kind in New York City, covers approximately 80 acres, or a full 10 City blocks, between First Avenue and Avenue C, and 14th Street and 23rd Street, and consists of 110 apartment buildings comprising 11,200 units, which house at least 20,000 people.

Met Life, in order to finance the development of the Complex, entered into an agreement with the City of New York pursuant to the New York Redevelopment Companies Law, which is now codified as article V of the Private Housing Finance Law (PHFL). The agreement provided Met Life, inter alia, with considerable assistance in acquiring the designated land and necessary financing, and afforded it a real estate tax exemption for 25 years. In 1974, the New York State Legislature enacted an amendment to the Real Property Tax Law which provided that upon expiration of the 25-year tax exemption, real property taxes payable on the Complex would be phased in over a 10-year period,

and, in connection therewith, the apartment units in the Complex would become subject to the New York City Rent Stabilization Law.

In 1992, Met Life applied for and began receiving property tax benefits under New York City's J-51 tax abatement program (the J-51 program), which provided incentives for owners to rehabilitate and improve their buildings. One of the caveats of the J-51 program was that the rent deregulation of residential units in buildings receiving J-51 abatements was prohibited. Met Life, and the successor owners of the Complex, have received approximately $24.5 million in real estate tax benefits since entering the program, and are scheduled to remain in the program, and to continue to receive additional tax abatements, until 2017.

Plaintiffs now allege that more than 25% of the Complex's units, or an estimated 3,000 apartments, have been illegally deregulated under the high rent/high income decontrol provisions of the Rent Stabilization Law, because those same provisions specifically prohibit deregulation during the period in which the owner is receiving J-51 tax benefits. Plaintiffs seek, inter alia, recovery of rent overcharges for the four years preceding commencement of the action, attorney's fees, and a judgment declaring that their apartments are subject to the Rent Stabilization Law and that all the apartments in the Complex will continue to be subject to rent stabilization for the duration of

time in which defendants receive J-51 tax benefits.

Defendants maintain, among other things, that the prohibition against deregulation for apartments enrolled in the J-51 tax benefit program applies only to those apartments that are rent stabilized *solely because* of J-51, and that apartments that were already rent stabilized when they were enrolled in J-51 may be luxury decontrolled prior to the expiration of, and despite the fact that the owners are continuing to receive, tax benefits. In support of their argument, defendants rely on the New York State Department of Housing and Community Renewal's (DHCR) regulations, as well as DHCR Fact Sheet 36, together which stand for the proposition that the exception to luxury decontrol for properties receiving J-51 tax benefits only applies when an apartment is subject to rent stabilization "solely by virtue of" the receipt of J-51 tax abatements (*see* Rent Stabilization code [9 NYCRR] §§ 2520.11[l][5][i], [s][2][i]).

Defendants, by separate notices of motion, subsequently moved to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7),[1] on the basis of documentary evidence and for failure to state a cause of action. The motion court, by judgment entered

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[1]Defendants also raised lack of capacity to sue, res judicata and statute of limitations arguments in their motion papers, but have not addressed those issues on appeal.

August 24, 2007, granted the motions and dismissed the complaint. In doing so, the court adopted the DHCR's view that the term "by virtue of" means for "the sole reason" of and concluded that since the Complex became subject to "rent stabilization in 1974 pursuant to the PHFL, 18 years before applying for J-51 tax benefits, defendants did not become subject to rent stabilization [solely] by virtue of receiving J-51 tax benefits." The court, noting that the Legislature neglected to amend the statute after the DHCR promulgated its regulations, concluded that the Complex is therefore not exempt from the high rent/high income decontrol provisions of the Rent Stabilization Law, despite receiving J-51 tax abatements. We disagree and reverse.

The Statutory and Regulatory Framework

The New York State Legislature, in 1955, in an endeavor to improve and maintain the urban housing inventory, enacted Real Property Tax Law (RPTL) § 489, which authorized cities to promulgate local laws that would provide multiple dwelling owners with tax incentives to rehabilitate their properties or convert them to residential use. In accordance therewith, the City of New York, in 1960, adopted Administrative Code § J51-2.5 (now Administrative Code § 11-243), the objective of which was to "reward [] residential major capital improvement, moderate rehabilitation and conversion projects with real property tax

exemption and abatement benefits" (*Matter of 31171 Owners Corp. v New York City Dept. of Hous. Preserv. and Dev.*, 190 AD2d 441, 442-443 [1993]).

Administrative Code § 11-243(i)(1)[2] provides that the benefits of the J-51 program are limited to the owners of buildings that are subject to rent stabilization, rent control or the PHFL. The Rules of the City of New York likewise require a building receiving J-51 benefits to be subject to rent regulation for the duration of the period in which such benefits are received (28 NYCRR 5-03[f][1]).[3] The Legislature, in 1985, amended RPTL § 489 so as to allow rent regulation to continue after expiration of the J-51 benefits until the first vacancy thereafter, unless the lease contains a prominent notice

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[2]"i. The benefits of this section shall *not* apply: (1) ... to any existing dwelling which is not subject to the provisions of the emergency housing rent control law or to the city rent and rehabilitation law or to the city rent stabilization law or to the private housing finance law or to any federal law providing for supervision or regulation by the United States department of housing and urban development."

[3]"In order to be eligible to receive tax benefits under the Act and for at least so long as a building is receiving the benefits of the Act, except for dwelling units which are exempt ... pursuant to paragraph (2) below, all dwelling units in buildings or structures converted, altered or improved shall be subject to rent regulation pursuant to [inter alia, the NYC Rent and Rehabilitation Law (Administrative Code § 26-410 *et seq.*) or the Rent Stabilization Law of 1969 (Administrative Code § 26-501 *et seq.*)]."

informing the tenant that rent regulation will expire when the tax benefits expire, and the approximate date thereof (RPTL § 489[7][b][2], as amended by L 1985, ch 289, § 2; *see Matter of Bleecker St. Mgmt. Co. v New York State Div. of Hous. & Community Renewal*, 284 AD2d 174, 176 [2001], *lv denied* 97 NY2d 606 [2001]). Finally, the J-51 program is administered by the New York City Housing Preservation and Development Agency (HPD), which promulgates regulations to implement the program (*id.* at 175, *see also Marosu Realty Corp. v Community Preserv. Corp.*, 26 AD3d 74 [2005]).

The Rent Stabilization Law (RSL) was enacted by the New York City Council in 1969 (*see* Administrative Code of the City of New York § 26-501 *et seq.*) in response to a continuing housing shortage as well as the need to regulate buildings previously omitted from rent control laws. The goal of the RSL was to encourage future housing construction by allowing owners to implement reasonable rent increases; to prevent the exaction of "unjust, unreasonable and oppressive rents;" and to "forestall profiteering, speculation and other disruptive practices" (RSL § 26-501; *see Drucker v Mauro*, 30 AD3d 37, 40 [2006], *lv dismissed* 7 NY3d 844 [2006] [the "policy of the statute is to provide an adequate supply of affordable housing in the City of New York"]; *Pultz v Economakis*, 40 AD3d 24, 27 [2007], *affd* 10 NY3d 542

[2008] ["the statute's intent (is) to provide affordable and stable housing to New York City residents"]).

The RSL applies, in pertinent part, to: multiple dwellings not owned as cooperatives or condominiums, completed and ready for occupancy after February 1, 1947 and before March 10, 1969, subject to certain delineated exceptions (RSL § 26-504[a]); multiple dwellings made subject to the law by the Emergency Tenant Protection Act (ETPA) of 1974 (RSL § 26-504[b]);[4] and "[d]welling units in a building or structure receiving the benefits of section 11-243 [i.e., J-51 benefits] or section 11-244 of the code or article eighteen of the [PHFL]" (RSL § 26-504[c]). The RSL expressly acknowledges that a building may be

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[4]The State Legislature, in 1971, in an effort the DHCR once characterized as an "experiment with free-market controls" (*Matter of KSLM-Columbus Apts. v New York State Div. of Hous. & Community Renewal*, 6 AD3d 28, 32 [2004], *affd as mod* 5 NY3d 303 [2005]), and which was subsequently vilified in a State Assembly debate as having caused "outrageous damage," enacted the Vacancy Decontrol Law (L 1974, ch 371), which released newly vacated apartments from rent regulation. The "experiment," however, was short-lived and the State Legislature, in 1974, once again recognized the need for rent regulation due to an "acute shortage of housing accommodations caused by continued high demand" and that tenants "are being charged excessive and unwarranted rents and rent increases" (McKinney's Uncons Laws of NY § 8622 [L 1974, ch 576, sec 4, §2]) and, accordingly, enacted the Emergency Tenant Protection Act (ETPA), L 1974, ch 576, § 4 [Uncons Laws § 8621 *et seq.*). The Court of Appeals, in *LaGuardia v Cavanaugh*, 53 NY2d 67, 74-75 [1981], characterized the ETPA "not [as] a rent and eviction regulating law," but as "an enabling act, which empowered New York City ... to extend rent stabilization."

subject to its provisions for more than one reason and states that when both J-51 and another basis concurrently require rent stabilization, the expiration of the J-51 benefits has no effect on the other:

> "[I]f such dwelling unit would have been subject to this chapter or the [ETPA of 1974] in the absence of this subdivision, such dwelling unit shall, upon the expiration of such benefits, continue to be subject to this chapter or the [ETPA of 1974] *to the same extent and in the same manner as if this subdivision had never applied thereto*" (RSL § 26-504[c] [emphasis added]).

In 1993, the Legislature, having found that the current system of rent regulation was not equitable to either tenants or owners because the system in place disproportionately benefitted "high income tenants" whose rent should not be subsidized, and that no housing emergency existed with respect to apartments renting for more than $2,000 (*see* Memorandum of Senator Kemp Hannon, L 1993, ch 253 at 175-176), enacted the Rent Regulation Reform Act to amend, inter alia, the RSL (RRRA) (L 1993, ch 253, § 6). The new sections of the RSL provided for the deregulation of residential units that became vacant with a legal regulated rent of $2,000 or more per month (Administrative Code § 26-504.2), or had a legal regulated rent of $2,000 or more per month and whose tenants and occupants had a total annual income in excess of $250,000 for each of the two preceding calendar years

(Administrative Code § 26-504.1).

The high rent or luxury decontrol provisions of the RRRA, as amended in 1997, now exclude housing accommodations from the scope of the RSL when either: the legal regulated rent is $2,000 or more and the combined household income exceeds $175,000 for two consecutive years (RSL § 26-504.1) or the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more (RSL §§ 26-504.2; 26-511[c][5-a]). The foregoing decontrol exclusions, however, are subject to the following exception:

> "Provided, however, that *this exclusion shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section* [421-a] or *[489] of the real property tax law*, except as otherwise provided in subparagraph (i) of paragraph (f) of subdivision two of section [421-a] of the real property tax law, or (b) by virtue of article seven-C of the multiple dwelling law" (RSL §§ 26-504.1; 26-504.2[a] [emphasis added]).

As discussed above, the J-51 program was enacted pursuant to RPTL § 489.

DHCR Interpretation and Regulations

The DHCR,[5] as set forth in the Omnibus Housing Act passed by

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[5]Although the DHCR is not a party herein, defendants place a great deal of reliance on its interpretation of the statutes in question.

the Legislature in 1983, is vested with the responsibility of administering the New York City Rent Stabilization and Rent Control Laws (*see 459 W. 43rd St. Corp. v New York State Div. of Hous. & Community Renewal*, 152 AD2d 511, 511 [1989]). In Operational Bulletin 95-3, dated December 18, 1995, the DHCR, tracking the language of the exception to the high rent decontrol provisions, stated that "[t]hese high rent/high income deregulation provisions shall not apply to housing accommodations which are subject to rent regulation by virtue of receiving tax benefits pursuant to sections 421-a or 489 of the Real Property Tax Law, until the expiration of the tax abatement period."

Shortly thereafter, in an opinion letter dated January 16, 1996, the Assistant Commissioner of the DHCR accepted a reading of the exception language urged by counsel for the Tishman defendants as a feasible alternative. Under that interpretation, the statutory exception is restricted to those having accommodations that became, or become, subject to the RSL for "the sole reason" of receipt of J-51 tax abatement benefits, and not to those housing units that receive those abatement benefits but are also subject to the RSL for other reasons. The Assistant Commissioner noted that the Introducer's Memorandum in Support of the RRRA is "silent on the issue" of the meaning of the phrase "by virtue of," and states that the language will be construed

"literally, in accordance with the ordinary meaning thereof."

The letter concludes:

> "Therefore, applying a lexicographical definition to those words, as for example is enunciated in Webster's College Dictionary, it is our opinion that their apparent meaning is synonymous to 'by reason of' or 'because of,' and that an owner is precluded from seeking Luxury Decontrol of a housing accommodation receiving 'J-51' tax abatement benefits only where the receipt of such benefits is the sole reason for the accommodation being subject to rent regulation."

The DHCR, however, also issued the following caution:

> "[I]t should be noted that where Luxury Decontrol is applied before the 'J-51' tax benefit period has expired, the abatement should be reduced proportionately. That the Legislature recognized the inherent inequity of an owner's continuing to enjoy tax benefits after decontrol is apparent from RPTL Section 489(7)(b)(1)..."

In December 2000, the DHCR adopted formal regulations that, following the analysis embodied in the 1996 opinion letter, provide that the exception to the luxury deregulation provisions does not apply unless the apartments "became or become subject to the RSL and this Rent Stabilization Code: (i) solely by virtue of [inter alia, J-51] tax benefits" ([9 NYCRR] §§ 2520.11[r][5][e]; [s][2][i]). A subsequent Fact Sheet issued by the DHCR echoes the foregoing and states that an exception to high-rent vacancy decontrol applies to "[a]partments that are subject to rent

regulation only because of the receipt by the owner of [inter alia, J-51] tax benefits."

Statutory Interpretation

It is a well-settled principle that while the correct interpretation of a statute is ordinarily an issue of law for the courts, "[a[n administrative agency's interpretation of the statute it is charged with implementing is entitled to varying degrees of judicial deference depending upon the extent to which the interpretation relies upon the special competence the agency is presumed to have developed in its administration of the statute" (*Matter of Rosen v Public Empl. Relations Bd.*, 72 NY2d 42, 47 [1988]; *Matter of Gruber (New York City Dept. of Personnel-Sweeney)*, 89 NY2d 225, 231 [1996]). Indeed, in those instances "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute [and i]f its interpretation is not irrational or unreasonable, it will be upheld" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]; *see also Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 58-59 [2004]).

In contrast thereto, where, as here, "the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" (*Kurcsics*, 49 NY2d at 459; *see also Matter of Belmonte v Snashall*, 2 NY3d 560, 565-566 [2004]). On such occasions, the courts are free to ascertain the proper interpretation from the statutory language and intent and may undertake the function of statutory interpretation without any deference to the agency's determination (*Matter of Albano v Board of Trustees of N.Y. City Fire Dept., Art. II Pension Fund*, 98 NY2d 548, 553 [2002]; *Gruber*, 89 NY2d at 232; *Madison-Oneida Bd.*, *4 NY3d* at 59 [where the court is "faced with the interpretation of statutes and pure questions of law ... no deference is accorded the agency's determination"]; *Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 173 [1988] ["ultimately ... legal interpretation is the court's responsibility; it cannot be delegated to the agency charged with the statute's enforcement."]). Since, in this matter, the interpretation of the provisions in question requires no special competence, or understanding of underlying practices on the part of the DHCR, we find unavailing defendants' reliance on the DHCR's regulations and opinion letter and conclude that the

agency's construction of the statute is not entitled to deference.

Our analysis now shifts to the well settled principle that in interpreting a statute, it is fundamental that a court "ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a], at 177; *see Riley v County of Broome*, 95 NY2d 455, 463 [2000]; *Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.*, 14 AD3d 553, 557 [2005]), and, "[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; *see also Flores v Lower East Side Serv. Ctr., Inc.*, 4 NY3d 363, 367 [2005]). Moreover, "new language cannot be imported into a statute to give it a meaning not otherwise found therein" (McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 190; *see Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 104-105 [1997], quoting § 94), and a court, in discerning the meaning of statutory language, must "avoid objectionable, unreasonable or absurd consequences" (*Long v State of New York*, 7 NY3d 269, 273 [2006]; *Ryder v City of New York*, 32 AD3d 836, 837 [2006]), *lv dismissed* 8 NY3d 896 [2007]).

Bearing the foregoing in mind, it is clear to us that the impact of the J-51 and rents stabilization statutes is that all apartments in buildings receiving J-51 tax benefits are subject to the RSL during the entire period in which the owner receives such benefits. The high rent decontrol provisions of the RSL, which are at the crux of this matter, provide two means of excluding apartments from the coverage of the RSL when the legal rent reaches $2,000, but also provide that the decontrol provisions do not apply to housing accommodations that "became or become" subject to the RSL "by virtue of" receiving J-51 tax benefits. The parties agree that "by virtue of" means "because of" or "by reason of," and it is clear to us that such phrase does not, in ordinary language, mean that only a single cause or reason exists. Indeed, the Legislature, in numerous instances, has not hesitated to use the phrases "only by virtue of" or "solely by virtue of" when it intended to restrict a provision to a single cause. *See e.g.* Real Property Tax Law § 489(14) ("The benefits of this section shall not apply to any conversion of property to residential use where the conversion was contrary to the applicable zoning resolution and was permitted *only by virtue of a* variance as to use ..."); Civil Service Law § 58(3), Executive Law § 835(7) and General Municipal Law § 209-q(2)(a) (each of which excludes from the definition of police officer any

person "serving as such *solely by virtue of* his occupying any other office or position"); Executive Law § 247(1) ("The division may discontinue such service at any time but shall not be required to discontinue such service *solely by virtue of* the fact that more than five probation officers are needed ..."); Executive Law § 390 and General Municipal Law § 445 (public employees required to wear uniforms shall not be deemed to violate any law regulating uniform appearance "*solely by virtue of* the display on the shoulder area of the sleeve of such uniform of an American flag ..."); Public Health Law § 4360(1) ("An organ procurement organization shall not constitute a bank or storage facility *solely by virtue of* storing or arranging for the storage of heart valves ..."); Real Property Law § 232-c ("Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term *solely by virtue of* the tenant's holding over."); RPAPL § 1523(5)(b) ("the defendant whose right[,] title or interest will be extinguished by failure to redeem the property within the time fixed by the judgment held such right to redeem *only by virtue of* a subordinate mortgage ..."); Tax Law § 290(c)(2) ("Every organization whose sole unrelated trade or business carried on in New York consists of activities constituting an unrelated trade

or business *solely by virtue of* section 501(m)(2)(A) of the internal revenue code shall not be subject to tax under this article." [footnote omitted]) (emphasis added throughout).

We also find instructive the decision of the United States Court of Appeals for the Fifth Circuit in *Demette v Falcon Drilling Co., Inc.* (280 F3d 492 [2002]), wherein the Court was presented with the issue of whether an indemnity agreement between an oil drilling platform provider and its contractor was voided by the Longshore and Harbor Workers' Compensation Act (LHWCA) where the injured employee of the contractor was entitled to the benefits of the LHWCA "by virtue of" section 1333(b) of the Outer Continental Shelf Lands Act (OCSLA). Having determined that the central issue in the case was the meaning of the phrase "by virtue of," the court stated that:

> "The most obvious meaning of 'by virtue of section 1333' is simply that the worker is covered by section 1333. For example, it is perfectly sensible to say, 'Demette is eligible to receive LHWCA benefits by virtue of section 1333 and also by virtue of the LHWCA itself.' This sentence makes sense because we understand that 'by virtue of' does not imply exclusivity. The adverbs 'exclusively' or 'solely' would have indicated the meaning [third-party defendant] advocates, but those words are absent from the statute" (*id.* at 502).

We also find that the broader interpretation of the phrase "by virtue of" urged by plaintiffs herein is more consistent with

the overall statutory scheme, which makes no distinction based on whether a J-51 property was already subject to regulation prior to the receipt of such benefits. Indeed, RPTL § 489(7)(b)(2) provides that any apartment subject to rent regulation "as a result of receiving a [J-51] tax exemption or abatement pursuant to this section *shall be subject to such regulation* until the occurrence of the first vacancy of such unit after such benefits are no longer being received" (emphasis added). Correspondingly, the RSL provides that upon expiration of the J-51 tax benefit period, those apartments previously subject to regulation by other mechanisms continue to be covered "to the same extent and in the same manner as if [the J-51 benefits] had never applied thereto" (RSL § 26-504[c]).

Finally, we find that by limiting the scope of the high-rent exceptions so that apartments that receive J-51 tax benefits and are also rent-stabilized pursuant to other criteria are subject to high-rent deregulation, but apartments that are regulated solely because they receive J-51 benefits are not subject to high-rent deregulation, despite the fact that all of the units in question receive J-51 benefits, is to invite absurd and irrational results. By way of example, a high-rent unit deregulated as the result of a vacancy prior to receipt of J-51 benefits would again become subject to rent stabilization when

the owner began receiving J-51 benefits and would remain exempt from the high-rent decontrol provision throughout the J-51 period. In contrast, a similarly high-rent unit that was already subject to rent stabilization at the commencement of the J-51 benefits period would be subject to deregulation at any time during the J-51 period if the tenant vacated the apartment. We, however, perceive no rational basis upon which owners should be treated differently depending upon the timing of a tenant's departure. Nor is there any reason to endorse the motion court's counterintuitive outcome of allowing landlords to be exempt from rent stabilization obligations in certain building units even though they continue to receive J-51 tax abatements originally provided to the owner on the condition that the owner guaranteed its housing stock would be rent stabilized throughout the J-51 period (*see State of New York v Fashion Place Assoc.*, 224 AD2d 280, 281 [1996], *lv dismissed* 89 NY2d 917 [1996] [owners who chose to "reap [the] substantial tax benefits" of the J-51 program agreed to accept the obligations imposed by the Rent Stabilization Law while receiving the benefits]). Since there is no basis for limiting the scope of the exemption, the motion court's insertion of the word "solely" into the regulations implementing the statute was impermissible.

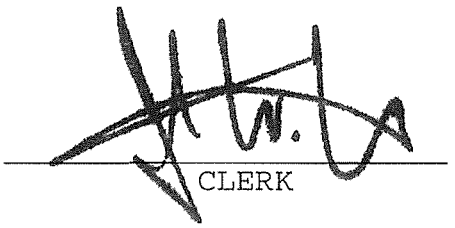
Accordingly, the judgment of the Supreme Court, New York

County (Richard B. Lowe III, J.), entered August 24, 2007, dismissing the complaint, should be reversed, on the law, without costs, and the complaint reinstated.

All concur.

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

ENTERED: MARCH 5, 2009



CLERK