

**Matter of Andersen v Klein**

2006 NY Slip Op 30575(U)

November 16, 2006

Supreme Court, New York County

Docket Number: 100632/2006

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. PAUL G. FEINMAN

PART 52

Index Number : 100632/2006

**ANDERSEN, JAMES**

VS.

**KLEIN, JOEL I.**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. 100 632/06

MOTION DATE 3/10/06

MOTION SEQ. NO. 001

MOTION CAL. NO. 2

this motion to/for Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*Notice of Cross Motion*

Cross-Motion:  Yes  No

*INTERIM ORDER of 4/19/06*

Upon the foregoing papers, it is ordered that this motion—

PAPERS NUMBERED

1

4

5

2, 3

6

*STIPS 7, 8  
Additional papers 9-12*

*petition & cross motion are  
decided in accordance  
with the annexed  
decision, order & judgment.*

**UNFILED JUDGMENT**  
 Judgment has not been entered by the County Clerk  
 notice of entry cannot be served based hereon. To  
 obtain entry, counsel or representative must  
 appear in person at the County Clerk's Desk (Room  
 41B).

Dated: 11/16/06

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

In the Matter of the Application of  
JAMES ANDERSEN,

Petitioner,

For a Judgment under Article 78 of the  
Civil Practice Law and Rules

- against -

JOEL I. KLEIN, Chancellor of the New York City  
Board of Education,

Respondent.

-----X

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Papers considered in review of this petition to annul and reinstate and

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion & Memo of Law.....	<u>2, 3</u>
Aff. in Opp. to Cross-Motion.....	<u>4</u>
Reply Memo of Law.....	<u>5</u>
Interim Order of April 19, 2006.....	<u>6</u>
Stipulations.....	<u>7, 8</u>
Transcript of Hearing.....	<u>9</u>
Aff. in Support of Petition & Reply Memo .....	<u>10, 11</u>
Notice of Amended Petition.....	<u>12</u>
Verified Answer & Memo of Law.....	<u>13, 14</u>

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and hence of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk.

**PAUL GEORGE FEINMAN, J.:**

In this Article 78 proceeding, petitioner seeks to annul an unsatisfactory rating ("U rating") and to be reinstated as a probationary teacher pursuant to CPLR 7803(3). Respondent cross-moves to dismiss the petition. For the reasons which follow, the petition is granted in part, and the cross-motion is denied.

*Factual Allegations and Procedural Background*

Petitioner James Andersen was hired as a probationary teacher in the New York City public school system in September 2002 (Am. Pet. ¶ 4). In February 2004, he was assigned to work in Chelsea High School, the principal of which was Timothy Timberlake (Am. Pet. ¶ 5). Timberlake first formally observed Andersen's classroom work on March 9, 2004 (Ver. Ans. Ex. 2). In finding it "satisfactory," he noted among other strengths that petitioner actively circulated through the classroom to provide help when needed; spoke clearly and authoritatively; that the students were "highly motivated by the assignment" and "clearly involved in the lesson," and that there was a "clear indication that significant learning was taking place." He pointed out, however, that although students answered and discussed the questions, petitioner did not assess the understanding of the entire class. He noted that he himself "usually hand[s] out one extra copy [of the handout] to each group" who must come to a consensus before turning it in, thus providing an assessment. He suggested implementing "silent debates" as another tool for interaction and assessment, and noted that students need to be frequently reminded to take notes. He suggested certain reminder phrases for petitioner's use.

The principal conducted a second class observation on April 22, 2004, which he found "unsatisfactory." (Ver. Ans. Ex. 3). He found that there was "no classroom management" with the students talking throughout the lesson. He noted that twice a student "yelled out" racial slurs, but that petitioner did not respond. He indicated that petitioner needed to demand that students raise their hands when asking questions or when adding comments to the discussion, and to "use escalating discipline procedures" from a warning, to talking to the student outside of class, to calling the student's home, to referring to the dean or assistant principal. He also indicated that petitioner

needed to organize the class seating so as to be in direct contact with all students. He also noted that petitioner's use of a "silent debate" was not well-planned as the directions were confusing and the question called for a list of words rather than opinions. Timberlake's observation report concluded: "Teaching is [a] serious job and is not for everybody. Every effort must be made every day to give our students the opportunity to succeed. Each of the recommendations should be taken seriously and attempts to implement them should be made immediately." Petitioner acknowledged reading this report on May 17, 2004.

On May 19, 2004, Timberlake observed petitioner's classroom for a third time. He again found the lesson "unsatisfactory" (Ver. Ans. Ex. 4). Although Timberlake specifically indicated that the lesson was well planned and that petitioner had followed his suggestions concerning organizing the class seating, he stated that the time was poorly managed, that the students talked throughout the class and repeatedly called out questions, answers, and comments. According to Timberlake, although petitioner scolded them for talking, he "did little to persuade students to stop this behavior" and petitioner did not ever indicate to the students that they should be taking notes. Timberlake offered several suggestions for managing the students, including changing seats, writing names on the board, and calling parents, as well as using positive reinforcement of good behaviors. Petitioner acknowledged reading this report on June 1, 2004.

On May 21, 2004, an incident occurred in which petitioner alleged that a student from one of his other classes entered his classroom without permission, initially refused to leave, and then left with a curse and a raised fist, with petitioner pushing the door closed after him for his own safety, and possibly "touch[ing] him unintentionally." (Am. Pet. Ex. B, "Report of Incident," May 21, 2004). The student alleged in writing that petitioner "got up & put his hands me [sic] and push me

out the room [sic]" (Am Pet. Ex. D, "Written Statement Form," May 21, 2004). Petitioner orally recounted the incident to two of the school's deans moments after it occurred and voluntarily reported the event in writing that afternoon (Am. Pet. ¶¶ 7-9; Ex. B).

On May 26, 2004, petitioner was called to a meeting with Timberlake and a union representative, and on June 1, 2004 Timberlake issued a letter stating that after investigation, he concluded that petitioner had placed his hands on the student and pushed him out of the room, an action classified as corporal punishment, and advised petitioner that the incident could lead to further disciplinary action including an unsatisfactory rating and a discontinuance of his probation (Am. Pet. Ex. E, F). Petitioner acknowledged receipt of that letter on June 4, 2004, and on the same day, requested a Step I Grievance Conference, which was held on June 10, 2004 before Timberlake with petitioner and his union representative (Am. Pet. Ex. F, H, I). The substance of petitioner's Grievance was that the student was a disruptive influence in class and the school, that petitioner did not push the student, that he had requested more security in that part of the school building, and that petitioner had not been able to review "the Dean's oral testimony" upon which Timberlake relied in part for his decision that corporal punishment had occurred. In denying the Grievance, Timberlake noted a lack of evidence that petitioner had previously complained about the student or that the student had used a threatening hand gesture (Am. Pet. Ex. I).

On June 11, 2004, petitioner received his annual review issued by his principal and countersigned by respondent's Local Instructional Superintendent, Alan Dichter. Petitioner received an overall U rating with a recommendation of discontinuance of probationary service (Am. Pet. Ex. J). He was rated "unsatisfactory" in all subcategories concerning "pupil guidance and instruction," as well as "professional attitude and professional growth," "resourcefulness and initiative,"

“attention to physical conditions” in the classroom, “maintenance of good relations with other teachers and with supervisors,” and “effort to establish and maintain good relationships with parents.” In support of the recommendation, Timberlake referred to the Observation Reports of April 25, 2004 and May 19, 2004, and the letter dated June 1, 2004, acknowledged by petitioner on June 4, 2004, concerning the finding of corporal punishment.

Petitioner initiated an appeal of the U rating on June 16, 2004 (Am. Pet. Ex. K).

By letter dated September 9, 2004, Local Instructional Superintendent Dichter informed petitioner a decision would be made on October 11, 2004 as to whether or not his probationary service would be terminated on that date; he was permitted to submit a written response to be received no later than a week before the decision date (Am. Pet. Ex. L). Thereafter, by letter dated October 29, 2004, petitioner was notified that he was terminated as of that day (Ver. Ans. Ex. 12).

On March 14, 2005, the three-member Chancellor’s Committee conducted a review of the recommendation to discontinue probation, based on petitioner’s appeal of his U rating (Am. Pet. ¶ 21). The three-member Committee heard statements and asked questions of petitioner, who appeared with a union representative, and the principal. According to the Committee’s findings, “there was a lack of supporting documentation to prove that an act of corporal punishment did take place,” as the “student had a record of previous misconduct and in all probability did make a gesture that threatened” petitioner, and “a discontinuance based on these charges is inaccurate.” (Ver. Ans. Ex. 13, p. 3). The Committee further noted that the principal “did not offer [petitioner] the help and assistance he needed,” and that the pre-Observation conferences held between petitioner and Timberlake did not provide petitioner with the necessary guidelines for the lessons that were going to be observed. However, the Committee highlighted Timberlake’s Observation reports, the second

of which noted “major problems in the area of classroom control,” many of which “were still present when [petitioner] was observed for the third time.” (Ver. Ans. Ex. 13, p. 3). The majority opinion believed that it was petitioner’s obligation to “find ways to incorporate the suggestions and recommendations made to him after the first observation by the Principal and include them in the second observation,” that petitioner “was either unable or unwilling to do this,” and that therefore a concurrence with the recommendation to discontinue probationary service was warranted (Ver. Ans. Ex. 13, p. 3).

The minority member of the Committee wrote a separate letter report dated March 15, 2005 (Ver. Ans. Ex. 14). Her report argued that petitioner should be restored to his teaching position, based on Timberlake’s admission that he had no plan to assist petitioner in addressing his shortcomings, the lack of documentation as required by departmental regulations that would establish that discussions and assistance occurred and, in addition, because there was no observation of petitioner’s class by a representative from the Superintendent’s Office as required by State regulations when a probationary teacher’s employment is in danger of being discontinued.

On September 16, 2005, Local Instructional Superintendent Dichter reaffirmed the “previous actions which resulted in” discontinuance of petitioner’s probationary service as of October 29, 2004 (Ver. Ans. Ex. 15).

Petitioner commenced this summary proceeding by filing a notice of petition and petition in Supreme Court, New York County, on January 17, 2006. He seeks a declaration that the 2004 year end U rating and the Chancellor’s September 16, 2005 determination upholding it, were arbitrary and capricious, an abuse of discretion, improper, and unlawful under CPLR 7803(3); a declaration that the U rating and the September 15, 2005 determination were not supported by substantial

evidence under CPLR 7803(4); and an order revoking and expunging the annual 2004 year end U rating, as well as the “unsatisfactory” ratings of April 26, 2004 and May 19, 2004, and the corporal punishment determination of June 1, 2004, and revoking petitioner’s termination and reinstating him to his position.

### *Legal Analysis*

#### 1. Statute of Limitations

An Article 78 proceeding against a public body must be commenced only after a matter has been finally determined (CPLR 7801[1]). CPLR 217(1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination (*Carter v State of New York*, 95 NY2d 267, 270 [2000]). An agency determination is deemed final “when the petitioner is aggrieved by the determination,” meaning that it has been received by the petitioner (*Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). “In analyzing the Statute of Limitations issue we must first ascertain what is the determination sought to be reviewed” (*Martin v Ronan*, 44 NY2d 374, 380 [1978]).

The Department of Education and the courts distinguish between a probationary employee who seeks a review of a decision to terminate employment and one who seeks review of a U rating. It is well established that probationary teachers who seek to challenge their discontinuance must commence an Article 78 proceeding within four months of termination (*see, DeMilio v Borghard*, 55 NY2d 216, 220 [1982]; *McCain v Fernandez*, 226 AD2d 380 [2d Dept.], *lv denied* 88 NY2d 806 [1996]). There is no toll of the statute should an employee seek review of the discontinuance by the Chancellor’s Committee, as such review is purely a product of the collective bargaining agreement (*Frasier v Board of Educ. of the City School Dist. of the City of New York*, 71 NY2d 763, 766, 767

[1988]; *Schulman v Board of Educ. of the City of New York*, 184 AD2d 643, 644 [2d Dept. 1992]). However, it is also clear that the time to commence a judicial proceeding to review the Department of Education's upholding of a U rating after appeal, such as petitioner explicitly sought on June 16, 2004, does not begin to run until the Chancellor issues a decision denying the appeal and sustaining the rating (*Mateo v Board of Educ.*, 285 AD2d 552, 552 [2d Dept. 2001]; *Bonilla v Board of Educ. of City of New York*, 285 AD2d 548, 548 [2d Dept. 2001]). In both *Mateo* and *Bonilla*, the Courts held that the provisional teachers could seek Article 78 review of the Chancellor's sustaining their U ratings, although they were time barred from commencing a proceeding seeking review of the notice of termination.

Thus, contrary to the respondent's argument, the letter notice from the Chancellor's Office dated September 16, 2005, although reaffirming respondent's decision to discontinue petitioner's employment, was also the reaffirmation upholding the U rating, and commenced the four-month period in which petitioner could commence an Article 78 proceeding *to seek review of the U rating*. Moreover, although respondent argues that petitioner commenced his proceeding too late because the petition was only filed on January 17, 2006, the court takes judicial notice that Monday, January 16, 2006 was Martin Luther King Day, a federal holiday, and the courts were closed. The petition was therefore filed on the first day the court was open subsequent to the expiration of the statute.<sup>1</sup> Accordingly, the petition was timely filed and respondent's cross-motion to dismiss the petition based on the running of the statute of limitations is denied.

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<sup>1</sup>The parties provide no argument concerning whether or not petitioner actually received notice on September 16, 2005, although the law is clear that the determination becomes final and binding only when the petitioner is informed of the decision (*Gomez v Safir*, 271 AD2d 246, 247 [1<sup>st</sup> Dept. 2000], citing *Biondo v New York State Bd. of Parole*, 60 NY2d at 834).

## 2. Merits of the Petition

A judicial review of an administrative determination is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but will decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1<sup>st</sup> Dept. 1983]). The test of whether a decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609).

As petitioner was a probationary teacher, he could be terminated at any time and for any reason (*Speichler v Board of Coop. Educ. Servc.*, 90 NY2d 110, 114 [1997]; Educ. Law § 3014[1]). Judicial review is limited to an inquiry as to whether the termination was made in bad faith (*Johnson v Katz*, 68 NY2d 649 [1986]). Petitioner bears the burden of raising and proving bad faith through the presentation of evidence (*Witherspoon v Horn*, 19 AD3d 250, 251 [1<sup>st</sup> Dept. 2005], citing *Soto v Koehler*, 171 AD2d 567, 569 [1<sup>st</sup> Dept.], *lv denied* 78 NY2d 855 [1991]). Here, petitioner, an inexperienced probationary teacher who only taught at Chelsea High School for one semester, sets forth sufficient credible evidence to establish bad faith. In particular, petitioner points to Timberlake's inactions which seemed designed to result in petitioner's failure, in particular not informing petitioner beforehand of the goals and content of each of the observations, and not providing guidance or support by way of printed materials, meetings, practice sessions, guided teachings, and other remedial measures to help petitioner improve, in violation of section 89 of the

Chancellor's Regulations.<sup>2</sup>

Petitioner avers that he realized within the first week of his arrival at the high school that many of the students had behavioral problems, including talking during class, using foul language, failing to attend class, coming late to class, and using cell phones and CD players although told not to do so (Aff. in Supp. of Pet., Andersen Aff. [hereinafter Andersen Aff.] ¶ 2). He avers that he spoke to Timberlake before the end of his first week to ask that the principal explain to the students that although he was a new teacher arriving more than half way through the school year, he was not a substitute teacher but the designated social studies teacher and should be treated accordingly (Andersen Aff. ¶ 3). However, although Timberlake said he would visit petitioner's classes for this purpose, he "never did" (Andersen Aff. ¶ 3). Petitioner learned from conversations with other teachers that they had "the same disciplinary problems" which "occurred persistently in other teachers' classes" (Andersen Aff. ¶ 4).

Disputing the characterization that he had poor relations with other teachers, petitioner includes a letter from one colleague at the school, a Special Education teacher, which states that he "personally helped" her department with conflicting schedule issues, and that his "ability to get

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<sup>2</sup>According to the transcript of the Chancellor's Committee hearing, the union advisor quoted section 89 as stating, in part, as concerns the school principal, "He shall give specific attention to the work of substitute teachers, inexperienced teachers or teachers whose work has been recorded as unsatisfactory. He shall keep such cumulative records of assistance rendered as will show what opportunity and assistance such teachers have had to enable them to succeed. He shall keep official records of all class inspections and examinations, conferences with teachers and of such other matters, as he may deem necessary." (Transcript p. 11).

The current Chancellor's Regulations available through the website at <http://schools.nyc.gov/Administration/ChancellorsRegulations>, do not include a "section 89," and do not discuss this material. The court's own research, although not successful in finding the particular document referred to, found under Section IV of "THE APPEAL PROCESS," issued by the New York City Public Schools, Division of Human Resources, a discussion of the types of reports and documents that are prepared throughout the year by supervisors for employees.

along with his peers is exemplary” (Andersen Aff. ¶ 9; Ex. C). He also avers that he “was diligent about calling parents when necessary,” and includes copies of four “summonses” from April and May documenting various student behaviors and petitioner’s follow-up which included speaking with the students, student counselors, and calling parents, as well as a copy of a sample page from one of his notebooks in which he recorded grades, attendance, and other matters, which shows telephone calls made in April, May and June to various parents (Andersen Aff. ¶ 10; Ex. D, E).

Petitioner points out that Timberlake’s recommendation of a U rating was based on two “unsatisfactory” Observations and made without crediting the first satisfactory observation or considering his previous year’s history of satisfactory ratings at another school. Moreover, the two “unsatisfactory” Observations were conducted so close in time that petitioner could hardly have had time to absorb and implement the very few pedagogical tools given to him by Timberlake. Notably, the second Observation, which indicates that a post-Observation conference took place on April 28, 2004, resulted in a revised report issued on May 11, 2004 which petitioner read on May 17, 2004, *two days* before the May 19, 2004 Observation. The May Observation Report in fact indicated that petitioner implemented Timberlake’s suggestion concerning seat arrangement, and that he had a “well-planned lesson,” contradicting the ultimate rating in June 2004 in the category of lesson planning. While Timberlake found petitioner’s work unsatisfactory in other respects, this May Observation was the last time petitioner was formally observed, although there was another month of school. Petitioner convincingly argues that he was given insufficient time in which to demonstrate improvement.

Although the members of the Chancellor’s Committee were informed that Timberlake had not followed proper procedures either by keeping records concerning petitioner’s work or, more

importantly, by attempting to help him improve, and that petitioner was not independently observed by someone from the Superintendent's office prior to receiving a U rating, as required under the regulations,<sup>3</sup> only the minority member of the Committee was concerned by these serious limitations on petitioner's rights to work in an environment in which he was encouraged to develop as a teacher, and to have a neutral viewer observe his work and benefit from his or her assessment. Instead, the majority held that even without the charge of corporal punishment, petitioner's alleged failure to improve his teaching *between, at most April 14 to May 19, 2004 and in all likelihood between May 17 to May 19, 2004*, was grounds for a U rating, and for discontinuance of probationary service, even though he had only taught at the school for one semester. This is manifestly unfair and evidence of bad faith. Also questionable is that the same Local Instructional Superintendent who endorsed the U rating (without observing and discussing with petitioner his work), is the very individual who reaffirmed the decision to discontinue probation after receipt of the report from the Chancellor's Committee.

Based on the record presented, the petition is granted to the extent that it is declared that the 2004 year end U rating and the Chancellor's September 16, 2005 determination upholding it, are arbitrary and capricious, an abuse of discretion, improper, and unlawful under CPLR 7803(3) in that the Chancellor's own regulations were ignored regarding the need for observation by the Local Instructional Superintendent. The branch of the petition which seeks an order to revoke and

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<sup>3</sup>Petitioner's union representative quoted from "section 41.3(e) of the Chancellor's Regulations," as stating that "an appropriate superintendent of a city district is required to examine the records, make personal visits, and confer with the employee if an adverse rating is contemplated by the rating officer. The reports or visits made by the appropriate superintendent or his or her designee should be written, clearly stating the purpose of the visit and be signed by the employee prior to placement in the file." (Transcript, p. 11). The current Chancellor's Regulations do have contain a section 41, and do not discuss this issue.

expunge the 2004 year end U rating is therefore granted and his rating shall be changed to Satisfactory.

The branch of the petition seeking to expunge the corporal punishment determination of June 1, 2004 is granted, based on the Chancellor's Committee report. The branch of the petition seeking to expunge the "unsatisfactory" ratings of the Observations of April 26, 2004 and May 19, 2004, is denied. There is little to suggest that Timberlake's observations on the two dates were necessarily incorrect, let alone arbitrary and capricious. Rather, because the two assessments were made too closely in time and without proper follow-up and assistance, while they may be sustainable as "snapshots" of the lessons observed, they are insufficient to be of use as an evaluative tool as to Andersen's progress as an educator.

The branch seeking revocation of petitioner's termination and reinstatement to his position is granted to the extent that the matter is returned to respondent for further action consistent with the findings in this decision and order. In light of the foregoing, the court need not reach the branch of the petition which seeks a declaration that there was a lack of substantial evidence to support the determination need not be reached.

Finally, petitioner's argument that the letter dated October 29, 2004 from Local Instructional Superintendent Dichter which affirmed the discontinuance of petitioner's probationary service, did not give him the required 30 days notice, as he had previously been informed that consideration of his service would be decided on October 11, 2004, is unpersuasive. The court notes, that were petitioner terminated without a full 30 days notice as required under the statute, this would not render his dismissal ineffective, but merely entitle him to 30 days' salary (*see, Matter of Rossi*, 15 Educ. Dept. Rep. 363 [1976]). Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that:

(1) The 2004 year end U rating and the Chancellor's September 16, 2005 determination upholding it are arbitrary and capricious, an abuse of discretion, improper, and unlawful under CPLR 7803(3); and

(2) The respondent shall revoke and expunge the 2004 year end U rating and change it to "Satisfactory"; and

(3) The respondent shall expunge the corporal punishment determination of June 1, 2004 from petitioner's record; and it is further

ORDERED that the matter is returned to respondent for further action consistent with the findings in this decision, order and judgment as concerns revoking petitioner's termination and reinstatement to a teaching position; and it is further

ORDERED that the remainder of the petition is denied; and it is further

ORDERED that the cross-motion to dismiss the petition is denied.

This shall constitute the decision, order and judgment of this court.

ENTER:

*Paul George Ferraro*

J.S.C.

Dated: November 16, 2006  
New York, New York

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or party must appear in person at the County Clerk's Desk (Room 41B).

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