

**Matter of West Harlem Bus. Group v Empire State
Dev. Corp.**

2010 NY Slip Op 33948(U)

September 27, 2010

Supreme Court, New York County

Docket Number: 116839/06

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 107368/2007

TUCK IT AWAY ASSOCIATES

vs

EMPIRE STATE DEVELOPMENT

Sequence Number : 002

COUNSEL FEES, EXPENSES

INDEX NO. _____

MOTION DATE 5/13/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

1-3

4

5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

+ papers in Matter of West Harkon Business Group, Index No. 116839/06 Motion Seq. 003

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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 authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Dated: 5/27/10

JUSTICE SHIRLEY WERNER KORNREICH

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 YORK
COUNTY OF NEW YORK

-----X

In the Matter of the Application of

WEST HARLEM BUSINESS GROUP,

Petitioner,

**DECISION
and
ORDER**

Index No.: 116839/06

For a Judgment Pursuant to Article 78
of the CPLR

-against-

EMPIRE STATE DEVELOPMENT
CORPORATION,

Respondent.

-----X

In the Matter of the Application of

TUCK-IT-AWAY ASSOCIATES, L.P.,

Petitioner,

Index No.: 107368/07

For a Judgment Pursuant to Article 78
of the CPLR

-against-

EMPIRE STATE DEVELOPMENT
CORPORATION,

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

-----X

KORNREICH, SHIRLEY WERNER, J.

Motions of attorneys' fees in the two above-entitled proceedings are consolidated for
disposition.

In these Article 78 proceedings involving requests for records under the Freedom of

Information Law (FOIL),¹ petitioners, West Harlem Business Group (West Harlem) and Tuck-It-Away Associates, L.P. (TIA, collectively, Petitioners), move for an award of attorneys' fees, pursuant to POL §89(4)(c). Petitioners requested attorneys' fees in their original petitions. Final judgments in both proceedings were entered in the summer of 2007. In the West Harlem proceeding, the final judgment of this court, dated June 27, 2007 and entered July 3, 2007, contained a single decretal paragraph, as follows:

ORDERED, ADJUDGED and DECREED that the petition is granted to the extent that the documents listed on the attached log, must be disclosed by respondent within seven days.

In the TIA proceeding, this court issued a final disposition, dated August 16, 2007 and entered August 23, 2007, which disposed of TIA's petition in accordance with the judgment in West Harlem's case.

Respondent, Empire State Development Corporation, appealed both final judgments to the Appellate Division, First Department, and then to the Court of Appeals. The appeals were decided jointly. Petitioners did not cross-appeal. The Appellate Division, First Department, determined Respondent's appeal on July 15, 2008. Respondent appealed to the Court of Appeals, which affirmed the Appellate Division's order on December 15, 2009.

This court no longer has jurisdiction to amend the judgments in this proceeding to include attorneys fees. CPLR 5019(a) permits a court to correct mistakes in a judgment that do not affect a "substantial right" of a party. Absent a reservation of jurisdiction, a judgment cannot be amended to include a post-judgment award of attorneys' fees because that affects a substantial

¹ New York State Public Officers Law, §84 et seq. (POL).

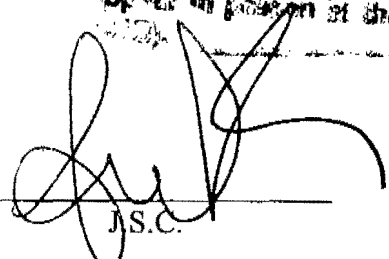
right. *Rotunno v Gruhill Constr. Corp.*, 29 AD3d 772 (2d Dept 2006). Further, while a court has inherent power to amend a judgment in the interest of justice, that power is not appropriately exercised when the relief could have been, but was not, requested during the appeal process. *Pjetri v New York City Health & Hosp. Corp.*, 169 AD2d 100, 103 (1st Dept 1991); *Harbas v Gilmore*, 214 AD2d 440 (1st Dept 1995)(errors that could have but were not raised on appeal cannot be fixed pursuant to a court's inherent power unless they arise from fraud, mistake, inadvertence, surprise or excusable neglect).

Here, Petitioners claim that they could not have raised the attorneys' fee issue until the appeals were decided and they knew they were prevailing parties. However, this is not so. This court granted judgments in Petitioners' favor without awarding the fees they requested in their petitions. At the time of the appeal to the Appellate Division, respondent had been ordered to produce records and petitioners could have raised their entitlement to fees by cross-appeal. At this juncture, this court no longer has jurisdiction to amend the judgments. Accordingly, it is

ORDERED that the motions for attorneys' fees by WEST HARLEM BUSINESS GROUP and TUCK-IT-AWAY ASSOCIATES, L.P., are denied.

Dated: September 27, 2010

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 authorized representative must appear in person at the Judgment Clerk's Desk (Room 1202).

ENTER: _____

 J.S.C.