SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 30, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

361N Carlos Severino,
Plaintiff-Respondent,

Index 20597/04
85035/06
85039/06

-against-

Brookset Housing Development Fund Corp.,
Defendant-Respondent,

Settlement Housing Fund, Inc., et al.,
Defendants.
- - - - -
Settlement Housing Fund, Inc., et al.,
Third-Party Plaintiffs,

-against-

MC&O Construction, Inc.,
Third-Party Defendant,

American Home Assurance Company,
Third-Party Intervenor-Appellant.
- - - - - -
Brookset Housing Development Fund Corp.,
Second Third-Party Plaintiff-Respondent,

-against-

MC&O Construction, Inc.,
Second Third-Party Defendant,

American Home Assurance Company,
Second Third-Party Intervenor-Appellant.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for appellant/appellant.

Andrew H. Rosenbaum, New York, for Carlos Severino, respondent.

Weiner Millo & Morgan, LLC, New York (Alissa A. Mendys of counsel), for Brookset Housing Development Fund Corp., respondent/respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered November 17, 2008, which, in an action for personal injuries by a construction worker against the construction site's owners and general contractors, and a third-party action against plaintiff's employer (the employer), denied the motion of the employer's workers' compensation and liability insurer (the insurer) to intervene in the third-party action, unanimously affirmed, without costs.

The insurer argues that its "employer's liability policy" covers only the common-law, not the contractual, indemnification claims asserted against the employer in the third-party action; that coverage under its policy is conditioned upon the existence of a "grave injury" within the meaning of the Workers' Compensation Law; that the common-law claims against the employer in the third-party action cannot be maintained unless third-party plaintiffs show that plaintiff sustained a grave injury; and that the employer's counsel, who is being paid by the insurer, "is potentially faced with an ethical conflict if asked by [the insurer] to move to have the common law claims dismissed, because in doing so counsel risks the loss of coverage afforded by the employer's liability policy," and thus "may properly refuse to move to dismiss the third-party action based upon lack of 'grave

injury.'" Notably, in its verified answer, the employer asserts as its tenth affirmative defense that the third-party action against it is barred by the Workers' Compensation Law.

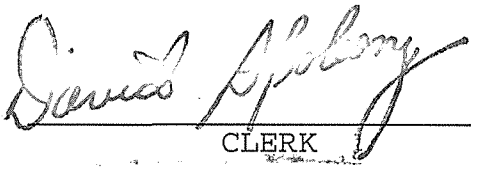
The insurer's motion to intervene should be denied because the insurer does no more than posit the possibility that notwithstanding the tenth affirmative defense, the employer's counsel might not seek dismissal of the common-law indemnification claims on the ground that plaintiff did not sustain a grave injury. Such speculation is not enough to show that the insurer's rights are not being adequately represented (*see generally Osman v Sternberg*, 168 AD2d 490, 490 [1990]).

To the extent the posited possibility is based on the theory that counsel would no longer be paid by the insurer to represent the employer on the contractual claims once the common-law claims were dismissed, absent an additional reason, we cannot accept that counsel might unethically act in its own interests. We also note that the insurer asserted in its motion that it believed the contractual claims were covered by general liability insurance the employer obtained from another insurer. Nonetheless, the insurer provides no reason to suppose that in the event the common-law claims were dismissed, counsel would not continue to represent the employer and be paid by the other insurer (or the employer in the event there was no other insurance). To the extent the posited possibility is based on the theory that

counsel might conclude that making the motion was not in the employer's interest because the employer would be harmed if the common-law claims against it were dismissed, the speculative character of that theory also is apparent from the insurer's own moving papers indicating that other coverage is available to the employer. Finally, we note that the interests of the insured cannot be compromised unless a meritorious motion to dismiss could be brought on that ground. The insurer, however, does not attempt to show that such a meritorious motion could be made.

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

ENTERED: MARCH 30, 2010



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Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2039 Jumax Associates, Index 603954/02
Plaintiff-Respondent,

-against-

350 Cabrini Owners Corp.,
Defendant-Appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered September 26, 2008, inter alia, declaring that, subject to defendant's right to the proceeds from an existing licensing agreement, plaintiff is the owner of the rights to the roof of defendant's building, including any transferable development rights, unanimously affirmed, without costs.

In a previous order, this Court affirmed the dismissal of plaintiff sponsor's claims for past and future income from the license to Cellular Telephone for installation and operation of antennas and related equipment on the roof of the building, but vacated the finding that defendant cooperative corporation had acquired the roof rights via adverse possession (46 AD3d 407, 408 [2007]). However, we did not affirmatively find for plaintiff on its claim to roof rights when we rejected defendant's adverse

possession claim. Therefore, the law of the case doctrine was inapplicable. Indeed, in the present motion, defendant co-op corporation offers an alternative ground for its own claim to roof rights, namely, that the sponsor never properly obtained an interest in those rights. It reasons that by assigning its interest, rather than first taking title to the premises and then conveying title with a carve-out for its rights to the roof, the sponsor failed to obtain the rights contemplated in the offering plan and therefore could not retain those rights.

While we reject the motion court's application of the law of the case doctrine to decide the present motion, we affirm on the merits its determination of the parties' competing claims to roof rights, declaring that plaintiff is the owner of the roof rights, including any transferable development rights, subject to the existing license agreement. The offering plan reserved the roof rights to the sponsor and specified that those rights would survive the closing and would exist as an exception to title, although the deed might omit the exception when the co-op took formal title. The sponsor acquired an equitable interest upon entering into the sale contract (*see Bean v Walker*, 95 AD2d 70, 72 [1983]), which equitable interest was sufficient for it to acquire and retain the contemplated roof rights, and its assignment of the purchase contract to the co-op corporation before the closing on the property did not eliminate or negate

that retention of rights.

Finally, as the motion court held, the co-op corporation failed to making a showing sufficient to demonstrate adverse possession between 1992 and 1995.

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

ENTERED: MARCH 30, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2258 Osvaldo Baez, Index 23080/01
Plaintiff-Respondent,

-against-

Barnard College,
Defendant-Appellant.

Marshall, Conway, Wright & Bradley, P.C., New York (Marci D. Mitkoff of counsel), for appellant.

Wingate Russotti & Shapiro, LLP, New York (Stavros E. Sitinas of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered November 5, 2008, which denied defendant's motion to set aside a jury verdict on liability, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant.

Plaintiff, a cook in a restaurant operated by defendant's lessee, Tealuxe, fell through a trapdoor in the floor behind the service counter that had been left open by a co-employee. He testified that the trapdoor was used constantly by employees for access to the basement, where supplies and kitchen facilities were located, and that when the trapdoor was open, there was only a foot-long margin on either side, which employees had to "tippy toe" around. Plaintiff himself had been up and down the stairs through the trapdoor about eight times that day. The practice was that an employee called "trapdoor opening" when emerging and

closed it after reaching the floor.

The undisputed facts were that defendant was an out-of-possession landlord with, according to the lease, access to the premises for making structural repairs. The building superintendent read the water meter several times a year by going down through the trapdoor. The trapdoor or hatch was constructed pursuant to blueprint specifications, drawn by the tenant, which had been submitted to and approved by the Buildings Department. Prior to Tealuxe's tenancy, there had been no basement hatch in the premises, and Tealuxe paid for one to be constructed. The tenant then constructed the counter around the trapdoor, consistent with Buildings Department approval. The jury found that the premises were unreasonably dangerous because of the location of the trapdoor, and that defendant was negligent in permitting the trapdoor to be so located on the premises it owned. It found defendant 100% liable based on causation, finding that although plaintiff was also negligent, his negligence was not a substantial factor in causing his injury.

In rejecting the motion to set aside the verdict, the court found that although the trapdoor itself was not dangerous, it became dangerous because of its location and use, which required it to be frequently opened: "[U]ndisputed evidence regarding the configuration and use of the area surrounding the hatch and door . . . provided a basis for the jury to conclude that defendant

created a dangerous condition," notwithstanding the "lack of evidence of a structural defect in the hatch or its door."

Defendant argues that it did not create the condition for which it was held liable. Since the evidence shows that the landlord had no role in designing or constructing the counter, which was done after the commencement of the lease term, there was no basis for the court to conclude that defendant had created the dangerous condition. The only construction work defendant did was to lay the concrete floor and provide for a hatch, both at the tenant's request and approved by the Buildings Department.

Defendant also contends that as an out-of-possession landlord, it cannot be held liable for a nonstructural defect. A properly functioning trapdoor that is left open by someone under the tenant's control is not a structural defect, either pursuant to the lease or under case law (*see Dexter v Horowitz Mgt.*, 267 AD2d 21 [1999]; *Daniel v Fleisher*, 230 AD2d 736 [1996]; *Wisznic v Nostrand Shoppers*, 215 AD2d 553 [1995]; *Brown v Weinreb*, 183 AD2d 562 [1992].

Under the facts established here, defendant cannot be liable. Implicit in the court's finding is that somehow, the landlord should have required the tenant to remove the counter, which it built to make its business viable, in order to prevent an employee from accidently falling down because of another employee's negligence. Neither the counter nor the trapdoor

constitutes a Building Code violation, and neither was structurally defective. Therefore, the landlord, even if it had notice of the configuration, could not be held responsible.

Brasby v Barra (156 AD2d 530 [1989]), the only relevant case cited by plaintiff, is inapposite. There, the defendant owned the real property and was the sole stockholder and president of the restaurant that leased the premises. The plaintiff, a waitress, alleged that the defendant was in control and in possession of the premises when she fell through a trapdoor, which was negligently maintained. In *Brasby* there was a question of fact concerning the landlord's control over the premises as well as whether the trapdoor presented a dangerous condition. Here, there is no claim or evidence that the landlord maintained any control over the leased premises, and the lease specifically imposed responsibility on the tenant for complying with safety requirements in making alterations to the premises.

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

ENTERED: MARCH 30, 2010

David Apolony

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Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2447 The People of the State of New York, Ind. 2934/04
Respondent,

-against-

Edelmiro Cesario,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John Carter, J.), rendered July 18, 2007, convicting defendant, after a jury trial, of manslaughter in the first degree (two counts), criminal possession of a weapon in the second degree and endangering the welfare of a child (two counts), and sentencing him to an aggregate term of 50 years, unanimously affirmed.

The court properly declined to submit manslaughter in the second degree as a lesser included offense. There was no reasonable view of the evidence, viewed most favorably to defendant and in light of the "principle of deference to the jury on questions of mens rea" (*People v Fernandez*, 64 AD3d 307, 310 [2009], *appeal withdrawn* 13 NY3d 796 [2009]), that he acted with anything less than intent to kill or seriously injure the two victims (*see People v Butler*, 84 NY2d 627, 634 [1994]). During a dispute, defendant went to another room of the apartment, took a

pistol from a safe, returned, shot one victim six times, and shot the other victim three times. Since defendant had to squeeze the trigger of his semiautomatic weapon nine separate times, there is no reasonable possibility that the weapon was discharged through careless handling. Furthermore, nothing in the prosecution or defense case tended to explain why defendant would fire nine shots, other than to hit his victims. The testimony of defendant and his psychiatric expert witness that defendant experienced a loss of control may have supported counsel's successful request for submission of the defense of extreme emotional disturbance, but it did not create a reasonable view that defendant acted without intent to cause death or serious physical injury.

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 30, 2010

CLERK

Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2448 In re Sandra G.,
Petitioner-Respondent,

-against-

Victor P.,
Respondent-Appellant.

Neal D. Futerfas, White Plains, for appellant.

Richard A. Kahn, BAS Legal Advocacy Program, Inc., Bronx (Joana Kaso of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), Law Guardian.

Appeal from order, Family Court, Bronx County (Alma Cordova, J.), entered on or about July 29, 2008, which, to the extent appealed from, denied respondent's motion to vacate default orders of protection and of custody and visitation, same court and Judge, entered on or about December 4, 2007, unanimously dismissed, without costs, as moot.

Given the absence of any genuine possibility of confusion or prejudice attributable to the father's failure to include in the caption of the notice of appeal the docket number of the custody proceeding initiated by the mother, we exercise our discretion to disregard that defect and treat the notice of appeal as valid insofar as the father seeks to appeal custody and visitation-related issues (*see* CPLR 5520[c]; *Cirillo v Macy's, Inc.*, 61 AD3d 538, 539 [2009]). Nonetheless, the father's subsequent filing of

a new custody petition, and his consent to satisfaction of that petition by entry of a final order of visitation, render his appeal moot insofar as it relates to custody and visitation issues (*see Matter of Kimberly M. [Nancy L.]*, 67 AD3d 562, 562 [2009]). Likewise, the expiration of the order of protection has rendered the father's appeal moot insofar as it seeks to vacate the entry of that order on default, as the father has identified no "permanent and significant stigma" or other enduring consequences which might flow from the entry of the order of protection on default (*see Matter of Diallo v Diallo*, 68 AD3d 411 [2009]).

Were we to reach the merits, we would find that the father has failed to demonstrate any reasonable excuse for his default or meritorious defense to the mother's claims which would warrant vacatur of the default orders (*see* CPLR 5015[a]; *Matter of Jaynices D. [Yesenia Del V.]*, 67 AD3d 518, 519 [2009]).

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

ENTERED: MARCH 30, 2010

CLERK

Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2449 The People of the State of New York, Ind. 2631/06
Respondent,

-against-

Gilbert Rivera,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Melkonian, J. at resentence), rendered on or about July 28, 2009,

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.

ENTERED: MARCH 30, 2010

CLERK

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

Saxe, J.P., Catterson, Moskowitz, Freedman, JJ.

2450 In re Hervacia Sanchez, Index 402494/08
Petitioner-Respondent,

-against-

John B. Mattingly, as Commissioner
of the New York City Administration
for Children's Services, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for City appellants.

Andrew M. Cuomo, Attorney General, New York (Richard O. Jackson of counsel), for State appellants.

Ashley Grant, New York, for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 17, 2009, which granted petitioner's application to annul the determination of respondent New York State Office of Children and Family Services (OCFS), made after a fair hearing, that respondent New York City Administration for Children's Services (ACS) correctly discontinued petitioner's child care benefits for failure to submit documentation verifying her husband's in-kind income, unanimously vacated, the proceeding treated as if it had been transferred to this Court for de novo review pursuant to CPLR 7804(g), and, upon such review, OCFS's determination unanimously annulled, and the matter remanded to

respondents so as to afford petitioner another opportunity to submit verification of her husband's in-kind income, without costs.

Respondents discontinued petitioner's child care benefits because she failed to submit documentation verifying her husband's in-kind income in the form of a rent-free apartment from his employment as the superintendent/janitor of the apartment building in which petitioner's family lives. Petitioner asserts that the new landlord of the apartment building denied the existence of any employment relationship with her husband but refused to supply documentation verifying the lack of such relationship or the fair market rental value of petitioner's apartment. Supreme Court concluded that respondent's discontinuance of benefits was arbitrary and capricious because petitioner demonstrated that she was unable to obtain the requested documentation despite her best efforts and that, in any event, it was unlikely that the rental value of the apartment would raise the family's income level beyond that to qualify for the benefits.

Supreme Court should have transferred the matter to this Court pursuant to CPLR 7804(g). Regardless of the terms used by petitioner, her petition essentially challenges factual findings made at the fair hearing claimed to justify the discontinuance of benefits, namely, that at all relevant times her husband had been

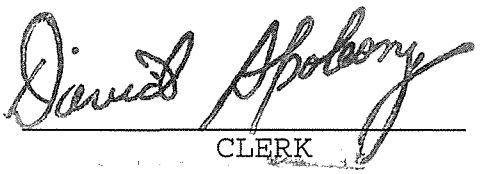
in an employment relationship with the building's landlord for which he received in-kind income in the form of a rent-free apartment, and that petitioner failed to submit proof of the apartment's rental value. Those findings are supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]), including petitioner's testimony that although her husband had stopped performing the duties of a superintendent, he was still doing maintenance and janitorial work in the building, and that her family was still living in the apartment rent-free. Because petitioner had the burden to supply documentation demonstrating her eligibility for the benefits (*see* 18 NYCRR 404.1[e][1][ii]; [2]; 415.3[b]), her failure to supply documentation verifying the rental value of the apartment normally would have warranted discontinuance of benefits.

Nonetheless, we annul OCFS's determination that ACS correctly discontinued petitioner's benefits, and remand to respondents, because petitioner should be afforded another opportunity to provide additional documentation of the value of the apartment. Such further opportunity is warranted by a record showing that ACS specifically instructed petitioner to obtain a letter from her landlord indicating the rental value of the apartment; that despite petitioner's diligent efforts to obtain such a letter, the landlord refused to accede to her requests;

that aside from such a letter, petitioner submitted all other information requested by ACS; and that although ACS asserted at the fair hearing that petitioner could have submitted other forms of documentation to verify the value of the apartment, petitioner was never so advised.

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

ENTERED: MARCH 30, 2010



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Saxe, J.P., Catterson, Freedman, Román, JJ.

2451 Credit Suisse Securities (USA) LLC, formerly known as Credit Suisse First Boston LLC,
Plaintiff-Respondent,

-against-

Ask Jeeves, Inc.,
Defendant-Appellant. Index 600401/06

Friedman Kaplan Seiler & Adelman LLP, New York (Eric Seiler of counsel), for appellant.

Shearman & Sterling LLP, New York (Richard F. Schwed of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 21, 2009, which denied defendant's motion for summary judgment, unanimously affirmed, with costs.

The agreement between the parties was ambiguous, with each side offering its own reasonable interpretation (*see LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307 [2007]; *Lantis Eyewear Corp. v Luxottica Group*, 294 AD2d 127, 128 [2002]). Furthermore, the extrinsic evidence presented does not resolve the ambiguity or determine the parties' intent at the time they entered the agreement (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52 [2008]). On the contrary, each party offered

evidence supporting its own interpretation, leaving the matter inappropriate for summary disposition (*LoFrisco*, 42 AD3d at 307).

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

ENTERED: MARCH 30, 2010

CLERK

Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2452 The People of the State of New York, Ind. 4064/06
Respondent,

-against-

Harold Russell,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Craig A. Ascher of counsel), for respondent.

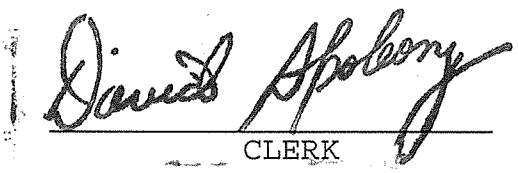
Judgment, Supreme Court, New York County (Charles H. Solomon, J. at motions; Robert M. Stolz, J. at plea and sentence), rendered June 25, 2007, convicting defendant of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty. Instead, in a separate part of the allocution, it explained that, in return for the negotiated disposition, defendant was additionally agreeing to waive his right to appeal, and defendant accepted that condition. Furthermore, defendant also signed a valid written waiver, in which he acknowledged, among other things, that he had

discussed the waiver with counsel. This waiver forecloses defendant's suppression claim. As an alternative holding, we also reject the claim on the merits.

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

ENTERED: MARCH 30, 2010



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Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2453-
2454 Ficus Investments, Inc., et al., Index 600926/07
Plaintiffs-Respondents,

-against-

Private Capital Management, LLC, et al.,
Defendants,

Thomas B. Donovan,
Defendant-Appellant.

Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for appellant.

Alston & Bird LLP, New York (Craig Carpenito of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered November 18, 2009 which denied defendant-appellant Donovan's motion pursuant to CPLR 5001 and 5003 for pre-judgment and post-judgment interest on the principal sum of $1,541,999.08, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 4, 2009, unanimously dismissed, without costs, as superseded by the appeal from the November 18, 2009 order.

In the context of an action commenced by plaintiffs against Donovan, among others, for, inter alia, breach of fiduciary duty, conversion and unjust enrichment, and in which Donovan asserted similar counterclaims, Donovan demanded, pursuant to the terms of the governing Operating Agreement, that plaintiffs comply with

their contractual obligations under section 3.4.3 and advance and reimburse him for the expenses he had incurred in defending the action. Five days after making the demand, Donovan also moved in court, as was permitted by the terms of the Operating Agreement, for an order awarding him an advancement of expenses. The court ultimately determined, and this Court affirmed on appeal (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1 [2009]; *Ficus Invs., Inc. v Private Capital Mgt., LLC*, 63 AD3d 611 [2009]), that Donovan was entitled to an advancement of expenses in the amount of $1,541,999.08. There has been no finding in these proceedings that plaintiffs breached the Operating Agreement by challenging Donovan's demand for an advancement of expenses, based upon their reading of the Operating Agreement that such advancement was tied to the issue of whether Donovan would ultimately be entitled to indemnification under the agreement. Rather, the court interpreted the parties' agreement and found that Donovan was entitled to an advancement of expenses prior to disposition of the action. The issue was before the court solely by virtue of the terms of the Operating Agreement, and not in the context of a breach of contract action. Since the sum was not awarded because of breach of a contract, Donovan is not entitled to pre-judgment interest pursuant to CPLR 5001. Nor

is Donovan entitled to post-judgment interest pursuant to CPLR 5003, since no money judgment was entered against plaintiffs.

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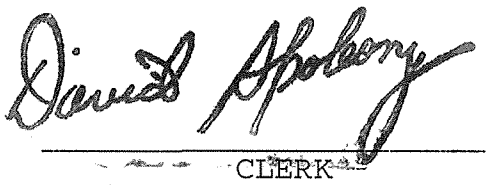
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 30, 2010



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Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2455 Carmen Garcia, Index 28912/01
Plaintiff-Appellant,

-against-

Barry Dolich, M.D.,
Defendant-Respondent.

The Pagan Law Firm, P.C., New York (Tania M. Pagan of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John A. Barone, J.), entered February 26, 2008, dismissing this action after a jury verdict in defendant's favor, unanimously affirmed, without costs.

Despite ample evidence supporting the jury's finding that defendant was not negligent in treating plaintiff, she attributes the jury's rejection of her position largely to defense counsel's summation, claiming it was permeated with prejudicial comments intended to destroy her character and credibility and that of her expert witnesses. Notwithstanding an occasionally injudicious remark, the fact remains that counsel's summation, when viewed in the context of the entire trial, was well within the latitude afforded attorneys in advocating their cause (*see People v Halm*, 81 NY2d 819, 820 [1993]; *Murray v Weisenfeld*, 37 AD3d 432, 434 [2007]). None of these remarks -- some of which were not even

objected to at trial -- were so inflammatory and prejudicial as to deprive plaintiff of a fair trial (*see Wilson v City of New York*, 65 AD3d 906, 908 [2009]).

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

ENTERED: MARCH 30, 2010

CLERK

Saxe J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2456 Azeriah Kerr, Index 111821/06
Plaintiff-Appellant,

-against-

Miriam S. Klinger
Defendant-Respondent.

Law Offices of Timothy G. Griffin, Bronxville (Eileen T. Rohan of counsel), for appellant.

Kelly, Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 1, 2009, which granted defendant's motion for summary judgment dismissing the complaint for lack of a serious injury, unanimously affirmed, without costs.

Defendant established her prima facie entitlement to summary judgment by submitting evidence, including the affirmed reports of a radiologist, who, upon reviewing the MRI films taken after plaintiff's accident, concluded that the disc bulges and/or herniations revealed therein were the result of degenerative disc disease and not caused by the automobile accident at issue (*see D'Ariano v Meldish*, 68 AD3d 640 [2009]; *Lopez v American United Transp., Inc.*, 66 AD3d 407 [2009]).

In opposition, plaintiff's expert provided insufficient evidence to raise an issue of fact as to a causal connection between accident and injury (*see Lopez*, 66 AD3d 407). Plaintiff

also failed to raise triable issues of fact as to whether he was incapacitated from performing substantially all of his usual and customary activities for at least 90 of the first 180 days after the accident, having failed to offer the requisite competent medical proof to substantiate his claim (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556 [2009]; *Moses v Gelco Corp.*, 63 AD3d 548 [2009]).

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

ENTERED: MARCH 30, 2010

CLERK

Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2457 Patrick Keane, Index 104746/05
Plaintiff-Appellant,

-against-

Chelsea Piers, L.P., et al.,
Defendants-Respondents.

Friedman, James & Buchsbaum LLP, New York (Andrew V. Buchsbaum of counsel), for appellant.

John V. Coulter, New York, for respondents.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 8, 2009, dismissing the action, and bringing up for review an order, same court and Justice, entered October 21, 2008, directing a verdict, after jury trial, in favor of defendants, dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 240(1) claims, unanimously reversed, on the law, without costs, the judgment vacated, the order modified to reinstate the § 240(1) claim, and a new trial directed thereon with respect to injuries sustained from the falling board.

Plaintiff was injured while working under a pier when the action of waves caused the floating stage on which he was kneeling to drop while plaintiff was sawing a board. This drop caused the board to fall on top of him. Given that the swing in elevation of the stage due to tides and waves was understood by all as a risk of this particular construction site, and the accident could not have occurred without the differential in

elevation between the plaintiff (in the wave's trough) and the board above him, the injuries caused by the falling board were plainly contemplated by § 240(1) (*see Dooley v Peerless Importers, Inc.*, 42 AD3d 199 [2007]; *see also generally Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]). Plaintiff's other injuries, caused by the wave lifting him up and knocking him against the bottom of the pier, are not similarly covered.

The court was correct in dismissing the statutory and common-law negligence claims against the tenants in possession. The accident was caused by waves from the wakes of passing vessels, an obvious condition known to plaintiff and his employer (*Bombero v NAB Constr. Corp.*, 10 AD3d 170 [2004]). We further note that bifurcation of the liability and damages issues at trial was not an improvident exercise of discretion (*Sommer v Pierre*, 51 AD3d 464 [2008]), inasmuch as plaintiff was permitted to put on medical evidence in rebuttal.

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

ENTERED: MARCH 30, 2010

CLERK

Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2458 Guillermo Parraguirre, Index 6130/06
Plaintiff-Appellant-Respondent,

-against-

27th St. Holding, LLC, et al.,
Defendants-Respondents-Appellants.

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

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered June 23, 2009, which, insofar as appealed from, as limited by the briefs, denied plaintiff's motion for summary judgment as to his Labor Law § 240(1) claim, granted so much of defendants' motion for summary judgment as sought dismissal of said claim and denied defendants' motion as to plaintiff's Labor Law § 200 and common-law negligence claims, unanimously modified, on the law, to deny defendants' motion to dismiss plaintiff's § 240(1) claim and grant plaintiff's motion for summary judgment on the § 240(1) claim; grant defendants' motion to the extent of dismissing plaintiff's Labor Law § 200 and common-law negligence claims against defendants 27th St. Holding, LLC and Principe-Danna, Inc., and otherwise affirmed, without costs.

Plaintiff, while transporting dust filters from a cement mixing plant's rooftop structure to a ground level garage where

the filters were to be cleaned, fell to a lower level roof and sustained injuries. The motion court determined that plaintiff was engaged in routine maintenance, and thus not in a protected activity under Labor Law § 240(1). However, it is necessary to ascertain whether the activity "created the type of elevation-related risk that the statute was intended to address" (*Swiderska v New York Univ.*, 10 NY3d 792-793 [2008] citing *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 680 [2007]). In removing the six foot long filters from an elevated structure and transporting them to ground level, plaintiff was engaging in activity that encompassed an ever present elevation-related risk that the safety devices enumerated in § 240(1) were designed to protect against. Furthermore, the filter room was clearly a "structure" for the purposes of § 240(1). The record is clear in that no safety devices of any kind were provided to plaintiff. Therefore, plaintiff should be granted summary judgment on the § 240(1) claim.

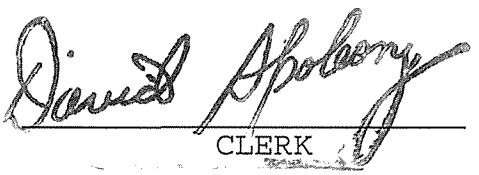
There is no issue of fact on the question of whether plaintiff disregarded specific instructions to use the stairs to transport the steel filters from the building rather than throw them from the plant's rooftop, because defendant Fordham Road's president never stated that he told plaintiff not to use the roof in performing the filter removal. Thus, Fordham Road is not entitled to summary judgment on plaintiff's Labor Law § 200 and

common law negligence claims. Nevertheless, those claims should have been dismissed as against property owners 27th St. Holding, LLC and Principe-Danna, Inc., since they demonstrated that they had no authority to control the activity bringing about the injury or actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Mitchell v New York Univ.*, 12 AD3d 200 [2004]).

Finally, the court properly determined that the record does not demonstrate, as a matter of law, that plaintiff was Fordham Road's special employee so as to bar his claims under the Workers' Compensation Law (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

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

ENTERED: MARCH 30, 2010



CLERK

Saxe, J.P., Catterson, Moskowitz, Freedman, Román JJ.

2459N Loretta Vecciarelli, et al., Index 100879/08
Plaintiffs-Appellants,

-against-

King Pharmaceuticals, Inc.,
Defendants-Respondents.

Simon, Eisenberg & Baum, LLP, New York (Eric M. Baum of counsel), for appellants.

Jackson Lewis, LLP, White Plains (Mary A. Smith of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 3, 2008, which granted defendants' motion for severance and separation of the action into five individual actions, with related relief, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the motion denied without prejudice to renewal after completion of discovery.

Where there is "a common nucleus of facts," severance requires a showing that a joint trial will result in "prejudice or substantial delay" (*see Sichel v Community Synagogue*, 256 AD2d 276 [1998]). Defendants in this employment discrimination action had the burden of making that showing (*see Andresakis v Lynn*, 236 AD2d 252 [1997]) in seeking severance immediately after service of their answers. That burden was not sustained.

All of the plaintiffs were in the same department of the

corporate defendant, and all were fired within the same year. All but one plead common-law torts. While plaintiffs' territories comprised diverse areas of New York and Connecticut, it has not yet been shown whether or not the discriminatory conduct occurred in diverse counties or at the home office of the corporate defendant, nor is there any showing that a geographically diverse group of witnesses will have to participate in the case. All but one of the plaintiffs allege conduct by the two individual defendants. All of the plaintiffs allege an overall pattern and practice of discrimination to a degree at this initial post-pleading phase.

The joint trial format can serve judicial efficiency and avoid the risk of inconsistent verdicts (*Williams v Property Servs.*, 6 AD3d 255 [2004]). It is too early here for a determination that such a format will cause prejudice or substantial delay, or that there are "only the most superficial common factual grounds to be explored" among the five cases (*cf. Hickson v Mt. Sinai Med. Ctr.*, 87 AD2d 527 [1982]).

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

ENTERED: MARCH 30, 2010

CLERK

Saxe, J.P., Catterson, Moskowitz, Freedman, Román, JJ.

2460N Polar International Brokerage Corp., et al., Plaintiffs-Respondents, Index 601213/03

-against-

Benjamin S. Richman, et al., Defendants,

Associated Financial Corporation, et al., Defendants-Appellants.

The Rotbert Law Group, LLC, Bethesda, MD (Mitchell J. Rotbert of counsel), for appellants.

Ballon Stoll Bader & Nadler, P.C., New York (Dwight E. Yellen of counsel), for respondents.

Order, Supreme Court, New York County (Bernard Fried, J.), entered January 20, 2009, which denied defendants-appellants' motion seeking reimbursement from plaintiff of their attorneys' fees and costs in this action, unanimously affirmed, with costs.

In a prior appeal, we held that the instant action, seeking restitution for amounts paid by plaintiffs to resolve claims brought against them in federal district court, Louisiana, arising out of the administration of insurance proceeds for certain property damaged by Hurricane Andrew in 1992, is barred by a Stipulation and Release (SAR) entered into by the parties in a subsequent action in federal district court, New York, involving the same claims (32 AD3d 717 [2006], *lv denied* 12 NY3d 714 [2009]). Thereafter, appellants made the motion at issue

seeking attorneys' fees pursuant to paragraph III.G of the SAR, which provides that "[t]he parties agree that the United States District Court for the Southern District of New York shall be the exclusive venue for the resolution of any claim arising out of or related to this Agreement. In any *such proceeding to enforce this Agreement*, in whole or part, the prevailing Party shall be awarded its actual costs and attorneys' fees" (emphasis added). The court properly concluded that the two sentences must be read together and that the agreement only provides for attorneys' fees in an action brought in the federal district court for the Southern District of New York. Any other interpretation would render meaningless the word "such" in the second sentence (*see Two Guys from Harrison-NY v S.F.R. Realty Assoc.*, 63 NY2d 396 [1984]).

We reject appellants' argument that, by bringing the instant action in state court, plaintiffs waived their right to object to the claim for attorneys' fees. This is not an action to enforce the SAR, and while appellants successfully raised the SAR as a

defense, plaintiffs cannot be said to have waived the limitation imposed on the prevailing party clause (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

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

ENTERED: MARCH 30, 2010

David Spolenz

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2461 The People of the State of New York, Ind. 5275/06
Respondent,

-against-

Eric Alejandro,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Frank Glaser of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered January 7, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning

credibility. We do not find the police testimony to be implausible or materially inconsistent.

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

ENTERED: MARCH 30, 2010

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2462 Susan Fox, Index 114938/07
Plaintiff-Appellant,

-against-

Central Park Boathouse, LLC,
Defendant-Respondent.

Edelman, Krasin & Jaye, PLLC, Carle Place (Donald MacKenzie of counsel), for appellant.

Kelly, Rode Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered May 13, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was appropriate in this action where plaintiff alleges that she was injured when, while disembarking from a rowboat she rented from defendant, she slipped on algae that was present on the dock. The algae did not constitute an unreasonably dangerous condition for which the defendant may be held liable, as it was inherent in the nature of a lake in the summer (*see Stanton v Town of Oyster Bay*, 2 AD3d 835 [2003], *lv denied* 3 NY3d 604 [2004]; *Nardi v Crowley Mar. Assoc.*, 292 AD2d 577, 578 [2002]). Plaintiff should have reasonably anticipated that there would have been algae present, given the testimony that algae covered the dock along the

waterline for approximately 150 feet. Furthermore, plaintiff's argument that her injury was caused by a concealed condition, and that defendant breached its duty to take reasonable measures to remedy said condition, is unavailing (*see Rosen v New York Zoological Socy.*, 281 AD2d 238 [2001]).

We have considered plaintiff's remaining contentions and find them unavailing.

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

ENTERED: MARCH 30, 2010

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2463 Family M. Foundation Ltd., Index 605207/98
Plaintiff-Respondent,

-against-

Ninotchka Manus, etc.,
Defendant-Appellant,

Niman International, Ltd., S.A.,
Defendant.

Morton S. Minsley, New York, for appellant.

Davidoff Mallito & Hutcher LLP, New York (Ralph E. Preite of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 20, 2009, which, in an action to recover a loan, denied defendant-appellant's motion for relief from a prior order, same court and Justice, entered July 1, 2004, which had, inter alia, granted plaintiff's motion to enforce a stipulation of settlement, unanimously affirmed, with costs.

As the motion court had already explained in granting plaintiff's motion to enforce the stipulation of settlement, the action is properly maintained by plaintiff corporation under the authority of its president and sole director, Elizabeth (Libby) Manus, and it is "inconsequential" whether she is the owner of all of plaintiff's shares, as she represented on plaintiff's motion to enforce the stipulation, or one-third of its shares, as defendant claimed in opposing such motion, or none of its shares,

as defendant presently claims on the basis of purportedly new evidence. A corporation's president has presumptive authority to act on behalf of the corporation, including the authority to prosecute and defend lawsuits (*see West View Hills v Lizau Realty Corp.*, 6 NY2d 344 [1959]; *Executive Leasing Co. v Leder*, 191 AD2d 199, 200 [1993]). This is not a case where one 50% shareholder seeks to assert a claim on behalf of the corporation against another 50% shareholder who possesses an equal degree of control, or where the president is acting in contravention of a board of director's vote (*see e.g. Executive Leasing*). Defendant's new claims that the corporation was dissolved by operation of the laws of the Cayman Islands, and that Libby's status as plaintiff's president has never been conceded and is fairly disputable, are either untimely raised (*see* CPLR 2221[e][3]), speculative, based on hearsay, or otherwise insufficiently substantiated to warrant relief from the July 1, 2004 order.

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

ENTERED: MARCH 30, 2010

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2464 Danielle Wansi, Index 3755/05
Plaintiff-Respondent,

-against-

Emmanuel Wansi,
Defendant-Appellant.

Michael Karnes, Bronx (Steven J. Mines of counsel), for appellant.

Arnold S. Kronick, White Plains, for respondent.

Judgment of divorce, Supreme Court, Bronx County (Ellen Gesmer, J.), entered January 12, 2009, to the extent appealed from as limited by the briefs, determining equitable distribution and denying defendant's applications for continued temporary maintenance and attorney's fees, unanimously affirmed, without costs.

The court improperly rejected the Special Referee's findings that defendant was the sole support of the parties for a few years after they married and that his company owed more than $70,000 in debt, since these findings are supported by the record (*see Poster v Poster*, 4 AD3d 145, 145 [2004], *lv denied* 3 NY3d 605 [2004]). However, the court properly rejected the Referee's findings that defendant could not work because of depression and other medical conditions, that he was the "prime enabler" in plaintiff's becoming employed as a librarian, and that his future financial circumstances were less advantageous than hers, since

these findings are not supported by the record (*see id.*).

Based on the foregoing, the court properly rejected the Referee's recommendation that plaintiff be directed to continue to pay temporary maintenance to defendant until the three-family residence is sold. Although defendant was unemployed at the time of the trial, the court properly determined that, given his skills and experience, he is capable of working and earning a salary sufficient for his own support (*see Naimollah v De Ugarte*, 18 AD3d 268, 271 [2005]). Defendant failed to substantiate through expert testimony his claim that health conditions prevent him from working. While, contrary to plaintiff's contention, defendant requested before the Referee and the court that plaintiff continue to pay for his health benefits, the court properly determined that that also was not warranted (*cf. Pickard v Pickard*, 33 AD3d 202, 205 [2006], *appeal dismissed* 7 NY3d 897 [2006] [directing defendant to pay for health insurance of plaintiff, given the latter's "bleak work prospects"]).

The court properly modified the Referee's recommendation that defendant receive 30% of the value of the three-family residence deeded to plaintiff to reduce his award to 15% of the value. Defendant having made little, if any, contribution to the marital asset, the court was not required to divide the asset equally (*see Arvantides v Arvantides*, 64 NY2d 1033 [1985]; *Naimollah*, 18 AD3d at 269).

The court properly accepted the Referee's recommendation that plaintiff not be required to pay defendant's attorney's fees. Although appointed counsel in a matrimonial case may seek attorney's fees from the other spouse (*see* Domestic Relations Law § 237(a); *Matter of Smiley*, 36 NY2d 433, 440 [1975]; *Jordan v Jordan*, 226 AD2d 349 [1996]), and although plaintiff's assets are greater than defendant's, the court properly considered defendant's failure to present evidence at the grounds trial to support his counterclaims for a divorce (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]).

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

ENTERED: MARCH 30, 2010

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2465 Mintz & Gold, LLP, Index 102758/07
Plaintiff-Appellant-Respondent,

-against-

Daniel Zimmerman,
Defendant-Respondent,

Steven Cohn, P.C., et al.,
Defendants-Respondents-Appellants.

Mintz & Gold, LLP, New York (Paul Ostensen of counsel), for appellant-respondent.

Lewis Johs Avallone Aviles, LLP, Riverhead (Michael G. Kruzynski of counsel), for respondents-appellants/respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 10, 2009, which granted the motions of defendants Zimmerman and Cohn and the cross motion of defendant Hart for summary judgment to the extent of dismissing as time-barred so much of the first cause of action as based on acts that occurred more than one year prior to the filing of this action, unanimously reversed, on the law, with costs, the motions denied, and the first cause of action reinstated in its entirety. Cross appeal by defendants Cohn and Hart from so much of the order as determined that the relevant accrual date was November 7, 2007, dismissed, without costs, as academic.

This action, brought pursuant to Civil Rights Law § 70, is in the nature of a claim for malicious prosecution claim, governed by a one-year statute of limitations (CPLR 215[3]).

The court erred in finding that defendants' tortious conduct ceased during the period between the 2005 dismissal of their unauthorized action against plaintiff in Nassau County and their notice of appeal from that dismissal, and that a new cause of action accrued when that notice was filed, continuing through dismissal of the appeal by the Appellate Division, Second Department, on November 7, 2007 (45 AD3d 575). Rather, defendants' planning and filing of an appeal was simply a continuation of their tortious conduct in bringing and continuing an unauthorized action (*see Ballen-Stier v Hahn & Hessen*, 284 AD2d 263 [2001], *lv dismissed* 97 NY2d 699 [2002]). Inasmuch as the final actionable event (dismissal of that appeal) occurred within one year of -- and actually was preceded by -- the commencement of the present action, plaintiff may rely on wrongful conduct occurring more than a year prior to that commencement (*see Shannon v MTA Metro-North R.R.*, 269 AD2d 218 [2000]).

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

ENTERED: MARCH 30, 2010

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2466 In Joel J.,

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

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

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

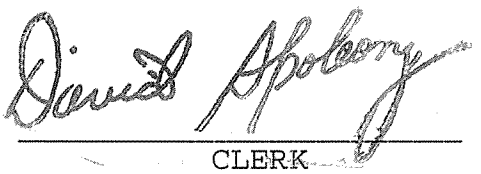
Order of disposition, Family Court, Bronx County (George J. Silver, J.), entered on or about July 30, 2009, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act constituting unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant appellant an adjournment in contemplation of dismissal. The record establishes that probation was the least restrictive alternative consistent with appellant's needs and the needs of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given the seriousness of the incident, in which appellant caused

injury with a BB gun, along with appellant's egregious school disciplinary, attendance record and lack of parental involvement.

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

ENTERED: MARCH 30, 2010



CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2467 The People of the State of New York, Ind. 6633/04
Respondent,

-against-

Miguel Andrade,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Adam B. Gottlieb of counsel), for appellant.

Miguel Andrade, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered September 19, 2005, convicting defendant, after a jury trial, of rape in the first degree and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 12½ years, unanimously affirmed.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant's main complaint is that his counsel failed to use notations in medical records to impeach or contradict certain testimony by the People's medical witness. However, we conclude that defendant was not prejudiced, because counsel's failure to utilize this evidence could not have affected the

outcome of the case or deprived defendant of a fair trial.

The principal issue at trial was whether the sexual activity was forcible or consensual. The victim was examined in an emergency room by an internist who was trained as a sexual assault forensic examiner. In pertinent part, the internist testified that the victim had a large amount of blood in her genital area. While the internist never directly stated that the blood was the result of forcible rape, she expressed the opinion that it was not menstrual blood, and she explained her reasons for forming that opinion. However, two resident physicians made notations in the victim's record that the blood was menstrual.

Regardless of whether trial counsel should have made use of those notations, they would not have undermined the People's case or created a reasonable doubt as to defendant's use of force. The record reveals several reasons for accepting the internist's opinion notwithstanding these notations, including the likelihood that the other physicians mistakenly assumed the blood to be menstrual, and the fact that the internist had considerably more training and experience in examining alleged rape victims for forensic purposes.

In any event, the case did not turn on whether or not the blood was the product of injury caused by forcible rape, since there was extensive evidence of force. In particular, the victim's facial injuries were not just proof of the assault

charge, but also compelled the inference that the sexual conduct was forcible. In a lengthy summation, the prosecutor made only a brief reference to the vaginal bleeding as proof of force. Contrary to defendant's assertions, the circumstances under which the court accepted a partial verdict that left unresolved the charges of first-degree criminal sexual act shed little or no light on the jury's thinking.

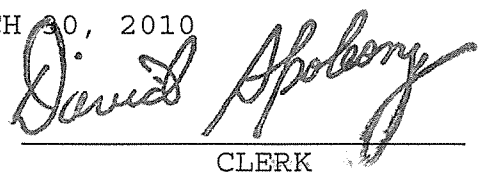
We have considered and rejected defendant's remaining ineffective assistance claims.

The isolated portion of the prosecutor's summation that defendant challenges did not shift the burden of proof or deprive defendant of a fair trial. The remarks in question were permissible comment on the credibility of defendant's trial testimony, and were responsive to the defense summation, which argued that defendant's behavior immediately after the incident displayed his innocence (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]).

Defendant's pro se claims are unreviewable for lack of a sufficient record (*see People v Kinchen*, 60 NY2d 772 [1983]), and are without merit in any event.

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

ENTERED: MARCH 30, 2010



CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2468 In re Giacomo Graceffo, Index 108709/08
Petitioner,

-against-

City of New York, et al.,
Respondents.

Silberman Law Firm, New York (Martin N. Silberman of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

Determination of respondent Department of Housing Preservation and Development (HPD), dated February 26, 2008, terminating petitioner's Section 8 rent subsidy on the ground that he misrepresented his employment status and the overall household income in a 2004 Application for Rental Assistance and in 2005 and 2006 recertification applications, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Edward H. Lehner, J.], entered April 27, 2007), dismissed, without costs.

HPD's determination was supported by substantial evidence showing that petitioner failed to accurately report his household income on the subject applications. Although petitioner stated that he was unemployed and receiving benefits at the times that he completed the initial application and the recertification

applications, the evidence shows that during the relevant time period petitioner earned money that he failed to disclose, working intermittently as a union carpenter. There exists no basis to disturb the hearing officer's rejection of petitioner's claim that his failure to report all income and the changes in his employment status was the result of a mistake made in good faith (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty imposed was not so disproportionate to the offense as to be shocking to one's sense of fairness (*see Matter of Alarape v New York City Dept. of Hous. Preserv. & Dev.*, 55 AD3d 316 [2008], *lv denied* 12 NY3d 801 [2009]; *Matter of Gerena v Donovan*, 51 AD3d 502 [2008]).

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

ENTERED: MARCH 30, 2010

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2470 The People of the State of New York, Ind. 3097/07
Respondent,

-against-

Edwin Jorge,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered November 26, 2007, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, 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]). There is no basis for disturbing the jury's determinations concerning credibility. The element of force was established by evidence that after stealing an item from a store, defendant sprayed mace in the face of a store employee in an effort to prevent him from recovering the property. Contrary to defendant's argument, there was ample evidence that he knew this person was a store employee. Since defendant was in possession of the stolen property while he was

engaged in this use of force and never discarded or even sought to relinquish it, the evidence supports the inference that his purpose in using force was to retain control of the property and not merely to escape or defend himself (*see e.g. People v Brandley*, 254 AD2d 185 [1998], *lv denied*, 92 NY2d 1028 [1998]).

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

ENTERED: MARCH 30, 2010

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2471 Dolores E. Knighton, Index 116675/06
Plaintiff-Appellant,

-against-

Municipal Credit Union,
Defendant-Respondent.

Blau Brown & Leonard, LLC, New York (Steven Bennett Blau of counsel), for appellant.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Roger A. Goodnough of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered January 20, 2009, which, to the extent appealed from, as limited by the briefs, granted defendant summary judgment dismissing plaintiff's disability discrimination causes of action, unanimously modified, on the law, to reinstate plaintiff's first and second causes of action for disability discrimination to the extent such claims are based on the failure to accommodate, and otherwise affirmed, without costs.

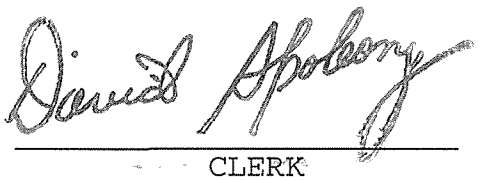
In this action for wrongful termination, grounded on charges of disability discrimination and whistleblower retaliation, plaintiff's assertion of a claim for retaliatory termination pursuant to Labor Law § 740(7) did not require the dismissal of her causes of action based on disability discrimination. Plaintiff's claims that defendants failed to reasonably accommodate her disabilities stated separate causes of action

from her claim of retaliatory termination under the Whistleblower Statute (*see Bordan v North Shore Univ. Hosp.*, 275 AD2d 335, 336 [2000]; *Kraus v Brandstetter*, 185 AD2d 302, 303 [1992]).

Plaintiff's claims of retaliatory termination based on the filing of a complaint with OSHA, however, were properly dismissed. Labor Law § 740(4)(c) provides that "[i]t shall be a defense . . . that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section" (*DaSilva v Clarkson Arms*, 189 AD2d 619, 619-20 [1993]). Defendant offered documentary evidence showing that plaintiff was not terminated in retaliation for filing a complaint with OSHA, and, in opposition, plaintiff failed to rebut defendant's evidence.

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

ENTERED: MARCH 30, 2010



CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2472N Anderson Williams, et al., Index 7153/05
Plaintiffs-Appellants,

-against-

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

The New York City Transit Authority, et al.,
Defendants-Respondents.

Rosenbaum & Rosenbaum, P.C., New York (Andrew B. Roth of counsel), for appellants.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for The New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority, respondents.

Rafter and Associates, PLLC, New York (Thomas J. Moran of counsel), for DeMicco Brothers, Inc., respondent.

Order, Supreme Court, Bronx County (Larry Schachner, J.), entered June 9, 2009, to the extent appealed from, as limited by the briefs, which upon granting plaintiffs' motion to vacate orders entered on default, also granted the motions of defendants-respondents New York City Transit Authority and Manhattan and Bronx Surface Transit Authority, and DeMicco Brothers, Inc. for summary judgment dismissing the complaint on the merits as against those defendants, unanimously reversed, on the law, without costs, the motions for summary judgment dismissal denied, the complaint reinstated, and the matter remanded for a determination of the summary judgment motions on the merits after briefing of the issue by plaintiffs.

The motion court erred in granting summary judgment dismissal on the merits inasmuch as the showing of merit for vacatur of the default orders was different than the more extensive showing necessary to defeat summary judgment, the parties had not charted a course for summary judgment in addressing plaintiffs' motion to vacate the orders entered on default, and plaintiffs were prejudiced insofar as their merits showing was limited to the issue of vacatur (*see Goodsill v Middleburgh Little League*, 213 AD2d 843 [1995]). Consequently, we remand as indicated.

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

ENTERED: MARCH 30, 2010

CLERK

Mazzarelli, J.P., Sweeny, Nardelli, Acosta, Manzanet-Daniels, JJ.

2473N-
2473NA State Farm Mutual Automobile Insurance Company, Petitioner-Respondent, Index 260173/09

-against-

Alison Taveras, Respondent,

Richard A. Cruz, et al., Additional Respondents-Appellants.

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellants.

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for State Farm Mutual Automobile Insurance Company, respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about November 9, 2009, which granted petitioner insurer's application to permanently stay an uninsured motorist arbitration, unanimously affirmed, without costs. Appeal from short-form order, entered on or about September 14, 2009, unanimously dismissed, without costs, as subsumed in the appeal from the above order.

Additional respondents, the owner and insurer of the offending vehicle, assert that the vehicle was uninsured at the time of the accident because it was being driven by an unknown thief. No basis exists to disturb the court's finding, after a framed-issue hearing, that the evidence of such theft and

nonpermissive use was insufficient to overcome the presumption of permissive use (*see Murdza v Zimmerman*, 99 NY2d 375, 380 [2003] ["substantial" evidence needed to overcome presumption of permissive use]; *Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992] [fact-finding court's decision should not be disturbed on appeal unless it is "obvious" that its conclusions could not be reached under any fair interpretation of the evidence, especially where findings of fact largely rest on witness credibility]). In so finding, the hearing court properly took into account the owner's failure to adequately explain his substantial delay in calling the police to report the alleged theft, which call immediately followed an alleged assault on the owner and his friends by a mob of angry people (*see Minaya v Horner*, 279 AD2d 333 [2001]). There being no dispute that the burden of proof was initially on additional respondents to prove nonpermissive use, it does not avail them that the hearing court also rejected as incredible the testimony of one of the victims, called by petitioner, that he had seen the owner sitting in the passenger side of the car in the seconds before the car jumped the curb and knocked him down.

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

ENTERED: MARCH 30, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Eugene Nardelli
James M. Catterson
Karla Moskowitz, JJ.

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Index 102101/06

David Strachman, as Administrator of the Estate of Yaron Ungar, et. al.,
Plaintiffs-Respondents,

-against-

The Palestinian Authority, etc., et al.,
Defendants,

The Palestinian Pension Fund for the State Administrative Employees of the Gaza Strip,
Defendant-Appellant.

Defendant The Palestinian Pension Fund for the State Administrative Employees of the Gaza Strip, appeals from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 7, 2008, which, insofar as appealed from, denied the motion to strike plaintiffs' demand for a jury trial.

Morrison & Foerster LLP, New York (Charles L. Kerr, Mark David McPherson and Adam Jackson Heintz of counsel), for appellant.

Jaroslawicz & Jaros, LLC, New York (Robert J. Tolchin of counsel), for respondents.

CATTERSON, J.

The sole issue in this appeal is whether the plaintiffs, judgment creditors of the Palestinian Authority (hereinafter referred to as "PA") and the Palestine Liberation Organization (hereinafter referred to as "PLO"), have a right to a jury trial in a declaratory judgment action. The action seeks to establish the PA's ownership of more than $100 million in securities and debt instruments frozen by Swiss American Securities Inc., (hereinafter referred to as "SASI") in New York. Thus, as set forth below, this Court's task is to find an 1894 analog for a claim of money-laundering designed to interfere with the execution of a judgment.

The plaintiffs are the survivors and the administrator of the estate of United States citizen Yaron Ungar who was murdered with his pregnant wife in a terrorist machine-gun attack in June 1996 in Israel. The plaintiffs alleged that the attack was carried out by members of Hamas acting under the command of the PA and the PLO. In July 2004, the plaintiffs obtained a default judgment against the PA and PLO in an amount of $116,409,123. See Estate of Ungar v. Palestinian Auth., 325 F. Supp. 2d 15 (D. R.I. 2004), aff'd, 402 F.3d 274 (1st Cir. 2005), cert. denied, 546 U.S. 1034 (2005).

In 2005, the federal judgment was domesticated in New York. The federal court issued a restraining order and injunction, and the plaintiffs served information subpoenas and restraining notices pursuant to CPLR 5222 on a number of entities believed to be holding assets of the PA and the PLO. The notices stated that the federal injunction applied to all assets of the PA and the PLO "however titled." In response to the notice, SASI froze more than $100 million in accounts titled variously as the Palestinian Pension Fund for the State Administrative Employees and the Palestinian Pension Fund for the State Administrative Employees of the Gaza Strip.

On or about December 7, 2005, defendant, the Insurance and Pension Fund (hereinafter referred to as "IPF") appeared for the first time and asserted that the names on the account are aliases of the IPF not the PA; and that IPF is an independent entity. IPF moved to moved to vacate the restraining order. The plaintiffs did not respond but instead filed for a turnover proceeding against SASI, and filed a sheriff's levy co-extensive with the proceeding. The plaintiffs further filed this declaratory judgment action seeking a declaration that the assets held by SASI belong to the PA not IPF, and alleging that the PA and the IPF engaged in a fraudulent scheme to prevent the Ungars from enforcing their judgment against the assets frozen by SASI.

In or around March 2006, the court deemed the motion to vacate the restraining notice moot in view of the fact that the plaintiffs had withdrawn it. IPF moved to dismiss the turnover proceeding and the court granted the motion.

Discovery in this declaratory judgment action was completed in February 2007, and the plaintiffs filed a corrected note of issue demanding a trial by jury on all issues. Four months later, on May 30, 2007, defendant Palestinian Pension Fund for the State Administrative Employees of the Gaza Strip (hereinafter referred to as "the Gaza Fund"), moved to strike the plaintiffs' demand for a jury trial.[1] By decision and order entered May 7, 2008, the court denied the defendant's motion to strike the jury demand.

For the reasons set forth below, we affirm. CPLR 4101 provides for a jury trial in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of

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[1]The plaintiffs take exception to the defendant naming itself the Palestinian Pension Fund for State Administrative Employees of the Gaza Strip in its motion to strike the jury trial demand, since they assert that defendant first appeared in the motion to vacate the restraining order as Insurance and Pension Fund. Defendant explains in a footnote that it has used the "abbreviation" of Insurance and Pension Fund in papers filed in this action and in related proceedings "rather than using its full and proper name." The plaintiffs are right that, by so doing, the defendants attempt to prejudge the very issue at the heart of this action, that is, whether the IPF and the Gaza Fund are legitimately interchangeable names.

money only" or in "any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury."

The declaratory judgment action was unknown at the time of the adoption of the 1894 Constitution which "fr[o]ze" the right to a jury trial to those types of cases in which it was recognized at common law or by statute as of the adoption of the Constitution. See Independent Church of Realization of Word of God v. Board of Assessors of Nassau County, 72 A.D.2d 554, 554, 420 N.Y.S.2d 765, 765 (2nd Dept. 1979).

However, the right to trial by jury is not limited to those instances in which it was used as of 1894 but extends to cases that are analogous to those which were traditionally tried by jury. Id., citing Wynehamer v. People, 13 N.Y. 378, 426 (1856) and Colon v. Lisk, 153 N.Y. 188, 193, 47 N.E. 302, 304 (1897). Hence, as the motion court correctly noted, it is necessary to examine which of the traditional common-law actions would most likely have been used to present the instant claim had the declaratory judgment action not been created. See Siegel, New York Practice, §439; see also James v. Powell, 25 A.D.2d 1, 266 N.Y.S.2d 245 (1st Dept. 1966), rev'd on other grounds, 19 N.Y.2d 249, 279 N.Y.S.2d 10, 225 N.E.2d 741 (1967).

It then follows that if the traditional action that most likely would have been used is an action at law, then the plaintiff will be entitled to a jury trial. See Matter of DES Mkt. Share Litig., 79 N.Y.2d 299, 304-305, 582 N.Y.S.2d 377, 380, 591 N.E.2d 226, 229 (1992); if the traditional action that would have been presented is equitable, there is no right to a jury trial. Independent Church of the Realization of the Word of God, Inc., 72 A.D.2d at 555, 420 N.Y.S.2d at 765-766.

While the parties agree on the applicable standard, on appeal they disagree, as they did before the motion court, as to which traditional action would have been used instead of the instant declaratory judgment action. The defendants argue that this is essentially a "quiet title" claim and thus the action lies in equity because disputes concerning ownership of property including personal property such as securities were treated as equitable claims.

The plaintiffs assert that the gravamen of their complaint is that the Gaza Fund is a fictitious name used by the judgment debtor PA to shield PA assets. More significantly, they allege that the IPF's claim that it owns the assets is false and an attempt to mislead the court and to unlawfully prevent the plaintiffs from enforcing their judgment against the PA. Thus, the plaintiffs argue that the motion court held correctly that

the action is substantively analogous to an action at law for tortious interference with the enforcement of a judgment. We agree.

The plaintiffs further assert correctly that a cause of action for unlawful interference with enforcement of a judgment has long been recognized in New York, and that it was always an action triable by a jury. See Yates v. Joyce, 11 Johns 136 (1814) (party liable for damages after its fraudulent misconduct where plaintiff acquired a legal lien on a property and injury to property was done with a full knowledge of the plaintiff's rights); see also Quinby v. Strauss, 90 N.Y.664 (1882). In Quinby, an action for damages was held maintainable against a judgment debtor and his attorney for conspiring to keep defendant's property out of the reach of his creditors by securing fictitious debts under which the property was sold to his attorney.

There is no question, therefore, that the cause of action existed at the time that the Constitution was enacted in 1894. Nor is there any doubt that the action was an action at law and thus, triable by a jury. See Quinby, 90 N.Y. at 664-665.

In James v. Powell, this Court further explained:

> "At common law, whoever by improper means interfered with the execution of a judgment was liable for the damage he caused to the judgment creditor (Mott v

> Danforth, 6 Watts 304 (Pa.); Collins v Cronin, 117 Pa. 35, 11 A. 869). The right of action [for unlawful interference with execution on a judgment] has been recognized and discussed at length by the United States Supreme Court in Findlay v McAllister, 113 U.S. 104, 5 S.Ct. 401, 28 L.Ed. 930 and is undoubtedly part of the common law of this state (Quinby v Strauss, 90 N.Y. 664" (James, 25 A.D.2d at 2, 266 N.Y.S.2d at 247).

This Court then discussed the measure of damages for such an action:

> "In any event, this is neither a suit on the judgment nor for the same relief, and not even specifically to collect it. It is for damages resulting from a tort. The amount of the judgment is not the measure of the damages; it is rather the loss or expense caused by the interference (Penrod v Mitchell, 8 Serg. & R. 522 (Pa)). Conceivably, this could embrace the judgment itself (see Quinby v Strauss, supra), in which event satisfaction of the judgment so obtained would also operate to satisfy the original judgment." 25 A.D.2d at 4, 266 N.Y.S.2d at 248.

See also Arrow Communication Labs. v. Pico Prods., 219 A.D.2d 859, 632 N.Y.S.2d 903 (4th Dept. 1995) (the trial court properly denied defendant's motion to strike plaintiff's jury demand; although plaintiff sought equitable relief in the form of a declaratory judgment and an accounting, underlying controversy sought monetary damages); Hebranko v. Bioline Labs, 149 A.D.2d 567, 540 N.Y.S.2d 264 (2nd Dept. 1989) (plaintiff's allegation of facts upon which damages alone will afford full relief entitled him to jury trial notwithstanding inclusion of a request for equitable relief).

We reject the dissent's contention that any reliance on Quinby is misplaced because the plaintiffs did not have any interest in the allegedly fraudulently "transferred" property at the time of the transfer. This position appears to amplify the equivocation of the court which, while concluding that the most analogous action here is tortious interference, nonetheless was compelled to recognize that "the alleged overall scheme was designed to hide the PA's and the PLO's assets for all purposes, and not solely to thwart execution of plaintiffs' judgment".

The dissent relies on Federal Deposit Ins. Corp. v. Porco (147 A.D.2d 422, 423, 538 N.Y.S.2d 261, 262 (1989), aff'd, 75 N.Y.2d 840, 552 N.Y.S.2d 910, 552 N.E.2d 158 [1990]) for the proposition that a judgment creditor must have "a lien or other interest in fraudulently transferred property of his debtor in order to maintain an action for damages." The dissent therefore would reverse on the ground that, if the PA or PLO set up accounts like the Gaza Fund as aliases in a general scheme prior to the federal judgment, then the plaintiffs could not allege tortious interference because the alleged tortious "transfer" was effected before the judgment.

However, in our view, that misses the point of the plaintiffs' complaint. At the very heart of the declaratory judgment action is the question of whether the Gaza Fund is a

fictitious account owned or controlled by the PA, or whether it is a synonym for the IPF, which the plaintiffs acknowledge may be a separate juridical entity, and a legitimate pension fund.

Hence, in seeking a declaration that PA not IPF owns the assets, the plaintiffs are essentially seeking a declaration that IPF's interjection into the suit, with its claim that it owns the assets held in the SASI accounts, was the tortious act of interference. Moreover, plaintiffs claim that IPF's claim of ownership was specifically aimed at thwarting the plaintiffs' execution on the judgment since the IPF's interjection and fraudulent assertion occurred *after* the judgment in favor of the plaintiffs, and *after* the plaintiffs filed their restraining notices.

Finally, the court properly rejected defendant's contention that the action is analogous to a quiet title action. In every case cited by the defendants in support of its "quiet title" theory, the plaintiff or plaintiffs alleged an ownership claim to the property at issue, be it real property or securities. See Wright v. Nostrand, 94 N.Y. 31 (1883); Cushman v. Thayer Mfg. Jewelry Co., 76 N.Y.365 (1879); New York & New Haven R.R. Co. v. Schuyler, 17 N.Y. 592 (1858). Here the plaintiffs are in the shoes of a judgment creditor, rather than an alleged owner, and are asking for a judgment declaring a third party, codefendant

PA, as the true owner of the securities held by SASI.

The defendants initially ignored the issue of plaintiffs not claiming ownership to the SASI securities. The court raised the issue, and defense counsel admitted at oral argument that the precedent on quiet title involved only parties who claimed ownership to the property at issue. The defendants were unable to cite a single "quiet title" action where the plaintiff sought a finding of ownership with respect to a third-party. Further, on appeal, defendants did not address the issue either in its 31-page brief or even in its 17-page reply brief after the plaintiffs specifically raised this point. We find that this is not coincidental or a mere harmless omission.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 7, 2008, which, insofar as appealed from, denied the motion to strike plaintiffs' demand for a jury trial, should be affirmed, with costs.

All concur except Tom, J.P. who dissents in an Opinion as follows:

TOM, J.P. (dissenting)

In this declaratory judgment action, plaintiffs seek to satisfy a judgment obtained against defendant Palestinian Authority (PA) from funds held on behalf of the Pension Fund by a New York custodian, nonparty Swiss American Securities, Inc. Pursuant to a federal injunction, Swiss American has frozen over $100 million in securities and debt instruments held in the Pension Fund's account.

Plaintiffs are the administrator and survivors of the estate of Yaron Ungar, who was murdered together with his wife in a June 9, 1996 terrorist machine-gun attack in Israel. Plaintiffs alleged that the attack was carried out by members of Hamas acting under the command of the PA and the Palestine Liberation Organization (PLO). On July 12, 2004, plaintiffs obtained a default judgment in the amount of $116,409,123 against those parties under the Antiterrorism Act of 1991 (18 USC § 2337[2]) (*Estate of Ungar v Palestinian Auth.*, 325 F Supp 2d 15 [D RI 2004], *affd* 402 F3d 274 [1st Cir 2005], *cert denied* 546 US 1034 [2005]). In April 2005, plaintiffs domesticated their judgment in New York County.

Plaintiffs learned that Swiss American Securities was holding a large portfolio of stocks and bonds in the Pension Fund's name. In February 2006, they simultaneously commenced

this action, which seeks a declaration that such securities actually belong to the PA (CPLR 3001), and a turnover proceeding against Swiss American (CPLR 5225[b]), which was ultimately dismissed by Supreme Court. This appeal is brought by the Pension Fund from the denial of its motion to strike plaintiffs' demand that the remaining declaratory judgment action be tried before a jury.

This action, like other proceedings brought by plaintiffs to collect the judgment, is predicated on the contention that the PA and the particular Palestinian entity on behalf of which funds are held are alter egos (*see e.g. Knox v Orascom Telecom Holding S.A.E.*, 477 F Supp 2d 642, 648 n 5 [SD NY 2007]; *Estate of Ungar v Orascom Telecom Holding S.A.E.*, 578 F Supp 2d 536, 550 [SD NY 2008]; *Palestine Monetary Auth. v Strachman*, 62 AD3d 213, 218 [2009]). Plaintiffs allege that the "Palestinian Pension Fund" designation on the custodial account is "merely a fictitious name invented and used by the [PA] to conceal the true ownership and nature of these funds," that the judgment debtors have expressly refused to pay the judgment, and that plaintiffs have been obliged to seek out the judgment debtor's assets in the United States and abroad. The complaint states that the PA has

> "systematically held and managed the PA's and PLO's assets under various fictitious names and aliases in order to hide the PA's and

> PLO's involvement in financial activities from parties who would not otherwise do business with them, and to shield the financial activities and assets of the PA and PLO from law-enforcement and tax authorities and from creditors such as the instant Plaintiffs."

The pleadings do not identify any transfer that was made to Swiss American after plaintiffs obtained their judgment or that would otherwise be rendered fraudulent under Debtor and Creditor Law § 278 and § 279.

The Pension Fund responds that it is a distinct legal entity responsible for the management of a pension system for some 50,000 civil, administrative and municipal employees in the Gaza Strip. It explains that the pension system, originally founded in 1964, currently makes payments to between 5,000 and 6,000 beneficiaries and that the account name, "The Palestinian Pension Fund of State Administrative Employees" is a name used exclusively by it and not by the PA.

It is well settled that the question of whether one entity is the alter ego of another is a matter consigned to the equitable discretion of the court (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or

injustice against that party such that a court in equity will intervene" (*id.* at 142; *see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998] [alter-ego analysis "(a)kin to piercing the corporate veil"]). Whether the PA and the Pension Fund are discrete entities is an issue that must be tried to the court and does not implicate the need for a jury, advisory or otherwise.

In aid of their effort to bring this matter before a jury, plaintiffs adopt an anomalous position, portraying the alleged alter egos as discrete entities that have conspired to perpetrate a fraud on their judgment creditors. As plaintiffs summarize their case for this purpose, "this action alleges in essence that the PA and the [Pension Fund] are engaged in a fraudulent plan to prevent the Ungars from executing their judgment against the assets at issue." In support of their demand that the matter be tried before a jury (CPLR 4101), plaintiffs contend that the nature of the claim underlying the declaratory judgment action is legal rather than equitable (*see Murphy v American Home Prods. Corp.*, 136 AD2d 229, 231-232 [1988]), arguing that the complaint states a cause of action akin to the common-law action for unlawful interference with a judgment. They "allege that the [Palestinian Authority] and its co-conspirator the [Pension Fund] conspired to place the assets at [Swiss American Securities] out of the Ungars' reach, by fraudulently asserting that the assets

are the property of the [Pension Fund]."

In support of their asserted right to a jury trial, plaintiffs' contend that the action they purport to maintain is analogous to an action at law that was cognizable when the right to trial by jury was fixed. Thus, they suggest, it remains an action for which a jury trial is available. The trouble with this reasoning is that the restrictions imposed on the right of a judgment debtor to dispose of assets, in the interest of protecting the right of a judgment creditor to recover against those assets, is a matter of statute and had been controlled by statute for at least the better part of a century before the right to jury trial was fixed in 1894. Consistent with the governing statutes, the analogous action invoked by plaintiffs — unlawful interference with a judgment — required that the judgment creditor have a lien on the property alleged to have been fraudulently transferred. Since plaintiffs have yet to establish their right to a lien on the assets held on behalf of the Pension Fund, they cannot maintain such an action.

It was long ago settled that a debtor is free to dispose of property at will and that any such disposition is not actionable by a creditor until a superior right in the property has been acquired. In *Adler v Fenton* (65 US 407, 410 [1860]), the United States Supreme Court stated the general rule that an aggrieved

party "'must not only establish, that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie'" (quoting *Hutchins v Hutchins*, 7 Hill 104, 109 [1845]). More particularly, the Court observed that "chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it" (*id.* at 411). Quoting *Moran v Dawes* (Hopk Ch 365, 367 [1825]), the Court continued:

> "Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment; and upon the personal goods of the debtor, by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor, and those of a creditor, are thus defined by positive rules; and the points at which the power of the debtor ceases, and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any interposition of equity" (*Adler*, 65 US at 411-412 [internal quotation marks omitted]).

The Court emphasized that while protection ought to be afforded against "acts of an insolvent or dishonest debtor . . . the Legislature must determine upon the remedies appropriate for this end" (*id.* at 412). It concluded,

> "In the absence of special legislation, we may safely affirm, that a general creditor cannot bring an action on the case against his debtor, or against those combining and colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud creditors" (*id.* at 413).

In support of their action for fraudulent conspiracy against the Pension Fund despite their lack of a lien against the Pension Fund's assets, plaintiffs rely on *Quinby v Strauss* (90 NY 664 [1882]). Contrary to the clear pronouncements of New York courts in *Hutchins* and *Moran*, quoted by the Supreme Court in *Adler*, plaintiffs construe *Quinby* as affording an action at law against a judgment debtor and his attorney, who conspired to prevent execution against certain of the debtor's personalty, even in the absence of "the delivery of an execution to the sheriff," as required by *Moran* (Hopk Ch at 367). Plaintiffs further contend that this interpretation of *Quinby* was adopted by the Court of Appeals in *Braem v Merchants' Natl. Bank of Syracuse* (127 NY 508 [1891]) and by this Court in *James v Powell* (25 AD2d 1 [1966], *revd* 19 NY2d 249 [1967]). This analysis is flawed.

The report of *Quinby* is unclear both as to the facts and the Court's rationale. In particular, the decision fails to specify whether the judgment creditors had obtained a lien on the alienated property or not. The case holds only that the trial court improperly instructed the jurors that if they were satisfied the defendants had conspired to keep the judgment debtor's property out of the reach of his creditors, the "plaintiffs were entitled to a verdict for the amount of the judgments, and for such amount for the trouble and inconveniences as the jury should consider had been proved to have been sustained by plaintiffs" (*Quinby*, 90 NY at 664-665). A subsequent case indicates that the plaintiff in *Quinby* had already obtained an execution on the judgment prior to the fraudulent transfer complained of (*see Hurwitz v Hurwitz*, 10 Misc 353, 358 [1894]). Thus, *Quinby* is wholly consistent with the reasoning set forth in *Adler*. As to *Braem*, the *Hurwitz* court stated that, rather than follow *Quinby*, "the Court of Appeals in *Braem v Merchants' Bank* expressly repudiated the principle supposed to have been propounded in *Quinby v Strauss*" (*Hurwitz*, 10 Misc at 358-359), applying the traditional rule that the right to recover a debtor's personalty arises when an execution is delivered to the sheriff (*Braem*, 127 NY at 515).

Plaintiffs' reliance upon *James v Powell* (25 AD2d 1 [1966],

supra) is equally misplaced. *James* adopted the rationale purportedly propounded in *Quinby*, portraying the action not as one on the judgment but for damages resulting from expenses incurred as a result of interference with efforts to collect on the judgment. However, its reasoning was expressly rejected by this Court in *Federal Deposit Ins. Corp. v Porco* (147 AD2d 422, 423 [1989], *affd* 75 NY2d 840 [1990]), a case not cited by either party, which holds that "a creditor must have a lien or other interest in fraudulently transferred property of his debtor in order to maintain an action for damages for conspiracy to defraud him of his claim by such transfer" (*see also James*, 25 AD2d at 5 [Witmer, J., dissenting]). We further pointed out that "[i]n *James v Powell*, moreover, a judgment had already been entered against the debtor at the time of the fraudulent transfer" (*Federal Deposit Ins. Corp.*, 147 AD2d at 423). Finally, it should be noted that in reversing *James*, the Court of Appeals remanded the case to Supreme Court for, inter alia, reconsideration of the sufficiency of the complaint (*James*, 19 NY2d at 259).

Adler v Fenton (65 US 407, 411 [1860], *supra*) indicates that by 1825, when *Moran v Dawes* (Hopk Ch 365, 367 [1825], *supra*) was decided, the respective rights of debtors and their judgment creditors were governed by statute and could not be varied by a

court in the exercise of its equitable powers. While *Quinby* indicates that the common-law action for unlawful interference with a judgment, relied upon by plaintiffs as a predicate for trial by jury, survived the enactment of these statutes, it is clear that in the absence of a lien against assets alleged to have been fraudulently transferred, the action was not available (*see e.g. Yates v Joyce*, 11 Johns 136 [1814]).

Without a lien against the assets held on the Pension Fund's account, plaintiffs may not maintain an action for the alleged fraudulent transfer, whether denominated unlawful interference with a judgment, tortious interference with economic advantage, prima facie tort or fraud, all of which they invoke on appeal. Since the alleged fraudulent transfer does not support the asserted action at law, it does not afford grounds for a jury demand (*see Murphy*, 136 AD2d at 231-232).

Accordingly, the motion should be granted and plaintiffs' jury demand struck.

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

ENTERED: MARCH 30, 2010

CLERK