SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 7, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2100 Motor Vehicle Accident Indemnification Corporation, Petitioner-Respondent, Index 111677/08

-against-

NYC East-West Acupuncture, P.C., et al., Respondents-Appellants.

_____

Israel, Israel & Purdy, LLP, Great Neck (Jennifer Greenhalgh Howard of counsel), for appellants.

Marshall & Marshall, Jericho (Craig B. Marshall of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered August 13, 2009, which, to the extent appealed from as limited by the briefs, granted petitioner Motor Vehicle Accident Indemnification Corporation's (MVAIC) application to vacate the arbitration awards in favor of respondent medical providers, and denied respondents' cross petition to confirm said awards, unanimously reversed, on the law, without costs, the petition denied, the cross petition granted, and the awards confirmed.

This appeal arises out of a motor vehicle accident that occurred on September 21, 2003. Chong Hong Li, a pedestrian,

claimed to have been struck by a motor vehicle that fled from the scene. The one witness to the incident, Jian Neng Wu, provided the license plate number of the offending vehicle to the responding police officer. Based upon the information provided by Wu, police traced the vehicle to the owner, Phyllis Chu, a resident of New York State. Chu's vehicle was insured by Government Employees Insurance Company (GEICO) during the time period when the hit-and-run accident occurred.

As a result of the injuries she allegedly sustained, Li underwent medical treatment from appellants East-West Acupuncture, P.C. (East-West), MBR Psychological, P.C. (MBR), Sinai Medical, P.C. (Sinai), PSW Chiropractic Care, P.C. (PSW) and NY Comprehensive Medical P.C. (Comprehensive). All five medical providers submitted their claims to GEICO for payment. However, GEICO denied their claims on the basis that its investigation revealed that neither Chu, nor the vehicle insured by GEICO, was involved in the underlying incident.

In a letter dated October 27, 2004, counsel for appellant East-West notified MVAIC that GEICO denied its claim and requested payment for the medical services it rendered to Li.

On December 10, 2003, Li executed a notice of intent to file a claim with MVAIC. MVAIC responded in a letter, dated January 20, 2004, that it would not honor Li's claim because pursuant to Article 52 of the New York Insurance Law, she was not a

"qualified person" within the meaning of the statute since there was coverage from GEICO. Appellants East-West, Sinai, PSW and Comprehensive then filed arbitration request forms as to MVAIC and GEICO with the American Arbitration Association.[1]

During the course of the arbitration, GEICO received several continuances. On August 20, 2007, at the first scheduled hearing, GEICO produced an affidavit from Chu attesting that neither she, nor a vehicle she owned, had been involved in the hit-and-run accident. The arbitrator granted GEICO's request for an adjournment to allow GEICO to produce Chu to testify. However, at the next scheduled hearing GEICO failed to produce Chu. The arbitrator ordered GEICO to produce deposition transcripts of Li and Chu taken as a result of a personal injury action Li had filed against Chu in Supreme Court. The arbitrator also ordered GEICO to produce the order dismissing Li's personal injury claim.

On October 15, 2007, the next scheduled hearing date, GEICO produced Chu, however it did not produce the deposition transcripts or the order. Chu testified and MVAIC cross-examined her. The arbitrator then allowed GEICO until October 22, 2007,

---

[1] East-West's arbitration request form is dated May 24, 2007, Sinai's arbitration request form is dated May 24, 2007, 2007, PSW's arbitration request form is dated June 28, 2007, and Comprehensive's arbitration request form is dated May 23, 2007. MBR's arbitration request form, dated November 20, 2007, was filed after the arbitration decisions regarding the other providers were rendered.

to serve all transcripts and the court order in the underlying personal injury action filed by Li. The arbitrator determined that should any party require further testimony from Chu, the parties were to advise the arbitrator within five days from the date GEICO served the deposition transcripts.

On October 22, 2007, the attorney for GEICO submitted to the arbitrator an affidavit of service attesting that GEICO served upon all parties the deposition transcript of Li and the order of the underlying personal injury action. After a telephone conference held on November 1, 2007 between the arbitrator and the parties, it was established that Chu's transcript had not been produced. The arbitrator then determined, after review of Supreme Court's decision dismissing Li's personal injury action, that the dismissal was not a result of the matter being tried on the merits, but as a result of Supreme Court granting a CPLR 3126 motion to dismiss for Li's failure to provide discovery.

At one point in Chu's testimony, when questioned regarding the license plate cited in the police report filed in connection with the underlying motor vehicle accident, Chu testified that she owned the vehicle cited in the police report, but that those license plates had been surrendered to the New York Department of Vehicles prior to the accident. Chu further testified that at the time Li was struck by the unidentified vehicle, she had been preparing her children for bed and that no one else was using her

vehicle. Chu also testified that she had been advised by her counsel, who had represented her in Li's personal injury action, that Li had stated that Chu was not involved in the incident.

At a hearing held on November 5, 2007, MVAIC argued to the arbitrator that Li was not entitled to receive no-fault benefits because she was not a "qualified person" within Insurance Law § 5102 since there was a possibility that she was insured by Allstate. In support of its argument, MVAIC submitted an uncertified "Insurance Activity Expansion" document dated October 18, 2007, which indicated that someone with the same last name and date of birth, and who appeared to live at the same address as Li, held insurance with Allstate during the time she sustained her alleged injuries. MVAIC requested that the arbitrator adjourn the matter in order to allow it to investigate.

The arbitrator denied MVAIC's request based upon its conclusion that given the fact that four years had elapsed since Li had filed her notice of claim, MVAIC failed to exercise due diligence in investigating this matter. The arbitrator rendered awards in favor of the medical providers against MVAIC and dismissed the claims against GEICO. MVAIC appealed to the master arbitrator arguing that although GEICO was given multiple adjournments, its single request for a continuance to investigate whether Li was insured with Allstate was denied. MVAIC asserted that although it had time to investigate alternative theories of

insurance coverage for Li, it did not have the opportunity to do so, and that it had no obligation to fully investigate this matter until either an arbitrator or a court concluded that no other insurer was responsible. The master arbitrator affirmed the awards based upon its conclusion that MVAIC's argument that it was not obligated to fully investigate this matter until after the arbitrator declared GEICO not responsible, was inconsistent with the purpose and intent of Articles 51 and 52 of the Insurance Law.

MVAIC moved to vacate the arbitration awards. In a decision and order dated October 31, 2008, Supreme Court affirmed the decisions of the arbitrator and the master arbitrator that GEICO was not responsible for Li's medical expenses. However, Supreme Court remanded this matter to the arbitrator for a new hearing in order to provide MVAIC with the opportunity to present evidence showing that Li is not entitled to benefits because she was covered by other insurance.

By order dated January 8, 2009, Supreme Court, *inter alia*, consolidated the five separate actions brought by MVAIC to vacate arbitration awards arising out of Li's motor vehicle accident and allowed appellant medical providers to interpose answers and/or cross-move to confirm the arbitration awards.

Appellant medical providers cross-moved to confirm the arbitration awards. In the order appealed from, Supreme Court

denied the applications based upon its conclusion that

> "[g]iven the length of time that had already passed since the accident and the commencement of the arbitration, a brief adjournment to ascertain whether or not Ms. Li had insurance coverage was not an unreasonable request . . . [and] that the arbitrator's failure to grant MVAIC's request is deemed to constitute an abuse of discretion constituting misconduct within the meaning of CPLR 7511 (b)(1)(i) since it resulted in the foreclosure of the presentation of pertinent and material evidence" [internal quotation marks and citations omitted].

We reverse.

It is well settled that "[a]djournments generally fall within the sound exercise of an arbitrator's discretion pursuant to CPLR 7506(b), the exercise of which will only be disturbed when abused" (*Matter of Bevona [Superior Maintenance Co.]*, 204 AD2d 136, 139 [1994] [citations omitted]). The burden falls to "the party seeking to avoid an arbitration award to demonstrate by clear and convincing proof that the arbitrator has abused his discretion in such a manner so as to constitute misconduct sufficient to vacate or modify an arbitration award" (*Matter of Disston Co. [Aktiebolag]*, 176 AD2d 679, 679 [1991] *lv denied* 79 NY2d 757 [1992] [internal quotation marks and citation omitted]). Arbitral misconduct is established not by the refusal of an adjournment, but where the refusal forecloses "the presentation of material and pertinent evidence to the [movant]'s prejudice" *(Matter of Omega Contr. v Maropakis Contr.*, 160 AD2d 942, 943

[1990], *lv denied* 76 NY2d 710 [1990]).

We conclude that the arbitrator did not abuse his discretion in refusing to grant MVAIC an adjournment. The arbitrator's decision not to grant a postponement in order to allow MVAIC to investigate an adversary's contention was within his sound discretion and powers. Here, the record establishes that because of East-West's letter dated October 27, 2004, MVAIC had been on notice for approximately three years that GEICO denied East-West's claim on the basis that neither Chu nor a vehicle insured by GEICO was involved in the underlying hit-and-run motor vehicle accident. This letter also advised MVAIC that GEICO's investigation revealed that there existed no other insurance coverage for Li.

MVAIC's untimely assertion of a lack of coverage defense does not preclude it from denying liability (*see Matter of MVAIC v Interboro Med. Care and Diagnostic PC*, 73 AD3d 667 [2010]). However, we find that the arbitrator's refusal to adjourn the hearing did not constitute misconduct because there was an insufficient showing of cause for MVAIC's last minute request (*see Gillis v Toll Land XIII Ltd. Partnership*, 309 AD2d 734 [2003], *lv denied* 3 NY3d 602 [2004]).

Despite MVAIC having notice in late 2004 of GEICO's contentions, MVAIC took no affirmative steps, such as searching New York State Department of Motor Vehicle (DMV) records, to

establish whether Li was eligible for MVAIC benefits. Indeed, MVAIC provides no explanation as to why it did not investigate the DMV records sooner or why it could not discover that Li allegedly used the alias "Lillian Li," and that under this alias, she was insured by Allstate at the time she sustained her injuries. Under these circumstances, we conclude that MVAIC has failed to establish by clear and convincing proof that the arbitrator abused his discretion in such a manner to constitute misconduct sufficient to vacate or modify the arbitration awards in favor of appellants.

We have reviewed MVAIC's remaining contentions and find them without merit.

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

ENTERED: OCTOBER 7, 2010

CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3306 The People of the State of New York, Ind. 95/09
Respondent,

-against-

Greg Cantoni,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J. at request for new counsel; Daniel Conviser, J. at jury trial and sentence), rendered August 18, 2009, convicting defendant of criminal possession of stolen property in the fourth degree (two counts), criminal possession of stolen property in the fifth degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The court properly exercised its discretion in summarily denying defendant's eve-of-trial request for the appointment of substitute counsel. It was clear to the court that defendant's sole complaint about his attorney was that he had mishandled defendant's request to testify before the grand jury. The court was thoroughly familiar with that matter by virtue of its recent

disposition of defendant's motion to dismiss the indictment, and it was well aware that defendant's complaint about his counsel had no merit and that there was no good cause for a substitution (*see People v Beriguette*, 84 NY2d 978, 980 [1994]; *compare People v Sides*, 75 NY2d 822, 824 [1990]). Moreover, there no indication that counsel's representation, either before or after the application, was in any way deficient (*see People v Linares*, 2 NY3d 507, 511 [2004]).

The trial court properly exercised its discretion in denying defendant's mistrial motion based on a police officer's fleeting and unelaborated reference to the recovery of an undescribed identification card at the time the stolen credit cards at issue were recovered. This testimony did not implicate defendant in any uncharged crimes and was not prejudicial (*see People v Flores*, 210 AD2d 1, 2 [1994], *lv denied* 84 NY2d 1031 [1995]).

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

ENTERED: OCTOBER 7, 2010

CLERK

Andrias, J.P., Freedman, Renwick, Richter, Manzanet-Daniels, JJ.

3307 Financial Structures Limited, et al., Index 601159/08
Plaintiffs-Respondents,

-against-

UBS AG, et al.,
Defendants-Appellants.

_____

Paul, Hastings, Janofsky & Walker LLP, New York (James R. Bliss and Kevin P. Broughel of counsel), for appellants.

Sonnenschein Nath & Rosenthal LLP, New York (Richard M. Zuckerman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 9, 2009, which, to the extent appealed from, denied defendants' motion seeking to dismiss the first and second causes of action and related injunctive relief, unanimously modified, on the law, the motion granted with respect to dismissal of the first cause of action and all claims for injunctive relief, and otherwise affirmed, without costs.

The alleged oral side agreement was capable of full performance within one year, and thus was not barred by the statute of frauds (*see* General Obligations Law § 5-701[a][1]). The written agreement to which this side agreement was inextricably tied set forth several methods by which the maturity date could be accelerated within the first year of the transaction without a breach by any party to the agreement. For

example, an optional redemption upon the occurrence of a withholding tax event, in which a change in the tax laws could require the withholding of taxes from payments on the underlying junior notes, resulting in the payments received on the underlying junior notes being insufficient to cover the payments due on the senior notes, would trigger acceleration, requiring full repayment of all principal and interest due on the senior notes, and completion of full performance under the agreement possibly as early as 10 months after the closing date. The fact that full performance within one year was unlikely or improbable does not make the agreement subject to the statute of frauds (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]), for the statute encompasses only those agreements which, by their terms, "have absolutely no possibility in fact and law of full performance within one year" (*D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]; *see also North Shore Bottling Co. v C. Schmidt & Sons*, 22 NY2d 171, 175-176 [1968]). The contingencies at issue here may or may not have happened within one year, clearly taking the subject agreement out of the statute of frauds (*see id.* at 177; *see also Lichtman v Estrin*, 282 AD2d 326, 328 [2001]; *Nakamura v Fujii*, 253 AD2d 387, 389 [1998]; *Metro-Goldwyn-Mayer v Scheider*, 43 AD2d 922, 923 [1974]).

Contrary to defendants' contention, the methods of acceleration that would not constitute a breach would not

frustrate the agreement's purpose so as to render it no performance at all (*compare Solomon v Urban Dental Mgt., Inc.*, 39 AD3d 529, 531 [2007]; *Cohen v Bartgis Bros. Co.*, 264 App Div 260 [1942], *affd* 289 NY 846 [1943]), but rather would simply shorten the period of time that noteholders would earn interest on their notes and thereby "advance[] the period of fulfillment" (*Blake v Voight*, 134 NY 69, 73 [1892]). Defendants' argument that the options for acceleration depend on the occurrence of events or contingencies outside the parties' control is equally unavailing, for this circumstance does not remove an agreement from the purview of the statute of frauds (*see e.g. Lichtman*, 282 AD2d at 328; *Nakamura*, 253 AD2d at 389; *Metro-Goldwyn-Mayer*, 43 AD2d at 923).

We agree with the motion court that the fraud cause of action was not conclusively barred by the applicable two-year statute of limitations (*see* CPLR 213[8]) because the parties' competing factual contentions render it impossible to determine, at this stage of the proceedings, when plaintiffs first became -- or should have become -- aware of the alleged fraud (*see Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315 [2006]; *Ghandour v Shearson Lehman Bros.*, 213 AD2d 304, 305-306 [1995], *lv denied* 86 NY2d 710 [1995]). The mere fact that plaintiffs were aware of the general market deterioration beginning in 2002 or 2003 does not equate to notice of a potential fraud, nor would it

necessarily cause a reasonably diligent plaintiff to suspect fraud so as to give cause for further investigation (*see CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 155-156 [2009]).

The motion court erred, however, in failing to dismiss the fraud cause of action as duplicative of the breach-of-contract cause of action, inasmuch as it is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages (*see J.E. Morgan Knitting Mills v Reeves Bros.*, 243 AD2d 422 [1997]). The essence of the fraudulent inducement cause of action is that defendants allegedly misrepresented to plaintiffs their intentions with respect to the manner in which they would manage the underlying assets, and thus plaintiffs allege a misrepresentation of future intent rather than a misrepresentation of present fact, which is not sustainable as a cause of action separate from breach of contract (*see Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 AD2d 526, 527-528 [1986]).

Finally, in light of plaintiffs' separate settlement with the noteholders in mitigation of their damages here, their requests to enjoin defendants from acting with any objective other than to increase or maintain the quality of the assets underlying the notes should be dismissed as moot.

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 7, 2010

CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3308 The People of the State of New York, Ind. 909/09
Respondent,

-against-

James Quinn,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey M. Kneipper 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 (Carol Berkman, J.), rendered on or about July 1, 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: OCTOBER 7, 2010

CLERK

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

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3309 In re Sheliah M.,
Petitioner-Appellant,

-against-

Joseph G.,
Respondent-Respondent.

_____

Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

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

_____

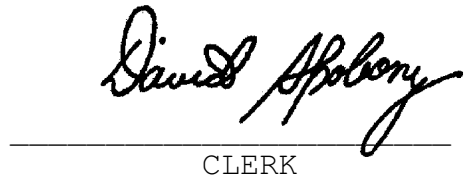
Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about August 29, 2007, which, on the court's own motion, dismissed the petition seeking a change of custody, unanimously affirmed, without costs.

Petitioner failed to demonstrate any change in circumstances that would warrant modification of the prior order granting custody to respondent (*see Matter of Patricia C. v Bruce L.*, 46 AD3d 399 [2007]). Contrary to her contention, the record reflects that, despite ample opportunity to do so, petitioner failed to present credible evidence to support her allegations against respondent and that the court had sufficient evidence on which to determine that a change of custody was not in the best interests of the child. In the absence of the necessary evidentiary showing, the court was not required to hold a hearing (*id.*).

In view of petitioner's failure to avail herself of the opportunities she was given to retain counsel, after refusing the court's offers to appoint counsel and stating that she preferred to retain counsel of her own choosing, the court properly declined to appoint counsel (*see Matter of Adams v Bracci*, 61 AD3d 1065, 1066 [2009], *lv denied* 12 NY3d 712 [2009]).

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

ENTERED: OCTOBER 7, 2010



CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3311-
3312 The People of the State of New York, Ind. 6548/05
Respondent,

-against-

Rafael Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (William A. Wetzel, J. at suppression motion; Michael R. Ambrecht, J. at trial and sentence), rendered December 14, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree and conspiracy in the second degree, and sentencing him to concurrent terms of 17 years and 5 to 15 years, unanimously modified, on the law, to the extent of remitting the matter to Supreme Court for the sole purpose of imposing a term of postrelease supervision in defendant's presence, and otherwise affirmed.

The court's summary denial of the portion of defendant's suppression motion that sought to suppress eavesdropping evidence on the ground of lack of CPL 700.50(3) notice was proper. As relevant to this case, the statute directs that the named subject

of an eavesdropping warrant, such as defendant, be notified of the existence of the warrant within 90 days of its termination.

Federal courts have held that under 18 USC § 2518(8)(d), the federal equivalent of CPL 700.50(3), no suppression remedy properly flows from a post-termination notice violation without a showing of prejudice to a defendant named as a target in the eavesdropping warrant (*see United States v Fury*, 554 F2d 522, 528-529 [2d Cir 1977], *cert denied* 436 US 931 [1978]). In light of the general principles stated by the Court of Appeals in *People v Bialostok* (80 NY2d 738, 746-748 [1993]), as well as the language of CPL 700.50(3), we hold, consistent with federal law, that suppression of wiretap evidence based on the People's failure strictly to observe the statute's notice requirement is not warranted without a showing of prejudice.

In contrast to CPL 700.70, which explicitly bars the use of wiretap evidence at trial unless the People, within 15 days after arraignment, furnish the defendant with a copy of the warrant and application, CPL 700.50(3) does not set forth a consequence for failure to comply with its notice provisions. Furthermore, suppression of wiretap evidence in the absence of a showing of prejudice would run counter to the "commonsense balance between the rights of defendants and the needs of law enforcement" (*Bialostok*, 80 NY2d at 747). Applying the prejudice rule here, we find that defendant failed to allege any prejudice that would

have warranted a hearing on his suppression argument that the People had failed to comply with CPL 700.50(3). Defendant received proper notice of the warrant at his arraignment, and had a full opportunity to challenge its legality.

The trial court properly exercised its discretion in denying defendant's mistrial motion, made on the ground that the court had improperly taken on the role of an advocate in rehabilitating a prosecution witness and had conveyed to the jury its belief in the witness's credibility. The court's limited participation in the examination of this witness did not deprive defendant of a fair trial, and the court did not take on "either the function or appearance of an advocate" (*People v Arnold*, 98 NY2d 63, 67 [2002]) or suggest to the jury that it had an opinion. Furthermore, the court's charge was sufficient to prevent any prejudice in this regard. Defendant's remaining challenges to the court's conduct of the trial are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

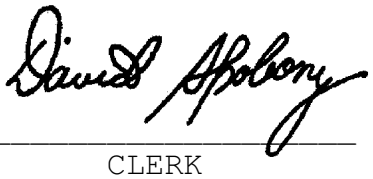
When, at trial, the People introduced a document into evidence under the past recollection recorded exception to the hearsay rule, defendant's sole objection was that the hearsay exception only applies when the testifying witness personally authors the document. However, that argument is unavailing (*see People v Taylor*, 80 NY2d 1, 9 [1992]). Defendant's remaining

challenges to this document are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that any error in receipt of this document was harmless.

We perceive no basis for reducing the sentence. However, as the People concede, a remand is required for proper imposition of postrelease supervision.

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

ENTERED: OCTOBER 7, 2010



CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, JJ.

3314 The People of the State of New York, Respondent, Ind. 41247C/06

-against-

Caesar Santiago, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Dana Levin of counsel), for respondent.

_____

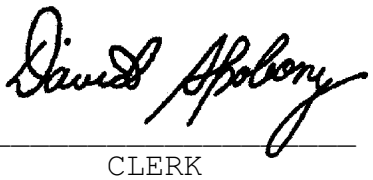
Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered March 5, 2008, convicting defendant, after a nonjury trial, of attempted assault in the third degree, and sentencing him to a conditional discharge for a period of 1 year with a $250 fine, unanimously affirmed.

The court properly denied defendant's motion to suppress his statement. The hearing evidence establishes that the officer's question, "What happened?" at the scene of an assault did not constitute custodial interrogation requiring *Miranda* warnings (*see People v Taylor*, 57 AD3d 327 [2008], *lv denied* 12 NY3d 860 [2009]).

Defendant's remaining contentions are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: OCTOBER 7, 2010



CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3315 Sara Kinberg, Index 1628/06
Plaintiff-Appellant, 21593/06

-against-

Yoram Kinberg,
Defendant-Respondent.

- - - - -

Sara Kinberg,
Plaintiff-Appellant,

-against-

Jane Bevans,
Defendant-Respondent.

_____

Sara Kinberg, appellant pro se.

Yoram Kinberg, respondent pro se.

Jan Levien, P.C., New York, for Jane Bevans, respondent.

_____

Order, Supreme Court, Bronx County (Ellen Gesmer, J.), entered June 22, 2009, which, in postdivorce proceedings, dismissed certain claims asserted by plaintiff against defendant Kinberg (Kinberg), plaintiff's former husband, and defendant Bevans (Bevans), Kinberg's former attorney, unanimously affirmed, without costs.

The trial court correctly determined that Kinberg did not breach the provisions of the parties' September 2000 settlement agreement relating to his 401(k) account. Under the plain meaning of those provisions, Kinberg was only obligated to

"execute and consent to the entry" of a QDRO, not prepare one. Any obligation on Kinberg's part to prepare and submit a QDRO arose subsequently, in a March 2002 order, with which Kinberg complied, and which, after various challenges by plaintiff, resulted in the issuance of a QDRO in June 2002 and the distribution of plaintiff's share of the 401(k) plan in December 2002. Although the process took more than two years, it does not appear that the delay was caused by Kinberg, and no other basis appears for holding Kinberg responsible for the account's loss in value over this two-year period. Contrary to plaintiff's contention, the agreement did not provide that the 401(k) account was to be divided as of the agreement's date of execution, and, indeed, the agreement specifies no date of division whatsoever. Nor should the 401(k) account be valued as of the date the divorce, absent a provision to that effect in either the QDRO or the divorce judgment. Article XXV of the agreement, which requires the parties to execute, acknowledge, and deliver any documents that might be necessary to give the agreement full force and effect, does not avail plaintiff, as it is not clear that the documents that Kinberg purportedly failed to provide were necessary to give full force and effect to his obligation to execute and consent to the entry of a QDRO. Nor did Kinberg violate the agreement by investing the 401(k) funds. The agreement plainly contemplated that he would continue investing

the funds and did not obligate him to do so in any particular way.

The trial court also correctly determined that Kinberg did not violate the settlement agreement when, four years after its execution, he canceled plaintiff's health insurance coverage. The agreement required Kinberg to continue to provide plaintiff with the predivorce amount of health insurance "to the extent that [he] is able to [do so] without any additional cost to him[self]," and that within 30 days of the agreement's execution, he advise plaintiff "whether he is able to provide such insurance" and "provide [her] with all information necessary so she may confirm [his] advice in this regard." The trial court credited Kinberg's testimony that he so advised plaintiff within 30 days of agreement's execution, and no basis exists for disturbing that credibility determination. Article XXXIV of the agreement, which involves the addressing of notices required by the agreement, does not avail plaintiff, since the clause pertaining to medical insurance coverage does not require a written notice. Nor is it clear that the Medical Plan Monthly Contribution Rate Sheet that Kinberg admittedly provided to plaintiff was insufficient to confirm any "additional cost." That Kinberg voluntarily provided plaintiff with health insurance for four years after the agreement's execution is insufficient to show that he waived his right to cancel, and nothing in the

agreement prohibited Kinberg from canceling plaintiff's health insurance in order to provide health insurance to his new wife.

With respect to plaintiff's claim against Bevans, plaintiff failed to show that she received less than what was due her under the agreement or that Bevans possessed any assets belonging to her (*see Ira E. Garr, P.C. v Kinberg*, 7 AD3d 453 [2004]). Plaintiff's claim that she established an account stated, based on certain letters she wrote to Bevans regarding money Bevans was ostensibly holding for payment of a charging lien asserted by plaintiff's former attorney (*see id.*), is improperly raised for the first time on appeal, and we decline to consider it.

We have considered and rejected plaintiff's other arguments.

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

ENTERED: OCTOBER 7, 2010

CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3316 The People of the State of New York, Ind. 5926/07
Respondent,

-against-

Edward Wright,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Heather L. Holloway of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered on or about May 15, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 7, 2010

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, JJ.

3317 The People of the State of New York, Respondent, Ind. 34522C/06

-against-

Saturnino Torres, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

_____

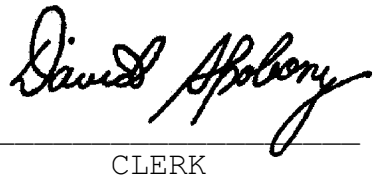
Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered April 20, 2007, convicting defendant, after a nonjury trial, of attempted criminal possession of a weapon in the fourth degree, menacing in the third degree, attempted assault in the third degree, harassment in the second degree and attempted aggravated harassment in the second degree, and sentencing him to an aggregate term of 270 days, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. Furthermore, 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 fact-finder's determinations concerning credibility. The

evidence established, among other things, that defendant menaced the victim with a shotgun, and we reject defendant's arguments to the contrary.

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

ENTERED: OCTOBER 7, 2010



CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3318 Faye Roimesher, Index 302217/07
Plaintiff-Respondent, 84086/08

-against-

Colgate Scaffolding & Equipment Corp.,
Defendant-Appellant,

770 Lexington Associates, LLC.,
Defendant-Respondent,

JP Morgan Chase, et al.,
Defendants.

[And A Third-Party Action]

_____

O'Connor & Golder LLP, Bronx (Terrence J. O'Connor of counsel), for appellant.

Kenneth J. Gorman, New York, for Faye Roimesher, respondent.

Wade Clark Mulcahy, New York (Alex Niederman of counsel), for 770 Lexington Associates, LLC, respondent.

_____

Order, Supreme County, Bronx County (Alan Saks, J.), entered January 5, 2010, which, to the extent appealed from, as limited by the briefs, denied defendant-appellant Colgate's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and Colgate's motion granted. The Clerk is directed to enter judgment accordingly.

On the morning of April 4, 2007, plaintiff tripped and fell on an uneven sidewalk located at 770 Lexington Avenue, New York,

New York. Defendant 770 Lexington is the owner of the commercial building adjacent to the sidewalk where plaintiff fell. At the time of plaintiff's accident, defendant Colgate had erected a sidewalk bridge pursuant to an agreement with 770 Lexington.

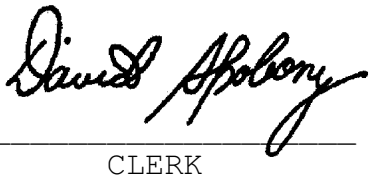
Neither plaintiff's verified complaint nor her bill of particulars allege that Colgate's sidewalk bridge narrowed plaintiff's pathway, directing her towards the area of the defective sidewalk. During her sworn deposition, plaintiff testified that nothing blocked the sidewalk at the time of the accident and that she was looking straight ahead. She further stated that the area under the sidewalk bridge was lighted.

The motion court properly found that Colgate was not responsible for the condition of the sidewalk, but erred in denying Colgate's motion for summary judgment. Since the pleadings and discovery are bereft of any allegation that Colgate's sidewalk bridge directed plaintiff to the hazardous area (*see Betances v 700 W. 176th St. Realty Corp.*, 250 AD2d 504 [1998]; *cf. McKenzie v Columbus Ctr.*, LLC, 40 AD3d 312 [2007]; *Coulton v City of New York*, 29 AD3d 301 [2006]; *Ryan v Gordon L. Hayes, Inc.*, 22 AD2d 985 [1964], *affd* 17 NY2d 765 [1966]), the only such record evidence is contained in plaintiff's expert's affidavit which, introduced to defeat summary judgment, contradicted plaintiff's sworn testimony and should have been

disregarded (*see Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270 [2009]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). Further, it failed to cite to any statute, regulation, or industry standard, and consisted of conjecture and speculation, which is also insufficient to defeat a motion for summary judgment (*see DiSanza v City of New York*, 11 NY3d 766 [2008]; *Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Matos v Challenger Equip. Corp.*, 50 AD3d 502 [2008]).

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

ENTERED: OCTOBER 7, 2010



CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3319 The People of the State of New York, Ind. 4587/00
Respondent,

-against-

Dequan Williams,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 7, 2008, resentencing defendant to a term of 9½ years, with 5 years' postrelease supervision, unanimously affirmed.

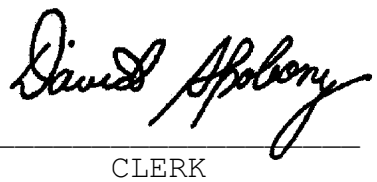
The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at that time, and therefore had no reasonable expectation of finality in his illegal sentence (*see People v Murrell*, 73 AD3d 598 [2010]).

We have considered and rejected defendant's due process argument. Defendant's remaining claims are similar to arguments

that were rejected in *People v Williams* (14 NY3d 198 [2010]).

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

ENTERED: OCTOBER 7, 2010



CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3320 In re Victor M.,

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

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about July 30, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of attempted burglary in the second and third degrees, attempted assault in the third degree, attempted criminal trespass in the second degree and menacing in the second and third degrees, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. The showup occurred within close temporal and physical proximity to the incident, and it was not rendered unduly suggestive by the fact that the identifying witness was told that she would be viewing a potential suspect, since any person of ordinary

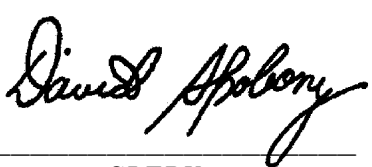
intelligence would have drawn that inference, or by the presence of officers on either side of appellant, which was justified as a security measure (*see People v Sanchez*, 66 AD3d 420 [2009], *lv denied* 13 NY3d 862 [2009]).

The court's fact-finding determination 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]). The evidence supports inferences that appellant, either personally or as an accessory under Penal Law § 20.00, attempted to force his way into an apartment for the purpose of assaulting an occupant against whom one of appellant's companions had a grudge, displayed what appeared to be a firearm, and attempted to assault the targeted victim's wife. Accordingly, the evidence established the elements of each offense at issue.

Enhanced supervision probation was the least restrictive alternative consistent with appellant's needs and the need for protection of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: OCTOBER 7, 2010



CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, JJ.

3324 The People of the State of New York, Ind. 4198/04
Respondent,

-against-

Jesus Vega,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

_____

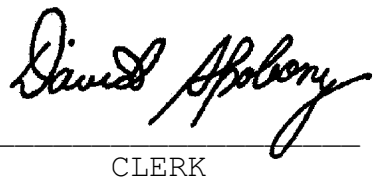
Order, Supreme Court, Bronx County (Eugene Oliver, Jr., J.), entered on or about December 16, 2009, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

In light of defendant's serious record of misconduct, including violent behavior, both before and after his drug conviction, the court properly exercised its discretion in concluding that substantial justice would dictate the denial of

defendant's application for resentencing (*see e.g. People v Hidalgo*, 47 AD3d 455 [2008]). We find it unnecessary to decide any other issue.

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

ENTERED: OCTOBER 7, 2010



CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3325N Jeffrey Squitieri, Index 350138/06
Plaintiff,

-against-

Beth Squitieri,
Defendant-Appellant.

- - - - -

Susan Y. Kunstler,
Non-party Respondent.

_____

Port & Sava, Garden City (George S. Sava of counsel), for appellant.

Susan Y. Kunstler, New York, respondent pro se.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered June 24, 2009, which granted the motion of non-party respondent attorney for an order directing defendant wife to pay the sum of $248,502.30 to respondent attorney within 30 days of the order's date, and that should the wife fail to make the payment, the clerk was to enter a money judgment in respondent attorney's favor in the amount of $248,502.30 with interest from the date of entry until the date of payment, and denied the wife's cross motion to allocate responsibility for the attorney's fees 80% to plaintiff husband and 20% to the wife, unanimously modified, on the law, to strike those portions of the order

providing for payment of the fees within 30 days and for entry of a money judgment and statutory interest should the amount not be paid within 30 days, and otherwise affirmed, without costs.

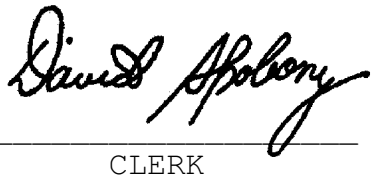
An attorney's charging lien under Judiciary Law § 475 "attaches to a . . . judgment or final order in his client's favor, and the proceeds thereof . . ." Thus, the procedure of Judiciary Law § 475 is designed to attach only the specific proceeds of the judgment or settlement in the action where the attorney appeared (*Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 219 [1997]), and since there had been no final judgment on equitable distribution in the underlying matrimonial action, the motion court erred in ordering that the amount fixed under the charging lien be paid within 30 days of the order.

The denial of the wife's cross motion was proper at this juncture. As the motion court recognized, the appropriate method for allocating responsibility for the attorney's fees generated in the underlying matrimonial action is upon the final determination of equitable distribution between the parties.

We have considered the wife's remaining contentions, including that the fee dispute was subject to arbitration, and find them unavailing.

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

ENTERED: OCTOBER 7, 2010



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5361 Ramon A. Torres, Index 115881/07
Plaintiff-Respondent-Appellant, 591167/07

-against-

Peter D'Alesso,
Defendant-Appellant-Respondent.
- - - - - -
Peter D'Alesso,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Greenblatt & Agulnick, P.C., et al.,
Third-Party Defendants-Respondents-Appellants.

_____

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for appellant-respondent.

Greenblatt & Agulnick, P.C., Great Neck (Scott E. Agulnick of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered November 3, 2008, affirmed, without costs.

Opinion by Saxe, J.P. All concur except Catterson and McGuire, JJ. who dissent in an Opinion by McGuire, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, JJ.

5361

Index No. 115881/07
591167/07

_____x

Ramon A. Torres,
Plaintiff-Respondent-Appellant,

-against-

Peter D'Alesso,
Defendant-Appellant-Respondent.

- - - - -

Peter D'Alesso,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Greenblatt & Agulnick, P.C., et al.,
Third-Party Defendants-Respondents-Appellants.
_____x

Cross-appeals from an order of the Supreme Court, New York County (Edward H. Lehner, J.), entered November 3, 2008, which, inter alia, granted plaintiff's motion for summary judgment, dismissed the counterclaim and third-party complaint, directed entry of judgment against defendant, denied defendant's motion to disqualify third-party defendants as attorneys for plaintiff, denied third-party defendants' motion for summary

judgment on their counterclaims and for sanctions against defendant and his counsel, and dismissed said counterclaims.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz and Peter A. Massa of counsel), for appellant-respondent.

Greenblatt & Agulnick, P.C., Great Neck (Scott E. Agulnick of counsel), for respondents-appellants.

Saxe, J.P.

When both parties to a real estate sales contract have executed and delivered to the other party a completely integrated written contract containing the specific language that any prior oral agreements or representations are merged into the writing, and that "neither party rel[ies] upon any statement made by anyone else that is not set forth in this contract," such a contract may not be avoided by a claim of a prior orally agreed-upon condition precedent to the effectiveness of the contract. The rule that the parties to a written contract may orally agree to a condition precedent to the effectiveness of the contract, so that a party must be permitted to prove by parol evidence a claim that the contract never became effective because the condition precedent never occurred (*see Hicks v Bush*, 10 NY2d 488, 491 [1962]), is not applicable under circumstances such as those presented here. Even if the rule were applicable here, the purported condition would be unenforceable because it contradicts terms of the writing. And, the words used to create the condition lack the "clear language showing that the parties intended to make it a condition" (*Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992]) that is necessary to validly create a condition precedent to the effectiveness of the contract.

Defendant buyer executed a written contract to purchase real property on Fire Island from plaintiff seller. With the signed contract, the buyer turned over to the individual third-party defendant, the seller's attorney, a contract down payment check for $120,000. However, the buyer alleges that the terms of the parties' contract were modified by an oral agreement he made with the seller's attorney at the time he turned over the signed contract and down payment check, under which the attorney allegedly agreed not to deposit the buyer's down payment check "until further notice" while the buyer awaited word on whether his application for a home equity line of credit was granted.

The written contract as negotiated by the parties consisted of a modified standard form contract for the sale of residential real estate, with a rider. In the contract's final form, the parties deleted from the standard form its entire mortgage financing contingency provision, so that the final agreement contained nothing that conditioned the buyer's obligations on his ability to obtain financing. Indeed, rider paragraph 45 contained a specific representation that the buyer had sufficient assets to complete the purchase. Additionally, rider paragraph 39 dealt with the possibility of a check being returned, giving *the seller* the option of deeming the contract void ab initio "in the event any check being delivered herewith fails of

collection," and *if* the seller so notified the buyer, giving the buyer 48 hours to replace the bounced check with certified funds.

Also important here is the language of the written contract's merger clause, in paragraph 28. It provides that "[a]ll prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract." It goes on to provide that "[n]either this contract nor any provision thereof may be waived, changed or cancelled except in writing."

On October 31, 2007, with the consent of the buyer's attorney, who declined to be present, the seller's attorney met with the buyer to receive the contract executed by the buyer and his down payment check. The seller's attorney disputes the buyer's claim as to exactly what was said at that meeting. According to the attorney, when the buyer gave him the executed contract and check, the buyer asked him not to deposit the check until Monday November 5, 2007, on which date he could deposit it unless he heard otherwise. In response, the attorney says, he told the buyer that it was his practice not to deposit a down payment check until he received the fully countersigned contract

from the seller, and that he would not be receiving the fully executed contract before November 5th, so the down payment would not be deposited before then; as to any other problems or questions, he advised the buyer to speak to his own attorney.

According to the buyer, he informed the seller's attorney that he was waiting to hear within the next week on his application for a home equity line of credit, and that he "'did not have money in [his] account' to make good the deposit check, and asked if he [the seller's attorney] could hold the check without depositing same until he heard further from me," and "[the seller's attorney] responded that he 'will not submit the check until I hear from you.'" The buyer then signed the contract and gave the seller's attorney the check based on this assurance. A friend of the buyer's who accompanied him to the attorney's office concurs with the buyer's version of the events.

The seller's attorney sent the contract to his client for signature. While awaiting the return of the contract from his client, the seller's attorney received three calls from the buyer's attorney, who inquired about when the fully executed contract would be received and requested immediate delivery of it upon receipt. He also ordered a title report. On November 12, 2007, the seller's attorney received the executed contract from

the seller, deposited the down payment check in the escrow account, and delivered a copy of the fully executed contract to the buyer by fax and by mail, with a letter indicating that the check had been deposited in the escrow account.

On November 19, 2007, the buyer's attorney faxed a letter to the seller's attorney stating, "Our client has advised us that he will not be proceeding with the above transaction." On the same day, the seller's attorney was also informed by the bank that the down payment check had been returned for insufficient funds. The seller's attorney sent a letter to the buyer's attorney requesting a certified replacement check for $120,000 plus a certified check for $15 to cover the bounced check fee charged by the bank. The buyer sent the seller a check for $15, but never sent a replacement check for the down payment. This action followed, in which the seller, as plaintiff, sought a money judgment in the amount of $120,000 representing liquidated damages for the buyer's breach of contract. The court granted the seller's motion for summary judgment.

The buyer contends that the court should have denied the seller's motion for summary judgment because a dispute exists as to whether the allegedly agreed-upon oral condition was part of the contract, which, if resolved in the buyer's favor, would render the parties' written agreement unenforceable because the

condition never occurred. We reject this contention and affirm the grant of summary judgment in the seller's favor.

In taking the position that the signed written contract was not enforceable in view of the new condition that the seller's attorney allegedly agreed to upon accepting the contract executed by the buyer and the down payment check, the buyer relies on *Gutowski v Louie* (193 Misc 2d 465 [2002]). *Gutowski* is a New York County Supreme Court decision involving a signed contract and deposit check sent to a seller's attorney along with a letter requesting that the check be held in escrow and not deposited until the buyer was in possession of fully executed contracts; the court held that a question of fact was presented as to whether an enforceable contract was created before the buyer's receipt of the fully executed contracts (*see id.* at 467).

Gutowski does not fully support the buyer's position here, since the court's analysis in that case did not address whether the act requested in that buyer's letter -- waiting to deposit the buyer's check until the contracts were fully executed -- materially altered the terms of the written contract, so as to require the court to consider whether such a modification was permissible.

However, rejection of the cases cited by the buyer does not dispose of the appeal, because the dissent expands on the buyer's

argument. Relying on the rule that parties to a written contract may, by oral agreement, create a condition precedent to the effectiveness of the written contract, the dissent asserts that the buyer's claim is sufficient to preclude summary judgment because he is entitled to demonstrate, by parol evidence, that an orally agreed-upon condition precedent never occurred and that the contract therefore never became effective.

The rule relied on by the dissent, that "[p]arol testimony is admissible to prove a condition precedent to the legal effectiveness of a written agreement, if the condition does not contradict the express terms of such written agreement" (*Hicks v Bush*, 10 NY2d 488, 491, *supra* [internal citations omitted]), is one of long standing; in *Ware v Allen* (128 US 590, 596 [1888]), the United States Supreme Court discussed "that class of cases, well recognized in the law, by which an instrument . . . is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter."

In our view, however, that rule may not properly be applied to a real estate sales contract like that under consideration here, that is, a fully executed real estate sale contract containing a broad merger clause, especially when the merger clause specifies that "[n]either party rel[ies] upon any statement made by anyone else that is not set forth in this

contract."

Initially, we observe that treating real estate contracts differently from other kinds of contracts is supported by ancient common law of this State; indeed, the Court of Appeals clearly stated in 1894 that a party who delivers a signed written contract to the other party may not claim that an oral condition was added at the time of delivery, precluding its effectiveness or enforcement (*Blewitt v Boorum*, 142 NY 357 [1894]). As articulated by the Court of Appeals in *Blewitt*, the delivery of the signed contract to the other party itself renders the claimed condition unavailable:

> "The rule in this state regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee or other party thereto conditionally or as is said in escrow, and when delivered to a party the delivery operates at once and the condition is unavailable" (*id.* at 363, citing *Gilbert v The North American Fire Ins. Co.*, 23 Wend. 43 [1840], *Worrall v Munn*, 5 NY 229 [1851], *Braman v Bingham*, 26 NY 483 [1863], and *Wallace v Berdell*, 97 NY 13, 25 [1884]).

This rule also precludes adding oral conditions to a signed written real estate sales contract when its delivery was to the other party's agent (*see Worrall v Munn*, 5 NY at 238).[1]

---

[1] *Frantz v Gatto* (274 App Div 1003 [1948]), in which the Second Department allowed a claim that a condition was imposed upon the delivery of a signed real estate contract, is inapposite, since the claimed conditional delivery was not made either to the other party or to the other party's agent; rather,

Precluding a buyer such as defendant from undermining a signed and delivered contract by the means attempted here, the alleged imposition of an oral condition, also comports with fundamental principles of law. First, the statute of frauds' requirement that real estate sale contracts be in writing (General Obligations Law § 5-703) reflects important policy concerns. Real estate transactions are required to be in writing to ensure clarity and certainty, and to avoid fraud (*see Villano v G & C Homes*, 46 AD2d 907, 907 [1974]). Unlike other types of business transactions, real estate sales contracts are drawn up and executed only after all terms have been negotiated and finalized and the writing is complete. Any conditions precedent are normally included in those written terms, such as mortgage contingency clauses found in standard form real estate contracts making the deal contingent on the buyer's obtaining the contemplated mortgage loan. The writing is expected to represent the final version of the parties' agreement. While exceptions to the requirement of a writing exist, they are limited and inapplicable here. If we permit interference with enforcement of a written and fully executed real estate sales contract based on

---

it was to someone who "was acting for both respondent and appellant," whom the court characterized as "a person who is not a party to the agreement."

a claimed oral condition precedent to its effectiveness, the need for certainty and finality at the heart of the statute of frauds is undermined.

Cases in the tradition of *Hicks v Bush* (10 NY2d 488, *supra*), in which parties have been allowed to prove claimed oral conditions precedent to the effectiveness of a contract, have most frequently involved an underlying contract that was not required to be in writing, or circumstances in which there was no particular reason to object to part of the agreement being oral while the rest was written. *Hicks v Bush* itself, for example, involved a claimed breach of a written contract providing for a merger of the various parties' corporate interests into one holding company. The cases cited in *Hicks v Bush* similarly involved agreements that need not be in writing (*see Saltzman v Barson*, 239 NY 332 [1925]; *Grannis v Stevens*, 216 NY 583 [1916]; *Reynolds v Robinson*, 110 NY 654 [1888]; *Fadex Foreign Trading Corp. v Crown Steel Corp.*, 297 NY 903 [1948]). In such matters, it is perfectly appropriate to enforce an oral condition precedent to a written contract. Real estate sales contracts, which are required and expected to be completely set out in a writing, are another matter.[2]

---

[2] The case of *Mitchill v Lath* (247 NY 377 [1928]), which the dissent discusses at length, concerned an uncontested enforceable

But, it is not merely because the contract here is for the sale of real estate that we decline to permit the buyer to avoid enforcement of a complete and final contract, signed and delivered, by the assertion of an oral condition to the effectiveness of the contract. It is also important that, like real estate sales contracts generally, the parties' written contract contains a broad merger clause, providing that the writing constitutes the parties' entire agreement and specifying that no prior agreements or representations survive the execution of the writing. *Merger clauses are not mere boilerplate*. They provide further protection for the interests of certainty and finality. The merger clause in the present case specifies that "[a]ll prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract," and that the document "completely expresses their full agreement . . ., neither party relying upon any statement made by anyone else that is not set forth in this contract." Consequently, any claimed prior oral condition or agreement was necessarily extinguished at the moment the written

---

written real estate sales contract and a claimed *separate*, oral agreement by the sellers to remove an ice house from the property opposite that which they sold. The sellers' failure to perform the claimed oral agreement was not said to render the written contract ineffective.

contract became fully executed by both parties. At that point, the buyer could not expect to rely on any previous understanding or oral representation that was not included in the mutually executed written document.

We are aware that while the written contract considered in *Hicks v Bush* did not contain any merger clause by which the parties agreed that the writing represented the entirety of their agreement, there are cases applying the *Hicks v Bush* rule despite the presence in the writing of a merger clause that would seem to preclude an oral condition. However, we decline to adopt their reasoning, at least in the context of real estate sales contracts.

For instance, in *Tropical Leasing, Inc. v Fiermonte Chevrolet* (80 AD2d 467 [4th Dept. 1981]), the defendant car dealership claimed that a standard printed purchase order for a particular car was orally conditioned on the nonacceptance of the car by the customer for whom the car had originally been intended. Like in *Hicks v Bush*, it was held in *Tropical Leasing* that the dealership was entitled to establish the existence of the oral condition precedent since the alleged condition did not contradict or negate any term of the purchase order and did not involve the type of condition that would have normally been included in the form purchase order (*id.* at 469). While the

printed purchase order contained a general merger clause, the court ruled that the merger clause had no significance because the writing containing it never came into effect (*id.*).

We also recognize that the same reasoning, rendering merger clauses ineffective on the ground that the writing never became effective, has been employed, albeit rarely, in the context of real estate contracts. For instance, the Second Department, in *Procopis v G.P.P. Rests.* (43 AD2d 974 [1974]), allowed proof of an oral condition precedent to the effectiveness of a written real estate sales contract to be admitted to challenge that contract, despite the inclusion in the writing of a merger clause that provided that "all prior agreements and understandings are 'merged in this contract.'" We find this decision unpersuasive and decline to adopt its reasoning. While this Court's decision in *Mack-Lowe v Picault-Cadet* (33 AD3d 504 [2006]) assumed the applicability of the *Hicks v Bush* rule to real estate sales contracts, notably, the rule's applicability to the situation was not challenged on appeal. Rather, the focus was on whether the alleged oral condition contradicted the written contract, and whether the alleged condition was one that the parties would be expected to include in the written contract; consequently, our decision was limited to addressing the raised issues.

The dissent appropriately relies on such rulings as *Procopis*

and *Tropical Leasing* (*supra*) to support the contention that a merger clause cannot be relied on to eliminate an oral condition precedent to the effectiveness of the contract. Nevertheless, notwithstanding these cases, we are unwilling to adopt a rule allowing a party to a fully executed and delivered real estate sales contract lacking any financing contingencies or conditions to evade the effect of a broad merger clause clearly intended to extinguish exactly such a claimed oral condition.

Rather, we rely on the same type of reasoning as that articulated in *Blewitt v Boorum* (142 NY 357, *supra*). The deal, as documented by the writing, was binding and absolute upon execution of the contract by both parties and delivery to their contractual counterparties, and the buyer could not nullify it with a purported orally created condition precedent to the existence of a binding contract. Ultimately, the claimed oral agreement must be treated as irrelevant here, because its very existence was, in effect, extinguished when the parties delivered the fully executed writing. This is not a situation like that presented in *Gutowski* (193 Misc 2d 465, *supra*), where it was argued that the contract was not created because the signed contract and letter, characterized by the court as the buyer's offer, was rescinded *before the contract became binding* upon being countersigned by the seller.

We disagree with the dissent's implication that the lack of any prior case law dealing with the troubling nature of applying the *Hicks v Bush* rule in the context of real estate sales contracts tends to establish that its application here is not problematic. As to the dissent's suggestion that any difficulty the rule creates could be avoided by including in such contracts a provision specifying that no conditions precedent exist other than those stated in the agreement, while such language would be easy to include (in fact, meticulous drafters of real estate contracts may hereafter decide to add such language, in an abundance of caution), it should not be necessary. Indeed, it seems safe to assume that form contracts have up to now not included such language because the specialists who drafted them have universally, and properly, believed that claims such as that made here are already covered by merger clause provisions extinguishing "[a]ll prior understandings, agreements, representations and warranties, oral and written, between Seller and Purchaser." To require inclusion of the words "oral conditions precedent" in the foregoing provision as the way to prevent such a claim is unnecessarily exacting. Any reasonable person reading the language of the written merger clause as it exists would properly infer that any prior oral conditions were extinguished along with all other oral or written

"understandings, agreements, representations and warranties."

As to the absence of any problems with the enforceability of written real estate sales contracts up to now, it can be explained by the careful manner with which such transactions are generally handled by attorneys. It is unusual, not to say sloppy, for one party to meet alone with the attorney for the other party, ostensibly purely to sign the contract and tender the down payment, only to then propose a new condition to the deal. Standard practice would prevent any such situations, since two attorneys who negotiated a contract would treat such a request as an attempt to orally modify the terms of the negotiated writing, contrary to the writing's merger clause, and would put a stop to the process of finalizing the deal until they were sure that the writing correctly reflected the exact terms of the parties' full agreement.

It is worth recalling General Obligations Law § 15-301(1), which provides that "[a] written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." Thus, in the face of the written contract's provision that "[n]either this contract nor any provision thereof may be waived, changed or

cancelled except in writing," the buyer may not be allowed to claim an oral *modification* to the writing adding a contingency. Where the substance of the claimed orally agreed-upon condition precedent is of a nature equally suitable to be negotiated and included in the terms of the contract itself, it would amount to nothing less than a manipulation of the court and the law to allow the buyer to avoid that statute and that result by framing the claim not as an oral modification but as a separate oral agreement rendering ineffective the merger clause and the contract containing it.

We reject the dissent's contention that section 15-301(1) is inapplicable because at the time the alleged oral modification was agreed upon, the contract was not signed by both parties, and therefore an enforceable contract did not yet exist. As soon as the writing was executed by both sides and delivered to the other, section 15-301(1) took effect, and as of that moment, an executory oral agreement altering the terms of the writing could be of no effect, even if agreed upon earlier.

In sum, the contract for the sale of real property that we consider here, which extinguishes all prior understandings, provides that it constitutes the parties' complete agreement, and specifies that it cannot be modified except in a further writing, precludes the parties from introducing extrinsic evidence to vary

the terms of the written contract, or conditioning its effectiveness on some future event. By creating a written contract containing all the terms agreed upon during negotiations, and including a broad merger clause specifically proscribing any orally agreed-upon terms, the parties expressed their clear expectation that everything and anything related to their deal for the sale of the real property in question would be encompassed in a writing; that expectation must necessarily include any new agreements limiting the "effectiveness" of the contract.

Even if we believed that the parties' real estate sales contract could be rendered ineffective by an oral condition precedent as long as that condition did not contradict the terms of the writing, we disagree with the dissent that the differences between the written contract and the alleged oral condition are merely "disparities." The alleged condition does not merely "deal[] with a matter on which the written agreement . . . is silent" (*Hicks v Bush*, 10 NY2d at 492). Rather, we conclude that the alleged oral condition precedent contradicts terms of the written contract, precluding application of the rule of *Hicks v Bush* in any event. The effect of the alleged oral condition is that the seller's attorney would, for an undefined period, hold the down payment check without depositing it until the buyer

notified him that a home equity line of credit had been obtained and the check would clear. This purported agreement is contrary to the written contract's provisions directing the seller's attorney to place the down payment in a specified escrow account, describing the down payment as made by "good check", giving only the seller the option to choose to void the contract in the event a check fails of collection, and representing that the buyer had sufficient assets to complete the purchase. It is also arguable that leaving open the question of whether the contract will be effective contradicts the provision in paragraph 15 definitively scheduling the closing for November 30, 2007 and making time of the essence. Additionally, the alleged condition creates a financing contingency in a contract in which the need for such a provision was rejected.

Finally, the language the buyer says he used to elicit the agreement of the seller's lawyer was too precatory to successfully create a condition precedent. "To make a provision in a contract a condition precedent, it must appear from the contract itself that the parties intended the provision so to operate" (22 NY Jur 2d, Contracts § 262). "[A] contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition" (*Unigard Sec. Ins. Co. v. North Riv. Ins. Co.*, 79 NY2d

576, 581 [1992]). "[F]or such a condition to exist it must be apparent from the contract itself that this was the intention of the parties" (*Manning v Michaels*, 149 AD2d 897, 898 [1989]). Here, the buyer stated that after he informed the seller's attorney that he was waiting to hear within the next week on his application for a home equity line of credit, he told the seller's attorney that he "'did not have money in [his] account' to make good the deposit check, and asked if he [the seller's attorney] could hold the check without depositing same until he heard further from me," and that "[the seller's attorney] responded that he 'will not submit the check until I hear from you." The buyer mentioned nothing about conditioning the enforcement or effectiveness of the contract. Even a writing containing the same language would at best be ambiguous, and "the law does not favor a construction which creates a condition precedent (*Lui v Park Ridge at Terryville Assn.*, 196 AD2d 579, 582 [1993]). Contrary to the dissent's assertion, a request to hold a check, rather than depositing it, until further notice does not by itself "plainly" demonstrate the parties' intent to have the fully signed and delivered written contract not become effective unless further steps are taken. If we are to allow a buyer to an otherwise enforceable, all-cash real estate contract to undermine the enforceability of that contract with an oral

condition precedent, we should at least require that oral statement to unambiguously establish that it created a condition to the contract.

The buyer here was not without options. Rather than insisting on personally visiting the office of the seller's attorney to immediately sign the contract and deliver the down payment check, if he did not yet have the funds for the down payment, he could have -- and should have -- postponed signing and handing over the contract and down payment until his contractual representations that he had the funds and could provide the required "good check" were true. Of course, if he had done that, neither party would have been bound, and the seller could have attempted to find another buyer; instead, the buyer took steps calculated to bind the seller to the negotiated contract terms while seeking to leave himself a right to avoid the contract entirely.

The dissent's suggestion that the buyer may have been the victim of dishonesty at the hands of the seller's attorney, and that it is just such dishonesty that the *Hicks v Bush* rule was created to combat, turns this situation on its head. Avoiding dishonesty is exactly why we insist that such contracts be entirely in writing. Indeed, it is the buyer's effort to see the seller's attorney without his own attorney that is suspect here.

It was he who attempted to bind the seller while leaving himself unbound by the contract.

In conclusion, the buyer's attempt to avoid the fully executed and delivered contract by operation of a claimed condition precedent must fail for several reasons. The rule permitting claims of oral conditions precedent to the effectiveness of a written contract is not applicable to real estate sales contracts such as this; even if the rule were applicable, the purported condition would be unenforceable because it contradicts terms of the writing; and even if there were no contradictions, the words purportedly used by the buyer lack the type of "clear language" necessary to show the parties' intent to create a condition precedent.

Once the viability of the claimed oral condition precedent is rejected, the buyer has no viable defense to the seller's prima facie case of entitlement to judgment in the amount of the down payment represented by the bounced check (*see Texter v Trotta*, 48 AD3d 455 [2008]). This disposition of the seller's motion for summary judgment obviates the need for the seller's attorney to be called as a witness and renders moot the issue of a potential conflict of interest. In any event, since the attorney's testimony would not be prejudicial to his client, there is no conflict of interest warranting disqualification (*see*

Rules of Professional Conduct rule 3.7[b][1] [22 NYCRR 1200.29[b][1]).

The court properly declined to impose sanctions against the buyer and his attorney.

Accordingly, the order of the Supreme Court, New York County (Edward H. Lehner, J.), entered November 3, 2008, which, inter alia, granted plaintiff's motion for summary judgment, dismissed the counterclaim and third-party complaint, directed entry of judgment against defendant in the principal amount of $120,000, denied defendant's motion to disqualify third-party defendants as attorneys for plaintiff, denied third-party defendants' motion for summary judgment on their counterclaims and for sanctions against defendant and his counsel, and dismissed said counterclaims, should be affirmed, without costs.

All concur except Catterson and McGuire, JJ.
who dissent in an Opinion by McGuire, J.:

McGUIRE, J. (dissenting)

The issue in this case is whether an oral agreement between the parties to a written contract for the sale of real estate is enforceable as an "orally established condition precedent" to the contract (*Hicks v Bush*, 10 NY2d 488, 491 [1962]). The majority and I agree that an exception to the parol evidence rule permits the validity of such an oral condition precedent to be recognized under certain circumstances. We disagree, however, in two principal respects: whether integrated contracts for the sale of real estate that contain a merger clause are categorically excluded from that exception as a matter of law; and whether the alleged oral condition precedent at issue is in any event consistent with the exception.

With respect to the first question, I disagree with the majority about both the relevance of Court of Appeals' decisions handed down over a hundred years ago and the import of more recent decisions of the Court of Appeals. Even if the Court of Appeals were to decide that the question is one it has not resolved, decisions of this Court, the Second Department and the Fourth Department make clear that no exception to the oral-condition-precedent exception to the parole evidence rule exists for integrated contracts with merger clauses for the sale of real estate. The majority chooses not to follow these precedents (or

other authorities that contradict its position) on the basis of public policy considerations. But absent definitive guidance from the Court of Appeals, I would follow the precedents of this Court and the Second and Fourth Departments. Although the majority asserts that I "impl[y]" that applying those precedents "is not problematic," I imply nothing of the sort. Rather, I am simply arguing that the majority's is not the only position supported by public policy considerations. Indeed, this case presents a variant of an old and significant public policy dispute. As for the second question, the majority's answer is inconsistent with the Court of Appeals' leading decision on the subject and is based on a misreading of both the contract and the condition precedent.

A

The written contract is for the sale of real property on Fire Island. It provides for a purchase price of $1.2 million and a down payment of $120,000, "payable . . . on the signing of this contract, by Purchaser's good check payable to the Escrowee [the seller's attorney] . . ., subject to collection the receipt of which is hereby acknowledged, to be held in escrow pursuant to [another provision] of this contract." The contract includes a rider, the terms of which control over those of the contract in the event of a conflict. Paragraph 38 of the rider states that

"[u]nder no circumstances shall this Contract have a binding effect upon the Purchaser(s) and Seller(s) unless and until the Purchaser(s) and Seller(s) have each executed the same and delivered executed counterparts hereof to each other and the Purchaser(s) shall have paid the Contract Deposit to the Escrowee." The next paragraph states that "Purchaser(s) understand that, in the event any check being delivered herewith fails of collection, this Contract shall be deemed void *ab initio* at the option of Seller(s), provided however, Purchaser(s) shall have 48 hours from notice by Seller(s) to replace any failed check with a Bank or Certified check." Although the parties do not alert us to it, paragraph 45 of the rider states that "Purchaser(s) represent that they have good credit, sufficient assets to complete the purchase, have not filed for bankruptcy." The contract also provides that "[n]either this contract nor any provision thereof may be waived, changed or cancelled except in writing."

The buyer executed the contract on October 31, 2007. On that date, the buyer met with the seller's attorney (with the apparent consent, communicated to the seller's attorney, of the buyer's attorney) at the latter's office. According to the affidavit submitted by the buyer in opposition to the seller's motion for summary judgment, he met with the seller's attorney in

a conference room before signing the contract and told the attorney that he was waiting to hear from Countrywide Bank in California within the next week on his application for a home equity line of credit. According to the buyer, "I specifically told [the seller's attorney] that I 'did not have money in my account' to make good the deposit check and asked if he could hold the check without depositing same until he heard further from me." In response, the seller's attorney stated that he "will not submit the check until I hear from you." The buyer also swore that "[b]ased upon that assurance, I signed the contract and gave him the check." A friend of the buyer's who was with him in the seller's attorney's office also submitted an affidavit in opposition to the seller's summary judgment motion; the friend's sworn account was essentially identical to the buyer's.

Viewing the evidence in the light most favorable to the buyer, as we must on this motion by the seller for summary judgment (*see Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 588 [2010]), we assume the truth of these factual assertions and deem them sufficient to establish an oral agreement conditioning the contract's effectiveness on the buyer's telling the seller's

attorney that he could deposit the down payment check.[1]

The following subsequent events are undisputed. On November 12, the seller's attorney received the executed contract from the seller and deposited the down payment check into the escrow account that same day. The next day, the seller's attorney faxed and mailed the executed contract to the buyer's attorney, who received the faxed copy that same day and the mailed copy on November 16. On November 19, the buyer's attorney faxed a letter to the seller's attorney stating that "[o]ur client has advised us he will not be proceeding with the . . . transaction." Also that day, the seller's attorney was advised by the bank that the down payment check had been returned for insufficient funds. This action ensued, with the seller suing to recover the contract down payment as liquidated damages, and the buyer both counterclaiming and bringing a third-party complaint against the

[1]Although the seller's attorney agreed that there was a discussion about holding the down payment check, his account differed from that of the buyer. The seller's attorney affirmed that after he received the executed contract and down payment check from the buyer on October 31, the buyer "asked [him], in sum and substance, not to deposit the check until Monday, November 5, 2007," and told him that he could deposit the check then unless he heard otherwise from the buyer. The seller's attorney responded that he routinely deposits down payment checks only after receipt of the executed contract from the seller, and that he would not be receiving the executed contract from the seller before November 5, 2007. Accordingly, he told the buyer that he would not deposit the check before then and advised the buyer to speak with his attorney if he had any other questions.

seller's attorney and his law firm, both of which filed counterclaims.[2]

B

The leading case in New York is *Hicks v Bush* (10 NY2d 488, *supra*). A paragraph from the opinion states much of the relevant law and identifies the problem:

> "The applicable law is clear, the relevant principles settled. Parol testimony is admissible to prove a condition precedent to the legal effectiveness of a written agreement (see *Saltzman v. Barson*, 239 N.Y. 332, 337; *Grannis v. Stevens*, 216 N.Y. 583, 587; *Reynolds v. Robinson*, 110 N.Y. 654; see also, 4 Williston, Contracts [3d ed., 1961], § 634, p. 1021; 3 Corbin, Contracts [1960 ed.], § 589, p. 530 *et seq*.), if the condition does not contradict the express terms of such written agreement. (See *Fadex Foreign Trading Corp. v. Crown Steel* Corp., 297 N.Y. 903, affg. 272 App. Div. 273, 274-276; see also, Restatement, Contracts, §

[2]Given the provision stipulating that the contract was not binding "until the Purchaser(s) and Seller(s) have each executed the same and delivered executed counterparts hereof to each other," the buyer was free to cancel the contract before the date the seller delivered the executed contract to the buyer (*cf. Golkin v S.R.D.N. [USA], Inc.*, 9 AD3d 325, 326 [2004] ["defendant accepted plaintiff's offer to purchase when it mailed a fully executed copy of the contract to plaintiff ... three days before plaintiff purported to revoke his offer"] [citation omitted]). Thus, until that date, the buyer had complete control over payment of the deposit without regard to the enforceability of the oral agreement. Neither in his answer nor in his affidavit opposing the motion for summary judgment does the buyer assert that he did not exercise that right to cancel in reliance on the oral agreement.

> 241.) A certain disparity is inevitable, of course, whenever a written promise is, by oral agreement of the parties, made conditional upon an event not expressed in the writing. Quite obviously, though, the parol evidence rule does not bar proof of every orally established condition precedent, but only of those which in a real sense contradict the terms of the written agreement. (See, e.g., Illustration to Restatement, Contracts, § 241.) Upon the present appeal, our problem is to determine whether there is such a contradiction" (10 NY2d at 491).

Hicks v Bush also makes clear that there is "no direct or explicit contradiction between the oral condition and the writing" when "the parol agreement deals with a matter on which the written agreement . . . is silent" (*id.* at 492). The oral condition is enforceable if it "may stand side by side" with the written condition(s) precedent so that it is "simply a further condition . . . and not one which is contradictory" (*id.*). Thus, "evidence of an oral condition is not to be excluded as contradictory or inconsistent merely because the written agreement contains other conditions precedent" (*id.* [internal quotation marks omitted]).

In *Hicks v Bush*, the parties to a written contract agreed to merge various corporate interests that each owned into a holding company. The contract provided that the parties' respective subscriptions for the holding company's stock were to be made

within 5 days of the date of the contract and that the contract would be terminated if, within 25 days of that date, the holding company failed to accept any of the subscriptions. The consideration for the subscriptions was the transfer to the holding company of the stock in the operating companies owned by the parties. All the subscriptions were made and accepted promptly and the plaintiff transferred to the holding company the stock he owned in one of the operating companies to be merged into the holding company. However, because the defendants did not transfer their stock in their respective operating companies, the merger never occurred. In defending against the plaintiff's breach of contract claim, the defendants asserted that the written contract was subject to a parol condition that it was not to operate as a contract and . . . was not to become effective until so-called equity expansion funds . . . were first procured" (10 NY2d at 490 [internal quotation marks omitted]).

In an opinion by Judge Fuld, the court upheld the validity of the oral agreement because: the written condition (that the contract would not be binding if, inter alia, any of the subscriptions were not accepted within 25 days) and the oral condition "may stand side by side"; "the oral requirement . . . is simply a further condition . . . and not one which is contradictory"; and finally, "[i]f both conditions had been

contained in the written agreement, it is clear that the defendants would not have been under immediate legal duty to transfer the stock in their companies to [the holding company] until both conditions had been fulfilled and satisfied" (*id*. At 492).

Here, too, even if there is a "certain disparity" between the oral and written agreements, the former "does not contradict the express terms" of the latter (*id*. at 491). The written agreement specifies necessary conditions for it to become binding (i.e., execution and delivery of executed counterparts and collection of the down payment), but it does not state, let alone expressly state, that these conditions are sufficient conditions. To the contrary, nothing in the written agreement expressly precludes any other conditions to it becoming binding on the parties. Even more to the point, the written agreement does not require, expressly or otherwise, that any check for the down payment be deposited at the time it is delivered to the escrowee. Here, too, the oral condition -- that the check not be deposited until the attorney heard further from the buyer -- "is simply a further condition" and the oral and written conditions "may stand side by side" (*id*. at 492).

Thus, if the buyer had informed the seller's attorney the next week that the check could be deposited, the buyer would be

bound by the terms of the written agreement if the check nonetheless was returned for insufficient funds (and, of course, if the other written conditions had been satisfied). Similarly, if the buyer did so inform the seller's attorney, he would be bound if, contrary to paragraph 45 of the rider, he proved not to have "sufficient assets to complete the purchase." Moreover, as in *Hicks v Bush*, if the oral condition had been contained in the written agreement, the seller would not have been under any legal duty to transfer the property to the buyer until that and all the other conditions had been fulfilled and satisfied.

Nor is the oral condition precedent contradicted by the provision of the contract stating that it "shall not be binding or effective until duly executed and delivered by [both parties]." If the buyer had given the go ahead to deposit the check before the seller executed the contract, the contract would have been binding and effective once duly executed and delivered by both parties. Although due execution and delivery are conditions precedent, the buyer giving his go ahead to the depositing of the check "is simply a further condition . . . and not one which is contradictory" (*Hicks v Bush*, 10 NY2d at 492).

C

The majority, however, holds that "[w]hen both parties to a real estate sales contract have executed and delivered to the

other party a completely integrated written contract containing the specific language that any prior oral agreements or representations are merged into the writing, ... such a contract may not be avoided by a claim of a prior orally agreed-upon condition precedent to the effectiveness of the contract."[3] The majority's position, then, is that the rule *of Hicks v Bush* does not apply to a written agreement that is integrated, contains a merger clause and is for the sale of real estate. The majority contends as well that its position with respect to merger clauses is buttressed by General Obligation Law § 15-301(1) and by public policy considerations.

I turn first to the majority's reliance on the merger clause

---

[3]The ellipsis in this quotation reflects the omission of language from the merger clause quoted by the majority that it apparently regards as significant. In relevant part, the paragraph containing the merger clause reads as follows: "All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, *neither party relying upon any statement made by anyone else that is not set forth in this contract*" (emphasis added). The majority cannot eke any support for its position by singling out the italicized fragment. After all, the fragment does not add anything that is not otherwise stated in the clause. With equal logic, the majority could have singled out the statement that "[a]ll prior understandings ... are merged in this agreement" or the statement that the contract "completely expresses th[e] full agreement" of the parties. As discussed below, the merger clause itself does not bar recognition of the oral condition precedent. A fortiori, no component of the clause bars its recognition.

and General Obligations Law § 15-301(1). That statute provides as follows: "A written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." The majority's reliance on the merger clause and General Obligations Law § 15-301(1) is pervasive. Thus, it asserts that because of the merger clause, "any claimed prior oral condition or agreement was necessarily extinguished at the moment the written agreement became fully executed by both parties." Variants of this assertion appear throughout the majority's writing. For example, it contends that "[u]ltimately, the claimed oral agreement must be treated as irrelevant here, because its very existence was, in effect, extinguished when the parties delivered the fully executed writing." In other words, the majority's position permits one of the parties to have its fingers crossed. The oral agreement of both parties as to the effectiveness of the written agreement is "extinguished" by the unilateral actions of one of the parties.

However, as the Second Department put it in holding that the trial court had erred in excluding evidence of an oral condition precedent to a written contract, "[t]he statement in the contract, in effect, that the written document embodies the

agreement of the parties and may not be changed or terminated orally has no significance until there is a contract" (*Procopis v G.P.P. Rests.*, 43 AD2d 974, 975 [1974]). In a case in which the validity of an oral condition precedent was at issue, this Court expressly agreed (*Mack-Lowe v Picault-Cadet*, 33 AD3d 504, 504 [2006] ["the merger clause, which provides that the written document embodies the entire agreement of the parties, is of no consequence until there is a contract in effect"]), as has the Fourth Department in another such case (*Tropical Leasing v Fiermonte Chevrolet*, 80 AD2d 467, 469 [1981] [same]).

Although none of these three decisions discusses General Obligation Law § 15-301(1),[4] their rationale explains why the majority's reliance on the statute is misplaced: it presupposes that the written agreement containing a provision barring oral modifications went into effect once signed by both parties. General Obligations Law § 15-301(1) no more applies to the writing signed by these parties than it would to an unsigned writing no matter how complete in form.

---

[4]General Obligations Law § 15-301(1) was enacted in 1963 (1963, ch 576, § 1), long before *Procopis* was decided. Indeed, subdivision 1 of the statute was in effect as to contracts for real and personal property since at least 1941, long before *Hicks v Bush* was decided, with the enactment in 1941 of its identically worded (in relevant part) predecessors, Personal Property Law § 33-c(1) (1941, ch. 329, § 5) and Real Property Law § 282(1) of (1941, ch. 329, § 4).

Moreover, *Procopis, Mack-Lowe* and *Tropical Leasing* are hardly legal outliers. The majority is free to choose not to follow these three decisions, but it should not suggest that it need deal only with these precedents. To the contrary, the rationale they embrace is the venerable one embraced in several English decisions discussed by the Supreme Court in *Ware v Allen* (128 US 590, 596-597 [1888]). As was stated in one of those cases, "'[t]he distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible'" (*id.* at 546, quoting *Pym v Campbell*, 6 Ell & Bl 370, 373 [1856]). This same rationale was embraced by the Court of Appeals not later than 1891 (*see Thomas v Scutt*, 127 NY 133, 137-138 [1891] ["Such [parol] proof does not recognize the contract as ever existing as a valid agreement and is received from the necessity of the case to show that that which appears to be, is not and never was a contract"]; *see also Saltzman v Barson*, 239 NY 332, 337 [1925] [Cardozo, J.] [holding that upon retrial, "evidence will be admissible that by force of a condition attached to the delivery the writing was not to come into being as a contract except upon the making of the stipulated loan"]). Not long after *Thomas v Scutt*, the court made clear that the integrated character of a written contract does not bar proof of

an oral condition precedent (*Grannis v Stevens*, 216 NY 583, 587 [1916] ["The manual transfer of an instrument, *in form a complete contract*, does not, however, bar parol evidence that it is not to become binding until the happening of some condition precedent resting in parol"] [emphasis added]). And on this score, New York law is fully in accord with the Restatement (Second) of Contracts: "Even a 'merger' clause in the writing, explicitly negating oral terms, does not control the question whether there is an integrated agreement or the scope of the writing" (§ 217, Comment b).

A related argument the majority makes is not persuasive. Immediately after invoking General Obligation Law § 15-301(1), the majority writes as follows: "Where the substance of the claimed orally agreed-upon condition precedent is of a nature equally suitable to be negotiated and included in the terms of the contract itself, it would amount to nothing less than a manipulation of the court and the law to allow the buyer to avoid that statute and that result by framing the claim not as an oral modification but as a separate oral agreement rendering ineffective the merger clause and the contract containing it." This objection, however, proves too much, as it would invalidate the reasoning in *Procopis*, *Mack-Lowe* and *Tropical Leasing*. Indeed, except to the extent that the written contract in *Hicks v*

Bush did not contain a merger clause, it would compel the conclusion that *Hicks v Bush* was wrongly decided.

The majority writes that "the written contract considered in *Hicks v Bush* did not contain any merger clause by which the parties agreed that the writing represented the entirety of their agreement." Although the most that can be said is that the opinion in *Hicks v Bush* does not say whether the written contract contained such a clause, it seems fair to assume it did not from the absence of any reference to a merger clause in the briefs of the parties. A merger clause, however, simply makes express what is implicit in an integrated written contract, i.e., that the writing constitutes the parties' entire agreement. The plaintiff-appellant in *Hicks v Bush* claiming a breach of contract, urged both that the written contract stated all its conditions precedent (Brief for Appellant at 3) and that it was an integrated contract (*id.* at 17), but the court upheld the validity of the oral condition precedent nevertheless.

Finally, on this score anyway, the majority also is unpersuasive to the extent it means to suggest that the oral agreement is improperly "fram[ed]. . . not as an oral modification" of the written agreement but as an oral condition precedent. An oral agreement surely is a condition precedent when its terms do not vary or even affect the duties of the

parties once the written agreement becomes binding but affect only whether the written agreement becomes binding at all. In sum, the presence of a merger clause in a written agreement does not preclude recognition of an oral condition precedent to the agreement.

Turning to the majority's reliance on the fact that the contract is one for the sale of real estate, I note first that nothing in *Hicks v Bush* suggests that its holding does not apply to real estate contracts. Nor does Restatement of Contracts § 241, cited by the court in *Hicks v Bush* (10 NY2d at 491), suggest that a different rule applies to contracts for the sale of real estate.[5] The same is true with respect to each of the four cases and the two treatises cited in *Hicks v Bush* in support of the rule that an oral condition precedent to the effectiveness of a written agreement may be proven if the condition does not contradict the express terms of the written agreement (*Saltzman v Barson*, 239 NY 332, *supra*; *Grannis v Stevens*, 216 NY 583, *supra* *Reynolds v Robinson*, 110 NY 654 [1888]; *Fadex Foreign Trading*

[5]Section 241 broadly provides as follows: "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

Corp. v Crown Steel Corp., 297 NY 903 [1948], *affg* 272 App Div 273 [1947]; 4 Williston, Contracts [3d ed 1961] § 634; Corbin, Contracts [1960 ed], § 589).[6]

The majority's position also is hard to reconcile with *Mitchill v Lath* (247 NY 377 [1928]). In *Mitchill*, the parties had executed a written agreement for the sale of land, "for cash and a mortgage and containing various provisions usual in such papers" (247 NY at 378). The issue was whether the buyer could enforce an oral agreement by the sellers to remove an ice house from the property (*id.*). The majority discussed at length the conditions under which such an oral agreement can be enforced, and concluded that it was not enforceable (*id.* at 379-384). That discussion was pointless if the fact that a written contract is one for the sale of real estate is sufficient to preclude recognition of an oral agreement. After all, that the written

---

[6]In fact, the cases cited by Corbin include ones in which the written agreement was for the sale of real estate (Corbin, Contracts [1960 ed], § 589, notes 63-78.5, at 530-547). Moreover, Chief Judge Breitel made no mention of a real estate exception to the exception in his dissenting opinion in *Long Is. Trust Co. v International Inst. for Packaging Educ.* (38 NY2d 493, 498 [1976] [Breitel, C.J., dissenting]). Rather, Chief Judge Breitel broadly stated that "[t]he great and hoary exception is that a party is always free to establish by parol evidence that the written undertaking by which he is apparently bound, never came into existence because of an agreed precondition that it not take effect unless and until the extraneous precondition has come to pass" (*id.*).

agreement was for the sale of real estate played no role in the majority's analysis. Nor did it play any role in the dissenters' analysis. Rather, the dissenters would have recognized the validity of the oral agreement even though they were of the view that the written contract "was so complete on its face that the conclusion is inevitable that the parties intended to embody in the writing all the negotiations covering at least the conveyance" (*id.* at 387 [Lehman, J., dissenting]). The majority counters my "discuss[ion] at length" (i.e., the preceding sentences of this paragraph) of *Mitchill v Lath* with the contention that it "concerned an uncontested enforceable written real estate sales contract and a claimed *separate*, oral agreement" (emphasis in original). The court refused to enforce the oral agreement, however, precisely because it was *inseparable* from the written real estate sales contract (*id.* at 382 ["Collateral in form [the oral agreement] is found to be, but it is closely related to the subject dealt with in the written agreement - so closely that we hold it may not be proved"]).

The majority's position -- at least to the extent it carves contracts for the sale of real estate out of the exception -- is contradicted by *Marsh v McNair* (99 NY 174 [1885]). In *Marsh*, the court stated:

"It is well settled in the law of this State,

> that an instrument assigning or conveying *real or personal property* in absolute terms may by parol evidence be shown to have been intended as security only. While this is an exception to the general rule of evidence, forbidding the contradiction or explanation of written instruments by parol evidence, it has long been established in the law of this State. It grew up in the equity courts from the efforts of equity judges to prevent forfeiture, to relieve against frauds ....” (*id.* at 178-179 [emphasis added]).

Six years later, discussing *Marsh v McNair*, the court again unequivocally stated that it was well settled that the exception applies without regard to the type of property assigned or conveyed by the written instrument (*Thomas v Scutt*, 127 NY at 140, *supra*).

Moreover, the statement in *Marsh v McNair* that this exception to the parol evidence rule applies to instruments assigning or conveying both real and personal property is consistent with one of the English decisions discussed by the Supreme Court in *Ware v Allen* (128 US 590, *supra*). As the Supreme Court stated:

> “Later, in 1861, in *Wallis v Littell*, 11 C.B.(N.S.) 369, the same court laid down the same doctrine in regard to an assignment of a lease of a farm which had been made by a tenant to a third party, and the instrument delivered, but with an agreement that it should not take effect until the consent of the landlord was procured. The later [sic] refused his consent, and the court held the assignment of the lease, although executed

> and delivered, had never become operative" (*id.* at 597).

Notably, the majority makes no effort to deal with *Marsh v McNair*. Rather, it focuses on *Blewitt v Boorum* (142 NY 357 [1894]). In that case, the court discussed an earlier decision holding that parol proof of a condition should have been admitted because "if a bond be signed and put into the hands of the obligee or a third person on the condition that it shall become obligatory upon the performance of some act of the obligee or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent shall be performed. Until then there is no contract" (*id.* at 363). Although the contract at issue in *Blewitt v Boorum* was not one for the sale of real property, the court nonetheless proceeded to distinguish cases involving delivery of instruments relating to the conveyance of real property, stating that "[t]he rule in this state regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee or other party thereto conditionally or as is said in escrow, and when delivered to a party the delivery operates at once and the condition [precedent] is unavailable" (*id.*).

It may be that the apparent tension between *Marsh v McNair*

and *Blewitt v Boorum* can be reconciled. That is, the rule identified in *Blewitt* may have been a narrow one, applying only when delivery of the instrument to the grantee or other counterparty was the final legal act necessary to convey the real property. In any event, whatever vitality the rule stated in *Blewitt* had or may continue to have, it has no application to the facts of this case.

In *Frantz v Gatto* (274 App Div 1003 [1948]), the Second Department, citing an 1851 decision of the Court of Appeals and a 1912 decision of the Second Department, stated that "[t]he rule announced in cases which hold that parol evidence may not be introduced to establish a conditional delivery of a contract providing for the sale of real property (cf. *Blewitt v. Boorum*, 142 N.Y. 357) does not prevent the introduction of such evidence in support of a contention that a conditional, or escrow, delivery was made to a person who is not a party to the agreement" (*id.* at 1003). Accordingly, on facts strikingly similar to those presented here, the court reversed a grant of summary judgment in favor of the respondent, the party opposing proof of an oral condition precedent. "[I]n an action to recover upon a check alleged to have been delivered by appellants to respondent, pursuant to the terms of a contract for the sale of real property, appellants contended . . . that the contract and

check were left in the office of a Florida attorney, who was acting for both respondent and appellant Thomas J. Gatto, upon the understanding that the contract would be of no force and effect and that the check would be returned if the contract should not be approved by appellant's New York attorney" (*id.*). The "contract was not so approved," and the court concluded that "a question of fact as to the delivery and acceptance of the contract was presented . . ., which question should not have been summarily decided" (*id.*).[7]

More recent and more specific precedents contradict the majority's position. The written contract (with a merger clause) that was at issue in *Procopis* (43 AD2d 974, *supra*) was one for the sale of real estate. The purchaser's attorney testified at trial that the $10,000 down payment, given to the seller's attorney to hold in escrow when the contract was executed, "was conditioned upon [the purchaser's] ability to arrange adequate financing" (*id.* at 975). The purchaser's attorney also testified

---

[7]The majority seeks to distinguish *Frantz v Gatto* by asserting that the delivery of the contract and check "was not made either to the other party or to the other party's agent." As the majority acknowledges, however, the court expressly stated that "the contract and check were left in the office of a Florida attorney, *who was acting for both respondent and appellant*" (*id.* [emphasis added]). The majority does not explain its apparent view that a person "acting for" another is not the latter's agent.

that "he notified [the seller's] attorney the day following the contract execution that the purchaser would not be able to arrange the financing and that the deal was thereby terminated" (*id.*). The trial court disregarded that testimony, ruling that the merger clause required it to be disregarded. Reversing the judgment in favor of the purchaser, the Second Department cited to and quoted from *Hicks v Bush* in support of its holding that "it was improper for the trial court to exclude proof that there was a condition precedent to the contract taking effect" (*id.*).[8]

Similarly, the written contract (with a merger clause) that was at issue in *Mack-Lowe* (33 AD3d 504, *supra*) was in substance one for the sale of real estate. Although this Court -- the panel included the author of the majority's opinion -- concluded that the oral condition precedent was not enforceable, that conclusion was not based on the fact that the written contract conveyed the seller's interest in her cooperative apartment. Rather, after rejecting the seller's reliance on the merger clause for precisely the reason stated in *Procopis*, this Court held that the oral condition precedent contradicted a specific provision of the written agreement (*id.* at 505).

---

[8]As noted above, the court also ruled that "[t]he statement in the contract, in effect, that the written document embodies the agreement of the parties and may not be changed or terminated orally has no significance until there is a contract" (*id.*).

That leaves only, at least with respect to the previously unrecognized exception (for real estate contracts) to the exception (for oral conditions precedent) to the parol evidence rule that the majority discovers lurking in the law, the majority's reliance on the integrated character of the written contract. But in the first place, as noted earlier, a merger clause shouts out what is only implicit in an integrated contract: the writing constitutes the entirety of the parties' agreement.[9] Accordingly, if a merger clause does not preclude recognition of an oral condition precedent, it necessarily follows that the integrated character of a written contract does not prevent recognition of an oral condition precedent.

Second, the majority's position is contradicted, albeit implicitly, by *Hicks v Bush*. Although the court did not expressly state that parol testimony is admissible to prove a condition precedent to the effectiveness of an integrated written agreement, it relied on Restatement of Contracts § 241 (*Hicks v Bush*, 10 NY2d at 491). Not only does section 241 expressly permit recognition of an oral condition precedent when the written agreement "purports to be an integration of a contract,"

[9]"An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement" (Restatement, Contracts, § 228).

but section 237 of the same Restatement expressly states that section 241 is an exception to the rule that "the integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject-matter."

Third, the majority's position is contradicted by this Court's decision in *Meadow Brook Natl. Bank v Bzura* (20 AD2d 287 [1964]). Then-Justice Breitel expressly stated that "an *integrated* written agreement may be shown not to have taken effect because of an oral condition precedent" (*id.* at 289 [emphasis added]). Moreover, before quoting at length Judge Fuld's statement of the law in *Hicks v Bush*, Justice Breitel stated that "[t]he Restatement [of Contracts] expresses the law of New York" (*id.*).[10]

Although I need not address the public policy arguments advanced by the majority, a defense of what I understand to be the rule of *Hicks v Bush* will do no harm. Unquestionably, the

---

[10]*Thomas v Scutt* (127 NY 133, *supra*) makes clear that oral agreements that are "collateral" -- i.e., "separate, independent and complete contracts, although relating to the same subject" (*id.* at 140-141) -- to written contracts can be proven by parol evidence regardless of whether the written contract "appear[s] on its face to be complete" (*id.* at 140). To the extent *Thomas v Scutt* can be read to suggest that a different rule obtains when the oral agreement is not classified as "collateral," it is inconsistent with *Hicks v Bush*, the Restatement of Contracts and the other authorities discussed above.

need "to ensure clarity and certainty, and to avoid fraud" have a strong claim on the law, and the statute of frauds is designed to protect those policy goals. Just as unquestionably, protecting those goals is particularly important in real estate transactions. But it is far from obvious that these public policy goals support the majority's exception for real estate contracts to the exception for oral conditions precedent to the parol evidence rule. The rule of *Hicks v Bush* operates to prevent enforcement of written contracts that never became legally binding because of the nonoccurrence of a condition precedent to their validity to which the parties orally agreed. The majority's position raises an obvious question: How can (or why should) such a written contract that never became legally binding nonetheless be enforced if it is one for the sale of real estate? I contend only that the majority has not answered that question, not that no reasonable answer can be given.

The majority implicitly assumes that fraud and wrongdoing only can be curtailed by not recognizing an oral condition precedent exception to the parol evidence rule for real estate contracts. Thus, it takes me to task as follows: "The dissent's suggestion that the buyer may have been the victim of dishonesty at the hands of the seller's attorney, and that it is just such dishonesty that the *Hicks v Bush* rule was created to combat,

turns this situation on its head. Avoiding dishonesty is exactly why we insist that such contracts be entirely in writing." Of course, however, we are required to assume that the seller's attorney did make and break the oral promise alleged by the buyer. The majority hardly does justice to that obligation with its assertions that "[i]t is unusual, not to say sloppy, for one party to meet alone with the attorney for the other party" and that "it is the buyer's effort to see the seller's attorney without his own attorney that is suspect here."[11] But the more fundamental point is there is no a priori reason to assume dishonesty on the part of all parties to a written real estate

---

[11]The majority attempts to buttress the latter assertion with the hyperbolic additional claim that the buyer "attempted to bind the seller while leaving himself unbound by the contract." Similarly, the majority asserts that "the buyer took steps calculated to bind the seller to the negotiated contract terms while seeking to leave himself a right to avoid the contract entirely." Of course, however, the seller was free both to reject the proposed oral agreement and, even after accepting it, to prevent himself from becoming bound by not signing the written contract. Nor did the buyer purport to require the seller, if he did choose to sign it, to deliver an executed copy of the contract. Any suggestion by the majority that it is implausible to suppose that the seller would enter into the oral agreement is unpersuasive. It is conceivable, after all, that rejecting the proposed oral agreement would have caused the buyer to walk away and that the seller could have entertained doubts about when a new buyer would have come forward and how much the new buyer would be willing to pay. Moreover, as the buyer was not in the seller's office for a closing, it hardly seems highly implausible that the buyer would go without his own lawyer to the seller's attorney's office. In any event, whether the buyer's account is dishonest is a matter for the trier of fact.

contract who allege an oral condition precedent to the validity of the agreement.

The rule of *Hicks v Bush* is not founded on the opposite and equally indefensible assumption of honesty on the part of all parties to written contracts who allege an oral condition precedent to the validity of the agreement. Rather, the requirement that the oral condition precedent not be contradicted by the express terms of the written agreement serves to screen out claimed oral agreements that are most likely to be false. Are real estate contracts so different from or more important than all other contracts as to justify on public policy grounds the conclusion that this same screen would be ineffective or imprudent?

The assumption behind the statute of frauds, one I certainly do not question, is that it will prevent more fraud than it will occasion. Obviously, however, it is wrong to think that its inflexible application will not sometimes permit the unscrupulous to profit from fraud and wrongdoing. As Judge Cardozo put it in a similar context:

> "The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong (*Riggs v. Palmer*, 115 N.Y. 506). The Statute of Frauds was not

> intended to offer an asylum of escape from that fundamental principle of justice" (*Imperator Realty Co. v. Tull*, 228 NY 447, 457 [1920] [Cardozo, J., concurring]).

Indeed, it is the majority whose equilibrium is askew when it contends that I "turn [] th[e] situation on its head" by "suggest[ing]. . . that it is just such dishonesty [by the seller's attorney] that the *Hicks v Bush* rule was created to combat." Dishonesty on the part of those denying an oral agreement is indisputably one of the reasons for this ancient exception to the parol evidence rule. As noted earlier, *Marsh v McNair* explains that the exception "grew up in the equity courts from the efforts of equity judges to prevent forfeitures, to relieve against frauds" (99 NY at 178). Forfeiture is prevented and frauds are relieved by the exception precisely because, be it attributable to the naivete of one party or the guile of the other, oral agreements relating to written agreements can be made.

Despite the law's abhorrence of forfeitures (*Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 577 [1979]), the majority is indifferent to the prospect of that injustice in this case. If the buyer's claim is true, application of the rule of *Hicks v Bush* would prevent the forfeiture of his $120,000 deposit. That indifference is inherent in the majority's

position, and for that reason is all the more problematic. The rule of law the majority adopts will apply even if in a particular case the oral agreement could be proven to a certainty (or even if it is admitted) and its nonenforcement would visit a substantial forfeiture on one party while bestowing a windfall on the other.

Moreover, precisely because parties to written agreements, be they for the sale of real estate or personal property, sometimes do come to oral agreements on conditions precedent, the public policy considerations favoring freedom of contract also support what I understand the rule of *Hicks v Bush* to be (*see Miller v Continental Ins. Co.*, 40 NY2d 675, 679 [1976] ["It is well to remember too that 'the right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy"] [quoting *Baltimore & Ohio R. Co. v Voight*, 176 US 498, 505 [1900]). Another point about the majority's reliance on the "need for certainty and finality" is the one made by Judge Cardozo in an analogous context: "Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against

those of equity and fairness, and found the latter to be the weightier" (*Jacob & Youngs, Inc. v Kent*, 230 NY 239, 243 [1921]).

The rule of law the majority adopts is a simple one, and that certainly has its virtues. The parties to written contracts for the sale of real estate thereby are spared the uncertainties attendant to the application of the rule of *Hicks v Bush*; the parties and the courts are spared the costs and burdens of litigating the rule's application. But just as the majority cannot claim that only its position prevents fraud and furthers freedom of contract, it cannot claim that only its position can reap those benefits.

After all, application of the rule of *Hicks v Bush* to real estate contracts does not doom either the parties to those uncertainties or both the parties and the courts to those costs and burdens. An oral condition precedent will be recognized only "if the condition does not contradict the express terms of [the] written agreement" (*Hicks v Bush*, 10 NY2d at 491). Thus, the parties to real estate contracts are free to agree to include in their written agreements a provision specifying that no conditions precedent exist (or that none exist other than those stated in the agreement).[12]

---

[12]Such a provision would be sufficient to bar recognition of an oral condition precedent, even though neither a merger clause

The parties' ability to adopt such a provision brings to mind a similar expedient that "renders .... simple" the rule against perpetuities:

> "The rule . . . represents an incredible labyrinth for those unwary people foolish enough to fall within its grasp. But alongside the rabbit warren created by the rule runs a four-lane superhighway, open for all to travel, in the form of a standard savings clause, easily inserted into any will or deed, that will validate just about any conceivable gift that the harried testator or loving parent cares to make" (Richard A. Epstein, Simple Rules For A Complex World, at 26 [1995]).

D

Before addressing the majority's arguments regarding the second question, other aspects of the majority's writing should

---

nor a clause forbidding oral modifications alone would be sufficient. The express and specific contradiction between the written agreement that indisputably was made and the oral agreement that allegedly was made must be resolved in favor of the written agreement. The evident rationale of the rule of *Hicks v Bush* is that the contradiction casts too much legitimate doubt on the oral agreement and a contrary rule would cast too much illegitimate doubt on the written agreement. Although the majority believes that requiring such a provision is "unnecessarily exacting," it is not the only way to prevent recognition of an oral condition precedent. Obviously, the contradiction between an oral condition precedent and the express terms of a written agreement that will invalidate the former can be established in other ways. It would be established in this case if, for example, the written agreement expressly required either the seller to deposit the down payment check immediately or the buyer's check to be a "good check" at the time it was tendered to the seller.

be addressed. In *Mitchill v Lath* (247 NY 377, *supra*), the court stated:

> "Under our decisions before such an oral agreement as the present is received to vary the written contract at least three conditions must exist, (1) the agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing; or put in another way, an inspection of the written contract, read in the light of surrounding circumstances must not indicate that the writing appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement (*id.* at 380-381 [internal quotation marks omitted]).

Although the majority does not expressly rely on the third condition, it declares that "real estate sales contracts are drawn up and executed only after all terms have been negotiated and finalized and the writing is complete," that "[a]ny conditions precedent are normally included in the those written terms" and that "[r]eal estate sales contracts . . . are expected . . . to be completely set out in a writing."

As the seller makes no argument that can be construed to invoke the third condition (or, for that matter the first), it should not be a ground for affirmance (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009]). In any event, at least with respect to oral agreements on conditions precedent, the foregoing statement

of the law in *Mitchill v Lath* is no longer correct.[13] As discussed above, *Hicks v Bush* makes clear that an oral condition precedent can be valid even when the written contract is integrated or contains a merger clause. Accordingly, the majority's declarations do not invalidate the condition precedent. I note, too, that neither the first nor the third condition appears in the Restatement of Contracts § 241, the provision addressing the subject of oral conditions precedent that the court cited in *Hicks v Bush*. Moreover, in the paragraph of the opinion in *Hicks v Bush* in which the court states what the law is (10 NY2d at 491), the court makes no mention of the first and third conditions. Nor did the court mention either condition in *Bank of Suffolk County v Kite* (49 NY2d 827 [1980]); rather, it simply stated that "parol evidence may be admissible to prove a condition precedent to the legal effectiveness of a written agreement if the condition is not contradictory or at variance with its express terms" (*id.* at 828).[14]

---

[13]The alleged oral agreement in *Mitchill v Lath* was not one concerning a condition precedent. Rather, the oral agreement would have imposed an additional duty of performance on the sellers (247 NY at 380).

[14]As for the statement in *Mitchill v Lath* that the oral agreement "must not contradict express *or implied* provisions of the written contract" (247 NY at 381 [emphasis added]), *Hicks v Bush* and *Bank of Suffolk County* make clear that an oral condition precedent will be invalidated only if it is inconsistent with the

The majority is wrong for two reasons when it argues that because the buyer, in eliciting the oral agreement, "mentioned nothing about conditioning the enforcement or effectiveness of the contract," the "language . . . used . . . was too precatory to successfully create a condition precedent." First, the majority cites nothing in support of its position that forms of the words "conditioning" and either "enforcement" or "effectiveness" must be used to create an oral condition precedent. According to the buyer, the seller's attorney agreed to "hold the check without depositing [it] until he heard from [him]." Plainly, the intention of the parties was that the written contract would not take effect unless and until the seller's attorney heard from the buyer about the check. Although the majority contends otherwise, it does not propose an alternative reading of the oral agreement, one pursuant to which the written agreement would take effect even though the seller's attorney had not heard from the buyer about the check. Accordingly, the language used was sufficient to create a condition precedent (*cf. Manning v Michaels*, 149 AD2d 897 [1989];

---

express terms of the written agreement (*but see Long Is. Trust Co. v International Inst. for Packaging Educ.*, 38 NY2d 493, 499, *supra* [Breitel, C.J., dissenting] ["It is to ignore the principle and the appendant rules to assume that only explicitly contradictory oral preconditions are precluded"]).

Bazak Intl. Corp v Mast Indus., 73 NY2d 113, 125 [1989] ["magic words" not necessary to satisfy confirmatory writing requirement of UCC 2-201[2]). Second, and in any event, as this argument is one the majority has "winkled out wholly on [its] own" (*Misicki v Caradonna*, 12 NY3d at 519), it should not be a ground for affirmance (*id.*).

E

Turning at last to the second question of whether the oral condition precedent is contradicted by express terms of the written agreement, the majority's arguments are unpersuasive. According to the majority, "[t]he effect of the alleged oral condition is that the seller's attorney would, for an undefined period, hold the down payment check without depositing it, until the buyer notified him that a home equity line of credit had been obtained and the check would clear." As the majority appears to recognize, the reason why the buyer sought the oral agreement (condition precedent) is not itself a term of that agreement (condition). The oral agreement is that the seller's attorney would hold the down payment check without depositing it until he heard from the buyer. Stated in terms of a condition precedent, the oral condition is that the contract would not be binding until the buyer told the seller's attorney he could deposit the down payment check. The written agreement states other

conditions precedent to its becoming effective, but "it is equally clear that evidence of an oral condition is not to be excluded as contradictory or inconsistent merely because the written agreement contains other conditions precedent (*Hicks v Bush*, 10 NY2d at 492 [internal quotation marks omitted]).

In any event, there is no "direct or explicit contradiction" (*Hicks v Bush*, 10 NY2d at 492) between the oral condition and the express terms of the written agreement. Although the majority relies on the contractual provision "directing the seller's attorney to place the down payment in a specified escrow account," nothing in the contract required the deposit to be placed into the escrow account as soon as it was tendered by the buyer. Nor, as noted earlier, does the agreement purport to require the contract to be transmitted to the seller for his signature as soon as the buyer signed and tendered a check for the down payment.

To be sure, the contract provides for the down payment to be made by the buyer's "good check." But for at least two reasons, no "explicit contradiction" exists. First, the oral agreement itself (not to deposit the check until the buyer gave his go ahead) is not inconsistent with the check being a "good check." Second, nothing in the written agreement requires, expressly or otherwise, that the buyer's check be negotiable when or on the

day it is tendered. As for the provision "giving only the seller the option to choose to void the contract in the event a check fails of collection," the oral agreement does not deprive the seller of that option. If the buyer gave his go ahead and the check nonetheless failed, the seller and only the seller would have that option.

Contrary to the majority, the buyer's contractual representation that he "had sufficient assets to complete the purchase" is not contradicted by the oral agreement. If, for example, the check cleared after the buyer gave his go ahead but the buyer was not able for any reason to obtain all the necessary financing, the oral agreement would not relieve the buyer of any of the legal consequences of that representation. Thus, no financing contingency relieving the buyer of liability was created. Accordingly, the oral condition precedent does not even contradict the extrinsic evidence that, as the majority puts it, "the parties deleted from the standard form its entire mortgage financing contingency provision, so that the final agreement contained nothing that conditioned the buyer's obligations on his ability to obtain financing."

The majority's key error is failing to appreciate that the tension or "disparity" that is "inevitable ... whenever a written promise is, by oral agreement of the parties, made conditional

upon an event not expressed in the writing" (*Hicks v Bush*, 10 NY2d at 491) cannot be equated with the "direct or explicit contradiction" between the oral condition and an express term of the written agreement that will invalidate the former. In sum, there is no necessary conflict between the oral condition and the express terms of the written contract, i.e., the oral and written terms "may stand by side" (*id.*).

Finally, the majority notes that the buyer "was not without options" and, positing another course he could have taken, apparently concedes that an oral agreement to "postpone[] signing and handing over the contract and down payment" would have been enforceable. Such an agreement does not differ in substance from the one to which, according to the buyer, he and the seller orally agreed. If the seller could not disavow with impunity the posited agreement, he should not be permitted to disavow the agreement he, through his attorney, actually made. Why the majority reproaches the buyer for seeking an agreement to which the buyer assented is unclear. As noted earlier, moreover, the majority errs in asserting that the buyer "took steps calculated to bind the seller to the negotiated contract terms while seeking to leave himself a right to avoid the contract entirely."

As there is a material issue of fact over whether the seller (through his attorney) agreed to hold the down payment check, the

seller's motion for summary judgment on liability under the contract should have been denied. Because my view that the alleged oral condition is enforceable does not command a majority, I see no point in considering the merits of the buyer's motion to disqualify the seller's attorney. I otherwise agree with the majority, including its determination that the court properly declined to impose sanctions against the buyer and his counsel.

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

ENTERED: OCTOBER 7, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Freedman, Abdus-Salaam, JJ.

2753 The People of the State of New York, Ind. 3573/73
Respondent,

-against-

Clarence Williams, also known as
Fletcher Anderson Worrell,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Martin M. Lucente of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at speedy trial motion; Bonnie G. Wittner, J. at trial and sentence), rendered November 28, 2005, as amended November 30, 2005, affirmed.

Opinion by Nardelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
Eugene Nardelli
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

2753
Ind. 3573/73

_____x

The People of the State of New York,
Respondent,

-against-

Clarence Williams, also known as
Fletcher Anderson Worrell,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Renee A. White, J. at speedy trial motion; Bonnie B. Wittner, J. at trial and sentence), rendered November 28, 2005, as amended November 30, 2005, convicting him of rape in the first degree and robbery in the first degree, and imposing sentence.

Steven Banks, The Legal Aid Society, New York (Martin M. Lucente of counsel), for appellant.

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

NARDELLI, J.

The genesis of this proceeding is a notorious incident involving a brutal rape and robbery in 1973 in Manhattan. The issues presented are whether defendant's statutory and constitutional rights to a speedy trial were violated, and also whether the trial court should have conducted an inquiry of the jurors to determine whether they had read an article in a prominent newspaper about the trial on the day it commenced.

Defendant has a history of being arrested under different names. For instance, on August 12, 1972, he was arrested for possession of burglar's tools while on a fire escape, and gave his name as Anderson Worrell, with a date of birth of December 30, 1946, and an address of 180 Saratoga Avenue in Kings County. When he was arrested for the rape in this case in June 1973, he told police that his name was Clarence Williams, that he was born on November 10, 1945, and that he lived at 432 East 10th Street. He also claimed that he did not have a criminal history.

On September 25, 1974, while awaiting trial on this case, defendant was arrested in Queens County for an attempted murder and rape that had occurred on July 18, 1974. When arrested in Queens, defendant gave his name as Anderson Worrell, his date of birth as December 30, 1946, and his residence as 1974 Montau or Montauk Street in Kings County, and his prior residence as 326

Riverside Drive in Manhattan. He claimed that he had a wife named Rasheda Worrell who lived in the Bronx.

Defendant was tried in this case as Clarence Williams in November 1974. The jury, however, could not reach a verdict, and a mistrial was declared.

On October 31, 1975 defendant, as Anderson Worrell, was convicted in Queens County of attempted murder and rape, and sentenced to a term of 10 years. On November 18, 1975, he pleaded guilty in this case, with the understanding that he could seek to have his plea vacated if his conviction in Queens were reversed on appeal. Defendant was sentenced to a term of 10 years, which was to run concurrently with the term imposed on the Queens County conviction.

In 1976 the Second Department reversed defendant's conviction in Queens County (*People v Worrell*, 54 AD2d 768 [1976]). On January 14, 1977, his plea in this case was consequently vacated. On January 28, 1977, an individual identified as Rasheeda Abdul Hakeem posted cash bail for defendant, and gave a Washington, D.C. post office box as her address.

During 1977, this case was adjourned about a dozen times, with at least nine adjournments marked "ex," meaning either that the time was excludable or that defendant was excused, since

during that period, defendant's attorney was preparing, and the court was considering, his suppression motion, which had been made on August 10, 1977.

On September 25, 1977, defendant was arrested in Washington, D.C., and gave his name as Hakim Abdul Umar. While this arrest now appears on defendant's consolidated NYSID report, the New York County prosecutor handling the case at that time was unaware that defendant was in Washington, D.C., and the People's file contained no information on defendant's whereabouts.

On October 5, 1977, defendant failed to appear in the Queens County case. A warrant was issued for his arrest, and bail was forfeited. After several adjournments of this case in New York County, defendant's bail was forfeited on February 15, 1978, and a bench warrant was issued. Defendant then vanished, insofar as the New York court system was concerned, for 26 years.

He was eventually returned to New York in 2004 on the 1978 New York County warrant. In his motion in New York County in which he claimed that his right to a speedy trial had been impaired, defendant submitted an affirmation from Michael Keesee, his attorney in the Queens County prosecution, which had been submitted in support of a motion in Queens County in which defendant sought to vacate the Queens bail forfeiture. Keesee stated that after defendant's arrest in Washington, D.C., in

1977, he had been found unfit to proceed and was committed to St. Elizabeth's Hospital on March 9, 1978. On October 10, 1978, the court in Queens County denied the motion, finding insufficient evidence that defendant's "alleged incarceration in Washington, D.C." had prevented his appearance in Queens, and further noting that even if it were to find the affidavit and order of commitment credible, they only established defendant's whereabouts on the March 1978 committal date, and failed to explain why he did not appear in Queens in 1977.

In his speedy trial motion in this case, defendant himself offered an affidavit, which he signed "Fletcher Anderson Worrell," in which he asserted that he had been involuntarily committed at St. Elizabeth's Hospital in Washington, D.C., from 1978 until 1981, although hospital records offered by the People in opposition to the motion established that no individual by the name of Fletcher Anderson Worrell had been treated at the hospital during that period. DNA evidence offered by the People established that defendant had committed nine rapes in Maryland between 1987 and 1991, and two more in New Jersey in 1993.

Other evidence established that on August 19, 1993, defendant had been issued a passport in the name of Fletcher Anderson Worrell. According to defendant, he relocated to Egypt from 1993 until he returned to the United States on August 28,

2003. On September 9, 2003, defendant obtained a birth registration card in the name Fletcher Anderson Worrell, with a birth date of December 30, 1946. A few months later, defendant obtained a Georgia driver's license and a health insurance card using that same name.

In an application to purchase a gun, dated May 21, 2004, defendant provided a different social security number than he had given previously, and claimed that he was not under indictment, not a fugitive, and had never been committed to a mental institution. When he provided his fingerprints, however, the New York State Division of Criminal Justice Services determined that defendant had two different prior NYSID numbers. The new consolidated report under a new NYSID number listed his former names as Fletcher Worrell, Anderson Worrell, Umar Abdul Hakeem, Clarance Williams and Clarence Williams; with two different dates of birth, three different social security numbers, and two reported places of birth. He was returned to New York on the outstanding New York warrant in October 2004.

Defendant moved to dismiss the indictment on statutory and constitutional speedy grounds. The motion was denied in an order dated October 31, 2005.

The United States Supreme Court has identified four factors in considering whether a defendant has been deprived of his

constitutional rights under the Sixth Amendment to a speedy trial: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" (*Barker v Wingo*, 407 US 514, 530 [1972]; *see also Doggett v United States*, 505 US 647, 651 [1992]). In New York this inquiry has been interpreted to include five factors: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v Taranovich*, 37 NY2d 442, 445 [1975]).

Regardless of which test is applied, however, "the Speedy Trial Clause's core concern is impairment of liberty" (*United States v Loud Hawk*, 474 US 302, 312 [1986]). Here, as will be discussed further, it is beyond cavil that the sole reason for the delay in defendant not being tried earlier was his own conduct. He fled, first, to another city, and then to another continent, and used multiple aliases and dates of birth. The conflicting pedigree information he provided had its obvious effect - to prevent authorities from realizing that defendant was wanted in New York to face trial. Defendant cannot now claim that he was deprived of his constitutional speedy trial rights

since the delay was entirely attributable to his conduct in absconding from the jurisdiction and using aliases (*see People v Brown*, 281 AD2d 340, 341 [2001], *lv denied* 96 NY2d 899 [2001]).

In asserting his statutory speedy trial challenge, defendant first argues that the motion court should have been guided by the 1973 version of CPL 30.30, rather than the 1984 version, and that under the earlier version the time during which he was absent would not be excludable unless his absence prevented the People from being ready for trial.

Criminal Procedure Law § 30.30 requires that the People must be ready for trial within six months of the commencement of a felony action. In its 1973 incarnation, operative at the time that the prosecution of this case was initiated, the People could not be charged with a "period of delay resulting from the absence or unavailability of the defendant" (CPL § 30.30[4][c][i]). In *People v Sturgis* (38 NY2d 625 [1976]), the Court of Appeals interpreted that provision to require a showing not just that the defendant had been absent or unavailable, but that the delay in readiness resulted from that absence or unavailability (*id.* at 628). The Legislature amended paragraph 4(c)(i) to overrule the decision in *Sturgis*, so that the People would not be required to establish a causative relationship "between the defendant's absence or unavailability and the People's delay in preparing

their case" *(People v Bolden*, 81 NY2d 146, 151-152 [1993]). Under the amendment, the People need only establish that the defendant is absent, and his whereabouts cannot be obtained by due diligence, in order for the time not to be charged against them.

The People argue that the earlier version of the statute is inapplicable because CPL 30.30 is procedural in nature, and thus a speedy trial motion based on the statute is governed by the law in effect at the time of the motion. They cite *People v Mandel* (48 NY2d 952 [1979]), in which the Court of Appeals upheld application of the amended version of CPL 60.42 (which governs the admissibility of the history of complainant's sexual conduct) in a case where the crime had occurred when a prior, less restrictive law was in effect.

To determine whether defendant was deprived of his statutory right to a speedy trial, however, we need not address the issue of whether CPL 30.30 is a procedural or substantive statute. Even if the earlier version of CPL 30.30(4)(c)(i) governs our inquiry, the record supports a finding that defendant's absence was responsible for the delay in bringing him to trial. Defendant had previously been tried, and the jury was unable to reach a verdict. While this Court does not have the benefit of the jurors' thinking in ascertaining why they could not reach a

unanimous decision, it is self-evident that in a rape case the victim's testimony, and, in particular, in-court identification of the defendant, are central to any quest for a conviction. Even though the victim had presumably identified defendant at the prior trial, the jury still could not reach a verdict. Clearly, defendant's presence at a second trial, where the victim could identify her assailant to a new group of jurors, would be a sine qua non to a successful prosecution.

Further, at the time he was recaptured, defendant had already been indicted and tried, while the defendant in *Sturgis*, had not even been indicted at the time he went missing. The Court of Appeals specifically noted that the failure to indict did not in any way result from the defendant's absence (*Sturgis*, 38 NY2d at 628).

More to the point, in *People v Patterson* (38 NY2d 623 [1976]), decided the same day as *Sturgis*, the Court found that a defendant who had been indicted, but failed to appear on the adjournment date, was not entitled to a dismissal pursuant to CPL 30.30(4)(c). Even though the defendant was working in a parking lot in close proximity to the county jail, the court found that his admission that he had been waiting for the authorities to come and arrest him provided a basis for excluding the period of time that his location was unknown, and finding that he was

attempting to avoid prosecution (*Patterson*, 38 NY2d at 625).

Parallel reasoning suggests that a defendant who flees the jurisdiction and uses multiple aliases, after indictment and a mistrial, was also attempting to avoid prosecution, and that this conduct hampered the People's ability to bring him to trial (*see People v Delacruz*, 271 AD2d 452 [2000]; *People v Ladson*, 202 AD2d 212 [1994], *affd* 85 NY2d 926 [1995]; *see also People v Cadilla*, 245 AD2d 9 [1997], *lv denied* 91 NY2d 924 [1998]). We also note that in *People v Colon* (59 NY2d 921 [1983], *rvg for reasons stated* in 110 Misc 2d 917 (Crim Ct, NY County [1981])), upon which defendant relies, the defendant had been charged with two misdemeanors, but an information had not been prepared. The court found that "the fundamental task of filing sufficient informations" was not impaired in any way by the defendant's absence (110 Misc 2d at 922).

The facts presented here are significantly distinguishable from those in the cases on which defendant relies, and we thus conclude that his absence was the principal factor in the People's inability to advance the criminal proceeding.

Defendant also argues that at the time of the October 3, 1978 Queens bail exoneration motion his location was known. Yet, while the Queens County authorities may have known of defendant's whereabouts at that point in time, nothing in the record

establishes that the officials in New York County had actual knowledge of his location. The Court of Appeals has made clear that knowledge of a defendant's location by another authority cannot be imputed to a prosecutor who lacks actual knowledge (*see People v Sigismundi*, 89 NY2d 587, 592 [1997]).

Defendant's remaining argument is that the trial court should have conducted an inquiry of the jurors when, on the morning of the trial's opening statements, the New York Times published a front-page article about the trial, to determine whether any jurors had read the article. According to defendant, the article was highly sympathetic to the victim, and included statements that the DNA evidence had provided a "conclusive" link between defendant and this crime, as well as dozens of rapes and similar crimes along the East Coast.

Defense counsel requested an in camera inquiry of the individual jurors to determine whether they had read the article and, if so, whether the opinions expressed in the article would taint their ability to be fair and impartial. The court denied the application, noting that it had emphasized in each round of the voir dire and at each recess that the jurors must not listen or read any account of the case in any news media, and concluding that there was no reason for it to question the jurors.

A trial court has wide flexibility to determine "what, if

any, steps are required to assure a defendant's right to a fair trial in light of . . . midtrial publicity" (*People v Shulman*, 6 NY3d 1, 32 [2005], *cert denied* 547 US 1043 [2006]; *see People v Erving*, 55 AD3d 419 [2008], *lv denied* 11 NY3d 897 [2008]). Where a newspaper article appears in the middle of trial, the court retains discretion whether to ask the jurors if they have seen the article (*see Medina*, 67 AD3d at 549-550; *Erving*, 55 AD3d at 419). The court may decide not to inquire about an article, which inquiry could have the effect of focusing the jurors' attention on something that there was no indication any of them had seen (*see Shulman*, 6 NY3d at 30-32). Furthermore, where the trial judge admonishes the jurors to avoid press coverage of the case, the defendant is less likely to suffer prejudice from mid-trial publicity (*see People v Moore*, 42 NY2d 421, 434 [1977], *cert denied* 434 US 987 [1977]).

Here, as the court noted, the jurors had been repeatedly warned that if the case were reported in the press or on the radio or television, they were not to listen to or read any account or discussion of the case other than the trial testimony. Defense counsel also discussed press coverage, and asked the jurors to assure him that they could follow the judge's instructions and not read any articles about the case.

Two prospective jurors had read a *New York Post* article. One

informed the court, outside the presence of the other jurors, that he had read a Post article which "has a bearing on this case;" he was ultimately removed by a defense peremptory challenge. After another prospective juror reported that he had also read the Post article the previous evening, counsel asked the court to repeat its instruction, and the court complied, and repeated its admonition that the jurors should not read anything in the paper and should turn off the radio or television if there was any coverage of the case. Defense counsel asked the juror if he could promise not to consider anything he read in the article. The juror agreed, and confirmed that he would decide the case based on the evidence presented; he was seated as a juror.

After the New York Times article appeared, the court delivered its preliminary instructions, which included the admonition not to read or to listen to any media accounts of the case. The court agreed at counsel's request to remind the jurors not to read the newspapers, and accordingly, each day, the court instructed the jury not to read or listen to any account or discussion of the case in the newspaper, or on the radio or television.

In view of these repeated cautionary instructions, the court did not abuse its discretion in declining to conduct an individual inquiry of each juror. While the placement of the

article on the first page heightened the possibility that a juror might see it, and defendant argues that it is "virtually unthinkable" that none of the jurors would have seen the article, the record does not reveal any reason to believe that any juror had actually seen or read the article. For instance, during the voir dire, two jurors had informed the court that they had seen an article in the Post, yet during the trial, no jurors came forward to inform the court that they had seen or read the Times article.

Defendant further argues that the admission by two prospective jurors that they had read the Post article demonstrates that the court's instructions were ineffective in preventing the jurors from reading such news articles. The court, however, noted that while it had on the first day instructed the sworn jurors not to read any articles, it may not have given that instruction to all of the prospective jurors, which would explain why those two jurors had read the Post article. Furthermore, the fact that the second juror had read the article, yet the defense did not use a peremptory challenge to excuse him, suggests that counsel believed that the court's instructions would be sufficient to insure that the jurors – even a juror who had read an article about the case – would decide the case in accordance with the court's instructions to base the

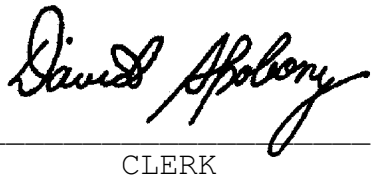
verdict solely on the evidence presented at trial.

Accordingly, the judgment of the Supreme Court, New York County (Renee A. White, J. at speedy trial motion; Bonnie G. Wittner, J. at trial and sentence), rendered November 28, 2005, as amended November 30, 2005, convicting defendant of rape in the first degree and robbery in the first degree, and sentencing him to consecutive terms of 8 1/3 to 25 years and 7 to 21 years, should be affirmed.

All concur.

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

ENTERED: OCTOBER 7, 2010



CLERK