SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 17, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Román, JJ.

1469 In re Probate Proceeding, File No. 2719/06
Will of Seymour Halpern, etc.,
Deceased.
- - - - -
Adrienne Halpern, et al.,
Petitioners-Respondents,

-against-

Elizabeth Halpern,
Respondent-Objectant-Appellant.

Charles Shabsels, New York (Harry L. Klein of counsel), for appellant.

Cleary Gottlieb Steen & Hamilton LLP, New York (Christopher P. Moore of counsel), for respondents.

Decree[1], Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about June 23, 2008, which, inter alia, admitted the document dated September 12, 1958 to probate as the last will and testament of Seymour Halpern, a/k/a Seymour Lionel Halpern, affirmed, without costs.

The decedent, Seymour Halpern, a physician, married his first wife Anafred in 1953. On September 12, 1958, he

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[1]The decree refers to an earlier order which granted petitioners' motion for summary judgment and denied the cross motion for summary judgment of the objectant.

purportedly executed a document that petitioners, his daughters, seek to probate as his will. Anafred died in 1981, and in 1988, the decedent married his second wife Elizabeth (the objectant). On June 7, 2006, Seymour died, leaving an estate valued at approximately $28 million. At the time of his death, his family believed he died intestate, but two months after her husband's death, Elizabeth found an almost 50-year-old four-page document in their home. The decedent's children now seek to have that document probated as his will.

Three witnesses signed the will. Harry Grayer, Esq., Barbara Sammons, and Mary Ann Schuder. Grayer was the decedent's attorney. There is an invoice from Grayer in the record, dated September 12, 1958, the day the will was executed, charging Seymour for "professional services rendered" "Re: Preparation of Will, etc." The two other witnesses, Sammons and Schuder, worked in the decedent's medical office at the time the will was signed. All three of the witnesses' signatures appear at the end of the will, underneath an attestation clause, which recites:

> "The above instrument was on the 12th day of September, 1958 in the Borough of Manhattan, County, City and State of New York, subscribed by SEYMOUR LIONEL HALPERN, the Testator above named in the presence of us and of each of us, and at the same time and place, the above instrument was published and declared by the said Testator to be his Last Will and Testament and thereupon each of us

> at the request of the said Testator and in his presence and in the presence of each other have hereunto signed our names as witnesses thereto, and wrote the places of our respective residences alongside our names."

The will made a number of minor bequests to relatives and charitable organizations. With the exception of those bequests, Anafred and Adrienne, Seymour's eldest daughter, and his only child born before 1958), were the sole beneficiaries under the will, with a provision made for any after-born children. Seymour and Anafred subsequently had a second daughter and a son, Vivienne and Ronald.

In the fall of 2006, Adrienne and Vivienne (the proponents) submitted a petition for admission of the will to probate. On June 29, 2007, Ms. Sammons, the only surviving attesting witness, was deposed. The deposition lasted 45 minutes. Ms. Sammons, who was 69 years old, testified that she recognized her signature at the end of the will and that she remembered living at the address listed next to her signature in 1958. However, she also testified, more than 15 times, in response to a variety of questions, that she had no memory of the events of September 12, 1958, because they occurred 50 years before the deposition. Handwriting experts authenticated decedent's signature at the end of the will, as well as that of his attorney, Mr. Grayer.

On July 17, 2007, Elizabeth filed objections to probate, asserting that the will was not duly executed. The proponents moved for summary judgment to admit the will to probate, and the objectant cross-moved for summary judgment as well. The court held a hearing and concluded that there was no material issue of fact as to the due execution of the will. The objectant appeals from the decree admitting the will to probate.

Before admitting a will to probate, Surrogate's Court must be satisfied that the execution of the will was valid (*see* SCPA 1408; *Matter of Pirozzi*, 238 AD2d 833, 834 [1997]). The proponent has the burden of demonstrating, by a preponderance of the evidence, that a purported will was duly executed (*id.*; *Matter of Falk*, 47 AD3d 21, 25 [2007], *lv denied* 10 NY3d 702 [2008]). If an attorney-drafter supervises the execution of a will, there is a presumption of regularity that the will was properly executed (*see Matter of Moskoff*, 41 AD3d 481, 482 [2007]; *Matter of Tuccio*, 38 AD3d 791, 791 [2007], *lv denied* 9 NY2d 802 [2007]; *Matter of James*, 17 AD3d 366, 367 [2005]; *Matter of Seelig*, 302 AD2d 721, 722 [2003]). In addition, a valid attestation clause raises a presumption of a will's validity, although it is nonetheless incumbent upon Surrogate's Court to examine all of the circumstances surrounding the execution of the

document in order to ascertain its validity (*see Falk*, 47 AD3d at 26, citing, inter alia, *Matter of Collins*, 60 NY2d 466, 471 [1983]). The determination whether to dismiss objections and admit a will to probate is within the discretion of Surrogate's Court, and its determination will not be overturned absent a showing of an abuse thereof (*Matter of Colverd*, 52 AD3d 971, 972 [2008]).

In 1958, when the instant will was purportedly executed, Decedent Estate Law § 21 governed. That section provided:

> "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:
>
> 1. It shall be subscribed by the testator at the end of the will.
>
> 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.
>
> 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.
>
> 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

Here, Dr. Halpern signed the will at the end of the document (Decedent Estate Law § 21[1]) . An attestation clause states that he did so in the presence of three attesting witnesses

(Decedent Estate Law § 21[2]). This clause also states that Dr. Halpern declared the document to be his last will and testament (Decedent Estate Law § 21[3]). Mr. Grayer, the decedent's lawyer, prepared the will, served as an attesting witness, and billed the decedent, on the date of the execution of the instrument, for services rendered with respect to its "Preparation . . . etc." (*see Seelig*, 302 AD2d 722, *supra* [attorney's presence at signing of will constituted prima facie evidence of will's due execution]). The cover page of the will also contained Mr. Grayer's letterhead. Ms. Sammons identified her signature and address on the document, and a handwriting expert verified the signatures of the decedent and Mr. Grayer (Decedent Estate Law § 21[4]).

Thus, Surrogate's Court correctly concluded that the proponents demonstrated a prima facie showing of due execution of the will, as it contained a valid attestation clause (*see Matter of Collins*, 60 NY2d 466, 471 [1983]; *Falk*, *supra* at 26), and was executed under an attorney's supervision (*Matter of Leach*, 3 AD3d 763, 764 [2004]; *Matter of Seelig*, *supra*), despite the fact that the sole surviving witness, Ms. Sammons, testified that she did not remember the will's execution (*see Collins* 60 NY2d at 470-472; *Matter of Korn*, 25 AD3d 379, 379 [2006]; *Matter of James*, 17 AD3d 366, 367 [2005]).

Upon the presumption of due execution, the burden then shifted to the objectant to produce evidentiary proof in admissible form to rebut the presumption and raise a material issue of fact (*Seelig*, 302 AD2d at 722).

It is the dissent's position that a trier of fact could reasonably infer, from the sole surviving witness's deposition testimony, that the formalities set forth in the attestation clause had never taken place. However, the excerpts from her EBT relied on by the dissent, read in context, can also be interpreted as testifying that she could not confirm the statements made in the attestation clause because she didn't remember an event almost 50 years earlier, when she was approximately 20 years old.

The dissent relies on *Lewis v Lewis* (11 NY 220 [1854]) and *Matter of Pulvermacher* (305 NY 378 [1953]), in support of its contention that the requisite formalities were not followed here. Both *Lewis* and *Pulvermacher* are distinguishable on their facts. In *Lewis*, the proponents sought to probate a will *less than two years* after it was drafted. Both attesting witnesses in *Lewis* were deposed. The first testified that the decedent handed him a folded a paper and asked him to sign his name and address. This

witness did not see the body of the document,[2] and the decedent incorrectly declared it to be his "free will and deed" (*id.* at 222). The other subscribing witness also testified that the document was folded; he did not know what he was signing when he placed his signature on the purported will; and that he did not remember the decedent signing the document in his presence (*id.* at 222). Upon this record, the Court of Appeals concluded that because the decedent did not sign the document in the presence of the witnesses, the document was folded in such a manner that the witnesses could not see the subscription, and the decedent's declaration as to a "free will and deed" was incorrect, there was an insufficient basis to satisfy the statutory requirements (*id.* at 225).

In this case, by contrast to *Lewis*, almost five decades (not two years) had passed between the purported execution of the will and its presentation for probate. Here, there was only one living witness to be examined, and the Surrogate found that her testimony was insufficient to rebut the presumption of due execution because, she could not "recall the circumstances

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[2] *See also Matter of Mackey* (110 NY 611 [1888]), cited by the dissent. In *Mackay*, as in *Lewis*, the attesting witness stated that the decedent handed him a folded piece of paper to sign and that he did not see the decedent's signature. The court refused to admit the will to probate.

surrounding execution" of the will. The Court of Appeals' holding in *Lewis* was based on entirely different facts and does not require a different result.

Likewise, in *Pulvermacher*, three years before the testator's death, he asked a guard and a vault attendant at his bank to witness his signature at the bottom of a folded sheet of paper. Both witnesses were available to testify in the probate proceedings, and they were consistent in their testimony that the decedent did not declare the document to be a will. The deposition testimony indicated that while both signed their names next to the decedent's signature, neither knew what they were signing, and the document did not have an attestation clause stating that the publication requirement had been complied with. The Court of Appeals denied probate for lack of proper publication.

Here, by contrast to *Pulvermacher*, there was a five decade time lapse between the execution and attempted probate of the will. There was only one living witness to the will, which was drafted by the decedent's attorney, who also signed as a witness to the execution, and the will contained an attestation clause.

In the circumstances, given all of the evidence submitted to the Surrogate – - the objectant's delivery of the will, which she found in the decedent's closet; the invoice from the attorney-

drafter, dated the same day the will was purportedly executed, September 12, 1958; the signature of the supervising attorney at the end of the will (authenticated by a handwriting expert); the admission of the attesting witness that she too signed the will and that her address at the time was correctly set forth next to her signature; and the authentication of the decedent and the attorney's signatures at the end of the will by a handwriting expert – - it was not an abuse of the court's discretion to have granted the proponent's motion for summary judgment admitting the subject will to probate.

All concur except McGuire, J. who dissents in a memorandum as follows:

McGUIRE, J. (dissenting)

The majority holds that the deposition testimony of Barbara Sammons does not raise a material issue of fact on the question of whether the will was duly executed. The majority so holds because it concludes that the deposition testimony given by Ms. Sammons that I quote below, "read in context, can also be interpreted as stating that she could not confirm the statements made in the attestation clause because she didn't remember an event almost 50 years earlier." Ms. Sammons, however, certainly did not testify merely that she could not remember those circumstances and her testimony certainly cannot as a matter of law only be so interpreted. Rather, viewing her testimony as a whole, the trier of fact reasonably could conclude that an execution ceremony in accordance with the law had never taken place. For that reason, I respectfully dissent.

Ms. Sammons was 69 years old at the time of her deposition, almost 49 years after the date the will allegedly was executed and attested to in accordance with the then-applicable law, Decedent Estate Law § 21. She testified that she began working for the decedent, Dr. Seymour Halpern, in 1956, when she was 19 years old, and worked for him as a "medical assistant" until she was 21. A woman named Mary Ann also worked for the decedent. The decedent's practice was in internal medicine and Ms. Sammons'

duties included secretarial work, such as answering phones, sending out bills, handling correspondence with other doctors, and assisting with examinations.

When questioned by counsel for the proponents of the will, two of the decedent's three children, Ms. Sammons testified that she recognized what appeared to be her signature on the will. Apart from noting the passage of nearly 50 years, Ms. Sammons had no reason to believe that the signature was not hers. With respect to the address next to her signature, Ms. Sammons testified that she did live at that address between 1956 and 1958 and recalled living there in September of 1958 when the will was allegedly signed. Shown the names of the other two subscribing witnesses, Ms. Sammons testified that one of them, Mary Ann Schuder, was the Mary Ann who was her coworker; she did not know anyone named Harry Grayer. Asked if she ever had occasion to sign any documents on behalf of the decedent or in his presence, Ms. Sammons answered, "Not that I remember." Asked if it was possible she had, she answered, "I don't know." Ms. Sammons did not recall signing the will or anything about signing the document; nor did she recall ever signing a document in the presence of the decedent, Ms. Schuder and an attorney. Asked if it was possible she had done so in 1958, she answered, "I don't remember signing one." When she was immediately asked the same

question, she responded, “Anything is possible 50 years ago.” Asked yet again whether it was possible that she had signed the will in the presence of the two people whose signatures appeared below hers, Ms. Sammons answered, “I guess it could be possible.”

Ms. Sammons was then examined by counsel for the objectant, the decedent’s second wife. She testified that correspondence coming out of the decedent’s office did not require her signature, and that she did not sign any documents while in the office. Asked if “it would be unique and very much out of the ordinary if [she] did sign any document while in the office,” Ms. Sammons answered, “That’s true.” Ms. Sammons also testified that she did not remember the decedent ever mentioning to her that he had a will, and that she would no longer recognize his signature. At that point, testimony that is critical to the proper resolution of this appeal was elicited:

> “Q: At any time, did Dr. Halpern announce or declare to you that he had signed his last will and testament and then asked you to sign as a witness?
>
> [Proponents’ Counsel]: Objection.
>
> “A: No.
>
> “Q: If Dr. Halpern had done that, meaning said I am declaring this document to be my last will and testament and, Barbara, I would like you to sign it for me, do you feel that is something you would remember?
>
> “A: Yes, I probably would.

> "Q: Why do you think you would remember that?
>
> "A: It's very specific. I can't imagine him doing that. As I said, he was very controlling and very private and very . . . ." [ellipsis in original]

This unequivocal "No," in response to a question that was more specific than those previously asked by counsel for the proponents, was not negated by Ms. Sammons's later testimony. Nor did her later testimony undermine her explanation for why she "probably" would remember such a declaration and request from the decedent. To the contrary, Ms. Sammons' testimony that the decedent never stated to her that he had signed his will before asking her to sign it as a witness was reinforced by the testimony she went on to give in response to additional, similarly specific questions posed by counsel for the objectant:

> "Q: Now, that paragraph right above your signature says that you, Mary Ann Schuder, the attorney Harry Grayer and Dr. Halpern all executed this Will in each other's presence. In other words, you're in the same room at the same time. Did that ever happen?
>
> "A: I don't remember it happening. Is that the correct answer?
>
> "Q: The correct answer is what you remember.
>
> "A: I don't remember it happening.
>
> "Q: Was there ever any occasion where you signed any document with a lawyer and Dr. Halpern in the same room at the same time?
>
> "A: Not that I remember.

“Q: Can you say definitively that it did or didn’t happen?

“A: It didn’t happen.

“Q: Can you feel confident when you say that?

“A: I don’t remember it happening. So yes, I do feel confident when I say that.

“Q: You feel confident when you say that it did not occur; is that right?

“A: Right.

“Q: Now, we’re presuming under the -- strike that.

“A: How do you expect people to remember what happened 50 years ago? This is what . . .

“Q: I understand, I understand.

“[Proponents’ Counsel]: Let her finish.

“A: I can’t remember what happened ten years ago. Sorry.

“Q: Well, you do. You remember plenty about your college. So your signature appears on [the will], correct?

“A: It is.

“Q: Did anyone, not just Dr. Halpern, but did anyone tell you that the document you were signing was anybody’s will?

“[Proponent’s Counsel]: Objection.

“A: No.”

Ms. Sammons also testified that if the decedent had put a document in front of her and told her to sign it, she “probably”

would have signed it because he “was controlling, manipulative.” As a 19 or 20 year old, she would not have felt comfortable asking the decedent what he was asking her to sign. She “didn’t think that way back then.”

Ms. Sammons was questioned anew by the proponents’ counsel. Asked if it was possible that there were other people in the room when she signed the will, she answered “I don’t remember,” but acknowledged it was possible. Similarly, she did not recall anyone saying anything to her when she signed the will, but acknowledged it was possible someone had. However, when she was asked more specifically if it was possible that someone told her the document was a will, she first answered “No” before stating, “Anything is possible 50 years ago.”

In pertinent part, the formal requirements for the execution and attestation of a will, as set forth in EPTL 3-2.1(a), are that: “[t]he signature of the testator shall be affixed to the will in the presence of each of the attesting witnesses, or shall be acknowledged by the testator to each of them to have been affixed by him or by his direction”; “[t]he testator may either sign in the presence of, or acknowledge his signature to each attesting witness separately”; and “[t]he testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the

instrument to which his signature has been affixed is his will." These formalities have been required to prove due execution of a will for more than 150 years (*see Lewis v Lewis*, 11 NY 220, 223 [1854]).

"Surrogate's Court, before admitting a will to probate, must be satisfied that the execution of the will was valid, even if no interested party files an objection to its validity, and the burden of demonstrating that the purported will was duly executed lies squarely with the proponent, who must prove such by a preponderance of the evidence" (*Matter of Falk*, 47 AD3d 21, 26 [2007] [internal citations omitted], *lv denied* 10 NY3d 702 [2008]). Although the attestation clause "raises a presumption of validity . . . it is incumbent upon Surrogate's Court to examine all of the circumstances attendant to the execution of the document in order to ascertain its validity" (*id.*).

"The publication requirement mandates that decedent make [his] intention known that the document is to serve as [his] will, and absent such declaration, the instrument should not be admitted to probate" (*id.; see Lewis, supra*). Although due execution may be shown by evidence other than the testimony of the attesting witnesses, "it cannot however be presumed in opposition to positive testimony, merely upon the ground that the attestation clause is in due form and states that all things were

done which are required to be done to make the instrument valid as a will" (*Lewis*, 11 NY at 224]; *see also Matter of Pirozzi*, 238 AD2d 833, 834 [1997], quoting *Matter of Roberts*, 215 AD2d 666 [1995] ["Publication can be through words or actions, but something must occur to show that there had been 'a meeting of the minds between the testator and the attesting witnesses that the instrument they were being asked to sign as witnesses was testamentary in character'"]).

Although it is true that "a presumption of regularity is raised that the will was properly executed" when an attorney drafts it and supervises its execution (*Matter of Leach*, 3 AD3d 763, 764 [2004]), and that "this presumption cannot be overcome merely because the attesting witnesses are not able to specifically recall the will execution" (*id.* at 765), "[n]ot being able to remember the details of the execution ceremony is not the same as testifying that the formalities described in the attestation clause did not occur" (*id.* [internal quotation marks omitted]). Indeed, where there is no evidence that an attorney supervised the will's execution and an attesting witness specifically testifies that the statutory formalities did not occur, courts have repeatedly held that the will is not valid

(*see e.g. Lewis*, 11 NY 220, *supra*; *Matter of Mackay*, 110 NY 611 [1888]; *Matter of Pulvermacher*, 305 NY 378 [1953]; *Matter of Falk*, 47 AD3d 21, *supra*). That is precisely what occurred in *Lewis v Lewis* (11 NY 220), where, according to the factual summary preceding the Court's opinion, one of the attesting witnesses testified that he and the other attesting witness worked in the deceased's store at the time the will was signed, he signed his name at the end of the attestation clause at the request of the deceased but the deceased had the paper "so folded or placed upon the desk that he saw no part of the contents, and that neither the same or any part of it was read to him; that he did not see the [deceased] sign it, nor did he see [the deceased's] signature to it when he signed as a witness" (*id.* at 222).

The attesting witness further testified that after requesting that he and his coworker sign the document and add their addresses, the deceased stated, "'I declare the within to be my free will and deed'" (*id.*). He and his coworker then signed the document. He did not know with certainty that the document was a will although he believed that it may have been one because "the deceased had that morning sent out and procured a blank will" (*id.*). The other attesting witness testified that:

"he signed his name to the alleged will in

> the office of the deceased; that he was unable to say what occurred on that occasion, but that according to his recollection he signed it at the request of the deceased; that he had no recollection that the deceased said any thing else to him at the time he requested him to sign it, unless it was 'to see him sign the document;' that he did not recollect that the deceased signed the instrument in his presence; that he had no recollection that . . . the other witness[] was present when he signed . . . . On his cross-examination he further testified that according to his recollection he did not read, nor was any part of the instrument read to him when he signed it, and that he had no recollection that he then knew what the paper was" (*id.*).

The Court of Appeals relied on this testimony from the attesting witnesses in finding that the evidence warranted "the conclusion that the instrument was not subscribed by the decedent in the presence of the witnesses; that the paper was so folded that the witnesses did not see the subscription, and that the only declaration or acknowledgment of the party was in substance, 'I declare the within to be my free will and deed,'" which the Court found insufficient to comply with the statutory requirements (*id.* at 225). Specifically, the Court stated:

> "[I]t might probably be inferred that the deceased at the time of requesting the witnesses to subscribe as such, had himself signed the instrument and intended to comply with the statute and make a valid will. But that is not sufficient. The formalities prescribed by statute must be observed, and the attesting witnesses must be informed at

> the time and by the testator, or in his presence and with his assent, and have a knowledge of all the facts necessary to a due execution and publication of the will, and to which they are called to attest. If the party does not subscribe in their presence, then the signature must be shown to them and identified and recognized by the party, and in some apt and proper manner acknowledged by him as his signature. The statute is explicit, and will not be satisfied with any thing short of a substantial compliance with its terms" (*id.*).

Almost a century later, the Court of Appeals reiterated this requirement that the "definite formalities" of the statute, one of them being publication of the document as a will, be complied with in order for a will to be admitted to probate (*Matter of Pulvermacher*, 305 NY 378, 383, *supra*). In *Pulvermacher*, the court stated that "[p]ublication . . . demands, not only that the testator have knowledge of the character of the instrument, but, equally important, that he share that knowledge with his witnesses" (*id.*). The court explained that "[w]hile no particular form of words is necessary, the courts have held the minimum statutory prescription to be some kind of communication that the instrument, which they are being asked to sign, is testamentary in character" (*id.* [internal quotation marks omitted]). It further explained:

> "The reason for requiring publication is twofold: first, to furnish proof that the testator is under no misapprehension, whether

> by malicious contrivance or otherwise, as to the nature or identity of the instrument, and second, to impress upon the witnesses the fact that, since the document is a will, they are expected to remember what occurred at its execution and be ready to vouch for its validity in court" (*id.* [internal quotation marks omitted]).

The majority attempts to distinguish *Lewis* and *Pulvermacher* from this case on the ground that a longer period of time passed between the execution of the will and its submission to the court for probate. But the number of years that passed by is irrelevant to the question of whether the will was properly executed in accordance with the statutory requirements.

Summary judgment in a contested probate proceeding is rare (*Matter of Colverd*, 52 AD3d 971, 972 [2008]), and should only be granted where the petitioner sufficiently establishes a prima facie case for probate and the respondent fails to raise any genuine issue of fact (*id.*). Although the majority relies on both the attestation clause and attorney-supervision presumptions, neither is applicable. Ms. Sammons' testimony raises material questions of fact with respect to whether the decedent declared the document she signed to be his will, whether the attorney-drafter supervised the execution, and whether any will ceremony ever had occurred. While Ms. Sammons acknowledged that she could not be certain given the passage of time, she

testified both that there was never an occasion in which she signed a document in the presence of a lawyer and the decedent and that she was confident that such an event had not occurred.

Moreover, Ms. Sammons provided specific and credible reasons why she "probably" would remember a will ceremony if one had occurred. As she explained, she thought she would remember if the decedent had asked her to sign a document that he had declared to be his last will and testament, because "it's very specific" and she could not "imagine him doing that" as he was "very controlling and very private." Similarly, she gave a specific and credible explanation for why her signature nonetheless might appear on the will underneath the attestation: because of her youth and his "controlling, manipulative nature," she "probably" would have signed a document if he put it in front of her and told her to sign it. Regardless of what may or may not be the case today, the majority cannot dismiss as implausible the notion that 50 years ago a male employer might be so "very controlling and very private" with respect to a young female employee as to direct her to sign a document and keep her in the dark about its nature.

Furthermore, that a will ceremony is an unusual event is a matter of common experience. For this reason, a trier of fact could conclude that, even 50 years later, a person might well

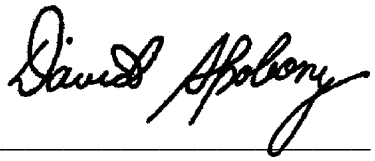
remember participating in it. As the Court of Appeals explained, embedding the will ceremony in the memory of the attesting witnesses is one of the very reasons for the statutory requirements (*Pulvermacher*, 305 NY at 383, *supra*). And if a trier of fact were impressed by the demeanor and overall mental state of the person, that conclusion would be all the more reasonable. Obviously, the majority knows nothing about Ms. Sammons' demeanor and has no basis for being unimpressed by her overall mental state. Nonetheless, the majority concludes that no trier of fact reasonably could conclude that Ms. Sammons was correct that she "probably would" remember a will signing ceremony if it had occurred. Although this startling conclusion is left unstated in the majority's writing, it nonetheless is implicit in the majority's ruling.

The key to this appeal is that the inference that Ms. Sammons would have remembered a will ceremony is one to which the objectant, as the opponent of the motion for summary judgment, is entitled (*see Consolidated Edison Co. Of N.Y. v Jet Asphalt Corp.*, 132 AD2d 296, 300 [1987]). I agree that Ms. Sammons' testimony must be read "in context." But that banality cannot be a license to disregard specific testimony bearing on the crucial subjects of the witness' testimony. By affirming, the majority vitiates the principle that the court's function on a motion for

summary judgment is issue finding, not issue determination (*Rodriguez v Parkchester S. Condominium*, 178 AD2d 231, 232 [1991]). Although the majority does not acknowledge that it is weighing the evidence and finding that the better conclusion is that the decedent executed the will in accordance with the statutory requirements, that is precisely what the majority does. Accordingly, I would reverse the grant of summary judgment.

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

ENTERED: AUGUST 17, 2010



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Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, JJ.

2983 Darlin Melendez, Index 14617/03
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Friedman & Moses, LLP, Garden City (Lisa M. Comeau of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about July 1, 2009, which, in an action for personal injuries sustained when the 13 year-old plaintiff fell off the ledge at the top of a waterfall in a park owned by defendant City, after a trial on the issue of liability, granted defendant's motion to set aside the verdict and for judgment in its favor as a matter of law, unanimously affirmed, without costs.

The waterfall, a naturally occurring phenomenon within the grounds of Bronx River Park, was not open to the public. There was a four-foot high pipe rail fence blocking access to the waterfall, beyond which was a six-foot drop. There was testimony that the City had erected a second, 15-foot high chain link fence

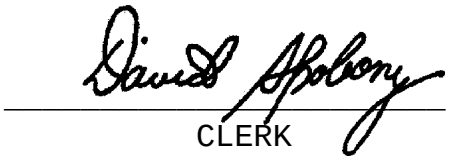
to block access to the waterfall but that the fence often had to be repaired because of "sneak holes" made by people accessing the waterfall. According to plaintiff, on the date of the accident, there was no chain link fence at the site, only the pipe rail fence. He testified that he went beyond the pipe rail fence and walked out onto the ledge of the waterfall, which he observed to be wet due to the splashing water. Plaintiff knelt down to watch the people in the waterfall, and when he tried to get up, he slipped and fell into the water.

The waterfall was an open and obvious, rather than latent, natural feature of the landscape, and the wet, slippery condition of the ledge was also open and obvious. The danger of climbing out on the wet ledge of the waterfall was apparent and plaintiff could reasonably have anticipated it. Thus, the City had no duty to protect park visitors from the waterfall (*see Rosen v New York Zoological Socy.*, 281 AD2d 238 [2001]; *Tushaj v City of New York*, 258 AD2d 283, 284 [1999], *lv denied* 93 NY2d 818 [1999]; *Plate v City of Rochester*, 217 AD2d 984 [1995], *lv denied* 87 NY2d 801 [1995]; *Tarricone v State of New York*, 175 AD2d 308 [1991], *lv denied* 78 NY2d 862 [1991]; *Diven v Village of Hastings-On-Hudson*, 156 AD2d 538 [1989]). Plaintiff cites this Court's decision in *Westbrook v WR Activities-Cabrera Mkts*. (5 AD3d 69 [2004]), which involved a cardboard box that had been left in a supermarket

aisle. In *Westbrook*, we noted that we were joining the other Departments in rejecting the open and obvious doctrine that had been applied in prior years, and concluded that the "open and obvious nature of a hazard merely negates the duty to *warn* of the hazard, not necessarily all duty to maintain premises in a reasonably safe condition" (*id*. at 72). Notably, however, post-*Westbrook* holdings in the other Departments have applied the open and obvious doctrine to natural geographic phenomena such as a whirlpool area in a state park where four camp counselors drowned (*Cohen v State*, 50 AD3d 1234 [2008], *lv denied* 10 NY3d 713 [2008]); a ten-foot cliff over which an infant plaintiff rode his bike (*Comack v VBK Realty Assoc., Ltd.*, 48 AD3d 611 [2008]); and a ravine in a county park into which plaintiff fell (*Cramer v County of Erie*, 23 AD3d 1145 [2005]).

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

ENTERED: AUGUST 17, 2010



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Friedman, J.P., Sweeny, Freedman, Richter, Abdus-Salaam, JJ.

1757 In re Carlos Rueda, M.D., etc., Index 84/05
Petitioner-Respondent,

-against-

Charmaine, D.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Namita Gupta of counsel), for appellant.

Abrams Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake Success (Eric Broutman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 11, 2009, which, to the extent appealed from, granted the petition to retain respondent at the Montefiore facility, affirmed, without costs.

Although respondent's release from the hospital has rendered this appeal moot as to her, we address the merits pursuant to the exception to the mootness doctrine for issues likely to recur (*see Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 505-506 [1998]).

The main issue before us is whether the emergency room psychiatrist who treated respondent properly made an application pursuant to Mental Hygiene Law § 9.27 for her involuntary

admission to a hospital, when such involuntary admission could also have been made pursuant to § 9.39. We hold that although § 9.39 provides for emergency involuntary admissions, it does not preclude applications by emergency room psychiatrists for non-emergency involuntary admissions pursuant to § 9.27. The trial court's determination that respondent could have been involuntarily admitted under § 9.39 does not alter the fact that her admission pursuant to § 9.27 was proper.

Petitioner asserts, without contradiction, that § 9.27 has for years been relied on by hospitals for this type of admission. The crux of the problem is that while there are different admission standards as well as different retention periods, there are overlapping elements between the two sections. A close reading of each section shows how, in some cases, a patient could meet the criteria of both.

In § 9.39, entitled "Emergency admissions for immediate observation, care and treatment," two criteria must be met for admission. The patient must have a mental illness for which "immediate observation, care and treatment in a hospital is appropriate *and* which is likely to result in *serious* harm to himself or others" (emphasis added). Section 9.01 defines the likelihood of resulting in serious harm as

> (a) substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or
>
> (b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

Moreover, as respondent has conceded, there must a present need for such immediate observation and treatment under § 9.39 (*see Matter of Boggs v New York City Health & Hosps. Corp.*, 132 AD2d 340, 362 [1987], *appeal dismissed* 70 NY2d 972 [1988], as manifested by a recent homicidal or suicidal threat, attempt or act (*see* Memorandum of Office of Mental Health, accompaying enactment of L 1985, ch 343, 2 McKinney's 1985 Session Laws of NY, at 3064).

Admission under § 9.27, on the other hand, allows admission of an individual who is mentally ill and "in need of involuntary care and treatment." Although not specifically set forth in § 9.27, for a hospital to involuntarily admit a patient for psychiatric treatment, there must also be a showing, by clear and convincing evidence that "the patient poses a substantial threat of physical harm to himself and/or others" (*New York City Health & Hosps. Corp. v Brian H.*, 51 AD3d 412, 415 [2008]).

Both sections thus permit the involuntary admission of a

patient for care and treatment where the patient poses a threat of harm to himself or others. Although § 9.39 requires the additional element of recent suicidal or other violent behavior, the nature of the illness may be such that the patient could, at the time of the admission, evidence "other conduct demonstrating that [s]he is dangerous to [her]self." Both sections also provide that a patient admitted to a facility must be examined by a psychiatrist from that facility.

The mere fact that a patient is brought into an emergency room for initial treatment of a mental illness does not, by itself, make it an emergency admission within the meaning of § 9.39. It is the condition of the patient, not the location or the circumstances of the admission, that determines which section of the Mental Hygiene Law controls the patient's involuntary admission.

There is no issue that respondent, upon presentation to the emergency room, met the requirements of §§ 9.27 and 9.39. Here, respondent was inter alia, psychotic, disrobing in public and incoherent. The record does not show that the examining physicians classified her actions as "likely to result in serious harm," the hallmark requirement of admission under § 9.39. However, the physician certifications utilized in her admission contained the following pre-printed language:

> "[A]s a result of his or her mental illness, this person poses a substantial threat of harm to self or others ("*substantial threat or harm" may encompass [i] the person's refusal or inability to meet his or her essential need for food, shelter, clothing, or health care, or [ii] the person's history of dangerous conduct associated with noncompliance with mental health treatment programs*) [emphasis in original]."

While respondent clearly met the criteria of a mentally ill person in need of involuntary care and treatment pursuant to § 9.27, there is no evidence in the record of affirmative, overt conduct on her part, at the time of her admission, that would constitute suicidal or other violent behavior, as defined in § 9.39. However, her actions, particularly with respect to disrobing in public, could constitute "other conduct demonstrating that the person is dangerous to . . . herself," as well as a "substantial risk of physical harm" to herself (§ 9.01).

The dissent argues that the Legislature could not have intended for these sections to be used interchangeably, and the statutory scheme must thus be harmonized to carry out the legislative intent. But as the dissent acknowledges, the statute provides different criteria for involuntary admission under each section. There is no legislative intent that these sections be used interchangeably, although there may well be situations, as

here, where the admission standards overlap and the patient meets the criteria of both.

The issue that appears to trouble the dissent is that § 9.39 provides for a much shorter involuntary commitment period before judicial review than that authorized by § 9.27.

The nature of an involuntary admission under either section is per se a serious restriction of one's liberty (*see Project Release v Prevost*, 722 F2d 960, 971 [2d Cir 1983]).

Recognizing this fact, the statutory scheme provides that upon admission by medical certification under § 9.27, the director of the medical facility must "forthwith" provide notice to the mental hygiene legal service (§ 9.29[a]), thus triggering immediate legal representation for the patient. In addition, the director must provide to the nearest relative - and up to three additional persons as designated by the patient - notice of the patient's rights, including the right to a hearing, not later than five days after admission (§ 9.29[b]). The patient, either personally or through another, may seek judicial intervention to challenge his or her confinement at any time, and such hearing must be held within five days of the request, unless the applicant consents to a longer period of time (§ 9.31). Of note is the fact that § 9.31 applies to both §§ 9.27 and 9.39.

The statutory scheme of Mental Hygiene Law Article 9 already

takes into account the differences in the duration a patient can be involuntarily retained before judicial intervention is mandated. While the dissenting opinion is premised on the assumption that the statutory scheme involving §§ 9.27 and 9.39 needs to he harmonized, it in fact would restrict the discretion of the admitting physicians to determine which section best meets the needs of the individual patient requiring psychiatric treatment. It is not for the courts to impose restrictions that do not otherwise exist, and which the Legislature has not seen fit to impose (*see People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995]).

Simply put, when the statutory scheme of Article 9 is read as a whole, it is clear that the Legislature has already adequately addressed the patient's due process and liberty interests.

Respondent also contends that unlike the other persons authorized by the statute to execute an application for involuntary admission (*see* § 9.27[b][1]-[10]), an emergency room psychiatrist is not explicitly listed, and hence, was not a proper person to execute the application for her admission. We agree with the trial court's determination that the Jacobi Medical Center emergency room psychiatrist who executed the application for involuntary admission of respondent to Montefiore

North Medical Center was “a qualified psychiatrist who [was] . . . treating [respondent] for a mental illness,” and thus was authorized to make the application (*see* § 9.27[b][11]). The absence of an established treatment relationship notwithstanding, the emergency room psychiatrist was “treating” the individual within the meaning of the statute.

All concur except Freedman and Abdus-Salaam, JJ. who dissent in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting)

The issue presented here is whether an emergency room psychiatrist properly made an application pursuant to Mental Hygiene Law § 9.27 for the involuntary admission to a hospital of respondent when such an involuntary admission could have been accomplished pursuant to § 9.39. I conclude that where an individual with mental illness meets the involuntary admission standard of § 9.39, it is not proper to admit her pursuant to § 9.27. I would thus reverse the order of the trial court. On the morning of April 16, 2009, EMT personnel brought respondent to the emergency room at Jacobi Medical Center, relating that she was agitated, undressing in public, and making no sense. A Jacobi emergency room attending psychiatrist applied for respondent's involuntary admission to another hospital, Montefiore (apparently because of an insurance issue). Two psychiatrists at Jacobi served as certifying physicians under § 9.27, determining that respondent was in need of involuntary care and treatment, and that because of her mental illness, she posed a substantial threat of harm to herself or others. Later that day, respondent was transferred from the Jacobi emergency room to Montefiore, where Dr. Willy Alexis admitted her for involuntary psychiatric treatment under § 9.27.

Five days after the admission, Dr. Alexis requested a court

hearing to determine whether respondent was in need of involuntary hospitalization, and Dr. Carlos Rueda, the director of the psychiatric department at Montefiore, applied for court authorization to retain her for a period of 30 days. At the hearing, Dr. Alexis testified that respondent was bipolar, manic with psychotic features, potentially belligerent and assaultive, and concluded that she could pose a threat to others. He did not expect her to get better immediately, and planned to treat her by upgrading her medications to the maximum dose. His plan after discharge was to refer her to her private treating psychiatrist. After a hearing, the trial court ordered respondent to be retained for 30 days. The motion by Mental Hygiene Legal Service (MHLS) to dismiss the retention proceeding on the ground that the involuntary admission was not authorized under § 9.27 was denied.

Article 9 of the Mental Hygiene Law governs involuntary admissions to psychiatric facilities. The standards and procedures of Article 9 have been held to meet federal constitutional due process requirements (*see Project Release v Prevost*, 722 F2d 960 [2d Cir 1983]).

Section 9.27, entitled "Involuntary admission on medical certification," provides, in its opening sentence, that the director of a hospital may "receive and retain therein as a patient any person alleged to be mentally ill and in need of

involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person." "'In need of involuntary care and treatment' means that a person has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment" (§ 9.01). The application initiating the involuntary admission process must contain a statement of facts, sworn by the applicant, upon which the allegation of mental illness and the need for care and treatment are based (§ 9.27[c]). The statute lists in § 9.27(b) appropriate applicants, which include, inter alia, family members, any person with whom the person resides, the director of community services or a social services official, and "a qualified psychiatrist who is either supervising the treatment of or treating such person for a mental illness in a facility licensed or operated by the office of mental health" (§ 9.27[b][11]). The application at issue here was made pursuant to paragraph (b)(11), pertaining to a qualified psychiatrist.

After the application has been made, two examining physicians must certify that the person is mentally ill and in need of involuntary care (§ 9.27[a]). The person is then brought to a hospital, where he or she is examined by a member of the

hospital's psychiatric staff who determines whether the person requires involuntary care and treatment and admission to the facility (§ 9.27[e]). The hospital may retain a person admitted under this procedure for a maximum of 60 days without court authorization (§ 9.33).

At any time during that 60-day period, the patient, a relative or friend, or MHLS may request a hearing addressing the necessity of involuntary confinement and the initial admission (§ 9.31[a]). At that hearing, the hospital bears the burden of demonstrating, by clear and convincing evidence, that the patient is "mentally ill and in need of continued, supervised care and treatment, and that the patient poses a substantial threat of physical harm to h[er]self and/or others" (*Matter of Ford v Daniel R.*, 215 AD2d 294, 295 [1995]). If the director of a hospital determines that a patient admitted under § 9.27 requires inpatient treatment beyond 60 days, the director may apply for a court order for further retention (§ 9.33[a]).

Section 9.39, entitled "Emergency admissions for immediate observation, care and treatment," opens with an authorization for the director of any hospital to receive and retain as a patient for a period of 15 days "any person alleged to have a mental illness for which immediate observation, care and treatment in a hospital is appropriate and which is likely to result in serious

harm to himself or others." "Likelihood to result in serious harm" is defined as a "[1] substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or [2] a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm" (§ 9.39[a]).

No application is required to admit an individual pursuant to § 9.39. Rather, admission follows an examination performed by the hospital's staff physician who determines that the person meets the standard for emergency hospitalization (§ 9.39[a]). However, to extend the hospitalization beyond 48 hours, a hospital staff psychiatrist must confirm the admitting physician's determination that the patient requires immediate hospitalization (*id.*). At any time during the 15-day retention period, the patient, a friend or relative, or MHLS may request a hearing to determine whether there is reasonable cause to believe that immediate observation, care and treatment is needed (*id.*).

There are differences between the admission standards and processes under § 9.27 and § 9.39, as well as different retention periods. An admission under § 9.27 requires only that the individual be "in need of involuntary care and treatment," while

the standard under § 9.39 is that the individual require "*immediate* observation, care and treatment" (emphasis added). Section 9.27 contemplates involuntary retention where an individual's mental illness "manifests itself in neglect or refusal to care for himself, where such neglect or refusal presents a threat of substantial harm to his own well-being" (*Matter of Scopes*, 59 AD2d 203, 205 [1977]), whereas § 9.39 "do[es] not rely solely on medical diagnosis, but instead require[s] that the potential for serious harm be objectively 'manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that [the patient] is a danger to himself . . . [or] by homicidal or other violent behavior'" (*Project Release v Prevost*, 551 F Supp 1298, 1305 [ED NY 1982], *affd* 722 F2d 960). Although only two physicians must examine the patient under § 9.39 in contrast to the three physicians required under § 9.27, a patient may be retained without judicial review for a maximum of 15 days under § 9.39(a) in contrast with the 60-day period under § 9.27. While § 9.39 pertains to "emergency admissions," there is no such language in § 9.27.[1]

[1]The statute also includes another section involving emergency admissions. Section 9.57, entitled "Emergency admissions for immediate observation, care and treatment; powers of emergency room physicians," specifies the powers of emergency

The trial court properly rejected respondent's argument that an emergency room psychiatrist does not provide treatment for or supervise treatment of a mentally ill individual pursuant to § 9.27, and that accordingly, such a psychiatrist is not a proper applicant under § 9.27(b)(11). A plain reading of the statute does not reveal any intent by the Legislature to exclude an emergency room psychiatrist from the applicants listed in § 9.27(b). In fact, the legislative history accompanying the amendments to Article 9 expresses a desire to broaden the scope of those who can apply for admission under § 9.27 (*see* Memorandum of Office of Mental Health, accompanying enactment of L 1985, ch 343, 2 McKinney's Session Laws of NY 1985, at 3064-3065). However, the trial court erred in holding that although respondent could have been involuntarily admitted under § 9.39, she was also properly admitted under § 9.27. The statutory scheme can only be harmonized if, when an individual meets the admission standards of § 9.39, an emergency room psychiatrist uses the procedures therein to admit that individual, and not the non-emergency procedures set forth in § 9.27.

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room physicians for emergency admissions pursuant to § 9.39 where the hospital does not have an inpatient psychiatric service. In that instance, a physician is authorized to request the director of the hospital to direct the removal of a person to a hospital with an inpatient psychiatric service, where that person may then be admitted in accordance with the provisions of § 9.39.

When an emergency room psychiatrist obtains an involuntary admission under § 9.27 for an individual who meets the standards set forth in § 9.39, this bypasses the stringent short-retention period included in § 9.39. Given that involuntary commitments entail "a massive curtailment of liberty" (*Vitek v Jones*, 445 US 480, 491 [1980]), quoting *Humphrey v Cady*, 405 US 504, 509 [1972]), the Legislature could not have intended that §§ 9.27 and 9.39 be used interchangeably, as this would result in arbitrarily different retention periods depending on which provision the physician chooses to use for admission. The majority points out that under § 9.31, the patient has the right to challenge his or her confinement at any time and that such a hearing must be held within five days of the request. However, this does not address the fact that where a patient does not request a hearing, § 9.39 provides for a much shorter involuntary commitment period before judicial review.

Finally, petitioner's argument that hospitals have been admitting patients pursuant to § 9.27 under similar circumstances for years does not require this Court to place its imprimatur on a custom and practice that treats these different statutes as if they are the same. The record shows that respondent was psychotic, was disrobing and required restraints. She thus qualified for admission under § 9.39, and should have been

committed pursuant thereto.

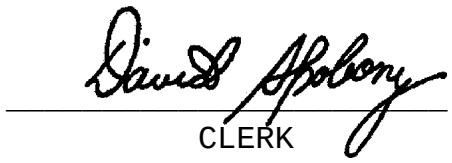
While respondent argues that § 9.27 and § 9.39 have a "muddled past" and that overlapping judicial interpretations make it impossible to divine an overall statutory scheme within Article 9, statutory provisions "relating to the same subject matter must be construed together unless a contrary legislative intent is expressed, and courts must harmonize the related provisions in a way that renders them compatible" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 [2001]). Sections 9.27 and 9.39 are in accord only if emergency room psychiatrists use the procedures of § 9.39 to admit emergency room patients who qualify for admission under that statute, and do not use the non-emergency provisions of § 9.27 for such patients.

In sum, respondent had a right to benefit from the heightened admission standard and shorter retention period attached to § 9.39. Once the patient is properly admitted, the director of the hospital, or a qualified psychiatrist who is treating her (§ 9.27 [b][11]) could then apply for her admission/retention for 60 days pursuant to § 9.27. This is the

proper procedure in such instances (*see e.g. New York City Health & Hosps. Corp. v Brian H.*, 51 AD3d 412 [2008]; *Matter of Boggs v New York City Health & Hosps. Corp.*, 132 AD2d 340 [1987], *appeal dismissed* 70 NY2d 972 [1988]), and it should have been followed here.

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

ENTERED: AUGUST 17, 2010



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Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2399 & M-2275 M-2796 — Index 103966/01

Cornell University, et al.,
Plaintiffs-Respondents,

-against-

Francine Gordon,
Defendant-Appellant.

Norman A. Olch, New York, for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Robert A. Jacobs of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Walter B. Tolub, J. and a jury), entered December 19, 2008, in favor of plaintiffs and against defendant in the amount of $39,449.43 (after offsetting a judgment in favor of defendant in another action), unanimously affirmed, without costs.

Plaintiffs originally sought attorneys' fees pursuant to a stipulation of settlement involving defendant-tenant's agreement to correct illegal and unauthorized alterations to her apartment. The stipulation provided for such fees in the event of defendant's noncompliance with the stipulation. The tenant breached the stipulation and plaintiffs obtained a judgment against her for attorneys' fees in the amount of $59,508.23. Under the broad and inclusive terms of the stipulation, which

provided that both parties agree to indemnify and hold each other harmless for any and all costs and expenses incurred due to the failure to abide by the terms of the stipulation, including, but not limited to reasonable attorneys' fees, plaintiffs were properly awarded attorneys' fees incurred in connection with enforcement of that judgment.

The fee award of $15,000, compensating plaintiffs' attorneys for their efforts to compel defendant's compliance with the term of the stipulation that required defendant, at her sole cost and expense, to remove the final remaining Department of Buildings violation issued against the building because of her unauthorized apartment renovation, was not excessive under the circumstances.

Inasmuch as defendant fully consented to -– indeed even proposed -– having the two alternate jurors deliberate and render a verdict with the regular jurors, she has failed to preserve her argument that the court committed reversible error in submitting the case to a jury of eight persons rather than six (*see Fader v Planned Parenthood of N.Y. City*, 278 AD2d 41 [2000]; *see also Sharrow v Dick Corp.*, 86 NY2d 54, 59-60 [1995]; *Waldman v Cohen*, 125 AD2d 116, 118-124 [1987]). Also unpreserved, for failure to timely object, is defendant's argument that the 6 to 2 jury votes in favor of plaintiffs were contrary to the requirement of CPLR 4113(a) that a verdict must be rendered by not less than five-

sixths of the jurors constituting a jury (*see Harvey v B & H Rests., Inc.*, 40 AD3d 241, 241 [2007]). We note, however, with respect to the merits, that while CPLR 4106 requires that alternate jurors be discharged after the final submission of the case, there was no substitution here of the two alternates for regular jurors after deliberations had begun, the circumstance that invalidated the jury deliberations in *Gallegos v Elite Model Mgt. Corp.* (28 AD3d 50, 54-55 [2005]), and that all eight jurors deliberated as a group from start to finish and reached a verdict together.

We reject defendant's contention that the court erred in giving a missing witness charge due to her failure to testify. While much of the trial indeed focused on the amount of attorneys' fees that would constitute a reasonable award, an issue about which defendant would not likely have had anything meaningful to contribute, the issue of whether attorneys' fees were properly awardable at all was also submitted for the jury's consideration, an issue that turned, at least in part, on the actions that defendant took to have the remaining plumbing violation removed. As plaintiffs' lay witness testified that defendant was not cooperative in producing the documents necessary to certify removal of the plumbing violation, defendant could be expected to dispute those facts or to explain why she

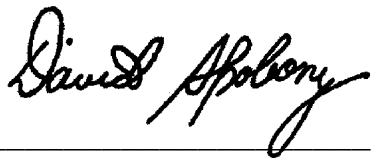
cannot (*see Crowder v Wells & Wells Equip., Inc.*, 11 AD3d 360, 361 [2004]).

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

The Decision and Order of this Court entered herein on March 18, 2010 is hereby recalled and vacated (*see* M-2275 and M-2796 decided simultaneously herewith).

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

ENTERED: AUGUST 17, 2010



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Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2498N-
2498NA-
2498NB In re New York City Health and Hospitals Corporation, Petitioner-Respondent, Index 403141/08

-against-

New York State Commission of Correction, Respondent-Appellant.

Andrew M. Cuomo, Attorney General, New York (Monica Wagner of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg and Wayne A. McNulty of counsel), for respondent.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 20, 2009, quashing the subpoena duces tecum issued by respondent New York State Commission of Correction and served upon Elmhurst Hospital seeking the medical records of a deceased inmate, unanimously affirmed, without costs. Appeal from orders, same court and Justice, entered June 1, 2009 and July 8, 2009, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The New York State Commission of Correction is an independent state agency that monitors and inspects all correctional facilities in New York (*see* NY Const, art XVII, § 5;

Correction Law § 45). Within the Commission is a medical review board responsible for, inter alia, investigating "the cause and circumstances surrounding the death of any inmate of a correctional facility" (Correction Law § 47[1][a]). In the exercise of its duties, the Commission is authorized to issue and enforce subpoenas in accordance with the CPLR (*see* Correction Law § 46[2]).

This case arises from the Commission's investigation into the death of inmate Carlos Frazier. Frazier was admitted to Elmhurst Hospital sometime in 2008 and was later transferred to Bellevue Hospital where he died on August 19, 2008. On August 27, 2008, the Commission served a subpoena duces tecum upon Elmhurst Hospital seeking production of Frazier's medical and mental health records. No one had executed an authorization for the records on behalf of the decedent. Petitioner New York City Health and Hospitals Corporation (HHC), which operates Elmhurst Hospital, brought this proceeding to quash the subpoena and Supreme Court granted HHC's application.

The subpoena was properly quashed because the records are protected from disclosure by the physician-patient privilege. CPLR 4504(a) provides that "[u]nless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in

attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." A physician or hospital may assert the privilege for the protection of a patient who has not waived the privilege (*Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d 130, 135 [1983]) and the privilege survives death (*Liew v New York Univ. Med. Ctr.*, 55 AD3d 566 [2008]).

There is no question that the records sought by the Commission's subpoena fall within the ambit of the physician-patient privilege. Nevertheless, the Commission argues that its statutorily-mandated investigative functions would be frustrated if it were required to obtain authorizations before obtaining the medical records of deceased inmates. The mere fact that the Commission is authorized to issue subpoenas in aid of its investigations, without more, is insufficient to eradicate the protections afforded by the physician-patient privilege (*see Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d at 132 [quashing grand jury subpoena on physician-patient privilege grounds]).

Although the Commission's goal of thoroughly investigating inmates' deaths is laudable, there is no general public interest exception to the privilege (*People v Sinski*, 88 NY2d 487, 492 [1996]). Rather, "exceptions to the statutorily enacted

physician-patient privilege are for the Legislature to declare" (*Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d at 136). Here, no exception to the privilege is contained in any of the Correction Law provisions governing the Commission and its functions, and the Commission points to no other statutes creating any such exception for the records sought.

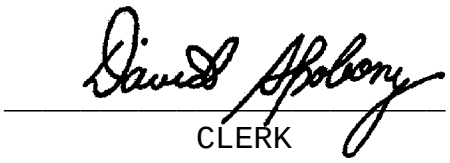
The Commission's argument that Elmhurst Hospital cannot assert the physician-patient privilege because it is a target of the investigation into Frazier's death is raised for the first time on appeal, and thus is not properly before us (*see Jean v Kabaya*, 63 AD3d 509 [2009]). Were we to consider it, we would reject it based on the sparse record before us. Although the privilege does not protect disclosure of patient records where a hospital is being investigated by a grand jury in connection with possible crimes committed against its patients *(see Matter of Grand Jury Proceedings [Doe]*, 56 NY2d 348 [1982]) or where there is an investigation by a government agency into allegations of physician misconduct (*see Atkins v Guest*, 201 AD2d 411 [1994]), the Commission failed to make even a "minimal threshold showing" (*id.* at 411) that either of these exceptions applies here. The Commission did not submit an affidavit explaining the nature of its investigation and there is no specific evidence in the record to show that Elmhurst Hospital, or any physician working there,

is being investigated for any crimes or other misconduct.

Indeed, the record is devoid of any facts as to the circumstances of Frazier's death. Thus, it is not known why Frazier was taken to Elmhurst, how long he stayed there or why he was transferred to Bellevue. Nor is there any indication as to the cause of his death. Given the absence of any facts to show that Elmhurst Hospital or its physicians actually are the subject of the Commission's investigation, there is no basis to abrogate the physician-patient privilege. In light of this determination, we need not reach the question of whether the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*, as added by Pub L 104-191, 110 US Stat 1936) provides independent grounds to quash the subpoena.

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

ENTERED: AUGUST 17, 2010



CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3071 Denise Thomas, Index 400994/08
Plaintiff-Respondent,

-against-

Adrian Booker, et al.,
Defendants-Appellants.

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Morgan Melhuish Abrutyn, New York (Erin A. O’Leary of counsel), for Adrian Booker, appellant.

Baker, McEvoy, Morrissey & Moskovitz, P.C., New York (Stacy R. Seldin of counsel), for Moazzam Ahmed and Sancho Cab Corp., appellants.

Goldstein & Handwerker LLP, New York (Steven Goldstein of counsel), for respondent.

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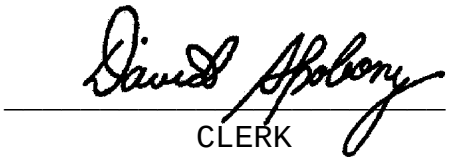
Order, Supreme Court, New York County (Paul Wooten, J.), entered October 29, 2009, which, to the extent appealed from, denied the motion by defendants Ahmed and Sancho Cab and the cross motion by defendant Booker for summary judgment dismissing the complaint except with respect to the 90/180 day category under Insurance Law § 5102, unanimously reversed, on the law, without costs, the motion and cross motion granted in full, and the complaint dismissed in its entirety.

Defendants made a prima facie showing that plaintiff’s injuries were caused by preexisting, degenerative conditions

rather than the accident (*Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [2009]). Plaintiff's submissions were insufficient to defeat summary judgment not only because her experts failed to raise an issue of fact addressing the evidence of her preexisting cervical spine disease with "factually based medical opinions ruling out . . . degenerative conditions as the cause of her limitations" (*Rose v Citywide Auto Leasing, Inc.*, 60 AD3d 520 [2009], but also because her experts failed to demonstrate a causal nexus between the accident and plaintiff's injury in the first instance (*Jimenez v Rojas*, 26 AD3d 256, 257 [2006]).

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

ENTERED: AUGUST 17, 2010



CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3122 The People of the State of New York, Ind. 4567/07
Respondent,

-against-

Christopher Perino,
Defendant-Appellant.

_____

Hogan Lovells US LLP, New York (Ira M. Feinberg of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered September 22, 2009, convicting defendant, after a nonjury trial, of perjury in the first degree (three counts) and perjury in the third degree, and sentencing him to an aggregate term of 4 months, concurrent with 5 years' probation, unanimously modified, on the law, to reduce the conviction of perjury in the first degree under the third and fourth counts of the indictment to perjury in the third degree, and also modified, as a matter of discretion in the interest of justice, to reduce each term of imprisonment to two months, and otherwise affirmed. The matter is remitted to Supreme Court, Bronx County, for further proceedings pursuant to CPL 460.50(5).

Defendant, a former police detective, was convicted of

perjury based on his false testimony at the criminal trial of Erik Crespo. At defendant's trial, Crespo testified as follows: On December 31, 2005, police arrested Crespo for a shooting that had occurred on December 25, 2005, brought him to the 44th Precinct in the Bronx, and left him alone in a room without giving him *Miranda* warnings. While Crespo was listening to an MP3 player, defendant entered the room and told him that he knew Crespo was involved in a shooting and wanted to ask him some questions. When defendant left the room for a few moments, Crespo activated the "Record" function on his player. Defendant returned and, again without giving *Miranda* warnings, interrogated Crespo for about 80 minutes. Crespo recorded the entire interrogation, during which he answered defendant's questions.

Crespo further testified that, after the interrogation, defendant allowed Crespo's mother and aunt into the room. Crespo told them that the police wanted him to make a written statement, and then said to his mother, "[H]e wants to know why I shot him."

The following day, defendant filed a Detective Division Form DD5, which was admitted into evidence in the perjury trial. Defendant stated in the DD5 that he had tried to interview Crespo alone, but that Crespo would not make any statements or answer any questions. Defendant added that he had then allowed Crespo's mother and aunt to join him in the room. Thereafter, Crespo's

mother answered a cell phone call, and while she told the caller that the police wanted to know Crespo's side of the story, Crespo said to her, "[T]hey want to know why I shot him." In addition, defendant wrote that he then searched Crespo and found a newspaper clipping about the shooting in his pocket.

In March 2007, defendant falsely testified at a pretrial hearing about, among other things, the admissibility of Crespo's statement to his mother that defendant had reported on the DD5. An excerpt of the hearing testimony was introduced into evidence at the perjury trial. Defendant falsely testified that, before he brought Crespo's relatives into the room, he had not questioned him, and that he "wouldn't question him without Mirandizing him."

In April 2007, defendant testified at Crespo's trial about Crespo's statement to his mother. On direct examination, defendant again falsely testified that he had not read Crespo his *Miranda* rights because he had not interrogated him, and that Crespo had not said anything about the crime before his statement to his mother.

On cross-examination, defendant repeatedly gave false answers in response to defense counsel's questions. Among other things, defendant testified that he was alone in the interview room with Crespo for about "ten minutes or so, if that." He

denied that he was in the room with Crespo for more than an hour before he allowed Crespo's mother and aunt to join them, and denied that he asked Crespo any questions during that time.

Using the transcript of Crespo's recording of his interrogation, defense counsel confronted defendant with specific questions he had asked Crespo and statements he had made to him; defendant denied asking any of the questions or making any of the statements. For example, defendant denied telling Crespo the following: that if Crespo was "straight up" with defendant he would end up "beating [the] case"; that if Crespo did not tell defendant where the gun he used was, he would "lean on" Crespo and keep him from seeing a judge for three days; and that if Crespo did not give a written statement he would not be able to talk. Defendant denied asking Crespo specific questions about the shooting and the whereabouts of the gun Crespo had used. He also denied that he tried to dissuade Crespo from getting a lawyer and that he told Crespo "the lawyer would not let him open his mouth because in a court of law they twist things around."

Following the cross-examination, Crespo's attorney had the transcript marked for identification and informed the court of its origins. The court advised defendant that he might want to consult with an attorney. Defendant asked the court, "When I speak to my attorney, your Honor, do I get to keep a copy of this

fabricated transcript?" The case was adjourned, and when it resumed, the People changed their plea offer to Crespo from 15 to 7 years. Crespo accepted the more favorable offer and pleaded guilty to second-degree criminal possession of a weapon.

Thereafter, defendant was indicted on 12 counts of first-degree perjury. Eleven of the counts charged that defendant perjured himself by falsely denying that he had asked a specific question or made a specific statement during the interrogation. The twelfth charged that defendant falsely denied that he had interrogated Crespo before bringing in his relatives.

After a nonjury trial, defendant was convicted of first-degree perjury for answering "no" to the following questions during cross-examination:

- "Now, you . . . said on direct examination that you never asked him any questions when you were alone with him in the room on December 31, 2005, isn't that true?" (Answer: "That's correct. He wasn't questioned.") (second count)

- "Did you ever ask him, 'where did you get the gun?'" (Answer: "No, Sir.") (third count)

- "Did you ever ask him 'what did you do with the gun?'" (Answer: "No, Sir.") (fourth count)

Defendant was convicted of third-degree perjury on another count, and acquitted of the other eight counts of perjury.

Contrary to defendant's contention, the evidence was legally

sufficient to establish his intent to commit perjury (*see People v Acosta*, 80 NY2d 665, 672 [1993]). The length and content of the interrogation, along with surrounding circumstances, would have made it memorable to defendant. Accordingly, the evidence established that defendant knowingly and intentionally gave false testimony, and the court properly rejected his claim that he had forgotten about the interrogation because of the passage of time and other factors. There is no reason to disturb the court's credibility determinations.

Defendant further contends that even if he intended to commit perjury, he did not commit first-degree perjury, a class D felony, because the three false statements for which he was convicted were not "material to the action, proceeding or matter in which [they were] made" (Penal Law § 210.15). Instead, defendant argues, the convictions for the three statements should be reduced to the lesser included offense of perjury in the third degree, a class A misdemeanor, of which materiality is not an element (Penal Law § 210.05).

The materiality of perjured testimony is a question of fact (*People v Davis*, 53 NY2d 164, 170 [1981]). To be material, the testimony "need not prove directly the fact in issue"; it suffices if the testimony is "circumstantially material or tends to support and give credit to the witness in respect to the main

fact" (*id.* at 170-171, quoting *Wood v People*, 59 NY 117, 123 [1874]). Thus, testimony is material if it "reflect[s] on the matter under consideration" (*id.* at 171, quoting *People v Stanard*, 42 NY2d 74, 80 [1977]), even if only as to the witness's credibility (*id.*).

Defendant's perjured testimony that he did not question Crespo when they were alone was material to the criminal trial. His denial of the lengthy undisclosed interrogation preceding Crespo's allegedly spontaneous statement went to his credibility on matters that could have affected the jury's verdict, had the trial been completed. The jury was entitled to a truthful account of the events leading up to the statement. The false testimony gave Crespo's attorney the opportunity to raise issues concerning whether the statement was actually made, and whether it should be disregarded by the jury as involuntary. The prosecution's decision to offer Crespo a more favorable plea offer immediately after defendant's cross-examination demonstrates its material impact on the trial.

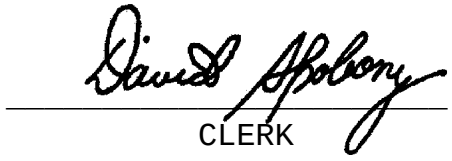
However, contrary to the trial court's determination, defendant's perjured statements that he did not ask Crespo where he got his gun and did not ask what he did with it were not material, because they are too narrow in scope and unrelated to the question of whether Crespo made a voluntary statement to his

mother. Accordingly, the convictions with respect to those statements are reduced to perjury in the third degree.

We find the sentence excessive to the extent indicated.

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

ENTERED: AUGUST 17, 2010



CLERK

Tom, J.P., Sweeny, Catterson, McGuire, Román, JJ.

3157 Keisha Thomas, Index 116922/05
Plaintiff-Respondent, 590045/08

-against-

Boston Properties, et al.,
Defendants-Appellants,

Allied Partners, et al.,
Defendants.

[And a Third-Party Action]

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for Boston Properties, appellant.

Hack, Piro, O'Day, Merklinger, Wallace & McKenna, P.A., New York (Rebecca K. Megna of counsel), for Citigroup Center Condominium, appellant.

Viscardi, Basner & Bigelow, P.C., Jamaica (Norman Basner of counsel), for respondent.

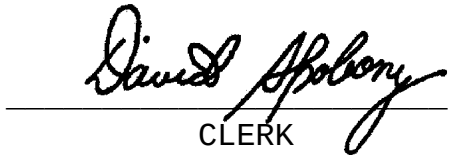
Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered February 11, 2010, which denied the motions by defendants Boston Properties and Citigroup Center for summary judgment, unanimously reversed, on the law, without costs, the motions granted, and the complaint dismissed as against those defendants. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges she slipped on ice that formed on the floor of a revolving door during the evening rush hour. The moving defendants established their prima facie entitlement to summary judgment as a matter of law by establishing they had no notice of the defect alleged to have caused plaintiff's fall, submitting evidence that they never received complaints with respect to accumulation of snow or ice in the area where the accident occurred, that there were no reports regarding burned out light bulbs, and that the area where plaintiff fell was well lit. In opposition, plaintiff relied on climatological data showing that the temperature never exceeded 17 degrees between 7:00 A.M. and 7:00 P.M. on the date of the accident, and on the 12-hour passage of time between the last snowfall and the time she fell to raise an inference of constructive notice. However, plaintiff conceded that she did not see the ice, and her evidence is equally susceptible to the interpretation that it formed as a result of moisture tracked in by pedestrians. It is not alleged that these defendants created the allegedly hazardous condition, and the law imposes no obligation to take continuous remedial action to remove moisture accumulating as a result of pedestrian traffic (*see Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 467 [2009]). Plaintiff thus failed to demonstrate that the

condition existed for a sufficient length of time preceding her accident to afford defendants' employees sufficient opportunity to discover and remedy it.

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

ENTERED: AUGUST 17, 2010



CLERK

Tom, J.P., Sweeny, Catterson, McGuire, Román, JJ.

3158-
3158A Errika Arrington, Index 305343/08
Plaintiff-Respondent,

-against-

Bronx Jean Company, Inc.,
also known as, Jeans Plus, Inc.,
Defendant-Appellant,

John Doe, etc.,
Defendant.

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Carol R. Finocchio, New York (Lawrence B. Goodman of counsel), for appellant.

Laurence M. Savedoff, P.L.L.C., Bronx (Laurence M. Savedoff of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 1, 2009, which, to the extent appealed from, adhered, upon reargument, to so much of a prior order granting plaintiff's cross motion for a default judgment on her cause of action for negligence, unanimously reversed, on the facts, without costs, the cross motion denied and default judgment vacated. Order, same court and Justice, entered December 23, 2009, which denied the corporate defendant's motion to vacate the note of issue and strike the complaint for failure to comply with discovery, unanimously modified, on the law, the

motion granted to the extent of vacating the note of issue, and otherwise affirmed, without costs.

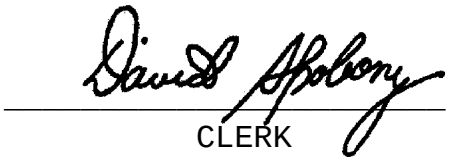
Although the corporate defendant served its motion to dismiss approximately 22 days late, the delay was minimal, given that defense counsel received the complaint from defendant's insurance carrier only six days prior to serving the motion, and there was no prejudice to plaintiff (*see Siwek v Phillips*, 71 AD3d 469 [2010] [default not warranted where counsel for defendant did not receive complaint from carrier until after time to serve answer had expired, delay was minimal and plaintiff claimed no prejudice]; *Rodriguez v Dixie N.Y.C., Inc.*, 26 AD3d 199 [2006]] [insurance carrier's delay in assigning counsel may constitute reasonable excuse for default in answering complaint]). Notably, five days prior to the statutory deadline for service of the answer, plaintiff's counsel fowarded a copy of the summons and complaint and an affidavit of service to defendant's insurance carrier via fax with a note requesting that an answer be served "as soon as possible." Defense counsel's understanding that he had additional time to answer was not unreasonable, as the request hardly alerted defense counsel that plaintiff's counsel was insisting on service of an answer by the imminent deadline. Moreover, service of the motion to dismiss in lieu of an answer shortly thereafter, on August 13, evidenced an

intent to defend. Although in opposing the motion for a default judgment defendant did not provide an affidavit of merit, none is required where no default order or judgment has been entered (*Lamar v City of New York*, 68 AD3d 449 [2009]). Under these circumstances, and in view of the strong public policy favoring resolution of cases on their merits, the court improvidently exercised its discretion in granting a default judgment.

In view of the foregoing, the note of issue scheduling an assessment of damages, filed in connection with the negligence cause of action, is vacated.

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

ENTERED: AUGUST 17, 2010



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Andrias, J.P., Saxe, Friedman, Nardelli, Acosta, JJ.

3194 Yuppie Puppy Pet Products, Inc., et al., Plaintiffs-Respondents, Index 601450/08

-against-

Street Smart Realty, LLC, et al., Defendants-Respondents,

Petra Mortgage Capital Corp., et al., Proposed Intervenors-Appellants.

Winston & Strawn LLC, New York (Christopher J. Paolella of counsel), for appellants.

Alan M. Goldston, Scarsdale, for Yuppie Puppie respondents.

Abraham Borenstein & Associates, P.C., New York (Abraham Borenstein of counsel), for Street Smart Realty, LLC and E & S Development and Properties, LLC, respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 4, 2008, reversed, on the law, costs awarded to appellant, and Petra's motion to intervene in the proceeding should be granted.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
David Friedman
Eugene Nardelli
Rolando Acosta, JJ.

3194
Index 601450/08

_____x

Yuppie Puppy Pet Products, Inc.,
et al.,
Plaintiffs-Respondents,

-against-

Street Smart Realty, LLC, et al.,
Defendants-Respondents,

Petra Mortgage Capital Corp., et al.,
Proposed Intervenors-Appellants.

_____x

Proposed intervenors appeal from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered December 4, 2008, which denied their motion for permission to intervene in the action.

Winston & Strawn LLC, New York (Christopher J. Paolella, Joseph DiBenedetto and Christopher Costello of counsel), for appellants.

Alan M. Goldston, Scarsdale, for Yuppie Puppy respondents.

Abraham Borenstein & Associates, P.C., New York (Abraham Borenstein and Massimo D'Angelo of counsel), for Street Smart Realty, LLC and E & S Development and Properties, LLC, respondents.

ACOSTA, J.

This appeal calls upon us to consider whether a mortgagee can be permitted to intervene in an action where the named defendant, the mortgagor, has defaulted. On the facts of this case, we hold that the motion court improvidently exercised its discretion in denying intervention and that permission to intervene should be granted.

In the latter half of 2007, defendant Street Smart Realty, LLC (Street Smart) purchased property located at 274-276 West 86th Street in the borough of Manhattan (the premises). The premises had been owned by the family of nonparty Joseph Sporn, president of the plaintiffs, Yuppie Puppy Pet Products, Inc. and Yuppie Puppy Pet Care, Inc., (collectively, Yuppie Puppy), which leased the first floor and basement of the premises for their business. Street Smart financed the purchase with a mortgage from appellants and proposed intervenors Petra Mortgage Capital Corp., LLC, Petra Fund REIT Corp. and Petra CRE CDO 2007-1, Ltd. (collectively, Petra) in the amount of $20,853,750. As part of the mortgage and as is relevant to this appeal, Street Smart assigned to Petra, inter alia, the rents from the premises as security for the payment of the mortgage.

Yuppie Puppy and Street Smart then entered into a series of lease agreements dated March 29, 2007 whereby the business would relocate from 274 to 276 West 86th Street. When this plan proved untenable, Street Smart and Yuppie Puppy entered into an amended lease surrender agreement in or about December of 2007. Pursuant to the amended agreement, Street Smart was to pay Yuppie Puppy $6,000,000 to vacate the premises altogether.

Following the payment to Yuppie Puppy of approximately $1.1 million, Yuppie Puppy, by letter dated April 30, 2008, sought to hold Street Smart in default of the amended agreement by claiming that the remaining $4,900,000 due on April 30, 2008 had not been delivered.

On or about May 14, 2008, Yuppie Puppy commenced the instant action, alleging that Street Smart had breached the agreement by failing to deliver the remaining balance of $4,900,000. Yuppie Puppy sought a retroactive lien on the premises for the remaining $4.9 million dating back to the execution of the lease surrender agreements in December, 2007 and an order declaring that, as permitted by the agreement, it could continue to occupy the

premises rent-free until the $4.9 million was paid.[1]

Following service of the complaint, Street Smart and Yuppie Puppy entered into settlement negotiations. During these negotiations, Yuppie Puppy submitted an ex parte order to have Street Smart declared in default, as it had not entered any appearance, at all, in the action. Street Smart apparently failed to obtain from Yuppie Puppy a stipulation extending their time to appear in the action. The default was granted on September 24, 2008 and an inquest was ordered on that same date (Sherry Klein Heitler, J.).

During this time, Street Smart defaulted on the mortgage. As a result, Petra prepared foreclosure proceedings on the premises. Petra learned of Street Smart's default in the litigation, but was advised by Street Smart that it was preparing a motion to vacate the default judgment. Petra then contacted Yuppie Puppy's counsel, advising him that it would seek to intervene in the case unless a stipulation was signed agreeing that any issue determined in this action would not be binding on any future action involving Petra and the premises. Discussions

[1]The amended lease surrender agreement contains a clause in section 3(b) which apparently permits Yuppie Puppy to remain in the premises, without charge, until 5:00 p.m. on the surrender date. However, the numerous subsequent amendments to the amended lease agreements have clouded the precise surrender date.

concerning the language of the stipulation ensued, with Petra sending Yuppie Puppy a draft stipulation on November 6, 2008. However, on November 20, 2008, Yuppie Puppy broke off negotiations with Petra.

Petra prepared an order to show cause for intervention in the action pursuant to CPLR § 1012(a)(2) and (3) or 1013, submitting it to the court on December 1, 2008. The order to show cause was not signed by the court. All parties then appeared at the inquest hearing on December 2, 2008.

At the inquest, the court refused to allow Petra to intervene in the proceeding, concluding that as the mortgage lender, Petra had no interest in the outcome of the action. In so doing, the court stated that as an assignee, Petra's rights and duties are between it and Street Smart, as it was not in privity with Yuppie Puppy. The court stated that Petra should proceed with its foreclosure proceeding against Street Smart. By order entered December 4, 2008, the Supreme Court denied Petra's motion to intervene. Petra filed a notice of appeal from that order.

Subsequently, the court entered a judgment on August 17, 2009, in Yuppie Puppy's favor which permitted it to continue to occupy the premises, without charge, until Street Smart was able to pay $4,900,000 owed to it under the agreements.

Petra then commenced its foreclosure action. By order dated October 9, 2009 (Milton Tingling, J.), Petra was granted summary judgment against all defendants, including Street Smart and the property's other tenants except Yuppie Puppy.

As a threshold matter, the interests of justice and judicial economy leads this court, *sua sponte,* to deem Petra's notice of appeal a motion for leave to appeal from the order, and so deemed, grant said leave (*see e.g. Winn v Tvedt*, 67 AD3d 569 [2009]).[2]

CPLR 1012(a), specifically, subdivisions 2 and 3, provides that upon timely motion, any person shall be permitted to intervene in an action when "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment" (subdivision 2) or "[w]hen the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may

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[2]Defendant-Respondent Street Smart has submitted a lengthy brief on this appeal arguing that the motion court should have permitted it to appear at the inquest, cross-examine witnesses, give testimony, and offer proof in mitigation of damages. However, there is no basis for this court to consider Street Smart's arguments on appeal. The judgment was entered on Street Smart's default and it never filed a motion to vacate the default judgment before the motion court. Indeed, there is no indication in the record that it even filed a notice of appearance, leading the court to note that it did not want Street Smart on the record at the inquest "because, really, in a sense, you're not here."

be affected adversely by the judgment" (subdivision 3). CPLR 1013 provides that upon timely motion, a court may, in its discretion, permit intervention when, inter alia, the person's claim or defense and the main action have a common question of law or fact, provided the intervention does not unduly delay determination of the action or prejudice the rights of any party.

Consideration of any motion to intervene begins with the question of whether the motion is timely. In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party (*see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 522 [1996] and *Poblocki v Todoro*, 55 AD3d 1346 [2008]).

Here, there was no delay in Petra's motion to intervene in the case and no prejudice to Yuppie Puppy as a result of the motion. The record makes clear that Petra, as Street Smart did before it, sought in good faith to resolve its issues with Yuppie Puppy before being forced to seek intervention in the action. As Petra sought to intervene a mere two weeks after the negotiations to obviate the motion to intervene ended, it cannot be said the motion was untimely. Neither can the motion be held to be untimely if measured by Street Smart's default; Petra sought to

intervene three months after the default was entered and inquest directed in September, 2008 (*see Moon v Moon*, 6 AD3d 796 [2004] [five month delay in seeking intervention not prejudicial]). Moreover, Yuppie Puppy was not prejudiced by the motion since it had notice of Petra's intent to file the motion if their negotiations failed.

Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action (*see e.g. Nicholson v KeySpan Corp.*, 14 Misc 3d 1236[A] [Sup Ct Suffolk County 2007]). Distinctions between intervention as of right and discretionary intervention are no longer sharply applied (*see Siegel*, NY Practice, § 178 at 307 [4th ed]; *see also Berkoski v Board of Trustees of Incorporated Village of Southampton*, 67 AD3d 840, 843 [2009]).

As the holder of the mortgage on the underlying premises, it cannot be seriously disputed that Petra has a real, substantial interest in the outcome of this litigation (*see* e.g. *Wells Fargo Bank, NA, v McLean*, 70 AD3d 676 [2010]). Additionally, it is clear that Petra's interests were not adequately represented by Street Smart, the defaulting defendant (*see Greenpoint Sav. Bank v McMann Enters.*, 214 A.D.2d 647 [1995]).

Moreover, the facts plainly warrant intervention under both CPLR 1012(a)(2) and (3). The resulting judgment following the default and inquest permitted Yuppie Puppy to remain as a tenant of the premises, rent free, until Street Smart was able to pay the amounts due under the agreements. The basis for this part of the judgment, which substantially impairs the interest of Petra in receiving the rents of the premises as a guarantee of the mortgage, is, at best, unclear from the record (*cf. Lowentheil v O'Hara*, 30 AD3d 360 [2006] [37.5% shareholder in the corporate defendant properly granted intervenor status in view of her substantial economic interest in the outcome of plaintiffs' action to recover on disputed promissory notes]).

Furthermore, Yuppie Puppy has aggressively used the judgment in an effort to preclude Petra from obtaining any relief in its separate, pending, foreclosure action. In its recently filed brief opposing summary judgment in the foreclosure proceeding, of which we take judicial notice as a undisputed court record or file (*see e.g. RGH Liquidating Trust v Deloitte & Touche, LLP*, 71 AD3d 198, 207 [2009]), and during oral arguments on this appeal on June 9, 2010, Yuppie Puppy argued that the judgment in this case is a complete defense to foreclosure, as the monies which

remain owing to it are ostensibly part of the negotiated purchase price of the property, superior to Petra's mortgage, and thus, cannot be foreclosed.

Yuppie Puppy cannot be permitted to have it both ways, arguing on the one hand that Petra cannot be permitted to intervene in this action to defend its interest and then arguing on the other that the judgment which Petra was not permitted to defend itself against is to be given preclusive effect in the foreclosure proceeding. It is axiomatic that the potentially binding nature of the judgment on the proposed intervenor is the most heavily weighted factor in determining whether to permit intervention (*see e.g. Vantage Petroleum v Board of Assessment Review of Town of Babylon*, 61 NY2d 695, 698 [1984] [whether a movant for intervention "will be bound by the judgment within the meaning of [CPLR 1012 (a) (2)] is determined by its res judicata effect"]).[3]

[3]In an order of the Supreme Court, New York County entered April 26, 2010 (Milton A. Tingling, J.), in an action by the receiver of rent for the property against Yuppie Puppy, the court granted the receiver's motion to direct Yuppie Puppy to pay use and occupancy. The default judgment was found to have no preclusive effect against the receiver, the receiver was granted use and occupancy from June 2008 until the present time, and whatever "lien" Yuppie Puppy possesses was found to be subordinate to Petra's mortgage. However, the fact that the receiver was ultimately successful does not impact Petra's right to intervene in this action.

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered December 4, 2008, which denied Petra's motion to intervene in the action, should be reversed, on the law, with costs, and the motion should be granted.

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

ENTERED: AUGUST 17, 2010

CLERK