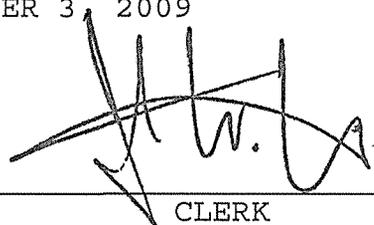


proceedings up until the imposition of sentence are excludable" pursuant to CPL 30.30(4)(a) (*People v Boyd*, 189 AD2d 433, 437 [1993], *lv denied* 82 NY2d 714 [1993]). Furthermore, the delay was reasonable. With respect to the period up to the January 17 verdict in the homicide trial, it would have been impractical for defendant to be on trial in two separate cases at the same time, and with respect to the period from the verdict to February 3, that was "a reasonable period of delay *resulting* from . . . trial of other charges" [emphasis added] within the meaning of CPL 30.30 (4)(a) (see *People v Osorio*, 39 AD3d 400 [2007], *lv denied* 9 NY3d 925 [2007]; *People v Fleming*, 13 AD3d 102 [2004], *lv denied* 5 NY3d 788 [2005])).

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

ENTERED: DECEMBER 3, 2009



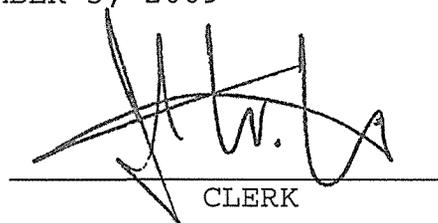
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significance. Accordingly, we conclude that the lineup was not unduly suggestive (see *People v Carroll*, 303 AD2d 200 [2003], lv denied 100 NY2d 560 [2003]). Moreover, the witness knew defendant by his nickname, and had identified him from a proper photo array two days before the lineup. To the extent that an identification procedure may be unconstitutionally suggestive even when the suggestiveness is the product of pure happenstance (see *Raheem v Kelly*, 257 F3d 122, 137 [2d Cir 2001], cert denied 534 US 1118 [2002]), we find that this identification was sufficiently reliable. In any event, we conclude that any error in the admission of this witness's lineup or in-court identifications was harmless in view of the overwhelming evidence of defendant's guilt (see *People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 3, 2009



CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1625 Donald Cohen,
Plaintiff-Appellant,

Index 113533/07

-against-

First Unum Life Insurance Company,
Defendant-Respondent.

Yoeli & Gottlieb LLP, New York (Michael Yoeli of counsel), for
appellant.

Begos Horgan & Brown LLP, Bronxville (Patrick W. Begos of
counsel), for respondent.

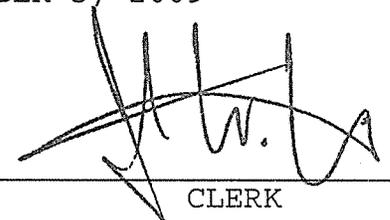
Order, Supreme Court, New York County (Joan A. Madden, J.),
entered on or about July 17, 2008, which granted defendant's
motion for summary judgment dismissing the complaint and denied
plaintiff's cross motion to dismiss defendant's defenses,
unanimously affirmed, with costs.

Plaintiff's efforts to create an ambiguity in the insurance
policy are unavailing (see *Moore v Kopel*, 237 AD2d 124, 125
[1997]). The term "disability period" as used in the policy is
reasonably susceptible of only one meaning. An unsupported
hearsay statement attributed by plaintiff to a purported agent of
defendant neither changes the policy's terms nor renders them
ambiguous (see *Kass v Kass*, 91 NY2d 554, 566 [1998]).

We have considered and rejected plaintiff's remaining contention.

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

ENTERED: DECEMBER 3, 2009



CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1626 In re Jahad R.,

A Person Alleged to be
in Need of Supervision,
Appellant.

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Presentment Agency

Tamara Steckler, The Legal Aid Society, New York (Judith Harris
of counsel), for appellant.

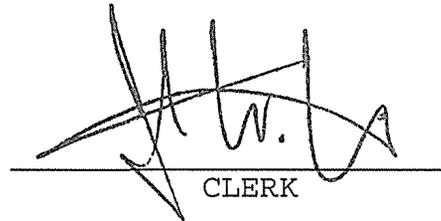
Order of disposition, Family Court, Bronx County (Alma
Cordova, J.), entered on or about November 12, 2008, which, upon
a fact-finding determination that appellant failed to keep his
curfew on a regular basis, adjudicated appellant a person in need
of supervision and placed him in the custody of the Commissioner
of Social Services for 12 months, unanimously reversed, on the
law, without costs, the fact-finding determination vacated and
the petition dismissed.

In its report accompanying the petition to have appellant
adjudicated to be a person in need of supervision, the
Administration for Children's Services (ACS) states that
"diligent efforts" have been made, that services have been
"exhausted," that appellant is "resistant to services," and that
there is "no substantial likelihood that the family will benefit
from diversion services." However, ACS failed to "clearly
document[]" any diligent attempts it made to provide appropriate
services to appellant and his family before it was determined

that it was substantially unlikely they would benefit from further attempts, as required by Family Court Act § 735. The report does not identify the services that allegedly were offered. The failure to comply with this statutory requirement renders the petition jurisdictionally defective (*Matter of Leslie H. v Carol M.D.*, 47 AD3d 716 [2008]).

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

ENTERED: DECEMBER 3, 2009



CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1629-

Ind. 2579/04

1629A The People of the State of New York,
Respondent,

-against-

Louis Koonce,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and O'Melveny & Myers LLP, New York (Abby C. Johnston of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 20, 2005, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 10 years, and order, same court and Justice, entered on or about January 8, 2009, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

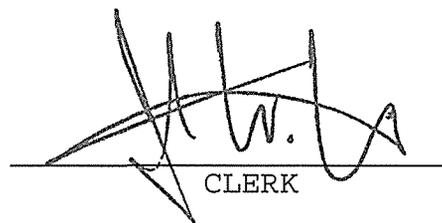
The court properly denied defendant's motion to vacate the judgment, made on the ground of ineffective assistance of counsel. The submissions on the motion, taken together with the trial record, establish that defendant received effective assistance under both the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]). Counsel reasonably declined to

use recorded conversations between the victim and defendant's cousin for impeachment purposes since aspects of the tape were damaging to defendant and would have opened the door to additional evidence of defendant's guilt (see *People v Alicea*, 229 AD2d 80, 89 [1997], lv denied 90 NY2d 890 [1997]). Counsel could have reasonably concluded that the disadvantages of using this tape outweighed its impeachment value. Furthermore, counsel was not obligated to make the same choice as the attorney who represented defendant at his first trial, which ended in a hung jury; the second attorney could have reasonably concluded that a different tactic was more likely to lead to an acquittal. In any event, even if counsel should have used the tape, defendant has not shown that counsel's failure to do so affected the outcome.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 3, 2009

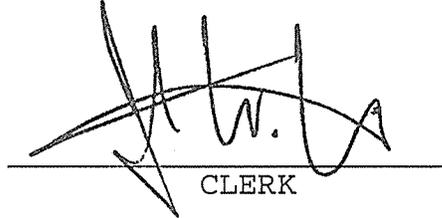


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(see *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252-253) *Rieger v 303 E. 37 Owners Corp.*, 49 AD3d 347 [2008]), or that plaintiff himself was negligent in attempting to descend the ladder with both hands full of materials and tools (see *Aponte v City of New York*, 55 AD3d 485 [2008]). We have considered defendants' other arguments and find them to be unavailing.

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

ENTERED: DECEMBER 3, 2009



CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1632-
1632A In re Shamel R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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

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

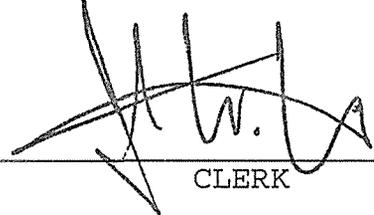
Order of disposition, Family Court, New York County (Susan
R. Larabee, J.), entered on or about April 30, 2009, which
adjudicated appellant a juvenile delinquent upon a fact-finding
determination that he committed acts which, if committed by an
adult, would constitute the crimes of assault in the second
degree (two counts), obstructing governmental administration in
the second degree, resisting arrest and menacing in the third
degree (two counts), and ordered restrictive placement with the
Office of Children and Family Services for a period of three
years, and order of disposition, same court (Jane Pearl, J.),
entered on or about April 30, 2009, which revoked appellant's
probation and placed him with OCFS for a period of 18 months,
unanimously affirmed, without costs.

The court properly exercised its discretion in ordering
restrictive placement, which included denial of credit for time

served, an initial nine-month placement in a secure facility, followed by a minimum placement of one year in a residential facility. Given the seriousness of the appellant's repeated violent behavior both in and out of custody, his violent conduct only four months after being placed on probation, his general lack of cooperation, and a psychologist's unfavorable report, the placement was the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection (see *Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: DECEMBER 3, 2009



CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1633 Douglas Schultz, et al., Index 117195/07
Plaintiffs-Appellants,

-against-

Laurence Gershman, et al.,
Defendants-Respondents,

Bonnie Gershman,
Defendant.

Sadis & Goldberg, LLP, New York (Douglas R. Hirsch of counsel),
for appellants.

Thomas M. Mullaney, New York, for Laurence Gershman, respondent.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White
Plains (Brian T. Belowich of counsel), for Charles Omphalius,
Michael Caprio, John I. Keay, Jr. and Kevin Mannix, respondents.

Order, Supreme Court, New York County (Richard B. Lowe III,
J.), entered October 10, 2008, which, insofar as appealed from as
limited by the brief, granted defendant Laurence Gershman's
motion to dismiss the cause of action for breach of contract as
against him and granted the motion of defendants Omphalius,
Caprio, Keay and Mannix to dismiss the cause of action for unjust
enrichment as against them, unanimously modified, on the law, to
deny Gershman's motion, and otherwise affirmed, with costs
against Laurence Gershman in favor of plaintiffs.

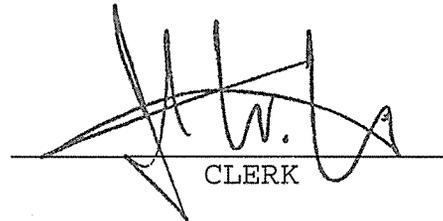
The court should not have considered the Bloomberg Finance
L.P. report demonstrating the trading history of the subject
stock, since it was improperly raised for the first time in

Gershman's reply (*see McNair v Lee*, 24 AD3d 159 [2005]). In any event, the report does not conclusively establish a defense to plaintiffs' allegations (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). While it demonstrates that the stock was trading in December 2006, it does not conclusively establish that a "liquid, public market" for the shares had developed as that term was defined in the parties' agreements.

Plaintiffs' unjust enrichment cause of action is barred by the existence of the contract between the parties (*see Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [2004]).

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

ENTERED: DECEMBER 3, 2009



CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1635 In re Enrique V., and Another,

Children Under the Age of
Eighteen Years, etc.,

Vanessa F.,
Respondent,

Jose U.V.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Harris of counsel), Law Guardian.

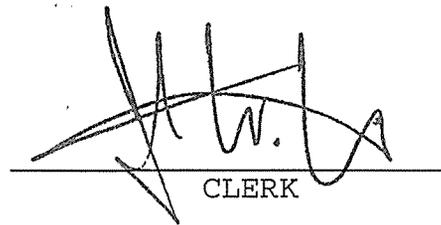
Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 4, 2008, which, upon a fact-finding determination that respondent father neglected his children, Enrique V. and Stephanie V., released the children to their mother's custody with 12 months of supervision by petitioner Administration for Children's Services, unanimously affirmed, without costs.

The finding of neglect against respondent was supported by a preponderance of the evidence, including testimony that he committed acts of domestic violence against the children's mother in the children's presence (see Family Court Act § 1012[f][i][B]).

No expert or medical testimony is required to show that the violent acts exposed the children to an imminent risk of harm (*Matter of Athena M.*, 253 AD2d 669 [1998]). There is no basis to disturb the court's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [2009]).

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

ENTERED: DECEMBER 3, 2009



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performance of his plea bargain, which contained no provision for PRS, in that he had performed his part of the bargain by serving his sentence. Defendant did not, and does not presently, seek to withdraw his plea.

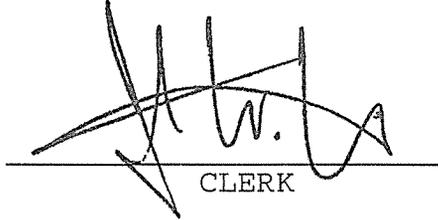
Without the prosecutor's consent (see Penal Law § 70.85), omission of PRS would render defendant's sentence illegal. To the extent that the original sentence promise was a five-year prison term with no mention of PRS, that promise was unauthorized. Accordingly, defendant is not entitled to specific performance of an illegal plea bargain (see *People v Cooney*, 290 AD2d 727, 728 [2002], lv denied 97 NY2d 752 [2002]). *People v Jones* (75 AD2d 734 [1980]), cited by defendant, is not to the contrary because it does not involve an unlawful sentence promise. In any event, simply serving his sentence was not the type of additional "performance," going beyond giving up the right to a trial, that would entitle defendant to specific performance as a matter of fairness (see *People v Danny G.*, 61 NY2d 169 [1984] [testifying for prosecution]; *People v McConnell*, 49 NY2d 340 [1980] [same]).

We have considered and rejected defendant's procedural arguments regarding the specific performance issue. Defendant's remaining challenges to his resentencing are similar to arguments

rejected by this Court in *People v Hernandez* (59 AD3d 180 [2009],
lv granted 12 NY3d 817 [2009]).

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

ENTERED: DECEMBER 3, 2009



CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1637 Haydee Garcia-Martinez, Index No. 101469/05
Plaintiff-Appellant,

-against-

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

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

Dinkes & Schwitzer, P.C., New York (Naomi J. Skura of counsel),
for appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for
respondents.

Order, Supreme Court, New York County (Donna M. Mills, J.),
entered on or about June 18, 2008, to the extent it granted the
motion of defendants New York City Transit Authority and Manhattan
and Bronx Surface Transit Operating Authority for summary judgment
dismissing the complaint as against them, unanimously affirmed,
without costs. Appeal from that portion of the order that denied
defendant 1873 Amsterdam Realty Corp.'s motion for summary
judgment dismissing the complaint as against it unanimously
dismissed, without costs, for failure to perfect in accordance
with this Court's order entered June 18, 2009 (M-1928).

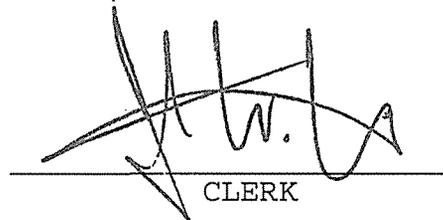
Defendants established prima facie, through plaintiff's
deposition testimony, that they did not breach their duty as
common carriers to provide a safe place for bus passengers to

disembark (see *Malawer v New York City Tr. Auth.*, 18 AD3d 293, 294-295 [2005], *affd* 6 NY3d 800 [2006]; *Blye v Manhattan & Bronx Surface Tr. Operating Auth.*, 124 AD2d 106, 109 [1987], *affd* 72 NY2d 888 [1988]). Plaintiff testified that she was discharged at a designated bus stop, directly in front of a cleared path, which had a patch of ice on it, leading to the sidewalk, and that she had safely exited the bus before she fell on the sidewalk.

Plaintiff's affidavit in opposition, stating that the entire path to the sidewalk was covered with ice, which therefore was impossible to avoid, contradicted her deposition testimony describing a narrower patch of ice in the middle of the three-foot-wide pathway, and thus created only a feigned issue of fact insufficient to defeat defendants' motion (see *Pippo v City of New York*, 43 AD3d 303, 304 [2007]; *Telfeyan v City of New York*, 40 AD3d 372 [2007]).

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

ENTERED: DECEMBER 3, 2009


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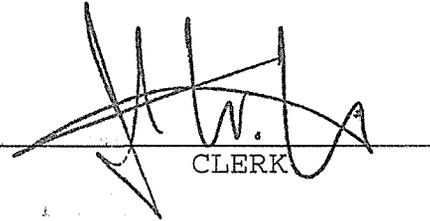
(*Batson v Kentucky*, 476 US 79 [1986]; *People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]). The record supports the court's finding that the race-neutral reasons provided by defense counsel for the peremptory challenge at issue were pretextual, and this finding is entitled to great deference (see *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]). Counsel's failure to question the panelist was a significant indicator of pretext under the circumstances (see e.g. *People v Kidkarndee*, 41 AD3d 247 [2007], *lv denied* 9 NY3d 923 [2007]). Defendant did not preserve his contention that the court failed to follow the required three-step procedure (see *People v Richardson*, 100 NY2d 847, 853 [2003]), and we decline to review in the interest of justice. As an alternative holding, we reject the claim. In particular, it was permissible for the court to find that defense counsel's race-neutral reasons were pretextual without hearing from the prosecutor (see *People v Payne*, 88 NY2d 172, 184 [1996]).

The People made a proper showing under *Waller v Georgia* (467 US 39 [1984]) to justify closure of the courtroom during the testimony of an undercover officer. Although the officer was no longer working in the area of defendant's arrest, testimony in an open courtroom still posed a serious risk to his safety,

particularly because of the large number of cases he had pending that were likely to be calendared at the same courthouse.

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

ENTERED: DECEMBER 3, 2009



CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1640 Kelvin D. Anderson,
Plaintiff-Appellant,

Index 113140/04

-against-

Young & Rubicam,
Defendant-Respondent.

Noah A. Kinigstein, New York, for appellant.

Davis & Gilbert LLP, New York (Maureen McLoughlin of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered September 29, 2008, which, after a jury trial, denied plaintiff's motion for judgment notwithstanding the verdict or a new trial, unanimously affirmed, without costs.

The verdict that plaintiff failed to prove a prima facie case of age discrimination and that the reasons defendant gave for his termination were not pretextual was based on a fair interpretation of the evidence (*see Jordan v Bates Adv. Holdings, Inc.*, 46 AD3d 440 [2007], *lv denied* 11 NY3d 701 [2008]). The jury's determination, based largely on credibility, is amply supported by the evidence, including plaintiff's retraction of his allegation about his supervisors' remarks, his "correction" of a deposition errata sheet to insert the word "older" in his recitation of one of those remarks, his admission that he had been given a negative job performance evaluation, unanimous

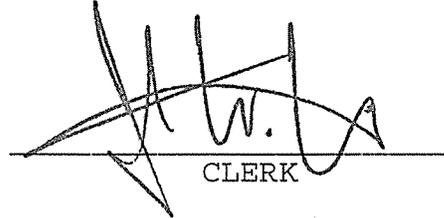
testimony from defendant's personnel as to both defendant's need to cut costs and plaintiff's professional shortcomings, undisputed testimony that plaintiff was hired, promoted and given a raise after the age of 50, evidence that a substantially older employee was not terminated, and undisputed evidence that two younger persons hired after plaintiff's termination as regular employees were paid at a combined lower salary than that of plaintiff.

As to the jury charge, contrary to plaintiff's contention, there is no meaningful distinction between a "determining" factor, as given in the pattern instruction, and a "determinative" factor, as the trial court charged. "Except for" and "but for," both used by the court in defining "determinative," are synonymous; plaintiff himself requested the use of "except for" language, and case law endorses the "but for" language (*see Gross v FBL Fin. Servs., Inc.*, _US_, 129 S Ct 2343, 2350-2351 [2009]; *Ioele v Alden Press*, 145 AD2d 29, 36-37 [1989]). Giving the *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) burden-shifting instruction is not alone a ground for reversal (*see Vincini v American Bldg. Maintenance Co.*, 41 Fed Appx 512, 515 [2002]). The requested mixed motive charge was unwarranted (*see Gross v FBL Fin. Servs.*, *supra*).

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

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

ENTERED: DECEMBER 3, 2009



CLERK

Society program. However, if he failed to do so, or if he got arrested for another crime in the interim, he was told, he would be sentenced to a minimum of 3 years and a maximum of 15 years.

Seven months later defendant was in court for sentencing, having been rearrested twice and having failed to successfully complete the Fortune Society program. The sentencing court remarked that the People had previously requested a term of 3½ years if imprisonment was required, and the People continued to recommend that term. When defense counsel protested about the "raise" in the term being imposed, the court said,

"It's not a raise. Just to remind you, the plea agreement he pled guilty to on January 2, 2007, he pled to robbery in the second degree which is a Class C Violent Felony offense. I advised him that I would place him on this Interim Probation Sentence; and if he was successful, he would get YO and probation. However, the minimum sentence being 3-1/2 years, I told him that if he was not successful he will have to go to prison for 3-1/2 years and, of course, 5 years of Post-Release Supervision."

Defense counsel said, "Yes; I remember that, Judge."

Notwithstanding the court's assertion at sentencing that defendant was informed at the time of the plea that his sentence would include the postrelease supervision component, and defense counsel's agreement, in the absence of any mention in the plea minutes of postrelease supervision, we are unable to conclude that defendant was timely informed of it.

When a defendant pleads guilty with the understanding of the

term of imprisonment to be imposed, but is not informed until sentencing of the postrelease supervision component of his sentence, the plea must be vacated as not knowing and voluntary (*People v Louree*, 8 NY3d 541, 545 [2007]). Belated knowledge of postrelease supervision learned of at the time of sentencing does not constitute grounds to require a motion to vacate the plea in order to preserve the issue for appeal (*id.* at 545-546).

We reject the dissent's assertion that defendant did not have to be informed of the postrelease supervision component of the potential sentence, on the reasoning that postrelease supervision was not in this instance a "direct consequence" of the plea as contemplated by *People v Catu* (4 NY2d 242 [2005]), since it would only become necessary in the event that defendant failed to satisfy the conditions of his "deferred sentence." At the time of the plea, in order to ensure that defendant was knowingly and voluntarily waiving his right to trial, the court appropriately informed defendant that the proposed terms of the plea included a potential determinate term of anywhere from 3 years to 15 years if he failed to satisfy the conditions of his interim probation. By the same token, the court should have simultaneously made defendant aware of the postrelease supervision component of that potential sentence. In our view, the potential term of imprisonment, including postrelease

supervision, may have been contingent on defendant's behavior, but it nevertheless does not fall into the category of "collateral consequences" about which the defendant need not be informed in order to ensure a valid waiver.

All concur except Buckley and McGuire, JJ. who dissent in a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting)

The majority implicitly concludes that defendant's claim under *People v Catu* (4 NY3d 242 [2005]) is preserved for review and has not been waived. As defendant is entitled to no relief in any event, I need not decide whether I agree with that conclusion.

Although the plea minutes make clear that defendant was not advised on the record of a postrelease supervision component to the sentence in the event he did not successfully complete the interim probation sentence, the critical question is whether defendant was so advised prior to the plea colloquy during proceedings that were not transcribed. The record provides a substantial, albeit not a conclusive, basis for concluding that defendant was so advised. At sentencing, the court stated that at the time of his plea defendant was advised that if he was not successful on the interim probation sentence, he would "have to go to prison for 3-1/2 years and, of course, 5 years of Post-Release Supervision." Defendant's attorney agreed with the court, expressly stating, "Yes, I remember that, Judge." If Justice White and defense counsel were correct, vacating defendant's guilty plea confers a windfall on defendant and needlessly deprives the People of a fairly obtained conviction for a serious crime. The majority writes that "in the absence of any mention in the plea minutes of postrelease supervision, we are unable to conclude that defendant was timely informed of it." I

respectfully submit that the majority also should be unable to conclude that the court and defense counsel were wrong, i.e., that defendant was not timely informed of postrelease supervision.

Accordingly, I would hold that defendant has failed to meet his burden of presenting this Court with a factual record sufficient to permit review of his claim that he was not timely informed about postrelease supervision (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]). For the majority to simply accept defendant's appellate claim that his counsel and the court were wrong is particularly inappropriate given the absence of any sworn assertion from defendant that he was not informed about postrelease supervision at the time of the plea.

Defendant's claim under *People v Catu* should be rejected for an independent reason: on the particular facts of this case, the court was not required to advise defendant about postrelease supervision. Although a trial court must advise a defendant of the direct consequences of a guilty plea, the court "has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions" (4 NY3d at 244). Collateral consequences "are peculiar to the individual and generally result from the actions taken by agencies the court does not control"; a direct consequence "is one which has a definite, immediate and largely automatic effect on defendant's punishment" (*id.* [internal

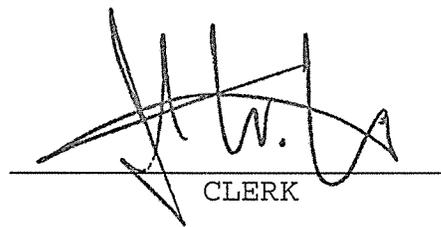
quotation marks omitted])). Under the plea agreement, neither a term of imprisonment nor a period of postrelease supervision was a definite, immediate or automatic consequence of the plea. Rather, defendant was to be placed on interim probation supervision for up to one year and, if he successfully abided by the conditions of that supervision, including completing a Fortune Society program and not getting rearrested, he would be permitted to receive youthful offender treatment and a probationary sentence. The imposition of a sentence that included a period of postrelease supervision was no more than an indefinite possibility, one that was contingent on defendant's own actions. In my view, accordingly, the direct consequences of defendant's plea did not include a period of postrelease supervision.

In this regard, *Torrey v Estelle* (842 F2d 234, 236 [9 Cir 1988]) is instructive. After serving two years in the custody of the California Youth Authority following his plea of guilty to first-degree murder, Torrey was returned to court for imposition of a state prison sentence on the ground that he was not amenable to Youth Authority treatment, and was sentenced to 25 years to life. Rejecting Torrey's claim that his plea was involuntary because he was not advised of the possibility he thus could be returned to court and committed to state prison, the Ninth Circuit held that "the possibility that [Torrey] could be returned to the court for commitment to state prison was not an automatic

consequence of his plea" (*id.* at 236). The court reasoned that "exclusion from the Youth Authority is contingent on many factors, including the future conduct of the defendant himself, and cannot be held to be a direct consequence of his plea" (*id.* [footnote omitted]). Finally, what the court concluded about Torrey's "failure to succeed under the original terms of his sentence" is equally applicable to defendant's failure to succeed on interim probation supervision: it "was simply an indefinite possibility on which the trial judge had no duty to speculate" (*id.*).

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

ENTERED: DECEMBER 3, 2009



CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

419N-

Index 18827/07

419NA In re Liberty Mutual Insurance Company,
Petitioner-Respondent,

-against-

Surujdat Mohabir, et al.,
Respondents,

Progressive Insurance Company, etc., et al.,
Additional Respondents-Appellants.

Buratti, Kaplan, McCarthy & McCarthy, Yonkers (Michael A. Zarkower
of counsel), for appellants.

Burke Lipton & Gordon, White Plains (Philip J. Dillon of counsel),
for respondent.

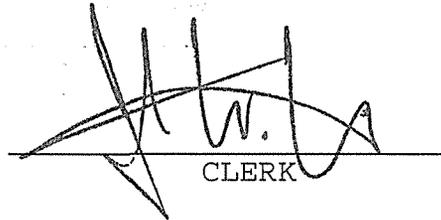
Order, Supreme Court, Bronx County (Patricia Anne Williams,
J.), entered July 31, 2008, which granted reargument and adhered
to the prior determination granting the petition to stay an
uninsured motorist arbitration pending a framed-issue hearing on
insurance coverage and added additional respondents to the
proceeding, unanimously affirmed, without costs. Appeal from
order, same court and Justice, entered March 28, 2008, unanimously
dismissed as superseded by the appeal from the order of July 31,
2008.

Supreme Court correctly determined that petitioner presented
a prima facie case that additional respondent Singh's vehicle was
involved in the accident, which, in view of Singh's sworn denial
of involvement, raises a genuine triable issue of fact justifying

a stay pending a framed-issue hearing to determine whether the offending vehicle was his (see *Matter of AIU Ins. Co. v Cabreja*, 301 AD2d 448 [2003]; cf. *Matter of New York Cent. Mut. Fire Ins. Co. [Reid]*, 34 AD3d 333 [2006]).

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

ENTERED: DECEMBER 3, 2009



CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1644-

1644A In re Sharnaza Q. and Another,

Children Under the Age of
Eighteen Years, etc.,

Clarence W.,
Respondent-Appellant,

Shaquetta W., et al.,
Respondents,

Administration for Children's Services,
Petitioner-Respondent.

Anne Reiniger, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of
counsel), for respondent.

Lawyers for Children, Inc., New York (Lisa May of counsel), and
Orrick, Herrington & Sutcliffe LLP, New York (Sarah E. Walcavich
of counsel), Law Guardian.

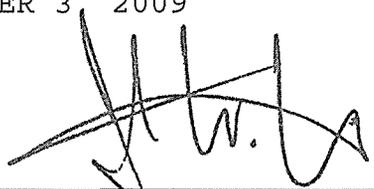
Orders of disposition, Family Court, New York County (Gloria
Sosa-Lintner, J.), entered on or about October 9, 2008, which
placed respondent under the supervision of petitioner, with
submission to random drug screening, unanimously affirmed, without
costs.

Respondent failed to preserve his argument that he was not a
person legally responsible for the subject children of his two
daughters, and we decline to consider it (see e.g. *Matter of
Saraphina Ameila S.*, 50 AD3d 378, 379 [2008], lv denied 11 NY3d
709 [2008]).

The court properly denied respondent's motions to dismiss these neglect petitions under Family Court Act § 1051(C). One child was paroled to her mother, and the other was placed with respondent's mother (the child's great-grandmother). Respondent repeatedly stated that he wished to have contact with his grandchildren, and he did in fact have unsupervised contact with them. "The agreed-upon placement of the child with a relative did not, under the circumstances, obviate the necessity for the court to . . . impose conditions upon respondent" (*Matter of Diana Y.*, 246 AD2d 340 [1998]). Moreover, given the seriousness of respondent's involvement with controlled substances, supervision by the agency is necessary for the purpose of monitoring his conduct (*Matter of A.G.*, 253 AD2d 318, 328 [1999]). This case is distinguishable from *Matter of Kirk V.* (60 AD3d 427 [2009]), where the person alleged to be a danger to the child had not lived or visited with the family for more than four years prior to court's decision.

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

ENTERED: DECEMBER 3, 2009


CLERK

engaging in an activity covered by § 240(1) (see *Francis v Foremost Contr. Corp.*, 47 AD3d 672 [2008]). Plaintiff testified that the panel was too heavy and bulky to hold in his hands as he was removing and lowering it, and that the only way to get it down without a hoist or other safety device was to pry it from the wall with a crowbar and let it fall to the ground through the force of gravity. Such an activity clearly posed a significant risk to plaintiff's safety due to the position of the heavy electrical panel above the ground, even if such elevation differential was slight, and was thus a task where a hoisting or securing device of the kind enumerated in the statute was indeed necessary and expected precisely because the object was too heavy to be hoisted or secured by hand (see *Brown v VJB Constr. Corp.*, 50 AD3d 373 [2008]; *Mendoza v Bayridge Parkway Assoc., LLC*, 38 AD3d 505 [2007]; *Salinas v Barney Skansa Constr. Co.*, 2 AD3d 619 [2003]). Moreover, plaintiff offered uncontroverted evidence that he was not provided with any safety equipment to aid in accomplishing the task he was instructed to perform, and that the failure to provide any such device was the proximate cause of his injuries (see *Mendoza and Salinas, supra*). Plaintiff testified that, when the electrical panel separated from the wall, the electrical conduit stubs connected to the top of the panel collided with the pipes that ran horizontally beneath the ceiling, redirecting the panel so that instead of falling away from plaintiff, it fell onto his

left arm and shoulder, causing severe injury. Defendant's argument -- that plaintiff's admitted failure to test the electrical panel prior to applying force with the crowbar was the sole proximate cause of his accident -- is unavailing because no evidence was presented remotely suggesting that plaintiff had adequate safety devices available, that he knew they were available and he was expected to use them, that he chose for no good reason not to do so, or that had he not made that choice he would not have been injured (see *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [2008]).

Plaintiff has conceded that he has no viable claims under § 200 and for common-law negligence. The undisputed evidence demonstrates that defendant did not supervise, direct or control plaintiff's work (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

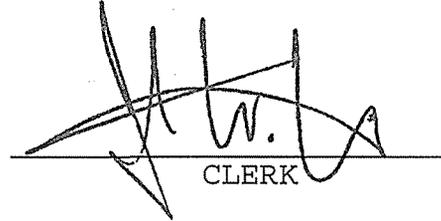
On the other hand, the § 241(6) cause of action raises triable issues of fact. Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal, except for 12 NYCRR 23-3.3(c), which mandates regular inspections "to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material" during "hand demolition operations," and further requires that protection against any such discovered hazards be

provided by "shoring, bracing or other effective means." We have held that § 23-3.3(c) creates a specific standard of care, violation of which can establish liability under Labor Law § 241(6) (see *Gawel v Consolidated Edison Co. of N.Y.*, 237 AD2d 138 [1997]). Plaintiff established that defendant violated the rule by failing to designate an individual to conduct the required inspections, and that the "loosened material" language of the rule could cover the electrical panel allegedly improperly secured to the wall. It is not possible to discern on this record whether the work being performed at the building amounted to "demolition" within the general meaning of Industrial Code § 23-3.3, or whether any specific violation of § 23-3.3(c) was the proximate cause of plaintiff's injuries. "Demolition" is defined in the Code as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment" (12 NYCRR 23-1.4[b][16]). Our decisions have required that in order to constitute demolition within the meaning of § 23-3.3, the work must involve "changes to the structural integrity of the building" as opposed to mere renovation of the interior (*Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 [2007]; see also *Baranello v Rudin Mgt. Co.*, 13 AD3d 245, 246 [2004], lv denied 5 NY3d 706 [2005]). The evidence presented on the motion did not establish

conclusively that the asbestos removal project being carried out at One State Street amounted to demolition within the meaning of the Code.

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

ENTERED: DECEMBER 3, 2009



CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1647-

1647A In re Tony H., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Gwendolyn H.,
Respondent-Appellant,

New Alternatives for Children, Inc.,
Petitioner-Respondent.

Susan Jacobs, The Center for Family Representation, Inc., New York
(Dari Yudkoff of counsel), for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti
of counsel), for respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of
counsel), and Proskauer Rose LLP, New York (Nathaniel M. Glasser
of counsel), Law Guardian.

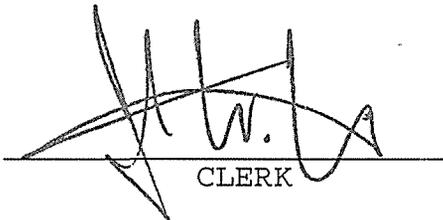
Orders of disposition, Family Court, New York County (Sara P.
Schechter, J.), entered on or about October 2, 2007 and October
17, 2007, terminating respondent's parental rights upon a finding
that she violated the terms and conditions of a suspended
judgment, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding,
based in part upon its unassailable credibility determinations
(see *Matter of Kairi Jazlyn F.*, 50 AD3d 602 [2008]), that there
were several instances of respondent's violation of the suspended
judgment. In any event, contrary to respondent's argument, her
failure to submit to the required random drug testing was a

material violation of a core term of the suspended judgment that, by itself, would have warranted its revocation (see *Matter of Male M.*, 46 AD3d 471, 472 [2007]; see also *Matter of Christian Lee R.*, 38 AD3d 235 [2007], *lv denied* 8 NY3d 813 [2007]). Termination of respondent's parental rights is in the best interests of the children where, over the course of the suspended judgment, respondent repeatedly exhibited poor parental judgment and utterly failed to make progress in several of the problem areas that led to the suspended judgment (see *Matter of Darren V.*, 61 AD3d 986 [2009], *lv denied* 12 NY3d 715 [2009]), including interacting appropriately with the children's medical and educational providers and appropriately supervising the children during visits.

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

ENTERED: DECEMBER 3, 2009



CLERK

it to pay those taxes as "additional rent." Consequently, on September 4, 1996, defendant obtained a possessory judgment in the Justice Court for the Town of Orangetown, Rockland County. Defendant reentered the premises and resumed operation of the driving range for its own benefit until selling the property in 2001.

At the trial of this action (Herman Cahn, J.), in which plaintiff seeks the return of its security deposit, defendant admitted that, pursuant to the lease on September 6, 1996, when the certificate of deposit account containing plaintiff's \$350,000 security deposit matured, it deposited those monies into its own corporate account, and used the monies to pay expenses, including the unpaid school taxes, as well as legal fees incurred in prosecuting the Justice Court action. However, General Obligations Law § 7-103(1) forbids landlords from commingling security deposit monies with their own funds, and defendant's admitted commingling of plaintiff's security deposit vested in plaintiff an "immediate right" to receive those monies (*LeRoy v Sayers*, 217 AD2d 63, 68-69 [1995]). GOL § 7-103(3) provides that the anti-commingling protections of GOL § 7-103(1) cannot be waived and that the provision of the lease purporting to grant defendant the right to commingle the security deposit was "absolutely void" under the statute.

Thus, the trial court erred in holding that the interest rate

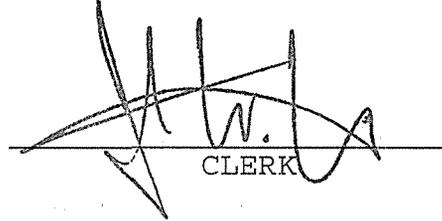
of 0% provided for under the lease continued to apply to the security deposit monies for so long as defendant was holding them. Upon breaching its fiduciary duty not to commingle the money, defendant "forfeited any right [it] had to avail [it]self of the security deposit for any purpose" (*Dan Klores Assocs. v Abramoff*, 288 AD2d 121, 122 [2001] [internal quotation marks omitted]). Defendant could no longer claim the benefit of the interest rate provided for under the lease. Instead, the statutory rate of 9% applied from the moment of commingling forward (CPLR 5001, 5004). Because defendant, as landlord, functioned as a "trustee of the deposit, not a debtor" (*Matter of Perfection Tech. Servs. Press*, 22 AD2d 352, 356 [1965], *affd* 18 NY2d 644 [1966] [discussing a predecessor statute to GOL § 7-103]), any debts owed by plaintiff could not be offset against the commingled security deposit funds (see *Dan Klores Assocs.*, 288 AD2d at 122). Nor could defendant raise plaintiff's breach of the lease as a defense to plaintiff's action to recover the commingled funds (see *LeRoy*, 217 AD2d at 68). The trial court correctly declined to deduct the unpaid school taxes from the commingled security deposit monies, prior to calculating interest due to plaintiff.

We note, however, that defendant is entitled to an offset of the taxes and interest in the amount stipulated to before the special referee, of interest since January 5, 2009 on the

principal sum of \$65,145, as well as attorney's fees in the stipulated amount.

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

ENTERED: DECEMBER 3, 2009



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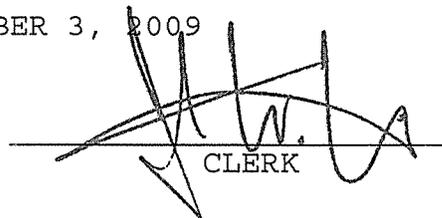
enterprise was established by the testimony of defendant's accomplices, fully corroborated by other evidence, which included, among other things, recorded conversations in which defendant told undercover agents posing as patients to exaggerate their symptoms. There is also no basis for dismissal in the interest of justice.

The People's medical expert did not state an opinion as to whether defendant acted with an intent to defraud insurers, and the fact that aspects of his testimony were related to the ultimate issue of innocence or guilt did not render that testimony inadmissible (see *People v Hicks*, 2 NY3d 750, 751 [2004]). The challenged portions of his testimony essentially stated that there was no legitimate medical explanation for defendant's actions, and left it to the jury to determine whether defendant was guilty of the charged crimes (see *People v Kanner*, 272 AD2d 866, 867 [2000], *lv denied* 95 NY2d 867 [2000]).

We have considered and rejected defendant's remaining arguments concerning the medical expert's testimony, his challenges to background testimony by investigators, and all of his contentions concerning the court's charge.

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

ENTERED: DECEMBER 3, 2009


CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1650 Robert M. Morgenthau, Index 400295/05
District Attorney of New York
County, etc.,
Plaintiff-Respondent,

-against-

Victor Basbus, M.D.,
Defendant-Appellant,

Premier Medical Care P.C., et al.,
Defendants.

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

Robert M. Morgenthau, District Attorney, New York (Martin J.
Foncello of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.),
entered August 13, 2008, which denied defendant-appellant's motion
to stay CPLR Article 13A civil forfeiture proceedings pending
appeal from a judgment of conviction in a related criminal action,
unanimously affirmed, without costs.

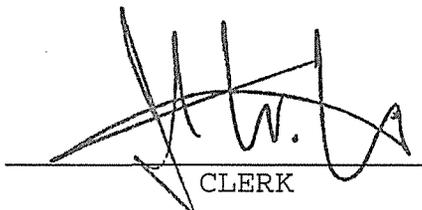
Following his conviction and sentencing under an indictment
involving an insurance fraud enterprise, defendant-appellant moved
to stay a related civil forfeiture proceeding pursuant to CPLR
1311(a)(1), which mandates that such proceedings be stayed "during
the pendency of a criminal action which is related to it." A
criminal action has a precise definition set forth in CPL
1.20(16), which provides that it terminates "with the imposition
of sentence or some other final disposition in a criminal court of

the last accusatory instrument filed in the case." For purposes of this statute, the "final disposition" of defendant's case was his sentencing. The fact that an appeal is pending, or that execution of the criminal judgment has been stayed pending appeal, does not mean that the criminal action itself is still pending. While an appeal may be a criminal proceeding under CPL 1.20(18)(b), it is not part of the criminal action. Since there is no statutory provision for the stay of civil forfeiture proceedings pending appeal from a judgment of conviction in a related criminal action, the court properly denied defendant's motion. In any event, we have affirmed the conviction (*People v Basbus*, ___ AD3d ___ [appeal no. 1649, decided herewith]).

We have considered and rejected defendant-appellant's remaining arguments.

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

ENTERED: DECEMBER 3, 2009

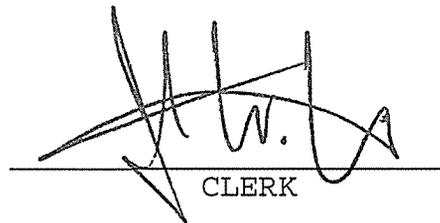

CLERK

and available to translate it for defendant (*see People v Marrero*, 40 AD3d 321 [2007], *lv denied* 9 NY3d 867 [2007]).

This waiver forecloses review of defendant's suppression claim. As an alternative holding, we also reject it on the merits.

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

ENTERED: DECEMBER 3, 2009



CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1652 In re Karla V.,
 Petitioner-Respondent,

-against-

Angel L.,
 Respondent-Appellant.

John J. Marafino, Mount Vernon, for appellant.

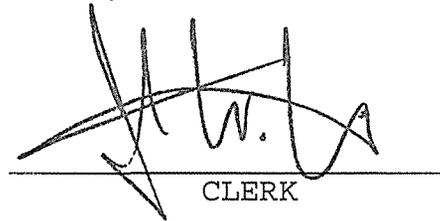
Order, Family Court, Bronx County (Carol Ann Stokinger, J.), entered on or about March 18, 2008, which denied respondent's objection to the Support Magistrate's child support order of December 17, 2007, unanimously reversed, on the law, without costs, the objection sustained, and the matter remanded for a new hearing on the petition.

Respondent, who was incarcerated at the time of the December 17, 2007 hearing, was entitled to an opportunity to be heard (Family Ct Act § 433[a]). Although he wrote the court advising of his incarceration and his desire to participate in the hearing, no effort was made to produce him for the hearing or to permit him to testify by telephone or other electronic means as permitted in such circumstances (Family Ct Act § 433[c][ii]). "[E]ven an incarcerated parent has a right to be heard on matters concerning [his] child, where there is neither a willful refusal

to appear nor a waiver of appearance" (*Matter of Tristram K.*, 25 AD3d 222, 226 [2005]; see *Matter of Jung* [*State Commn. on Jud. Conduct*], 11 NY3d 365, 373 [2008]). Accordingly, we reverse and remand for a new hearing (see *Matter of Seckler-Roode v Roode*, 53 AD3d 616 [2008]).

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

ENTERED: DECEMBER 3, 2009



CLERK

grant of L&M and C&C's cross motion for indemnification upon a finding that the accident was caused, in whole or in part, by negligence of Great American, and to deny plaintiff's motion, and otherwise affirm, without costs.

Great American's motion for summary judgment was properly denied, as the only evidence it offered that it had not contracted to install window guards was the testimony of its principal. However, the contract unambiguously stated that Great American was to perform this work, and in light of the contract, there was no issue of fact as to the scope of the indemnity (see *Omansky v Whitacre*, 55 AD3d 373 [2008]).

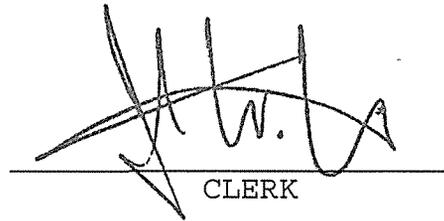
Great American also contends that issues of fact as to the negligence of L&M and C&C (respectively, the owner and managing agent of the building) should have precluded summary judgment to them on the issue of contractual indemnification. While this issue is raised for the first time on appeal, we can reach it, since it is determinative and may be determined on the instant record (see *Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [2009]). On the merits, the indemnification clause of Great American's contract will not be enforceable in the event it is determined that negligence of L&M and C&C was the sole cause of the accident (see *Zeigler-Bonds v Structure Tone*, 245 AD2d 80, 81 [1997]). Accordingly, we modify to condition the grant of summary judgment to L&M and C&C as to

indemnification on a determination being made that the accident was caused, in whole or in part, by negligence of Great American. We note that, notwithstanding General Obligations Law § 5-321, the indemnification clause is enforceable to the extent indicated because it is coupled with an agreement by Great American to purchase insurance for the parties to be indemnified (see *Great N. Ins. Co. v Interior Const. Corp.*, 7 NY3d 412 [2006]).

Furthermore, plaintiff's motion for summary judgment on the issue of liability as against L&M and C&C is denied, since the motion was predicated on the incorrect assumption that a violation of Administrative Code of City of NY § 17-123 gives rise to negligence per se (see *Elliott v City of New York*, 95 NY2d 730 [2001]).

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

ENTERED: DECEMBER 3, 2009



CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1654 Shannon Smith, Individually and as Index 18673/04
Parent and Natural Guardian of
Mikailah Barnett, an Infant, etc.,
Plaintiff-Respondent,

-against-

City of New York, et al.,
Defendants-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon
of counsel), for appellant.

Thomas J. Minotti, Stormville, for respondent.

Interlocutory judgment, Supreme Court, Bronx County (Wilma
Guzman, J.), entered January 8, 2008, upon a jury verdict in favor
of plaintiff and against defendants on the issue of liability,
unanimously reversed, on the law, without costs, and the complaint
dismissed. The Clerk is directed to enter judgment accordingly.

The verdict finding defendants strictly liable for the dog-
bite injuries sustained by the infant plaintiffs is not supported
by evidence sufficient to establish that Officer Smith knew or
should have known of the dog's vicious propensities (*see Petrone v
Fernandez*, 12 NY3d 546, 550 [2009]). In the very brief time he
spent with the abandoned dog, Smith observed that the dog was
friendly, playful, and "rambunctious." Further, Smith saw
plaintiff petting the dog and did not see the dog growling or
lunging at any time. Indeed, plaintiff testified that the dog was
playful and friendly, both to her and to a family sitting in the

precinct house. Even crediting the testimony of plaintiff's husband that he saw the dog growl and lunge and that a longer rope was needed to tie the dog inside his car, that testimony does not support the inference that Smith knew or should have known of the dog's vicious propensities (*see Phillips v Coffee To Go*, 269 AD2d 123 [2000]).

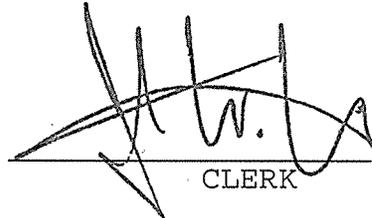
The evidence was also insufficient to establish that Officer Smith owned the dog (*see Petrone, supra*). He had taken temporary custody of the dog with the intention to transport him to the ASPCA, and the dog was in his possession for, at most, a few hours. In any event, he had transferred any right of his to the dog to plaintiff, who had possession of the dog at the time of the attack (*see Bukhatetsky v Vysotski*, 296 AD2d 367 [2002]). Contrary to plaintiff's contention, the evidence showed not that she was holding the dog temporarily for Smith but that she had the right to keep the dog or give him away. Further, there was no evidence that Smith wanted the dog back or that he retained any control over the dog.

Plaintiff has no cause of action in negligence (*Petrone, supra*). In that regard, any violations by defendants of

Agriculture and Markets Law § 374 and 24 RCNY 161.06 are irrelevant (*id.*).

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

ENTERED: DECEMBER 3, 2009



CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1655 Carlos A. Pou,
Plaintiff-Respondent,

Index 20990/05

-against-

E&S Wholesale Meats, Inc., et al.,
Defendants-Appellants.

Carlucci & Giardina, LLP, New York (Tamara Sorokanich of counsel),
for appellants.

The Lynch Law Firm, LLP, Suffern (Arthur V. Lynch of counsel), for
respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-
Hughes, J.), entered January 23, 2009, which denied defendants'
motion for summary judgment, unanimously reversed, on the law,
without costs, the motion granted and the complaint dismissed.

Defendants met their initial burden of demonstrating the
absence of any permanent or significant physical limitation of
plaintiff's lumbar or cervical spine by submitting the affirmed
report of an expert who examined plaintiff and concluded, based
upon objective tests conducted, that he had not suffered a
permanent consequential limitation or a significant limitation
(see *Onishi v N & Taxi, Inc.*, 51 AD3d 594, 595 [2008]). In
opposition, plaintiff failed to raise a triable issue of fact.

Plaintiff's expert's assertions of range-of-motion
limitations during the period shortly after the accident were
conclusory, and were contradicted by other records from

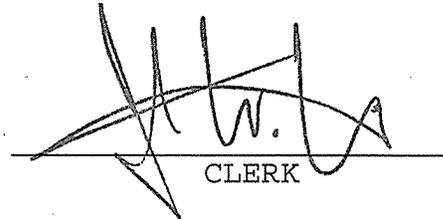
plaintiff's therapy noting a full range of motion involving both the lumbar and cervical spine. Plaintiff's expert's more recent findings, occurring some 4½ years after the accident, while quantitative, are too remote in time to raise an inference that plaintiff's purported present limitations were causally related to the accident (see *Danvers v New York City Tr. Auth.*, 57 AD3d 252 [2008]). Nor has plaintiff explained the 4½-year gap in treatment, following six months of therapy. Plaintiff's self-serving statements that he felt he had reached the maximum benefit and had learned to live with the pain are insufficient explanations for suspending treatment (see *Thompson*, 15 AD3d at 99; *Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383 [1985]; cf. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 355 [2002]). He thus failed to raise any triable issue of fact as to his suffering of a serious injury causally connected to the accident.

Defendants also established prima facie that plaintiff did not suffer a 90/180-day injury, and plaintiff failed to raise a triable issue of fact, given his testimony that he was out of

work for a "couple of days only" (see *Gorden v Tribulcio*, 50 AD3d 460, 463 [2008]; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669, 670 [2007]).

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

ENTERED: DECEMBER 3, 2009

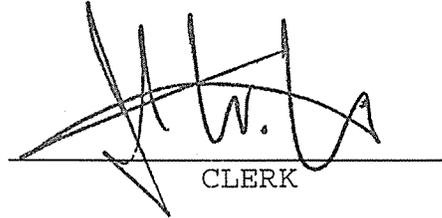


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judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 3, 2009



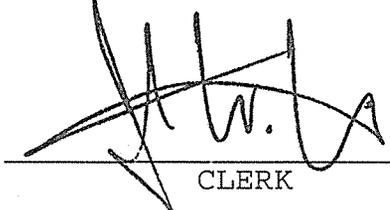
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related transaction instead of a robbery.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 3, 2009



CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1659N In re Progressive Insurance
 Company,
 Petitioner-Respondent,

Index 115237/03

-against-

Melton Dillon, et al.,
Respondents-Appellants.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellants.

Brand, Glick & Brand, P.C., Garden City (Peter M. Khrinenko of counsel), for respondent.

Order, Supreme Court, New York County (James A. Yates, J.), entered November 26, 2008, which granted petitioner's motion to stay arbitration to the extent of directing an evidentiary hearing on the preliminary issue of insurance coverage, unanimously modified, on the law, to redefine the framed issue as "whether the insured's policy included underinsured motorist coverage," and otherwise affirmed, without costs.

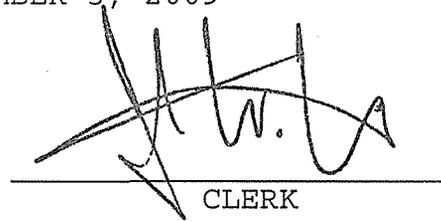
The court correctly declined to address respondents' other arguments pending a determination of the issue of underinsured motorist coverage, since estoppel cannot be used to create coverage where none exists, regardless of whether the insurance company timely issued its disclaimer (*Wausau Ins. Cos. v Feldman*, 213 AD2d 179, 180 [1995]). We modify only to redefine the framed issue as indicated. We reject respondents' attempts to liken the court's previous orders to a judicial determination that coverage

existed. There is no other basis in the current record for finding that coverage existed.

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

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

ENTERED: DECEMBER 3, 2009



CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1660N Michael E. Lamar,
Plaintiff-Appellant,

Index No. 14622/07

-against-

The City of New York,
Defendant-Respondent,

"John" Smalls, etc., et al.,
Defendants.

Richard M. Duignan, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo
of counsel), for respondent.

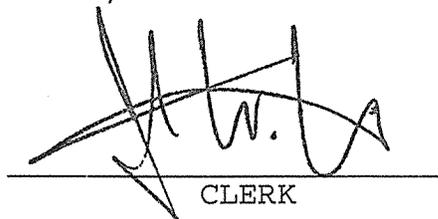
Order, Supreme Court, Bronx County (Larry S. Schachner, J.),
entered August 6, 2008, which denied plaintiff's motion for a
default judgment against the City of New York and granted the
City's cross motion for an order deeming its answer to be timely
served *nunc pro tunc*, unanimously affirmed, without costs.

While the City's generalized assertion of law office failure
as the excuse for its delay is not particularly compelling, it
constitutes "good cause" for the delay (*see Spira v New York City
Tr. Auth.*, 49 AD3d 478 [2008]). No prejudice to plaintiff has
been shown (*see Cirillo v Macy's, Inc.*, 61 AD3d 538, 540 [2009]),
and New York's public policy strongly favors litigating matters

on the merits (see *Silverio v City of New York*, 266 AD2d 129 [1999]). An affidavit of merit is not required where no default order or judgment has been entered (see *Cirillo, supra*).

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

ENTERED: DECEMBER 3, 2009



CLERK

DEC 3 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

James M. McGuire, J.P.
Rolando T. Acosta
Leland G. DeGrasse
Rosalyn H. Richter
Sheila Abdus-Salaam, JJ.

624
Index 601812/06

x

Neal Flomenbaum,
Plaintiff-Appellant,

-against-

New York University,
Defendant-Respondent.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered June 23, 2008, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for an order of preclusion based on spoliation of evidence.

Foley & Lardner LLP, New York (Barry G. Felder of counsel), for appellant.

Nancy Kilson, New York, for respondent.

DeGRASSE, J.

On this appeal we must decide whether a university's offer of tuition-free enrollment in a two-year program rather than the four-year program applied for can be construed as a breach of an agreement with the offeree's parent. We answer the question in the negative based on the facts and legal principles that follow. The 2002 agreement resolved a tenure dispute between defendant and plaintiff, a former faculty member at the NYU School of Medicine. The agreement provides that plaintiff's children

shall be entitled to tuition remission upon admission to New York University for undergraduate or graduate study. Their admission to New York University and their entitlement and advantages to tuition remission shall be on the same basis with the same courtesies as a then current, active, full-time employed, tenured member of the faculty of the School of Medicine or a retired, tenured member of the faculty of the School of Medicine, whichever is greater.

The agreement, which contains a merger clause, makes no other provision with respect to tuition remission. Plaintiff's son, Adam, applied for admission to the NYU College of Arts and Sciences (CAS) for the September 2006 term. By letter dated March 2, 2006, the university informed Adam that it was unable to offer him admission to CAS. Instead, Adam was offered admission to NYU's General Studies Program (GSP), a two-year course of study in the liberal arts. As explained in the letter and an accompanying brochure,

- all GSP courses fulfill liberal arts requirements toward the bachelor's degree at NYU's eight undergraduate schools and colleges;
- after two years, GSP students are eligible to transfer as juniors to one of NYU's four-year programs, having earned 64 credits, half of the 128 credits needed for the NYU bachelor's degree;
- GSP students can participate in all NYU student activities; and
- only 10% of the students who were not offered admission to NYU's four-year bachelor's degree program were selected for GSP.

In keeping with the agreement, enrollment in GSP would have qualified Adam for tuition remission.

This action is based upon the premise that the offer of admission to GSP instead of CAS violated the obligation to extend Adam the courtesies due a faculty child pursuant to the agreement. An understanding of what these courtesies entail is crucial to our analysis. Defendant's unrefuted answer to an interrogatory describes the courtesies afforded the children of active, full-time, tenured faculty members of the School of Medicine as follows:

Generally, the Admissions Committee becomes aware that an applicant is the child of a faculty member because the applicant discloses the information about his parents' employment on the application form. The Admissions Committee makes a list of applicants who have designated the University as the employer of a parent. As to the individuals on that list, the Admissions Committee takes a second look at their admissions decisions to make sure that those decisions

are fair. If any such student is not qualified for admission to the particular school to which he or she applied, the Admissions Committee may, because of his or her status as the child of a faculty member, give more consideration to admitting the student to the General Studies Program than would otherwise be the case.

Plaintiff testified that he has no direct knowledge of any other relevant courtesies or considerations. Plaintiff also acknowledged that the agreement and the courtesies it incorporates did not guarantee a seat for Adam in the freshman class of CAS. In sum, plaintiff bargained for a fair decision on his son's application for admission to CAS, and added consideration as a candidate for GSP in the event that he was not qualified for admission to CAS. The next question is whether there is an issue of fact as to whether NYU's decision to deny Adam admission to CAS was a fair one. Here we examine the process by which Adam's application was evaluated.

Barbara F. Hall, NYU's Associate Provost for Enrollment Management, described the university's admissions process at her deposition. Ms. Hall testified that when an application is received, a file is assembled for review by the admissions team, and data taken from the application is entered in the university's Student Information System (SIS). The file would include the application, transcripts and recommendations. The applicant's relationship, if any, with an NYU employee would be

entered in SIS. The file is reviewed by two members of the team responsible for admissions to the particular school or college to which the applicant has applied. The team members then confer and make their individual recommendations regarding the action to be taken on the application. The file would be read by one of two directors in the event of a disagreement between the team members. Although the file is reviewed holistically, the applicant's grade point average is very carefully scrutinized because it is considered the best indicator of success at NYU. An applicant's relationship with an NYU employee would be taken into account after the file has been read but before an official decision is made.¹ In this regard, an evaluation is made as to whether the recommended action on the application appears to be equitable. Relationship to a faculty or staff member is considered a positive if an applicant is considered "on the bubble," i.e., distinguished by some but not all of the characteristics deemed necessary for admission.

Approximately three years after the agreement was executed, Adam applied for admission to CAS for the term beginning in September 2006. Adam declined to check a box on the application

¹Notwithstanding the agreement, relationships with all NYU employees are given the same consideration regardless of any particular employee's position with the university.

form that would have indicated his parent or legal guardian was an NYU employee. Accordingly, on its face, Adam's application gave no indication of his status under the tuition remission agreement. Approximately one month before the application was submitted, plaintiff forwarded Adam's resume to Dr. Richard Levin, the Vice Dean of NYU's Medical School, who had negotiated the tuition remission agreement on behalf of the university. The information regarding the tuition remission agreement was passed on to Dr. Robert Berne, NYU's Vice President for Health. Dr. Berne was supposed to but neglected to initially apprise the Admissions Committee of Adam's entitlement to faculty child status. Unaware of the tuition remission agreement, the Admissions Committee nonetheless decided to admit Adam to GSP. After the Admissions Committee passed upon Adam's application, Dr. Berne asked Ms. Hall to review his file. Ms. Hall testified that she believed Dr. Berne's request was related to what she described as a previous lawsuit. Upon conducting her review, Ms. Hall concluded that the Admissions Committee's determination was a very good decision. At her deposition, Ms. Hall gave the reasons for her conclusion.

Ms. Hall testified that GSP is a great program for students who can benefit from its smaller classes and more intrusive

advising. Ms. Hall added that Adam was not a suitable candidate for CAS because "his transcript was not particularly stellar" and his "S[cholastic] A[ptitude] T[est score]s. . . would have been in the lower part" of the class for which he applied. She felt that Adam had done well in his particular high school, where there is a lot of individual attention, which is also something that GSP provides. Ms. Hall further testified that Adam was not "on the bubble" as defined above and his low grade point average led her and the Admissions Committee to believe that he would benefit from GSP's seminar style teaching as opposed to the teaching method of CAS, which is a "research university" and does not provide the intrusive support offered by GSP.

Adam registered as a freshman in GSP but later withdrew his registration, citing the university's denial of his request for permission to take certain elective courses he wanted during his freshman year, in addition to its unwillingness to admit him to CAS. Adam applied for and was denied admission to the freshman classes at Brown, Columbia and Georgetown Universities, as well as Dartmouth College. He transferred to Columbia University after completing his freshman year at the University of Miami. Plaintiff's claim for damages includes the tuition paid to both universities.

Under the first cause of action of the amended complaint, plaintiff alleges that in breach of the tuition remission agreement the Admissions Committee did not extend the agreed-to considerations and courtesies in acting upon Adam's application for admission to CAS. Plaintiff's second cause of action is based on a contract theory with respect to prospective applications for admission to NYU to be filed by his two younger children. Supreme Court granted defendant's motion for summary judgment and denied plaintiff's cross motion for an order determining liability in his favor based on defendant's alleged spoliation of evidence. We now affirm.

As noted above, NYU's Admissions Committee should have been, but was not made aware of Adam's rights under the tuition remission agreement when it processed his application. Seizing upon that misstep, plaintiff argues that defendant's liability has been established by its negative answer to the following interrogatory: "Did the Admissions Committee take into account the Courtesies and Considerations Provision [of the tuition remission agreement] in evaluating Adam Flomenbaum's application for admission to the freshman class entering CAS in the Fall 2006 semester?" That interrogatory, however, misses the point. The relevant question is whether Adam was accorded the same

courtesies as the son or daughter of a university employee would have received. As set forth above, such courtesies consist of a second look at the Admissions Committee's decision to make sure it is fair, and additional consideration for admission to GSP if an applicant is not qualified for admission to the school or college to which he or she has applied. Plaintiff cites no proof in the record that the courtesies required by the tuition remission agreement encompass anything else. A party opposing summary judgment must submit proof in evidentiary form or explain the failure to do so (*Barbour v Knecht*, 296 AD2d 218, 227 [2002]). Plaintiff has thus failed to meet his burden in light of NYU's prima facie showing of entitlement to summary judgment. Because no additional courtesies have been identified, we disagree with the dissent's view that NYU's offer of admission to GSP "provides significant support for plaintiff's allegation that Adam would have been admitted to CAS if Adam had received the 'courtesies' to which plaintiff was entitled." Ms. Hall's testimony about her handling of Adam's application and the reasons for her determination constitute proof that the Admissions Committee's decision was given the required second look and Adam was properly and fairly considered for GSP. Because this proof is not refuted we find it dispositive of the

issue. Hence, despite the initial lack of communication between Dr. Berne and the Admissions Committee, Adam's application was handled with all of the courtesies required under the parties' tuition remission agreement.

For two reasons we disagree with the dissent's premise that a "jury could find that the reason the admissions committee took a second look at Adam's application was not because of the bargained for courtesies, but rather because of its initial breach of the contract." First, the salient point is that the contractually required second look was taken, albeit after Dr. Berne initially failed to communicate with the Admissions Committee. The reason for the second look would, therefore, be irrelevant. Second, the inquiry suggested by the dissent involves the issue of academic decision-making. Courts exercise restraint in applying traditional legal rules to determinations concerning academic qualifications because such determinations generally rest upon the subjective professional judgment of trained educators (*Matter of Olsson v Bd. of Higher Educ. of City of N.Y.*, 49 NY2d 408, 413 [1980]). When asked to review the substance of a genuinely academic decision, such as the one at issue here, courts should show great respect for the faculty's professional judgment. "Plainly, they may not override it unless

it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment" (*Regents of Univ. of Mich. v Ewing*, 474 US 214, 225 [1985]). The record before us demonstrates that in taking a second look at the Admissions Committee's determination, Ms. Hall did exercise professional judgment in weighing Adam's grade point average, his SAT scores, and his academic needs in relation to the learning environment offered by GSP. A trial in this case would require a court or a jury to engage in its own academic decision-making on the question of Adam's suitability for admission to CAS.

The dissent cites *Eidlisz v New York Univ.* (61 AD3d 473 [2009]) and *Brody v Finch University of Health Sciences/Chicago Med. School* (298 Ill App 3d 146, 698 NE2d 257 [1998], *lv denied* 179 Ill 2d 578, 705 NE2d 434 [1998]) for the proposition that an institution "cannot hide behind the screen of academic freedom" to avoid a contractual obligation. Both cases are distinguishable because they did not involve genuinely academic decisions. *Eidlisz* was a suit upon a promise that a student would be billed per credit and obtain a degree by simply completing three courses. *Brody* involved a promise of admission to the defendant's medical school to anyone who completed the

defendant's physiology program and received a specified minimum grade point average. Those cases are inapposite for the additional reason that here defendant is not seeking to be excused from contractual obligation; it has fulfilled its obligation. In *Raethz v Aurora Univ.* (346 Ill App 3d 728, 732, 805 NE2d 696, 699 [2004]), the Court held that "in the student-university context, a student may have a remedy for breach of contract when it is alleged that an adverse academic decision has been made concerning the student but *only* if the decision was made *arbitrarily, capriciously, or in bad faith*" (emphasis added). Guided by our own jurisprudence, we hold that such a contractual remedy is available only where "the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute" (*cf. Matter of Susan M. v New York Law School*, 76 NY2d 241, 246 [1990]). Accordingly, the first cause of action, sounding in breach of contract, was properly dismissed.

The second cause of action, pleaded with respect to plaintiff's twin sixth graders who have obviously not applied for admission to NYU, was also properly dismissed. A claim is premature and may not be maintained if the issue presented for adjudication involves a future event beyond the control of the

parties, and which may never occur (*American Ins. Assn. v Chu*, 64 NY2d 379, 385 [1985], *appeal dismissed and cert denied* 474 US 803 [1985]). Plaintiff's cross motion for an order of preclusion based upon defendant's alleged spoliation of evidence was properly denied. The information in question concerned statistical data regarding faculty children who applied for admission to, but did not enroll in, CAS for the Fall 2006 semester. As noted above, Adam's application was given the required second look as well as consideration for admission to GSP. Therefore, we disagree with the dissent's contention that a comparison of Adam's application with those of the other faculty children who unsuccessfully applied for admission to CAS would shed light on whether plaintiff was afforded the required courtesies. Moreover, such a comparison would be an exercise in academic decision-making. The sanction sought by plaintiff is unwarranted since the required element of an unfairly gained advantage by reason of nondisclosure has not been demonstrated (*see e.g. Holliday v Jones*, 297 AD2d 471 [2002]). Also, the allegedly spoliated statistics are irrelevant to the propriety of NYU's academic decision under the standards discussed above.

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

For the foregoing reasons, the order of Supreme Court, New York County (Milton A. Tingling, J.), entered June 23, 2008, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for an order of preclusion based on spoliation of evidence should be affirmed, with costs.

All concur except McGuire, J.P. and Acosta, J. who dissent in an Opinion by Acosta, J.

ACOSTA, J. (dissenting)

At issue in this case is whether "academic freedom" to choose an incoming class insulates defendant from liability for allegedly breaching the terms of a settlement agreement with a former faculty member. The agreement obligated NYU to extend certain courtesies and considerations to the former faculty member that it normally extends to full-time tenured medical school faculty when their children apply for admissions. Defendant may not breach its obligations under the agreement on the ground of academic freedom. Moreover, given the nature of the litigation, defendant should not have destroyed the paper applications of similarly situated applicants. Accordingly, plaintiff's breach of contract claim with respect to plaintiff's eldest son should not have been summarily dismissed, and plaintiff's cross motion for spoliation sanctions should have been granted to the extent of directing that an adverse inference charge be issued.

Background

Plaintiff was the Associate Director of Emergency Services at NYU, Assistant Professor of Clinical Medicine in the NYU School of Medicine, and an attending physician at the Bellevue and NYU Hospital Centers from 1979 to 1987 when he left over a

tenure dispute. As a result of NYU's conduct toward plaintiff, the American Association of University Professors (AAUP) placed NYU on its list of censured administrations in 1990. In 2002, Dr. Richard Levin, the newly appointed Vice Dean of the Medical School, sought to resolve the tenure dispute with plaintiff. The parties eventually resolved their dispute by entering into an agreement in November 2002. Paragraph 2 of the agreement required plaintiff to send a letter to the AAUP in a form annexed to the agreement, and to take "all reasonable and appropriate actions as may be requested to assist in the removal of the censure of New York University."

For its part, NYU, in addition to considerations of a confidential nature, agreed in paragraph 6 to extend certain courtesies and considerations in the admission process to plaintiff's children:

[Plaintiff's children] shall be entitled to tuition remission upon admission to New York University for undergraduate or graduate study. Their admission to New York University and their entitlement and advantages to tuition remission shall be on the same basis with the same *courtesies as a then current, active, full-time employed, tenured member of the faculty of the School of Medicine* or a retired, tenured member of the faculty of the School of Medicine, whichever is greater (emphasis added).

In the fall of 2005, plaintiff's eldest son, Adam, was preparing to apply for admission to NYU's College of Arts and Sciences (CAS) for the September 2006 term. As plaintiff was no

longer employed by NYU, Adam did not check off the "faculty child" space on the application. Instead, to exercise his rights under the agreement, plaintiff provided Adam's resume to Dr. Levin.¹ Dr. Levin wrote to plaintiff that Adam had a "lovely resume" and that he would be entering Adam's admission process at a "very high level." At his deposition, Dr. Levin testified that he informed Dr. Berne, the Vice President for Health and "key liaison" between the medical school and the rest of the university, of Adam's application, and reminded Dr. Berne of the obligations NYU undertook under the agreement.

Dr. Berne, however, conceded that he neglected to inform the Admissions Committee of NYU's obligations under the Agreement, and had no explanation for his failure to do so. In fact, in response to an interrogatory asking "Did the admissions committee take into account the Courtesies and Considerations Provision [¶ 6 of the Agreement] in evaluating Adam['s] application for admission to the freshman class entering CAS in the Fall 2006 semester?" a representative of NYU responded "No." Adam was

¹The majority casts these facts negatively by stating that "Adam declined to check a box on the application form which would have indicated that his parent . . . was an NYU employee." It is not that Adam declined to check the box, but rather by not checking it, he honestly indicated that no family member was currently employed by NYU. Plaintiff, however, informed Dr. Berne about Adam's application, to avail himself of the bargained-for consideration.

subsequently denied admission to CAS and instead was informed that he met the requirement for admission to the General Studies Program (GSP), a two-year program at NYU to which he never applied. Rather than enrolling in GSP, Adam attended the University of Miami College of Arts and Sciences in the 2006-2007 school year, and then transferred to Columbia University in the fall of 2007. Plaintiff paid tuition for Adam at both institutions.

Plaintiff filed the initial complaint in July 2006, alleging that when he first spoke with Dr. Berne, he requested that "a mutually acceptable impartial, respected outside educator review all of the relevant applications of all faculty children who applied to NYU," and that Dr. Berne rejected this request, stating that "if [plaintiff] was not satisfied with his decision, he could sue NYU." In April 2007, in response to plaintiff's interrogatories, NYU provided plaintiff with the mean and median SAT scores and high school GPAs "for the children of active, full-time employed [or] retired tenured members of the faculty of the School of Medicine applying for admission to CAS for the freshman class entering in the Fall, 2006 term. One month later, in a supplemental document, it stated that its initial response was incorrect and that it "does not collect data enabling it to provide information regarding students who applied for admission

to CAS, unless they subsequently enrolled."

The paper files for students who were not admitted in Spring 2006 and those who were admitted but did not enroll were shredded in the normal course of business in October 2006. According to Barbara Hall, NYU's Associate Provost for Enrollment Management, there had been no "hold" put on any files other than Adam's. She noted that the paper files included staff comments and recommendations. Although digital records were maintained on the student information system, they did not include these handwritten comments and recommendations.

Plaintiff cross-moved for an order, based on NYU's spoliation of relevant records, precluding defendant from contesting that its breach of the agreement caused Adam to be rejected from CAS. Supreme Court denied the motion, finding that "significant, unshaken deposition testimony" indicated NYU's document shredding was routine and pursuant to policy. It also held that plaintiff failed to show the destruction was done "willfully, contumaciously or in bad faith," causing the "loss of allegedly vital documents . . . prejudicial to his case."

Analysis

Viewing the evidence in the light most favorable to plaintiff, the party opposing summary judgment, and drawing all reasonable inferences in his favor (see *Boyd v Rome Realty*

Leasing Ltd. Partnership, 21 AD3d 920 [2005]), defendant has failed to establish its prima facie entitlement to summary judgment with respect to plaintiff's breach of contract claim as it relates to his son Adam. The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage (*Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [2009]).

Here, a valid agreement was formed in 2002 whereby plaintiff agreed to settle a pending dispute with NYU that had caused the university to be censured by AAUP. Plaintiff performed under the agreement by writing the requisite letter to AAUP. Dr. Berne conceded that he failed to inform the admissions committee, as NYU was required to do under the agreement, to extend the courtesies it normally extends to the children of full-time, tenured medical school faculty members prior to a decision being made. Plaintiff's son was denied admission to CAS, and plaintiff was forced to pay tuition at another university.

In referring to an interrogatory response that the majority characterizes as "unrefuted," defendant described the "courtesies afforded the children of active, full-time, tenured faculty members of the School of Medicine." These "courtesies" include adding the applicant to the list of applicants whose parents are

employed by NYU so that the Admissions Committee will "take[] a second look" at the decisions made in connection with those applicants "to make sure that those decisions are fair."

Moreover, according to Ms. Hall, the relationship between an applicant and an NYU employee is "*taken into account after the file has been read and prior to an official decision being made*" (emphasis added). It is unrefuted that this did not happen in Adam's case. The Admissions Committee rejected Adam's application to CAS and never provided him with the courtesy of a "second look" prior to making that decision. Defendant thus did not establish its prima facie entitlement to summary judgment.

The fact that NYU took a "second look" after the decision was made to reject Adam is of no moment in the context of this summary judgment motion. It bears mentioning that after Adam was rejected, Dr. Berne asked Hall to "look into it," and then read the file. Although she thereafter told him it was "a clear case" for Adam not being admitted to CAS, Dr. Berne acknowledged in his deposition that he did not know why Hall had so concluded. Indeed, Hall testified that because the university reviews applications holistically, and that "Admissions is more of an art than it is a science, any applicant could gain entry. There are thresholds, however, that are generally required to be competitive, including a GPA of B or better, 1250 or higher on

the SATs and, generally a 3 to a 6 activity rating. Based on these thresholds, Adam appeared to be "competitive" for admission to CAS rather than a "clear case" for rejection, since he had a 3.2 GPA, a combined SAT score of 1340, an activity rating of 4, and excellent recommendations.

Importantly, there is no question that Adam would have been entitled to some benefit had the Admissions Committee known of the Agreement and its courtesies and consideration provision. In this respect, I disagree with the majority that plaintiff merely bargained for a "fair decision on his son's application" and "added consideration as a candidate for GSP in the event that he was not qualified for admission to CAS." Any applicant who applies to NYU should be entitled to a "fair" decision. And, by NYU's own literature, GSP is available to any applicant who meets the program's qualifications regardless of whether the applicant had a similarly worded agreement. Here, plaintiff specifically bargained for considerations extended to "full-time employed, tenured member[s] of the faculty of the school of medicine."

In any event, in the context of a summary judgment motion, where the evidence is viewed in the light most favorable to the opposing party, the plain language of the agreement, as well as the other evidence presented in the summary judgment motion, indicates that the bargained-for courtesies included much more

than taking a "second look" after a decision had already been made. Indeed, Hall stated that "If it appears that a student is on the bubble, then having a faculty or staff relationship would be positive," and, as noted above, that "positive" would be taken into account prior to an official decision. Therefore, contrary to the majority, plaintiff has identified a courtesy other than merely having the committee take a "second look." In other words, the "second look" was designed to ensure that Medical School faculty status was factored into the equation prior to a decision being made, and not simply to make sure that the decision was fair or that additional consideration for GSP was given.

Indeed, Dr. Berne testified that the NYU relationship gets "some very minor weight . . . but if you had two children, two applicants with roughly the same impression of the whole application, and the only difference was one was a faculty child and one was not, that would be a weighing on the faculty child if everything else on the application was the same." Dr. Berne and Hall thus agree, as does defendant in its interrogatory answers, that Adam should have received special consideration, but did not, prior to the decision on his application.

Notwithstanding this evidence, the majority accepts and regards as dispositive Hall's testimony that in taking a second look, the

admissions committee exercised professional judgment in deciding to reject Adam for admission to CAS. But issues of fact are for a jury to decide. A jury could find that the reason the committee took a second look at Adam's application was not because of the bargained for courtesies, but rather because of its initial breach of the contract. In other words, since "taking a second look" is not mentioned in the agreement, defendant's claim that the bargained-for courtesies merely included taking a second look to make sure the decision was fair was simply an attempt to excuse its failure to perform under the agreement in the first place. The reason for the second look in this case is thus relevant, and a jury should decide whether to reject it or not.

Moreover, the letter from NYU informing Adam that it was unable to offer him admission to CAS provides significant support for plaintiff's allegation that Adam would have been admitted to CAS if Adam had received the "courtesies" to which plaintiff was entitled. That letter informed Adam that his application had been "selected" for the GSP, congratulated him on that selection and stated that he met "the requirements for admission to the program." In accompanying materials, NYU stated that "The opportunity to attend NYU through GSP is offered only to a carefully selected group of students. This past year, only 10

percent of the students who were not offered admission to a four-year bachelor's program [at NYU] were selected for GSP." Drawing all reasonable inferences in favor of plaintiff, surely a jury could conclude that Adam was at least "on the bubble" and would have been admitted to CAS if NYU had provided the bargained-for courtesies.

Defendant's attempt to dismiss the case by asserting its right to academic freedom in selecting an incoming class does not excuse the university from honoring its contractual obligations. If NYU had applied the agreed-upon courtesies and considerations prior to rejecting Adam from CAS, its actions might have been virtually immune from judicial scrutiny. However, where, as here, an institution has contractually obligated itself, it cannot hide behind the screen of academic freedom to avoid its obligations (see e.g. *Eidlisz v New York Univ.*, 61 AD3d 473 [2009]; *Brody v Finch Univ. of Health Sciences/Chicago Med. School*, 298 Ill App 3d 146, 698 NE2d 257 [1998], lv denied 179 Ill 3d 578, 705 NE2d 434 [1998]). In *Brody*, the defendant breached its contractual obligation by denying medical school admission to certain applicants who were members of a specific pre-med program by failing to apply the criteria to which the defendant had contractually agreed, and damages were awarded to

the applicants.² The majority attempts to distinguish these cases on the basis that they do not involve "genuinely academic decisions," and that NYU is not seeking to be excused from its contractual obligations since it has in fact fulfilled its obligations. With respect to the former, regardless of the academic decisions involved, this is a breach of contract case. Defendant could have resolved the dispute with plaintiff in a number of different ways, including paying plaintiff a certain sum that he requested. It chose, however, to bind itself to the terms of the agreement. Second, whether defendant fulfilled its

²The cases cited by the IAS Court on this issue do not apply here because none of the cited cases involved a contractual obligation. In *Brown v Albert Einstein Coll. of Medicine of Yeshiva Univ.* (172 AD2d 197 [1991]), there was no contract at issue; the plaintiff merely claimed age discrimination based on the school's failure to admit him in the normal application process. Moreover, unlike Adam, plaintiff Brown's test scores and grades were well below average for admission to the medical school. Similarly, *Ochei v Helene Fuld Coll. of Nursing of N. Gen. Hosp.* (22 AD3d 222 [2005], *lv denied* 6 NY3d 714 [2006]), which concerned a challenge to the school's decision to dismiss a student after she twice failed a course, did not involve any contractual obligation. In the one case cited by defendant below that did involve a contractual obligation, *Mangla v Brown Univ.* (135 F3d 80, 83 [1st Cir 1998]), the court noted that the proper standard for interpreting the contract is "reasonable expectation -- what meaning the party making the manifestation, the university, should reasonably expect the other party to give it" (quoting *Giles v Howard Univ.*, 428 F Supp 603, 605 [D DC 1977]). Here, given the nature of the dispute and the parties' willingness to settle the dispute by, inter alia, including ¶ 6 in their agreement, it is certainly reasonable for NYU to have anticipated that plaintiff would expect NYU to honor the courtesies and considerations it agreed to extend.

obligation under the terms of the agreement is a matter for the trier of facts to decide, not this Court.

The majority also cites *Raethz v Aurora Univ.* (346 Ill App 3d 728, 732, 805 NE2d 696, 699 [2004]) in support of its concession that a student may have a remedy for breach of contract from an adverse academic decision (there, dismissal from a masters program for failing to complete the field instruction), but only if that decision was made arbitrarily, capriciously or in bad faith. That case is inapposite. Adam was never a student of NYU, and plaintiff's claim with respect to Adam has nothing to do with whether NYU properly dismissed Adam from CAS for poor academic performance. The issue here is whether defendant breached its agreement with plaintiff, and as noted above, plaintiff presented sufficient proof in admissible form regarding the elements of a breach of contract claim to avoid summary judgment.

With respect to damages, there is no question that plaintiff incurred tuition expenses at other universities because Adam was not admitted to CAS. Therefore, in the event a jury were to find in favor of plaintiff, there are indisputable damages that must be established at trial (*J.R. Loftus, Inc. v White*, 85 NY2d 874, 877 [1995]).

Defendant's claim that Adam could have mitigated these

damages by attending the School of General Studies or by reapplying for admission to CAS has no merit. "The rule requiring the party injured by a breach of contract to make efforts to minimize the damages . . . does not require that the party enter into a new contract with the party in default" (36 NY Jur 2d, Damages § 25; see *Rollins v Sidney B. Bowman Cycle Co.*, 96 App Div 365, 369 [1904]). "It is often reasonable to refuse to mitigate by agreeing to a substitute contract with the breaching party" (11 Corbin on Contracts § 57.11 at 314 [rev ed]).

In my opinion, the court also erroneously denied plaintiff's cross motion for a finding of spoliation. As noted above, plaintiff had a conversation with Dr. Berne during which he asked that a disinterested party review the relevant applications of all faculty children who applied to NYU. Dr. Berne rejected this request and stated that plaintiff could sue if he was not satisfied with NYU's response. This conversation clearly placed defendant on notice of the relevance of paper files of all faculty children who applied for admission to CAS.³ Rather than

³Indeed, in response to interrogatory 15, defendant provided statistical data for applicants whose parents were either current or retired faculty members of the School of Medicine. Although it later informed plaintiff that its answer to interrogatory 15 was incorrect because it only reflected applicants who were admitted, it bears mentioning that defendant, in initially responding, never argued that the request was irrelevant.

placing a hold on these documents, NYU merely held Adam's paper file, and in the normal course of business destroyed the other files in October 2006, approximately four months after the filing of the complaint. Once a party is "on notice that the evidence might be needed for future litigation," it may not destroy documents, even "pursuant to normal business practice" (*Lawrence Ins. Group, Inc v KPMG Peat Marwick LLP*, 5 AD3d 918, 919 [2004]; see also *Conderman v Rochester Gas & Elec. Corp.*, 262 AD2d 1068 [1999] [spoliation sanctions appropriate for discarding items in good faith and pursuant to normal business practices, where litigation is pending or there is notice of a specific claim]).

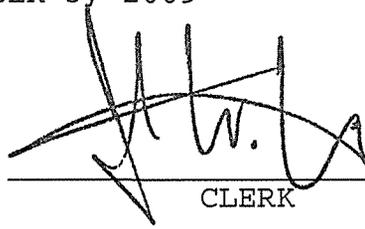
The fact that NYU kept a digital version of the files is of no moment. The paper files were important because they contained the admissions staff's handwritten comments on the applications they reviewed. A direct comparison of these files with Adam's could have established whether Adam had been extended the courtesies plaintiff had bargained for, and whether he would have been admitted to CAS. Although defendant improperly destroyed these documents, the record, as the IAS court found, does not indicate that the destruction was done "willfully, contumaciously or in bad faith." The destruction of these vital documents nonetheless prejudices plaintiff's case. Accordingly, the IAS court should have granted the cross motion to the extent of

directing that an adverse inference charge be given to the jury.

I agree with the majority, however, that the IAS court properly dismissed the breach of contract claim on behalf of plaintiff's twin sixth graders as unripe and speculative.

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

ENTERED: DECEMBER 3, 2009



CLERK

DEC 3 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom,	J.P.
Eugene Nardelli	
James M. Catterson	
Dianne T. Renwick	
Rosalyn H. Richter,	JJ.

777-778

x

In re Parminder Kaur, et al.,
Petitioners,

-against-

New York State Urban Development
Corporation, etc.,
Respondent.

- - - -

In re Tuck-It-Away, Inc., et al.,
Petitioners,

-against-

New York State Urban Development
Corporation, etc.,
Respondent.

x

In these proceedings, the petitions challenge the determination of respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation, dated December 18, 2008, which approved the acquisition of certain real property for the project commonly referred to as the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project.

Goldberg Weprin Finkel Goldstein LLP, New York (David L. Smith of counsel), for Parminder Kaur, Amanjit Kaur and P.G. Singh Enterprises, LLP, petitioners.

Norman Siegel, New York and McLaughlin & Stern, LLP, New York (Steven J. Hyman of counsel) and Philip Van Buren, New York for Tuck-it-Away petitioners.

Carter Ledyard & Milburn LLP, New York (John R. Casolaro, Joseph M. Ryan, Susan B. Kalib, Victor J. Gallo and Theodore Y. McDonough of counsel) and Sive Paget & Riesel, P.C., New York (Mark Chertok and Dan Chorost of counsel), for respondent.

CATTERSON, J.

"An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority [...] A few instances will suffice to explain what I mean [...] [A] law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Government, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them." Calder v. Bull, 3 U.S. 386, 388, 3 Dall. 386, 388, 1 L.Ed. 648 (1798).¹

The exercise of eminent domain power by the New York State Urban Development Corporation d/b/a Empire State Development Corporation (hereinafter referred to as "ESDC") to benefit a private elite education institution is violative of the Takings Clause of the U.S. Constitution, article 1, § 7 of the New York Constitution, and the "first principles of the social contract." The process employed by ESDC predetermined the unconstitutional outcome, was bereft of facts which established that the neighborhood in question was blighted, and ultimately precluded the petitioners from presenting a full record before either the ESDC or, ultimately, this Court. In short, it is a skein worth

¹The beginning of Justice O'Connor's dissent in Kelo v. City of New London (545 U.S. 469, 494, 125 S.Ct. 2655, 162 L.Ed.2d 439, 460-462 (2005)) quotes extensively from this passage. However, one need not adopt her dissenting position to agree with the powerful warning of Justice Chase in Calder.

unraveling.

THE TAKING OF MANHATTANVILLE

This case involves the acquisition, by condemnation or voluntary transfer, of approximately 17 acres in the Manhattanville area of West Harlem for the development of a new campus for Columbia University, a not for profit corporation (hereinafter referred to as "The Project"). The Project, referred to as the Columbia University Educational Mixed Used Development Land Use Improvement and Civic Project, would consist of a total of approximately 6.8 million gross square feet in up to 16 new buildings, a multi-level below-grade support space, and the adaptive re-use of an existing building. In addition, the Project would purportedly create approximately two acres of publicly accessible open space, a market along Twelfth Avenue, and widened, tree-lined sidewalks.

The Project site is bounded by and includes West 125th Street on the south, West 133rd Street on the north, Broadway and Old Broadway on the east, and Twelfth Avenue on the west, as well as certain areas located beneath City streets within this area and beneath other City streets in the Project site. The estimated acquisition and construction cost for the Project is \$6.28 billion, and will be funded by Columbia without any contribution from any municipal entity.

In 2001, Columbia, together with numerous other organizations, began working with the New York City Economic Development Corporation (hereinafter referred to as "EDC") to redevelop the West Harlem area. In August 2002, the EDC issued a West Harlem Master Plan (hereinafter referred to as the "Plan") describing the economic redevelopment plan. In the Plan, the EDC contended that the area was "once denser, livelier and a waterside gateway for Manhattan," and that "[a] renewed future seem[ed] possible." The EDC stated that it hoped to "revitaliz[e] [...] a long-forsaken waterfront," provide transportation, develop "a vibrant commercial and cultural district," and support academic research. The EDC noted that the current land use was "auto-related or vacant," with several "handsome, mid-rise buildings [...] interspersed with parking lots and partially empty industrial buildings." According to data prepared for the Plan by Ernst & Young, 54 of the 67 lots were in "good," "very good" or "fair" condition.

In 2000, Columbia owned only 2 properties in the Project area. In 2002, Columbia began purchasing property in the area in order to effectuate its own plan to expand its facilities. By early October 2003, Columbia controlled 51% of the property in the Project area - 33% of which was still privately owned.

As early as March 2004, ESDC, EDC, and Columbia began

meeting regarding the Project and the condemnation of land. In June 2004, Columbia hired Allee, King, Rosen and Fleming, Inc. (hereinafter referred to as "AKRF"), an environmental and planning consulting firm, to assist in its planning, to act as its agent in seeking approvals and determinations from various agencies necessary to realize its expansion plan, and to prepare an Environmental Impact Statement (hereinafter referred to as the "EIS"). See Matter of Tuck-It-Away Assoc., L.P. v. Empire State Dev. Corp., 54 A.D.3d 154, 157, 861 N.Y.S.2d 51, 53-54 (1st Dept. 2008), lv. granted, 12 N.Y.3d 708, 879 N.Y.S.2d 55, 906 N.E.2d 1089 (2009) (hereinafter referred as "Tuck-It-Away I"). AKRF began attending meetings with Columbia, ESDC and EDC in connection with the Project.

On July 30, 2004, Columbia entered into an agreement with ESDC to pay the costs incurred by ESDC in connection with the Project. According to the agreement, Columbia owned or controlled, or expected to control, "a substantial portion of the lots within the" Project area.

In August 2004, EDC issued a "Blight Study" of the West Harlem/Manhattanville Area which was prepared by a consultant, Urbitran Associates, Inc. The study concluded that the area was "blighted."

In December 2004, the ESDC, not content to rest on the

Urbitran study, noted that it would have to make its own "blight findings" in connection with the Project. In an e-mail dated January 7, 2005, Columbia's Project Manager, Lorinda Karoff of Karen Buckus and Associates, indicated that Columbia's attorneys "and also possibly AKRF (who has already reviewed the document once at EDC's offices), wished to see the draft blight study." Karoff noted that the draft study "may change or even be completely replaced as ESDC uses different standards than the City."

In or about September 2006, ESDC retained Columbia's consultant AKRF to evaluate the conditions at the Project site. AKRF in turn retained Thornton Tomasetti, Inc., an engineering firm, to inspect and evaluate the physical condition of each existing structure at the Project site.

On November 1, 2007, AKRF issued its Manhattanville Neighborhood Conditions Study (hereinafter referred to as "AKRF's study"). The study noted that as of April 30, 2007, Columbia owned or had contracted to purchase 48 of the 67 tax lots (72 percent) in the study area. The study found that "48 of the 67 lots in the study area (or 72 percent of the total lots) have one or more substandard condition, including poor or critical physical lot conditions, a vacancy rate of 25 percent or more, or site utilization of 60 percent or less." In addition, the study

found that "34 of the 67 lots in the study area (or 51 percent of the total lots) were assessed as being in poor or critical condition." According to the study, "[t]he presence of such a high proportion of properties with multiple substandard conditions suggests that the study area has been suffering from a long-term trend of poor maintenance and disinvestment." The study concluded that the Project area was "substantially unsafe, unsanitary, substandard, and deteriorated."

On November 16, 2007, the New York City Planning Commission (hereinafter referred to as the "CPC"), the lead agency for the Project under the New York State Environmental Quality Review Act (hereinafter referred to as the "SEQRA") and the City's Environmental Quality Review Act (hereinafter referred to as the "CEQRA"), issued a notice of completion for the Project's final environmental impact statement (hereinafter referred to as the "FEIS"). On November 26, 2007, CPC issued its findings on the FEIS pursuant to both SEQRA and CEQRA.

After a public hearing held by the City Council on December 12, 2007, the Council approved the rezoning of approximately 35 acres of West Harlem including the 17-acre Project site. Meanwhile, West Harlem Business Group (hereinafter referred to as "WHBG"), a group of businesses within the Project area, as well as Tuck-It-Away Associates, L.P., a member of WHBG, requested

various documents from the ESDC related to the Project pursuant to the Freedom of Information Law (hereinafter referred to as "FOIL"). When the ESDC refused to provide certain documents, WHBG and TIA filed article 78 petitions. See Tuck-It-Away I, 54 A.D.3d at 159, 861 N.Y.S.2d at 55.

On July 3, 2007 and on or about August 23, 2007, the New York County Supreme Court (Shirley Werner Kornreich, J.), granted the applications to compel ESDC to release the documents, including documents involving ESDC's communications with AKRF. In particular, the court found that an agency exemption did not apply to the AKRF documents since AKRF lacked "sufficient neutrality" due to its role as a consultant for both the ESDC and Columbia. The ESDC appealed from those orders.

On July 15, 2008, this Court affirmed Supreme Court's order for disclosure of documents related to ESDC's communications with AKRF, and otherwise reversed. See Tuck-It-Away I, 54 A.D.3d at 162, 861 N.Y.S.2d at 57. With respect to the AKRF documents, we agreed with Supreme Court that AKRF's representation of both ESDC and Columbia with respect to the Project "creates an inseparable conflict for purposes of FOIL." 54 A.D.3d at 164, 861 N.Y.S.2d at 58-59. In particular, we found that "FOIL is not blind to the extensive record of the tangled relationships of Columbia, ESDC and their shared consultant, AKRF." 54 A.D.3d at 166, 861

N.Y.S.2d at 60. Due to AKRF's consulting and advocacy work for Columbia, we questioned AKRF's ability to provide "objective advice" to the ESDC, particularly with respect to its preparation of the blight study. Id., 861 N.Y.S.2d at 60.

In response to the concerns about AKRF's neutrality, on February 7, 2008, approximately two months after we heard oral argument on the FOIL litigation, Carter Ledyard & Milburn LLP, acting on behalf ESDC, retained Earth Tech, Inc., an engineering and environmental consultant, to "audit, examine and evaluate" AKRF's study. Pursuant to that agreement, Earth Tech was "not now providing services to" Columbia and was prohibited from "perform[ing] any services for Columbia throughout the duration of th[e] Agreement." While the agreement is not an admission that AKRF was thoroughly compromised in its representation of both ESDC and Columbia, it is nonetheless an acutely transparent attempt to inoculate Earth Tech and ESDC from the damage done by AKRF.

In May 2008, almost six years after EDC issued the West Harlem Master Plan, and five years after Columbia gained control of more than one half of the realty contained in the project area, Earth Tech issued a Manhattanville Neighborhood Conditions Study. According to that study, Earth Tech "independently reviewed" AKRF's study as well as Thornton Tomasetti's findings

relating to the structural conditions of the buildings in the Project site. As part of its review, Earth Tech inspected and assessed the 67 lots on the Project site, "surveyed the study area," and "conducted various searches of public data bases on environmental contamination, Building Code violations, and ownership records." It bears repeating that, by this time, Columbia either owned or was in contract to purchase 48 of those 67 lots.

According to the Earth Tech study, Earth Tech's "independently arrived at findings substantially confirm[ed] those of AKRF and Thornton Tomasetti." However, Earth Tech found that certain buildings had "further deteriorated since the prior inspections." In particular, while the AKRF report had found that 34 lots (51%) were in critical or poor condition, Earth Tech found that 37 sites (55%) were in critical or poor condition. In addition, Earth Tech found a "long-standing lack of investor interest in the neighborhood," demonstrated by, among other things, the paucity of new buildings constructed since 1961, as well as "the extended neglect of building maintenance" and extensive Building Code violations. In particular, Earth Tech found that, as of July 2006, "there were 410 open violations" with respect to 75% of the lots in the Project site. Accordingly, Earth Tech concluded that a majority of the

buildings and lots in the Manhattanville area exhibited "substandard and deteriorated conditions" creating "a blighted and discouraging impact on the surrounding community."

On July 17, 2008, the ESDC adopted a General Project Plan (hereinafter referred to as the "GPP") for the Project as both a land use improvement project and a civic project in accordance with the New York State Urban Development Corporation Act.

By notice dated August 3, 2008, ESDC advised the public that they would conduct a hearing on September 2 and 4, 2008 in connection with the proposed Project and acquisition of property within the Project site. The petitioners and others spoke at the hearing. The record of the hearing remained open for any additional written comments until October 10, 2008.

On December 18, 2008, ESDC approved its SEQRA statement of findings, adopted a modified GPP, and authorized the issuance of the determination and findings. On December 22, 2008, ESDC issued its determination and findings authorizing the acquisition of certain real property for the Project. In particular, ESDC found that "[t]he Project qualifies as both a Land Use Improvement Project and separately and independently as a Civic Project pursuant to the New York State Urban Development Corporation Act."

On February 20, 2009, two petitions were filed in this Court

challenging the determination and findings. The petitioners Tuck-It-Away, Inc., Tuck-It-Away Bridgeport, Inc., Tuck-It-Away at 133rd Street, Inc. and Tuck-It-Away Associates, L.P. are owners of storage facilities located at 3261 Broadway, 614 West 131st Street, 655 West 125th Street, and 3300 Broadway.

Petitioners Parminder Kaur and Amanjit Kaur are the owners of a gasoline service station located at 619 West 125th Street, and petitioner P.G. Singh Enterprises, LLP is the owner of a gasoline service station located at 673 West 125th Street. It is uncontested that the petitioners' property is within the Project site and thus is subject to condemnation.

THE STANDARD OF REVIEW

In reviewing the determination and findings in these Eminent Domain Procedure Law (EDPL) proceedings this Court's scope of review is limited to whether (1) the proceeding was in conformity with the federal and state constitutions; (2) the proposed acquisition was within the condemnor's statutory jurisdiction or authority; (3) the condemnor's determination and findings were made in accordance with procedures set forth in EDPL article two and article eight of the Environmental Conservation Law ("SEQRA"); and (4) a public use, benefit or purpose will be served by the proposed acquisition. See EDPL § 207[C].

A negative finding in any one of these factors necessarily

dooms ESDC's determinations. The petitioners assert that the ESDC exceeded its statutory authority in designating the Project as a "Civic Project" under the Urban Development Corporation Act (hereinafter referred to as "UDCA") (L 1968, ch 174, §1, as amended) (McKinney's Uncons Laws of N.Y. §6252 et seq.). In addition, the petitioners assert that the alleged "civic" benefits of the Project are insufficient public purposes for the use of eminent domain. In particular, the petitioners assert that the expansion of a private university does not qualify as a "civic project" nor as a public purpose to justify the use of eminent domain under the EDPL. In addition, the petitioners assert that the other purported "civic purposes" and public benefits of the Project do not qualify as public purposes to justify condemnation or the designation of the project as a "civic project" since some of the purported benefits (1) arise from preexisting obligations of Columbia; (2) primarily benefit Columbia; and (3) are pretextual, unrelated to the use of the Project or are de minimis in value.

ESDC's determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent. A public use or benefit must be present in order for an agency to exercise its power of eminent domain. See U.S. Const. 5th amend; NY Const. art. I, § 7; EDPL 204[B] [1]). "[T]he

term 'public use' broadly encompasses any use [...] which contributes to the health, safety and general welfare of the public." See Matter of C/S 12th Ave. LLC v. City of New York, 32 A.D.3d 1, 10-11, 815 N.Y.S.2d 516, 525 (1st Dept. 2006). If an adequate basis for the agency's determination is shown, and the petitioner cannot show that the determination was corrupt or without foundation, the determination should be confirmed. See Matter of Waldo's, Inc. v. Village of Johnson City, 74 N.Y.2d 718, 720, 544 N.Y.S.2d 809, 810, 543 N.E.2d 74, 75 (1989); Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 425, 503 N.Y.S.2d 298, 310, 494 N.E.2d 429, 441 (1986); Kaskel v. Impellitteri, 306 N.Y. 73, 78, 115 N.E.2d 659, 661 (1953), cert. denied, 347 U.S. 934 (1954).

The UDCA defines a "civil project" as: "[a] project or that portion of a multi-purpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service or other civic purposes." Uncons. Laws of N.Y. § 6253(6)(d) (UDCA 3(6)(d)).

At the outset, it is important to note that as late as May 18, 2006, 2 ½ years into ESDC's participation project planning, the draft GPP still identified the project only as the "Manhattanville in West Harlem Land Use Improvement Project" even though there was no arguably independent blight study until May

2008. It was not until September 2006 that the project had "and Civic Project" added to its title, fully two years after Columbia agreed to wholly underwrite the project.

THE KELO DOCTRINE MANDATES

Any analysis of the constitutionality of ESDC's scheme for the development of Manhattanville must necessarily begin with a discussion of the most recent Taking Clause exposition by the U.S. Supreme Court in Kelo v. City of New London. 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).

It is recognized that Kelo, as described below, did not concern an area characterized as "blighted." However, the blight designation in the instant case is mere sophistry. It was utilized by ESDC years after the scheme was hatched to justify the employment of eminent domain but this project has always primarily concerned a massive capital project for Columbia. Indeed, it is nothing more than economic redevelopment wearing a different face. "[E]ven where the law expressly defines the removal or prevention of 'blight' as a public purpose and leaves to the agencies wide discretion in deciding what constitutes blight, facts supporting such determination should be spelled

out." Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 484, 373 N.Y.S.2d 112, 119, 335 N.E.2d 327, 332 (1975), appeal dismissed, 423 U.S. 1010, 96 S.Ct. 440, 46 L.Ed. 381 (1975). Furthermore, "[c]arefully analyzed, it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so." Yonkers, 37 N.Y.2d at 485, 373 N.Y.S.2d at 120, 335 N.E.2d at 333; see Matter of City of Brooklyn, 143 N.Y. 596, 618, 38 N.E. 983, 989 (1894), aff'd, 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165 (1897) ("But whether the use for which the property is to be taken, is a public use, which justifies its appropriation, is a judicial question; upon which the courts are free to decide.")

The determination of the Yonkers Court and the hoary authority of City of Brooklyn are still controlling precedent that require this Court not to abdicate its role to decide a "judicial question." Whether the respondents describe the use of eminent domain in Manhattanville as "urban renewal" or economic redevelopment, the question of public purpose or public use should be analyzed under the standards set out in Kelo.

In Kelo, the City of New London, a municipal corporation, and the New London Development Corporation attempted to use state law to take land to build and support economic revitalization of the city's downtown area known as Fort Trumbull. In its plan, New London divided the development into seven parcels with some of these parcels destined to be public waterways or museums. One parcel, known as Lot 3, was designated to be a 90,000 square foot high-technology research and development office complex and parking facility ultimately for the use of Pfizer Pharmaceutical Company.

Several plaintiffs in Lot 3 challenged the taking of their property. They claimed that the condemnation of unblighted land for economic development purposes violated both the state and federal constitutions. More specifically, they argued that the taking of private property under Connecticut's statute and handing it over to a private party did not constitute a valid public use, or at a minimum, the public benefit was incidental to the private benefits generated. The Connecticut Supreme Court rejected their claims under both the state and federal constitutions. The U.S. Supreme Court granted certiorari on the federal question of whether the taking of private property for economic development purposes, when it involved transferring land from one private owner to another, constituted a valid public use

under the Fifth and Fourteenth Amendments.

Justice Stevens, writing for the four-Justice plurality, characterized the New London program as "economic rejuvenation":

"The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including - but by no means limited to - new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in Berman, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan." 545 U.S. at 483-484, 125 S.Ct. at 2665, 162 L.Ed.2d at 454 (footnote omitted) citing Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed.2d 27 (1954).

The plurality broke little new ground on this issue. In Berman, Justice Douglas, writing for the unanimous Court, upheld the District of Columbia's use of eminent domain via act of Congress to acquire, inter alia, commercial property that was, itself, not blighted. The Court stated that "[t]he concept of public welfare is broad and inclusive [...] [and] the power of eminent domain is merely the means to the end." 348 U.S. at 33, 75 S.Ct. at 102-103, 99 L.Ed.2d at 38. The Berman Court elaborated on the deference due to government decisions of this

type:

"[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government -- or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." 348 U.S. at 33-34, 75 S.Ct. at 103, 99 L.Ed.2d at 38 (internal citations omitted).

The Kelo plurality also relied heavily on Hawaii Hous. Auth. v. Midkiff (467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984)), wherein the Court upheld a Hawaii statute that authorized the taking, under eminent domain, of fee title from large land-holding lessors and transferring it to a series of lessees. The Kelo plurality stated that in "[r]eaffirming Berman's deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the 'social and economic evils of a land oligopoly' qualified as a valid public use." 545 U.S. at 482, 125 S.Ct. at 2664, 162 L.Ed.2d at 453, quoting Midkiff, 467 U.S. at 241-242, 104 S. Ct. at 2330, 81 L.Ed.2d at 198.

The Kelo plurality reaffirmed the broad deference accorded to the legislature in determining what constitutes a valid public use as first enunciated in Berman. However, Justice Kennedy, in a concurring opinion, pointed out the obligations of any court

faced with challenges such as presented by ESDC's scheme to redevelop Manhattanville. He wrote specifically and separately on the issue of improper motive in transfers to private parties with only discrete secondary benefits to the public.

This is precisely the issue presented by the instant case. Justice Kennedy placed particular emphasis on the importance of the underlying planning process that ultimately called for the exercise of the power of eminent domain, and laid out in detail the elements of the New London plan that ensured against impermissible favoritism:

1. The city's awareness of its depressed economic condition, by virtue of a recent closing of a major employer and the state's designation of the city as a distressed municipality. 545 U.S. at 491, 125 S.Ct. at 2669, 162 L.Ed.2d at 459; cf. 545 U.S. at 473.
2. The formulation of a comprehensive development plan meant to address a serious citywide depression. Id. at 493, 125 S.Ct. at 2670, 162 L.Ed.2d at 460.
3. The substantial commitment of public funds to the project before most of the private beneficiaries were known. Id. at 491-492, 125 S.Ct. at 2669, 162 L.Ed.2d at 459.
4. The city's review of a variety of development plans. Id., 125 S.Ct. at 2669, 162 L.Ed.2d at 459.
5. The city's choice of a private developer from a group of applicants rather than picking out a particular transferee beforehand. Id.
6. The identities of most of the private beneficiaries being unknown at the time the city formulated its plan. Id. at 493, 125 S.Ct. at 2670, 162 L.Ed.2d at 460.

7. The city's compliance with elaborate procedural requirements that facilitate the review of the record and inquiry into the city's purposes. Id.

Justice Kennedy specifically acknowledged that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." Id., 125 S.Ct. at 2670, 162 L.Ed.2d at 460. Although he declined to conjecture as to what sort of case might justify a more demanding standard of scrutiny, beyond finding the estimated benefits there "not *de minimis*", it was the specific aspects of the New London planning process that convinced him to side with the plurality in deference to the legislative determination. See Id.

The contrast between ESDC's scheme for the redevelopment of Manhattanville and New London's plan for Fort Trumbull could not be more dramatic. Initially, it must be noted that unlike Fort Trumbull, Manhattanville or West Harlem as a matter of record was not in a depressed economic condition when EDC and ESDC embarked on their Columbia-prepared-and-financed quest. The 2002 West Harlem Master Plan stated that not only was Harlem experiencing a renaissance of economic development, but that the area had great development potential that could easily be realized through

rezoning. Again, it bears repeating that the only purportedly unbiased or untainted study that concluded that Manhattanville was blighted, and thus in need of redevelopment, was not completed until 2008; the point at which the ESDC/Columbia steamroller had virtually run its course to the fullest.

Unlike the City of New London, EDC, in conjunction with ESDC, did not endeavor to produce a comprehensive development plan to address a Manhattanville-wide economic depression. Furthermore, no municipal entity in New York committed any public funds for the redevelopment of Manhattanville. Indeed, Columbia underwrote *all* of the costs of studying and planning for what would become a sovereign sponsored campaign of Columbia's expansion. This expansion was not selected from a list of competing plans for Manhattanville's redevelopment. Indeed, the record demonstrates that EDC committed to rezoning Manhattanville, not for the goal of general economic development or to remediate an area that was "blighted" before Columbia acquired over 50% of the property, but rather solely for the expansion of Columbia itself.

The only alternative considered was West Harlem Community Board 9's alternative 197-a plan. More than 10 years in the making, Community Board 9's self-initiated comprehensive plan explicitly sought integrated and diversified development of the

Manhattanville industrial area so as to maximize economic benefits to local area residents rather than just Columbia. That plan contemplated that Columbia would play an important role in the eventual redevelopment of Manhattanville. However, it explicitly rejected the use of eminent domain and exclusive Columbia control in favor of diversified development and preservation of existing businesses and jobs.

Until May 3, 2007, drafts of the Columbia GPP make no mention of Community Board 9's 197-a plan. ESDC appears to have first considered the 197-a plan in the October 12, 2007 draft of the GPP, whereupon it rejected the city building's plan on the ground that it *"does not meet Columbia's needs as Columbia had defined them."* When the New York City Planning Commission adopted the 197-a plan, it carved out the area sought by Columbia because it did not provide Columbia *"adequate opportunity to facilitate Columbia's long-term growth."* The record shows no evidence that ESDC placed any constraints upon Columbia's plans, required any accommodation of existing, or competing uses, or any limitations on the scale or configuration of Columbia's scheme for the annexation of Manhattanville.

Thus, the record makes plain that rather than the identity of the ultimate private beneficiary being unknown at the time that the redevelopment scheme was initially contemplated, the

ultimate private beneficiary of the scheme for the private annexation of Manhattanville was the progenitor of its own benefit. The record discloses that every document constituting the plan was drafted by the preselected private beneficiary's attorneys and consultants and architects, from the General Project Plan, the Special District Zoning Text, the City Map Override Proposal, and the Land Use Restrictions to all phases of the environmental review. Even the blight study on which ESDC originally proposed to base its findings was prepared by Columbia's consultant AKRF, nominally retained by ESDC for the purpose, but which retention and use by ESDC was roundly condemned by this Court in Tuck-it-Away I.

In Kelo, the plurality assumed that the redevelopment in question was itself a public purpose. No such assumption should be made in the instant case despite the Columbia sponsored finding of blight.

**THERE IS NO INDEPENDENT CREDIBLE PROOF OF BLIGHT IN
MANHATTANVILLE**

Under the UDCA, the ESDC is empowered to acquire property for a land use improvement project if it finds, in pertinent part, that "the area in which project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the

sound growth and development of the municipality." Uncons. Laws 6260[c][1] (UDCA 10(c)(1)). The statute states, in relevant part, that "[t]he term 'substandard or insanitary area' shall mean and be interchangeable with a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area." Uncons. Laws 6253[12] (UDCA 3[12]). The statute's statement of legislative findings and purposes lists various "substandard, insanitary, deteriorated or deteriorating conditions" including, among other things:

"obsolete and dilapidated buildings and structures, defective construction, outmoded design, lack of proper sanitary facilities or adequate fire or safety protection, excessive population density, illegal uses and conversions, inadequate maintenance, [and] buildings abandoned or not utilized in whole or substantial part[.]" Uncons. Laws § 6252 (UDCA 2).

It is important to note that the record before ESDC contains no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein. Only that evidence which was part of ESDC's record before it was closed on December 18, 2008 can be properly considered on the question of blight. See Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d at 418, 503 N.Y.S.2d at 305 ("courts reviewing compliance with statutory requirements should consider whether the agency's conclusion is supported by substantial evidence in the record that was before the agency at

the time of its decision").

Thus, the affidavits of Dr. R. Andrew Parker, Earth Tech's principal urban planner and of Philip Pitruzzello which were sworn to after the record was closed, cannot inform this Court's review of ESDC's determinations.² ESDC's reliance on CPLR 403(b) is nothing more than an attempt to circumvent the plain language of EDPL 207(A) and the standard of review articulated in Jackson. Furthermore, the use of the subsequently crafted affidavits would preclude the petitioners from responding to the averments contained therein before the agency charged with the power of eminent domain.

It is critical to recognize that EDC's 2002 West Harlem Master Plan which was created prior to the scheme to balkanize Manhattanville for Columbia's benefit found no blight, nor did it describe any blighted condition or area in Manhattanville. Instead, as described above, the Plan noted that West Harlem had great potential for development that could be jump-started with re-zoning. It was only after the Plan was published in July 2002 that the rezoning of the "upland" area was essentially given over to the unbridled discretion of Columbia. In little more than a

² It is ironic that the respondent has urged this Court to consider the Parker and Pitruzzello affidavits while simultaneously defending the closing of the record despite the petitioners' protests that it was incomplete.

year from publication of the Plan, EDC joined with *Columbia* in proposing the use of eminent domain to allow Columbia to develop Manhattanville for Columbia's sole benefit.

This ultimately became the defining moment for the end game of blight. Having committed to allow Columbia to annex Manhattanville, the EDC and ESDC were compelled to engineer a public purpose for a quintessentially private development: eradication of blight.

From this point forward, Columbia proceeded to acquire by lease or purchase a vast amount of property in Manhattanville. It is apparent from the record that ESDC had no intention of determining if Manhattanville was blighted prior to, or apart from Columbia's control of the area. Though ESDC staff expressed concern about the sufficiency of the Urbitran study as early as December 15, 2004, it made no move towards independently ascertaining conditions in the area until late March 2006. Indeed, ESDC only commissioned a new study on September 11, 2006. From its first meeting with Columbia in September 2003, ESDC received regular updates about Columbia's property acquisitions in the area. On August 1, 2005, ESDC solicited reports about the parcels that were not owned by Columbia. Throughout this time Columbia not only purchased or gained control over most of the properties in the area, but it also forced out tenant businesses,

ultimately vacating, in 17 buildings, 50% or more of the tenants. The petitioners clearly demonstrate that Columbia also let water infiltration conditions in property it acquired go unaddressed, even when minor and economically rational repairs could arrest deterioration. Columbia left building code violations open, let tenants use premises in violation of local codes and ordinances by parking cars on sidewalks and obstructing fire exits, and maintaining garbage and debris in certain buildings over a period of years.

Thus, ESDC delayed making any inquiry into the conditions in Manhattanville until long after Columbia gained control over the very properties that would form the basis for a subsequent blight study. This conduct continued when ESDC authorized AKRF to use a methodology biased in Columbia's favor. Specifically, AKRF was to "highlight" such blight conditions as it found, and it was to prepare individual building reports "focusing on characteristics that demonstrate blight conditions."

This search for distinct "blight conditions" led to the preposterous summary of building and sidewalk defects compiled by AKRF, which was then accepted as a valid methodology and amplified by Earth Tech. Even a cursory examination of the study reveals the idiocy of considering things like unpainted block walls or loose awning supports as evidence of a blighted

neighborhood. Virtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor.

ESDC originally specified that AKRF should study trends in real estate values and rental demand, and though its counsel requested that AKRF evaluate building conditions at the time Columbia acquired them, AKRF's final report included none of this evidence or any analysis derived therefrom. Even when ESDC abandoned AKRF, it nonetheless requested that its subsequent consultant, Earth Tech, "replicate" the AKRF study using the same flawed methodology.

The "no blight" study proffered by the petitioners sets forth all of the factors that AKRF, Earth Tech and ESDC should have considered, but did not, to arrive at any conclusion that Manhattanville was, or was not, blighted. The study contains an analysis of real estate values, rental demand, rezoning applications and multiple prior proposals for the development of Manhattanville's waterfront and new commercial ventures; all omitted from ESDC's studies. ESDC failed to demonstrate any significant health or safety issues other than minor code violations that exist throughout the city, but more particularly in the buildings controlled by Columbia.

THE FOLLY OF UNDERUTILIZATION

The most egregious conclusion offered in support of the finding of blight is that of underutilization. AKRF and Earth Tech allege the existence of blight from, inter alia, the degree of utilization, or percentage of maximum permitted floor area ratio ("FAR") to which lots are built. The theoretical justification for using the degree of utilization of development rights as an indicator of blight is the inference that it reflects owners' inability to make profitable use of full development rights due to lack of demand. Lack of demand can only be determined in relation to the FAR when combined with the zoning for the area in question. Manhattanville, for the relevant period, was zoned to allow maximum FAR of two, leaving owners essentially with a choice between a one or two-story structure. No rationale was presented by the respondents for the wholly arbitrary standard of counting any lot built to 60% or less of maximum FAR as constituting a blighted condition. To the contrary, the New York City Department of City Planning uses a 50% standard to identify "underbuilt" lots. The petitioners accurately contend that while in a mid-rise residential area, or a high-rise business district, a 60% figure might have some meaning as an indicator of demand, in an area zoned for a maximum of two stories, it effectively requires owners to build to the

maximum allowable FAR. The M-1, M-2, and M-3 zoning of the Manhattanville industrial area was specifically intended, however, for uses in which a single story structure may be preferable. In our view, a 50% use of a permissible FAR of two does not, a fortiori, reflect a lack of demand. Moreover, for uses requiring loading docks, or storage of trucks or heavy equipment, or gas stations, for example, full lot coverage is not desirable. In an area zoned for such uses, utilization of 40% of FAR would be perfectly appropriate before any inference of insufficient demand can reasonably be made. The difference between AKRF's 60% standard and the petitioners' "no blight" study's 40% standard is the difference between 39% of the area, and 20% of the area being counted as "underutilized."

The time has come to categorically reject eminent domain takings solely based on underutilization. This concept put forward by the respondent transforms the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal. See Gallenthin Realty Dev. Inc. v. Borough of Paulsboro, 191 N.J. 344, 365, 924 A.2d 447, 460 (2007) ("Under that approach, any property that is operated in a less than optimal manner is

arguably 'blighted.' If such an all-encompassing definition of "blight" were adopted, most property in the State would be eligible for redevelopment"); In re Condemnation by Redevelopment Authority of Lawrence County, 962 A.2d 1257, 1265 (Pa. 2008), appeal denied, 973 A.2d 1008 (Pa. 2009) (holding use to less than full potential does not constitute "economically undesirable" land use); Sweetwater Valley Civic Assoc. v. City of National City, 18 Cal.3d 270, 555 P.2d 1099 (1976); Southwestern Illinois Dev. Auth. v. National City Env'tl., 304 Ill.App.3d 542, 556, 710 N.E.2d 896, 906 (1999), aff'd, 199 Ill.2d 225, 768 N.E.2d 1 (2002), cert. denied, 537 U.S. 880, 123 S.Ct. 88, 154 L.Ed.2d 135 (2002) ("If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite").

In New York, wherever underutilization has been a significant factor in a blight finding, courts have upheld the finding only in connection with other factors such as zoning defects rendering the property unusable or insufficiently sized or configured lots. Matter of Haberman v. City of Long Beach, 307 A.D.2d 313, 762 N.Y.S.2d 425 (2d Dept. 2003), appeal dismissed, 1 N.Y.3d 535, 775 N.Y.S.2d 232, 807 N.E.2d 282 (2003), cert.

dismissed, 543 U.S. 1086, 125 S.Ct. 1239, 160 L.Ed.2d 896 (2005); see Matter of Horoshko, 90 A.D.2d 850, 456 N.Y.S.2d 99 (2d Dept. 1982).

In this case, the record overwhelmingly establishes that the true beneficiary of the scheme to redevelop Manhattanville is not the community that is supposedly blighted, but rather Columbia University, a private elite education institution. These remarkably astonishing conflicts with Kelo on virtually every level cannot be ignored, and render the taking in this case unconstitutional.

THERE IS NO CIVIC PURPOSE TO THIS USE OF EMINENT DOMAIN

The use of eminent domain should also be rejected on the grounds that Columbia's expansion is not a "civic project." See Uncons Laws §6253(6)(d) (UDCA 3(6)(d)). ESDC states that the project will be used by Columbia for "education related uses," and thus the project serves a civic purpose. The petitioners correctly contend that within the definition of Uncons. Laws §6253(6)(d) (UDCA 3(6)(d)), a private university does not constitute facilities for a "civic project." The statutory definition does refer to educational uses, but the final clause "or other civic purposes," clearly restricts the educational purposes qualifying for a civic project to only such educational purposes as constitute a "civic purpose."

There is little precedent on precisely this question, and what there is to guide us augurs powerfully against the respondent. In Matter of Fisher (287 A.D.2d 262, 263, 730 N.Y.S.2d 516, 517 (1st Dept. 2001)), this Court affirmed the condemning agency's findings that the condemnation of a building for the construction of new New York Stock Exchange facilities would "result in substantial public benefits, among them increased tax revenues, economic development and job opportunities as well as preservation and enhancement of New York's prestigious position as a worldwide financial center." Here, Columbia is virtually the sole beneficiary of the Project. This alone is reason to invalidate the condemnation especially where, as here, the public benefit is incrementally incidental to the private benefits of the Project.

Although, as the petitioners note, there does not appear to be any New York case involving the condemnation of property for the purpose of expanding a private university, a California court held that a private university could acquire private land under its power of eminent domain for the purpose of landscaping and "beautify[ing]" the grounds surrounding a newly constructed university library. See University of S. California v. Robbins, 1 Cal. App. 2d 523, 525, 37 P.2d 163, 164 (1934), cert. denied, 295 U.S. 738, 55 S.Ct. 650, 79 L.Ed. 1685 (1935). The California

court reasoned that "[t]he higher education of youth in its largest implications is recognized as a most important public use, vitally essential to our governmental health and purposes." Robbins, 1 Cal. App. 2d at 530, 37 P.2d at 166. However, this case offers little support for the respondent's position. In Robbins, the grant of eminent domain power to a tax-exempt educational institution was a creature of state law. No such legislative grant is present in the instant case. Furthermore, neither ESD nor ESDC based the use of eminent domain on Columbia's tax exempt status.

At least one court in New York has acknowledged, in dicta, that private institutions of higher learning serve important public purposes (see Matter of Board of Educ., Union Free School Dist. No.2 v. Pace Coll., 27 A.D.2d 87, 91, 276 N.Y.S.2d 162, 166 (2^d Dept. 1966)), but this case reaches a conclusion directly contrary to the respondent's argument. In Pace, a local school board sought to acquire, by condemnation, land that Pace College purchased for the purpose of expanding its facilities (see 27 A.D.2d at 88, 276 N.Y.S.2d at 163). The Second Department held that Pace, a private college, could not resist appropriation of the land by invoking the defense that such land was being used for public purposes, since such a defense "is available only to a property owner who has been granted a power to condemn equivalent

to that of the petitioning condemnor" and "Pace has been granted no such power" (27 A.D.2d at 89, 276 N.Y.S.2d at 164). While noting that Pace College "performs an admittedly useful service to the community and one in which the public has such vital interest that the State undertakes to regulate and control closely those institutions which engage therein" (27 A.D.2d at 91, 276 N.Y.S.2d at 166), the Second Department refused to consider whether Pace's character as an education institution would immunize it from the use of eminent domain by a local school board under the defense of prior public use. The Court explicitly rejected Pace's contention that its tax exempt status conferred such immunity:

"Nor do we find it persuasive that the State, in order to encourage and assist the development of private educational institutions such as Pace College, has conferred upon them an exemption from the operation of certain tax laws. The fallacy of the argument urged upon us that an educational corporation receives such an exemption upon the principle of nontaxation of public places and as a 'quid pro quo' for the institution's performance of a public function has been demonstrated elsewhere." Pace Coll., 27 A.D.2d at 91, 276 N.Y.S.2d at 166 (internal citations omitted).

Were we to grant civic purpose status to a private university for purposes of eminent domain, we are doing that which the Legislature has explicitly failed to do: as in California and Connecticut, that decision is solely the province of the state legislature.

UDCA IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE

The petitioners assert, inter alia, that UDCA is unconstitutional as applied by the ESDC because the agency has failed to adopt, retain or promulgate any regulation or written standard for the finding of blight. The petitioners argue that the statute fails to give owners notice of what constitutes a blighted area and thus penalizes them for investing in land that may be taken away. In addition, the petitioners assert that the statute permits and encourages the ESDC to apply the law in an arbitrary and discriminatory fashion to favor developers like Columbia. In support, the petitioners note that AKRF, the consultant for this Project, as well as the Atlantic Yards project, used different standards for determining blight. For example, the petitioners noted that in the Atlantic Yards study, AKRF considered buildings that are at least 50% vacant to exhibit blight, whereas in this Project AKRF considered a vacancy rate of 25% or more to be substandard. We agree with the petitioners' contentions and find that the statute is unconstitutional as applied.

"[C]ivil as well as penal statutes can be tested for vagueness under the due process clause." Montgomery v. Daniels, 38 N.Y.2d 41, 58, 378 N.Y.S.2d 1, 15, 340 N.E.2d 444, 454 (1975); see U.S. Const., 14th amend.; N.Y. Const., art. I, § 6. Due

process requires that a statute be sufficiently definite "so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms." Foss v. City of Rochester, 65 N.Y.2d 247, 253, 491 N.Y.S.2d 128, 131, 480 N.E.2d 717, 719-720 (1985); see People v. Stuart, 100 N.Y.2d 412, 420, 765 N.Y.S.2d 1, 7, 797 N.E.2d 28, 34 (2003).

While the words "substandard or insanitary area" are not unconstitutionally vague, this does not necessarily end the inquiry. While these are abstract words, they have been interpreted and applied in the past without constitutional difficulty. See e.g. Matter of Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 59 A.D.3d 312, 874 N.Y.S.2d 414 (1st Dept 2009). Indeed, in Berman v Parker (348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954)), the Supreme Court held that a District of Columbia Redevelopment Act allowing for the elimination of "substandard housing and blighted areas" was "sufficiently definite" even though the term "blighted areas" was not defined and the term "substandard housing" was defined broadly to include "lack of sanitary facilities, ventilation, or light [...] dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors." 348 U.S. at 28 n1, 75 S.Ct. at 100, 99 L.Ed at 39 The Court found that "the standards prescribed were adequate [...] to eliminate not only slums [...]"

but also the blighted areas that tend to produce slums." Id. at 35, 75 S.Ct. at 104, 99 L.Ed. at 39.

"The public evils, social and economic of [unwholesome] conditions [in the slums], are unquestioned and unquestionable. Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality [...] Time and again [...] the use by the Legislature of the power of taxation and of the police power in dealing with the evils of the slums, has been upheld by the courts. Now, in continuation of a battle, which if not entirely lost, is far from won, the Legislature has resorted to the last of the trinity of sovereign powers by giving to a city agency the power of eminent domain." Matter of New York City Hous. Auth. v. Muller, 270 N.Y. 333, 339, 1 N.E.2d 153, 154 (1936).

Long after the U.S. Supreme Court decided Berman, the Ohio Supreme Court was faced with a statute virtually identical to that employed in the instant case, in City of Norwood v. Horney (110 Ohio St. 3d 353, 853 N.E.2d 1115 (2006)). The Norwood Court noted that "[i]nherent in many decisions affirming pronouncements that economic development alone is sufficient to satisfy the public-use clause is an artificial judicial deference to the state's determination that there was sufficient public use." 110 Ohio St. 3d at 371, 853 N.E.2d at 1136. Nevertheless, the Court invalidated the Norwood Code:

"Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement - a danger made more real by the malleable nature of the public-benefit requirement. We must be vigilant in ensuring that so great a power as eminent domain, which historically has been used in areas where the most marginalized groups live, is not abused." Norwood, 110 Ohio St. 3d at 382, 853 N.E.2d at 1145.

The UDCA suffers the same vagueness as the Norwood Code. The application of the UDCA by the various agencies in this case has resulted in "ad hoc and selective enforcement" as evidenced by the greatly divergent criteria used to define blight. The differences between the blight studies in Develop Don't Destroy, (Brooklyn) for Atlantic Yards and in the instant case, both performed by the same consultant, highlight the unconstitutional application of the UDCA. One is compelled to guess what subjective factors will be employed in each claim of blight.

THE UNCONSTITUTIONAL CLOSURE OF THE ADMINISTRATIVE RECORD

The petitioners correctly contend that when the respondent intentionally limited the administrative record by arbitrarily closing it, while simultaneously withholding documents that the petitioners are legally entitled to receive, it deprived the petitioners of a reasonable opportunity to be heard. Furthermore, we agree the petitioners were prevented from creating a full record for review by this Court, in violation of

EDPL 203 and the petitioners' due process rights under the Fourteenth Amendment of the United States Constitution and article 1, § 6 of the New York Constitution.

The EDPL requires that at the administrative hearing, prior to the close of the record, the condemnee shall be given a "reasonable opportunity" to be heard and an opportunity to "submit other documents concerning the proposed public project" into the record. EDPL 203. A full administrative record is critical for the obvious reason that judicial review of a condemnation decision under the EDPL is limited to issues, facts, and objections entered into the record at the condemnation hearing. EDPL 202(C)(2); 207(A), (B). The Second Circuit, in Brody v. Village of Port Chester (434 F.3d 121, 134 (2005)), emphasized that point: "[T]he procedures that are available are indeed limited in scope. The Appellate Division, which has exclusive jurisdiction over the review, will only consider the issues resolved by the legislative determination. Furthermore, the review is limited to the record before the condemnor at the time of the determination."

Additionally, any challenge to ESDC's determination is limited to that contained in the record on which the agency based its determination. The petitioners clearly had no ability under the EDPL to call witnesses to supplement the record, introduce

further evidence, cross-examine the respondents' witnesses who submitted expert affidavits after the record was closed or submit argument in opposition to those untimely expert affidavits. More importantly, the petitioners filed numerous FOIL requests seeking information about the Columbia plan and the process utilized by ESDC. The respondents vigorously opposed some of those FOIL requests which ultimately led to several Supreme Court orders requiring disclosure and our decision in Tuck-It-Away I.

It is beyond dispute that, as the cutoff date to enter documents into the record approached, the respondent and other agencies engaged in a last-ditch effort to thwart the petitioners' attempt to obtain documents, including those which were ordered by the courts of this State to be released and turned over to the petitioners. The respondent moved for reargument, or in the alternative, for leave to appeal from this Court's ruling in Tuck-It-Away and Matter of West Harlem Bus. Group v. Empire State Dev. Corp., which motion this Court denied in its entirety on January 27, 2009. 2009 NY Slip Op 61948 [u] (1st Dept. 2009), lv. granted, 2 N.Y.3d 708 (2009). Nonetheless, in making the motion, the respondent invoked an automatic stay of the decision, under CPLR 5519. Similarly, the New York City Department of City Planning moved to reargue Supreme Court's decision ordering disclosure of Columbia-related documents based

on the holding of Tuck-It-Away I. The respondent and other cooperating agencies, therefore, by virtue of section 5519, were provided the opportunity to withhold documents that this Court and Supreme Court ordered released, while at the same time closing the record to prevent these documents from being submitted into the record. The appeals and reargument motions became the sine qua non of the various agencies' non compliance with FOIL. Similarly, the petitioners' efforts to extend the deadline for closing the record were vigorously rebuffed by ESDC. ESDC's actions deprived the petitioners of a reasonable opportunity to be heard under EDPL 203 and violated their due process rights under the Fourteenth Amendment of the United State Constitution and article 1, § 6 of the New York Constitution.

Many commentators have noted that "[f]ew policies have done more to destroy community and opportunity for minorities than eminent domain. Some three to four million Americans, most of them ethnic minorities, have been forcibly displaced from their homes as a result of urban renewal takings since World War II." Belito and Somin, Battle Over Eminent Domain is Another Civil Rights Issue, Kansas City Star, Apr. 27, 2008. The instant case is clear evidence of that reality. The unbridled use of eminent domain not only disproportionately affects minority communities, but threatens basic principles of property as contained in the

Fifth Amendment. In her dissent in Kelo, Justice O'Connor warned that:

"Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded--i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public--in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property--and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment." Kelo, supra, 545 U.S. at 494, 125 S.Ct. at 2671, 162 L.Ed.2d at 461.

Justice O'Connor's admonition is equally true in this case in that:

"Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. '[T]hat alone is a *just* government,' wrote James Madison, 'which *impartially* secures to every man, whatever is his *own*.' For the National Gazette, Property (Mar. 27, 1792) reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983). 545 U.S. at 505, 125 S.Ct. at 2677, 162 L.Ed.2d at _ (emphasis supplied).

It is not necessary to reach the position that Kelo was wrongly decided to invalidate the proposed takings in this case.

The sharp differences between this case and the careful plan drafted by New London and described by the Kelo plurality could not be more compelling.

Accordingly, the petitions brought in this Court pursuant to Eminent Domain Procedure Law § 207 challenging the determination of respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation, dated December 18, 2008, which approved the acquisition of certain real property for the project commonly referred to as the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project, should be granted, and the determination annulled.

All concur except Richter, J. who concurs in a separate Opinion and Tom, J.P. and Renwick, J. who dissent in an Opinion by Tom, J.P.

RICHTER, J. (concurring)

Under the circumstances presented here, ESDC's premature closing of the agency record, while it continued to withhold relevant documents this Court had ordered disclosed under the Freedom of Information Law (FOIL), violated both the EDPL and procedural due process under the state and federal constitutions. I write separately to explain my reasoning.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" (*Mathews v Eldridge*, 424 US 319, 332 [1976]). The essence of procedural due process is notice and an opportunity to be heard (*id.* at 333; *Matter of Quinton A.*, 49 NY2d 328, 334 n [1980]). In the context of eminent domain, "[t]he constitutional requirement with respect to notice . . . concerns the opportunity to be heard on the issues of compensation and public use" (*Fifth Ave. Coach Lines v City of New York*, 11 NY2d 342, 348 [1962]; *accord County of Monroe v Morgan*, 83 AD2d 777, 778 [1981]). The opportunity to be heard in condemnation proceedings is also mandated by the EDPL which requires a public hearing (EDPL 201), where the attendees must be given a "reasonable opportunity" to present oral or written statements and to "submit other documents concerning the proposed

public project" (EDPL 203).

In determining whether a procedural due process violation has occurred, courts must balance the property owner's interests against the government's interests (*Matter of Zaccaro v Cahill*, 100 NY2d 884, 890 [2003]). In doing so, the following factors must be weighed: (i) the private interest that will be affected by the official action; (ii) the risk of erroneous deprivation of such interest by the procedures employed, and the probable value, if any, of additional procedural safeguards; and (iii) the State's interest, including the function involved and the fiscal and administrative burdens that such additional procedural requirements would entail (*Pringle v Wolfe*, 88 NY2d 426, 431 [1996], *cert denied* 519 US 1009 [1996]).

The balancing of these factors leads me to conclude that, under the unique circumstances presented, Tuck-It-Away's procedural due process and statutory rights were violated by ESDC's refusal to keep the record open until the conclusion of the FOIL litigation initiated by Tuck-It-Away.¹ As to the first due process factor, the private interest affected here is substantial. Tuck-It-Away stands to lose the four properties it

¹ Tuck-It-Away shall refer, individually and collectively, to each of the four named petitioners in the first captioned matter.

owns in the Manhattanville area where it conducts its self-storage business.²

The second factor -- the risk of erroneous deprivation of Tuck-It-Away's properties by the closing of the agency record and the probable value of holding the record open until all of the withheld FOIL documents were produced -- requires review of Tuck-It-Away's claims. A condemnation can be set aside if it was made in bad faith (*Matter of 49 WB, LLC v Village of Haverstraw*, 44 AD3d 226, 238-39 [2007]; *Greenwich Assoc. v Metropolitan Transp. Auth.*, 152 AD2d 216, 221 [1989], *appeal dismissed* 75 NY2d 865 [1990]) or under the pretext of a public purpose when the actual purpose was to bestow a private benefit (*Kelo v City of New London*, 545 US 469, 478 [2005]; *Matter of Goldstein v New York State Urban Dev. Corp.*, 64 AD3d 168, 183 [2009]). Here, Tuck-It-Away points to evidence suggesting that ESDC's findings of blight and civic purpose were made in bad faith and were pretextual, and that the real reason for the condemnation was not to further any public purpose but rather to benefit Columbia, a private developer.

At the heart of Tuck-It-Away's bad faith/pretext argument

² Although the Kaur petitioners do not raise a due process claim, the devastating consequence of the loss of their property equals that of Tuck-It-Away.

lies what this Court has described as the "tangled relationships of Columbia, ESDC and their shared consultant, AKRF" (*Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 166 [2008], *lv granted* 12 NY3d 708 [2009]). In that decision, we found that AKRF's simultaneous representation of both ESDC and Columbia created "an inseparable conflict" for purposes of FOIL (*Tuck-It-Away*, 54 AD3d at 164). In light of the fact that AKRF was serving two masters, we concluded that there was reason to doubt AKRF's independence and objectivity (54 AD3d at 165).

Although ESDC subsequently hired another consultant -- Earth Tech -- to prepare a neighborhood conditions study, the record raises questions as to whether, in doing so, ESDC sought and obtained a truly independent analysis. The contract retaining Earth Tech does not require it to do a de novo study, but rather it was retained to examine the information in the AKRF study. If AKRF, due to its preexisting relationship with Columbia, used a flawed or biased methodology to evaluate neighborhood conditions in order to reach the result Columbia wanted, any such flaws or biases would necessarily have been carried over to the Earth Tech study. Furthermore, ESDC's Determination and Findings explicitly acknowledge that it "relied upon the facts and analyses set forth in the [AKRF study]" in exercising its condemnation power.

There are serious legal questions about whether the proposed

development constitutes a "civic project" under the Urban Development Corporation Act (UDCA) (McKinney's Uncons Laws of NY § 6251, *et seq.* [L 1968, ch 174, § 1, as amended]). In the absence of a civic purpose, the only possible basis for ESDC's exercise of eminent domain would rest on a finding of blight. Thus, in light of the significant questions raised concerning ESDC's alleged bad faith and improper motives, I find that ESDC should not have closed the agency record prior to the conclusion of the FOIL litigation.³ The final factor -- the State's interest and the burdens of keeping the record open -- weighs in favor of Tuck-It-Away. The wrongfulness of ESDC's actions becomes apparent by examining the history of Tuck-It-Away's efforts to obtain documents from the agency. In 2005 and 2006, Tuck-It-Away and West Harlem Business Group (WHBG), an association of which Tuck-It-Away is a member, made a number of requests to ESDC under FOIL seeking records relating to the project and planning activities. Although ESDC produced some records, others were withheld. Tuck-It-Away and WHBG brought CPLR article 78 petitions challenging ESDC's determination and Supreme Court

³ Neither the briefs nor oral argument established the precise number or nature of the withheld documents, though there are letters in the voluminous record on appeal which suggest that ESDC may have voluntarily produced some of the documents we ordered disclosed.

ordered the agency to turn over certain records, which we affirmed.

The public hearing on the condemnation was held on September 2 and 4, 2008, just six weeks after our decision, and the record was scheduled to be closed on October 10. Clearly, had ESDC complied with this Court's order and turned over all the documents, Tuck-It-Away could have submitted that information for inclusion in the record.⁴ Instead, by seeking reargument of our decision and leave to appeal to the Court of Appeals, ESDC gained the benefit of the automatic statutory stay of our order (CPLR 5519) thereby keeping the withheld documents out of the agency record. Although, as the dissent notes, Tuck-It-Away did not seek to vacate the automatic stay, this does not alter the legal analysis as to whether ESDC's subsequent closing of the record violated due process.

In addition, ESDC denied Tuck-It-Away's request to keep the record open until the resolution of the FOIL litigation and vigorously opposed Tuck-It-Away's attempt in Supreme Court to enjoin the agency from closing the record. Although a temporary restraining order was obtained, on October 30, 2008, Supreme

⁴ No argument can be made that Tuck-It-Away did not act diligently in trying to obtain the records because the relevant FOIL request was made a full two years before the public hearing was held.

Court vacated that order and dismissed Tuck-It-Away's challenge. That same day, ESDC closed the agency record, thus thwarting Tuck-It-Away's opportunity to submit the withheld documents.

ESDC has failed to convincingly explain why it did not adjourn the condemnation hearing until after the FOIL litigation was resolved. Indeed, EDPL 203 explicitly provides that "[f]urther adjourned hearings may be scheduled." Tellingly, ESDC does not argue that the relatively short delay in the hearing pending resolution of the FOIL litigation would have negatively impacted the project, which had been in planning as early as 2002 and whose construction is scheduled to take place in two phases over the course of 25 years. In *Matter of East Thirteenth St. Community Assn. v New York State Urban Dev. Corp.* (84 NY2d 287 [1994]), the Court of Appeals noted that the drafters of the EDPL recognized that increased public participation could delay projects, but also believed that requirements of notice and a hearing could forestall the increasing amount of litigation (84 NY2d at 294).

ESDC maintains that the premature closing of the record is of no legal significance because Tuck-It-Away was provided with ample opportunity to be heard through testimony at the public hearing and submission of documents into the record. However, "[a] due process right to be heard requires an opportunity to be

heard 'at a meaningful time and in a meaningful manner'" (*Rao v Gunn*, 73 NY2d 759, 763 [1988], quoting *Armstrong v Manzo*, 380 US 545, 552 [1965]). In light of the withholding of critical documents which were ordered disclosed by this Court, the opportunity provided to Tuck-It-Away here was not meaningful within the spirit of due process.

ESDC unpersuasively argues that a ruling in Tuck-It-Away's favor on this particular issue would require future condemning authorities to litigate every disputed issue through to the Court of Appeals before exercising their power of eminent domain. Due process, however, is a flexible concept whose procedural protections must be tailored to the particular facts at hand (*Curiale v Ardra Ins. Co.*, 88 NY2d 268, 274 [1996]; *Matter of Weeks Mar. v City of New York*, 291 AD2d 277, 278 [2002]). Thus, "not all situations calling for procedural safeguards call for the same kind of procedure" (*Morrissey v Brewer*, 408 US 471, 481 [1972]). Merely because I find a due process violation here does not mean that in every case, all FOIL requests must be resolved before an agency can condemn property. Nor do I find, as Tuck-It-Away urges, that due process requires a full trial court review, including discovery, cross-examination and a jury trial. However, the confluence of factors here, including the evidence raising questions of bad faith and pretext, Tuck-It-Away's

protracted effort to obtain the withheld documents and ESDC's denial of the request to keep the record open while exercising their right to stay this Court's order requiring disclosure leads me to conclude that a due process violation has occurred in this case.

The finding of a due process violation here is not in conflict with *Brody v Village of Port Chester* (434 F3d 121 [2005]). In *Brody*, the Second Circuit held that the EDPL's procedures for reviewing condemnation findings do not violate the federal constitution (434 F3d at 123). The Second Circuit, however, neither addressed the state constitutional issues nor did it decide whether a due process violation could occur if the State's actions interfere with a property owner's right to obtain meaningful review in this Court.

ESDC'S reliance on *Matter of Waldo's, Inc. v Village of Johnson City* (141 AD2d 194, 199 [1988], *affd* 74 NY2d 718 [1989]), is misplaced. In *Waldo's*, the petitioner maintained that the public hearing was invalid in part because the respondent refused to provide full and complete information about the project's funding and denied it the opportunity to cross-examine witnesses at the hearing. The Court denied the due process claim and found that the petitioner did in fact receive an answer to its question on funding and that there was no right to an adversarial hearing.

Here, in contrast, there is no dispute that at the time the record was closed, Tuck-It-Away had not received all the documents this Court ordered turned over.

Lawrence v Baxter (2004 WL 1941347, *3, 2004 US Dist LEXIS 18022, *8-10 [WD NY 2004], *affd* 139 Fed Appx 365 [2d Cir 2005]), cited by ESDC as support for denying Tuck-It-Away's due process claim, has no applicability to this dispute. *Lawrence*, a 42 USC § 1983 case having nothing to do with eminent domain, merely held that for due process purposes, a plaintiff has no property interest in obtaining documents under FOIL. The court dismissed the plaintiff's due process claim because he failed to allege that he was deprived of a property interest protected by the United States Constitution. Here, however, the property interest asserted is not the documents themselves, but rather Tuck-It-Away's four buildings. Thus, *Lawrence* is irrelevant to the due process analysis here.

Because the condemnation proceeding was neither "in conformity with the federal and state constitutions" (EDPL 207[C][1]) nor "in accordance with procedures set forth in [the EDPL]" (EDPL 207[C][3]), ESDC's Determinations and Findings should be rejected. Since the determination must be annulled based on ESDC's premature closing of the record, it is not

necessary for me to address the other statutory and constitutional issues presented by this case.

TOM, J. (dissenting)

At issue on this appeal is the acquisition of approximately 17 acres in the Manhattanville area of West Harlem by Columbia University for the development of its campus. In addition to up to 16 new buildings, a multi-level below-grade facility and the adaptive re-use of an existing building, the project would create approximately two acres of publicly accessible open space, a market along 12th Avenue and widened tree-lined sidewalks. The General Project Plan adopted by Empire State Development Corporation (ESDC), as modified, states that the project, inter alia, will maintain the City and State of New York as a leading center of higher education and academic research by providing state-of-the-art facilities and provide the community with employment opportunities and civic amenities.

Petitioners own property subject to condemnation located within the project site, which extends from West 125th Street to West 133rd Street and from Broadway and Old Broadway to 12th Avenue. They brought this proceeding to challenge ESDC's determination that the project qualifies not only as a land use improvement project but also, discretely, as a civic project pursuant to the New York State Urban Development Corporation Act

(UDCA) (L 1968, ch 174, § 1, as amended) § 6253(6)(c) and (d) (McKinney's Uncons Laws of NY § 6253[6][c], [d]).

I do not accept petitioners' contention that the project neither qualifies as a civic project nor serves a public purpose and, thus, that ESDC exceeded its statutory authority in designating the project a civic project pursuant to Uncons Laws § 6260(d). Under the UDCA, such designation is conditioned upon findings that "there exists in the area in which the project is to be located, a need for the educational, cultural, recreational, community, municipal, public service or other civic facility to be included in the project" (Uncons Laws § 6260[d][1]) and that "the project shall consist of a building or buildings or other facilities which are suitable for educational, cultural, recreational, community, municipal, public service or other civic purposes" (Uncons Laws § 6260[d][2]). A private institution of higher learning serves a public purpose (see *University of S. California v Robbins*, 1 Cal App 2d 523, 37 P2d 163 [1934], cert denied 295 US 738 [1935]). In any event, ESDC's finding that the project will serve a public purpose by providing, among other things, needed educational facilities in the area in which it is to be located is neither irrational nor baseless.

Property is subject to acquisition in connection with a land use improvement project upon ESDC's finding, inter alia, that "the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area" (Uncons Laws § 6260[c][1]). "Substandard or insanitary area," by definition, is "interchangeable with a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area" (Uncons Laws § 6253[12]). Various conditions constituting blight are set forth in the UDCA's statement of legislative findings and purposes (Uncons Laws § 6252). Contrary to petitioners' contention, the term "substandard or insanitary area" is not unconstitutionally vague. Though abstract, these words have been interpreted and applied without constitutional difficulty (see *Berman v Parker*, 348 US 26 [1954]; see also *Yonkers Community Dev. Agency v Morris*, 37 NY2d 478, 483 [1975], *appeal dismissed* 423 US 1010 [1975]).

I further reject petitioners' argument that ESDC's finding of blight was insufficient as a matter of law and fact and that

it was arrived at corruptly and in bad faith (see *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425 [1986]; *Kaskel v Impellitteri*, 306 NY 73, 79 [1953], cert denied 347 US 934 [1954])). Two blight studies documented substandard and insanitary conditions by photographic evidence and other indicia. Petitioners present merely "a difference of opinion" with the conclusions to be drawn from this evidence, in which event the courts are bound to defer to the agency (*Matter of Develop Don't Destroy (Brooklyn) v Urban Dev. Corp.*, 59 AD3d 312, 324 [2009])). As the Court of Appeals recently stated:

"It is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight, but any such difference would not, on this record, in which the bases for the agency findings have been extensively documented photographically and otherwise on a lot-by-lot basis, amount to more than another reasonable view of the matter; such a difference could not, consonant with what we have recognized to be the structural limitations upon our review of what is essentially a legislative prerogative, furnish a ground to afford petitioners relief" (*Goldstein v New York State Urban Dev. Corp.*, ___ NY3d ___, 2009 NY Slip Op 08677, 2009 WL 4030939, *9 [2009])).

Likewise, petitioners have not made a "clear showing" of bad faith (*Matter of Faith Temple Church v Town of Brighton*, 17 AD3d 1072, 1073 [2005]). While ESDC retained AKRF, Inc. to perform a blight study knowing that AKRF was performing consulting work for Columbia in relation to the project, any conflict of interest or bias was eliminated by ESDC's retention of Earth Tech, Inc., an independent consultant with no ties to Columbia, to review and audit the AKRF study. Nor is there clear evidence that ESDC and Columbia colluded to manipulate the blight findings. Although they worked together in the planning process, the UDCA requires that a land use improvement project "afford[] maximum opportunity for participation by private enterprise" (Uncons Laws § 6260[c][3]). That Columbia will benefit from the project as well as the public is not a legally sufficient reason to invalidate ESDC's determinations (*see Matter of Waldo's, Inc. v Village of Johnson City*, 74 NY2d 718, 721 [1989], *affg* 141 AD2d 194 [1988]).

Because petitioners were given notice of the public hearing and the opportunity to be heard and to submit documents, I reject petitioners' contention that they were denied due process or a

reasonable opportunity to be heard under EDPL 203 (see *Matter of Waldo's, Inc.*, 141 AD2d at 199; *First Broadcasting Corp. v Syracuse*, 78 AD2d 490, 495 [1981], appeal dismissed 53 NY2d 939 [1981]). Nor were petitioners' due process rights violated when ESDC denied some of their FOIL requests and closed the record prior to the resolution of the FOIL litigation (see generally *Lawrence v Baxter*, 2004 WL 1941347, *3, 2004 US Dist LEXIS 18022, *8-10 [WD NY 2004], *affd* 139 Fed Appx 365 [2d Cir 2005]). Contrary to petitioners' assertion, the EDPL procedures for challenging the agency's determinations satisfy the requirements of due process (see *Brody v Village of Port Chester*, 434 F3d 121, 132-133 [2d Cir 2005]). As to the FOIL requests, I note that petitioners received over 8,000 pages of documents from ESDC.

With respect to the closing of the record, petitioners fail to explain why they failed to bring a motion to vacate the automatic stay (CPLR 5519[a]) imposed upon respondent's appeal from our order directing that additional documents be turned over by it (54 AD3d 154 [2008], *lv granted sub nom. Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 12 NY3d 708 [2009]). A CPLR 5519(c) application would have afforded the Court with the opportunity to assess whether petitioners could demonstrate the likelihood of success on the merits of their position that the

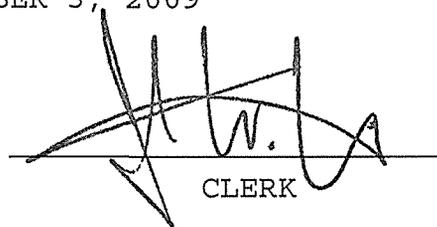
withheld documents fall outside the deliberative materials exemption applicable to disclosure under the Freedom of Information Law (see *Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131 [1985]) and that such documents were material to ESDC's determination and, thus, essential to affording petitioners procedural due process. A year has now elapsed since the record of the administrative proceeding was closed, and even at this late juncture, petitioners have not made any showing as to the materiality of documents directed to be produced under this Court's order; nor have petitioners set forth what the documents assertedly being withheld in contravention of our order might be expected to reveal. Furthermore, even if such materials are ultimately found by the Court of Appeals to be subject to disclosure under FOIL, there is simply no order concerning a stay of proceedings that is brought up for review (CPLR 5501[a][1]). Petitioners' intimation that the administrative determination should have been delayed while the FOIL litigation was completed is without factual or procedural foundation.

The record establishes that ESDC took the requisite hard look at the relevant areas of environmental concern, including the impact of the project's below-grade facility, particularly with respect to flooding issues (see *Matter of Jackson*, 67 NY2d at 417).

Accordingly, the determination of respondent New York State Urban Development Corporation should be confirmed.

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

ENTERED: DECEMBER 3, 2009



CLERK