

by the above three entities in an amount to be determined on remand. The Clerk, Supreme Court, New York County, is directed to enter judgment accordingly.

In this proceeding brought pursuant to RPAPL 881, we are called upon to revisit the issue of sanctions and whether petitioners, by filing a petition in a lower court to seek the relief denied them by this Court, engaged in conduct frivolous enough to warrant the imposition of the maximum financial sanctions.

On May 10, 2006, respondent, Alasdair McMullan, who leased an apartment at 153 West 21st Street (153), commenced an action against petitioners, HRH Construction, LLC, and 155 West 21st Street, LLC (HRH/155), the project manager and owner of a property development located at the adjoining property, 155 West 21st Street (155), alleging negligence, trespass and harassment related to HRH/155's construction activities.

On May 11, 2006, McMullan moved for preliminary injunctive relief to prohibit HRH/155 from entering his property. In his affidavit in support of the motion, McMullan stated that he had been a lessee since November 2002 of the garden floor apartment located at 153, which he occupied with his girlfriend, Katrina Carden. The leased property included a garden area back yard surrounded by a metal chain link fence, as well as a wooden privacy fence. He stated that sometime in 2004, HRH/155 began

construction work on the 155 property which was immediately adjacent to his apartment and back yard.

McMullan depicted egregious conduct by the construction company such as cutting down a tree in the 153 back yard; removing without permission the chain link and wooden fences around the back yard; littering the yard with equipment and debris; blocking a rear fire exit door to McMullan's apartment; and causing extensive flooding of his basement.

Meanwhile, on May 31, 2005, McMullan and HRH/155 had entered into an agreement permitting HRH/155 to use and occupy McMullan's back yard for limited construction purposes. The agreement provided, in pertinent part, that HRH/155 was to pay McMullan's full rent, retroactive to April 2005 until completion of the work, and HRH/155 was to return that area to substantially the condition it was in before the fence was knocked down.

On July 22, 2005, a backhoe allegedly tore a hole through the walls of McMullan's apartment, damaging cabinets in the apartment and injuring Carden. When Carden complained, she was told by HRH/155 project manager, Alex Papadopoulos, that "we have every legal right to go back there and take the fencing down."

McMullan alleged that subsequently several "significant breaches" of the rent agreement occurred, "in addition to destructive and potentially deadly tortious conduct." Despite settlement discussions with HRH's insurance carrier, these claims

were never resolved. Further, HRH/155 failed to pay McMullan's rent pursuant to the agreement, and although discussions ensued, HRH/155 ultimately refused to pay the rent.

In opposition to McMullan's motion for a preliminary injunction, HRH/155 submitted the affidavit of HRH's project manager, Alex Papadopoulos, a named defendant in the underlying action and that of Kevin Lalezarian, the developer of the construction project on-going at the 155 property. Lalezarian stated that HRH/155 was aware that McMullan objected to the access but HRH/155 did not know "whether he had any property interest in the garden or courtyard area (although he represented that he did)."

The motion court, on or about June 9, 2006, granted McMullan's motion for a preliminary injunction against HRH/155, without a hearing, and enjoined HRH/155 from entering onto the 153 property, which included the outdoor area, and from leaving debris and equipment on the subject premises. The court rejected HRH/155's argument that McMullan had no exclusive possessory rights to the garden and courtyard pointing to "the plain language of the lease and physical layout of the premises, particularly prior to the 155 defendants tearing down the fences." The court observed:

"[t]he 155 defendants argue, in essence, that they were and are entitled - and plaintiffs have no basis to object - to trespass on the 153 property despite the admitted absence of a current agreement with plaintiffs or the 153 property

owner, to tear down the fences, trees and uproot plants, to block ingress and egress to plaintiffs' home, to leave debris in the garden and courtyard of one's neighbors, to otherwise engage in the conduct of which plaintiffs complain, and to remain on the 153 property for which they have no right to enter and not to leave until the police are called to intervene."

The court concluded that "defendants' cavalier attitude and disregard of plaintiffs' rights [gave] additional weight to plaintiffs' showing of the need for the injunction."

HRH/155 appealed the preliminary injunction; then moved before this Court to vacate the injunction pending appeal. They did so on three grounds: a) that the factual issue of McMullan's right to the garden area had not been resolved; b) that RPAPL 881 provides adjoining property owners with the *right to a license* to make such repairs and improvements, and that, therefore the grant of a preliminary injunction in the face of such a right constitutes error; c) that HRH/155 needed a vacatur of the preliminary injunction in order to file for the RPAPL temporary license. They assured this Court that they would file such a special proceeding within days of the vacatur of the preliminary injunction.

We were not swayed by either HRH/155's arguments or entreaties, and on July 13, 2006 denied the motion to vacate the preliminary injunction pending an expedited appeal (2006 NY Slip Op 71957[u]). Subsequently, in March 2007, we affirmed the motion court's grant of the preliminary injunction (38 AD3d 206

[2007])).

In April 2007, Supreme Court granted McMullan's and Carden's motion for summary judgment on their causes of action for trespass and breach of contract in their underlying action.

In the meantime, following the denial of interim relief by this Court, though prior to the determination of the appeal affirming the grant of the preliminary injunction, HRH/155 brought a special proceeding in Supreme Court pursuant to RPAPL 881 against McMullan and the 153 owner. Section 881 states that:

"When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made ... without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter ... Such license shall be granted by the court in an appropriate case upon such terms as justice requires."

McMullan cross-moved for dismissal of the RPAPL proceeding and the imposition of sanctions and costs against HRH/155. McMullan opposed the petition on grounds of collateral estoppel and argued for imposition of sanctions on the grounds that the commencement of the proceeding was frivolous and in violation of 22 NYCRR 130-1.1(c) (1) and (3).

McMullan pointed out that in papers before this Court, HRH/155 had stated they would file for a temporary license after the preliminary injunction was lifted. He further described the filing of the special proceeding as "seek[ing] the interim relief

denied to them by [this Court].”

In June 2007 Supreme Court denied the motion for the RPAPL 881 temporary license as against McMullan as academic because he was no longer the lessee at the subject premises, denied McMullan’s request for imposition of sanctions and costs, and discontinued the action as against the 153 owner on the stipulation of the parties.

On appeal, McMullan argues that the court abused its discretion in denying his cross motion for sanctions. McMullan argues that the motion court failed to determine whether HRH/155's conduct was frivolous and failed to determine whether an award of costs would have been appropriate.

HRH/155 contend that the court did not abuse its discretion, that there was no frivolous conduct since the determination as to the preliminary injunction was not binding in the context of the RPAPL special proceeding, and that the license is for prospective access and cannot be based on allegations as to prior conduct.

For the reasons set forth below, this Court finds the motion court abused its discretion by failing to adjudicate the issue of frivolous conduct, which, to the extent outlined below, we find sanctionable since HRH/155's conduct was both meritless and evidently undertaken to harass McMullan and Carden. Thus, we award costs to respondent McMullan, and financial sanctions are imposed on HRH/155 up to the maximum amount permissible by law.

Pursuant to 22 NYCRR 130-1.1(a), a court "in its discretion, may award to any party or attorney in any civil action or proceeding before the court...costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct", and, in "addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part" (see also *Engel v CBS, Inc.*, 93 NY2d 195, 203 [1999]; *Tag 380, LLC v Ronson*, 51 AD3d 471 [2008]; *Costantini v Costantini*, 44 AD3d 509 [2007]; *Intercontinental Bank Ltd. v Micale & Rivera*, 300 AD2d 207, 208 [2002]).

Frivolous conduct occurs when, as defined in subdivision (c) of 22 NYCRR 130-1.1:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (see e.g. *Intercontinental Bank Ltd.*, 300 AD2d at 208 [the making of "false assertions of material facts" was frivolous]; *Nachbaur v American Tr. Ins. Co.*, 300 AD2d 74, 75 [2002], *lv dismissed*, 99 NY2d 576 [2003], *cert denied* 538 US 987 [2003] [the bringing of "repetitive and meritless motions" constituted frivolous conduct]; *Premier Capital v Damon Realty Corp.*, 299 AD2d 158 [2002]).

In this case, we find that the petition as commenced was totally without merit in the law. On the contrary, it was conduct entirely in keeping with HRH/155's cavalier attitude

demonstrated by their literal trampling of respondents' property and figurative trampling of respondents' property rights. Throughout the proceedings, HRH/155's obstinately argued that they were "entitled" to a license of access pursuant to RPAPL 881 and that it was their statutory right to be granted such a license. In fact, the right is the right to seek a license under certain circumstances. Nevertheless, relying on this erroneous interpretation of the law, HRH/155's attitude continued unabated.

As of July 13, 2006, the day they filed their petition, HRH/155's case was squarely before this Court; there was an expedited appeal pending on the preliminary injunction, and HRH/155 had been unequivocally denied the relief of vacating the preliminary injunction pending appeal by a full bench of this Court.

HRH/155 pressed forward regardless. In a move that was as inexplicable as it was ill-conceived, they filed their petition in Supreme Court by order to show cause, requesting a temporary license pursuant to RPAPL 881 to gain access to the 153 property *as well as seeking the vacatur of the preliminary injunction.* Counsel requested a court-ordered temporary licence for a period not to exceed 30 days to complete the project. Counsel suggested that during the license period, HRH/155 would provide a third-party security guard to prevent worker misbehavior and would pay a portion of McMullan's rent. Finally, counsel for HRH/155

stated that, for the purposes of the special proceeding, the court "can assume, as true, that McMullan has a possessory right to the garden/courtyard area."

HRH/155 repeated their erroneous assertion that because their improvements could not be accomplished without access, and permission was denied this "creates a statutory right to the license on such terms that are just."

The petition further stated that "[c]urrently pending before the Appellate Division is a motion to vacate the appeal" (*sic*). Meanwhile, an affidavit of counsel reflected that "[HRH/155] have appealed such decision" (of granting a preliminary injunction) of the court and have made an "expedited motion to vacate the preliminary injunction pending appeal." There was no mention anywhere that the expedited motion had been denied.

Arguably, the petition appears to have been drafted on July 11, 2006, two days prior to the full bench decision on the motion; it is also possible that HRH/155 filed the petition before noon of publication day, thus without being aware of the decision on the motion. Indeed at one point, HRH/155 explained that in filing the petition, they were endeavoring to accomplish both license and vacatur as "expeditiously as practicable." In other papers, they described it as a move to "avoid loss of time in the event of a vacatur of the preliminary injunction." This of course does not explain why they did not withdraw the petition

upon being served with the decision and order of this Court specifically denying the relief, or why they maintained the action even after this Court affirmed the motion court's preliminary injunction on appeal.

Further, the record does not reflect that counsel informed the court of these developments. Indeed, that places counsel in direct contravention of 22 NYCRR 130-1.1-a(a), which states that an attorney certifies to the accuracy of the contents of litigation papers by signing them. The papers are considered frivolous if they assert material factual statements that are false (see 22 NYCRR § 130-1.1[c][3]). Furthermore, frivolous conduct is continued when its lack of factual basis becomes apparent (see 22 NYCRR § 130-1.1[c]; see also Connors, *Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 29, Code of Professional Responsibility DR 4-101 [22 NYCRR 1200.19]*). Hence, counsel had an ongoing obligation to alert the court to material changes in the factual position stated initially. In other words, counsel had the obligation to inform the court that an interim application for vacatur of the injunction pending appeal was no longer pending, but had been determined against the client, and after March 2007, had the obligation to inform the court of this Court's affirmance.

It is not necessary to consider HRH/155's argument that collateral estoppel does not apply because a preliminary

injunction is not determined on the merits, or is not a final adjudication. Nor is there any merit to HRH/155's sly interjection, in parentheses, in their brief that "an interim order is always subject to review." Standing alone, such pronouncement may have some merit but not in this case where the interim order is made by an appellate court and the review is being thrust upon a lower court. Nor can HRH/155 argue, with any legal support or authority, that a license pursuant to RPAPL 881 is granted on different grounds from a preliminary injunction because a license grants prospective access while a preliminary injunction forbids access for prior conduct.

The simple fact is that this Court's determination to deny relief on July 13, 2006 was effectively an order of the Court to HRH/155 to stay out of the 153 back yard, while the special proceeding filed on the same day was a request to a different, and lower, court for a license that would allow defendants immediate access to the 153 back yard. Thus, any grant of the temporary license necessitated, as HRH/155 had conceded, a vacatur of the preliminary injunction.

RPAPL 881 states that a temporary license may be granted for access to an adjoining property where permission of the adjoining owner or lessee has been refused. The statute then contemplates court intervention in a dispute between adjoining property owners, not intervention by a lower court to override an

appellate court's prohibition of access. As respondent asserted, this was the equivalent of a "supplemental appellate process" seeking the necessary vacatur of the injunction, as well as the subsequent granting of the license.

It is beyond comprehension how HRH/155 believed they could gain the relief they were seeking from a lower court. In March 2007, this Court upheld the motion court's characterization of HRH/155's conduct as a "cavalier attitude" towards plaintiffs' property rights. It further declined to convert the appeal into an RPAPL special proceeding, and specifically decried HRH/155's argument of entitlement to the license as "risible" (38 AD3d at 207). The Court emphasized that HRH/155:

"utterly failed to justify their entry onto the backyard of the subject premises in connection with their construction work on the adjacent property, and repeated interference with plaintiffs' use and enjoyment of the premises by, inter alia, leaving thereon construction materials and debris, removing fences, obstructing an exit from plaintiffs' apartment and bolting closed the fire exit, for which they were issued a violation by the Department of Buildings, and causing damage to plaintiffs' apartment itself as well as the backyard" (38 AD3d at 206).

The Court admonished HRH/155 for their "cavalier attitude and disregard of plaintiffs' rights" and noted that HRH/155's claim that "McMullan's lease does not include the backyard garden area borders on the frivolous" (*id.*). Finally, the Court held:

"Defendants' argument raised for the first time on appeal, that plaintiffs' motion for a preliminary injunction should have been denied because of defendants' right to bring a special proceeding under RPAPL 881 for the

issuance of a license to enter adjoining property, can only be construed as a request to convert the motion for an injunction into an RPAPL 881 proceeding. This we decline to do. In any event, defendants' utter failure to show facts making the entry necessary would require denial of any such RPAPL application. Moreover, a license may be granted pursuant to RPAPL 881 'in an appropriate case upon such terms as justice requires.' Defendants' assertion on this appeal that they are 'entitle[d]' to a license under RPAPL is risible" (*id.* at 207 [citations omitted]).

At the very least, HRH/155's persistence in continuing an action that was legally futile from the beginning, but became particularly so after this Court's affirmance of the preliminary injunction in March 2007, must be construed simply as an action continued for the sole purpose of harassing the plaintiff.

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apartments on the first and second floors, each of which has four bedrooms, a kitchen, bathroom, and living room. In addition, the basement was converted into an apartment with two rooms, a kitchen, and a bathroom.

Petitioners moved into the building at various times between April 2007 and December 2007. They were told that the building was operated under the name "AJ Family House" as a "three-quarter house," which had a drug and alcohol-free environment and imposed an 11 p.m. curfew. It is uncontested that all of petitioners paid rent and entered into their rental agreements with a woman who allegedly leased the building from the owners. Petitioners all believed that the facility was a legal residence.

All the petitioners, save one, stayed in rooms on the first and second floors which were furnished with bunk beds that could sleep four to six men; the kitchen and bath facilities were shared by 11 to 16 men. Petitioners state that the house was drug and alcohol free, and that the roommates cooked together, shared responsibility for cleaning, studied Bible, and watched videos. They received their state and federal benefits there, kept personal possessions there, and received mail there.

In December 2007, the leaseholder commenced a proceeding against the owners in the Housing Part of the New York City Civil Court in Bronx County. Subsequently, an HPD inspector was sent to inspect the building. On December 26, 2007, the HPD inspector

found six class B violations, including illegal conversion to a multiple dwelling, and directed that the premises be restored to lawful occupancy.

On January 3, 2008, HPD issued a vacate order to the owners, lessees and occupants of the building. The vacate order charged that the dwelling had conditions rendering it dangerous to life and unfit for human habitation, including an illegal apartment created in the basement and illegal rooming units and/or single room occupancies on the first and second floors. HPD directed the owner to provide an adequate supply of heat, seal up accessible openings in the cellar apartment, and to legalize the conversion from a private dwelling to multiple dwelling use, if legally feasible, or else restore to lawful occupancy. HPD also directed a fire watch for the entire building.

On January 17, 2008 petitioners contacted HPD and requested that it provide them with relocation assistance pursuant to Administrative Code § 26-301(1). The statute provides that the Commissioner of HPD has a duty to provide relocation services to certain tenants. It further provides:

"1. The commissioner of housing preservation and development shall have the power and it shall be his or her duty:

"(a) To provide and maintain tenant relocation services: ...

"(v) for tenants of any privately owned building where the displacement of such tenants results from the enforcement of any law, regulation, order or

requirement pertaining to the maintenance or operation of such building or the health, safety and welfare of its occupants." (Administrative Code § 26-301[1][a][v]).

Rules promulgated by HPD define "relocatee" as: "[A]n individual ... deprived of a permanent residence rented by him/her or them in the City of New York as a direct result of the enforcement of a Vacate Order" (28 RCNY 18-01[a]).

On January 23, 2008, after HPD refused the request on the ground that petitioners' occupancy was "illegal," petitioners commenced this article 78 proceeding by order to show cause. Petitioners sought a judgment (1) granting a writ of mandamus, pursuant to CPLR 7801, directing HPD to provide relocation assistance, and (2) declaring that tenants in privately owned buildings subject to a vacate order are entitled to relocation services, pursuant to Administrative Code § 26-301, regardless of whether the dwelling units subject to the vacate order are lawful.

By decision, order and judgment dated April 30, 2008, Supreme Court granted the petition and annulled HPD's decision to deny relocation assistance to petitioners. The court remitted the matter to HPD with directions "forthwith to provide [p]etitioners with any and all services and assistance it would ordinarily afford a relocatee as defined in section 18-01(a) of the Rules of the City of New York." The court declared that "tenants in buildings subject to orders to vacate are entitled to

relocation services by the Respondent [HPD], pursuant to section 26-301 of the Administrative Code, whether or not the dwelling units which are subject to the order of vacate are lawful."

On appeal, HPD argues that Administrative Code § 26-301(1) only requires HPD to offer temporary relocation services "to an individual occupying a lawfully configured dwelling unit as his/her permanent residence," and that "illegal and hazardously configured dwelling units in violation of the Building Code and Multiple Dwelling Law cannot create a true and actual tenancy." In support of its argument, respondent relies on the affidavit of Associate Commissioner for Enforcement Services, who asserts, inter alia, that the term "tenant," as used in the Administrative Code, "connotes a person residing in a lawfully configured dwelling unit occupied as his/her permanent residence with the consent of the owner." Based on that connotation, the commissioner argues that it is "HPD's policy to provide relocation services only to individuals vacated from lawfully configured residential units otherwise rendered inhabitable [*sic*] and/or unsafe due to fire, flood, structural problem or other disaster."

Petitioners assert that Supreme Court correctly determined that they meet the unambiguous requirements of the Administrative Code for receipt of relocation assistance in that they paid monthly rent to reside in a privately-owned building and are

being displaced as a result of a vacate order. Moreover, petitioners maintain that the broad language of section 26-301 in no way limits the definition of "tenants" entitled to relocation assistance to persons who live in lawfully configured residences. They further assert that respondent's interpretation of Administrative Code § 26-301(1) ignores the legislative intent behind the statute, which is to provide relocation assistance to tenants who lose their housing through no fault of their own.

For the reasons set forth below, we find that Supreme Court properly concluded that tenants in buildings subject to orders to vacate are entitled to relocation services by HPD, pursuant to Administrative Code § 26-301(1), regardless of whether the dwelling units which are subject to the vacate orders are lawful.

The fundamental rule of statutory interpretation is that a court "should attempt to effectuate the intent of the Legislature" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] [internal quotation marks and citation omitted]). Since "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*id.*). Further, "it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is

no room for construction and courts have no right to add to or take away from that meaning" (*id.*) [internal quotation marks and citation omitted]. "[N]ew language cannot be imported into a statute to give it a meaning not otherwise found therein" (*Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 NY2d 382, 394 [1995], quoting McKinney's, Cons Laws of NY, Book 1, Statutes § 94, at 190).

It is well settled that an agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable (*Seittelman v Sabol*, 91 NY2d 618, 625 [1998]; *Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]). However, where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). "In such a case, courts are 'free to ascertain the proper interpretation from the statutory language and legislative intent'" (*Seittelman*, 91 NY2d at 625, quoting *Matter of Gruber [New York City Dept. of Personnel-Sweeney]*, 89 NY2d 225, 231-232 [1996]).

Applying these rules, we find that HPD's interpretation of Administrative Code § 26-301(1) is contrary to the plain meaning of the statute. Section 26-301 requires HPD to provide

relocation services to any tenant displaced as the result of "enforcement of any law, regulation, order or requirement pertaining to the maintenance or operation of such building or the health, safety and welfare of its occupants" (emphasis added). HPD's interpretation creates a broad exception to the applicability of the statute, by excluding all persons displaced as a result of vacate orders that enforce the law requiring an owner to obtain a certificate of occupancy for conversion of a private dwelling to multiple dwelling use (Multiple Dwelling Law § 301; § 302). HPD asserts that its policy is also to limit relocation assistance to situations in which a vacate order is issued following some "disaster," such as flood or fire, which further limits the plain language of the statute. However, an administrative policy that "graft[s]" onto the statute an addendum that excludes only certain tenants and vacate orders violates the plain meaning doctrine (*see Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 104-105, 107 [1997] [declining to enforce agency's interpretation which grafted exception onto zoning resolution]).

Furthermore, in *Matter of Cupidon v Donovan* (8 Misc 3d 1024[A], 2005 NY Slip Op 51263[u] [2005]), HPD argued, as it does here, that the petitioner could not be deemed a permanent resident under Administrative Code § 26-301(1) and section 18-01 of the Rules of the City of New York because he would be subject

to vacatur at any time because his occupancy of the unit violated the law.¹ The *Cupidon* court flatly rejected HPD's interpretation as negating the plain language of the statute and regulation as well as the clear intent to provide location assistance to tenants who lose their housing through no fault of their own (*id.* at 2, citing *Matter of Goodwin v Gleidman*, 119 Misc 2d 538, 549 [1983]).

Moreover, we reject HPD's argument that it is not creating an exception, but is simply interpreting the term "tenant," which it asserts cannot include persons who rent space in an illegal multiple dwelling. HPD repeatedly states, without citation of any legal authority, that a legal tenancy cannot be created in an illegal multiple dwelling because occupancy of an apartment lacking a valid certificate of occupancy is prohibited (Multiple Dwelling Law § 301), and the landlord cannot recover rent for occupancy of such unit (Multiple Dwelling Law § 302[1][b]).

To the extent the term "tenant" is ambiguous, courts may look to statutory definitions as an aid to interpretation and should interpret (*see Jericho Water Dist. v One Call Users*

¹As a general matter, it is presumed "that the government will abide by court rulings in future cases involving similarly situated petitioners, under principles of stare decisis" (*Jamie B. v Hernandez*, 274 AD2d 335, 336 [2000]). Here, HPD baldly asserted in its verified answer that it was "not bound" by the unappealed ruling in *Cupidon* and on appeal, it makes no effort to distinguish the case despite the fact that it is directly on point.

Council, Inc. 10 NY3d 385, 390-391 [2008] [referring to definitions of "municipality" in different statutes to aid interpretation]), and consider any well-defined technical or common-law meaning (McKinney's Cons Laws of NY, Book 1, Statutes § 233). Administrative Code § 26-301(1) does not define "tenant," but definitions in the City Rent Control Law and in the State Real Property Law do not make the issuance of a certificate of occupancy a prerequisite to the creation of a tenancy (see Admin. Code 26-403[m] [tenant is a "tenant, subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of any housing accommodation"]; RPAPL 711 ["tenant" includes "an occupant of one or more rooms in a rooming house ..."]). Petitioners are tenants under these definitions since they paid rent and were entitled to possess or use rooms in the housing accommodation.

Further, HPD's argument that a person cannot be a "tenant" of an apartment that is not in compliance with Multiple Dwelling Law sections 301 and 302 is unsupported by case law. In *Sima Realty v Philips* (282 AD2d 394 [2001]), we rejected a similar argument by a landlord seeking to rely on the absence of a certificate of occupancy to eject a tenant. In determining that there was no merit to the landlord's contention that the occupants should be ejected because the premises did not have a residential certificate of occupancy we stated:

"[the multiple occupancy] law was enacted to protect tenants of multiple dwellings against unsafe living conditions, not to provide a vehicle for landlords to evict tenants on the ground that premises are unsafe" (*id.* at 395; see also *Zane v Kellner*, 240 AD2d 208 [1997]).

Similarly, we find that HPD cannot rely solely on the fact that petitioners lived in a dwelling unit that was not in compliance with the Multiple Dwelling Law as a vehicle to deny them relocation services.

To the extent HPD argues on appeal a different or alternative rationale for denying relocation services, we are constrained to review only the grounds it invoked in denying petitioners' request for such services (*see Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 593 [1982]).

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ENTERED: APRIL 16, 2009

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Gonzalez, P.J., Mazzairelli, Friedman, Catterson, Renwick, JJ.

5281N	In re petition of Construction and Reformation of Matthews Trust No. 1, etc., - - - - -	Index 402801/06 402800/06 402802/06 402799/06
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William Morrison Matthews, et al.,
Petitioners-Respondents,

-against-

Cadwalader, Wickersham & Taft, LLP,
Respondent-Appellant,

Bank of New York,
Respondent.

- - - - -
In re petition for appointment of
Paul W. Mourning, as successor
trustee of Matthews Trust No. 1, etc.,
- - - - -

Paul W. Mourning,
Petitioner-Appellant,

-against-

William Morrison Matthews, et al.,
Respondents-Respondents.

Dewey Pegno & Kramarsky LLP, New York (Thomas E. L. Dewey of
counsel), for appellants.

Katten Muchin Rosenman LLP, New York (Neil V. Carbone of
counsel), for William Morrison Matthews, respondent.

Milbank, Tweed, Hadley & McCloy LLP, New York (David R. Gelfand
of counsel), for G. F. Robert Hanke, respondent.

Sidley Austin LLP, New York (Isaac S. Greaney of counsel), for
William T. Seed, respondent.

Order, Surrogate's Court, New York County (Renee R. Roth,
S.), entered June 25, 2008, which denied petitioner Mourning's
motion for summary judgment to compel respondent Bank of New York

to appoint him as individual trustee for the subject trusts, and which granted the motions of petitioner beneficiaries of the trust to dismiss Mourning's petition, unanimously reversed, on the law, the dismissal motions denied, and the petition reinstated and granted.

This is an appeal from the Surrogate's denial of petitioner Mourning's motion to compel the appointment of a member of the Cadwalader Wickersham & Taft law firm (Cadwalader) as the individual trustee of certain trusts. There are four trusts at issue. Three were established for the benefit of the grantor's two sons in 1957, and one for her nephew in 1964. These are inter vivos trusts, continuing until the beneficiaries pass away, and are irrevocable. At the time the trusts were created, the sons were 19 and 8 years old respectively, and at the time the nephew's trust was created, he was 33 years old.

The corporate trustee of all four trusts from the time of their creation to the present is the Bank of New York (BNY). The initial individual trustee of two of the trusts was Robert E. Lee, a member of the Cadwalader law firm; the initial individual trustee of a third trust was Andrew Oliver, who was not associated with Cadwalader. When Oliver resigned in 1961, Lee was appointed successor trustee in accordance with a provision (article Tenth) of that trust specifically naming him and Cadwalader. The individual trustee of the fourth trust, created

in 1964, after Lee's death, was William Moss, a Cadwalader partner who was also appointed trustee of the other three trusts upon Lee's death in 1963 in accordance with article Tenth of the trust instruments.

Each of the four trusts included a substantially identical article Tenth providing that, in the event of death or resignation of an individual trustee, BNY was to direct the appointment of a successor trustee. Such successor trustee was to be a member of the Cadwalader law firm and designated by the law firm "as most familiar with the affairs of the Grantor." Under the instruments, in the event of a dispute between the trustees, the decision of the individual trustee would control.

The grantor died in 1979. William Moss continued to serve as trustee until his death in 2005. At that time, Cadwalader again proposed a member of the firm as successor trustee, Paul Mourning. However, because of objections by the beneficiaries, corporate trustee BNY refused to appoint Mourning.

Mourning then commenced a proceeding in Supreme Court, Dutchess County, seeking to compel his appointment. The beneficiaries commenced a proceeding in New York County Surrogate's Court seeking to block the appointment. Eventually, the actions were consolidated before the Surrogate in New York County.

The Surrogate found that the plain language of article Tenth

conditioned Cadwalader's power to designate a trustee on its continuing to perform other, unspecified legal work for the grantor. Because the firm had not done so for decades, the Surrogate determined that Cadwalader had no right to name the successor trustee. The Surrogate denied Mourning's motion for summary judgment and granted the beneficiaries' motions to dismiss.

For the reasons set forth below, we disagree, and reverse. It is well established that, unless ambiguous, the plain language of the trust document must be given full force and effect (see *Matter of Chase Manhattan Bank*, 6 NY3d 456 [2006] ["trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself"] [internal quotation marks and citation omitted]). Article Tenth of the trust instruments provides in relevant portion:

"If at any time and from time to time due to death, resignation or other cause there shall be only one Trustee acting hereunder, such sole acting Trustee is directed to appoint such member of the firm of Cadwalader, Wickersham & Taft (or any successor firm) as may be designated by said firm as most familiar with the affairs of the Grantor, successor Trustee by an instrument in writing . . ."

The Surrogate interpreted article Tenth to require that any member of Cadwalader designated as trustee must be "familiar" with the grantor's *personal* affairs, and that this, in turn, meant that the person had to be familiar with more than just the

trust instruments. From this the Surrogate then reasoned that familiarity with personal affairs could only be achieved if the grantor remained a client of Cadwalader's, and in this way "grantor was at least able to make sure that any such authority [the power of appointment] could be wielded only by those who retained her confidence over time."

The Surrogate concluded that the grantor "was apparently determined that (to the extent practicable) Cadwalader's considerable power to influence the administration of the trusts would not outlast her confidence in the firm." Given the Surrogate's finding that in the mid-1970s, the grantor took her legal business to another law firm in the city (Sullivan and Cromwell) and that neither Cadwalader nor Moss had any further dealings in her personal matters, the Surrogate ruled against petitioners Mourning and Cadwalader.

We find that in so construing article Tenth, the Surrogate impermissibly excised a word from the clause (see *Matter of Buechner*, 226 NY 440, 443 [1919] [error to excise word "living" from clause in will describing class of heirs]). As Mourning correctly asserts, the Surrogate excised the word "most" out of article Tenth. This necessarily resulted in a tortuous interpretation of what is, essentially, clear language. The requirements for appointing a successor trustee according to the plain language of the provisions are 1) that the trustee is a

member of the Cadwalader law firm and 2) the Cadwalader member appointed will be the one *most* familiar with the grantor's affairs as compared to other members of the firm. This provision makes plain that the group from which a successor trustee is to be picked is the membership of Cadwalader. The criteria for choosing *which member* is the one who has the most familiarity with the grantor's affairs.

On appeal, the beneficiaries argue that the purpose of the trusts supports their reading that "affairs" cannot include the trusts, but must exclude them and refer only to other matters. Specifically, they point to the Surrogate's finding that the grantor must have wanted Cadwalader to have the power to appoint only so long as the firm held her confidence generally. The problem with this argument is that the document simply does not say this.

The Surrogate may have been correct that the term "affairs of the [g]rantor" is broader than the instant trusts. However, as Mourning notes, the phrase may not be fairly read to exclude the trusts (*see e.g. Teets v United States*, 29 Fed. Cl. 697, 710 [1993] [using term "affairs" to include certain trusts]). The grantor invested a considerable sum (now worth some \$250 million) in the trusts, dictated their terms, chose the trustees and the beneficiaries. Under the plain meaning of the words, the trusts must be included in her "affairs."

In any event, as Mourning correctly counters, the "purpose" of the trust cuts the other way. Given the young age of the beneficiaries at the time of the creation of the trusts, the grantor must have known that she would almost certainly predecease them, and the expiration of the trusts. As such, the grantor foresaw that a time would come when she had no affairs other than the trusts. Her goal then, was to ensure that a member of the firm she had chosen to designate the trustees would have an incentive to remain familiar with the trusts, and thus serve as a competent trustee even after her death.

Moreover, there is little merit in the beneficiaries' argument that the reference to "any successor firm" indicates an intention by the grantor that there might at some point be a firm other than Cadwalader who would act to appoint the trustee. A reading more consistent with the remainder of the language of article Tenth is that the phrase "any successor firm" refers to the possibility that, if Cadwalader were to merge, or reorganize, the appointment power would travel with Cadwalader to the successor. Had the grantor wanted the appointment power to follow her to any law firm she subsequently retained to manage all her legal affairs, she could easily have included this in article Tenth.

Petitioner Mourning further correctly argues that the Surrogate's interpretation of article Tenth places an

impermissible condition precedent on Cadwalader's appointment power. Such conditions cannot be found or gratuitously implied (see *Stratis v Doyle*, 176 AD2d 1096, 1098 [1991] ["(c)onditions subsequent are disfavored and are not found to exist unless the intention to create them is clearly expressed"]; *Lui v Park Ridge at Terryville Assn.*, 196 AD2d 579, 582 [1993] ["the law does not favor a construction which creates a condition precedent"]). Certainly there was no clear expression in the trust documents that Cadwalader's power to appoint is predicated on its continued representation of the grantor in other matters. On the contrary, the sole condition could not be more clearly expressed: that only the member of Cadwalader "most familiar" with the grantor's affairs be named.

Finally, we find that beneficiaries' argument that article Tenth violates public policy is without merit. Beneficiaries' reliance on *Matter of Putnam* (257 NY 140 [1931] [an attorney who receives a bequest in a will he drafts must make an affirmative showing that there was no undue influence on his part]), and on *Matter of Weinstock* (40 NY2d 1 [1976]), is misplaced.

Mourning correctly contends that *Weinstock* expressly exempts attorney trustees from the rule in *Putnam*, and places no burden on an attorney trustee who drafted the instrument to justify his appointment. In *Weinstock*, an attorney retained to draft a will persuaded the testator to name him and his son as executors, thus

allowing each to collect the statutory fee. The Surrogate concluded that the two had perpetrated a constructive fraud on the testator. In affirming, the Court of Appeals was careful to distinguish this situation from that of an attorney/beneficiary:

"In reaching the conclusion we do in this instance, we do not wish to be understood as implying that when a testator selects the attorney who draws his will as his executor any presumption or inference of impropriety arises from the circumstance that such attorney is otherwise a stranger. *That fact alone does not give rise to any obligation on the part of the attorney to come forward with an explanation...* [I]t is only where, as here, the evidence warrants an affirmative finding of impropriety and overreaching, predicated on more than the fact of appointment, that courts would be warranted in interfering with the testator's manifested intention and excluding the attorney as executor. (*Matter of Weinstock*, 40 NY2d 1, 7 [emphasis added]).

As such, the burden of showing some impropriety or overreaching is on beneficiaries, and they do not even attempt to meet that burden.

Hence, the Surrogate erred in criticizing the provision as allowing the firm "a self-perpetuating hold on a trusteeship (and likely concomitant expectation of substantial trustee's commissions and legal fees) presumably over the course of many years ... If such were the result of the Provision drafted by Cadwalader, it would raise the specter of overreaching by an attorney."

Even if the extrinsic evidence that the grantor consulted or retained new counsel was admissible, it would support her expressed intention that the trustee appointment provisions were to last beyond her lifetime. Indeed, at the time the grantor retained new counsel in the mid-1970s she could have taken steps to terminate the trusts and with them the Cadwalader trusteeships had she decided that she no longer had confidence in the firm regarding the trust instruments. EPTL 7.1.9(a) permits the creator of an irrevocable trust to revoke or amend the whole or any part "[u]pon the written consent ... of all the persons beneficially interested in a trust."

Nothing in the record reflects any intention of the grantor to do so. Cadwalader's trusteeship of the trust instruments lasted for 22 years during the grantor's lifetime. During that period, the grantor was undoubtedly aware of the financial impact of its trusteeships. Further, there is no allegation or assertion made that she asked Cadwalader to relinquish its designation function nor any evidence that after retaining new counsel the grantor made any effort to revoke or amend the trust indentures or that she was dissatisfied in any way with the

operation of article Tenth. Accordingly, there is no basis to strike the unambiguous terms of the trust instruments.

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

ENTERED: APRIL 16, 2009

CLERK

The People concede that at sentencing the court and counsel were under the misimpression that defendant was a second felony drug offender whose prior felony conviction was a violent felony, a status requiring a minimum sentence of six years in this case, whereas the predicate conviction at issue does not in fact qualify as a violent felony. The People also concede that the provision for postrelease supervision was defective under *People v Sparber* (10 NY3d 457 [2008]). Accordingly, defendant is entitled to be sentenced, within the court's discretion, within the range permitted for a second felony drug offender (see Penal Law § 70.70[3]), and to have the postrelease supervision component of his sentence pronounced orally.

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ENTERED: APRIL 16, 2009

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affirmations reporting normal ranges of motion in all tested areas, specifying the objective tests they performed to arrive at the measurements, and concluding that plaintiff's alleged injuries had resolved (see e.g. *Ayala v Douglas*, 57 AD3d 266 [2008]). Plaintiff's submissions in opposition to defendants' motion and in support of his cross motion for summary judgment were insufficient to raise an inference that he sustained a serious injury. While his experts reported range-of-motion limitations, specifying the objective tests they performed, their examinations were not contemporaneous with the accident and their findings are "too remote to raise an inference that the limitation was caused by the accident" (*Santos v Taveras*, 55 AD3d 405 [2008]).

Defendants also established prima facie that plaintiff did not sustain a 90/180-day injury by submitting plaintiff's testimony that he returned to work within the first 90 days following his accident (see e.g. *Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [2008]); plaintiff failed to submit competent medical evidence to show that he was prevented from performing his usual activities for not less than 90 of the first 180 days following the accident (see e.g. *Szabo v XYZ, Two Way Radio Taxi Assn.*, 267 AD2d 134, 135-136 [1999]).

In light of this disposition, we do not reach the parties' remaining contentions.

M-1049 - Kante v Diarrassouba, et al.,

Motion seeking leave for costs and expenses and striking the cross appeal denied.

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

ENTERED: APRIL 16, 2009

CLERK

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

329 In re Maria C.,
 Petitioner-Respondent,

-against-

Jorge R.,
 Respondent-Appellant.

Nancy Botwinik, New York, for appellant.

Steven N. Feinman, White Plains, for respondent.

Order, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about May 5, 2008, which denied respondent's objection to a Magistrate's order of support directing payment of child support in the amount of \$82 per week, plus a retroactive lump sum payment of \$3,199, unanimously affirmed, without costs.

Since respondent provided insufficient evidence to allow the Support Magistrate to determine his gross income and its application to various asserted medical conditions, the Magistrate had no option but to base his determination of child support on the child's needs (Family Ct Act § 413[1][k]), rather than on respondent's means (§ 413[1][a]; see *Matter of Denham v Kaplan*, 16 AD3d 685 [2005]).

We have considered respondent's other arguments and find them unavailing.

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

ENTERED: APRIL 16, 2009

CLERK

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

334 Susan D. Fine Enterprises, LLC, Index 101160/08
Plaintiff-Respondent,

-against-

Norman Steele, et al.,
Defendants,

Vincent Polimeni,
Defendant-Appellant.

Stephan Garber, Garden City, for appellant.

Daniel A. Eigerman, New York, for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered October 9, 2008, which, insofar as appealed from in this action to recover a real estate broker's commission, denied defendant-appellant's cross motion for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment accordingly.

Appellant made out a prima facie showing of entitlement to judgment as a matter of law. He established that no triable issue of fact exists as to whether he tortiously interfered with plaintiff's alleged agreement with codefendant Norman Steele to

serve as the co-broker for the sale of the apartment at issue. In any event, we note that the elements of tortious interference with contract were not sufficiently pleaded in the complaint with respect to appellant (see generally *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). There was no allegation that appellant intentionally procured the co-broker's alleged breach of the contract to pay a commission to plaintiff.

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ENTERED: APRIL 16, 2009

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was appropriate, since defendant's purported acceptance of responsibility or attempts to do so were not genuine, and since he engaged in sexually inappropriate behavior while incarcerated.

We have considered and rejected defendant's remaining claims.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 16, 2009

CLERK

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

337 Whitney Pulliam, et al., Index 116039/04
Plaintiffs-Appellants,

-against-

Deans Management of N.Y., Inc.,
Defendant-Respondent,

Patricia Correra,
Defendant.

Daniel J. Sweeney & Associates, PLLC, White Plains (Brian M. Hussey of counsel), for appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondent.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered October 31, 2007, which, in an action for personal injuries, granted the motion of defendant Deans Management of N.Y., Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to summary judgment by submitting evidence demonstrating that as an out-of-possession owner with no contractual obligation to repair, it is not liable for the injured plaintiff's injury. In opposition, plaintiffs failed to raise a triable issue of fact,

as they did not allege or submit evidence that the defective condition resulting in the accident constituted a specific statutory safety violation (see *Nieves v Burnside Assoc.*, AD3d , 2009 NY Slip Op 1330 [1st Dept 2009]; *Vasquez v The Rector*, 40 AD3d 265, 266 [2007]; *Velazquez v Tyler Graphics*, 214 AD2d 489, 490 [1995]).

Nor may plaintiffs succeed on the claim that defendant is liable based on its nondelegable duty to members of the general public to keep their premises safe, where its premises are open to the public (see e.g. *Thomassen v J & K Diner*, 152 AD2d 421, 424 [1989], *appeal dismissed* 76 NY2d 771 [1990]), since the injured plaintiff was injured in an area of the premises that was not open to the general public (see *Parsons v City of New York*, 195 AD2d 282, 284 [1993]).

Plaintiffs' claim that a triable issue exists with regard to defendant's lease obligations is unpreserved as it is raised for the first time on appeal. Plaintiffs' failure to raise this issue when defendant moved for summary judgment precluded defendant from including in its reply papers the documentary evidence plaintiffs assert is missing (see *815 Park Ave. Owners v Fireman's Ins. Co. of Washington, D.C.*, 225 AD2d 350, 355 [1996], *lv denied* 88 NY2d 808 [1996]).

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

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 16, 2009

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victim (see *People v Dorm*, 12 NY3d 16 [2009]). This evidence also placed the victim's testimony in a believable context and tended to refute defendant's defense (see *People v Steinberg*, 170 AD2d 50, 72-74 [1991], *affd* 79 NY2d 673 [1992]). Defendant's remaining arguments concerning this evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The court's *Sandoval* ruling, permitting only limited inquiry into defendant's extensive record, balanced the appropriate factors and was a proper exercise of discretion (see *People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]).

Defendant's generalized objections did not preserve his challenges to the prosecutor's summation comments (see *People v Tevaha*, 84 NY2d 879 [1994]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (see *People v Overlee*, 236 AD2d 133 [1997], *lv*

denied 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: APRIL 16, 2009

CLERK

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

340N

Esther Rivera,
Plaintiff,

Index 101164/03

-against-

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

New York City Transit Authority,
Defendant-Appellant,

CAB Associates,
Defendant-Respondent.

Wallace D. Gossett, New York (Steve S. Efron of counsel), for appellant.

Lewis Scaria & Cote, LLC, White Plains (Susan A. Scaria of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 21, 2007, which, to the extent appealed from as limited by the brief, granted defendant CAB Associates' motion to compel defendant New York City Transit Authority (NYCTA) to disclose documents and produce a witness for an examination before trial, unanimously affirmed, without costs.

The motion court providently exercised its discretion in ruling that the test boring project, its related documents, and

the testimony of the NYCTA's project manager for the test boring project was relevant to this action arising from plaintiff's trip and fall on the metal cap and plywood sheet which covered the boring hole (see e.g. *Daniels v City of New York*, 291 AD2d 260 [2002]). The documents and testimony are relevant to resolving questions as to what caused the accident and who installed the plywood and metal cap that plaintiff allegedly tripped and fell over on the project site. In this regard, the photographic evidence cited by the NYCTA does not conclusively establish its claim that its subcontractor, George Warren, Inc., was not responsible for the installation.

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The hearing officer's refusal to adjourn, after a jury had been empaneled, to allow plaintiffs to seek an amendment of the complaint or bill of particulars cannot serve as a basis for plaintiffs' refusal to proceed (see *Vink v Ranawat*, 48 AD3d 212 [2008]). Plaintiffs cannot avoid the consequences of the acts or omissions of their retained counsel (see *Drake v Bates*, 49 AD3d 1098 [2008]), whose intentional default, based on the misrepresentation that his firm had been discharged and he could not proceed, is ipso facto inexcusable (see *Wilf v Halpern*, 234 AD2d 154 [1996]).

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

ENTERED: APRIL 16, 2009

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Saxe, J.P., Friedman, Sweeny, Acosta, JJ.

4371-

TAT (E) 04-33 (GC)

4372 In re National Bulk Carriers,
Inc. and Affiliates,
Petitioner-Appellant,

-against-

New York City Tax Appeals Tribunal, et al.,
Respondents-Respondents.

Dewey & LeBoeuf LLP, New York (John M. Aerni of counsel), for
appellant.

Michael A. Cardozo, Corporation Counsel, New York (Andrew G.
Lipkin of counsel), for respondents.

Decision of respondent New York City Tax Appeals Tribunal,
dated November 30, 2007, sustaining a notice of deficiency for
petitioner's New York City General Corporate Tax (GCT) returns
for calendar years 1997, 1998 and 1999, unanimously confirmed,
the petition denied and the proceeding pursuant to CPLR article
78, commenced in this Court pursuant to CPLR 506(b)(4),
dismissed, without costs.

The Tribunal's decision, that it is the ratable share of
the fair market value of petitioner's partnership assets, rather
than the book value of its partnership interests, that should be
used to compute the GCT on capital pursuant to Administrative

Code of City of NY § 11-604(2) is rationally based and supported by substantial evidence, and is thus entitled to deference (see *Matter of Citrin Cooperman & Co., LLP v Tax Appeals Trib. of City of N.Y.*, 52 AD3d 228 [2008]). Even if petitioner's construction of the tax law is reasonable, petitioner cannot prevail as it fails to show that such construction is "the only reasonable construction" (*Matter of Bamberger Polymers v Chu*, 111 AD2d 589, 591 [1985], *lv denied* 66 NY2d 603 [1985]). We have considered petitioner's remaining arguments and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 16, 2009

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enter a ZIP code matching the credit card. Since most people know their own ZIP codes, this behavior was suggestive of a person trying to use someone else's credit card, as opposed to a person innocently having technical difficulties using his own card. Accordingly, the police had, at least, a founded suspicion of criminality warranting a level-two common-law inquiry (see *People v Wilson*, 52 AD3d 239 [2008], *lv denied* 11 NY3d 743 [2008]).

When the officer approached defendant and asked if he needed assistance, defendant said he was having problems with his credit card. The officer asked defendant to accompany him and his partner to a nearby wall of the subway station, in order to continue the inquiry away from the busy area in front of the MetroCard machines, and, without any use of force, he physically guided defendant by briefly grasping his elbow. Even though the officer made slight physical contact with defendant, none of the police conduct elevated the encounter to a seizure requiring reasonable suspicion (see *e.g. People v Stevenson*, 55 AD3d 486 [2008]; *People v Cherry*, 30 AD3d 185, 185-186 [2006], *lv denied* 7 NY3d 811 [2006]; *People v Wigfall*, 295 AD2d 222 [2002], *lv denied* 99 NY2d 540 [2002]). The officer lawfully asked to see the credit card and a form of identification, and the discrepancy

between the identification card and defendant's actual appearance provided probable cause for his arrest.

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

CATTERSON, J. (dissenting)

Because I believe that the police forcibly stopped and detained the defendant without a reasonable suspicion that the defendant had committed or was about to commit an offense, I dissent. Initially, I agree with the motion court and the majority that police had a founded suspicion of criminality based on the defendant's furtive behavior at the MetroCard machine. In my view, this founded suspicion merely allowed the police to pursue a common law right to inquire what the defendant was doing at the MetroCard machine. People v. De Bour, 40 N.Y.2d 210, 223-224, 386 N.Y.S.2d 375, 385, 352 N.E.2d 562, 572 (1976).

Where I depart from the majority's reasoning is in the characterization of the police conduct as "slight physical contact with defendant." It is uncontested that Police Officer Rodriguez approached the defendant, identified himself by showing his police identification and shield, and asked if the defendant was having a problem with his credit card. Officer Rodriguez was on the defendant's right side and Rodriguez's partner was on the defendant's left. The defendant replied that he was having problems with his credit card. Officer Rodriguez "grabbed" or "grasp[ed]" the defendant's elbow and propelled him to the side of the MetroCard machine. He simultaneously said to the defendant "please walk with me." The defendant found himself

against a wall next to a MetroCard machine, with Officer Rodriguez directly in front of him and another police officer "directly" to the side of Rodriguez. Officer Rodriguez further testified that he had "grabbed [the defendant] away from the people just in case anything happen[ed] and I put him on the wall."

This stop by police is significantly more intrusive than the minor interruptions that we have permitted under a De Bour level-two stop. See People v. Stevenson, 55 A.D.3d 486, 867 N.Y.S.2d 56 (1st Dept. 2008); People v. Cherry, 30 A.D.3d 185, 186, 816 N.Y.S.2d 450, 451 (1st Dept. 2006), lv. denied, 7 N.Y.3d 811, 822 N.Y.S.2d 486, 855 N.E.2d 802 (2006) (officer justified in raising hand to physically restrain defendant in a level-two encounter); People v. Grunwald, 29 A.D.3d 33, 34, 810 N.Y.S.2d 437, 439 (1st Dept. 2006), lv. denied, 6 N.Y.3d 848, 816 N.Y.S.2d 754, 849 N.E.2d 977 (2006) (police officer did not exceed limits of common-law right to inquire where he told defendant to "[c]ome over here," got in front of the defendant, and confronted him face-to-face when he tried to walk away).

The ultimate test of whether an encounter has risen to the level of a seizure is, "whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom." People v. Bora, 83 N.Y.2d 531, 535, 611 N.Y.S.2d 796, 798, 634 N.E.2d 168, 170

(1994). I submit that any reasonable person who is grasped by the elbow, "put [...] on the wall", and surrounded by police officers in the middle of a subway station would believe that there was a significant limitation on his freedom. Accordingly, I would reverse the motion court.

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employer, denying petitioners' applications to become certified bus drivers; DOE sent carbon copies of the letters to petitioners. The letters "reached a definitive position on the issue that inflict[ed] actual, concrete injury," and there was no further administrative action that petitioners could take (see *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007] [internal quotation marks and citation omitted]), as Chancellor's Regulation C-105 does not provide for administrative appeal of the denial of an application. As a result, the four-month statute of limitations (CPLR 217[1]) began running upon petitioners' receipt of the June 19, 2006 letters (*id.*; see e.g. *Matter of Saddler v Teachers' Retirement Sys. of City of N.Y.*, 7 AD3d 430 [2004]). This article 78 proceeding was commenced on November 27, 2006, some five months later.

While Branch's claims thus are time-barred, the statute of limitations was tolled with respect to Viola's claims after DOE sent Viola another letter on September 13, 2006, thereby creating ambiguity as to the finality of its June 19, 2006 determination (see *Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]).

We have considered petitioners' remaining arguments and find them unavailing.

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

ENTERED: APRIL 16, 2009

CLERK

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

362N Tolani Lakes, etc., Index 15340/07
Plaintiff-Respondent,

-against-

Lavelle School for the Blind,
Defendant-Appellant,

USA United Transit Inc.,
Defendant.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr. of
counsel), for appellant.

Bruce Montague & Partners, Bayside (Steven B. Drelich of
counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.),
entered August 19, 2008, which granted plaintiff's motion for
disclosure of certain material and denied defendant Lavelle
School for the Blind's cross motion for a protective order as to
the material sought, unanimously reversed, on the law, without
costs, plaintiff's motion denied, and defendant's cross motion
granted.

Defendant demonstrated that the reports sought by plaintiffs
were prepared in anticipation of litigation (CPLR 3101[d][2]).
Plaintiff failed to make the requisite showing that he has

"substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means" (*id.*).

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

ENTERED: APRIL 16, 2009

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THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
APRIL 16, 2009

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

M-1271 Hooper v Kaufman Arcade Associates, L.P.
Motion and appeal deemed withdrawn.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1287 People v Torres, Orlando

Motion deemed withdrawn.

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

M-1205
M-1300 Able Energy, Inc. v Marcum & Kliegman LLP

Time to perfect direct appeal enlarged to the September 2009 Term (M-1205). Dismissal of direct appeal granted unless appeal perfected for said Term, as indicated (M-1300).

Gonzalez, P.J., Mazzarelli, Andrias, Moskowitz, Renwick, JJ.

M-334 In the Matter of R., Christopher; B., Crieg and B.,
Curtis Jr. - Administration for Children's Services
In the Matter of B., Curtis Sr. v B.-B., Lecrieg

Leave to prosecute appeal as a poor person granted, as indicated.

Gonzalez, P.J., Mazzairelli, Andrias, Moskowitz, Renwick, JJ.

M-703 People v Savinon, Carlos

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

M-852 In the Matter of M., Gekia Hafeesah Amore - Harlem-Dowling Westside Center for Children and Family Services

Leave to prosecute appeal as a poor person granted, as indicated.

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

M-853 In the Matter of G., Christian

Leave to prosecute appeal as a poor person granted, as indicated.

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

M-1241 People v Letsche, Steven

Leave to prosecute appeal as a poor person granted, as indicated.

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

M-1239 People v Melendez, James

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

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

M-408 Walters v Collins Building Services, Inc.; American Building Maintenance Co. v Trammell Crow Service, Inc.

Reargument or other relief denied.

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

M-955 Mendoza v The City of New York

Time to perfect appeal enlarged to the September 2009 Term, as indicated.

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

M-1076 Angel v O'Neill

Time to perfect appeal enlarged to the September 2009 Term, as indicated.

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

M-1198 American Express Travel Related Services Company, Inc. v Gaal

M-1224 Gonzalez v 525 West 175th Street, LLC.

M-1318 Levine v The City of New York

Time to perfect appeals enlarged to the September 2009 Term.

Gonzalez, P.J., Mazzairelli, Saxe, Moskowitz, Richter, JJ.

M-1190 McLaughlin v Plaza Construction Corporation

Stay of trial granted.

Gonzalez, P.J., Mazzairelli, Saxe, Moskowitz, Richter, JJ.

M-1227 Adepetu v Adepetu

Stay denied; interim relief granted by the order of a Justice of this Court, dated March 10, 2009, vacated.

Gonzalez, P.J., Andrias, Saxe, Catterson, Acosta, JJ.

M-1006 Williams v The New York City Housing Authority

Reargument or other relief denied.

Gonzalez, P.J., Sweeny, Renwick, Freedman, JJ.

M-1172 Bank of America, N.A. v Solow

Reargument or other relief denied.

Gonzalez, P.J., Nardelli, Buckley, Acosta, JJ.

M-485 542 Holding Corp. v Prince Fashions, Inc.
(And another action)

Reargument or other relief denied.

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

M-824 LoBianco v Lake - Keyspan Energy Construction, LLC -
Hawkeye Electric LLC - Hawkeye LLC - Altec Capital
Services LLC.

Stay of trial granted.

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

M-1503 In the Matter of 515 East 5th St., LLC v New York City Board of Standards and Appeals

Time to perfect appeal enlarged to the September 2009 Term.

Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

M-1160 In the Matter of S., Genesis, also known as S., Geneses; S., Mark Anthony - Jewish Child Care Association

Leave to prosecute appeal as a poor person granted, as indicated.

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-830 In the Matter of R., Ciara - Episcopal Social Services

Leave to prosecute appeal as a poor person granted, as indicated.

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-1386 People v Sam, Ousame

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-1282

M-1251 In the Matter of V., Ralph v V., Elizabeth, also known as A., Elizabeth - Jones

Assignment of Law Guardian to respond to appeal denied, appeal having been dismissed by order of this Court entered March 24, 2009 (M-750).

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

M-1283 Alvarado v The City of New York

Reargument or other relief denied.

Mazzarelli, J.P., Buckley, McGuire, DeGrasse, JJ.

M-255 NYCTL 1996-1 Trust and The Bank of New York v EM-ESS
Petroleum Corp. - Stern

Reargument or other relief denied.

Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

M-1067 In the Matter of R., Jonathan v C., Jeidy

Leave to prosecute appeal as a poor person granted, as indicated.

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

M-1303 The People v Bowman, Edward

Extension of time to file pro se supplemental brief granted for the September 2009 Term, to which Term appeal adjourned, as indicated.

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

M-1333 In the Matter of A., L.; M., D., H.; M.P. v Novello

Time to perfect appeal enlarged to the December 2009 Term.

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-711 Citicorp Leasing, Inc. v U.S. Auto Leasing, Inc. -
Bishay

Reargument or other relief denied.

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

M-1544 CDR Créances S.A.S., as Successor to Société de Banque
Occidentale v Cohen; CDR Créances S.A.S., as Successor
to Société de Banque Occidentale v Cohen also known as
Levy, also known as Cohen-Levy, also known as Comen -
Assor - Cohen - Habib

Motion granted to the extent of directing appellants to
correct joint record on appeal by removing certain pages and
replacing the translations of certain affidavits, as indicated.

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

M-1391 Feuer v 24-7 Gym, LLC
(And a third-party action)

Stay of trial denied.

Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

M-611 George V Restauration S.A. v Little Rest Twelve, Inc.

Reargument or other relief denied.

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

M-1242 Dannucci v Gomez - Mastrovincenzo

Appeal taken by Mastrovincenzo deemed withdrawn.
Appeal by appellants Gomez remains extant.

Tom, J.

M-57 People v Benjamin, Lawrence

Leave to appeal to this Court denied.

Tom, J.

M-482 People v Wright, Charles

Leave to appeal to this Court denied.

Tom, J.

M-588 People v Tavaréz, Leonard

Leave to appeal to this Court and other relief denied.

The following order was entered and filed on April 14, 2009.

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

M-1450 Travelers Casualty and Surety Company v Honeywell
International Inc. - Employers Insurance Company of
Wausau

Leave to supplement record on appeal granted, as
indicated.

M-08