

Records & Briefs

New York State
Appellate Division

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----x

In the Matter of the Application of

007 REST. INC.,

Index No.
20453/67

Petitioner,

For a Review Pursuant to Article 78
of the Civil Practice Law & Rules,

-against-

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

-----x

RECORD ON REVIEW

-----x

KRONGOLD & EISENBERG
Attorneys for Petitioner
51 Broadway
New York, N.Y. 10006
BO-9-0260

HYMAN AMSEL
Attorney for Respondent
270 Broadway
New York, N.Y.
488-4141

MAR 14 '68

BOTEIN, P. J.
STEVENS
STEUER
TILZER
McNALLY JJ.

I N D E X

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STATEMENT UNDER RULE 5531

SUPREME COURT OF THE STATE OF NEW YORK
 APPELLATE DIVISION : FIRST DEPARTMENT

-----x

In the Matter of the Application of
 007 REST. INC.

Petitioner,
 For a Review Pursuant to Article 78
 of the Civil Practice Law & Rules,
 -against-

NEW YORK STATE LIQUOR AUTHORITY,
 Respondent.

Index No.20453/67

-----x

STATEMENT UNDER RULE 5531

1. The index number of the above entitled action is New York County Clerk's # 20453/67.

2. The parties to this action are as follows:
 007 REST. INC., Petitioner against NEW YORK STATE LIQUOR AUTHORITY, Respondent.

3. This proceeding was commenced in the Supreme Court of New York County, by the service of an Order to Show Cause dated December 14, 1967.

4. Issue was joined by the service of an answer on December 20, 1967.

5. This is a proceeding under Article 78 of the Civil Practice Law and Rules to review a determination of the New York State Liquor Authority.

6. This proceeding was transferred to the Appellate Division by Mr. Justice Mitchell D. Schweitzer, by order dated December 27, 1967, which order was filed in the Office of the County Clerk of New York on December 29, 1967.

7. The appendix method of appeal is not being used.

ORDER TRANSFERRING PROCEEDING
TO APPELLATE DIVISION

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM, PART
I, NEW YORK COUNTY, at the Courthouse thereof, 60 Centre
Street, New York City 7, New York

Present:

Hon. MITCHELL D. SCHWEITZER

Justice.

-----X
In the Matter of the Application of

007 REST. INC.,

-against-

NEW YORK STATE LIQUOR AUTHORITY.
-----X

Filed
Dec. 29, 1967
New York County
Clerk's Office

The following papers numbered 1 to 10 read on this motion
consented to:

Added No. 244 on Calendar of December 27, 1967

Order to Show Cause and Petition, annexed and
Exhibits 1-2

Answer, Affidavit 3-10

Replying Affidavit

. . . . Affidavit

. . . . Affidavit

Pleadings -- Exhibit

Stipulation -- Referee's Report -- Minutes . .

Filed Papers

Upon the foregoing papers this proceeding is trans-
ferred to the Appellate Division, First Department, on consent.

Dated: Dec. 27, 1967

s/ MDS

J.S.C.

Briefs: Plaintiff's . . Defendant's . . Petitioner's . .

Respondent's . . Relator's . .

Briefs

County Clerk's No. 20453 . .1967
Spec 1 Liber 0-27 Line 10. ., 1967

ORDER TO SHOW CAUSE

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, Borough of Manhattan, City and State of New York, on the 14th day of December, 1967.

P R E S E N T

H O N .

JUSTICE EDWARD R. DUDLEY

-----X
 In the Matter of the Application of
 007 REST. INC.

Index No.
 20453/67

Petitioner,
 For a Review Pursuant to Article 78
 of the Civil Practice Law & Rules,
 -against-
 NEW YORK STATE LIQUOR AUTHORITY,
 Respondent.
 -----X

Upon the annexed petition of 007 REST. INC., duly verified the 13th day of December, 1967,

LET, the respondent show cause before this Court at a Special Term, Part I thereof, to be held at the Courthouse located at 60 Centre Street, Borough of Manhattan, City and State of New York, on the 27th day of December, 1967 at 9:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, Why an order should not be made vacating and annulling the determination of respondent which cancelled petitioner's restaurant liquor license for premises 14 East 60th Street, New York City, or in the event that the Court should find that some disciplinary measure is warranted, but that the penalty imposed is too severe, setting aside and vacating the penalty imposed and directing the respondent to pre-a different and lesser penalty, and Why petitioner should not have, pending the determination of this proceeding, a stay of the enforcement of said order of respondent dated December 15, 1967, and Why the petitioner should not have such other and further relief as to this Court may seem just and proper in the premises; and it appearing from said petition that the enforcement of said order of cancellation will result in money damage and irreparable injury to the petitioner, in the event the same is carried into effect

ORDER TO SHOW CAUSE

during the pendency of the proceeding to review the action of the respondent, and the State Liquor Authority having been given notice of this application and having appeared in opposition herein, by Howard Hertzberg, it is

ORDERED, that pending the hearing and determination of this motion, the respondent, its agents and employees be stayed from enforcing the cancellation order dated December 11, 1967 against petitioner, at its premises located at 14 East 60th Street, New York City, for a period of not more than 30 days from the effective date of the order of cancellation, and it is further

ORDERED, that good cause appearing therefor, let service of a copy of this order and the papers upon which it is based upon respondent, on the 14th day of December, 1967, on or before 4:00 P.M. of said date, be deemed good and sufficient service.

E N T E R

s/ E.R.D.

J.S.C.

PETITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

-----X
 In the Matter of the Application of
 007 REST. INC.,
 Petitioner,
 For a Review Pursuant to Article 78 of
 the Civil Practice Law & Rules,
 -against-
 NEW YORK STATE LIQUOR AUTHORITY,
 Respondent.
 -----X

The petition of 007 REST. INC., respectfully shows to this Court and alleges, as follows:

1. That your petitioner now is and has heretofore been a domestic corporation, duly organized and existing under and by virtue of the Laws of the State of New York, with its principal office for the conduct of business at 14 East 60th Street, New York City, New York.

2. That petitioner owns and operates a restaurant at 14 East 60th Street, New York City, New York, and in connection with the operation of said restaurant, was engaged in the sale of alcoholic beverages to its customers.

3. That heretofore and on the 1st day of March, 1967, the State Liquor Authority issued to your petitioner, a restaurant liquor license, for the sale of alcoholic beverages, at retail, for "on premises" consumption, at the said premises herein, 14 East 60th Street, New York City, New York. That a similar license had been issued to your petitioner for said premises, for at least one year prior to the renewal license issued in 1967.

4. That the license issued in March 1967 was a renewal of former yearly licenses issued to petitioner.

5. That the 1967 license issued to your petitioner bore Serial No. New York RL 23586.

6. That your petitioner has an investment in the

PETITION

said business in excess of \$70,000.00 and the present value of said business is at least \$125,000.00.

7. That the said business has always been conducted in an orderly and legitimate manner and enjoys a good reputation in all respects.

8. That heretofore and on or about October 13, 1967, pursuant to notice theretofore served upon petitioner, a hearing was had before the respondent, in response to notice by the respondent to cancel its license, in accordance with the Rules of the State Liquor Authority. A copy of the Notice of Pleading and Hearing is attached hereto and made a part hereof and marked Petitioner's Exhibit "A".

9. That prior to the time of such hearing, petitioner pleaded "not guilty" to the charges preferred and at the hearing herein, appeared by its counsel, Krongold & Eisenberg.

10. That at the time of the hearing, petitioner's attorney requested an adjournment of the hearing on the grounds that the petitioner's chief witness, William Rockwell, refused to testify on behalf of the licensee, on constitutional grounds. The attorney for licensee was informed that Mr. Rockwell would testify on behalf of the licensee subsequent to the disposition of a criminal case which was pending against him in connection with the charges made against petitioner.

11. That petitioner's attorney request for an adjournment of the hearing subsequent to the disposition of the criminal case of William Rockwell was denied by the Hearing Officer and petitioner was forced to trial.

12. The testimony submitted by respondent's witnesses did not prove that petitioner or any of petitioner's officers knew of, aided, abetted or condoned the actions of William Rockwell.

13. The petitioner immediately upon learning of the charge against Mr. Rockwell discharged him from his service.

14. Petitioner, operating a restaurant open to the public, cannot run the hazard of violating the Civil

PETITION

Rights Law, by refusing to serve the public, whether a patron be male or female, escorted or unescorted. There certainly was nothing peculiar or out of the ordinary in a male patron entering the licensed premises and holding a conversation with a female patron.

15. Petitioner respectfully submits that it was never the intention of the legislature to require the operator of licensed premises to interrogate a patron as to his or her intentions, when entering a restaurant.

16. On December 11, 1967 an order was issued by the respondent cancelling the license herein and directing the surrender of said license. A copy of said order of cancellation is attached hereto and made part hereof and marked Petitioner's Exhibit "B".

17. Petitioner has been informed by its attorney, and believes, that from the testimony adduced at the hearing before respondent, it is apparant that petitioner did not know that acts of solicitation were committed and did not therefore suffer or permit the premises to become disorderly. There is not a scintilla of evidence to support the claim of lack of proper supervision, but to the contrary, the record is replete with evidence to the effect that the petitioner did not know of the alleged acts of solicitation or encourage same or participate in same in any manner. To the contrary, the record is barren of any evidence that the petitioner overheard or was even in the vicinity of the parties allegedly involved. Petitioner has further been advised by its attorney and verily believes, that the determination of respondent, involving the license heretofore issued to petitioner was not based upon sufficient legal, proper or competent evidence; was against the weight of evidence and there was no competent proof to sustain the Authority's determination, and that the determination by the respondent was arbitrary, capricious and contrary to law. Petitioner further submits that the penalty imposed, in any event, is too severe.

18. Petitioner alleges that the actions of respondent in this matter violate his constitutional rights under the Constitution of the State of New York and the Constitution of the United States of America.

19. That under Section of the Alcoholic Beverage Control Law, petitioner's remedy is provided for pursuant to Article 78 of the Civil Practice Law and Rules, to

PETITION

wit, an order of review of the determination of respondent by the Appellate Division, First Department.

20. That petitioner will suffer irreparable damage if in the conduct of its business, it cannot continue serving alcoholic beverages to its customers, pending a review herein. It is a well known fact that most patrons of a restaurant will not remain customers therein, unless they are in a position to be served with alcoholic beverages with their meals, and the continued loss of patronage, pending a review of the Appellate Division, would reach a point as to destroy petitioner's business completely.

21. That it is absolutely essential for the reasons aforementioned, that a stay be granted, so that petitioner may be permitted to continue its business in normal fashion, while petitioner's attorney is seeking review by the Appellate Division; that petitioner will make all reasonable effort to secure the completion of the record on appeal and argument on said appeal and determination from the Appellate Division, before the end of the period of the stay, which your petitioner is requesting to be granted herein. On the other hand, certainly no harm would ensue to anyone by the granting of this stay.

22. In view of the aforesaid facts and the shortness of time, petitioner is proceeding by making an application for this order to show cause, in place of the usual notice of motion.

23. That no previous application for the relief herein asked for has heretofore been made to any court or judge.

WHEREFORE, your petitioner prays that an order of review be made herein, transferring these proceedings for review and determination, to the Appellate Division, First Department, to the end that the determination of the Authority in cancelling petitioner's license be annulled, vacated and set aside, and the license be reinstated and grant to the petitioner herein, a stay of respondent's order of cancellation, until such review be had, pursuant to Section 121 of the A.B.C. Law and Article 78 of the CPLR, and that a temporary stay be granted to petitioner from, on and after December 15th, 1967, until

PETITION

determination be made by this Court on this application, for a thirty (30) day stay, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, N.Y.
December 13th , 1967

007 REST. INC.

By: s/ N.M.
NORBERT MEYER

VERIFIED ON December 13, 1967 by NORBERT MEYER

EXHIBIT "A", ANNEXED TO PETITION

STATE OF NEW YORK
LIQUOR AUTHORITY
270 Broadway
New York, N.Y. 10007

EXHIBIT "A"

-----X
In the Matter of Proceedings to Revoke
License Number: 1 RL 23586
Issued to: 007 Rest. Inc.
Licensed Premises: 14 East 60th Street
New York 22, New York
County of: NEW YORK

NOTICE OF
PLEADING AND HEARING

Serial No.
N.Y. RL 23586

-----X

PLEASE TAKE NOTICE, that you are required to appear at the offices of the State Liquor Authority, 270 Broadway, New York City, 19th floor, on August 11, 1967 at 9:30 A.M. in connection with proceedings to revoke the above license, and to plead to the following charges:

1. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law by suffering or permitting the licensed premises to become disorderly in that it suffered or permitted females on the licensed premises to solicit male patrons therein for immoral purposes on July 21, 22, 1967.

2. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967 by permitting the licensed premises to become disorderly in that it permitted an unescorted female to meet with an unescorted male in the licensed premises both evidently unknown to each other up to that time; that subsequently the female solicited the said male for immoral purposes.

3. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967 by suffering the licensed premises to become disorderly in that by failing to exercise a proper degree of supervision it suffered an unescorted female to meet with an unescorted male in the licensed premises, both evidently unknown to each other up to that time; that subsequently the female solicited said male for immoral purposes, and that if a proper degree of supervision had been used, the licensee should have known and could have prevented the aforesaid disorder.

4. That the licensee violated Section 100, subd.

EXHIBIT "A", ANNEXED TO PETITION

5 of the Alcoholic Beverage Control Law in that it sold, delivered or gave away or permitted alcoholic beverages to be sole, delivered or given away on credit.

PLEASE TAKE FURTHER NOTICE that you may be represented by counsel.

PLEASE TAKE FURTHER NOTICE that you may plead to the charges by mail instead of by personal appearance provided that a letter signed by you or your attorney, setting forth your plea of "Not Guilty" or "No Contest" is received by the Hearing Bureau of the State Liquor Authority at the above address on or before the pleading date specified above.

If you plead "Not Guilty" to the charges, a hearing will thereafter be scheduled at which you may appear with counsel, produce witnesses and introduce evidence in your behalf.

TO: 14 E. 60th St.
NYC 10022
TO: NEW YORK CITY A.B.C. BOARD
TO: Norbert Meyer, Pres.
124 Parkside Dr. Roslyn Hghts, NY
TO: Lau'e Hotels, Inc.
14 E 60th St., NYC

DATED: Aug. 3, 1967
By order of
STATE LIQUOR AUTHORITY

D.S. HOSTETTER,

Chairman

EXHIBIT "B", ANNEXED TO PETITIONSTATE OF NEW YORK
LIQUOR AUTHORITY

EXHIBIT "B"

-----X
In the Matter of Proceedings to Cancel
or RevokeLicense Number: 1 RL 23586
Issued to: 007 Rest. Inc.
Licensed Premises: 14 East 60th Street
New York 22, New York
County of: NEW YORK
-----XCANCELLATION ORDER
EFFECTIVE December
15, 1967WITH BOND CLAIM
\$1,000.00Serial No.
New York RL 23586

Proceedings having been duly instituted pursuant to the provisions of the Alcoholic Beverage Control Law (Chapter 478 of the Laws of 1934, as amended) to cancel or revoke the above license issued to the licensee for premises located at the address stated above and the licensee having duly pleaded "no contest" to the charges contained in the notice of hearing or a hearing having been duly held by the State Liquor Authority in connection with said proceedings, and

Said proceedings having been duly considered by the State Liquor Authority at a meeting duly held on December 7, 1967, and due deliberation having been had thereon, and the Authority having ^{as modified} adopted the findings of the hearing officer and duly found that:

1. That the licensee violated Sec. 106, Subd. 6 of the Alcoholic Beverage Control Law by suffering or permitting the licensed premises to become disorderly in that it suffered or permitted a female on the licensed premises to solicit a male patron therein for immoral purposes on July 21, 22, 1967.
2. That the licensee violated Sec. 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967 by permitting the licensed premises to become disorderly in that it permitted an unescorted female to meet with an unescorted male in the licensed premises both evidently unknown to each other up to that time; that subsequently the female solicited the said male for immoral purposes.
3. That the licensee violated Section 106, Subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967 by suffering the licensed premises to become disorderly in that by failing to exercise a proper degree of supervision it suffered an unescorted female or meet with an unescorted male in the licensed premises, both evidently unknown to each other up to that time;

EXHIBIT "B", ANNEXED TO PETITION

that subsequently the female solicited said male for immoral purposes, and that if a proper degree of supervision had been used, the licensee should have known and could have prevented the aforesaid disorder.

4. That the licensee violated Section 100, Subd. 5 of the Alcoholic Beverage Control Law in that it sold, delivered or gave away or permitted alcoholic beverages to be sold, delivered or given away on credit.

IT IS HEREBY ORDERED that the license aforesaid issued to said licensee for the above described premises be, and the same hereby is CANCELLED effective on December 15, 1967; and demand is hereby made upon said licensee and the surety company executing the bond filed by said licensee in connection with the issuance of said license, for the penal sum specified; and

IT IS FURTHER ORDERED that said licensee surrender said license forthwith to the State Liquor Authority or its duly authorized representative, on the effective date stated above; and

IT IS FURTHER ORDERED that a liquidator's permit shall be issued to the licensee on application therefor to sell his entire stock of alcoholic beverages to other licensees.

Dated: December 11, 1967

STATE LIQUOR AUTHORITY

Certified by

D.S. HOSTETTER,
Chairman

TO: William E. Bandon, Jr.
Secretary to the Authority

TO: 007 Rest. Inc.
14 E. 60th St. N.Y.C.
124 Parkside Dr.
Roslyn Heights, NY

TO: Laurie Hotel, Inc.
14 E. 60th St., N.Y.C.
TO: N.Y.C. A.B.C. Board

Please take notice that any person who shall sell any alcoholic beverages, without a license issued by the Liquor Authority or after his license has been revoked, cancelled or surrendered, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than two hundred dollars nor more than twelve hundred dollars or by imprisonment in a county jail or penitentiary for a term of not less than thirty days nor more than one year or both provided, however, that in default of payment of any fine imposed, such person shall be imprisoned in a county jail or penitentiary for a term of not less than thirty days (Section 130 of the Alcoholic Beverage Control Law.)

cc: Krongold & Eisenberg

RESPONDENT'S ANSWER

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

-----X

In the Matter of the Application of
 007 REST. INC.

Petitioner

For a Review Pursuant to Article 78 of
 The Civil Practice Law & Rules

A N S W E R

-against-

NEW YORK STATE LIQUOR AUTHORITY
 Respondent

Index No.
 20453-1967

-----X

The respondent, by its attorney, Hyman Amsel, for its answer to the petitioner herein, respectfully shows and alleges:

FIRST: Admits upon information and belief each and every allegation contained in those paragraphs of the petition designated "1" and "22".

SECOND: Admits each and every allegation contained in that paragraph of the petition designated "3", except it alleges that the 1967-1968 renewal license was issued on February 28th, 1967.

THIRD: Admits each and every allegation contained in that paragraph of the petition designated "16", except it alleges that the license was cancelled with a \$1000 bond claim.

FOURTH: Denies each and every allegation contained in those paragraphs of the petition designated "7", "14", "15", "18" and "21".

FIFTH: Denies each and every allegation contained in those paragraphs of the petition designated "10", "11", "12", "13" and "17", except as hereinafter set forth in paragraph "TENTH", and it respectfully refers this Court to a certified copy of the transcript of the testimony taken and evidence introduced at the hearing for a complete and accurate statement of the contents thereof, which is annexed hereto as Exhibit "C".

SIXTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in those paragraphs of the petition designated "6", "20" and "23".

ANSWER

SEVENTH: On January 31, 1966, the respondent issued a Restaurant Liquor license to 007 Rest. Inc. for premises located at 14 East 60th Street, New York, New York which license was renewed, on application therefor, for the 1966-1967 and the 1967-1968 license periods.

EIGHTH: On or about August 3, 1967, proceedings were initiated against the petitioner to revoke its license by the service of a Notice of Pleading and Hearing which recited the following charges:

"1. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law by suffering or permitting the licensed premises to become disorderly in that it suffered or permitted females on the licensed premises to solicit male patrons therein for immoral purposes on July 21, 22, 1967.

@2. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967, by permitting the licensed premises to become disorderly in that it permitted an unescorted female to meet with an unescorted male in the licensed premises both evidently unknown to each other up to that time; that subsequently the female solicited the said male for immoral purposes.

"3. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967 by suffering the licensed premises to become disorderly in that by failing to exercise a proper degree of supervision it suffered an unescorted female to meet with an unescorted male in the licensed premises, both evidently unknown to each other up to that time; that subsequently the female solicited said male for immoral purposes, and that if a proper degree of supervision had been used, the licensee should have known and could have prevented the aforesaid disorder.

"4. That the licensee violated Section 100, subd. 5 of the Alcoholic Beverage Control Law in that it sold, delivered or gave away or permitted alcoholic beverages to be sold, delivered or given away on credit."

ANSWER

A copy of said Notice of Pleading and Hearing is annexed hereto and made a part hereof as Exhibit "A".

NINTH: On August 7, 1967, petitioner's attorney sent a letter to the respondent demand a Bill of Particulars; on August 15, 1967, the respondent sent a letter to petitioner's attorney containing a Bill of Particulars. Copies of said letters are annexed hereto and made a part hereof as Exhibit "B".

TENTH: On October 13, 1967, a revocation hearing was duly held before Hearing Officer John Hyland; that Norbert Meyer, president of petitioner corporation, was present, and was represented by counsel; that the petitioner was afforded opportunity to cross-examine the witnesses for the respondent, and did cross-examine the witnesses; that the petitioner was afforded full opportunity to present evidence in its own behalf, and did present evidence in its own behalf. A certified copy of the transcript of the testimony taken and the evidence introduced at the hearing is annexed hereto and made a part hereof as Exhibit "C".

ELEVENTH: On November 21, 1967, subsequent to the completion of the hearing, and after giving due consideration to the testimony and evidence presented therein, Hearing Officer John Hyland prepared for the consideration of the Members of the Authority a statement of his findings, in which he sustained charges #1, #2 and #3 that petitioner suffered or permitted the licensed premises to become disorderly in violation of Alcoholic Beverage Control Law, § 106, subd. 6, and charges #4 that petitioner sold, delivered or gave away alcoholic beverages on credit, in violation of Alcoholic Beverage Control Law § 100, subd. 5. A copy of the Hearing Officer's findings is annexed hereto and made a part hereof as Exhibit "D".

TWELFTH: Petitioner's attorney sent to the respondent letters dated November 29, 1967 and November 30, 1967, controverting the Hearing Officer's findings. Copies of said letters are annexed hereto and made a part hereof as Exhibit "E".

THIRTEENTH: On December 7, 1967, at a regular meeting of the State Liquor Authority after carefully considering the testimony and evidence introduced at the revocation hearing, the findings of the Hearing Officer, and the letters from petitioner's attorney controverting the Hearing Officer's findings, the Authority made a determination modifying, and adopting as modified, the Hearing Officer's findings, sustaining

ANSWER

charges #1,#2,#3, and #4 , and directing a cancellation of the license, plus a \$1000 bond claim. A copy of said determination is annexed hereto and made a part hereof as Exhibit "F".

FOURTEENTH: On December 11,1967, the respondent issued the Cancellation Order, with a \$1000 bond claim, to become effective December 15,1967. A copy of said Cancellation Order is annexed h ere to and made a part hereof as Exhibit "G".

FIFTEENTH: There is substantial evidence in the record to sustain the determination of the State Liquor Authority that the petitioner violated Alcoholic Beverage Control Law § 106, subd. 6, in that it suffered or permitted the premises to become disorderly by suffering or permitting pandering and solicitation for purposes of prostitution on the premises, and violated Alcoholic Beverage Control Law § 100,subd. 5 in that it sold, delivered or gave away alcoholic beverages on credit.

SIXTEENTH: In imposing the measure of penalty directed in said Cancellation Order, the Members of the Authority duly considered and appraised the nature and gravity of the violations involved.

SEVENTEENTH: The penalty imposed by the respondent, as hereinabove alleged, was made after a hearing duly held pursuant to statute, and was an act within the discretion vested in the State Liquor Authority by Alcoholic Beverage Control Law, §§ 2,17 and 118.

EIGHTEENTH: In making its determination the State Liquor Authority did not abuse its discretion in imposing the measure of penalty or discipline.

NINETEENTH: A hearing was duly held and evidence taken thereat pursuant to statutory direction, to wit, Alcoholic Beverage Control Law, § 119, and the petitioner having raised the question in the petition whether the determination, on the entire record, is supported by substantial evidence, this proceeding must be transferred to the Appellate Division, First Judicial Department, for determination in the first instance, pursuant to Civil Practice Law and Rules, §§ 7803(4) and 7804(g).

ANSWER

WHEREFORE, the respondent respectfully prays that the proceeding herein be transferred to the Appellate Division, First Judicial Department, for determination in the first instance, and upon such transfer that the determination of the respondent be confirmed and the petition be dismissed together with costs and disbursements.

HYMAN AMSEL
Counsel, State Liquor Authority
Attorney for Respondent
Office & P.O. Address
270 Broadway
New York, New York 10007

EXHIBIT "A", ANNEXED TO ANSWER
NOTICE OF PLEADING AND HEARING
DATED - August 3, 1967

SAME AS EXHIBIT "A", ANNEXED TO PETITION

on pages 10 and 11 of Record

LETTER FROM

PETITIONER'S ATTORNEY REQUESTING

BILL OF PARTICULARS

Law Offices
Krongold and Eisenberg
RECEIVED

BOB

Max D. Krongold
David J. Eisenberg

AUG 28 1967

N. Y. STATE INDEMNITY BUREAU
270 Broadway, New York City 10006
ZONE 1
(212) BOWLING GREEN 9-0260

August 7, 1967

(Handwritten initials)

State Liquor Authority
270 Broadway
New York, N.Y.

RECEIVED

AUG 9 1967

Re: 007 Rest. Inc.
14 East 60th Street
New York, N.Y.
1 RL 23586

TRIAL EXAMINERS BUREAU

Gentlemen:

Please be advised that the above mentioned licensee hereby appears in this proceeding by the undersigned and pleads "Not Guilty" to the charges contained in the Notice of Pleading and Hearing, dated August 3, 1967, and hereby submits the following bill of particulars:

1. The exact names and addresses of the female or females who allegedly solicited male patrons on the premises for immoral purposes on July 21st and 22nd, 1967.

2. The exact time of said alleged solicitation.

3. The names and addresses of males allegedly solicited.

4. The name or names of members of

see Belians

August 7, 1967

State Liquor Authority

management who were present at said times.

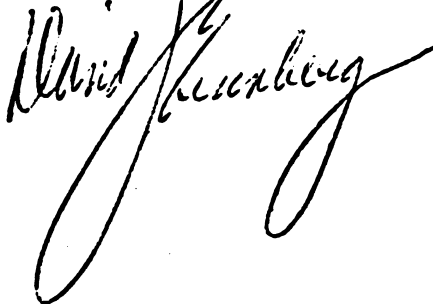
5. The exact manner in which management allegedly suffered or permitted the females to solicit said male patrons.

6. The exact names and addresses of patrons to whom licensee delivered or permitted alcoholic beverages to be sold or given away on credit.

7. An exact statement as to each item containing alcoholic beverages which was sold, delivered or given away on credit and the dates thereof, together with copies of any bills which the Authority intends to submit.

Very truly yours,

KRONGOLD & EISENBERG



DJE:lf

EXHIBIT "B", ANNEXED TO ANSWER
23
LETTER FROM RESPONDENT
CONTAINING BILL OF PARTICULARS

August 15, 1967

Krongold and Eisenberg, Esqs.
51 Broadway
New York, NY 10006

RE: 007 REST, INC.
14 East 60th St.
New York, N.Y.
1 RL 23586

Gentlemen:

The following is the Authority's Bill of Particulars pursuant to your demand, dated August 7, 1967:

1. Linda Borano, a/k/a Michele Pagan, 411 W.54th St, N.Y.C.
2. Approximately 1:00 A.M. on July 21, 1967.
Approximately 12:30 A.M. and 1:00 A.M. on July 22, 1967.
3. Ptl. Donald R. Gray shield #14808, N.Y.C.P.D.
4. William Rockwell
5. The licensee by its employee in charge offered to procure and did procure a female prostitute for Ptl. Gray. The prostitute then after solicited the officer to commit an act of sexual intercourse.
6. Ptl. Donald R. Gray
7. On July 22, 1967 licensee sold two rounds of Canadian Club with ginger ale and vodka and water which were charged to American Express Credit Card #042-75-743-9-800.
8. The Authority does not have possession at this

(cont'd page 2)

EXHIBIT "B" , ANNEXED TO ANSWER

1 RL 23586

~~XXX~~

time of any bill.

Very truly yours,

STATE LIQUOR AUTHORITY

ALBUM C. MARTIN
ASSOCIATE COUNSEL

SV:mt

EXHIBIT "C", ANNEXED TO ANSWER

TRANSCRIPT OF HEARING BEFORE
OFFICER, JOHN HYLAND, HELD
October 13, 1967

SET FORTH IN FULL ON PAGES 39-149b of Record

EXHIBIT "D", ANNEXED TO ANSWER

HEARING OFFICER'S FINDINGS
DATED NOVEMBER 21, 1967NY RL 23586
007 Rest., Inc.
Norby Walters Supper Club
14 East 60th Street
New York, N.Y.

Hearing held on October 13, 1967 before Hearing Officer John J. Hyland upon the following charges:

- "1. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law by suffering or permitting the licensed premises to become disorderly in that it suffered or permitted females on the licensed premises to solicit male patrons therein for immoral purposes on July 21, 22, 1967.
- "2. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967 by permitting the licensed premises to become disorderly in that it permitted an unescorted female to meet with an unescorted male in the licensed premises both evidently unknown to each other up to that time; that subsequently the female solicited the said male for immoral purposes.
- "3. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967 by suffering the licensed premises to become

NY RL 23586
007 Rest., Inc.

2.

disorderly in that by failing to exercise a proper degree of supervision it suffered an unescorted female to meet with an unescorted male in the licensed premises, both evidently unknown to each other up to that time; that subsequently the female solicited said male for immoral purposes, and that if a proper degree of supervision had been used, the licensee should have known and could have prevented the aforesaid disorder.

"4. That the licensee violated Section 100, subd. 5 of the Alcoholic Beverage Control Law in that it sold, delivered or gave away or permitted alcoholic beverages to be sold, delivered or given away on credit."

Authority's Exhibits 1 and 2 in evidence.

FINDINGS:

I credit the testimony of Patrolman Gray and Lieutenant Russo of the New York City Police Department, and I find that Patrolman Gray entered the licensed premises, which are in a building containing a hotel, at approximately 10:30 P.M. on July 20, 1967 and remained there until approximately 2:00 A.M. on July 21, 1967. During his visit and sometime after midnight Patrolman Gray was approached at the bar by the licensee's

NY RL 23586
007 Rest., Inc.

3.

maitre d', William Rockwell, who after some preliminary conversation designed to satisfy himself that Patrolman Gray was nothing more than a visiting businessman, offered to procure for Gray a girl for purposes of sexual intercourse if Gray would return to the licensed premises that evening.

Patrolman Gray did return to the premises at approximately 10:30 P.M. on July 21, 1967 and again met Rockwell at the bar where Rockwell advised Gray that he would procure for him a "professional."

Sometime after midnight, Rockwell introduced Gray to one Michele Pagan who after being assured by Rockwell that there was nothing wrong with Gray and after so assuring herself went with him from the bar to a table in the rear after first giving her handbag to the bartender for safekeeping. At the table, Gray purchased two rounds of alcoholic beverages for himself and the girl on credit using a credit card. At the table, Gray was solicited for purposes of prostitution, the girl suggesting that he obtain a room at the hotel, after first giving him a thorough "toss", i.e., a search designed to ascertain if he were carrying a gun and thus was a policeman, and after telling him that she would not do any kissing around his private parts.

EXHIBIT "D", ANNEXED TO ANSWER

NY RL 23586
007 Rest., Inc.

4.

Eventually, Gray and the girl repaired to a room in the hotel and there the girl was arrested and brought back to the premises where Rockwell was also arrested.


Subsequently, the girl was convicted in Criminal Court on her plea of guilty of offering to commit prostitution.

Upon such findings, I conclude that the premises did become disorderly as charged, and I so find, and I further conclude that the licensee corporation suffered and permitted the disorderly condition to exist on the licensed premises as exemplified by the actions of its agent, William Rockwell, and I so find.

Accordingly, charges 1, 2 and 3 are sustained.

As to charge 4, as found above, Patrolman Gray purchased alcoholic beverages on credit on the licensed premises on July 22, 1967. Accordingly, charge 4 is sustained.

JJH:pc



JOHN J. HYLAND
(11/21/67)

*Law Offices
Krongold and Eisenberg*

*Max D. Krongold
David J. Eisenberg*

RECEIVED
STATE LIQUOR AUTHORITY
CHAIRMAN'S OFFICE
NEW YORK CITY

510 Broadway, New York City 10006
NOV 30 1967

(212) BOWLING GREEN 9-0260

REFERRED TO: _____
RECORDED BY: _____

~~November 29, 1967~~

Donald S. Hostetter, Chairman
State Liquor Authority
270 Broadway
New York, N.Y.

Re: 007 Rest. Inc.
Norby Walters Supper Club
14 East 60th Street
New York, N.Y.
N.Y. RL 23586

Dear Sir:

The undersigned, as attorney for the above captioned corporation, hereby respectfully submits the following in rebuttal to the findings of Hearing Commissioner John J. Hyland, dated November 21st, 1967.

The charges are as set forth in the Memorandum of Mr. Hyland and substantially alleged that the licensee suffered or permitted the premises to become disorderly in that it permitted and suffered a female to solicit a male patron for immoral purposes on July 21st and July 22nd, 1967.

The testimony on behalf of the Authority consisted basically of Ptl. Gray's testimony. He testified that he entered the premises on July 20th and engaged in a conversation with William Rockwell, who was the maitre d' of the licensee. In essence, the conversation consisted of the following:

November 29, 1967

Donald S. Hostetter, Chairman
State Liquor Authority

That the Officer was an out of town buyer, that he was staying at the Plaza Hotel, that he did not know New York. Mr. Rockwell, who did not admittedly previously know Officer Gray, asked Officer Gray if he wanted to have some fun. Officer Gray answered in the affirmative. Mr. Rockwell then allegedly said come back tomorrow. That was the end of the conversation. No testimony that any member of management overheard this conversation, aided, abetted or condoned same. The next evening Officer Gray returned and allegedly Mr. Rockwell introduced a young lady to Gray, stating that "she was all right" and that he only knew good girls. No testimony was offered to show that any member of management overheard this conversation or aided, abetted or condoned same. The testimony was that the premises were noisy and crowded.

The licensee attempted to produce William Rockwell as a witness, having subpoenaed him. Mr. Rockwell refused to answer any questions on the grounds that his answers might tend to incriminate him. The attorney for the licensee moved to adjourn the hearing until Mr. Rockwell agreed to testify. Mr. Rockwell refused to testify until his case had been tried in Court, but agreed to testify after the completion of same.

The motion by the attorney for the licensee was denied and the hearing was continued. The licensee offered the testimony of Norbert Meyer and Walter Meyer in rebuttal to the testimony of Officer Gray. Norbert Meyer testified that he left the premises on July 21st, prior to the time the officer entered. Mr. Norbert Meyer testified that he was in the premises managing the premises in the rear and was not aware of any conversation had between Mr. Rockwell and the officer. Another witness testified that the officer attempted to buy her a drink prior to the time he claims that Mr. Rockwell introduced him to a female.

35 November 19, 1967

Donald S. Hostetter, Chairman
State Liquor Authority

It is a well established tenet of law that where a licensee does not have knowledge of a single transaction which occurs in his premises, he cannot be held to have suffered or permitted his premises to become disorderly.

Mr. Meyer has been a licensee for a period of over six years and has owned four different licensed premises, and has never been charged with suffering or permitting the premises to become disorderly through prostitution.

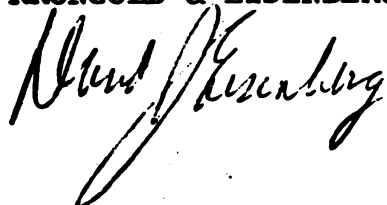
Officer Gray's testimony should be evaluated in the light of the fact that the licensee could not properly rebut same through the testimony of the only individual connected with it, Mr. Rockwell. The licensee testified that William Rockwell was discharged immediately after this incident.

The testimony of Officer Gray, to say the least, is incredible. He alleges that an individual introduced him to a prostitute whom he had not previously known, and who did not know him, and who has no record of being associated with prostitutes. Mr. Rockwell has been employed in such well known establishments as the Copa Cabana and other equally as famous restaurants for a period of over (30) years. Assuming for the moment that Mr. Rockwell was a "procurer", he certainly would not introduce a prostitute under the circumstances as related by Officer Gray.

The undersigned feels that the hearing was invalid as against the licensee, in that he did not have an opportunity to present proper evidence to rebut the evidence submitted by the Authority and the charge was not sustained by substantial evidence. Therefore, deponent prays that the Authority dismiss the charges as hereinabove set forth.

Very truly yours,

KRONGOLD & EISENBERG



DJE:lf

cc: Comm. Walter C. Schmidt
Comm. Robert E. Doyle
Comm. John C. Hart
Comm. Benjamin H. Balcom

Law Offices
Krongold and Eisenberg

Max D. Krongold
David J. Eisenberg

51 Broadway, New York City 10006

(212) BOWLING GREEN 9-0260

November 30, 1967

Donald S. Hostetter, Chairman
State Liquor Authority
270 Broadway
New York, N.Y.

Re: 007 Rest. Inc.
Norby Walters Supper Club
14 East 60th Street
New York, N.Y.
N.Y. RL 23586

Gentlemen:

In addition to my letter of November 29th, concerning the above captioned matter, please be advised that the summons issued against William Rockwell for violation of the Penal Law, "soliciting on behalf of a prostitute" and a summons issued to 007 Rest. Inc., for violation of Section 106, subd. 6 of the A.B.C. Law, in that the corporation suffered or permitted the premises to become disorderly, in that it permitted a prostitute to solicit a male patron therein for immoral purposes, were both dismissed after trial in the Criminal Court of the City of New York.

Very truly yours,

KRONGOLD & EISENBERG

David J. Eisenberg

RECEIVED
STATE LIQUOR AUTHORITY
CHAIRMAN'S OFFICE
NEW YORK CITY.

DEC 1 1967

DJE:lf

cc: Comm. Walter C. Schmidt
Comm. Robert E. Doyle
Comm. John C. Hart
Comm. Benjamin H. Balcom
Comm. John J. Hyland

RECEIVED TO RECD. CH

673636

MEMORANDUM
State Liquor Authority
ZONE 1

To: Zone I

Date:

12/8/67

From: Office of the Secretary

Subject: New York RL 23586
 007 Rest., Inc.
 Norby Walters Supper Club
 14 East 60th St.
 New York, N.Y.

1. Disorder Sec. 106 (6)
2. Disorder Sec. 106 (6)
3. Disorder Sec. 106 (6)
4. Sales on credit Sec. 100 (5)

The Members of the Authority at their regular meeting held at the Zone I New York Office on 12/7/67 determined:

Hearing Officer's findings are adopted and modified as follows:

In Charge #1 the Board notes that the charge is cast in the plural, that it refers to "females" and to "male patrons" however, the Board notes that actually only one female and one male patron were involved. As so adopted and so modified the charges are sustained. The appropriate penalty is cancellation, plus \$1,000 bond claim forthwith.

Dep. Comm. Roberts is to review Queens RL 9537 to determine if any action is warranted or required in that license in so far as the principal of Queens RL 9537 is connected with this cancelled license.

Chairman, Coms. Hart, Batom and Schmidt present and voting for the above.

13-4-5

WEB:hg

cc Dep Comm Roberts

FILE COPY
DO NOT REMOVE

William J. Roberts

EXHIBIT "G", ANNEXED TO ANSWER

**CANCELLATION ORDER WITH BOND
CLAIM, DATED DECEMBER 11, 1967,
EFFECTIVE DECEMBER 15, 1967**

SAME AS EXHIBIT "B", ANNEXED TO PETITION

(SET FORTH IN RECORD PAGES 12 and 13)

MINUTES OF HEARING

1 BEFORE THE STATE LIQUOR AUTHORITY

2 ZONE OFFICE ONE

3 -----X

4 IN THE MATTER OF :

5 Proceedings to Revoke :

6 Hotel Liquor License Issued : Serial Number
New York RL-23586

7 to 007 :

8 RESTAURANT, INC. :

9 -----X

10 B E F O R E : JOHN HYLAND,
Hearing Officer

11 A P P E A R A N C E S : STUART I. VOLAN, ESQ.
12 Attorney, SLA

13 KRONGOLD and EISENBERG, ESQS.
14 51 Broadway
New York, New York
15 By: DAVID EISENBERG, ESQ.,
of Counsel

16 P R E S E N T : PTL. DONALD R. GRAY
17 Shield #14808, 1st Deputy
Police Commissioner's Office
18 Investigating Unit
Public Morals Division
New York City Police Department

19 LIEUT. RALPH RUSSO
20 Public Morals Administrative Division
1st Deputy Commissioner's Office
21 New York City Police Department

22

23

24

25

Esquire reporting company

150 nassau street
new york 38, n. y.

bookman 3-6388

1 P R E S E N T : (CONTINUED) WILLIAM ROCKWELL
2 1 Seaman Avenue
3 New York, New York
4 Witness for Licensee
5
6 JOAN SANTOS
7 23-21 Beaumont Avenue
8 Bronx 58, New York
9 Witness for Licensee
10
11 WALTER MEYER
12 63-204 Alderton Street
13 Rego Park, New York
14 Witness for SLA
15
16 NORBERT MEYER, President
17 Licensee Corporation
18
19 Walter Harris
20 Hearing Reporter
21 New York, New York
22 October 13, 1967

23 * * *

24 MR. HYLAND: All right.

25 MR. VOLAN: Commissioner, this is a proceeding to revoke
Restaurant Liquor License issued to 007 Restaurant, Inc.,
Serial Number New York RL-23586, the license issued to 007
Restaurant, Inc., licensed premises 14 East 60th Street,
New York, New York.

I offer in evidence the Notice of Pleading and Hearing,
dated August 3, 1967, and I move that the charges contained
therein be spread upon the record, as if read.

MR. EISENBERG: I have no objection.

MR. HYLAND: Mark it Authority's Exhibit 1, please.

(The above mentioned document was marked Authority's
Exhibit 1 in evidence.)

1 1. That the licensee violated Section 106, subdivision 6 of the
2 Alcoholic Beverage Control Law by suffering or permitting the
3 licensed premises to become disorderly in that it suffered or
4 permitted females on the licensed premises to solicit male patrons
5 therein for immoral purposes on July 21, 22, 1967.

6 2. That the licensee violated Section 106, subdivision 6 of the
7 Alcoholic Beverage Control Law on July 21, 22, 1967 by permitting
8 the licensed premises to become disorderly in that it permitted
9 an unescorted female to meet with an unescorted male in the licensed
10 premises both evidently unknown to each other up to that time; that
11 subsequently the female solicited the said male for immoral purposes

12 3. That the licensee violated Section 106, subdivision 6 of the
13 Alcoholic Beverage Control Law on July 21, 22, 1967 by suffering the
14 licensed premises to become disorderly in that by failing to exercise
15 a proper degree of supervision it suffered an unescorted male in the
16 licensed premises, both evidently unknown to each other up to that
17 time; that subsequently the female solicited said male for immoral
18 purposes, and that if a proper degree of supervision had been used,
19 the licensee should have known and could have prevented the afore-
20 said disorder.

21 4. That the licensee violated Section 100, subdivision 5 of the
22 Alcoholic Beverage Control Law in that it sold, delivered or gave
23 away or permitted alcoholic beverages to be sold, delivered or
24 given away on credit.

25 MR. VOLAN: The Authority calls Patrolman Donald Gray.

1 MR. EISENBERG: I move that all witnesses be excluded
2 from the hearing room.

3 MR. HYLAND: Yes, those not actively participating wait
4 outside.

5 P T L. DONALD GRAY, called as a witness on
6 behalf of the Authority, having been first duly sworn,
7 testified as follows:

8 MR. HYLAND: Please give your name and shield number.

9 THE WITNESS: Patrolman Donald R. Gray, Shield Number
10 14808, 1st Deputy Police Commissioner's Investigating Unit,
11 Public Morals Division, formerly the CPIU.

12 MR. HYLAND: All right.

13 DIRECT EXAMINATION BY MR. VOLAN:

14 Q Patrolman Gray, were you employed by the New York City
15 Police Department on July 20, 1967?

16 A Yes.

17 Q Was your command the same as it is now?

18 A Yes.

19 Q What were you attached to on July 20th?

20 A The Patrols Investigating Unit.

21 Q In the course of your initial duties as a police officer
22 for the New York City Police did you have occasion to visit the
23 licensed premises at 14 East 60th Street, New York City, formerly
24 known as Norby's Super Club?

25 MR. HYLAND: What date is this?

1 MR. VOLAN: July 20th.

2 Q July 20th?

3 A Correct.

4 Q What time did you arrive at the premises?

5 MR. EISENBERG: I object. On the charge it is dated
6 July 21st.

7 MR. VOLAN: Just a moment. The officer arrived on the
8 premises on the evening of the 20th as far as I know and the
9 activity carried on until the 21st. This was one of those
10 visits that was made on that day.

11 MR. HYLAND: What is the 22nd?

12 MR. VOLAN: That's a subsequent visit also.

13 MR. HYLAND: All right.

14 MR. EISENBERG: I will withdraw the objection.

15 MR. HYLAND: All right.

16 Q You say you arrived July 20th?

17 A Yes.

18 Q At what time?

19 A Approximately 10:30 or a little before 10:30.

20 Q P.M.?

21 A Yes.

22 Q At that time were you in plain clothes or uniform?

23 A Plain clothes.

24 Q Did you arrive by yourself?

25 A I entered by myself.

1 Q Did someone enter later on who was associated with you?

2 A Yes.

3 Q Who was that?

4 A Lieutenant Russo, who was a sergeant at that time.

5 Q Now, on July 20th did you have occasion to meet a person
6 known as William Rockwell?

7 A I did, sir.

8 Q What was his connection with the premises?

9 A As informed by him, he was the maitre d'.

10 Q Did you have occasion to meet Mr. Norby Meyer that night?

11 A Yes, briefly.

12 Q How did you happen to meet him?

13 A Well, the maitre d' introduced us.

14 Q Now, did you have a conversation with the maitre d'?

15 A Yes, I did.

16 Q What was the conversation?

17 A The maitre d' started out with a general conversation,
18 how I was, how I was feeling, and where I was from, and where I
19 was staying and after not answering these particular questions he
20 said to me, well, was I looking to have fun? I said, that certainly
21 I was. At this point he told me that he could get me a girl to get
22 laid with.

23 MR. EISENBERG: I object unless he uses the exact
24 conversation.

25 MR. HYLAND: Are you stating the substance of the

1 conversation?

2 THE WITNESS: I am stating his exact words, "I will get
3 a girl to get laid with."

4 Q What time did that conversation occur?

5 A That took place at approximately maybe 10:40, in that
6 general area.

7 Q What happened after that?

8 A I remained and I continued that conversation. He told me
9 that there was nobody there that he knew right then and that if I
10 came back that evening he could arrange to have me taken care of.

11 Q Now, did you return to the premises?

12 A Yes, sir. I left and then I returned to the premises.

13 Q What time did you leave?

14 A Well, I believe it was somewhere around 2:00 o'clock in
15 the morning.

16 Q So that you were there from July 20th at 10:30 to July 21st
17 at 2:00 A.M., is that right?

18 A Yes, approximately 2:00 A.M.

19 Q Now, when did you return next?

20 A I returned at approximately 10:30 on the 21st.

21 Q When you arrived at 10:30 on the 21st, who was present
22 in the bar?

23 A There were numerous people standing at the bar. The
24 maitre d', who had told me to call him, Bill, on the previous
25 night, he was there but he was not standing at the very front when

1 I walked in. I walked in and stood at the bar.

2 Q Did you have a conversation with Rockwell on the second
3 visit?

4 A Yes, I did.

5 Q What was the conversation?

6 A He asked me how I was that evening and I said that I was
7 fine. He asked me how long I was going to stay and I said I didn't
8 know. He said not to worry, that he would get me a professional
9 girl, that I wouldn't have to wine and dine her and that I had no
10 further worries because he knew who all the professionals were
11 because I related at that point that I didn't particularly want to
12 have any trouble. At this point, Mr. Rockwell left me. I continued
13 standing at the bar.

14 Q Now, what happened next?

15 A Later on, I observed two females there and standing in
16 the vestibule area of the bar next to the coat room. The maitre d'
17 approached both of these females and had a conversation with them,
18 whereupon he brought both girls into the bar area. One girl stopped
19 at the bar ahead of where I was standing, closer to the door than
20 I was. He brought Michele Pagan over, who was the girl who I
21 later found out that that was her name. He said to me in her
22 presence, "You have nothing to worry about. He is all right. He
23 is a friend of mine."

24 Q Did he introduce you to that girl?

25 A Yes.

1 Q And you later learned her name was what?

2 A Michele Pagan.

3 Q At the time he introduced you what did he say to her
4 and what did he say to you?

5 A Well, he said to her while I was standing there, "He is
6 all right. He is a friend of mine."

7 Q Now, what time did this conversation take place and on
8 what date?

9 A This took place on the 22nd, somewhere around the area
10 of 12:30.

11 MR. HYLAND: 12:30 P.M.?

12 THE WITNESS: A.M., sir.

13 MR. HYLAND: It was after midnight then?

14 THE WITNESS: Yes.

15 MR. HYLAND: All right.

16 Q Now, did you subsequently engage in conversation with
17 the girl, Pagan?

18 A Yes, sir, I did.

19 Q Tell the commissioner what happened.

20 MR. EISENBERG: I object to any testimony of this girl
21 as hearsay, unless she is produced.

22 MR. HYLAND: All right. Overruled.

23 A Well, this young lady -- I had been introduced to her,
24 and she checked all my identification out and --

25 MR. EISENBERG: I object unless he states exactly what

1 she did.

2 MR. HYLAND: All right.

3 A She checked out my identification by looking in my wallet
4 and looking at the identification which I had there.

5 Q What did this identification show?

6 A Well, it showed a credit card from a New Jersey residence
7 It showed American Express, several gas companies, also. There
8 were credit cards from other companies, Macy's and Gimbel's, too.

9 Q Did you show her anything to identify you as a police
10 officer?

11 A No, sir.

12 Q All right. What happened after that took place?

13 A Well, she brought me back -- well, she walked over with
14 me to the bar. She handed the bartender her pocketbook which he
15 placed behind the bar and she said to me, "Let's get a seat." We
16 proceeded to get over to the rear of the bar whereupon there was
17 another gentleman who seated us at one of the rear tables of the
18 bar.

19 Q While you were seated at the table did you order any
20 drink?

21 A Yes, I did.

22 Q What did you order?

23 A Well, I ordered, I believe, a Canadian Club and a Gin
24 and tonic or Vodka.

25 Q How many rounds of drinks did you have?

1 A Two.

2 Q Now, did you have a discussion with the girl while you
3 were at the table?

4 A Yes, sir, I did.

5 Q What discussion did you have?

6 MR. EISENBERG: I will restate my previous objection
7 and I reserve a continuing objection to any conversation had
8 with this girl.

9 MR. HYLAND: Overruled. The attorney for the licensee
10 had a continuing objection as to testimony as to the conversa-
11 tion between the witness and Michele Pagan.

12 Go ahead. Please read back the last question.

13 (The last question was read by the reporter.)

14 Q Go ahead.

15 A Well, the discussion with the girl at the table was
16 that I should go outside and get a room and that prior to our
17 going upstairs that I was to know that there was no kissing down
18 below and she indicated the groin area by pointing to this area
19 while seated down.

20 Q Well, what happened after that?

21 A Well, after that she left to go to the ladies' room. I
22 proceeded to go out and go to the men's room.

23 Q Where were these two rooms, the ladies' room and the men's
24 room located?

25 A Directly outside the side door of the bar.

1 Q Well, is the side door of the bar open into the hotel
2 lobby?

3 A Yes, it does.

4 Q Continue.

5 A Well, when I entered out into the lobby she was talking
6 to a hotel clerk. She had a newspaper in her hand and there was
7 also a pile of newspaper on the clerk's table. When I went outside
8 she said, "Don't worry, I am going right back," and she handed
9 the hotel clerk the newspaper and proceeded to go to the ladies'
10 room and I proceeded to go to the men's room. I re-entered after
11 going to the men's room, re-entered the bar and I seated myself
12 at the table and a few minutes later she re-entered herself and
13 she had suggested that I get the room. I went outside and I
14 registered for the room. I came back in and she left with me
15 to go to the room.

16 Q Before you left were you given a bill for the drinks?

17 A Yes, sir, I was.

18 Q How much was the bill?

19 A The bill was \$4.75.

20 Q Did you pay for that by cash?

21 A No. I used the American Express Credit Card.

22 Q Do you have a receipt or card here from the American
23 Express Company?

24 A Yes, I do.

25 Q How did you receive that?

1 A I received that via the United States Mail, delivered
2 to my house or at the same time from the American Express Company.

3 Q Does that card have your signature on it?

4 A Yes, it does.

5 Q Did you sign it?

6 A Yes, at the time I purchased the drinks, at the time
7 the bill was presented to me, I mean.

8 MR. VOLAN: I offer this document in evidence.

9 (Handed to licensse's attorney.)

10 MR. EISENBERG: No objection.

11 MR. HYLAND: Mark it Authority's Exhibit 2, please.

12 (The above mentioned document was marked Authority's
13 Exhibit 2 in evidence.)

14 Q Now, after you left the bar where did you go with her?

15 A I went to room 60.

16 Q Of what hotel?

17 A Hotel 14, I believe is the name, the same location, the
18 same address.

19 Q What happened after that?

20 A The defendant agreed to perform a sexual --

21 Q Who was the defendant?

22 A Michele Pagan offered to commit an act of sexual
23 intercourse for the sum of \$83 which I placed her under arrest for.

24 Q Now, in other words, you went up to the room with her?

25 A Yes, sir.

1 Q You arrested her in the room?

2 A Yes, sir.

3 Q Now, did you bring her back to the bar?

4 A Yes, sir, I did.

5 Q What time was that?

6 A That was approximately at 1:05, sir.

7 Q What date was that?

8 A That would be on the 22nd.

9 Q Now, what happened when you came down into the bar with
10 her?

11 A Well, I came down into the bar. I entered through the
12 side door. I informed Sergeant Russo, who was still standing at
13 the bar, that I had placed this young lady under arrest and I
14 proceeded with him to walk up to the maitre d' and inform him,
15 number one, that he was under arrest, and secondly of his rights.

16 Q Now, did the girl, Michele Pagan, retrieve her pocketbook
17 at any time?

18 A Yes, she did.

19 Q When was that?

20 A Upon coming downstairs, while the conversation with the
21 maitre d' was going on, I held on to her with one hand, while she
22 spoke to the bartender and retrieved her pocketbook.

23 Q Now, you indicated that Sergeant Russo was present when
24 you came back with the girl?

25 A Yes, he was present in the bar.

1 Q Had he been present when you visited the bar on the
2 second occasion which would have been the evening of July 21st?

3 A Yes, sir, he entered a short time after I did.

4 Q Was there any conversation between Mr. Rockwell and the
5 Pagan girl?

6 A Yes, there was.

7 Q What was that conversation? How did it arise?

8 A The girl was raising some difficulty in being able to
9 move her to a police station without her causing a fuss. She was
10 kicking up quite a turmoil and directly at the door leading into
11 the place, on the outside of these doors, she summoned the maitre d
12 who was in the company of Sergeant Russo at this point and she said
13 to him, "Bill, Bill, what are they doing to me?"

14 Q Yes.

15 A Whereupon, he said, "Don't cause a fuss here. Go along
16 with them. They are policemen."

17 Q Yes, go on.

18 A We proceeded to go into the direction of our vehicle
19 which was between 6th Avenue and 60th Street, toward 6th Avenue,
20 whereupon the defendant kicked me and struck me about the body.

21 Q Which defendant?

22 MR. EISENBERG: I object to any testimony on any actions
23 that happened outside of the premises.

24 MR. HYLAND: Overruled.

25 What defendant?

1 THE WITNESS: Michele Pagan.

2 Q Go ahead.

3 A Whereupon, the maitre d' came over again and said, "Look,
4 don't cause a disturbance here. Go along quietly."

5 Q What was Mr. Rockwell's first name?

6 MR. HYLAND: He said it was William.

7 THE WITNESS: That's right.

8 MR. VOLAN: All right.

9 Q Now, what were the charges against Miss Pagan?

10 A 887 of the Penal Code, subdivision 4A.

11 MR. HYLAND: You mean the code of criminal procedure?

12 THE WITNESS: I am sorry, yes, that's right.

13 MR. HYLAND: What was the disposition of the case?

14 THE WITNESS: The disposition on the 22nd was guilty.

15 Q She pleaded guilty or what?

16 A She pleaded guilty.

17 Q You arrested Mr. William Rockwell, is that right?

18 A Yes.

19 Q What were the charges against him?

20 A Well, procurer.

21 Q Has that case been tried?

22 A No, sir, it has not. It is pending.

23 Q Did you serve any other summons that evening, the day
24 of the arrest?

25 A No, not that evening.

1 Q Well, at a later time did you serve a summons?

2 A Yes.

3 Q Was that against the 007 Restaurant, Inc.?

4 A Yes.

5 Q Has that case been tried?

6 A No, sir.

7 MR. HYLAND: What was that summons for?

8 THE WITNESS: Disorderly premises.

9 MR. HYLAND: What happened to that?

10 THE WITNESS: It is pending, sir.

11 MR. HYLAND: All right.

12 Q Now, can you tell me who was in charge of the premises
13 on the occasion of the second visit?

14 A To the best of my knowledge, William Rockwell.

15 Q How about on the first occasion?

16 A Well, I believe Mr. Meyer was in charge. I don't know.

17 MR. VOLAN: I have no further questions.

18 MR. HYLAND: Mr. Eisenberg?

19 CROSS-EXAMINATION BY MR. EISENBERG:

20 Q Officer Gray, when you went into the premises the first
21 time did you go in there with a specific purpose?

22 A Yes.

23 Q Were you directed to go into the premises?

24 A Yes, I was.

25 Q What was the purpose of your visit?

1 A The purpose of my visit was to see if there ^{were} violations
2 of the law occurring in those premises.

3 Q Any specific areas of the law?

4 A Yes, prostitution.

5 Q Had you ever met Mr. Rockwell prior to that date?

6 A No, sir, I had not.

7 Q Had you ever seen him in this place?

8 A No, sir, I have not.

9 Q What exactly was your conversation with Mr. Rockwell
10 when you first met him?

11 A Well, when I first met him?

12 Q Yes.

13 A He came up and introduced himself to me.

14 Q What did he say?

15 A Well, he asked me how I was, where I was from, where
16 I was staying at, what type of business I was in, a general
17 conversation.

18 Q What did you answer him?

19 A Well, I gave him specific answers. I told him that I
20 was staying, where I was staying, I told him that I was from New
21 Jersey.

22 Q What else was said between you and Mr. Rockwell?

23 A Well, Mr. Rockwell asked me if I was out looking for
24 some fun.

25 Q Was those his exact words?

- 1 A Yes, sir.
- 2 Q You were out looking for some fun?
- 3 A Yes.
- 4 Q What was your answer?
- 5 A Yes.
- 6 Q Then what did he say?
- 7 A Well, he said that he could get me a girl to get laid
- 8 with. Those were his exact words.
- 9 Q Did you ask to get laid prior to that?
- 10 A No, sir.
- 11 Q You said you were out looking for fun and he said that
- 12 he could get you a girl?
- 13 A Yes.
- 14 Q How long had he been talking at that particular time?
- 15 A Maybe ten minutes, I would say.
- 16 Q After ten minutes he offered to get you a girl?
- 17 A Yes.
- 18 Q Did you get a price?
- 19 A No, sir.
- 20 Q Did you ask what the price was?
- 21 A No, sir.
- 22 Q When he said he would get you a girl did he say he would
- 23 get you a girl to get laid?
- 24 A Yes, to get laid with.
- 25 Q What did you answer to that?

1 A Well, I said it sounds very interesting.

2 Q Where were you standing at the time?

3 A I was standing approximately midway at the bar.

4 Q How many people were in the bar at this time?

5 A I would say approximately maybe twenty-five or twenty.

6 Q How big is the bar, approximately?

7 A The length of the bar?

8 Q Yes.

9 A Well, it is about -- let me see. It is about ten,
10 fifteen seats. Well, I would say about twenty or twenty-five feet
11 long. I would like to add here that it is difficult to ascertain
12 the length of the bar because the bar has two curves in it, one
13 at the front and one at the back. It is winding in and out.

14 Q Now, the twenty-five people who were standing at the
15 bar --

16 A Yes?

17 Q -- were they standing behind you against the bar or
18 were they in groups or clusters?

19 A I don't recall where each individual was standing.

20 Q Were they more than one deep?

21 A Well, in some areas and in others, no.

22 Q What time was this?

23 A Well, this was, I would say, in the neighborhood of
24 maybe 12:30 or 1:00 o'clock.

25 Q Well, you said you had entered at 10:30 on July 20th?

1 A Yes.

2 Q What time were you approached by Mr. Rockwell?

3 A What time was I approached by Mr. Rockwell?

4 Q Yes.

5 A Well, somewhere in the neighborhood I would say of
6 12:30 to 1:00 o'clock.

7 Q And you were in the premises two hours before he came
8 over to you?

9 A Yes, sir.

10 Q What did you do between 10:30 and 12:30?

11 A Well, I had drinks at the bar and I just stood there.

12 Q How many drinks did you have at the bar?

13 A Well, I had two or three.

14 Q Did you charge them on the bill?

15 A No.

16 Q Did you pay cash for them?

17 A Yes.

18 Q Did you put that voucher to the Department concerning
19 your expenses for that evening?

20 A Yes, I did.

21 Q Did you go any place else that evening?

22 A No, sir, I did not, except home.

23 Q Did you have any other expenditures that night?

24 A Any other expenditures that evening?

25 Q Yes.

1 A Outside of parking, no.

2 Q In other words, you had three drinks in the premises,
3 two or three drinks in the premises?

4 A Yes, sir.

5 Q How much were the drinks?

6 A I think \$1.25 apiece and I gave the bartender a tip.

7 Q So that it was \$1.25 per drink plus whatever you gave
8 for a tip?

9 A Yes, plus my expenditures for that evening.

10 Q Your expenditures for that evening would be \$5 plus
11 expenses, giving the bartender \$1?

12 A Well, I don't know what my total expenses would have
13 been for the days. I don't remember that. I don't remember what
14 I placed in for that day.

15 Q Don't you keep a memorandum of what you put in for?

16 A Well, I do, but I don't keep it any longer after I put
17 it in. I put in the expenses and I put in the different sheets.
18 I may have bought gas that night but I don't remember. I don't
19 know what happened.

20 Q But those are not available, those records, are they?

21 A No, I handed them into the Police Department, sir.

22 Q When you hand that sheet in do you itemize how you make
23 these expenditures?

24 A No, sir.

25 Q In other words, you just put in a gross figure? You don't

1 say, so much for parking and so forth?

2 A Well, sometimes you do and sometimes you don't. I believe
3 to my best recollection I put down a round figure, I think.

4 Q Now, on the first evening was Mr. Meyer, the gentleman
5 sitting on my left, there?

6 A Yes, sir.

7 Q What was he doing?

8 A Well, he was working -- I should not say working. I
9 believe he was seating people but at that particular time I didn't
10 pay too much attention to Mr. Meyer.

11 Q Did Mr. Meyer speak to you at any time?

12 A Yes, at one point the maitre d' introduced me as a
13 friend, period, and that was the end of our conversation.

14 Q What did he say?

15 A Well, he said, "Hello," and just walked away. There
16 was no big meeting between either of us.

17 Q Did you speak to anybody else between 10:30 and 12:30
18 when Mr. Rockwell approached you?

19 A Yes.

20 Q Who did you speak to?

21 A The bartender.

22 Q Did you speak any of the other patrons?

23 A Not to my recollection, no.

24 Q How long did the conversation last with Mr. Rockwell?

25 A On the morning of July 21st, ten or fifteen minutes.

1 Q After he said to you that he was going to get you a
2 girl to get laid what did you say to him?

3 A What did I say to him?

4 Q Yes.

5 A Well, I said that that sounds like a good idea.

6 Q What did he say after that?

7 A He told me to come back that evening.

8 Q Meaning the evening of the 21st?

9 A Right.

10 Q Was that the total conversation?

11 A That was the total conversation, yes, sir.

12 Q In other words, he asked you where you lived, where you
13 worked, what were you doing?

14 A Yes.

15 Q Then he said, "Do you want to have some fun?"

16 A Yes.

17 Q Then he said, "Do you want to get laid?"

18 A Yes.

19 Q And you said, "That's interesting."

20 A Yes.

21 Q Then he said, "Come back this evening."

22 A Yes.

23 Q Is that the gist of your conversation?

24 A Yes.

25 Q Then what did he do?

1 A Well, he left and he walked away and he said he would
2 see me later.

3 Q Did he ask you for any identification?

4 A Yes, he asked me for identification.

5 Q What kind of identification?

6 A Well, I can't remember. I believe he did peruse my
7 identification, yes.

8 Q Well, what did he do?

9 A He looked at it.

10 Q Well, what did you show him and what did he look at?

11 A Well, I showed him my wallet.

12 Q Where do you carry your wallet?

13 A In my vest pocket, the inside.

14 Q In your inside vest pocket?

15 A Yes.

16 Q Did you give your wallet to him?

17 A Well, I held onto the wallet. I had some glace cases
18 in it.

19 Q Do you have that wallet with you?

20 A Yes, I do.

21 Q What did he do?

22 A I flipped it open. I opened it in half.

23 Q Well, what did he do?

24 A Well, he just nodded, yes, yes. He just looked at me,
25 that's all.

1 Q And this was at the bar, is that right?

2 A Well, yes, sir, at the bar, not standing directly at
3 the bar where I was touching the counter of the bar. It was
4 directly behind the chairs at the bar.

5 Q Well, you were about a foot or a foot and a half from
6 the bar, would you say?

7 A Well, I would say, yes, sir.

8 Q Were the premises well lit while you were at the bar?

9 A Yes, they were well lit.

10 Q Do they have bright neon lights there or what?

11 A Well, they had subdued lights but it was well lit, lit
12 well enough to be able to read something.

13 Q Do you remember what type of light they had at the bar,
14 the back bar?

15 A Well, I believe it was a whitish-blue light.

16 Q Well, would it refresh your recollection if I told you
17 it was a black light?

18 A No. To be frank with you it seemed to me that it was
19 a blue-white light. The actual color of the light I could not
20 say. I couldn't say what the color was.

21 Q Who was standing around -- how did he ask you for your
22 identification?

23 A Well, it was during our conversation.

24 Q What were his words?

25 A I don't remember the exact words.

1 Q Well, after you said where you were working or living
2 did he say, "Let me see some identification"?

3 A Well, he asked me for a business card and I said I didn't
4 have one.

5 Q Then instead of your business card you took out your
6 wallet and showed him your credit card or what?

7 A Well, let me think.

8 Q Go ahead.

9 A No, I believe I said I had something with the company
10 name on it. He asked me that.

11 Q Yes?

12 A He said, "Do you have something else?"

13 Q At what point in your conversation did he ask you this?

14 A This was in the interim of a period when he was asking
15 me a group of other questions as to where I come from, what I was
16 doing in New York, how I liked it in New York, where I was staying.

17 Q And you complied? You showed him this?

18 A Yes.

19 Q Then you had the conversation about getting laid, is that
20 right?

21 A Yes.

22 Q After you showed him this identification?

23 A Yes.

24 Q With just your name on it?

25 A Yes.

1 Q Was that your name and address, too?

2 A No, I had a New Jersey address.

3 Q Did it have any business references on any of your cards?

4 A No.

5 Q Did he examine the cards closely?

6 A He looked at them. I don't know what a close scrutiniza.
7 by him would be or would not be.

8 Q When he asked for your identification you just showed him
9 your wallet?

10 A Well, he asked me for a business card and to the best
11 of my recollection I removed my wallet and I made out that I was
12 going -- I made as if I was going to give him a business card and
13 then I said, "I don't think I have any with me."

14 Q Well, your total conversation with Mr. Rockwell that
15 evening lasted about ten minutes?

16 A Yes, about ten or fifteen minutes.

17 Q Was there anybody else in the bar before this conversatio

18 A Yes.

19 Q Were there people on your right and people on your left?

20 A Well, there were people on my left. There was nobody
21 on my right except those who walked by.

22 Q Well, were you facing the bar at this point, Officer
23 Gray?

24 A No, sir. I was facing the back of the premises.

25 Q In other words, you were sideways to the bar?

1 A Yes.

2 Q And he was sideways to you?

3 A Well, he was facing me and facing the front.

4 Q And you were facing the rear?

5 A Yes.

6 Q And there were people in back of you?

7 A Well, there might have been. I don't know. Maybe there
8 were people alongside of me.

9 Q Were there people alongside of Mr. Rockwell?

10 A Yes, there were.

11 Q What was the tone of your conversation? Was it loud or
12 what?

13 A Well, I don't think you would consider it loud, no.
14 No, I wouldn't say it was loud. It wasn't exactly quiet, either.
15 We weren't whispering.

16 Q You were talking in a normal tone of voice, would you say?

17 A Yes.

18 Q When he said to you, "Do you want to get laid?" did he
19 say that in a normal tone of voice?

20 A To my best recollection, yes.

21 Q How far were you standing from each other?

22 A Well, we were standing face to face.

23 Q Were you a foot away or how far?

24 A Well, people normally stand a certain distance apart.
25 I didn't measure it.

1 Q Well, was it half a foot away or what?

2 A Well, what people normally do, a safe distance.

3 Q There wasn't anybody between you two?

4 A No.

5 Q And there were approximately twenty-five people at the
6 bar, is that right?

7 A Yes.

8 Q Was there a stool by your side or were you right next
9 to the bar?

10 A Well, there were people seated at the bar to my left and
11 there were seats to my left and I don't know how far the seats were
12 pulled out from the bar. I was standing behind him and I don't
13 know -- I would say I was maybe half an arm's length away, or
14 something like that.

15 Q Was there any conversation between the other patrons
16 of the bar at the time?

17 A With me?

18 Q No, not with you. Were there any conversations?

19 A Well, I have no idea.

20 Q Well, was it quiet immediately around that area or was
21 it noisy?

22 A Well, I would say that there was a slight, I guess you
23 would call it, a din. There was conversation going on in the bar
24 but not directed at me or toward me and I wasn't paying attention
25 to it.

1 Q Did they have any entertainment on the premises at that
2 time?

3 A Well, at that particular moment, if there was a conversa-
4 tion going on, I don't know. I don't remember if they had entertai-
5 ment going on that evening.

6 Q Well, did they have a band there that evening?

7 A Well, I don't know. I know there was a fellow and a
8 girl that were on the bandstand and I think just about the time
9 I think I was there there were some fellows coming in with some
10 instruments and I don't know whether they were going to play or
11 not, but when I was there there was a fellow and a girl playing.
12 The fellow played the organ.

13 Q Well, was there a jukebox playing?

14 A Well, I did not see a jukebox in the premises but I
15 think there was some subdued music there.

16 Q Subdued music?

17 A Yes.

18 Q When Mr. Rockwell had this conversation with you where
19 was Mr. Meyer?

20 A I don't know.

21 Q You have no idea?

22 A No.

23 Q After this ten minute conversation with Mr. Rockwell
24 he left and you left?

25 A Yes.

1 Q And you left the premises, is that correct?

2 A Yes.

3 Q When you came back the next day what time did you come
4 back?

5 A It was approximately 10:30.

6 Q This is on the evening of July 21st, is that right?

7 A Correct.

8 Q Was Mr. Meyer on the premises?

9 A Not to my recollection. I have no idea. I did not
10 observe him.

11 Q You don't know?

12 A No, I do not know.

13 Q Where was Mr. Rockwell when you came back?

14 A Mr. Rockwell was somewhere toward the back of the
15 premises.

16 Q What day of the week was this?

17 A I will have to refresh my memory with the calendar. I
18 think it was a Friday or a Thursday. Probably a Friday.

19 Q How many people were in the premises when you came in
20 the second time?

21 A I would say maybe twenty.

22 Q Twenty people in the premises?

23 A Yes.

24 Q At 10:30?

25 A Yes, it was approximately 10:30.

1 Q You mean in the entire place or just at the bar?

2 A Well, I don't know. I could not ascertain how many
3 people were in the whole premises at all.

4 Q Well, would you say there were twenty people at the bar?

5 A Right, approximately twenty people.

6 Q Was there a band?

7 A When I came in?

8 Q Yes.

9 A I don't remember whether they were on or not.

10 Q Were the premises quiet?

11 A I don't know. To me it was not noisy, no.

12 Q Where did you go as soon as you came in?

13 A Well, I stood where I stood before.

14 Q Where?

15 A In the center of the bar.

16 Q Were people to your right?

17 A Yes.

18 Q And were people to your left?

19 A Yes, that's right.

20 Q At what time did you speak to Bill Rockwell that evening?

21 A Well, I think it was right after I came in.

22 Q And you entered the premises at 10:30?

23 A Approximately 10:30.

24 Q Is that right?

25 A Yes.

1 Q It was about 10:35 when he walked up to you?

2 A Yes, something like that, 10:35 or 10:40. I would say
3 it would be closer to maybe 10:45.

4 Q 10:45?

5 A Yes.

6 Q Well, what happened?

7 A He came over and he asked me how I was. I said I was
8 fine.

9 Q Then what did he say?

10 A Well, he said to me that I didn't have to worry, that he
11 would get me a girl, that I would not have to wine and dine her and
12 not to worry, that he knew all the professionals.

13 Q Well, he didn't say this right away, did he?

14 A Well, like I said, "Hello, how are you."

15 Q And then he just said you don't have to worry?

16 A Well, I said I was fine and -- yes, sir.

17 Q In other words, after asking you how you were he said,
18 "Don't worry. I know all the professionals."

19 A No, he said that I don't have to worry. And then he
20 said, "I will get you a girl that you don't have to wine and dine."

21 Q Did you ask him for a girl?

22 A No.

23 Q What did you say to him?

24 A Well, I said, "All right."

25 Q Did you ask him how much?

- 1 A No, sir, I didn't.
- 2 Q Did he tell you how much?
- 3 A No, sir, he didn't.
- 4 Q Did he tell you it wasn't going to cost you at all?
- 5 A No.
- 6 Q He didn't mention money?
- 7 A No, sir.
- 8 Q What else did he say to you?
- 9 A Well, after the statement about he knew all the
10 professional girls, he said, "I will see you later." And he
11 walked away.
- 12 Q When was the next time you saw Mr. Rockwell?
- 13 A About 10:25 or 10:30.
- 14 Q You had just spoken to him at 10:45?
- 15 A Excuse me. I am sorry. It was at twenty-five after
16 twelve or 12:30.
- 17 Q In other words, he left you in the premises for two hours?
- 18 A Yes.
- 19 Q You were in the premises again for two hours?
- 20 A Yes.
- 21 Q How many drinks did you have?
- 22 A Two or three.
- 23 Q Two or three drinks?
- 24 A Yes.
- 25 Q At the bar?

1 A Yes.

2 Q How many people were in the bar during that period?

3 A Well, I don't know how many people came in. I would
4 say perhaps twenty-five or thirty.

5 Q Were the premises crowded, would you say?

6 A Well, it had a number of people in it. I don't know what
7 you would call crowded.

8 Q Were they standing more than one deep at the bar?

9 A Yes.

10 Q Were they standing two and three deep at the bar?

11 A Well, not throughout the whole bar.

12 Q Well, in portions of it?

13 A Well, possibly in one or two places, yes, if I can
14 recollect right.

15 Q Were there people sitting at tables?

16 A Yes, sir.

17 Q Was the band playing?

18 A I believe so.

19 Q Was it noisy?

20 A That's a hard question to answer. I don't consider it
21 to have been noisy, myself.

22 Q You don't?

23 A No.

24 Q Well, when the band was playing, how many pieces were
25 there?

1 A Well, I don't recall seeing a band there at all. The
2 only people I recall seeing there were a male and a female.

3 Q This was on July 21st in the evening?

4 A Right. I don't remember seeing a band. Although there
5 may have been a band. I was concentrating in paying attention to
6 other things.

7 Q About how wide are these premises at the point where the
8 bar is?

9 A Well, how wide?

10 Q Yes.

11 A I would say maybe twenty-five -- how wide to where?

12 Q Between the wall, one wall to the other or from the
13 entrance to the lobby to the back of the back bar.

14 A Well, to the back bar?

15 Q Well, yes, and straight across.

16 A Well, maybe thirty or thirty-five feet.

17 Q About how long is the premises from the entrance of the
18 bar to the back room?

19 A Well, it would be 120 or 150 feet.

20 Q Was it a big place or a small place?

21 A Well, I would say medium size. I wouldn't consider it
22 big or small.

23 Q And you spoke again to Bill Rockwell?

24 A Yes.

25 Q Around 12:30, is that right?

1 A Yes.

2 Q Well, this is 12:30 on July 22nd, is that right?

3 A Right.

4 Q Where did you speak to him?

5 A Standing at the same place as he was standing before, in
6 the center of the bar.

7 Q He came over to you?

8 A Yes.

9 Q What did he say?

10 A Well, he brought a female in.

11 Q Well, what did he say?

12 A Well, he said to her, "He is all right. He is a friend
13 of mine, Don." Then he said, this is so and so.

14 Q That was the whole conversation?

15 A Right, and he left.

16 Q You had no other conversation with Mr. Rockwell?

17 A No, sir, I didn't.

18 Q Then what happened? What did this woman, later identified
19 as Michele Pagan, what did she say to you at the bar?

20 A Well, at the bar itself?

21 Q Yes.

22 A Well, she asked me the usual questions, where I was from
23 and how long I was staying and what hotel I was staying at and so
24 forth and so on.

25 Q What did you tell her as far as where you were staying?

1 A Well, at the Hotel Plaza.

2 Q Which was on 59th Street and Fifth Avenue?

3 A Correct.

4 Q Is that right?

5 A Yes, sir.

6 Q And the premises here are on 60th Street between Fifth
7 Avenue and Madison Avenue, is that right?

8 A That's right.

9 Q Then what did she say?

10 A She specifically asked to see some identification. She
11 said, "You have to be very careful today."

12 Q We are still standing at the bar?

13 A Yes, sir.

14 Q What did you do?

15 A Me?

16 Q Yes.

17 A Well, I showed her my identification.

18 Q What did you show her?

19 A The same things that I had shown Mr. Rockwell, identifica-
20 tion from New Jersey, the American Express.

21 Q What type of identification from New Jersey did you show
22 her?

23 A Well, I showed her a credit card from the New Jersey
24 Bell System.

25 Q Did that have your name on it?

1 A Yes.

2 Q And your address on it?

3 A Yes.

4 Q Do you have it with you?

5 A Yes, I do.

6 Q May I see it, please?

7 A I will show it, although I would prefer not to because

8 it is a private residence and it has no bearing on this hearing

9 whatsoever. I do have it but I feel my address should be kept as

10 a personal matter.

11 MR. EISENBERG: For the record, I won't introduce it

12 in evidence but you can show it to the hearing officer.

13 THE WITNESS: All right.

14 MR. HYLAND: Let me see it.

15 THE WITNESS: All right (handing).

16 MR. HYLAND: Yes, it is a Bell System credit card showing

17 his name and a Jersey address, Mr. Eisenberg.

18 MR. EISENBERG: Without revealing the name of the town?

19 I am interested in that for the record.

20 Q Could the officer tell us how far he lives from New

21 York, according to that?

22 A About ninety-seven miles.

23 Q Ninety-seven miles?

24 A Yes, ninety-seven to one hundred miles, I would say.

25 Q What did you tell him you were doing in New York?

1 A I told her that I was here to work on some sales
2 promotion programs.

3 MR. HYLAND: That's a natural identification?

4 THE WITNESS: Yes, that's right. That's the reason I
5 didn't want to reveal the address. That telephone is
6 registered to me.

7 MR. HYLAND: All right.

8 Q She checked your wallet?

9 A Yes.

10 Q Did she take your wallet from you?

11 A No, I never let it go at any time.

12 Q You held your wallet in your hand?

13 A Yes.

14 Q What did she do?

15 A Well, she took my arm and walked over by the side door
16 and had me hold my wallet in the direction of the side door so as
17 to use the light from the side door to look at it.

18 Q In other words, she couldn't read it while she was
19 standing at the bar?

20 A No, sir.

21 Q She had to go to the side door in order to get enough
22 light to read it?

23 A Yes.

24 Q Did she look at more than one card?

25 A Yes, she did.

1 Q How long did this take? In other words, you were standin
2 there with your wallet in one hand and she was flipping it, is that
3 right?

4 A Yes.

5 Q How long did you stand in this way?

6 A I don't know. It was until she was satisfied. Maybe it
7 was two or three minutes. I cut her off and I said, "Look, I am
8 not going to have you look through my whole wallet." And she
9 indicated that she was satisfied, but I would not let my wallet
10 out of my sight.

11 Q Does your wallet contain anything indicating what business
12 you are in?

13 A You mean from the Police Department?

14 Q Yes.

15 A No.

16 Q Or the business that you were supposed to be in?

17 A No.

18 Q The only thing it revealed was your name and address?

19 A Yes.

20 Q It doesn't indicate who you worked for?

21 A No.

22 Q You indicated you were in the sales business?

23 A Yes.

24 Q Well, what did she do after she looked through your
25 wallet?

1 A She took me by the arm and brought me back to the bar
2 and said, "Let's go sit in the back." And she handed the bartender
3 her pocketbook.

4 Q Did you have a bar tag?

5 A No, as each drink came, I would pay cash.

6 Q You were then in the back?

7 A Yes.

8 Q Where did you sit down?

9 A Well, at a table against the back wall.

10 Q And you had a conversation with this Michele Pagan, is
11 that right?

12 A Yes, sir, I did.

13 Q What did she say to you and what did you say to her?

14 A Well, the conversation was general and at the very outset
15 of the conversation, I don't recall what niceties were said either
16 way. She gave me what is known in the profession as a complete
17 toss.

18 Q Would you define that?

19 A Well, she ran her hand up underneath the back of my
20 coat in an attempt to find out if I was carrying a shoulder holster.
21 She made sure that her attention ran completely around my waistband
22 and she found occasions to kick me in both ankles of my foot. And
23 she then started to have a conversation with me.

24 Q You didn't testify to that before.

25 A Well, I wasn't asked it before.

1 Q After she tossed you --

2 A Yes?

3 Q -- what did she say?

4 A Well, she said to me -- this was after she had gone to
5 the ladies' room and I had gone to the men's room and we had both
6 come back and sat down.

7 Q Before you sat down you went to the ladies' room?

8 A No.

9 Q You went and sat down in the back?

10 A Yes.

11 Q And she tossed you?

12 A Yes.

13 Q She felt your waist?

14 A Yes.

15 Q And she felt under your coat?

16 A Yes.

17 Q And she kicked your ankles?

18 A Yes.

19 Q Then what happened?

20 A Then she said, "I have to go to the ladies' room."

21 Q All right. Go ahead.

22 A After a few minutes I left to go outside to see where
23 she had gone on the premise that she may have gone to a telephone
24 booth. I found her standing talking to the night clerk. The
25 night clerk had newspapers in front of him on the side. She had

1 a newspaper in her hand. She said to me, "Don't worry. I didn't
2 run away. I will be right in." I said, "O.K., fine," and she
3 handed the newspaper to the night clerk and proceeded in the
4 direction of the ladies' room and I went toward the men's room and
5 I don't know whether she ever reached the ladies' room or not.

6 Q Then you both got back to the table?

7 A Yes, then I came into the bar and sat down and she came
8 in afterward.

9 Q What did she say to you and what did you say to her?

10 A Well, she said to me, "Why don't you get a room?"

11 Q What did you say?

12 A I said, "That sounds like a good idea, but what is this
13 going to cost me?"

14 Q What did she say?

15 A Well, she said to me, "I will not discuss price here but
16 before we leave you should know that I will not kiss you down there."
17 And she was pointing to my groin area.

18 Q Well, what did you say?

19 A Well, I said, "All right." And I went out and I got the
20 room.

21 Q You went out and you got a room?

22 A Yes.

23 Q Then what happened?

24 A Well, I came back in.

25 Q You went out and registered in Hotel 14?

1 A Yes.

2 Q Didn't you say anything about going to the Plaza Hotel?

3 A Well, she said to me, "I don't go to any hotel that I
4 don't know."

5 Q Then what happened? You went outside and registered in
6 your name?

7 A Yes.

8 Q And then you came back?

9 A Yes.

10 Q What did you say to her?

11 A Well, I said to her, "I have the room." And she said,
12 "Fine. Let's finish the drink and we will go upstairs," and I
13 called the girl to get the bill.

14 Q You had two drinks there, is that right?

15 A Yes.

16 Q Then what did you do? You went up to the room?

17 A Yes, I did.

18 Q What happened in the room?

19 A Well, I again asked her how much money it was going to
20 be. She said, "How much do you have?" I pulled out \$33 from my
21 pocket and proceeded to ask her if that was enough. She indicated,
22 no, with her head by shaking her head in a negative manner. I then
23 asked her would she take a check. She said -- she indicated with
24 her head, yes.

25 Q She didn't talk to you? She didn't give you any verbal

1 commitment on this?

2 A No. I asked her how much was the check and she still
3 did not give me an indication. I said, "Twenty, thirty, forty,
4 fifty," and at fifty she shook her head, yes. I signed the
5 check and I made it out cash, \$50. She picked up the money and
6 the check and placed it over on the dresser and she said, "Get
7 undressed."

8 Q Yes.

9 A And I started to get undressed and she started to disrobe
10 and at this point I reached in my topcoat pocket and identified
11 myself as a police officer and placed her under arrest.

12 Q In other words, it was \$83?

13 A Yes.

14 Q For what?

15 A To have sexual intercourse.

16 Q Once?

17 A Once.

18 Q Did you discuss how many times you would go with her?

19 A No, sir.

20 Q Did she say how many times she would go with you?

21 A No, sir.

22 Q Did she say she would stay with you all night?

23 A No, sir.

24 Q She didn't indicate any time downstairs in the hotel
25 lobby how long she would stay with you?

1 A No, sir.

2 Q Now, while you were having a discussion in the rear
3 concernng getting the room, where was Mr. Rockwell?

4 A He was nowhere in the area. I did not see him from my
5 seated position.

6 Q Was Mr. Meyer in the premises at the same time?

7 A I didn't observe him.

8 Q Was anybody connected with management in the premises?

9 A Yes, I believe somebody later identified as a brother
10 of his or a cousin was in the premises.

11 Q Was that the man who seated you?

12 A Yes.

13 MR. HYLAND: The brother or cousin of whom?

14 THE WITNESS: Mr. Meyer. Later I was informed of this,
15 although later when we attempted to find somebody to turn
16 the premises over to he was no longer there.

17 Q Where was this other gentleman at the time you were
18 in conversation in the rear?

19 MR. HYLAND: The man who seated you?

20 THE WITNESS: Well, the man seated.

21 MR. HYLAND: The man who seated you?

22 THE WITNESS: I don't know. He walked away from us. I
23 couldn't tell you where he was. I saw him walking by on one
24 or two occasions, I think going into the back, but where he
25 was in the interim, I don't know.

1 Q On the table that you were seated at, did it have a
2 tablecloth on it?

3 A Yes, two tablecloths. We were seated at two small tables
4 side by side.

5 Q With your backs against the wall?

6 A Yes.

7 Q Was the tablecloth hanging down from the table?

8 A Yes.

9 Q Had you ever met this woman before?

10 A I never saw her before in my life.

11 Q During the time that you were seated in the rear, was
12 the band playing?

13 A Yes, there was music.

14 Q There was music?

15 A Yes, sir. In fact, I recall people dancing to the music.

16 Q Did you dance with her?

17 A Yes, sir, I did.

18 Q You did dance?

19 A Yes.

20 Q How long did you stay downstairs or in the rear, rather?

21 A Well, I don't know. The whole process was a very quick
22 one. I would say twenty-five minutes.

23 Q At any time did Mr. Meyer or the gentleman who seated
24 you, either on the 20th, 21st or 22nd, speak to you about this
25 girl?

1 A No, sir.

2 Q At any time in that period did any of them approach you
3 and have any conversation other than the conversation you testified
4 to, that Mr. Meyer said hello to you?

5 A That is correct, sir.

6 Q At the time of the conversation with Mr. Rockwell, on
7 the 20th, when he said, "Do you want to get laid," --

8 A That I could get laid.

9 Q All right. Was Mr. Meyer or the gentleman who seated
10 you, near you?

11 A No, not to my knowledge.

12 Q Do they have a sound system in the premises?

13 A A sound system?

14 Q Well, microphones around or amplifiers?

15 A Yes.

16 Q And do they have a microphone on the stage?

17 A Yes, I believe so.

18 Q Well, is there not a sort of a discotheque, a little
19 booth in the entrance where they play records?

20 A Yes, in the coat room, I believe.

21 Q And it has a glass partition that you can see into it,
22 is that right?

23 A Yes, sir.

24 Q What type of band was it that was playing on the 21st and
25 the 22nd? Was it a latin band or a rock and roll band? Do you

1 remember?

2 A Gee, I don't recall. I remember seeing two men coming
3 up, two short men. I don't remember what type of music was playing
4 I know that when I danced there was a very soft, waltz-type dance.

5 Q A waltz-type dance?

6 A Yes, that's right.

7 Q How many pieces were in the band that you danced to?

8 A Gee, I don't know.

9 Q Had you ever been in the premises prior to July 20th?

10 A No, sir, I wasn't.

11 Q How long were you on the confidential squad?

12 A Since January. In plain clothes itself, a year prior
13 to that.

14 Q Have you made many prostitution arrests?

15 A Yes.

16 Q How many?

17 A In the neighborhood of about sixty.

18 MR. EISENBERG: I don't think I have any more questions.

19 REDIRECT EXAMINATION BY MR. VOLAN:

20 Q Officer Gray, did you have anything with you at the
21 time that you made your visit to the premises which indicated a
22 room at the Plaza Hotel?

23 A Yes, I did.

24 Q What did you have?

25 A I had a key from that hotel.

1 Q Was there any identification tag attached to it or
2 anything to indicate that it belonged to that hotel?

3 A Yes. Most midtown hotels do not put their names on
4 the keys any more. They use a coat of arms or another identificati
5 a trade mark of some sort, so as to not have somebody pick up a los
6 key and use it.

7 Q Did you ever display that key to Miss Pagan or Mr.
8 Rockwell?

9 A Yes, I believe I showed it to both of them.

10 MR. VOLAN: No further questions.

11 RE-CROSS-EXAMINATION BY MR. EISENBERG:

12 Q When did you show this key to Mr. Rockwell?

13 A I believe on the second evening.

14 Q What did he do? Did he ask to see your room key?

15 A No, sir. I think he made a comment, something to the
16 effect that where was I staying at and I reached into my pocket
17 and pulled out the key and I told him the Plaza.

18 Q But there was no name on the key, was there?

19 A No.

20 Q Did you show it to him?

21 A Well, I held it in my hand. He didn't take it from me.

22 Q Did he examine it?

23 A No.

24 Q When did you show the key to Miss Pagan?

25 A On the very first onset. It was when she wanted to know

1 my identification.

2 Q You were standing at the bar?

3 A I don't recall if I showed it to her at the bar or whether
4 I was standing at the door when the particular question was posed
5 upon me.

6 Q You were either standing at the bar or at the door?

7 A Yes.

8 Q And you showed her your wallet?

9 A Yes.

10 Q And you showed her your key?

11 A Yes.

12 Q Which had no name on it?

13 A Well, I showed her the wallet at the bar, where she
14 took me to the door to use the light coming from the inside.

15 MR. EISENBERG: I have no further questions.

16 MR. HYLAND: Any further witnesses?

17 MR. VOLAN: Yes.

18 MR. HYLAND: All right, bring them in.

19 L I E U T. R A L P H R U S S O, called as a witness
20 on behalf of the Authority, having been first duly sworn,
21 testified as follows:

22 MR. HYLAND: State your full name.

23 THE WITNESS: Lieutenant Ralph Russo, assigned to the
24 Public Morals Administrative Division, 1st Deputy Commissioner.

25 MR. HYLAND: All right, Mr. Volan.

1 DIRECT EXAMINATION BY MR. VOLAN:

2 Q Lieutenant, were you employed by the New York City Police
3 Department on June 20th, 1967?

4 A Yes, I was.

5 MR. HYLAND: July 20th.

6 MR. VOLAN: I'm sorry. July 20th.

7 THE WITNESS: I was.

8 Q What was your assignment at that particular time?

9 A I was on the patrols investigating unit, assigned to
10 the chief. I was a sergeant at that time.

11 Q And was Patrolman Gray in your command?

12 A Yes, he was.

13 Q Did you have occasion in your official capacity as a
14 police officer to work with him on the investigation of Norby
15 Walter's Supper Club?

16 A Yes, sir, I did.

17 Q Did you have occasion to visit the licensed premises
18 at 14 East 60th Street?

19 A I did.

20 Q When did you visit the premises?

21 A I visited it on Thursday, the 20th, going into the 21st,
22 about midnight I went in.

23 Q And did you arrive alone?

24 A No, there were other patrolmen with me.

25 Q Were you in plain clothes or uniform?

1 A Plain clothes.

2 Q At that time did you observe Patrolman Gray in the
3 premises?

4 A Yes, he was on the inside.

5 Q Was he there when you arrived?

6 A He was inside when I went inside.

7 Q He did not enter with you?

8 A No.

9 Q Did you see a person who you later learned was William
10 Rockwell?

11 A Yes, sir, I saw him.

12 Q Did you see them together at all that evening, that is,
13 Patrolman Gray and Mr. Rockwell?

14 A Yes, sir, I saw them in conversation after I had arrived
15 at the premises and was there for a short period of time.

16 Q Did you overhear the conversation?

17 A No, sir, I did not.

18 Q Did you have occasion to return to the premises?

19 A Yes, sir.

20 Q When was that?

21 A The next night, Friday night. I got in the area about
22 10:30 and I entered about 11:30.

23 Q When you entered was Patrolman Gray in the premises?

24 A Well, when I went in Patrolman Gray was in the premises.

25 Q Will you tell the Commissioner what observations you

1 made of Patrolman Gray and the people he contacted that evening?

2 A Well, I observed that he was standing at the bar, perhaps
3 ten or fifteen feet from where I was standing and he ordered a
4 drink and maybe about 12:00 o'clock I observed two females come
5 in from the street, one of which was later arrested. She had
6 whitish colored hair and the other one was a dark girl, and as
7 they entered the premises they were met by Mr. Rockwell.

8 Q What was the identity of the girl that was later arrested

9 A Michele Pagan, I believe, that was her name.

10 Q Tell, ^{us} officer, what happened after they entered.

11 A Well, I observed them in conversation with Mr. Rockwell,
12 the maitre d', in the area immediately preceding the bar.

13 Q Yes.

14 A Then the girls separated. The dark haired girl went
15 to the bar and the other girl, Pagan, went over with the maitre d'
16 and spoke with Patrolman Gray.

17 Q Did you hear the conversation between them?

18 A No, sir, I didn't.

19 Q What happened after that?

20 A The maitre d' left the two of them and Patrolman Gray
21 and the girl went over to the area near the doorway leading into
22 the lobby of the Hotel 14. She stood near the doorway and the girl
23 was looking at some papers in a wallet that Patrolman Gray had.

24 Q Then what happened? Did you overhear a conversation at
25 that time?

1 A No, I didn't.

2 Q Go on.

3 A Then the girl and Gray went over to the bar and the
4 girl gave her pocketbook to the bartender and then Gray and the
5 girl both walked to the rear of the premises and I couldn't see
6 them any more at that point.

7 Q Did you see them after that?

8 A Yes. Next I saw the Pagan girl coming out of the area
9 in the rear and walk into the lobby. I walked in there, too.

10 Q Did you see them return to the bar at the same time?

11 A Well, shortly after that they both came back in and they
12 went to the back where they were previously.

13 Q Then what happened?

14 A The next thing I observed was that Gray came out from
15 wherever he was and walked into the lobby of the hotel and he
16 returned shortly thereafter and he gave me a signal like this
17 (indicating), acknowledged that I was there and that he wasn't
18 in any danger and to stay where I was.

19 Q Did the girl return to the premises?

20 A The girl didn't go out with him at that time. He went
21 out alone.

22 Q Yes.

23 A And then he came back in.

24 Q Now, you say he went out?

25 A Yes.

1 Q Did he go out through the exit to the street or what?

2 A Well, to the exit into the lobby of the hotel.

3 Q After Gray returned what happened?

4 A He went back out of sight and then next I saw he and
5 the girl came out and went into the lobby of the hotel and I did
6 not see them again for maybe a period of fifteen minutes. Then
7 Gray came back and he had the girl in tow and brought her over to
8 where I was standing and said, "I just arrested this girl for
9 prostitution. I have the money here and the check I gave her.
10 Will you hold this? I want to get the manager. He is already
11 arrested." I took the things that he handed me and placed them
12 into my shirt pocket and I kept the girl there and he came forward
13 a few minutes later with Rockwell.

14 Q Yes.

15 A And we then headed towards the door. The girl was making
16 quite a bit of noise and she was talking to the maitre d', Rockwell,
17 and she said, she said to him, "Bill, Bill, what are they doing to
18 me?" She kept calling him, Bill, and I took Rockwell and the girl
19 and I put them in the car and drove to the 19th Precinct.

20 Q Did you see the girl retrieve her pocketbook?

21 A I did not. I did not notice her do that, no, but the
22 maitre d' said he wanted to come back in and turn the keys over
23 to someone to close the place and I took him back in before we
24 left and he went into the kitchen area and handed it to someone
25 and he said, "I am going to be gone for a while. You take care of

1 this," and then he went out to the police car.

2 MR. VOLAN: I have no further questions.

3 MR. HYLAND: Mr. Eisenberg, do you have cross-examination?

4 MR. EISENBERG: Yes, sir.

5 CROSS-EXAMINATION BY MR. EISENBERG:

6 Q On the 20th, when you entered the premises at midnight,
7 going from the 20th to the 21st --

8 A Yes, sir?

9 Q -- how many people were in the premises?

10 A I don't remember but there were quite a few.

11 Q Was it crowded?

12 A It was more than twenty, although I don't know how many.

13 Q Well, more than twenty in the whole place or in the bar
14 area?

15 A Well, it was fairly crowded, I know.

16 Q When you say that, what do you mean?

17 A Well, I can't give you an estimate of the number of
18 people but there were more than one deep at the bar, perhaps two
19 deep at the bar.

20 Q Were there people milling around?

21 A Well, most of the customers stayed where they were. Two
22 of the girls changed places at the bar, I noticed.

23 Q Was there a band playing that evening?

24 A There was not a band. I think there was a piano and
25 an entertainer or something.

1 Q How long did he stay in the premises?

2 A Well, half an hour, perhaps, the first time.

3 Q Did you see Mr. Rockwell speaking to Patrolman Gray?

4 A Yes, that night.

5 Q Where was Patrolman Gray standing?

6 A Well, he was further down along the bar somewhere.

7 Q Where were you standing?

8 A Right as you come in, at the bar.

9 Q At the entrance side of the bar?

10 A Yes, I stood there.

11 Q And he was standing down toward the rear?

12 A Yes.

13 Q Did you see Gray approach Mr. Rockwell or did Mr. Rockwell
14 approach Officer Gray?

15 A I don't know now. I remember seeing them in conversation

16 Q At the bar?

17 A Well, in the rear of the bar. He wasn't leaning against
18 the bar. He was standing back a few feet from the bar. I looked
19 up and I noticed that he was talking to Rockwell.

20 Q How long was the conversation that night?

21 A Well, I don't know how long the conversation was.

22 Q Was it short or long or what?

23 A Well, it was more than a minute. It wasn't ten minutes.
24 They were just in conversation for a short period of time. It was
25 a few minutes at least, anyway.

1 Q Were there people standing on each side of them?

2 A Well, there were people, yes, I would say there were
3 people behind and on the side of them.

4 Q Did you see Mr. Rockwell do anything with Officer Gray?

5 A Well, I wasn't watching them continually. I was standing
6 at the bar looking at the other people in the place and I saw them
7 in conversation and I didn't see anybody pass by them or anything
8 like that.

9 Q Were you with somebody?

10 A No, I wasn't.

11 Q You were alone that evening?

12 A Right.

13 Q You do know there was entertainment that evening? Is
14 that your testimony?

15 A Well, I recall that on one of the two nights there was
16 a female singer and a male, also, and one was singing and one was
17 playing the piano or maybe both, I know that.

18 Q Was there a five piece latin band there on that night?

19 A Yes. Now that I think about it. I think these people
20 left and then somebody got up onto the bandstand.

21 Q Was it continuous entertainment?

22 A Yes, something like that, but I don't remember if that
23 was both nights.

24 Q Were the premises noisy on the 20th?

25 A Nothing unusual.

1 Q Did you overhear the conversation of the people next to
2 you?

3 A Bits and pieces. If I listened, yes.

4 Q Did you order any drinks, Lieutenant?

5 A Yes.

6 Q Did you order from the bartender?

7 A Yes.

8 Q When you ordered from the bartender did you speak in
9 a normal tone of voice?

10 A There was some difficulty getting served because he
11 didn't notice me right away, and I had to get his attention and
12 then I ordered a Scotch and water, I believe.

13 Q Were you standing right next to the bar?

14 A Well, I was one customer behind the bar. I wasn't right
15 at the bar in the beginning. I don't think I got a seat.

16 Q How many drinks did you have then?

17 A Well, two or three.

18 Q Did you order these from the bartender?

19 A Yes.

20 Q When you ordered from the bartender where was he standing?

21 A Well, he was moving around, serving the people.

22 Q How far were you from the bartender, the length of the
23 bar, plus how far you were behind the bar or the width of the bar,
24 is that right?

25 A Yes, there were people seated when I first went in. I had

1 to lean forward to speak to the bartender.

2 Q Did he lean toward you?

3 A Yes.

4 Q About how far away were you from each other, you and the
5 bartender?

6 A I don't know. I would say a few feet, anyway.

7 Q Now, on the night of the 21st, going into the 22nd, you
8 arrived at what time, Officer?

9 A I arrived in the area about 10:30 and I went into the
10 bar about 11:30.

11 Q What time did officer Gray speak to Mr. Rockwell the
12 first time?

13 A Well, the second night when I went in. The first time
14 when I saw him speaking to Rockwell I believe it was when the girl
15 came with the maitre d', over to him.

16 Q How many times this night did you see Rockwell speaking
17 to the officer?

18 A That night?

19 Q Yes.

20 A I don't remember now.

21 Q Where were you standing on that evening?

22 A The same place but it wasn't as crowded.

23 Q It wasn't as crowded?

24 A No. There were two girls seated at the bar alongside of
25 where I was and I had to get right up against the bar and these

1 girls -- there was some conversation with these girls.

2 Q That was Friday night, is that right?

3 A Yes.

4 Q Did they have a band on that night?

5 A I think the band was Friday night. I think there was
6 a band there and I don't remember which night it was.

7 Q How many bands did they have on that night?

8 A I don't remember but I think there was an alternating
9 between the singer, the male and female entertainer and then the
10 band came on. I am sure it was the same night or both nights, I
11 don't know.

12 Q Would you estimate how many people there were in the
13 bar?

14 A Well, not offhand, but it was less crowded than the
15 night before.

16 Q What about further down the bar?

17 A Well, it was less crowded.

18 Q Did you make any note as to the amount of people there
19 were there?

20 A No, I didn't make any notes. It seems that I got served
21 faster because I was standing closer to the bar, as I look at it
22 now.

23 MR. EISENBERG: I don't think I have any further
24 questions of this witness.

25 MR. HYLAND: Thank you. You may step down.

1 Do you have another witness, Mr. Volan?

2 MR. VOLAN: No, that's the Authority's case.

3 MR. HYLAND: All right.

4 MR. EISENBERG: At this time, Mr. Commissioner, I want
5 to strike out any testimony of any of the witnesses, especially
6 the witness, Gray, concerning any conversation he might have
7 had with one Michele Pagan, on the grounds that it is merely
8 hearsay and that the Authority, if they want this testimony,
9 should produce Michele Pagan, to substantiate that.

10 MR. HYLAND: Motion denied.

11 Do you have any witnesses?

12 MR. EISENBERG: Yes, I do. I have William Rockwell.

13 MR. HYLAND: All right.

14 W I L L I A M R O C K W E L L, called as a witness on
15 behalf of the Licensee, having been first duly sworn,
16 testified as follows:

17 DIRECT EXAMINATION BY MR. EISENBERG:

18 Q Mr. Rockwell, did you appear here pursuant to a subpoena
19 today?

20 A Yes.

21 Q Did you have a conversation with me before?

22 A No.

23 Q I mean, today?

24 A Well, when I got the subpoena.

25 Q Did you tell me that you had been informed by your

1 attorney that there is an action pending against you and you will
2 refuse to testify --

3 MR. VOLAN: I object to the form of interrogation. Ask
4 him questions.

5 MR. HYLAND: All right. If there is a privilege it is
6 his, and not yours.

7 MR. EISENBERG: All right.

8 Q Mr. Rockwell, were you the maitre d' of the 007
9 Restaurant, Inc. on July 20th and July 21st, 1967?

10 A I am sorry. I can't answer any questions upon the advice
11 of my attorney, until my case is over.

12 MR. HYLAND: For what reason? Did the attorney tell
13 you why you shouldn't answer any questions?

14 THE WITNESS: Well, my case hasn't come up as yet and
15 he wants to wait until my case comes up.

16 MR. HYLAND: Well, in effect, are you asserting that
17 your answers would tend to incriminate you, is that right?

18 THE WITNESS: Well, those are my constitutional rights.
19 That is, not to answer any questions.

20 MR. HYLAND: We are trying to find out if this is the
21 reason you are refusing to testify because you fear that
22 the answers you would give would tend to incriminate you,
23 is that right?

24 THE WITNESS: Well, I wouldn't say one word either way.
25 He told me not to answer any questions until my case comes up.

1 MR. HYLAND: Did he indicate why you shouldn't?

2 THE WITNESS: No.

3 MR. HYLAND: He did not?

4 THE WITNESS: Only until the case is over. Those are
5 the only words he told me.

6 MR. HYLAND: He didn't say that you should assert your
7 constitutional privilege not to testify?

8 THE WITNESS: It is my constitutional privilege not to
9 testify.

10 MR. HYLAND: Well, we are trying to find out if that is
11 why you don't want to testify here. Did your attorney advise
12 you not to testify on the grounds of constitutional privilege?

13 THE WITNESS: That's right.

14 MR. HYLAND: All right. So that you are using in effect
15 your constitutional privilege not to testify because the
16 answers might tend to incriminate you?

17 THE WITNESS: Yes, until my case is over.

18 MR. HYLAND: All right. That's what we are trying to
19 find out.

20 Will you refuse to answer any questions put to you by
21 counsel?

22 THE WITNESS: Yes, I have to, upon advice of my counsel.

23 MR. HYLAND: Well, under those circumstances I will not
24 require you to put all the questions that you have for this
25 witness to him since he has indicated that on advice of counsel

1 he would refuse to answer them on the grounds of constitutiona.
2 privilege.

3 Do you understand that in effect, he is asserting his
4 constitutional privilege against self-incrimination, Mr.
5 Volan?

6 MR. VOLAN: Yes, I understand that.

7 MR. HYLAND: Is that understood, Mr. Eisenberg?

8 MR. EISENBERG: Yes.

9 MR. HYLAND: Under those circumstances I will not require
10 you to put every question in that you have. We will take it
11 that he will refuse to answer on the ground that the answers
12 would tend to incriminate him. Is it so stipulated?

13 MR. VOLAN: Yes.

14 MR. EISENBERG: In view of the fact that this witness
15 is a key witness in this case, and he refused to answer at
16 this time I am going to respectfully request that the case
17 be put over until he is able to answer.

18 MR. HYLAND: That request is denied.

19 Do you have any further witnesses?

20 MR. EISENBERG: Yes.

21 MR. HYLAND: All right, you may step down.

22 (At this point Mr. Rockwell was excused from the
23 witness stand.)

24 MR. HYLAND: Do you have any further witnesses?

25 MR. EISENBERG: Yes, sir.

1 MR. HYLAND: All right.

2 J O A N S A N T O S, called as a witness on behalf of
3 the Licensee, having been first duly sworn, testified
4 as follows:

5 DIRECT EXAMINATION BY MR. EISENBERG:

6 Q Miss Santos, are you familiar with the premises known
7 as Norby Walter's Supper Club?

8 A Yes, I am.

9 Q Were you in these premises on July 21st, 1967, at about
10 12:00 o'clock?

11 A Yes, I was.

12 Q Going from the 21st to the 22nd?

13 A Yes.

14 Q What were you doing there?

15 A Well, I happen to be manager and wife of the latin
16 group, Chino Santos, so I was there three or four nights a week.
17 I am his manager and his wife.

18 Q Is this the band that is playing in the premises?

19 A Yes.

20 Q How long have they been playing in the premises?

21 A Well, we started in the middle of June up until after
22 Labor Day.

23 Q You were there all summer?

24 A Yes.

25 Q Do you recognize this gentleman back here (indicating

1 Officer Gray)?

2 A Yes.

3 Q Did you see him on the evening of July 21st, going into
4 July 22nd?

5 A Well, it was Friday night. Yes, I did.

6 Q About what time was this?

7 A Well, oh, I would say about midnight. Walter was there
8 the early part of the evening and then towards the end of it I
9 noticed his brother was there and not Norby. His brother, Walter.
10 was there. The name of the place is Norby Walter's, so he is
11 known as Norby Walters but --

12 MR. HYLAND: Do you mean this gentleman with the glasses
13 here (indicating)?

14 THE WITNESS: Yes.

15 MR. HYLAND: All right. We will identify him for the
16 record as Norbert Meyer.

17 THE WITNESS: I am sorry. He was usually there but when
18 he wasn't there then his brother, Walter, would take over.

19 Q When did you first see Officer Gray?

20 A Well, when he walked in and I happened to notice him
21 because of his red, red beard. You don't see too many red beards
22 and it is an attraction. I happened to notice him, that's all.

23 Q What did he do?

24 A Well, he walked around and he walked up to the maitre d'
25 and he was usually standing next to me because I knew he sat at

1 one table.

2 Q Where was this?

3 A Right near the doorway at the left.

4 Q And that is usually the maitre 'd's station?

5 A Yes.

6 Q Go on.

7 A And he walked around and he came up to the table and
8 asked me to have a drink with him.

9 Q Yes.

10 A He said, "Come on and have a drink," and I said that I
11 was sorry that I don't drink with anyone and I happened to be the
12 leader's wife. He said, "What's the difference?" He said, "No
13 harm will come of it. Come on and we will have a drink." Again
14 I said that I am sorry, I am the leader's wife. I was a little
15 more emphatic about it the second time.

16 Q Did he have a conversation with Rockwell that evening?

17 A Well, I happened to overhear him say, "Where are the
18 girls," and I heard Bill say, "I don't know any," because Bill
19 Rockwell, as I said, he usually stood next to this little telephone
20 because that was his station and that was the table that he usually
21 kept for me because I usually sat there when I would go to Norby
22 Walter's. I am my husband's manager and I usually like to be there.

23 MR. EISENBERG: I have no further questions.

24 MR. HYLAND: Do you have any questions, Mr. Volan?

25 MR. VOLAN: Yes.

1 CROSS-EXAMINATION BY MR. VOLAN:

2 Q How long prior to July the 21st was your husband playing
3 at that place?

4 A Well, I would say about the middle of June.

5 Q He started in the middle of June?

6 A Yes.

7 Q So that would be approximately about six weeks?

8 A Yes, about.

9 Q You don't play an instrument, do you?

10 A No.

11 Q How many pieces are in your husband's band?

12 A Five.

13 Q What are your duties in detail as far as being manager
14 of your husband's business?

15 A What do I do?

16 Q Yes.

17 A Well, what do you mean?

18 Q Well, you say you are the manager of your husband's
19 business?

20 A Yes.

21 Q What do you usually do for him?

22 A Well, I contact the different clubs, the different club
23 owners, that are interested in a latin group.

24 Q Once you had booked their engagement how long was that
25 to run, the engagement at Norby Walter's, for instance?

1 A What was that again?

2 MR. HYLAND: How long was the engagement of your husband'
3 band on these premises?

4 THE WITNESS: Well, from the middle of June to Labor Day.

5 Q So that once you had done that work you were for
6 practical purposes out of work?

7 A Yes.

8 Q And you had nothing more to do with your husband until
9 Labor Day?

10 A Yes.

11 Q Did you accompany him to the bar where he worked?

12 A Yes.

13 Q So that you went with him every night he played there?

14 A Yes, about three or four times a week.

15 Q Other than sitting around you did nothing else?

16 A No, I would meet my husband and we would walk out.

17 Q How many hours would you spend in the premises each night?

18 A Well, I couldn't say exactly but I would get there and it
19 would be about 10:00 o'clock until closing time.

20 Q Was this your practice every night that your husband
21 played there?

22 A Yes, three or four nights a week, and mainly weekends.

23 Q Do you have any children?

24 A No, not with Mr. Santos.

25 Q Do you have any children at the present time who live

1 with you?

2 A Yes.

3 Q How old are they?

4 A I have a daughter, twenty-four years old and a son
5 twenty-six years old and my son is married and my daughter lives
6 with me.

7 Q Now, you were not aware of everything that Mr. Rockwell
8 was doing that evening, were you?

9 A Well, was I aware?

10 Q Yes, of everything that he was doing that evening.

11 A Well, he was standing there and the people, as they
12 would come in, he would seat them.

13 Q Would he walk around the premises and talk to people
14 and meet them?

15 A Well, not too much. He usually stood right there.

16 Q You mean he usually stood right next to the table?

17 A Yes.

18 Q And as the customers would come in he would escort them
19 to the tables or to the bar?

20 A Yes.

21 Q Now, you say that you remember Officer Gray because he
22 had a beard, is that it?

23 A Yes, a red beard. Beards aren't around too often and red
24 beards, you know, that's all.

25 Q And he has a very full beard today, doesn't he?

1 MR. HYLAND: Today?

2 MR. VOLAN: Yes.

3 Q It is a full beard and it goes underneath his chin?

4 A Yes.

5 Q And he has a little mustache, too, hasn't he?

6 A Yes.

7 Q Do you see it?

8 A Yes.

9 Q Is that the same red beard?

10 A Yes.

11 Q That he had that night?

12 A Well, I am not too sure about the mustache but I think
13 the beard might be a little fuller.

14 Q Don't you know?

15 A Well, I can't count the hairs.

16 Q Well, was it longer or in the same place or is it a
17 different beard that he had?

18 A Well, he didn't have the beard on his nose, if that's
19 what you mean.

20 Q You mean his mustache?

21 A No. You are trying to confuse me, sir. Where does a
22 beard grow?

23 Q Well, beards that you see today --

24 A Well, it looks a little fuller.

25 Q Well, what do you mean by "fuller"?

1 A Well, it looks a little bit fuller than the night I saw
2 him last.

3 Q Well, do you know what a goatee is?

4 A Well, it is a little hair on the chin.

5 Q Yes.

6 A Well, he might have had that.

7 Q Well, did he have a goatee that night or a beard?

8 A Well, I didn't look that hard to see whether it was a
9 goatee or he had already growing from the side down. You are
10 trying to confuse me.

11 Q I am not.

12 MR. HYLAND: It is not necessary to engage in this type
13 of colloquy with counsel. He will ask you simple questions and
14 you will answer.

15 THE WITNESS: All right.

16 MR. VOLAN: I have no further questions.

17 MR. EISENBERG: I have some more questions.

18 MR. HYLAND: Go ahead.

19 REDIRECT EXAMINATION BY MR. EISENBERG:

20 Q Mrs. Santos, on the night in question were the premises
21 crowded?

22 A Yes. Friday nights are always crowded, weekends.

23 Q How many people would you say were in the premises?

24 A Well, I wouldn't know. All I know is that it was very
25 crowded.

1 Q How deep were the people standing at the bar?

2 A Well, I would say like about five or six, from the bar to
3 the back, about five or six.

4 Q About how big is the bar, how long?

5 A You mean footage?

6 Q Yes.

7 A Well, I am not too good at that but I would say about
8 twice the size of this here.

9 Q Indicating about twenty-five feet?

10 A Well, about one-half of this here (indicating hearing
11 officer's bench).

12 Q Are you employed elsewhere other than as manager for
13 your husband?

14 A Yes, I work for the City, the Department of Hospitals.

15 Q What is your job there?

16 A Well, it is receptionist, typist, clerk, everything. I
17 handle problems, mainly.

18 Q How long have you worked there?

19 A Fifteen years.

20 Q Have you ever been arrested?

21 A Oh, no.

22 Q Have you ever been convicted of any crime?

23 A No.

24 MR. EISENBERG: I don't have any more questions.

25 MR. VOLAN: I have a few more.

1 MR. HYLAND: Go ahead.

2 RE-CROSS-EXAMINATION BY MR. VOLAN:

3 Q Were you on vacation in July from your job at the
4 Department of Hospitals, City of New York?

5 A In July?

6 Q Yes.

7 A Well, I don't think so. I don't think I had a vacation
8 in July.

9 Q What hours do you work in your job?

10 A 9:00 to 5:00.

11 Q Had you worked that day, July 21st?

12 A Yes.

13 Q And did you work on the 22nd?

14 A Yes.

15 Q And you say that you worked from 9:00 to 5:00 and then
16 you were in the bar until after midnight?

17 A Yes.

18 Q And you were going to work the following day?

19 A Yes.

20 Q And you did this three or four nights a week?

21 A Yes.

22 Q It is a rough routine, isn't it?

23 A No, I have bundles of strength.

24 Q Where do you live?

25 A 23-21 Beaumont Avenue, Bronx.

1 Q So that after you left the bar sometime after midnight
2 you traveled home and you would get up in the morning and be at
3 your job at 9:00 o'clock?

4 A Yes, 9:00 o'clock.

5 Q Where do you work for the Department of Hospitals?

6 A In the Bronx.

7 Q In the Bronx?

8 A Yes.

9 Q Were you there when the girl was arrested?

10 A I don't remember seeing anyone arrested because I was
11 in and out then. I didn't see the actual arrest.

12 Q Did you see Mr. Rockwell being arrested?

13 A I didn't see him arrested other than that I saw that he
14 had to go out.

15 Q Did you see him leave with the officers?

16 A Well, I didn't know they were officers.

17 Q Did you see them leave at the same time?

18 A Well, I saw them go out.

19 Q You saw them leave?

20 A Yes.

21 Q You saw Mr. Rockwell and the girl leave with these
22 two gentlemen?

23 A Yes.

24 Q Did you see the girl there?

25 A No.

1 Q Did you see a commotion?

2 A Well, I didn't see anything in the coat room.

3 Q Well, that evening did you see Officer Gray with the
4 girl?

5 A Well, I saw him walk around there, yes. He was walking
6 around, holding this girl by the hand and dancing.

7 Q Did you see him seated at the table with the girl?

8 A Well, I don't know if he was seated at a table. I wasn't
9 watching every move. I would see him only if he passed my table.

10 Q Weren't you seated right where the maitre d's stand is?

11 A Yes.

12 Q Wouldn't you have to see everybody who passed you if
13 they become seated?

14 A Well, I didn't watch everybody. On a few occasions I
15 saw him on the dance floor, Gray.

16 Q Where was he coming from when he went to the dance floor?

17 A Well, I don't know. I don't know if he came from the
18 table or the bar.

19 MR. HYLAND: Anything further?

20 MR. VOLAN: Just a moment, please.

21 May I have a minute, Commissioner?

22 MR. HYLAND: All right, off the record.

23 (Discussion off the record.)

24 MR. HYLAND: On the record.

25 Q Mrs. Santos, as you enter the door from the street where

1 is the bar located?

2 A Which direction?

3 Q From 60th Street.

4 A Well, there are two doors. There is a side door and
5 then there is a main door. Which door are you talking about?

6 Q How many entrances face 60th Street?

7 A Both of them.

8 Q All right. Now, as you walk in either one of these
9 doors, where is the bar?

10 A Well, when you are walking in from their main entrance
11 the bar is on your left.

12 Q All right. Now, where is the maitre d's table as you
13 come in?

14 A To the right.

15 Q Is it sort of a narrow hallway there?

16 A I don't know what you would call narrow.

17 Q Well, doesn't the premises branch out after you get inside
18 and widen?

19 A As you get in?

20 Q Yes.

21 A Well, naturally the room widens, yes.

22 Q Now, where is the maitre d's table with reference to
23 the bar?

24 A Well, say I was sitting here (indicating) and this is
25 the table. He would be standing right here (indicating).

1 Q No, I am asking you where is this table located with
2 reference to the layout of the premises?

3 A The table that I sat at?

4 Q No, the maitre d's table.

5 A Well, he wasn't sitting. He was standing.

6 Q All right. He stands next to a table, is that right?

7 A Yes.

8 Q Now, isn't that in a little vestibule before you come
9 to the bar as you walk through the door?

10 A Well, it is a very wide doorway there and you walk right
11 in.

12 Q How wide is that vestibule?

13 A Well, I would say maybe, I would say about seven or
14 eight feet.

15 Q Now, as you walk in that door where is the maitre d's
16 table, on the right or on the left?

17 A Well, he would stand usually on the right.

18 Q Well, I didn't ask you that. Where is the table?

19 A Well, the table that I sat at is to the right.

20 Q Well, as you walk in is there a maitre d' stand, a table
21 that he uses?

22 A Well, not a stand. He stands on the floor there. He
23 is staying right near the doorway there.

24 Q As you come in where was the table that you were seated at

25 A To his right.

1 Q To the right of the maitre d'?

2 A Right.

3 Q And you were seated at that table?

4 A Yes.

5 Q Which way were you facing?

6 A Well, facing the room.

7 Q The door or the room?

8 A The room, the bar was on my left and the room is not
9 in front of me.

10 Q Now, wasn't there a very pretty waitress seated at that
11 table that night?

12 A The waitresses hardly -- I hardly ever saw a waitress
13 sit. They usually stand, and not on a weekend. I never see any
14 waitress sit.

15 Q Now, from where you were seated where did the maitre d'
16 stand?

17 A To my left.

18 Q Well, was he standing right next to the table or was he
19 in the vestibule?

20 A No, he was standing right next to that table.

21 Q As you were seated at this table is the vestibule to your
22 rear?

23 A Well, there is a wall behind the table.

24 Q And to the left of that wall behind you and behind you
25 is the vestibule to the doorway?

1 A Well, not exactly behind, because the doorway was very
2 wide and you are able to see people halfway in.

3 Q From where you were seated were you able to see into the
4 back of the premises?

5 A Yes.

6 Q Could you see all the tables in the back?

7 A Well, not all of them.

8 Q Some were cut off from your view?

9 A Yes, because of the poles there.

10 Q During the time that you were sitting at the table did
11 you have anything to drink?

12 A Well, I don't drink.

13 MR. HYLAND: Well, yes or no?

14 THE WITNESS: No.

15 MR. HYLAND: All right.

16 MR. VOLAN: No further questions.

17 MR. HYLAND: All right.

18 REDIRECT EXAMINATION BY MR. EISENBERG (Continuing):

19 Q Mrs. Santos, do you work on your job on Saturday?

20 A No.

21 Q Did you work on Saturday?

22 A No, this was a Friday night.

23 Q A Friday night?

24 A That's right.

25 MR. HYLAND: Is that all?

1 MR. EISENBERG: Yes.

2 MR. HYLAND: Thank you. You may step down.

3 Any further witnesses?

4 MR. EISENBERG: Yes, sir.

5 MR. HYLAND: At this time we will take a short recess.

6 (At this time a short recess was taken.)

7 MR. HYLAND: All right, on the record.

8 W A L T E R M E Y E R, called as a witness on behalf of
9 the Licensee, having been first duly sworn, testified as
10 follows:

11 DIRECT EXAMINATION BY MR. EISENBERG:

12 Q Are you related to Norbert Meyer?

13 A Yes, a brother.

14 Q Were you in the premises, of the 007 Restaurant, Inc.,
15 on July 21st going into July 22nd, in the evening?

16 A Yes, I was.

17 Q What time did you arrive at the premises that evening?

18 A About 10:00 o'clock.

19 Q What were you doing there?

20 A Just visiting, saying hello to my brother, you know, and
21 managing the place when my brother left. I was visiting but Norby
22 had to go away and he asked me to stay in the place, just to
23 manage it.

24 Q What were you doing there after Norby left?

25 A Well, just overseeing the entire operation.

1 Q Do you see this gentleman at the rear, with the red
2 beard (indicating)?

3 A Yes, I do.

4 Q Indicating Officer Gray?

5 A Yes.

6 Q Do you recognize him?

7 A Yes, I do.

8 Q Now, about how many people were in the premises about
9 12:00 o'clock that evening, how many people?

10 A 150 or 125 people, I would say.

11 Q Did you have occasion to look at the bar at that time?

12 A Yes.

13 Q Could you tell me how many people were standing at the
14 bar?

15 A Well, there were some people. We had a rope up it was
16 so crowded.

17 Q In other words, people didn't just walk in. They had
18 to stand outside the vestibule in order to get into the premises?

19 A Just about, yes.

20 Q Who let them in the premises?

21 A Either I or Bill Rockwell.

22 Q What is his job?

23 A He is the maitre d', the host.

24 Q Now, how deep were they standing at the bar?

25 A Well, I would say five deep.

1 Q Were the premises noisy?

2 A Yes.

3 Q Was the band playing?

4 A Yes.

5 Q How many bands were there that evening?

6 A Two bands, always.

7 Q During the week did they have two bands?

8 A Yes.

9 Q Do they play continuously?

10 A Yes, a half hour on and off.

11 Q You mean one band goes on and one goes off?

12 A Well, they play alternately and in between the three or
13 four minute breaks they have a record machine that plays through
14 the speakers so that there is no lull in the room.

15 Q What type of band do you have?

16 A Well, a latin band and an American band.

17 Q What type of music do they play?

18 A Latin music and the leader plays the trumpet.

19 Q How many pieces are in that band?

20 A Well, in that particular band I think he is the only one
21 that plays the trumpet.

22 Q How many other instruments are there?

23 A Well, there are two sets of drums, a piano, and a bass.

24 Q Do you have a singer?

25 A Well, the leader sings.

1 Q You say they play loud?

2 A Yes, I would say so.

3 Q What type of music does the other band play?

4 A The American band?

5 Q Yes.

6 A Well, American music.

7 Q Do you mean waltz music or rock and roll type of music?

8 A Well, an upbeat type of music.

9 Q How many pieces does the other band consist of?

10 A Well, I don't remember that particular band but they are
11 always four or five piece bands, although I don't remember the name
12 of the group in there at that time.

13 Q Would you say the premises were noisy that evening?

14 A They were, yes.

15 Q Did you at any time see Officer Gray speak to Mr.
16 Rockwell?

17 A No.

18 Q Did you see Officer Gray in the rear with a young lady?

19 A Yes, I did.

20 Q Did you overhear any of their conversation?

21 A No.

22 Q Did you ever see any of the officers before?

23 A No.

24 Q Had you ever seen the young lady before?

25 A Yes, she had been in before.

1 Q How long have you been in the restaurant business? How
2 long have you been around the restaurant business?

3 A Since 1946.

4 Q Did your father have a restaurant at one time?

5 MR. VOLAN: I object to that. It has no merit in this
6 case.

7 MR. HYLAND: Overruled.

8 A Yes.

9 Q What is your employment right now?

10 A I am the manager of the Chinese restaurant in Queens
11 in which my brother is a partner.

12 MR. HYLAND: Are you an officer, director or stockholder
13 of those premises?

14 THE WITNESS: No, sir.

15 MR. HYLAND: All right.

16 Q What do you do in this Chinese restaurant?

17 A Well, buying, making a payroll, receiving merchandise.

18 Q Do you supervise the help?

19 A Along with Mr. Wong, Norby's partner, Tommy Wong.

20 Q Did this premises have a liquor license?

21 A Well, a service bar license. Yes, a liquor license, for
22 a service bar only.

23 Q What type of clientele do you have in these premises?

24 MR. HYLAND: You mean the Chinese restaurant?

25 MR. EISENBERG: I am talking about 007 Restaurant, Inc.

1 MR. HYLAND: All right, the licensed premises?

2 MR. EISENBERG: Yes.

3 MR. HYLAND: All right.

4 Q Do you have a family type crowd?

5 A No.

6 Q Do you have single people mainly?

7 A Yes, mainly.

8 MR. EISENBERG: I have no further questions.

9 MR. HYLAND: Do you have any questions, Mr. Volan?

10 MR. VOLAN: Yes.

11 CROSS-EXAMINATION BY MR. VOLAN:

12 Q Prior to July 21st, when were you last in the premises?

13 A Well, I would say I come down a few nights a week.

14 Q You are not on the payroll of the 007 Corporation, are
15 you?

16 A No.

17 Q Now, you say that your brother was there when you left?

18 A Yes.

19 Q And he left after you arrived, is that correct?

20 A No, he was there when I got there.

21 Q He was there when you got there?

22 A Yes.

23 Q How did you have a conversation with him in which he
24 told you he was leaving?

25 A Yes, He was telling me that he wanted to hear a few bands

1 Q What did he tell you to do?

2 A Just to oversee the place.

3 Q Where were you in the premises when he told you that?

4 A Near the front there. There is a maitre d' desk up in
5 the front where they answer the telephones.

6 Q And you were near the bar?

7 A Yes.

8 Q And you had no difficulty in hearing your brother telling
9 you that he was leaving, did you?

10 A Well, he was standing right next to me.

11 Q Well, you heard him say he was leaving, is that right?

12 A Yes.

13 Q All right. What time did he leave?

14 A Well, about 10:30 or twenty to eleven or a quarter to
15 eleven or something like that.

16 Q Have you been back to the premises since July 21st?

17 A Many times.

18 Q Is Mr. Rockwell working there still?

19 A No.

20 Q When did he stop working there?

21 A That night when he was arrested.

22 Q How long had he worked in the premises prior to that
23 night?

24 A Well, I would say about three weeks.

25 Q So that you had observed him on the premises about three

1 weeks, is that right?

2 A Yes, I had seen him five or six times since he had been
3 hired.

4 Q Now, do you have a set of keys for the premises?

5 A No.

6 Q Mr. Rockwell had the keys that evening when he was
7 arrested, didn't he?

8 A I don't believe so.

9 Q Did he turn any keys over to you?

10 A No.

11 Q Did you leave before he was arrested?

12 A No, I was there when he was arrested.

13 Q Now, you said you had seen the young lady that Officer
14 Gray had arrested?

15 A Yes, once before.

16 Q Well, when was that?

17 A Well, I think it was the time previous to that, maybe
18 a few days before that.

19 Q How long was she in the premises on that occasion?

20 A She was there when I arrived and she left when she was
21 arrested.

22 Q Well, so that in other words, it is your testimony that
23 you had seen her on two occasions, is that correct?

24 A Yes, I would say so.

25 Q Well, was there anything distinctive about her that made

1 you remember her on the second occasion when she was arrested?

2 A Well, I just recognized her because she wears her hair
3 high and she is bleached blonde and she caught my attention, that's
4 all. I don't know the girl.

5 Q Didn't you speak to her on the first occasion that you
6 saw her?

7 A No.

8 MR. VOLAN: No further questions.

9 MR. HYLAND: You say there is a maitre d's desk at the
10 entrance?

11 THE WITNESS: Well, there is a table where you answer the
12 telephones.

13 MR. HYLAND: Isn't that Rockwell's station?

14 THE WITNESS: Yes.

15 MR. HYLAND: Where would he station himself, seated at the
16 desk or where?

17 THE WITNESS: Well, this is no chair. It is a stand up
18 there.

19 MR. HYLAND: You mean there is a maitre d' stand?

20 THE WITNESS: Yes.

21 MR. HYLAND: Is there a table right next to him?

22 THE WITNESS: No. It is a table and everyting in itself.
23 It is about four foot high I would say, with two telephones
24 on it.

25 MR. HYLAND: Does this face the entrance?

1 THE WITNESS: Yes, it is up against the wall there and
2 you can see the room.

3 MR. HYLAND: Where was he facing?

4 THE WITNESS: Well, if I was standing here with the table
5 behind me, the door is right there and the bar is right there,
6 (indicating) so that you can see the people coming in and
7 everything.

8 MR. HYLAND: Do you know the band leader's wife, Mrs.
9 Santos?

10 THE WITNESS: Yes.

11 MR. HYLAND: Did you see her there on the night of the
12 21st and the 22nd?

13 THE WITNESS: Yes.

14 MR. HYLAND: Where did you see her?

15 THE WITNESS: Well, she was always there.

16 MR. HYLAND: Well, whereabouts in the premises was she
17 that night?

18 THE WITNESS: Well, sometimes she is at the bar with
19 friends and she has relatives come down, her own family,
20 or she would be seated at the first table, right off of
21 the maitre d's desk, right off the bar there. There is
22 a small table and she would sit at it.

23 MR. HYLAND: But she would move around?

24 THE WITNESS: Yes.

25 MR. HYLAND: All right.

1 CROSS-EXAMINATION BY MR. VOLAN (continuing):

2 Q If you sit with your back toward the wall, this first
3 table, so that you were looking into the premises, is there a
4 trellis there or some kind of latticework?

5 A (No response.)

6 Q Do you know what I mean?

7 A No.

8 MR. HYLAND: If you sit at a table and you look toward
9 where the rest of the tables are would you have a clear view?

10 THE WITNESS: No.

11 Q You wouldn't have a clear view?

12 A No.

13 Q Is there some kind of latticework on it there or
14 anything like that?

15 A No.

16 Q Did you see Mrs. Santos on that night, the arresting
17 night, in the premises?

18 A Yes.

19 Q You saw her there?

20 A Yes.

21 Q Did you see whether she drank anything that night?

22 A I don't know if she drinks or not.

23 Q Well, was she drinking?

24 A I don't know.

25 Q How many times did you ever see her in the premises?

1 A Almost every time I came in.

2 Q Well, on those occasions, did she drink?

3 A Well, I guess she did. Sometimes her family or her
4 friends would join her and --

5 Q And she would take a social drink?

6 A Yes.

7 Q She would drink with her husband?

8 A Yes, she would sometimes sit during the intermission
9 and have a drink.

10 MR. HYLAND: Anything further?

11 MR. VOLAN: No, Commissioner.

12 MR. EISENBERG: Do you know what she drinks on those
13 occasions? Is it a soft drink or liquor?

14 THE WITNESS: No, I don't know.

15 MR. EISENBERG: I have no questions.

16 MR. HYLAND: Any further witnesses?

17 MR. EISENBERG: Well, at this time, Mr. Commissioner,
18 I want to say that this witness is Norbert Meyer and the
19 corporation should be informed that there is a criminal
20 proceeding pending against the corporation of which Mr.
21 Meyer is the president and he is responsible for the violation
22 of the ABC Law, Section 106, subdivision 6, which arose out
23 of this set of circumstances. This case has not been completed
24 and is still pending. On those grounds I would move to continue
25 the case for a continuation of Mr. Meyer until after the case

1 has been heard in court and determined on the ground that he
2 has the constitutional right not to testify against himself,
3 and to force him to testify in this hearing would be a
4 violation of his constitutional rights.

5 MR. HYLAND: Well, you are presenting him as a witness
6 or you want an adjournment for that purpose?

7 MR. EISENBERG: I want to adjourn for that purpose.

8 MR. HYLAND: That motion is denied.

9 Do you want to reply now?

10 MR. EISENBERG: All right, under protest I will put
11 Mr. Meyer on the stand.

12 MR. HYLAND: You are putting him on the stand?

13 MR. EISENBERG: Yes.

14 MR. HYLAND: All right.

15 N O R B E R T M E Y E R, called as a witness on behalf of
16 the Licensee, having been first duly sworn, testified as follows:

17 DIRECT EXAMINATION BY MR. EISENBERG:

18 Q How long have you been connected with the 007 Restaurant,
19 Inc.?

20 A Twenty months, about.

21 Q How long have you been a licensee, have you owned the
22 licensed premises?

23 A Do you mean all my different premises?

24 Q Yes.

25 A About fifteen years.

1 Q Did you ever receive a violation of the ABC Laws,
2 based on prostitution?

3 A No, never.

4 Q Were you in the premises on July 21st going into July
5 22nd, 1967?

6 A Do you mean a Friday night?

7 Q Yes.

8 A Yes, I was.

9 Q What time were you there?

10 A Well, I came in about 6:00 o'clock in the evening and
11 I was there until about 10:30 or a quarter to eleven.

12 Q And you left at that point?

13 A Yes, I left to listen to a few other bands that I wanted
14 to listen to for possible future booking.

15 Q At the time that you left at about 10:30, how many people
16 were there in the premises?

17 A A lot of people were there. I would say between 100 to
18 125 people.

19 Q Was the bar area crowded?

20 A Yes, very.

21 Q How deep were they standing at the bar?

22 A Well, maybe four deep.

23 Q Were there people seated at the tables?

24 A Yes.

25 Q How many seats do you have?

1 A Well, we seat about seventy-five or eighty people.

2 Q So that there were seventy-five people seated at the
3 tables and there were another seventy-five seated around the bar
4 area, is that right?

5 A Yes.

6 Q How long is your bar?

7 A Twenty-eight feet long, about.

8 Q How many stools do you have?

9 A Well, about ten, I think, or twelve.

10 Q How much money did you take in that night from your
11 restaurant and bar?

12 A Well, I wouldn't know that exactly, but I do know that
13 we normally take in about \$1,500 on a Friday night.

14 Q What do you normally take in on other nights?

15 A Well, our weekday nights, Monday, Tuesday and Wednesday -
16 Monday is the weakest night. Tuesday and Wednesday get better and
17 Thursday night is the best weekday night, and we do about \$800,
18 about half of Friday night.

19 Q In other words, you do about double the business on a
20 Friday?

21 A That's right. We have quite a large crowd on Friday
22 nights.

23 Q Do you have paid entertainers? Did you have them on
24 that night?

25 A Yes, we did, and we always do.

1 Q What are the names of the bands?

2 A Well, I had the Chino Santos latin band and the DC Duo.
3 That stands for Danny and Carol. She plays an organ and he plays
4 drums and they both sing.

5 Q Would you say that on the evening of the 21st that the
6 premises were noisy?

7 A Yes. You mean that Friday night?

8 Q Yes.

9 A Yes, very noisy.

10 Q When the band plays on the bandstand is there a system
11 there that amplifies the sound?

12 A Yes, there is, with speakers.

13 Q How often do the bands alternate?

14 A Every half hour they go on and off, so that if anybody
15 were there for a length of time they would be seeing both bands
16 going on and off.

17 Q What type of music does the Duo play?

18 A An up tempo to a rock kind of thing.

19 Q Is that a slow type of music?

20 A No, swing type of music.

21 Q Was it soft or a dancing type of music?

22 A Well, dancing but not too soft.

23 Q You mean dancing, sort of rock and roll?

24 A Contemporary music and dancing.

25 Q And that latin band plays what?

1 A Meranges and limboes, and so forth. The clientele is
2 swing or swing entertainment.

3 Q What type of clientele do you cater to?

4 A Well, to a great degree, I cater to a single clientele.
5 However, I could draw many, many couples and I have thousands of
6 friends of members that have been following me through the year
7 and as a result the tables are filled with many, many couples,
8 many friends of mine, but the bar area tends to draw a great deal
9 of single people.

10 Q Now, is it a practice of any of the customers that
11 frequent your premises to put their handbags behind the bar?

12 A Yes, very much so, and I encourage it, because in all
13 the years I have been in business I found that when there is a
14 crowded bar girls seem to be rifled by characters and things and
15 not to have any problems, when girls come in by themselves and
16 are standing at the bar I say to them, "Why don't you put your
17 bag behind the bar." And at the end of the night they would
18 pay their tab and even if I don't know the girls, I let them know
19 that the bartender will protect their property.

20 Q All right. How long had Mr. Rockwell been working for
21 you?

22 A About two or three weeks. I know he was in the third
23 week at that time. I am not too sure.

24 Q How did you come to hire him?

25 A Well, I knew him for many years and I knew of his

1 reputation and I knew he had been over to Jack Silverman's
2 International and his reputation was one that he had managed
3 the Latin Quarter for a period of time and he had also worked
4 in the Copa Cabanna for a number of years.

5 Q As what?

6 A As a lounge manager.

7 Q Yes.

8 A And he was also the head waiter at the Riviera. He had
9 worked the biggest clubs in the city and he told me that he had not
10 been doing anything for a while and because he would like to go
11 back into action for a while and everybody said he was over the
12 hill because of his age, seventy years old and I was delighted to
13 hire him because of his background in the business.

14 Q To your knowledge had he ever been arrested before?

15 A Well, not to my knowledge. Well, he had a cabaret card
16 which would be given to a person who had not been convicted of
17 any serious crime, I assume.

18 Q What were his duties?

19 A Well, maitre d', seating captain, which means that when
20 they came in he would say, "Good evening," and he would take the
21 people to the tables but no other authorization whatsoever. He
22 had nothing to do with the business.

23 Q Did he have any managerial duties?

24 A Well, none whatsoever. He came in at 8:00 o'clock in
25 the evening and he left at 4:00 o'clock in the morning and I took

1 care of all the managerial duties in my own place.

2 Q How often are you there?

3 A Well, I am on the premises every day. I take off maybe
4 once every few weeks. I take a day off and at that time I usually
5 ask my brother to come in and fill in for me, since he knows the
6 business as well as I do and he is quite competent and I felt quite
7 competent in leaving him there, since he also worked for me in my
8 Chinese restaurant and he is sort of manager over there. He takes
9 care of a lot of the work and I am competent to leave him in charge
10 although he doesn't take money from me.

11 Q Is Mr. Rockwell still working there, for you?

12 A No, he isn't.

13 Q What happened?

14 A Well, we let him go on advice of counsel after the arrest
15 not that I don't have confidence in him as a human being and I don't
16 believe that he did anything. However, on advice of counsel I let
17 him go until such time as the matter will be closed up in the case
18 in court.

19 MR. EISENBERG: I haven't any further questions.

20 MR. HYLAND: Any questions, Mr. Volan?

21 MR. VOLAN: Yes.

22 CROSS-EXAMINATION BY MR. VOLAN:

23 Q How many people would you say were in the premises
24 before you left?

25 A 120, I would say.

1 Q And approximately how many of those were females?

2 A Well, I would venture to say that half the people were
3 females.

4 Q Do you have a check room in the premises?

5 A Yes, we do.

6 Q Now, when the girls hand the bag over to the bartender
7 does he give her a check for it?

8 A No.

9 Q Does your bartender have anywhere in the neighborhood
10 of sixty bags behind the bar when he leaves?

11 A No.

12 Q Well, how many bags would he have behind the bar?

13 A Well, when I say there are sixty women in the place,
14 possibly half of them are sitting at tables with gentlemen, when
15 they come in, so that there may be twenty or twenty-five women's
16 bags and out of those possibly fifteen or seventeen of those have
17 their bags behind the bar. It is about that, I would say.

18 Q You don't have any identification of those bags?

19 A No.

20 Q The bartender remembers which bag belongs to each girl?

21 A Yes, that's a very little thing to remember. They will
22 remember what drink you drink and they will remember what drink
23 it is when you come up to the bar again.

24 Q Well, if they know a girl well, would they be more
25 likely know her pocketbook?

1 A No, not necessarily.

2 Q Well, do you mean to say without giving any claim check
3 or check you assume responsibility for those bags?

4 A Well, I do more than that. I accept coats from many
5 girls and I don't even give them a check. I hang up their coats
6 without a check.

7 Q You mean without knowing the person?

8 A No, I don't even give them a check for their coats. So
9 far, no problems.

10 Q Now, you say you cater mostly to single people?

11 A Yes, to a great degree.

12 Q Also you say there were couples seated at the tables
13 that night?

14 A Yes, many, many.

15 Q And those couples were drinking?

16 A Yes, and eating.

17 Q And some of them were engaged in conversation?

18 A Yes, I think so.

19 Q And were they at the bar and engaging in conversations?

20 A Yes.

21 Q And people were ordering drinks and were being served?

22 A Yes.

23 Q And you supervised the operation?

24 A Yes.

25 Q And you gave instructions to the maitre d' and people ask

1 the maitre d' for tables and he seats them?

2 A Yes. Well, they come in the door and the maitre d's
3 job is to say, "Good evening. How many are in your party," and
4 "Would you care for a table?" If they say, yes, they are seated
5 at the table and if they say, no, they go to the bar and that's
6 the end of the conversation, that's all.

7 Q Well, despite the playing of the band and the playing of
8 the records business is conducted normally and people converse with
9 each other and people are heard and instructions are carried out,
10 is that right?

11 A Well, there are times that they are not and I have
12 problems with that, too.

13 Q And so sometimes you turn the volume up, don't you?

14 A Well, many times I have to lean over and yell to someone
15 and this is very true and you would know it if you were in my place
16 that people have to lean forward and say, "How are you?" And I
17 get many complaints about the noise being so loud.

18 Q You have no trouble in supervising your operations when
19 there is that much noise, do you?

20 A Well, there are problems sometimes.

21 Q Well, did you hear your brother say that sometimes you
22 turn the premises over to him?

23 A Well, sometimes.

24 Q Isn't the bar right close to where the noise is?

25 A Well, the bar area is a noisy area but we were standing

1 actually right up near the room where I spoke to my brother and
2 it is quite difficult to hear someone talk properly.

3 Q But it never interferes with your selling drinks?

4 A Yes, it does, many times.

5 Q Sometimes you can't serve drinks because the bartender
6 doesn't hear it?

7 A Yes, many times.

8 Q And it is a good business practice for you to keep the
9 premises so loud and it interferes with the sale of alcoholic
10 beverages?

11 A Well, that is my actual business. Whisky can be bought
12 for \$5 a bottle in a liquor store and someone can get drunk, but
13 we are trying to sell an atmosphere that people want to go into
14 and a successful club, such as mine, and in well-known places such
15 as Harlow's and some others the noise level is so high that you
16 can't hear yourself drink, let alone talk. There is big trouble
17 in ordering drinks.

18 Q Well, you don't make your money on atmosphere but on
19 selling drinks, don't you?

20 A Yes.

21 Q You don't charge a cover there, do you?

22 A No, I am selling whisky.

23 MR. VOLAN: No further questions.

24 MR. EISENBERG: I have a few more.

25 MR. HYLAND: Go ahead.

1 REDIRECT EXAMINATION BY MR. EISENBERG:

2 Q Mr. Meyer, do you sell any alcoholic beverages on credit?

3 A No, I don't.

4 Q What is your practice?

5 A We sell food on credit and alcoholic beverages are sold
6 for cash.

7 Q In other words, if I would order an alcoholic beverage
8 with my food, would you charge that whole check to a credit charge?

9 A Well, we break that into two different charges so that
10 the liquor would be paid for in cash and the food by card. However,
11 the waitresses that I have, as a matter of fact, just in the past
12 few weeks, I just changed five waitresses who were not too familiar
13 with the rules and regulations and sometimes might do something
14 against my order. However, to my knowledge it is always done,
15 that the food is broken into one order and the liquor they had
16 to pay for in cash. We never accept charges at the bar, in any
17 case.

18 MR. HYLAND: You don't have a credit permit?

19 THE WITNESS: No, I don't.

20 Q Did you know Michele Pagan prior to July 21st?

21 A Well, I had seen her on the premises a few nights before,
22 which is the first time that I had seen her.

23 Q Did you know that she was a prostitute?

24 A No, of course not.

25 Q Do you permit prostitutes in your place?

1 A No, we do not, not if I know them and I wouldn't know
2 if a girl is a prostitute or not, but if I don't know it or even
3 if I know it, and I have been in the business long enough to be
4 able to clock somebody who doesn't look legitimate.

5 MR. EISENBERG: I have nothing further.

6 MR. HYLAND: Anything further?

7 MR. VOLAN: That's it.

8 MR. HYLAND: Any further witnesses?

9 MR. EISENBERG: No, sir. Mr. Commissioner, at this
10 time I am going to ask for a continuation of this case until
11 Mr. Rockwell's case has been completed and he will be available
12 to testify.

13 MR. HYLAND: It is the same motion you had before?

14 MR. EISENBERG: I am renewing it.

15 MR. HYLAND: It is denied.

16 MR. VOLAN: He indicated in his direct testimony, and I
17 want to know whether he has any indication that this witness,
18 Rockwell, can help as a witness. He didn't testify and I want
19 to know if he will be of any help for him.

20 MR. HYLAND: Well, I will assume that he has something
21 in mind bearing on the licensee's case.

22 Do you want him to reverse himself, Mr. Volan?

23 MR. VOLAN: No, I am not trying to have him reverse
24 himself, Commissioner, but if he is making that statement
25 I think we should know the basis of it.

1 MR. EISENBERG: Well, I expect that Mr. Rockwell's
2 testimony will be very beneficial to my case and I want the
3 opportunity to present him to this Commission.

4 MR. HYLAND: Well, it is a true statement that you are
5 not familiar with what he is going to testify to?

6 MR. EISENBERG: Well, I did not say that. I do know.
7 That is what I am saying.

8 MR. HYLAND: All right. Is there anything further on
9 the motion?

10 MR. VOLAN: Nothing further.

11 MR. EISENBERG: Then I request that --

12 MR. HYLAND: Do you want the decision on it?

13 MR. EISENBERG: Yes.

14 MR. HYLAND: Your motion is denied.

15 Do you have anything further?

16 MR. EISENBERG: I have no further witnesses but I do
17 request a copy of the summary and finding be submitted to
18 me prior to the finding of the Board.

19 MR. HYLAND: All right. Do you rest, Mr. Volan?

20 MR. VOLAN: Yes.

21 MR. HYLAND: Do you rest, Mr. Eisenberg?

22 MR. EISENBERG: Yes, as I said before.

23 MR. HYLAND: Well, what do you mean?

24 MR. EISENBERG: All right, I rest.

25 MR. HYLAND: The hearing is closed and the matter will be

1 referred to the members of the Authority and you will be
2 advised in writing.

3 Thank you very much.

4

5 (Whereupon at 1:30 P.M. the hearing was closed.)

6

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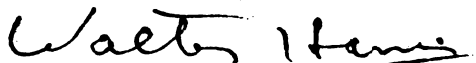
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9 This is to certify that the foregoing
10 is a true and accurate transcript of
11 the testimony taken by me in this
12 matter.

11

12



13

Walter Harris
Hearing Reporter

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AUTHORITY'S EXHIBIT "1"
(In Evidence)

ANNEXED TO ANSWER

NOTICE OF PLEADING AND HEARING
DATED -- August 3, 1967
(same as Exhibit "A")

AUTHORITY'S EXHIBIT "2" , ANNEXED TO ANSWER

AMERICAN EXPRESS CREDIT CARD
ACCOUNT OF -- DONALD R. GRAY,
SALE ON CREDIT BY -- NORBY
WALTERS REST. DATED OF CREDIT
July 21, 1967

042 750 743 9 800		DATE OF CHARGE	APPROVAL
DONALD R GRAY		66 THE LAW OF NY 12 67	7/21/67
AX			
NORBY WALTERS REST 61 00-0904 158 Y 011164006 N.Y. 631 102 499 6		4 50	
		1 25	
		2 00	
X Donald R Gray		6 75	AMERCO ONLY EQU-VALENT AMOUNT
CHANGE RECORD 17169			

NYLKKLFRIDQ-001



FLD00100030

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK)
COUNTY OF NEW YORK : SS.:
CITY OF NEW YORK)

DAVID J. EISENBERG, being duly sworn, deposes and says:

That he is a member of the firm of KRONGOLD & EISENBERG, attorneys for the petitioners herein, and that no opinion was filed by the Court below in making the order transferred herein.

Sworn to before me this

25 day of January, 1968

Max Krongold

David Eisenberg

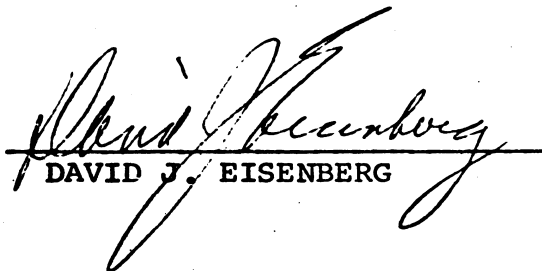
DAVID J. EISENBERG

NOTARIAL PUBLIC
Notary Public, State of New York
No. 2-2-1070
Qualified in New York County
Exp. Expires March 24, 1969

CERTIFICATION

I, DAVID J. EISENBERG, an attorney associated with the firm of KRONGOLD & EISENBERG, attorneys for the petitioner in this action, hereby certifies, pursuant to Rule 2105, CPLR, that I have compared the foregoing printed papers with the originals on file in the office of the Clerk of the County of New York and found to be true and complete copies of said originals and the whole thereof of the order of transfer to the Appellate Division, First Department, and all the papers upon which the Court below acted in making the order of transfer.

Dated: January 25, 1968


DAVID J. EISENBERG

To be argued by
DAVID J. EISENBERG,

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----x

In the Matter of the Application of

007 REST. INC.,

Petitioner,

For a Review Pursuant to Article 78
of the Civil Practice Law & Rules,

Index No. 20453/67

-against-

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

-----x

PETITIONER'S BRIEF

-----x

KRONGOLD & EISENBERG
Attorneys for Petitioner
51 Broadway
New York, N.Y. 10006

DAVID J. EISENBERG,
Of Counsel

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

-----x

In the Matter of the Application of

007 REST. INC.,

Index No.
20453/67

Petitioner,

For a Review Pursuant to Article 78
of the Civil Practice Law & Rules,

-against-

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

-----x

STATEMENT UNDER RULE 5531

1. The index number of the above entitled action is New York County Clerk's # 20453/67.

2. The parties to this action are as follows:
007 Rest. Inc., Petitioner against New York State Liquor Authority, Respondent.

3. This proceeding was commenced in the Supreme Court of New York County, by the service of an order to show cause dated December 14, 1967.

4. Issue was joined by service of answer on December 20, 1967.

5. This is a proceeding under Article 78 of the Civil Practice Law and Rules to review a determination of the New York State Liquor Authority.

6. This proceeding was transferred to the Appellate Division by Mr. Justice Mitchell D. Schweitzer, by order dated December 27, 1967, which order was filed in the Office of the County Clerk of New York on December 29, 1967.

7. The appendix method of appeal is not being used.

NOTICE AND OBJECT OF PROCEEDING

The petitioner is seeking an order vacating and annulling the determination of the respondent which cancelled the liquor license of petitioner, or in the event, that the Court should find that some disciplinary measure is warranted, but that the penalty imposed is too severe, setting aside and vacating the penalty imposed and directing the respondent to prescribe a different and lesser penalty, or, in the event, that the Court should find that the hearing held was unfair, or the constitutional rights of the petitioner were violated, then order the respondent to hold a new hearing.

QUESTIONS PRESENTED

1. Did not the respondent err in sustaining the charges against the petitioner in that the evidence adduced at the hearing was insufficient to sustain the charges?
2. Did not the respondent err in that the hearing held by respondent was unfair and illegal to the petitioner?
3. Did not the action of respondent in the conduct of the hearing deprive petitioner of his constitutional rights under the Federal and State Constitution to due process of law and right against self-incrimination?
4. Was not the action of respondent in cancelling petitioner's liquor license arbitrary, capricious, contrary to law and the weight of the evidence, and, as such, constitute an abuse of discretion?

STATUTES INVOLVED

Constitution of the United States of America
(Amendment V):

" * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case

to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * * "

Constitution of the State of New York, (Article 1, Section 6):

" * * * No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, * * * No person shall be deprived of life, liberty or property, without due process of law."

Alcoholic Beverage Control Law, (Section 106, Subd. 6):

Provisions governing licensees to sell at retail for consumption on the premises.

"6. No person licensed to sell alcoholic beverages shall suffer or permit any gambling on the licensed premises, or suffer or permit such premises to become disorderly."

FACTS

Respondent instituted revocation proceedings against petitioner on the basis of an occurrence which took place on petitioner's premises on July 21st and 22nd, 1967. (10)* The charges were subsequently sustained by respondent and petitioner's liquor license was cancelled. (12)*

The following constitutes a summary of the evidence produced by both sides at the hearing:

Patrolman Donald R. Gray, testified that he first entered the premises located at 14 East 60th Street, New York City, New York, at approximately 10:30 P.M. on July 20, 1967. (43)* At approximately 10:40 P.M. (45)* or 12:30 (21)*, he was approached by one, William Rockwell, the maitre d', employed by the licensee. The officer never met Mr. Rockwell prior to this date. (56)* After asking Officer Gray how he was, where he was from, where he was staying, etc., (56)*, Mr. Rockwell asked him if he was looking for some fun. (56)*

The Officer answered affirmatively. (57)* Mr. Rockwell then stated that "He could get me a girl to get laid with." (57)* Officer Gray stated that it sounded interesting. (57)* Rockwell told Gray to come back that evening. (45)* Officer Gray did not have any conversation with Norbert Meyer, the principal of the licensee corporation, (61)* except to say "Hello". He did not know where Mr. Meyer was during his conversation with Mr. Rockwell. (69)* The entire conversation with Mr. Rockwell lasted ten to fifteen minutes. (61)*

On July 21st, 1967, Officer Gray returned at 10:30 P.M. (45)* At 12:30 P.M. on July 22nd, 1967, Mr. Rockwell brought one, Michele Pagan, over to Officer Gray, and in his presence, said to her, "You have nothing to worry about. He is all right. He is a friend of mine." (46)* Gray and Pagan then sat at a table in the rear. Over objection of counsel for licensee, testimony was permitted as to a conversation had between Gray and Pagan. (49)* A discussion ensued between Officer Gray and Michele Pagan and finally he took her to a hotel, where he arrested her for offering to commit an act of prostitution. (51)* Mr. Rockwell was arrested for "procuring". (16)* A summons was later served on 007 Rest. Inc., for violation of Section 106, subd. (6) of the A.B.C. Law. (17)*

Lt. Ralph Russo testified on behalf of the respondent. (91 - 102)* He was in the premises when Gray was there on both dates but he did not overhear any conversations Officer Gray had with Mr. Rockwell or Miss Pagan. (94, 98)* The respondent did not produce Michele Pagan as a witness.

The licensee subpoenaed William Rockwell as its first witness. (103)* He refused to testify on advice of his counsel until after his criminal trial was completed. (104)* He indicated that after his trial he would be available to testify. Counsel for licensee requested a continuation of the case until Rockwell was available to testify. (106)* This request was denied. (106)*

Joan Santos testified that on the evening of July 21, 1967, Officer Gray requested that she join him for a drink. (109)* She also overheard Officer Gray say to Mr. Rockwell, "Where are the girls," and Mr. Rockwell

replied, "I don't know any," (109)*

Walter Meyer, the brother of Norbert Meyer, testified that on the evening of July 21, 1967, he was in charge of the premises. (123)* The premises were crowded and noisy. (124, 126)* He did not overhear any conversation between Officer Gray and Miss Pagan. (126)*

Norbert Meyer, the President and sole stockholder of the licensee corporation testified, after counsel for licensee attempted to adjourn the hearing on the grounds that a criminal case arising out of the same set of circumstances had not been completed. (134)* Counsel for the licensee based the request for adjournment on Norbert Meyer's constitutional right not to testify against himself. (135)* The motion was denied. (135)* Mr. Norbert Meyer then testified under protest. (135)* He testified that he left the premises on July 21, 1967 at about 10:30 P.M. (136)* He had received a violation based on charges of prostitution. (136)* At the time he left the premises, the premises were crowded. (136)* He had known William Rockwell for a number of years and knew he had managed such large establishments as Jack Silverman's International, The Latin Quarter and the Copacabanna. (140)* He had never been arrested to Mr. Meyer's knowledge. (140)* Mr. Rockwell had no managerial duties. (140)* He worked for the licensee for only three weeks, (139)* and was released July 22, 1967. (141)* He did not know that Miss Pagan was a prostitute. (146)* The Court, prior to November 30, 1967 and the respondent was informed of same on December 1, 1967. (36)*

POINT I

THE EVIDENCE ADDUCED AT THE
HEARING WAS INSUFFICIENT TO
SUSTAIN THE CHARGES.

Prior decisions of the Courts have indicated beyond peradventure of doubt that they will not relinquish their responsibility to see that administrative determinations are in line with the standards set forth in the pertinent provisions of Sections 7803 and 7804 of the C.P.L.R. and when such standards have not been met, determinations

have been set aside.

54 Cafe and Restaurant, Inc., v. O'Connell,
274 A.D. 428, aff'd 298 N.Y. 883;

Toyos v. Bruckman, 266 A.D. 28, appeal dis-
missed, 291 N.Y. 745;

Stork Restaurant, Inc. v. Boland, 282 N.Y.
256.

The cases clearly set forth that mere suspicion of an unlawful act is not a sufficient basis for the revocation or suspension of a license. There must be substantial evidence to justify such actions. See MIGLIACCIO v. O'CONNELL, 307 N.Y. 566, 568, where it was held that:

"Knowledge of disorderly behavior in licensed premises sufficient in law to justify the revocation of a restaurant liquor license must be the subject of substantial evidence; it must have as its basis something more than suspicion. Upon that subject we have said: ' * * * "considerations of expedience" must not outweigh a lack of proof. (People v. Wallace & Company, 282 N.Y. 417,420) * * *'."

In the case of 2125 Barney's, Inc., v. State Liquor Authority, 16 A.D.2d 252, the Court held that the determination "must be supported by a showing of circumstances raising an inference that the licensee did knowingly allow" the complained of conditions to exist or continue or to demonstrate an "attitude toward the same tending to indicate acquiescence therein."

The following quotation from the case of 2125 Barney's Inc., v. State Liquor Authority, is respectfully called to the Court's attention (at pp. 923-924):

"The mere proof of open incidents of gambling for a brief period in view of a bartender, though he is in apparent charge of the premises, is not sufficient to sustain the charge that the licensee suffered or permitted the gambling. Matter of Conservative

Grouping Corp. v. Epstein, supra; Albrams v. Bruckman, supra. On becoming suspect of the occurrence of the gambling, the bartender is not to be expected to move with the alacrity and definiteness of a law enforcement officer to make an arrest or to put a halt to the gambling. He does not have the authority or the responsibilities of such an officer. Primarily his duty is to his employer and in the interest of his employer, he would be expected to move cautiously against the patron suspected of being engaged in gambling. Before proceeding directly against the patron, he would be bound to consider the possible consequences to his employer. The reprimand then and there, the ejection or the arrest of the patron at his hands could very well subject his employer to the risk of a possible civil suit or criminal prosecution, and this is to be considered. See Matter of Stanwood United v. O'Connell, supra.

"Here, the brief period of the observable gambling transactions was immediately followed by the arrest by the police officers of the patron involved. This stopped the gambling on the premises. Under the circumstances here, the mere failure of the bartender to take direct action against the patron prior to the arrest does not sustain the finding that the licensee was suffering or permitting the gambling. Bearing in mind that the bartender was entitled to be sure of his ground and to move cautiously, such failure does not tend to indicate acquiescence in the gambling."

The mere fact that an illegal act takes place in a licensed premises is not sufficient to justify either the revocation or suspension of a license. In this regard, the Court's attention is respectfully called to the case of George Mihale v. The State Liquor Authority, 279 App. Div. 651, where it was held as follows:

"Determination annulled, with \$50 costs and disbursements to petitioners. The testimony that one of petitioners' patrons on one

occasion surreptitiously solicited a police officer in plain clothes fails to show that the management aided or condoned this act. This man's brother officer testified that he was unaware that this solicitation took place, although the woman while making it sat between the two officers. This single incident was the only basis for revocation of petitioner's license, it was not substantial evidence that such conduct was countenanced or assisted by the licensees."

Under no circumstances can the testimony submitted herein be deemed to have complied with the "substantial evidence rule" as set forth hereinabove.

The respondent's case in the instant matter is completely based upon the unsubstantiated testimony of Officer Gray. They did not produce a necessary witness, Michele Pagan. The testimony of Lt. Russo does not substantiate the tale of Officer Gray as he did not overhear any conversations between Officer Gray and Mr. Rockwell or Miss Pagan.

Not one scintilla of evidence was introduced to prove that the management of petitioner aided, abetted or condoned the activities of William Rockwell. No evidence was introduced to indicate that management knew of, or should have known of any such activities. Rockwell was a new employee of the petitioner and was immediately released after the incident.

It is respondent's position that the owner of a licensed premises is under obligation to cross-examine patrons, ascertain their intentions, and if then found worthy, serve them? Or should the owner of a licensed premises be placed in the unenviable position of refusing to serve patrons and be subjected to the charges of a violation of the Civil Rights Law?

The Court, in the case of Stanwood United Inc. v. O'Connell, 283 App. Div. 70 (republished 282 App. Div. 1045), aff'd 306 N.Y. 749, clearly recognized the position of the holder of a liquor license when it stated at page 82:

"Petitioner was not an insurer of the character of the persons who patronize its

business. Under the law it had no authority to take affirmative action to eject persons, whom it might suspect as objectionable without risking a possible violation of Sections 40 and 41 of the Civil Rights Law. Such conduct on its part might well subject it to both civil and criminal prosecution if there was no obvious disorder."

The facts of the instant case are exactly the same as those in the case of STEVENSVILLE LAKE HOLDING CORP. v. O'CONNELL, 269 A.D. 804, except that gambling, instead of prostitution was charged. In said case, the Appellate Division held that evidence that a licensee's bartender took bets on horse races from a state trooper, did not warrant revocation of the Corporation's liquor license on the ground that the Corporation permitted gambling on the licensed premises, in the absence of evidence that the Corporation's officers knew of or permitted or suffered gambling on the premises. If the Court held that in that case the Corporation did not violate Section 106, subd. (6), of the A.B.C. Law, then certainly, the charges should not be sustained in the instant case.

POINT II

BY REFUSING TO GRANT PETITIONER'S
APPLICATION FOR AN ADJOURNMENT,
RESPONDENT DEPRIVED PETITIONER OF
A FULL AND FAIR HEARING.

The Courts have long held that an administrative hearing must be fair in all respects to the licensee. This criteria was clearly set forth in the case of PEOPLE ex rel PACKWOOD v. RILEY, 232 N.Y. 283, where the Court of Appeals stated:

"The hearing to be accorded him is not 'a mere form to precede a predetermined removal' (People ex rel Mitchel v. La Grange, 2 App. Div. 444; aff'd no opinion below, 151 N.Y. 664; cited with approval; Matter of Griffin v. Thompson, 202 N.Y.104, 110; People ex rel Tappin v. Cropsey, 178 App. Div. 180, 181, aff'd 224 N.Y. 564), but must be fair in all respects, based upon an impartial re-

view of evidence to the exclusion of know-
ledge possessed by the trier of the fact
and free from prejudicial errors of law."
(emphasis supplied)

This very Court cited the PACKWOOD case, supra, with approval in the MATTER OF MERRITT v. SWOPE, 46 N.Y.S.2d 944, 267 App. Div. 519, see also EIGO v. WHEELER, 248 App. Div. 53, 57, 289 N.Y.S. 34, 38.

Even in cases where the administrative agency's proof adduced at a hearing was adequate to support the determination, the courts have annulled the determination if the licensee did not have a fair hearing. SILVERSTEIN v. MEALEY, 259 App. Div. 854, 19 N.Y.S.2d 730. In the SILVERSTEIN case, the Court held that the licensee was deprived of a fair trial because the notice of hearing was insufficient. The licensee was, therefore, deprived of due process of law. See also, NEW YORK SOUTHERN COAL TERMINAL CORP. v. WOOLEY, 35 N.Y.S.2d 443; BELPE REST. INC., v. NEW YORK STATE LIQUOR AUTHORITY, 247 N.Y.S.2d 902, 42 Misc.2d 374; MATTER OF BIEBE v. KELLY, 18 Misc.2d 910.

It could hardly be deemed fair to the licensee to refuse to adjourn the hearing for a short period of time, to permit his major witness, William Rockwell, to testify in the case. As a matter of fact, Mr. Rockwell's case was disposed of prior to November 30, 1967, less than two months after the hearing and more than one half a month prior to the determination in this case. Mr. Rockwell had a legal right not to testify prior to the date of trial of his criminal case under the Constitutions of the United States and New York State. No right is more sacred. It was indicated to respondent that Mr. Rockwell would testify after his trial. Deprived of the use of the testimony of this material witness, petitioner could not properly defend himself against the charges.

The attitude of respondent is also reflected in its refusal to adjourn the hearing until after the trial of the criminal case as against the petitioner. The criminal case against petitioner was dismissed and disposed of prior to November 30, 1967.

POINT III

Petitioner's constitutional rights under the Con-

stitution of the United States of America and the State of New York were violated by respondent's refusal to adjourn the case.

"It needs no extensive discussion to establish the high place which the privilege against self-incrimination enjoys in our free society." PEOPLE v. DONOVAN, 13 N.Y.2d 148, p. 151. The licensee and William Rockwell certainly have the same opportunities to invoke their respective constitutional rights against self-incrimination. However, in application, the results of invoking this inalienable right in an administrative agency, dilutes the rights and discriminates between citizens enjoying this "equal right". In the case of Mr. Rockwell, no adverse effect is felt by him when he invokes his constitutional right. When Mr. Norbert Meyer attempts to invoke the same right, consequences are quite different. Mr. Meyer must make a choice, he can invoke his constitutional right, the same as any other citizen and lose his large investment in his business or he can waive the right which is supposed to enjoy with all other citizens of the United States and attempt to protect his property by testifying. No citizen of the United States should be placed in such a dilemma by a governmental agency. The refusal of the respondent to adjourn the hearing until the trial of the cases against Mr. Rockwell and Mr. Meyer therefore deprived petitioner of his rights to due process of law, and right against self-incrimination. SILVER v. McCAMEY, 221 F.2d 873.

POINT IV

THE ACTION OF RESPONDENT IN
CANCELLING PETITIONER'S LIQUOR
LICENSE WAS ARBITRARY, CAPRI-
CIOUS, CONTRARY TO LAW AND THE
WEIGHT OF EVIDENCE, AND CON-
STITUTES AN ABUSE OF DISCRETION.

The courts have long held that they "have by no means abdicated their judicial responsibility to review and pass upon administrative action claimed to be arbitrary and without foundation in fact or law". (Matter of 54 Cafe & Restaurant v. O'Connell, 274 App. Div. 428, aff'd 298 N.Y. 863.)

Where a determination of the respondent is "based

upon conclusory reasons unsupported by factual considerations of reasonable persuasiveness" (Matter of Matty's Rest. Inc. 251 N.Y.S.2d 770, aff'd 15 N.Y.2d 659), a determination of the Authority, will be set aside.

This court is empowered to annul the determination of the respondent (ACORN EMPLOYMENT SERVICE v. MOSS, 56 N.Y.S. 2d 491, 269 App. Div. 836, affirmed 64 N.E.2d 275, 295 N.Y. 560); reduce the penalty imposed (APPLICATION OF McIntock, 244 N.Y.S.2d 508, 19 A.D.2d 931) or remand the case for separate and new trials (SILVERSTEIN v. MEALEY, 19 N.Y.S.2d 730, 259 App. Div. 854.)

The refusal of respondent to adjourn the hearing pending trial of the two criminal cases was arbitrary and capricious. The incident occurred on July 21, 1967, the hearing was held on October 13, 1967, the respondent's determination was dated December 7, 1967. Certainly, a delay of one month would not have injured anyone. The failure to permit an adjournment, did injure petitioner severely; he was deprived of the testimony of his only eye witness, William Rockwell.

On the evidence presented at the hearing, it is patently clear that the petitioner operated its premises in a proper manner and there was ample and proper supervision.

No Licensee should be placed in the position of being penalized for judgment exercised in the course of his employment in serving patrons, especially when nothing untoward is present. An ill advised action by the licensee, if proved to be erroneous, would subject the licensee to the possibilities of legal proceedings.

It is petitioner's position that upon the facts as developed herein, the action of the respondent in cancelling the license was not only excessive but constitutes acts which are arbitrary, capricious, contrary to law and against the weight of evidence and constitutes an abuse of discretion.

CONCLUSION

The determination of respondent and its order of cancellation should be vacated and annulled.

Respectfully submitted,

KRONGOLD & EISENBERG
Attorneys for Petitioner

DAVID J. EISENBERG,
Of Counsel

29297AD 2ND 1049

To be argued by

BENJAMIN LASKIN

(15 minutes)

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application

—of—

007 REST. INC.,

Petitioner,

For a Review Pursuant to Article 78 of the
Civil Practice Law and Rules,

—against—

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

RESPONDENT'S BRIEF

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BENJAMIN LASKIN

Of Counsel

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POINT I

The testimony of the police officers, credited by the Authority, and the reasonable inferences to be drawn therefrom, constitute substantial evidence that the petitioner suffered or permitted the licensed premises to become disorderly on July 21, 22, 1967 (solicitation and procuring for the purposes of prostitution) in violation of Alcoholic Beverage Control Law, §106, subd. 6; that the petitioner sold, delivered or gave away alcoholic beverages on credit without a duly issued permit in violation of Alcoholic Beverage Control Law, §100, subd. 5	15
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New York Supreme Court
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application

—of—

007 REST. INC.,

Petitioner,

For a Review Pursuant to Article 78 of the
Civil Practice Law and Rules,

—against—

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

RESPONDENT'S BRIEF

Statement

This is a proceeding under Article 78 of the Civil Practice Law and Rules to review a determination of the State Liquor Authority cancelling, with a \$1,000 bond claim, petitioner's Restaurant Liquor license issued for premises located at 14 East 60th Street, New York, New York.

This determination was based on findings, made after a hearing duly held, that the petitioner violated the Alcoholic Beverage Control Law in that it suffered or permitted

the licensed premises to become disorderly on July 21, 22, 1967 [solicitation and procuring for the purposes of prostitution]; and in that it sold, delivered or gave away alcoholic beverages on credit, without a duly issued permit.

The proceeding was transferred to this Court for disposition in the first instance by order of the Supreme Court, New York County, entered in the New York County Clerk's office on December 29, 1967.

Introduction

On January 31, 1966 the respondent issued a Restaurant Liquor license to 007 Rest. Inc. for premises located at 14 East 60th Street, New York, New York, which license was renewed for yearly periods thereafter, the last renewal being for the license period ending February 29, 1968.

On or about August 3, 1967 a proceeding was initiated against the petitioner to revoke its license by the service of a Notice of Pleading and Hearing, which recited the following charges (10-11):*

- “1. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law by suffering or permitting the licensed premises to become disorderly in that it suffered or permitted females on the licensed premises to solicit male patrons therein for immoral purposes on July 21, 22, 1967.
- “2. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22,

* Numerical references in parentheses are to pages in Record on Review. Note that pages 149a and 149b are to be found between pages 38 and 39.

1967, by permitting the licensed premises to become disorderly in that it permitted an unescorted female to meet with an unescorted male in the licensed premises, both evidently unknown to each other up to that time; that subsequently the female solicited the said male for immoral purposes.

- “3. That the licensee violated Section 106, subd. 6 of the Alcoholic Beverage Control Law on July 21, 22, 1967, by suffering the licensed premises to become disorderly in that by failing to exercise a proper degree of supervision it suffered an unescorted female to meet with an unescorted male in the licensed premises, both evidently unknown to each other up to that time; that subsequently the female solicited said male for immoral purposes, and that if a proper degree of supervision had been used, the licensee should have known and could have prevented the aforesaid disorder.
- “4. That the licensee violated Section 100, subd. 5 of the Alcoholic Beverage Control Law in that it sold, delivered or gave away or permitted alcoholic beverages to be sold, delivered or given away on credit.”

A hearing on these charges was duly held before the State Liquor Authority (25, 39-149b), at the conclusion of which the hearing officer duly found that charges #1, #2, #3 and #4 were sustained (29-32). The findings of the hearing officer were adopted by the Members of the Authority, who sustained charges #1, #2, #3 and #4, and directed that the license be cancelled, plus a \$1,000 bond claim (37).

In his findings, adopted by the Authority, the hearing officer stated (30-32) :

“I credit the testimony of Patrolman Gray and Lieutenant Russo of the New York City Police Department, and I find that Patrolman Gray entered the licensed premises, which are in a building containing a hotel, at approximately 10:30 P.M. on July 20, 1967 and remained there until approximately 2:00 A.M. on July 21, 1967. During his visit and sometime after midnight Patrolman Gray was approached at the bar by the licensee’s *maitre d’*, William Rockwell, who after some preliminary conversation designed to satisfy himself that Patrolman Gray was nothing more than a visiting businessman, offered to procure for Gray a girl for purposes of sexual intercourse if Gray would return to the licensed premises that evening.

“Patrolman Gray did return to the premises at approximately 10:30 P.M. on July 21, 1967 and again met Rockwell at the bar where Rockwell advised Gray that he would procure for him a ‘professional.’

“Sometime after midnight, Rockwell introduced Gray to one Michele Pagan who after being assured by Rockwell that there was nothing wrong with Gray and after so assuring herself went with him from the bar to a table in the rear after first giving her handbag to the bartender for safekeeping. At the table, Gray purchased two rounds of alcoholic beverages for himself and the girl on credit using a credit card. At the table, Gray was solicited for purposes of prostitution, the girl suggesting that he obtain a room at the hotel, after first giving him a thorough ‘toss,’ *i.e.*, a search designed to ascertain if he were carrying a gun

and thus was a policeman, and after telling him that she would not do any kissing around his private parts.

“Eventually, Gray and the girl repaired to a room in the hotel and there the girl was arrested and brought back to the premises where Rockwell was also arrested.

“Subsequently, the girl was convicted in Criminal Court on her plea of guilty of offering to commit prostitution.

“Upon such findings, I conclude that the premises did become disorderly as charged, and I so find, and I further conclude that the licensee corporation suffered and permitted the disorderly condition to exist on the licensed premises as exemplified by the actions of its agent, William Rockwell, and I so find.

“Accordingly, charges 1, 2 and 3 are sustained.

“As to charge 4, as found above, Patrolman Gray purchased alcoholic beverages on credit on the licensed premises on July 22, 1967. Accordingly, charge 4 is sustained.”

Statute Involved

The Alcoholic Beverage Control Law (Laws 1934, ch. 478), in pertinent part, provides:

§2. Policy of state and purpose of chapter

It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law. * * * It is the purpose of this chapter to carry out that policy in the public interest. The re-

strictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state. * * *

§17. Powers of the authority

The authority shall have the following functions, powers and duties:

* * * * *

3. To revoke, cancel or suspend for cause any license or permit issued under this chapter.

* * * * *

§100. Alcoholic beverages generally

* * * * *

5. No retail licensee shall sell, deliver or give away, or cause, permit or procure to be sold, delivered or given away any alcoholic beverage on credit; * * *

§106. Provisions governing licensees to sell at retail for consumption on the premises

* * * * *

6. No person licensed to sell alcoholic beverages shall * * * suffer or permit such premises to become disorderly.

§118. Revocation of licenses for cause

Any license or permit issued pursuant to this chapter may be revoked, cancelled or suspended for cause, * * *

§160. Construction of chapter

This chapter shall be so construed as to assure that the policy of the state and the intent and purpose thereof will be carried out.

Evidence

[The licensed premises are located in a building occupied by a hotel, known as Hotel 14, and has a side entrance into the hotel lobby (50).]

As to the Disorderly Premises on July 21, 22, 1967

Police Officer Donald R. Gray testified that he entered the licensed premises on July 20, 1967 at about 10:30 P.M. "by myself" (43). His brother officer, Ralph Russo, entered "later" (44). "I believe Mr. Meyer [Norbert Meyer] was in charge" of the premises (55). About ten minutes after Gray entered, at about 10:40 P.M. (45), William Rockwell introduced himself to Gray as the maitre d' of the premises, engaged him in conversation (44), and asked Gray if he were "looking to have fun, * * *" and "told me that he could get me a girl to get laid with" (44, 45). Rockwell told Gray "that there was nobody there that he knew" that evening in the premises, and that if Gray came back the following evening "he could arrange to have me taken care of" (45).

Gray testified that maitre d' Rockwell introduced him to petitioner's principal, Norbert Meyer, and Gray spoke to Norbert Meyer "briefly" (44). Gray left the premises at about 2:00 A.M. (45).

Gray testified that he returned to the licensed premises the following evening, July 21, 1967, at about 10:30 P.M. (45), and stationed himself "at the bar" (46); that "[t]o the best of my knowledge, William Rockwell" was in charge of the premises (55); that his brother officer, Ralph Russo, "entered a short time after I did" (52-53); that maitre d' Rockwell approached him, and "asked me how long I was going to stay", and told him "not to worry, that he would get me a professional girl, that I wouldn't have to wine and dine her and that I had no further worries because he knew who all the professionals were" (46).

Gray testified that later that evening, at about 12:30 A.M. on July 22, 1967 (47), he observed "two females * * * standing in the vestibule", and that maitre d' Rockwell "approached both of these females and had a conversation with them"; that Rockwell "brought both girls into the bar area"; that one of the girls "stopped at the bar * * * closer to the door"; that Rockwell brought the second girl, later identified as Michele Pagan, to Gray, and introduced Gray to her (46); that Rockwell told her, at the same time, "You have nothing to worry about. He is all right. He is a friend of mine" (46-47).

Gray testified that Michele Pagan "checked out my identification by looking in my wallet and looking at the identification which I had there"; that she examined his credit cards from "American Express, several gas companies * * * Macy's and Gimbel's"; that "she walked over with me to the bar", where "[s]he handed the bartender her pocket-book which he placed behind the bar"; that Michele Pagan said, "Let's get a seat," and they proceeded to the rear of the barroom, where they were seated at one of the rear tables by "another gentleman" (48), later identified as

Walter Meyer, Norbert Meyer's brother (86); that they ordered two rounds of alcoholic beverages (48-49); that Michele Pagan solicited him for purposes of prostitution at the table, and warned him that she would not commit certain sexual acts (49); that she directed him to "go outside and get a room" in the hotel (49, 50).

Gray testified that he and Michele Pagan went to a room in Hotel 14, where she "offered to commit an act of sexual intercourse for the sum of \$83"; that he placed her under arrest (51); that they returned to the bar at about 1:05 A.M., where he placed maitre d' Rockwell under arrest; that Michele Pagan "spoke to the bartender and retrieved her pocketbook" (52), and as they left the premises she "was kicking up quite a turmoil"; that she called to Rockwell (who was in the custody of police officer Russo), saying, "Bill, Bill, what are they doing to me?"; that Rockwell said to her, "Don't cause a fuss here. Go along with them. They are policemen"; that Michele Pagan "kicked me and struck me about the body" (53), and Rockwell said to her, "Look, don't cause a disturbance here. Go along quietly" (54); that Michele Pagan pleaded guilty to the charge of violation of Code of Criminal Procedure, §887, subd. 4a; that the charge ("procurer") against Rockwell was still pending; that the summons against petitioner corporation for disorderly premises was still pending (55).

Cross-Examination of Police Officer Gray disclosed no discrepancies in his original testimony, and elicited the following additional facts: That he had been directed to go into the premises (55) for the purpose of determining whether violations of law relating to prostitution were occurring therein (56); that he paid cash for his drinks while standing at the bar (59); that when Rockwell intro-

duced him to Norbert Meyer "as a friend", Mr. Meyer said, "Hello," and just walked away" (61); that Rockwell asked him for identification, and "I showed him my wallet" (63); that when he and Michele Pagan sat down at the table, she "gave me what is known in the profession as a complete toss"; that "she ran her hand up underneath the back of my coat, * * * her attention ran completely around my waistband and she found occasion to kick me in both ankles" (81); that the gentleman who seated them at the table was a brother or cousin of petitioner's principal, Norbert Meyer (86).

Police Officer Ralph Russo testified that he entered the licensed premises on July 20, 1967 at "about midnight", with "other patrolmen" (92); that when he arrived Gray "was inside"; that he saw maitre d' Rockwell in conversation with Gray; that the following night he entered the premises "about 11:30 P.M." (93), and saw Gray standing at the bar; that "maybe about 12:00 o'clock I observed two females come in from the street"; that Rockwell "met" them, and engaged them in conversation; that the "dark haired girl went to the bar and the other girl, Pagan, went over with the maitre d' and spoke to Patrolman Gray"; that Rockwell "left the two of them", and that "the girl was looking at some papers in a wallet that Patrolman Gray had" (94); that "the girl gave her pocketbook to the bartender and * * * both walked to the rear of the premises" out of his sight (95); that he saw Gray and the girl go "into the lobby of the hotel", and he did not see them for "a period of fifteen minutes"; that Gray came back with "the girl in tow," and said, "I just arrested this girl for prostitution"; that Gray arrested Rockwell; that Michele Pagan said to Rockwell, "Bill, Bill, what are they doing to me?"; that Rockwell told Russo that "he wanted to * * *

turn the keys over to someone to close the place" (96), and Rockwell handed the keys to someone in the kitchen area, saying "I am going to be gone for a while. You take care of this" (96-97).

William Rockwell, a witness for the petitioner, testified that he had appeared pursuant to a subpoena (103). He stated that "I can't answer any questions upon the advice of my attorney, until my case is over" (104). He asserted his constitutional privilege against self-incrimination, and the hearing officer excused him from the witness stand (105-106).

[The hearing officer denied petitioner's request "that the case be put over until he is able to answer" (106).]

Joan Santos, a witness for the petitioner, testified that she was in the premises on July 21, 1967 at about 12:00 o'clock (107); that she saw Gray in the premises when she walked in, and "I happened to notice him because of his red, red beard" (108); that she overheard Gray say to Rockwell, "Where are the girls", and she overheard Rockwell say, "I don't know any" (109); that "Walter [Norbert Meyer] was there the early part of the evening and then towards the end of it I noticed his brother was there and not Norby" (108); that the premises are known as Norby Walter's; that Norbert Meyer "was usually there but when he wasn't there then his brother, Walter [Meyer], would take over" (108); that "I work for the City, the Department of Hospitals" (115); that she is the wife of Chino Santos, and the manager of the Chino Santos Band, which played in the premises; that she was in the premises "three or four nights a week" (107); that she saw "the girl" and Rockwell leave with the two police officers (117).

Walter Meyer, a witness for the petitioner, testified that Norbert Meyer, petitioner's principal, is his brother (123); that he is employed as manager in another licensed premises in which his brother is a partner (127); that he entered the premises on July 21, 1967 "about 10 o'clock"; that he was just "visiting, saying hello to my brother * * * and managing the place when my brother left" (123); that his brother asked him to "overseer (sic) the place"; that his brother left the premises "about 10:30" to "a quarter to eleven"; that maitre d' Rockwell had worked in the premises "about three weeks" (129); that he "had seen him five or six times since he had been hired"; that Rockwell did not turn the keys to the premises over to him; that Michele Pagan was in the premises "when I arrived and she left when she was arrested"; that he had seen her "once before" in the premises, "maybe a few days before" (130); that he saw police officer Gray in the rear of the premises with a young lady (126); that Rockwell stopped working in the premises the "night when he was arrested" (129).

[The hearing officer denied petitioner's motion to adjourn the hearing until after a criminal proceeding against the petitioner corporation had been heard and determined (134-135). Norbert Meyer, petitioner's principal, testified under protest (135).]

Norbert Meyer, petitioner's principal, testified that he was in the premises on July 21, 1967 "about 6:00 o'clock in the evening and I was there until about 10:30 or a quarter to eleven"; that he left to listen to a few bands (136); that maitre d' Rockwell had worked for him about "two or three weeks" (139); that Rockwell "came in at 8:00 o'clock in the evening and he left at 4:00 o'clock in the morning"; that Rockwell was a "seating captain", and "had

nothing to do with the business” (140); that he had seen Michele Pagan in the premises “a few nights before”; that he did not know that she was a prostitute (146); that he caters generally “to a single clientele”; that “when girls come in by themselves and are standing at the bar I say to them, ‘Why don’t you put your bag behind the bar’” (139); that the bartender does not give checks to girls who put their bags behind the bar (142).

[Subsequent to the hearing, on November 30, 1967, petitioner notified the Authority, that the criminal charges against Rockwell and petitioner corporation were dismissed (36).]

As to the Sale of Alcoholic Beverages on Credit Without a Permit

Police Officer Gray testified that he and Michele Pagan were served two rounds of alcoholic beverages at the table in the rear of the premises (48-49); that they ordered “a Canadian Club and a Gin and tonic or Vodka” (48); that the “bill was \$4.75” for the two rounds of drinks; that he did not pay with cash, but “I used the American Express Credit Card” (50); that he signed the American Express Charge Record “at the time I purchased the drinks, at the time the bill was presented to me” (51), and he received the acknowledgment of the credit charge in the mail from the American Express Company (50-51, 149b).

Norbert Meyer, petitioner’s principal, testified that he does not have a credit permit; that he does not sell alcoholic beverages on credit; that “alcoholic beverages are sold for cash”; that “[w]e never accept charges at the bar, in any case” (108).

Questions Involved

1. Does the record contain substantial evidence that the petitioner suffered or permitted the premises to become disorderly [solicitation and procuring for purposes of prostitution] on July 21, 22, 1967 in violation of Alcoholic Beverage Control Law, §106, subd. 6?
2. Does the record contain substantial evidence that the petitioner sold, delivered or gave away alcoholic beverages on credit without a duly issued permit in violation of Alcoholic Beverage Control Law, §100, subd. 5?
3. Was the measure of penalty imposed by the Authority a reasonable exercise of its discretion?
4. Did the hearing officer violate a constitutional privilege of the petitioner corporation, when he refused a request to adjourn the proceeding, pending termination of criminal charges against a non-party witness and against the corporation?

POINT I

The testimony of the police officers, credited by the Authority, and the reasonable inferences to be drawn therefrom, constitute substantial evidence that the petitioner suffered or permitted the licensed premises to become disorderly on July 21, 22, 1967 (solicitation and procuring for the purposes of prostitution) in violation of Alcoholic Beverage Control Law, §106, subd. 6; that the petitioner sold, delivered or gave away alcoholic beverages on credit without a duly issued permit in violation of Alcoholic Beverage Control Law, §100, subd. 5.

[Answering Petitioner's Brief, Points I and IV, pp. 5-9, 11-12]

This is a proceeding under Article 78 of the Civil Practice Law and Rules to review a determination of an administrative agency made subsequent to a hearing held pursuant to statutory direction, in which the petitioner attacks the sufficiency of the evidence upon which the agency relied in making its determination.

Hence, the basic question presented herein is whether the determination of the respondent is supported by substantial evidence. (*Civil Practice Law and Rules*, section 7803 (4); *Matter of Humphrey v. State Insurance Fund*, 298 N. Y. 327, 331-332; *Matter of Miller v. Kling*, 291 N. Y. 65, 69.)

If there is substantial evidence to sustain the charges against the petitioner, the determination of the Authority may not be disturbed (*Matter of Avon Bar & Grill v. O'Connell*, 301 N. Y. 150, 153 [citing cases]).

An often quoted statement of the substantial evidence rule is found in *Matter of Kopec v. Buffalo Brake Beam, etc., Iron Works*, 304 N. Y. 65, 71, wherein the Court of Appeals stated:

“Under the test prescribed by our decisions for the judicial review of quasi-judicial determinations, the evidence supporting the findings of an administrative tribunal must be ‘viewed in the light of the record as a whole’ (*Matter of McCormack v. National City Bank, supra*, 303 N. Y. 5, 9), since ‘Evidence which unexplained might be conclusive may lose all probative force when supplemented and explained by other testimony.’ (*Matter of Stork Restaurant v. Boland, supra*, 282 N. Y. 256, 274.) That principle in mind, the quasi-judicial determination is to be sustained if the reviewing court concludes that others might reasonably reach the same result.

“This does not mean that the reviewing court will substitute its judgment for the considered judgment of the administrative tribunal. It does mean, however, that it will apply the only available objective test to determine whether the administrative tribunal did in truth exercise such considered judgment and that it will insist upon “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229.)’ (*Matter of Stork Restaurant v. Boland, supra*, 282 N. Y. 256, 274.)”

In applying the above rule to the quasi-judicial proceeding herein under review, the Authority respectfully submits that the record contained “such relevant evidence as

a reasonable mind might accept as adequate to support a conclusion" (*Matter of Kopec v. Buffalo Brake Beam, etc., Iron Works, supra*), and that there was substantial evidence to support the Authority's determination.

The petitioner was charged with (A) suffering or permitting its premises to become disorderly in violation of Alcoholic Beverage Control Law, §106, subd. 6 on July 21, 22, 1967 [solicitation and procuring for purposes of prostitution], and (B) the sale of alcoholic beverages on credit without a duly issued permit in violation of Alcoholic Beverage Control Law, §100, subd. 5. After a hearing duly held, the charges were sustained.

A. As to the Disorderly Premises on July 21, 22, 1967

The testimony of police officers Gray and Russo, and the reasonable inferences that may be drawn therefrom, furnish substantial evidence that the petitioner suffered or permitted its premises to become disorderly on July 21, 22, 1967 [solicitation and procuring for the purposes of prostitution] in violation of Alcoholic Beverage Control Law, §106, subd. 6.

The testimony of the police officers as to the disorderly premises on July 21, 22, 1967 was substantially uncontradicted in the record.

The record shows that maitre d' Rockwell had worked in the premises about two or three weeks (139); that he worked from 8 P.M. to 4 A.M. (140); that petitioner's principal, Norbert Meyer, "knew him for many years" (139); that on July 20, 1967, ten minutes after Gray entered the premises, Rockwell approached Gray, and actively pandered for the purposes of prostitution; that he asked Gray if he were "looking to have fun"; that he told Gray "that

he could get me a girl to get laid with" (44, 45); that he told Gray to come back the next evening, and that "he could arrange to have me taken care of" (45); that Rockwell introduced Gray to petitioner's principal, Norbert Meyer (44); that when Gray returned to the premises on July 21, 1967, Rockwell was in apparent charge of the premises (55); that Rockwell told Gray "not to worry, that he would get me a professional girl, * * * that he knew who all the professionals were" (46); that Rockwell brought Michele Pagan to Gray, and told her, "You have nothing to worry about. He is all right. He is a friend of mine" (46-47); that when Michele Pagan and Rockwell were placed under arrest, she "was kicking up quite a turmoil" and kept calling to Rockwell, who told her, "Don't cause a fuss. Go along with them. They are policemen" (53); that Rockwell admonished her, "Go along quietly" (54); that before leaving with the police officers, Rockwell handed the keys to the premises to a person in the kitchen area (96-97).

The record further shows that after maitre d' Rockwell introduced Michele Pagan to Gray, she "checked out my identification by looking in my wallet", examining his credit cards; that "she walked with me to the bar", where she "handed the bartender her pocketbook which he placed behind the bar"; that they were seated at a rear table by "another gentleman" (48), the brother of petitioner's principal (86); that they ordered two rounds of drinks; that Michele Pagan described the limitations on her sexual services (49); that she directed him to get a room in the hotel (49, 50); that in the hotel room she "offered to commit an act of sexual intercourse for the sum of \$83"; that he placed her under arrest for prostitution (51), and placed Rockwell under arrest for acting as "procurer"; that Michele Pagan pleaded guilty, and the cases against Rockwell and peti-

tioner corporation (disorderly premises) were still pending (55).

In the light of the foregoing facts, the conclusion is inescapable that maitre d' Rockwell was actively engaged as a procurer for the purposes of prostitution, while working as maitre d' in the premises, and that the petitioner suffered or permitted the premises to become disorderly [solicitation and procuring for purposes of prostitution].

In discussing the meaning of "suffering", the Court in *People ex rel. Price v. Sheffield Farms-Slawson-Decker Company*, 225 N. Y. 25, 30-31 stated:

" * * * Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. * * * Whatever reasonable supervision by oneself or one's agents would discover and prevent, that, if continued, will be taken as suffered. * * * "

Clearly, the petitioner and its agents failed to exercise reasonable supervision, and "[t]he inference is permissible that there was no adequate system either of repression or of detection" (*People ex rel. Price v. Sheffield Farms-Slawson-Decker Company, supra*, 225 N. Y. 25, 28).

The Courts have ruled that a licensee "suffers or permits" premises to become disorderly in one of three ways: (1) The licensee or his agent may *create* the disorder, (2) the licensee or his agent may have *actual knowledge* of the disorder, and fail to take reasonable steps to repress it, and (3) the licensee or his agent may have *constructive knowledge* (the opportunity through reasonable diligence to acquire knowledge) of the disorder, and fail to take reason-

able steps to repress it. (See, *People ex rel. Price v. Sheffield Farms-Slawson-Decker Company, supra*, at pages 29, 30-31.)

In *People ex rel. Price v. Sheffield Farms-Slawson-Decker Company, supra*, at page 29, the Court stated:

“ * * * He must neither *create* nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others (*People v. Taylor, supra* [192 N. Y. 398])” (italics added).

In the case at bar, it is apparent that the licensee or its agent had *created* the disorder, or had actively participated in the disorderly conduct. Hence, inquiry into the licensee's *actual knowledge* or *constructive knowledge* is unnecessary. It is a fundamental presumption that every man knows, indeed, intends, the natural and probable consequences of his own acts. Hence, from the fact that maitre d' Rockwell created the disorder, there is a presumption that he had actual knowledge and constructive knowledge of the disorder. See, *Matter of Chateau Madrid Restaurant Corp. v. New York State Liquor Authority*, — N Y 2d — (decided January 18, 1968), not officially reported, where the Court of Appeals stated: “We agree with the State Liquor Authority that charges Nos. 2, 3 and 4 were sustained by substantial evidence”. In that case, charge No. 4 related to the procuring activity for purposes of prostitution by the bartender in the premises on a single occasion.

The petitioner apparently suggests at Point I of its brief that “suffering or permitting” disorder cannot be inferred from the “single incident” of solicitation and procuring

for the purposes of prostitution by Michele Pagan and maitre d' Rockwell. This contention has no merit. The Court stated in *Tenement House Department of the City of New York v. McDevitt*, 215 N. Y. 160, 165:

“ * * * [A] building may be so used even on a single day as to justify the inference with but slight additional evidence that the illicit use has been continuous.”

In *Matter of Abrams v. Bruckman*, 263 App. Div. 593, 594, the Court stated:

“A single violation of the Alcoholic Beverage Control Law may constitute sufficient basis to cancel a license, and the owner of licensed premises may be liable for the acts of his agent * * * .”

Furthermore, the Authority submits that the question of “single act of vice” is relevant only on the issue of actual knowledge or constructive knowledge (see, *Tenement House Department of the City of New York v. McDevitt*, *supra*, 215 N. Y. 160), and has no relevance where the maitre d' had created the disorder (see, *Matter of Postiglione v. State Liquor Authority*, 23 A D 2d 662; *Matter of Bako v. New York State Liquor Authority*, 10 A D 2d 826; *Matter of Myred Amusement Corp. v. O'Connell*, 282 App. Div. 696), or actively participated in the disorder (see *Matter of L. & L. Lounge v. Rohan*, 10 A. D. 2d 668; *Matter of Kismet Restaurant, Inc. v. New York State Liquor Authority*, 7 A D 2d 967), and presumptively had knowledge of the disorder.

**B. As to the Sale of Alcoholic Beverages on Credit
Without a Permit**

The record shows that Norbert Meyer, petitioner's principal, admitted that petitioner does not have a credit permit (108); that police officer Gray and Michele Pagan were served two rounds of alcoholic beverages at the table (48-49); that Gray was given a bill for \$4.75; that he did not pay the bill with cash, but "I used the American Express Credit Card" (50); that he signed the American Express Charge Record "at the time I purchased the drinks, at the time the bill was presented to me" (51); that he received in the mail from the American Express Company the acknowledgment of the credit charge (50-51, 149 b). Clearly, Norbert Meyer's admission that he does not have a credit permit, and the testimony of police officer Gray, credited by the Authority, constitute substantial evidence that the petitioner sold alcoholic beverages on credit in violation of Alcoholic Beverage Control Law, §100, subd. 5.

The Authority respectfully submits that as to both charges the record shows "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (*Matter of Kopec v. Buffalo Brake Beam, etc., Iron Works, supra*, 304 N. Y. 65, 71); that there was substantial evidence in the record that the petitioner suffered or permitted the premises to become disorderly in violation of Alcoholic Beverage Control Law, §106, subd. 6 on July 21, 22, 1967 [solicitation and procuring for purposes of prostitution]; that there was substantial evidence in the record that petitioner sold alcoholic beverages on credit in the premises without a duly issued permit in violation of Alcoholic Beverage Control Law, §100, subd. 5; that the determination of the Authority should be confirmed; and that the petition should be dismissed.

POINT II

The measure of penalty imposed by the Authority was a reasonable exercise of its discretion.

The Authority adopted the hearing officer's findings, and sustained Charges #1, #2, #3 and #4. The Authority assessed the penalty to be imposed, pursuant to the discretion vested in it under Alcoholic Beverage Control Law, §§2, 17 and 118.

The penalty imposed was a cancellation of the license, plus a \$1000 bond claim.

In assessing the penalty, the respondent recognized the nature and gravity of the offenses charged [solicitation and procuring for purposes of prostitution; sale on credit without a duly issued permit].

Suffering or permitting procuring by the maitre d', and solicitation by a female patron of the premises, for purposes of prostitution, is reprehensible by its very nature and does violence to the public health, welfare and safety. The Courts have repeatedly sustained revocations and cancellations of licenses imposed by the Authority for this type of offense (*Matter of Cota v. New York State Liquor Authority*, 282 App. Div. 931, affd. 306 N. Y. 761; *Matter of M & O Rest. Inc. v. State Liquor Authority*, 24 A D 2d 554).

The measure of penalty may be set aside only if it is so disproportionate to the offenses as to be shocking to one's sense of fairness. (*Matter of McGinnis' Broadway Rest. Inc. v. Rohan*, 6 A D 2d 115, affd. 6 N Y 2d 770; *Matter of Stolz v. Board of Regents*, 4 A D 2d 361.)

Clearly, in view of the nature of the charges against the petitioner, the punishment imposed by the respondent was reasonable and does not shock one's sense of fairness. (Cf. *Matter of Miller v. New York State Liquor Authority*, 20 A D 2d 725.)

POINT III

Petitioner corporation's non-party witness and non-party principal were not compelled to testify against themselves; its non-party principal waived the privilege against self-incrimination by testifying on behalf of the petitioner; the hearing officer's refusal to grant an adjournment was a reasonable exercise of his discretion; and the petitioner corporation received a fair hearing.

[Answering Petitioner's Brief, Points II and III, pp. 9-11]

The record shows that the Authority did not compel petitioner corporation's non-party witnesses, William Rockwell and Norbert Meyer, to testify in violation of their constitutional privileges.

William Rockwell, who was no longer employed by petitioner, appeared at the hearing and was excused from testifying by the hearing officer, when he asserted his constitutional privilege.

Norbert Meyer, petitioner's principal, appeared at the hearing, and after apparently asserting his constitutional privilege, *waived* his privilege against self-incrimination, by testifying on behalf of the petitioner corporation (*People v. Cassidy*, 213 N. Y. 388; see, *People v. Riela*, 7 N Y 2d 571, 577).

As the Court of Appeals said in *People v. Cassidy, supra*, 213 N. Y. 388, 393-394:

“The fifth article or amendment to the Constitution of the United States, and section 6 of article 1 of the Constitution of this state provide that no person shall ‘be compelled in any criminal case to be a witness against himself.’ * * * It is a privilege, but a privilege that * * * can be waived in any case by the person offering himself as a witness.”

Furthermore, the privilege is personal to the non-party witness, and the petitioner corporation cannot assert the objection on behalf of the non-party witnesses. (See, *New York Life Ins. Co. v. People*, 195 Ill. 430, 63 N. E. 264; *Cloyes v. Thayer*, 3 Hill (N. Y.) 564; see, also, *People v. Brown*, 72 N. Y. 571, 577; *June Fabrics, Inc. v. Teri Sue Fashions, Inc.*, 194 Misc. 267, 270.)

It is fundamental that the Authority must conduct a fair hearing (*Matter of Hecht v. Monaghan*, 307 N. Y. 461). The Authority, in the case at bar, conducted an eminently fair hearing, in which petitioner’s principal was present and represented by counsel; petitioner was confronted by the Authority’s witnesses and had an opportunity to cross-examine these witnesses; petitioner had full opportunity to present evidence in its own behalf, and did present evidence in its own behalf, including the testimony of its principal, Norbert Meyer.

The petitioner claims, however, that the refusal of the hearing officer to adjourn the proceeding, until after criminal proceedings against its non-party witnesses have terminated, make the hearing unfair.

This contention is untenable. It is within the province of the Authority to call and conduct such hearings (Alcoholic Beverage Control Law, §119, subd. 2), and it is within

the sound discretion of the hearing officer to grant or refuse to grant an adjournment (see *Silver v. Ellis*, 34 Misc. 760, 763). It is the Authority's experience that former employees of licensees do not always make themselves available at hearings.

Hence, petitioner corporation's contention that its constitutional privileges have been violated are without basis.

CONCLUSION

The Authority respectfully submits that, upon the entire record before this Court, there was substantial evidence in the record that the petitioner violated Alcoholic Beverage Control Law, §106, subd. 6 by suffering or permitting the premises to become disorderly on July 21, 22, 1967 [solicitation and pandering for the purposes of prostitution], and violated Alcoholic Beverage Control Law, §100, subd. 5 by the sale, delivery or giving away of alcoholic beverages on credit without a duly issued permit; that the determination of the Authority should be confirmed, and the petition should be dismissed, with costs.

Respectfully submitted,


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Attorney for Respondent*

BENJAMIN LASKIN

Of Counsel

February, 1968

RECORD PRESS — N. Y. C.  38

New York Supreme Court

Appellate Division—Second Department

HELEN W. AMMANN,

Plaintiff-Appellant,

-against-

RUBY DOBBIS, DONALD DUNKENBERG,
and TWIN D. CORPORATION,

Defendants-Respondents.

APPELLANT'S APPENDIX

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Suffolk County Clerk's
Index No. 135595/1966

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

HELEN W. AMMANN,

Plaintiff-Appellant,

against

RUBY DOBBIS, DONALD DUNKENBERG, and
TWIN D. CORPORATION,

Defendants-Respondents.

Statement of
Appellant under
Rule 5531
Suffolk County
Clerk's No.
135595-1966

Pursuant to Rule 5531 CPLR appellant files the
following statement:

1. The index number in the court below is Suffolk
County Clerk's No. 135595-1966.

2. The full names of the parties which remain
unchanged are:

Helen W. Ammann,
Plaintiff-Appellant
against

Ruby Dobbis, Donald Dunkenberg, and
Twin D. Corporation,
Defendants-Respondents.

3. The action was commenced in the Supreme Court,
Suffolk County.

4. The action was commenced on January 21, 1966,
by service of the summons and complaint upon defendant;
the amended answer of the defendant was served on August
24, 1967; the reply of plaintiff was served on January 31,
1967.

5. The nature of the action is to set aside a

conveyance of property of plaintiff in Riverhead, Suffolk County..

6. The appeal is from a judgment entered June 1, 1967.

7. The appendix method is being used.

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

HELEN W. AMMANN,

Plaintiff-Appellant,

against

RUBY DOBBIS, DONALD DUNKENBERG, and TWIN
D. CORPORATION.

NOTICE OF
APPEAL

#135595/1966

Defendants-Respondents.

S I R S :

PLEASE TAKE NOTICE that the above named plaintiff, Helen W. Ammann, hereby appeals to the Appellate Division of the Supreme Court in and for the Second Department from the judgment of Mr. Justice William R. Geiler, dated June 1, 1967, and entered herein in the office of the Clerk of Suffolk County on June 1, 1967, dismissing plaintiff's complaint herein with costs, and directing that plaintiff execute and deliver to the defendants a release in recordable form from the lien of her purchase money mortgage on premises known as 10 Peconic Avenue, Riverhead, New York, upon receipt of a certified check for \$5,000. and from each and every part of said judgment.

Dated: New York, New York
June 16, 1967

FRANK DELANEY
Attorney for Plaintiff-
Appellant
11 East 82nd Street
New York, New York 10028
212-879-4600

At a Special Term, Part II,
of the Supreme Court of the State of
New York, held in and for the County
of Suffolk, at Riverhead, New York, on
the 1st day of June, 1967.

P R E S E N T :

Honorable WILLIAM R. GEILER,

Justice.

-----X

HELEN W. AMMANN,

Index No.
135595/1966

Plaintiff,

against

JUDGMENT ENTERED
JUNE 1, 1967
At 11:09 A.M.

RUBY DOBBIS, DONALD DUNKENBERG, and
TWIN D. CORPORATION,

Defendants.

-----X

The issues in the above entitled action having
duly come on to be heard before HONORABLE WILLIAM R. GEILER,
a Justice of this Court, without a jury, at a Special Term
Part II, of this Court, held at the Courthouse thereof, lo-
cated at Riverhead, New York, on the 8th, 9th, and 10th days
of May, 1967, and the plaintiff having appeared by her
attorney, FRANK DELANEY, Esq., and the defendants having
appeared by their attorney, PETER GLUCK, Esq., with JULIA
SEIDER, of counsel, and the issues having been duly tried,
and the Court having, after due deliberation duly made and
filed a decision in writing on the 23rd day of May, 1967
in favor of the defendants, dismissing the complaint, and
in favor of the defendants and against the plaintiff on
their counter-claim, and directing the entry of Judgment

thereon, and the costs and disbursements of the defendants having been duly taxed by the Clerk of this Court, in the sum of -----\$173.00 Dollars;

NOW, on motion of PETER GLUCK, Esq., attorney for defendants, it is

ORDERED, ADJUDGED AND DECIDED, that the complaint herein be and the same is hereby dismissed, and that the defendants do recover of the plaintiff the sum of \$173.00 Dollars costs and disbursements, as taxed, and that the defendants have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiff execute and deliver to the defendants a release in recordable form, of the lien of her blanket mortgage as against premises 10 Peconic Avenue, referred to in said mortgage as "Parcel 1", upon receipt of a certified check in the sum of \$5,000.00 at a time and place to be mutually agreed upon by the parties; and it is further

ORDERED, ADJUDGED AND DECREED, that in the event the parties are unable to agree upon a time and place mutually satisfactory therefor, that the Court, upon written notice thereof, shall fix a time and place for the delivery of said release and check.

E N T E R

(sd) WILLIAM R. GEILER
J. S. C.

GRANTED
Jun 1, 1967
NORMAN E. KLIPP
CLERK

Form 91B

M E M O R A N D U M

5/8/67
Cal.#6743
Ind.#135595/66

SPECIAL TERM PART II

SUPREME COURT, SUFFOLK COUNTY

HELEN W. AMMANN,

BY GEILER J. S. C.

Plaintiff, DATED May 23, 1967

vs.

RUBY DOBBIS, DONALD DUNKENBERG
and TWIN D. CORPORATION,

Defendants.

FRANK DELANEY, ESQ
Attorney for Plaintiff
11 E. 82nd Street
New York, N.Y. 10028PETER GLUCK, ESQ.
Attorney for Defendants
185 Montague Street
Brooklyn, N.Y. 11201

Action for rescision of a contract for the sale of real property based upon fraud. The plaintiff has failed to sustain the burden of proof as to the allegations of fraud contained in the complaint. The plaintiff was familiar with all the proceedings with reference to the contract for the sale of real property and was represented by an attorney of her own choice. The complaint is dismissed.

The defendants' counterclaim is granted to the following extent:

The plaintiff is directed to execute and deliver a release of lien to Parcel 1 and the defendants are to tender a certified check in the sum of \$5,000 at a time and place mutually agreed upon by the parties.

This constitutes the decision of the Court pursuant to C.P.L.R. 4213.

Settle judgment.

Complaint

SUPREME COURT OF THE STATE OF NEW YORK
SUFFOLK COUNTY

-----x

HELEN W. AMMANN, :

Plaintiff, :

against :

COMPLAINT

RUBY DOBBIS, DONALD DUNKENBERG and :

TWIN D. CORPORATION, :

Defendants. :

-----x

Plaintiff complaining of defendants alleges and shows to the Court.

1. Plaintiff prior hereto was the owner in fee of certain piece and parcel of land and the buildings and improvements thereon situated lying and being in Riverhead, County of Suffolk, State of New York, bounded and described as follows:

PARCEL I - 10 Peconic Avenue

BEGINNING at a point on the easterly side of Peconic Avenue, which point is South 15°27'30" West, a distance of 34.48 feet, as measured along the easterly side of Peconic Avenue, from the corner formed by the intersection of the easterly side of Peconic Avenue and the southerly side of Main Street, said point of beginning being at the center of a common or party wall dividing the building of Helen W. Ammann; running thence South 75°45'00" East along the center line of said common or party wall, a

Complaint

distance of 71.18 feet to a point and lands now or formerly of J. J. Sullivan; running thence South $6^{\circ}01'30''$ East along said last mentioned lands, a distance of 30.81 feet to a point; running thence North $83^{\circ}10'40''$ East still along said last mentioned lands, a distance of 27.78 feet to a point marked by a concrete monument and lands now or formerly of Fenimore Meyer; running thence South $8^{\circ}07'00''$ East along said last mentioned lands, a distance of 59.44 feet to a point marked by a concrete monument and lands of Theodore Leavitt; running thence North $74^{\circ}48'00''$ West still along said last mentioned lands, a distance of 59.63 feet to a point marked by a concrete monument; running thence North $2^{\circ}16'00''$ West still along last mentioned lands, a distance of 30.75 feet to a point, running thence North $74^{\circ}45'30''$ West still along said last mentioned lands, a distance of 62.91 feet to a point in the easterlyline of Peconic Avenue; running thence North $15^{\circ}27'30''$ East along the easterly line of Peconic Avenue, a distance of 42.33 feet to the point or place of beginning; said courses and dimensions being in accordance with a survey made by Alden W. Young, P. E. and L. S. , N.Y.S. Lic. No. 12845, Riverhead, New York, dated October 23 and October 30, 1963.

TOGETHER, with all the right, title and interest, if any, of the seller of, in and to Peconic Avenue to the center line thereof.

TOGETHER, with the Seller's right of perpetual use, in

Complaint

common with the owner of the adjoining premises, of the common or party wall hereinabove referred to, so long as the buildings now standing on the respective premises shall continue to exist; and SUBJECT to the privilege of the owner of said adjoining premises to use and occupy a kitchen and balcony which are a continuation of an apartment on the third story of the building on the North which extends over the roof of the above described premises and to the use of the service pipes leading to the said kitchen which run through the above described building.

BEING AND INTENDED to be the same premises conveyed to Matthias N. Ammann by deed dated March 26, 1919, and recorded in the Suffolk County Clerk's office on March 28, 1919 in Liber 975 of Deeds at Page 478, and thereafter devised to Helen W. Ammann by the Will of Matthias N. Ammann recorded in the office of Surrogate of the County of Suffolk in Liber 224 of Wills at page 278.

PARCEL II - 1-9 East Main Street

BEGINNING AT a point on the easterly side of Peconic Avenue, which point is North $15^{\circ}31'$ East, a distance of 42.33 feet as measured along the easterly side of Peconic Avenue from the northwesterly corner of land of Leavitt, said beginning point forming the center of a common or party wall dividing the building on the premises hereinafter described and the adjacent building of Helen W. Ammann; running thence North $15^{\circ}31'$ East along the easterly side of Peconic Avenue 34.48

Complaint

feet to Main Street; thence North $83^{\circ}36'$ East along the line of the building and sidewalk fronting Main Street 54.13 feet to land of John J. Sullivan; thence South $5^{\circ}58'$ East along land of John J. Sullivan 57.19 feet to land of Ammann; thence North $75^{\circ}41'30''$ West along land of said Ammann; and along the center of said party or common wall 71.18 feet to the easterly side of Peconic Avenue, the point or place of beginning.

TOGETHER with the right of perpetual use in common with Helen W. Ammann of the said party or common wall so long as the buildings now standing on the respective premises shall continue to exist, and subject to a similar right in said party or common wall which is hereby reserved in favor of said Helen W. Ammann, her heirs, executors, administrators and assigns.

"THE party of the second part shall also have the privileges to use and occupy a kitchen and balcony which are a continuation of the apartment of the third story of the building on the premises hereinabove described which kitchen and balcony extend in a southerly direction onto and over the roof of the adjacent building of said Helen W. Ammann, and to use the service pipes leading to the kitchen aforementioned running through the adjacent building of said Helen W. Ammann, immediately to the south of the said party or common wall, between the cellar of the adjacent building of said Helen W. Ammann and the said kitchen; said privilege to continue at the will of said Helen W. Ammann, her heirs, legal representatives and assigns, and subject to discontinuance thereof by

Complaint

her of them upon ninety days written notice to the party of the second part, her heirs, legal representatives or assigns. TOGETHER with a perpetual right to use, maintain and repair the sewer pipe or line running under and across adjacent land of said Helen W. Ammann between the above described premises and the public sewer.

THE foregoing description is in accordance with a survey made by Daniel R. Young, P. E. and L. S., and Alden W. Young, L. S., both of Riverhead, New York, dated February 24, 1944, and with a survey made by Alden W. Young dated October 23 and October 30, 1963.

BEING AND INTENDED to be the same premises conveyed to Helen W. Ammann by Matthias N. Ammann by deed dated January 1st, 1944, and recorded in the Suffolk County Clerk's office on March 21st, 1944, in Liber 2348 of Deeds, at Page 42, and to Matthias N. Ammann and Helen Ammann by the Long Island Lighting Company by deed dated July 1st, 1929, and recorded in the Suffolk County Clerk's office on July 1st, 1929, and recorded in the Suffolk County Clerk's office on July 2nd, 1929, in Liber 1441 of Deeds, at Page 312.

2. Twin D. Corporation is a corporation organized and existing under the laws of the State of New York.

3. That plaintiff, Helen W. Ammann was the sole owner of the stock of M.N. Hardware, Inc., a corporation organized and existing in the State of New York, which with its predecessor had operated a family hardware business located on the aforesaid premises without interruption for

Complaint

some 150 years.

4. That Plaintiff, Helen W. Ammann had theretofore advanced considerable sums to the aforesaid corporation in excess of \$33,000 for the purposes of its business.

5. That on or about May 1, 1965 the said business of the M.N. Hardware Inc. became insolvent and discontinued business and a committee of creditors was formed of whom one D'Andrea and one Goldman were members, and Messrs. Goldman, Horwitz and Chernow, counsel.

6. That efforts were then initiated to rehabilitate the business by raising new capital, and the stock in trade of the said corporation was allowed to remain in said building by said plaintiff, Helen W. Ammann without any demand for rent, and out of family pride Helen W. Ammann promised the creditors, most of whom she had known and dealt with for many years, that she would not assert her claim against the corporation or any claim for rent of premises, which she had no intention of doing and informed them her only purpose was to uphold the family name and rehabilitate the business.

7. That plaintiff was pressed and harassed by certain creditors to make payments although she had no legal liability therefor, and was made nervous and ill therein.

8. That plaintiff, Helen W. Ammann had a homestead at Jamesport and her sister Mrs. Anita Dunkenberg resides thereon as a tenant, and in consequence of the

Complaint

predicament, the son of Mrs. Anita Dunkenberg, Donald Dunkenberg, representing himself as a member of plaintiff's family, and acting only in plaintiff's interest, urged plaintiff in conjunction with one Peter Gluck, the father of the wife of defendant, Donald Dunkenberg, and defendant Ruby Dobbis, a real estate man, and a partner of defendant Dunkenberg, to sell the property, not only that occupied by said insolvent corporation, but also the contiguous buildings of great and independent value owned by plaintiff.

9. That the said defendants, Donald Dunkenberg and Ruby Dobbis were well informed of the strain and worry that plaintiff was enduring due to the insolvency and the attendant matters because the mother of said defendant Dunkenberg was a confidante of plaintiff and said defendant Dunkenberg was a family visitor to plaintiff's home and well aware of plaintiff's distress and nervousness.

10.. That on or about July 1, 1965 defendants Dunkenberg and Dobbis, acting in concert, did conspire to defraud plaintiff and to obtain said property from her, and to make false representations as aforesaid and elsewhere upon which plaintiff relied, and that Twin D. Corporation, a corporation controlled by them, entered into said conspiracy.

11. That plaintiff is a widow, honorable, mature, and 72 years of age of a trusting nature, and non-experienced in business, having lived a sheltered life in Suffolk County.

Complaint

12. That with the assistance of aforesaid Peter Gluck, Esq., the father-in-law of said defendant Dunkenberg, the latter and said defendant Dobbis caused a form of contract of sale of the aforesaid premises to be prepared on the Standard Form of the New York Board of Underwriters of numerous pages but which contained numerous other clauses not related to the title to real property but covering other personal property and choses in action of plaintiff.

13. Said contract was not on information and belief ever duly executed by the parties thereto, never came into being, and neither plaintiff, nor anyone on her behalf, ever had nor now has a copy thereof, executed by the alleged purchasers.

14. That thereafter, at a date unknown to plaintiff, the defendants prepared a so called binder and made a payment to plaintiff of \$2000, no copy of which binder was given to plaintiff or anyone on her behalf nor has she any information with respect to its contents nor has she now any copy.

15. That plaintiff did not wish to sell the property and offered to return the sum of \$2000 paid at the time of signing said binder, but defendants refused to accept the same and falsely told plaintiff she was obliged legally to convey the aforesaid property to them by reason of the aforesaid documents, although on information and belief

Complaint

the same did not contain all the terms of a contract for sale of real property, was incomplete and not duly executed, and was not enforceable in law or equity.

16. That thereafter in or about July 1965, plaintiff signed an undated form of contract because she was away and left the same with her attorney, Serena H. Stackpole, Esq and further concerted efforts were made by defendants to force and induce plaintiff to convey the real property described in the contract of sale upon the false representations to her that she was already legally bound and obligated to convey said real property, and would be subject to and compelled by legal action to do so if she refused.

17. That thereafter in the absence of plaintiff in Massachusetts without knowledge or authorization of plaintiff material changes were made in said contract and certain new clauses inserted and as so altered returned to defendants.

18. No valid contract was executed by plaintiff and the defendants, or any of them, and plaintiff did not receive into her possession, or see any copy of said amended contract executed by plaintiff and defendants and has never agreed to such contract.

19. That the defendants further represented falsely to plaintiff who relied thereon, that they would do the following and would bind themselves legally in writing so to do:

Complaint

a. That they would hold her harmless of all claims.

b. That they would not file any claim in the assignment for creditors on her behalf or as assignee of any claims from plaintiff or for any rent of premises sought to be purchased by them.

c. That they would immediately cause her complete exoneration from liability on the mortgage on premises by agreement with the mortgages or by payment.

d. That they would continue the business of the M. N. Ammann Hardware, Inc. at its present location and in the same manner and same appearance and with the same sign as theretofore.

e. That they would not complete the sale of the real property of the transaction unless Matthias Corwin Ammann executed an assignment to plaintiff of all claims against M.N. Ammann Hardware, Inc., and plaintiff relied on this for preventing a conveyance until such assignment was executed.

f. Falsely represented to the creditors committee that a lawyer of their appointment represented plaintiff Helen W. Ammann, and said lawyer without authority conducted legal actions regarding plaintiff's claims against the corporation in violation of said representation.

g. Falsely represented that plaintiff was legally obligated to perform said contract so altered and would be subject and compelled by legal action to convey

Complaint

20. That the said representations were false and defendants knew them to be false, but did not and had no intention of fulfilling these representations, and the same was a scheme and plan in which defendants conspired to get by said false representations on which plaintiff relied to obtain a contract of sale of said premises, and obtain a conveyance of same, and the same was accomplished without knowledge of plaintiff of the time and place of the closing of title or the delivery of a deed.

21. Plaintiff requested after delivery of the deed that the title to the said premises be reconveyed to her and did and has at all times since offered to repay defendants any moneys received by her from them and their reasonable expenses and any further reasonable requests.

22. That defendants in violation of the rights of plaintiff and in an effort further to overreach and defraud plaintiff brought a petition and precept in summary proceedings against MN. Ammann Hardware, Inc. and Isidore Chernob, its assignee, for benefit of creditors for rent of a part of premises from which conveyance from plaintiff had been fraudulently obtained for nonpayment of rent in the sum of \$3,400 for the months from April 1, 1965 through November 1965 at \$42.50 a month, and the petition was verified under oath by defendants Dunkenberg on November 3, 1965.

23. That defendants have demanded for reconveyance the return of the moneys paid by them, and \$40,000

Amended Answer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X

HELEN W. AMMANN, :

Plaintiff, :

against :

AMENDED ANSWER

RUBY DOBBIS, DONALD DUNKENBERG, and :
TWIN D. CORPORATION, :

Index No.
135595-66

Defendants. :

-----X

The defendants, as and for their amended answer to the complaint herein, respectfully allege and show to this Court:

FIRST: Deny the allegations contained in paragraphs numbered "10", "12", and "13" to "23", inclusive, of the complaint.

SECOND: Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "1", "3", "5", "6", "7", "8", "9" and "11" of the complaint.

As and For a Defense and Counterclaim

THIRD: That the plaintiff duly ratified and confirmed the contract for the sale of premises 1-9 East Main Street and 10 Peconic Avenue, Riverhead, New York, and the sale, transfer and conveyance thereof to the defendant corporation by, inter alia: the execution and delivery of

Amended Answer

a deed thereto which was duly recorded; the acceptance and retention of the consideration therefor; the acceptance, recording and retention of a purchase money mortgage given to secure payment of the purchase price (a copy of which mortgage is annexed to and made a part hereof); the execution and delivery to the said defendant of various written documents in furtherance of and in conjunction with the closing of title; the acceptance of payments of interest and amortization under said purchase money mortgage for approximately six months and one year, respectively, after delivery of the deed.

FOURTH: That the aforesaid purchase money mortgage contains the following provision, to wit:

"The mortgagee agrees to release from the lien of this mortgage, and to execute and to deliver to the mortgagor, appropriate instruments of release therefor, the said parcel hereinabove described as Parcel I, upon payment to her by the mortgagor of the sum of Five Thousand and 00/100 (\$5,000.00) Dollars additional amortization thereon, with interest thereon to the date of payment, provided that the mortgagor shall give written notice by registered mail of its intention to pay said sum and to procure said release at least thirty days in advance."

FIFTH: That upon the trial of this action the defendants will tender to the plaintiff a certified check in the sum of \$5,000., together with an appropriate form of release of the lien of the said mortgage on premises 10 Peconic Avenue and will request that the plaintiff execute, acknowledge and deliver to the mortgagor the aforesaid release in accordance with the foregoing provision of the

Amended Answer

said mortgage as more particularly set forth in paragraph "Fourth" hereof.

WHEREFORE, the defendants demand judgment against the plaintiff (1) dismissing the complaint herein; and (2) in the affirmative, judgment directing and compelling the plaintiff to execute the aforementioned release upon payment to her of the sum of \$5,000; and (3) such other and further relief as to this Court may seem just and proper, together with the costs and disbursements of this action.

PETER GLUCK
Attorney for Defendants
Office & P. O. Address
185 Montague Street
Brooklyn, New York 11201

Reply

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

-----X

HELEN W. AMMANN,	:	
	:	
Plaintiff,	:	
	:	
against	:	
	:	<u>REPLY</u>
RUBY DOBBIS, DONALD DUNKENBERG, and	:	Index No.
TWIN D. CORPORATION,	:	135595-66
	:	
Defendants.	:	
	:	

-----X

Plaintiff for her reply to the amended answer of
 defendants allege and show to the Court:

Deny the allegations of paragraphs Third and
 Fifth, of the Amended Answer.

WHEREFORE, plaintiff repeats her demand for the
 judgment against defendants contained in the complaint herein.

FRANK DELANEY
 Attorney for Plaintiff
 11 East 82 Street
 New York, New York 10028
 TR 9 4600

STATE OF NEW YORK)
 COUNTY OF SUFFOLK) ss.:

Helen W. Ammann being duly sworn, deposes and says
 that deponent is the plaintiff in the within action; that
 deponent has read the foregoing Reply and knows the contents
 thereof; that the same is true to deponent's own knowledge,
 except as to the matters therein stated to be alleged on in-
 formation and belief, and that as to those matters deponent
 believes it to be true.

Sworn to before me, this 30 day of January, 1967

Ammann for Plaintiff- Direct

Ammann - direct page 16

MR. DELANEY: Now may I have your copy of the contract of sale?

MRS SEIDER: Certainly (handing)

MR. DELANEY: I should like to have marked for identification a paper writing entitled - this agreement made the 12th of August between the plaintiff and the Twin D. Land Corporation, a defendant, entitled Contract of Sale.

THE COURT: Mark it.

(Copy of contract, referred to, was marked (p.17) for Identification only as Plaintiff's Exhibit 2.)

Q Now Mrs. Ammann, I show you Plaintiff's Exhibit 2 for Identification and ask you if on the last page this signature is yours (handing)?

A Yes. May I look at this?

Q Will you please look at Plaintiff's Exhibit 2 for Identification? If you will just examine that?

A Yes. This is my signature.

Q If you will just examine that I'll ask you a question --

A This is my signature.

Q Yes. Now looking at Plaintiff's Exhibit 2 for Identification, and noting the pages there, did you ever see that contract or any counterpart thereof before December 15, 1965?

Ammann for Plaintiff - Direct

A Well, part of this I'm not familiar with, or was not familiar with.

Q Was there a part of it --

THE COURT: She did not answer the question directly.

MR. DELANEY: She said there was a part that she was not familiar with. (page 18)

THE COURT: But the question was, did you ever see this contract prior to December 15, 1965.

MR. DELANEY: May I have it read?

THE COURT: Please read the question.

(Whereupon, the reporter read the last question, as recorded.)

THE WITNESS: You want me to answer that question?

Q Yes.

A Well, I can't say that I saw it in its entirety.

MR. DELANEY: May I have the exhibit please? (hande

Q Now I show you two pages of that contract entitled "Rider C" and ask you if you ever saw those two pages prior to December 15, 1965 (handing)?

A This isn't all familiar to me, no.

MR. DELANEY: May I have the document? (handed)

Q Now I show you "Rider B" of that contract and call your attention to a portion stricken out in pencil, and ask you if you ever saw that stricken out in pencil prior to December 15, 1965? (page 19)

A Well, (Reading) "The buyer shall hold --" No, I'll

Ammann for Plaintiff - Direct

say no to that.

Q May I have the contract please? (handed)

PAGE 19 Ammann - direct

Q Did you promise the creditors of the M.N. Ammann Hardware, Inc. that you would not file any claim in bankruptcy or assignment for any indebtedness that that corporation had to you personally?

MRS. SEIDER: I object to that, Your Honor.(p. 20)

THE COURT: What is the relevancy of this, sir?

MR. DELANEY: It appears that in these other documents, in the contract, in this Rider C that an assignment of this is indicated also an assignment of such claim is made to the purchaser.

THE COURT: This contract is not in evidence yet, is it?

MR. DELANEY: No.

The COURT: And you are saying that in Rider C there is an assignment, part of the consideration is the assignment of her claims?

MR. DELANEY: That is true.

THE COURT: Against the hardware company?

MR. DELANEY: Yes.

THE COURT: Mrs. Seider, did you hear?

MRS. SEIDER: I heard that, Your Honor, but any conversations allegedly had were certainly not

Ammann for Plaintiff - Direct

in our presence, nor are we bound by them, nor are we bound by any operation of mind here. We had no knowledge of it whatsoever. (page 21)

THE COURT: I'm afraid it isn't binding on these defendants. I'll sustain the objection, Mrs. Seider.

MRS. SEIDER: Thank you, sir.

page 21 Ammann - direct

Q I show you a packet with the name Syrena H. Stackpole, Riverhead, on it and ask you to look at the contents of that, and the cover, and ask you if you received that at the time you received the December 13, 1965 letter which is Plaintiff's Exhibit 3 in Evidence (handing)? (page 22)

A Yes.

MR. DELANEY: I would like to have that packet marked in evidence.

THE COURT: Any objection, Mrs. Seider?

MRS. SEIDER: Not at all, Your Honor.

THE COURT: Let it be received and marked in evidence.

(Packet of documents with envelope, above referred to, was received in Evidence and was marked Plaintiff's Exhibit 4.)

page 23 Ammann - direct

Q I ask you to examine that paper, denominated on the back, Contract of Sale, dated August 23, 1965 and containing

Ammann for Plaintiff - Direct

Rider A, Rider B and Rider C, and ask you if you ever saw that paper writing in that form prior to December 13, 1965?

A No, because -- (page 24)

Q (Interposing) Well, the answer is no?

A No, no.

page 24 Ammann - direct

Q Was there -- I withdraw that. At that time did you sign a contract with respect to the property of One to Ten Peconic and also on Main Street in Suffolk County, in Riverhead?

A Yes.

Q Was there a typewriter present for the use of any of you at the bank on that day?

A I do not recall a typewriter being used, or seeing one.

Q I show you Plaintiff's Exhibit 2 for Identification and ask you if you recall on that day of any changes were made on that exhibit by typewriter at the bank (handing)?(p.25

A Which portion of it? Just this portion?

Q I am asking if at any time a typewriter- typewriting changes were made on Exhibit 2?

A No. Oh, no, no.

Q Now Mrs. Ammann, do you know a lawyer named Mallin, M-a-l-l-i-n, Edward J. Mallin?

Ammann for Plaintiff - Direct

A I do not.

Q Did you ever meet him?

A I did not, I have not.

Q Did you ever engage him to act as your lawyer?

A I did not at any time.

Q Did you ever authorize anybody to engage him as your lawyer?

A No.

page 26 Ammann - direct

Q Mrs. Ammann, I show you this Plaintiff's Exhibit 5 for Identification and ask you if you ever authorized anyone to bring such an action to recover the real property (handing)?

A Why no - if I understand it.

Q Mrs. Ammann, I show you a letter dated December 13, 1965 from D & D. Associates, 185 Montague Street, Brooklyn, New York, and ask you if you recognize the signature on the letter (handing)?

A Well, it's Don's signature apparently.

MR. DELANEY: I offer this letter in evidence.
(Handed to defense counsel.)

MRS. SEIDER: No objection.

THE COURT: It will be received and marked in evidence.

(Letter referred to was received in Evidence and was marked Plaintiff's Exhibit number 6.)

Ammann for Plaintiff - Direct

page 28 Ammann - direct

Q Now I show you, Mrs. Ammann, Plaintiff's Exhibits 6 and 7, being letters exchanged between Mr. Dunkenberg and Miss Stackpole, dated December 15th and December 13, 1965, and ask you if you have any knowledge whatsoever of the transaction that is discussed therein (Handing)?

page 29 Ammann - direct

THE WITNESS: Rent arrears, no I have no recollection.

page 30 Ammann - direct

Q Did you ever agree at any time to release the parcel One to Ten Peconic Avenue from the lien of the purchase money mortgage upon the payment of \$5,000?

MRS. SEIDER: If Your Honor please, I object to that because the instrument speaks for itself.

THE COURT: I'll sustain the objection.

MR. DELANEY: She testified, Your Honor, that she had never seen Rider C.

Mr. GLUCK: There is no reference in Rider C to the mortgage. It's in Rider B.

MR. DELANEY: Will Your Honor examine the second page of Rider C, the paragraph numbered one --

MRS. SEIDER: We need one copy to work with. We have given you our only copy.

MR. GLUCK: You have both copies.

Ammann for Plaintiff - Direct

THE COURT: (To the witness) May I see it, Madam?
(Handed) (page 31)

Now your question to the witness is did she ever agree to this mortgage arrangement?

MR. DELANEY: That's right, this mortgage release.

THE COURT: And your objection to this, Mrs. Seider, is on the ground that the instrument speaks for itself?

MRS. SEIDER: Yes, Your Honor.

THE COURT: And she previously has testified that she has never seen Rider C; is that not correct?

MR. DELANEY: Yes, Your Honor.

MRS. SEIDER: I believe she testified she did see see Rider B. And may I respectfully call the Court's attention to the fact that the mortgage appears in Rider B.

THE COURT: There is some reference to mortgage terms in Rider C, is there not?

Mrs. SEIDER: As well, that's right. It's referred to in both, Your Honor.

MR. DELANEY: Well, the release provision doesn't appear any place else but in that Rider C. (p. 32)

THE COURT: Mrs. Seider, Mr. Delaney makes the point that the release provision only exists in Rider C.

MRS. SEIDER: That's correct, Your Honor. But will

Ammann for Plaintiff - Direct

Mr. Delaney at this time on the record concede that when an attorney represents a client that the attorney is the agent of the client and is presumed to have authority to make any necessary corrections to any written agreement, particularly when the client is present?

MR. DELANEY: I won't concede that, no.

THE COURT: Well, you have your objection and I sustain it.

Proceed, sir.

MR. DELANEY: You sustained the objection to my question whether she ---

THE COURT: Yes, because she has testified that she never saw Rider C.

MR. DELANEY: Well, then I asked her -- Then trespassing on Your Honor, may I ask her then if at any time she ever agreed to release parcel (p.3: One to Ten Peconic Avenue from the lien of the mortgage on a payment of \$5,000?

THE COURT: You may ask that question.

Q That's my question.

A No.

page 33 Ammann - direct

Q Mrs. Ammann, did you ever agree to procure from your son Peter Amman an assignment of his claim as a creditor

Ammann for Plaintiff - Direct

M.N. Ammann Hardware, Inc. to the purchasers?

A Why I couldn't, I couldn't agree to it because I couldn't do it. He's over 21.

Q Well, did you ever so agree?

A No.

Q Did you ever gurantee -- withdraw that. Did you ever state that there was a full and complete list of creditors against M.N. Ammann Hardware, Inc. of which you had knowledge?

A No.

page 34 Ammann - direct

Q Mrs. Ammann, are you still being dunned for indebtedness of the M.N. Ammann Hardware, Inc.?

A Yes.

MRS. SEIDER: If Your Honor please, I object to that.

THE COURT: I don't see the point of it, sir.

MR. DELANEY: Because, Your Honor, the fact that she was to be held harmless of these claims is stricken out in the Rider in pencil which she said she didn't ever see so stricken out. And the obligations to hold her harmless are not assumed by the defendants here, the purchaser, by the Twin D Corporation, and so her harrassment still goes on. And

Ammann for Plaintiff - Direct

I expect to --

THE COURT: How does that go to the heart of re-
cission?

MR. DELANEY: To prove the fact that this was a
principal object of Mrs. Ammann in contemplating the
sale at all on any terms - was to be held harmless of
this indebtedness.

THE COURT: And because some third party sends her
a claimletter it is indicative of the fact that she
has not been held harmless?

MR. DELANEY: It is -- Yes. I think the fact that
she's being dunned and can't turn it over to anybody
else is indicative of the fact that she was not (p. 36)
held harmless.

THE COURT: Perhaps the third party wishes to look
to her rather than to somebody else. I don't see
that this is binding on these defendants.

I'll sustain the objection, Mrs. Seider.

page 37 Ammann - direct

Q Mrs. Ammann, I show you a paper writing indicating
an assignment by you to the Twin D. Land Corporation, the de-
fendant here, for the sum of \$2,904.16, according to a state-
ment of account, and ask you if you were requested by defen-
dants to sign this assignment (handing)?

A Yes.

Q Did you ever sign it?

Ammann for Plaintiff - Direct

A If. I understand this -- Yes. It's not signed there but it was part of the --

Q (interposing) Well, now Mrs. Ammann, I would like --
MR. DELANEY: I would like to have this marked for identification.

(Assignment referred to was marked for Identification only as Plaintiff's Exhibit number 9.)

Q Now Mrs. Ammann, I ask you to look at Plaintiff's Exhibit 9 for Identification and the schedule attached thereto, for rent April through September, and ask you if you ever signed the assignement of rent from April through September (Handing)?

A No, I did not.

Q Well, you -- And when you testified you had signed it you were in error?

A I didn't -- I didn't understand what that piece was. I thought that was on the purchase price of the property.

Q Well, you had never signed that, this paper?

A Most assuredly not. I'm awfully sorry about the other. There was confusion there, and I thought it had to do with(p.39) the down payment on the purchase price.

page 39 Ammann - direct

Q Were you present at the time the deed was delivered?

A No.

page 40 Ammann - direct

Ammann for Plaintiff - Direct

Q Now did you know that that deed was recorded?

A No. I left it to my attorney.

page 43 Ammann - direct

Q Were you on October 5, 1965 advised by Miss Stackpole that due to the contract to which you were a party you must close title or be sued?

MRS. SEIDER: I object to that.

A Yes.

page 43 Ammann - direct

Q Did Miss Stackpole advise you on October 5, 1965 about closing title?

A On or about that date, yes.

Q And what did she advise you?

A I said that I did not want to sell, and she said you will have to sell because you have signed a contract to sell and you will be sued otherwise, and also that you have judgments coming up against you.

Q At that time did you instruct Miss Stackpole not to close the title?

A She -- Yes, not to close the title untill the expiration of ten days.

MRS. SEIDER: If Your Honor please, I object to that. Any conversation she had is not binding on us.

THE COURT: Yes. I don't think Miss Stackpole is a party to this action.

Ammann for Plaintiff - Cross

MRS. SEIDER: She is not.

MR. DELANEY: She is not.

THE COURT: So I will have to sustain the objection

MRS. SEIDER: May I respectfully request that the answer be stricken from the record?

THE COURT: Yes. Strike it out.

page 47 Ammann - cross

Q Now come, Mrs. Ammann, if I may have your attention. I believe that you have from time to time been on many a speaker's platform and I think you have a general reputation of being a woman of considerable acumen and poise and ability; would that be an unfair statement?

A Rather.

page 48 Ammann - cross

Q And have you had occasion to address large assemblages of people from time to time?

A Yes, but not on legal things.

Q But your general knowledge as to business, and living in these United States and operating both as a business woman and in civic life and in public life is a little bit more than just general; is that right, you are not an ordinary housewife, are you?

A I would say I am.

Q We are all housewives, whether we want to be or not, but wouldn't you say your experience has been a little bit

Ammann for Plaintiff - Cross

above average?

A Not in matters - not in legal matters, not at all.

page 56 Ammann - cross

Q Mrs. Ammann, referring to your previous testimony, did I understand you to say that you had never seen Rider C.

A There are certain things in Rider C which I have never seen.

Q Had you ever seen Rider C?

A No.

page 60 Ammann - cross

Q Well, now is there any period when you got up and walked out of the room, or did you stay there during the entire negotiations?

A As well as I can remember I stayed there.

Q Throughout the negotiations?

A Yes.

Q That is correct, isn't it?

A Yes.

Q And do you recall Mr. Gluck stating that some of this had to be filled in with a typewriter? This, if you will, Mrs. Ammann (indicating)?

A There was no typewriter there.

page 61 Ammann - cross

Ammann for Plaintiff - Cross

Q I see. But you don't recall both contracts being taken from the room by Mr. Stark for the purpose of having them conformed?

A I really do not.

page 65 Ammann - cross

Q But you had sold property before where contracts were prepared by your own attorney?

A I left that to my attorney.

Q I see. Now addressing your attention to Paragraph 13 of the complaint, you stated that the contract was not executed by the parties, never came into being and neither plaintiff or anyone on her behalf had nor now has a copy thereof executed by the alleged purchasers.

Did you see that paragraph and read it before you (p.66) signed this verified complaint?

A Yes, because when it was given to me it was not in that form, the original.

Q Just answer my question please. Addressing yourself to Paragraph 13 - I didn't ask you for a conclusion - I merely asked you, did you state that it had not been executed by the parties thereto and that it never came into being and that it had never been executed by the alleged purchasers; did you or did you not?

A Did I or did I not what?

Ammann for Plaintiff - Cross

Q When you read Paragraph 13th. I asked you did you read -- Did you read Paragraph 13th? Did you did you not read Paragraph 13th?

A Yes, I read Paragraph 13.

Q All right, Now isn't it a fact that this complaint is verified by you and sworn to on January 15, 1966?

A Not in the form in which I received it.

Q I didn't ask you that. I asked you did you not sign and verify and swear to this in January of 1966?

A Apparently on advice I did.

Q Whose advice? On whose advice did you sign? (p. 67)

A My attorney's advice.

Q In other words, Mr. Delaney who represented you at this point sent you this through the mails; is that correct? (indicating)

A No, this was earlier.

Q What?

A Said contract was not on information and belief ever duly executed by the parties thereto, never came into being and neither plaintiff --

Q (Interposing) I don't wish to confuse you, Mrs. Amma

A Well, you are confusing me.

Q I'm sorry if I am. I have no intention of confusing you. I just want to direct your attention --

THE COURT: (To the witness) Mrs. Ammann --

THE WITNESS: What is it?

Ammann for Plaintiff - Cross

THE COURT: -- if you will look at Mrs. Seider when she asks you a question, instead of trying to read, I think you will better understand her questions
Please proceed.

Q I merely asked you in relation to Paragraph 13th, did you read it before you signed the contract? (page 68)

A I did.

Q I mean did you read it, not the contract?

MR. DELANEY: Your Honor, she said she did.

MRS. SEIDER: I beg your pardon --

THE COURT: The witness is not cooperating with the attorney. Isn't it obvious to you?

MR. DELANEY: No --

THE COURT: She is reading while Mrs. Seider is asking her questions.

MR. DELANEY: The question was though whether she read it, and she said she did.

page 68 Ammann - Cross

Q Mrs. Ammann, shall we start again please?

THE COURT: (To the witness) Do you want to read it?

THE WITNESS: Yes. (Reading) "Said contract was not on information and belief ever duly executed by the parties thereto, never came into being and -neither plaintiff nor anyone on her behalf ever had or now has a copy thereof executed by the alleged purchasers.

Ammann for Plaintiff - Cross

Now what is your question? (page 69)

Q You have read it now. My question is this, Mrs.

Anmann: Is it not a fact that on December 15, 1965 you had already obtained a copy not only of the contract but of the mortgage, the mortgage note and correspondence relating to this entire transaction which you had in your possession?

A No, because much of this was not given to me. I had very little of it and it was obtained later.

Q I asked you if on December 15, 1965 you did or did not have possession of this contract, the note, the mortgage which was introduced in evidence by your attorney a little earlier in the morning?

A They were --

MR. DELANEY: I ask that the exhibit number be mentioned.

MRS. SEIDER: I don't have the exhibit number but we can get it in just a moment.

May I have it please?

MR. GLUCK: Number 4

MRS. SEIDER: Number 4. (page 70)

MR. DELANEY: Will you show it to her?

MRS. SEIDER: I believe this is it -- That's not the original, where is it?

MR. DELANEY: You have them all I think, I gave them to you.

MRS. SEIDER: The letter is number 3. The contents is number 4.

Ammann for Plaintiff - Cross

MR. GLUCK: Here it is (handing).

MRS. SEIDER: Yes.

Q Will you look at this please and tell us when you obtained these papers (handing)?

A Well, I cannot say because much of this was sent on, was obtained later on, on Mr. Delaney's request.

Q Well, on what specific date pursuant to Mr. Delaney's request did you obtain those papers?

MR. DELANEY: Do you want a concession?

MRS. SEIDER: Will you give me a concession?

MR. DELANEY: Yes.

A I can't give you dates.

MR. DELANEY: Certainly Plaintiff's Exhibit 3 in Evidence shows they were sent on the 13th. (page 71)

MRS. SEIDER: Of what month?

MR. DELANEY: December.

MRS. SEIDER: Of what year?

MR. DELANEY: 1965.

MRS. SEIDER: Right.

page 73. Ammann - Cross

Q Do you have a recollection of having cashed certain checks and endorsing them? First of all I would like to show the witness a check dated August 23, 1965 in the amount of \$2,000. (handing) Does that look familiar to you?

A Oh, yes.

Q Will you turn it over and identify your signature?

Ammann for Plaintiff - Cross

A Yes, yes.

Q And you did endorse that check?

A I did.

Q And you kept the proceeds?

A I did.

page 77 Ammann-Cross

Q And this binder that you presume was signed by you, with whom was it left?

A It was left with my attorney, Miss Stackpole.

Q And at the time it was signed, this binder that you allege was in existence, were there any other signatures on it, or just yours?

A I don't remember. I think I signed it first and left it with her. I'm not sure of that.

Q And have you ever seen this so called illusory binder since?

A I don't know where it is. I haven't, I haven't seen it.

page 78 Ammann - Cross

Q No, I mean before you came to court. Were you very worried about your testimony?

A No, I wasn't worried about the testimony but it was not until I saw Mr. Delaney afterward that I found that any binder I might have signed was not binding on the seller, or on the buyer.

Ammann for Plaintiff - Cross

MRS. SEIDER: I object to this reply --

THE WITNESS: Well, I don't know what you want.

MR. DELANEY: I think the witness should not be made to feel that there is anything wrong about that, in not knowing exactly the nature of a binder. We have all been through that trouble.

page 83 Ammann Cross

Q We are talking about the real estate, Mrs. Ammann. Did they have anything whatsoever to do with this real estate?

A Except that I had promised it to my son originally-- when I pass on the property would go to him.

Q You had promised your son Peter Brandon that when you passed on the property would go to him; is that right?

A Yes.

Q Now isn't it a fact that it's this very son Peter to whom you had left this mortgage in your last will and testament?

A What is it?

Q I say isn't it a fact that it's this very son Peter to whom you had left --

A (Interposing) Why certainly, certainly.

page 87 Ammann - Cross

Q (Interposing) You have answered it. Now I show you this check dated October 8, 1965 in the amount of \$840.65 made

Ammann for Plaintiff - Cross

out to your attorney Syrena Stackpole, and I ask you to read it and tell me what that represents (handing)? What does it say?

A It says "Closing adjustment on Ammann --" I don't know what that is, "--Riverhead, Long Island.

Q Is that the Ammann premises, 10 Peconic, Main Street?

A I'm not sure of that one word.

Q Now will you turn it over? (page 88)

A Yes.

Q And tell me what you see on the back of it?

A "Pay to the order of Helen Ammann, Syrena H. Stackpole attorney."

Q And who endorsed it?

A I endorsed it.

Q You endorsed it and then it was deposited and it was paid to you; is that right?

A Yes.

Q And you know what apportionments are, don't you?

A I'm not sure.

Q Well, you know if you sell property and somebody had paid the taxes ahead of time, or if there is fuel left or--

A Oh, yes, yes.

Q You understand what apportionments are?

A Yes.

Q You have sold property before. And you accepted that check, did you not?

A Yes.

Ammann for Plaintiff - Cross

Q .Now I also show you a check dated October 8, 1965 in the sum of \$5,000 and ask you to examine that check and identify it for us (handing)? (page 89)

page 93 Ammann - Cross

Q Now Mrs. Ammann, you of course admit that that note was paid, do you not, by the purchasers?

A I hope it's been paid.

Q Well, just to reassure you, will you turn this over and show it to the lady, so that we can give her complete -

A Yes. (looking).

Q Now your mind is at rest, is it not, Mrs. Ammann?

A I'm very glad.

Q Your obligation to the bank has been met and your family name is still intact; is that correct?

A No, it is not.

MR. DELANEY: I will object to that and move to strike it out.

MRS. SEIDER: Yes, I agree with you, Mr. Delaney. That was uncalled for.

THE COURT: Yes, strike it out. (page 94)

MRS. SEIDER: We would like to offer this note in evidence.

(Handed to Mr. Delaney)

MR. DELANEY: I object not so much to the note but to the facts that have been stated about it, that it has been paid, because it has been assigned

Ammann for Plaintiff - Cross

to one of the defendants by the bank.

MRS. SEIDER: Well, it was paid by one of the defendants.

MR. DELANEY: It doesn't say that at all. It's still a good note.

Will Your Honor look at it? It's very confusing to have the record say it has been paid and the family name being saved and then find it's an outstanding obligation of the makers.

MRS. SEIDER: Well, I withdrew the last statement about the family name.

THE COURT: Let me see it (Handed)

THE COURT: I will allow it in evidence.

(Note referred to was received in Evidence and was marked Defendants' Exhibit C.)

page 96 Ammann - Cross

Q Now Mrs. Ammann, since the closing and the turning over of the deed and the mortgage to you, have you received any payments on the semi-annual dates set forth in the mortgage

A Yes.

Q How many payments to date have you received?

A I haven't the record here with me. I would say since the -- Let me see, when did this go into effect? How many payments have come due, whatever number of payments have come due have been paid.

Ammann for Plaintiff - Cross

Q Have you received the sum of \$2,000 on March 30, 1966 on this mortgage?

A I presume I have.

Q Have you received the sum of \$2,000 on September 26, 1966 on the mortgage?

A Yes, those have been paid. (page 97)

Q Did you receive the sum of \$2,000 on April 1, 1967?

A They have all been paid.

Q MRS. SEIDER: I would like to offer these in evidence. There is another check which we are waiting to clear from the bank.

MR. DELANEY: Well, I have no objection, I have no objection to the other one either, when it's produced except if there is any peculiar notation,--

MRS. SEIDER: There will be no peculiar notation on it, except your client's signature.

MR. DELANEY: I thought I was helpful.

MRS. SEIDER: Thank you, Mr. Delaney

THE COURT: Mark it in.

(Two checks referred to were received in Evidence and were marked as Defendants' Exhibit D.)

THE COURT: Mrs. Seider, is the record to indicate that \$6,000 has been paid on this mortgage so far?

MRS. SEIDER: I believe there has been (p.98)

Ammann for Plaintiff - Cross

\$6,000 paid on the mortgage.

MR. DELANEY: We concede that.

MRS. SEIDER; There is a concession there.

If Your Honor please, at this time I would like to offer in evidence the check in the amount of \$3,046.50 dated November 3, 1965, in payment of the note which is in evidence.

(Handed to Mr. Delaney)

MR. DELANEY: Well, I object on the ground that the note is in evidence and is not paid but is the property of one of the defendants, Dobbis. It's still good and outstanding.

THE COURT: Well, I would assume that the bank, if the bank assigns a note to the individual they have been paid for it in some way.

MR. DELANEY: I have no doubt they were paid, the consideration, but the offer is on the ground that it was the payment of the obligation, The obligation is still in the hands of the endorsee, (p. 99) of the assignee.

THE COURT: I will overrule your objection, sir. Let it go in.

(Check referred to was received in Evidence and was marked as Defendants' Exhibit E.)

Ammann for Plaintiff - Cross

Q -- on the bottom of page 8, I want you to observe the language you employed. "I never assigned my claim to the purchasers nor did my son. I did not agree so to do."

Now did you ever make such an assignment, as you recall, or if you recall?

page 105 Ammann -Cross

Q Now Mrs. Ammann, you stated that you never assigned any claim to the purchasers; is that correct? (page 106)

A I certainly had no intention to do such thing because the creditors knew I only wanted to settle with them, and they had agreed further to sell with 70 cents on the dollar, and advised me to keep the stock.

Q I show you this assignment and ask you to identify it and tell me whether that's your signature (handing)?

A That's my signature, but I had no intention of, of doing the creditors out of anything. I was not --

Q (Interposing) I didn't ask you that question, Madam. I merely asked, did you or did you not execute an assignment?

A If I did, I didn't know it, if you want to know it.

Q Mrs. Ammann, how old are you?

A I'm too old for this sort of thing, I'll tell you that.

Q I just asked you a simple question. You are under oath, you have tell the truth. Now how old are you, Mrs. Ammann?

A I'm over 70.

Q How much over 70?

Ammann for Plaintiff - Cross

A I'm five years over 70. (page 107)

Q You are 75 years of age?

A I am.

Q And how old were you when you handled this transaction?

A How many years ago is it -- I don't know -- three, two -- what is it, 196 -- what was it?

Q Well, you handled it.

A I can't tell unless I go back on the dates here. It was 1966, I think -- '65. I don't know, somebody will have to supply the date. I don't know. It isn't that important.

Q (Interposing) I do believe from your moving papers that you stated that you were 72 years of age; right?

A In what?

Q In your moving papers you stated you were 72. This morning you tell us you are 75. But, Mrs. Ammann, do you sign things without knowing what you are signing?

A I have been in the habit of leaving all legal things to attorneys because I do not understand.

Q Well, did an attorney sign your name to that, or did you?

A No, but when it was time for me to sign I signed(pl08 on the dottedline wherever I was told to.

Q You never read any papers that were handed to you?

A I read them without understanding them, my dear.

Q All right. Thank you. That is your statement, Mrs.

Ammann?

Ammann for Plaintiff - Cross

A In many cases.

Q In many cases, or in all cases?

A I wouldn't say in all cases. If it interested me I read it very closely.

Q This didn't interest you very much?

A It interested me and I -- but I thought it was a matter of legal import and should be handled by an attorney.

Q But didn't you know what you were doing when you signed that?

A Apparently I didn't get the real importance of it.

Q Is it your statement that this was not explained to you by the attorney that you had engaged to represent you?(p109)

A I don't know.

Q You don't know. I see. All right, Mrs. Ammann, will you look at these stock certificates (handing). Are those-- is that your signature?

A Yes.

Q And will you look at the other stock certificate? Do you recognize the signature of your son?

A Yes.

Q And were those stock certificates delivered in conformance to the terms of the contract?

A I don't know. I suppose they were.

Q And you knew what you were doing when you turned those over, did you not?

A I did what I was told to do, what was necessary.

Ammann for Plaintiff - Cross

Whatever papers I was asked to produce or do I tried to do.

MRS. SEIDER: Could we staple this together because I want to offer it?

I would like to offer as one exhibit the original assignment from Helen Ammann to Twin D. Land Corporation, and the stock certificates.

THE COURT: Do you have any objection, Mr. Delaney? (page 110)

MR. DELANEY: May I see them.

MRS. SEIDER: They were originally marked for identification by you, sir.

MR. DELANEY: Yes, but I didn't understand what you are offering. (Looking)

I have no objection.

THE COURT: They will be received.

MRS. SEIDER: Your Honor, may I request the indulgence of the Court and have them marked as independent exhibits?

THE COURT: You mean the stock certificates as G and the assignment as F?

MRS. SEIDER: All right.

(Assignment above referred to was received in evidence and marked Defendants' Exhibit G.)

THE COURT: Proceed.

page 112 Ammann -Cross

Q I see. Do you recall executing an affidavit, called

Ammann for Plaintiff - Cross

Affidavit of Title, on September 23, 1965 to induce Twin D Land Corporation to accept a title to the premises which you were then conveying, knowing that the Chicago Title, Home Division Company would issue its policy of title insurance and will rely on the statements made in your affidavit?

A No, I don't remember it.

Q Well, may I show you this and ask you whether that would help to refresh your recollection (handing)?

A Yes, I remember Miss Stackpole speaking to me (p.113) about this. Yes, I do remember this.

Q And you remember executing it, is that correct?

A I signed my name to it, I suppose it must have been executed.

Q And you knew the purpose of that when you signed it, did you not?

A Well, this was a person whose name was mine except the middle letter. That's all I thought it amounted to. It was a judgment against her, a Helen M.

Q Right. And you attested to the fact that you were the person who was selling the property, right, and that you were Helen Ammann and that you were the widow of Mathias Corwin Ammann.

A Yes.

Q Is that right?

A Yes.

Q So you do recall that affidavit, do you not?

Ammann for Plaintiff - Cross

A I don't think I understand the whole thing. I remember the fact that this person had a judgment against her and her name was confused with mine. But now as the executrix of the will -- this I don't remember -- it was made out, I suppose, and I signed it but probably not ----

 page 115 Ammann - Cross

Q So on September 23rd, 1965 you knew that you were selling this property to Twin D. Corporation, didn't you?

A I had signed, I had signed an agreement to sell and I thought it was binding.

Q And you thought it was binding?

A I thought it was binding.

Q Right.

A And that the deal would have to go through.

Q Well, you know when you sign a contract the deal must go through unless there is something wrong with the title; isn't that so?

A Well, as I understood it later, that was not binding, but I didn't know this prior to that.

Q And who gave you the understanding later that it wasn't binding?

A Mr. Delaney, that it was not binding.

Q Is it your statement, Mrs. Ammann, that Mr. Delaney a member of the Bar, told you that when you signed a contract for the sale of property that it is not binding? (p.116)

Ammann for Plaintiff - Cross

A It is not --

MR. DELANEY: (Interposing) That is not the testimony.

MRS. SEIDER: I'm trying to interpret the testimony.

THE COURT: I don't know what the testimony is. I'm trying to find out, too.

MRS. SEIDER: So am I.

THE COURT: I overrule the objection.

(To the witness) You may answer the question, Madam.

THE WITNESS: I understood from Mr. Delaney later on that the agreement to sell was not binding. There is always -- it isn't always in the contract, but it is not binding on the seller or the buyer if for any reason they wish to drop the deal. The money is returned and that ends the contract. And so I --

Q (Interposing) And this --

A (Continuing) -- and I presumed at this time that it had to go through, not knowing that it was not binding.

page 126 Ammann - Cross

Q Well, did you send a check in the amount of (p.127) \$275 as a refund of rent deposit on four apartments in the Main Street building?

A Probably, if I was told to do that, I did it.

Q All right. Now do you remember sending a check

Ammann for Plaintiff - Cross

in the amount of \$41 for arrears on a water bill?

A I tried to settle anything I was told to

page 130 Ammann - Cross

Q Now Mrs. Ammann, I direct your attention to an item here representing claims of creditors as filed by assignee in completion of the assignment for the benefit of creditors. And I ask you to look at the third item from bottom of page 4 and read it to us please (reading). (p. 131)

A Third item from where?

Q The bottom of page 4, one of the creditors listed there.

A Peter Brandon, in care of Robert Morris --

Q (Interposing) Not so fast. I didn't get the amount Peter Brandon?

A -- in care of Robert Morris, Esquire.

Q Yes?

A 1350 Avenue of Americas, New York

Q What is the amount

A \$39,853.07.

Q And underneath that do you see another claim of Mr. John?

A Of 772, \$772,04.

Q I see. So Mr. John put in an independent claim, and Peter Brandon Corwin Ammann put in a claim for \$39,000; is that right?

A Apparently.

Ammann for Plaintiff - Cross

MR. DELANEY: Well, I believe the record must speak for itself.

THE WITNESS: Apparently it's true.

MRS. SEIDER: All right. I would like to offer that in evidence at this time, if Your Honor please. We will develop this --

THE COURT: Is this signed by anyone in particular?

MR. GLUCK: It's a public record now. It's the assignee's report. It's part of the public record now.

THE COURT: Do you have any objection to it? It's a public record.

MR. DELANEY: Well, I haven't -- I have never seen it. May I see it?

THE COURT: I haven't seen it yet, Look at it
(Handed to Mr. Delaney)

MR. DELANEY: I object to this as not binding upon the plaintiff here, and call attention to the fact that there is -- the list is nothing but a statement of claimants made by the assignee without any proof of claims, that I have been able to find here.

THE COURT: Well, it's a sworn statement by the assignee.

MR. DELANEY: It is?

MRS. SEIDER: Yes, it is. (page 133)

Ammann for Plaintiff - Cross

MR. DELANEY: But that doesn't mean that those people made claims. Now Mr. John is a corporation - that is something I'm not talking about - but there is no proof that any of these people filed claims, and I think there is indeed an explanation in this matter which will have to be brought out in testimony.

THE COURT: Well, I think you will have you opportunity to do that then.

MRS. SLIDER: We will have the assignee here.

MR. DELANEY: But I certainly believe this is not binding on the plaintiff, because an assignee chooses to list creditors, maybe being careful to give everyone that might possibly have claims notice so that he will not have failed to give them notice of the proceeding.

MR. GLUCK: It says "Filed and allowed," if you read it.

THE COURT: I know, Are you going to bring the assignee in? (page 134)

MRS. SLIDER: Yes, we hope to, Your Honor. That's one of the reasons we said we would like to go through the full day tomorrow, instead of going over to Wednesday, but if we have no choice we will have him here. He is under subpoena.

THE COURT: We are going to work tomorrow,

Ammann for Plaintiff - Cross

too, and Wednesday.

MRS. SEIDER: I understand that , Your Honor.

THE COURT: I will allow it. Objection overruled.

MR. DELANEY: As I understand it, the whole file is being marked?

THE COURT: Yes.

(County Clerk's file, above referred to, was received in evidence and marked Defendants' exhibit I.)

Q Mrs. Ammann, did you in any way whatsoever assist your son in the filing of this claim for the \$39,000 - odd dollars?

MR. DELANEY: I object because there is no proper foundation. There is no proof that (p 135 her son filed any such claim.

THE COURT: Other than the report of the -- I will sustain the objection.

Q You did make previous statements in papers that were submitted to this Court that neither you nor your son would ever file any demand as creditors of the corporation; is that correct?

A Yes. I wanted to settle with the creditors. That

Ammann for Plaintiff - Cross

was my whole aim.

Q I didn't ask you that question. I said you made a statement to the effect that you would at no time ever file, nor would your son ever file as a creditor against the corporation?

A I had no jurisdiction over what he would do.

THE COURT: (To the witness) Can't you answer the question directly, Madam?

THE WITNESS: Well, I can say for my part.

Q What?

A For my part.

Q Did you ever also make a statement that your son would not file?

A I don't remember that I made that statement, (p.136 but I may have.

page 137 Ammann - Cross

MR. DELANEY: Surely. I will be very happy to have you look at it because I'm really confused -- "That on the 21st day of October the above named tenant, M.N. Ammann Hardware, Inc., in care of R. Dobbis, 2449 Hubbart Street, Brooklyn, New York, the respondent tenant, executed assignement for the benefit of creditors to Isidor Chernob, as assignee."

But that was in no way Mrs. Ammann, as plaintiff. This was Dobbis, one of the defendants,

Ammann for Plaintiff - Cross

he was both the defendant and the plaintiff, and the objection was made that the dispossess had not been permitted to be brought by the court when there was an assignment to be required. And I believe then that the proceedings seemed to have been dropped.

MRS. SEIDER: That's not the question I addressed to the lady at all.

MR. DELANEY: I know, but you are talking about the Lipetz' assignment.

page 139 Ammann - Cross

Q Well, then you do recall making such a statement in these papers, do you not? That was the question I put to you.

A If it's there I probably did, because it was at no time early in the proceedings did I ever expect, nor did he expect to make any claim against the creditors. But other things developed later.

Q I see, so then he did make a claim? (140 p.)

A I don't know, did he --

Q (Interposing) Well, it's obvious because it's a matter of public record that he put in a claim.--

MR. DELANEY: I object to the question. I don't think it is obvious. It's not obvious to me, because I know that assignee list certain claims to be protected against possible oversight

Ammann for Plaintiff - Cross

Q Now did you assist your son in any way to substantiate this claim?

A Not that I recall.

Q You made no statements at all in writing to that effect, is that correct, Mrs. Ammann? Is that your testimony?

A I can't remember that I did. There were so many letters and so many papers, I don't remember that I did. I don't know.

Q I see. You don't remember, you don't know, which is it?

A It could be both.

page 142 Ammann - Cross

Q What was your purpose in trying to determine (p.1 what was a good price on the property?

A Well, eventually, probably it was up to my sons to do something with it if they wished. And I would have kept it as long as I could have.

Q All right --

A (Continuing) Because it was self supporting.

Q Was it self supporting?

A It was self supporting, with the corner --

Ammann for Plaintiff - Cross

Ammann-cross page 145

Q Have those remained in the store, or were they removed?

A No, they yanked out everything, sold it. They had no right to.

Q Who is "they"?

A I don't know what Twin D did with it. I never went near the place.

Q Is it your statement that Twin D yanked this out? (page 146)

A Whatever they did, they made the assignment to creditors. I don't know who took it out.

Q Who made the assignment to the creditor?

A After they bought the property.

page 149

Q At what time did you do it?

A After I found out that the contract to sell was not binding.

Q Who told you the contract to sell was not binding?

A Mr. Delaney told me it was not binding.

Q So then you went to Miss Stackpole and told her you didn't like the contract and you wanted to stop that, is that right?

A After my visit to New York, to talk over-- (page 150)

Q (Interposing) So you didn't speak to Miss Stackpole, did you? You spoke to Mr. Delaney.

Ammann for Plaintiff - Cross

A Originally, originally, but I then spoke to Miss Stackpole on the way, when I went into New York to get my son's -- he wanted to buy the property in.

Q Just a minute. When did you see Mr. Delaney?

Mr. Delaney said you didn't see him until November 11th?

MR. DELANEY: No, no. I said I was retained on November 11th. I conceded that.

MRS. SEIDER: I see.

A I talked this over earlier with Mr. Delaney.

Q And was Miss Stackpole with you when you talked it over with Mr. Delaney?

A No, she was not.

Q And you went in on this day with Miss Stackpole.

Do you remember the particular day you went in?

A The day, or the date?

Q The date?

A It was just prior to this deal being closed, perhaps a couple of days or so earlier. And my son would not give me the, would not --he made me an offer on the property which I couldn't accept at that time, but he (page 151 asked me for ten days in order to raise the money, to pay off the creditors. And I, coming home, said to Miss Stackpole - this whole deal Mr. Gluck said was contingent on getting both waivers, and my son would not give up his waiver. He said he would not buy the property, and on the way home I said to her, "Then the deal is off since

Amann for Plaintiff - Cross

he will not take it without the two waivers." And she said --

Q (Interposing) Who wouldn't take it without the two waivers?

A Mr. Gluck, Twin D.

Q Wasn't the option with Mr. Gluck as attorney for the purchasers to decide whether he wanted to take it with or without the waivers?

A Well, I was given to understand he wouldn't take it, so I thought the deal was off and said so.

Q You thought, but did you know this to be a fact?

A I asked, I spoke to Miss Stackpole and she said, "Yes. I suppose so." And then I came home and said, "I'll have to look for another --"

Q (Interposing) Just a moment please. Is it your statement that Miss Stackpole told you that this deal (page152 was off if Mr. Gluck had decided that he would waive the waiver?

A Without my son's waiver.

Q Is that your statement?

A Yes, yes, it is my statement.

Q You couldn't be mistaken about that, could you?

A No. That's according to "Miss Stackpole's advice. I said, "Then this property cannot be sold because we didn't get my son's waiver, and I promised him 10 days in order to raise the money."

Ammann for Plaintiff - Cross

Ammann-cross page 153

THE COURT: It is in evidence. Plaintiff's (page 151) Exhibit number 4 is a contract.

MR. DELANEY: I offered the packet of papers.

MRS. SEIDER: That's in the packet.

MR. DELANEY: That was the packet that was sent to her by Miss Stackpole, but I didn't offer the contract nor did I have any proof as to the signature.

MRS. SEIDER: It was offered.

THE COURT: Well, what were you offering it for, with the envelope?

MR. DELANEY: To show what Miss Stackpole sent her as late as December 15, 1965 and not before.

THE COURT: Included in the packet is a contract.

MR. DELANEY: That's right, which we challenge--

THE COURT: The only thing--

MR DELANEY: --as containing Rider C, that up until that time--

THE COURT: That's the only thing you challenge on it, isn't it, Rider C? (page 155)

MR. DELANEY: And the deletion in Rider B, as to the holding harmless.

THE COURT: But the other part you do not challenge?

MR. DELANEY: No, I don't believe so.

Ammann for Plaintiff - Cross

THE COURT: Because it appears to me that this is the plaintiff's signature on that.

MR. DELANEY: There is no question about that.

THE COURT: And it is also indicated on here that July was the date and it has been stricken out and August was put in.

MR. DELANEY: Yes, but there was no July signature of any kind.

THE COURT: No, no. That was not your question, was it?

MRS. SEIDER: I was merely trying to show the ten day period, that actually it was a 30 day period.

THE COURT: Well, let's continue. I think the witness' testimony was yes to that question.

MRS. SEIDER: And should there be any question about offering it in evidence. Your Honor, then I would like at this time to also on behalf of the defendants, offer the contract and the original mortgage and note so that there will be no question about it.

MR. DELANEY: I have no objection.

THE COURT: So you wish to make Plaintiff's Exhibit 4 your Exhibit G?

MRS. SEIDER: Our Exhibit as well. We offer the mortgage, the mortgage note --

THE COURT: I see no necessity for it unless you have --

MRS. SEIDER: I don't want Mr. Delaney for one

Ammann for Plaintiff - Cross

MR. DELANEY: On behalf of my client I reject the offer.

It's all right, Mrs. Ammann. I reject it. I reject it. You don't have to --

THE WITNESS: Okay.

Q. Do you understand what that check is, Mrs. Ammann? You have the right to look at it please?

A. I don't know what it's for. (page 160)

Q. Do you recall your contract with Twin D Corporation which called for an accelerated payment of \$5,000 to you so that one of the parcels which is presently under the blanket mortgage could be released for sale?

MR. DELANEY: I object on the ground it calls for a legal conclusion.

THE COURT: No, I think this is --

THE WITNESS: (Interposing) I don't know anything --

MR. DELANEY: I say on behalf of my client we reject this offer.

THE COURT: She has testified that she doesn't know what it is.

THE WITNESS: I don't know really what it is.

MR. DELANEY: In any event --

THE WITNESS: It's not signed or any thing.

MR. DELANEY: -- I know what they intend it to be, and I should like the privilege as the attorney for my client to reject the offer.

THE COURT: And she has testified that (page 161)

Ammann for Plaintiff - Cross

she does not know what you are rejecting.

MR. DELANEY: Well, will she accept my

Ammann for Plaintiff - Cross

moment to think that we are not offering it.

THE COURT: Unless you have some pride in the possession of the instruments, or being attributed to you, but if you wish to have them so marked I will do so, but I believe it is unnecessary.

MRS. SEIDER: Well, if Your Honor believes it's unnecessary and Mr. Delaney concedes it has been offered, that's it. (page 157)

THE COURT: It is in evidence.

MR. DELANEY: I never offered the contract or anything. These were just a packet of papers that were received by Mrs. Ammann.

THE COURT: Well, then we had better have it marked in evidence as your exhibit.

MRS. SEIDER: I thought so. Thank you.

THE COURT: Then Plaintiff's Exhibit 4 in evidence will now be Defendants' Exhibit J.

(Plaintiff's Exhibit 4 in evidence was marked Defendants' Exhibit J.)

Ammann-cross page 159

MRS. SEIDER: (Interposing) That's all I wanted to know. Thank you.

THE COURT: Take these papers away.

THE WITNESS: They are very confusing to me. There are so many papers.

Ammann for Plaintiff - Redirect

Ammann-Cross page 159

MRS. SEIDER: Mrs. Ammann, at this point I tender to you a check in the amount of \$5,000 to your order, in conformance with the arrangements made regarding the mortgage (handling). I ask you to accept this check. It's a certified check.

MR. DELANEY: On behalf of my client I reject the offer.

page 161

MRS. SEIDER: Let the record show that a tender of a certified check for \$5,000 in conformance with the terms of the original contract has been made as of this date.

page 162

Q. Mrs Ammann, I show you a filed paper in the Supreme Court, Suffolk County, in the matter of the general assignment for the benefit of creditors of the M.N. Ammann Hardware, Inc., assignor, to Isidor Cherno, assignee, being an Order of the Special Term, Part 1 of the Supreme Court of the State of New York for the County of Suffolk, made on the 28th day of October, 1965, and ask you if you have seen this paper realizing that it is an assignment for the benefit of creditors, and the date thereof (handling)?

THE COURT: Your question is, has she ever seen this before

Ammann for Plaintiff - Redirect

MR. DELANEY: I know she had seen it on the stand, but if she recognized it for what it is. She was only examined as to the one item.

THE COURT: (To the witness) Do you know what it is?

THE WITNESS: No, I don't know what it is. (page 163)

page 164

THE COURT: Let the record indicate that that is what the document says.

MR. DELANEY: Now May I read into the record that this is in the matter of the general assignment for the benefit of creditor of M.N. Ammann Hardware, Inc., assignor, to Isidor Chernov, assignee, and that the order is granted on October 28, 1965.

THE COURT: What was the date of the assignment, sir?

MR. DELANEY: The date of the assignment is October 26, 1965 and the order on the 28th of October, 1965.

THE COURT: Very good.

Q Now Mrs. Ammann, did you have anything to do with filing this assignment for the benefit of creditors?

A No, not after it got--

Q (Interposing) Did you have anything to do with that?

A No.

page 168

Q Now Mrs Ammann, did you request the defendants at your house to reconvey the property to you some time in October of 1965?

A Yes.

Q And what was the reply?

Ammann for Plaintiff - Redirect

A The reply was no.

Q Who was present at that time?

A Don, Mr. Dobbis, Jack Sussman and myself.

Q Was Mr. Gluck there?

A No, he was not.

Q He was not. Mrs. Ammann, did you receive this letter dated December 15, 1965 from Miss Stackpole (handling)?

A I presume so, yes.

page 169 MR. DELANEY: May I have it marked in evidence?

(Handed to defense counsel)

MRS. SEIDER: No objection.

THE COURT: Let it be received and marked.

(Letter above referred to was received in evidence and marked as Plaintiff's Exhibit number 13.)

THE COURT: You may continue, Mr. Delaney.

MR. DELANEY: May I have marked for identification an affidavit dated September 23, 1965 allegedly made by Helen W. Ammann?

THE COURT: Are you offering this in evidence?

MR. DELANEY: No, for identification.

THE COURT: Mark it.

(Affidavit above referred to was marked for identification only as Plaintiff's Exhibit 14.)

THE COURT: Is that the affidavit of title?

Ammann for Plaintiff - Redirect

MRS. SEIDER: That affidavit refers to the affidavit of title, yes.

MR. DELANEY: It's an affidavit merely correcting a judgment. page 170

THE COURT: We loosely call them affidavits of titles.

MR. DELANEY: Yes,---a bill of sale of fixtures, dated September 23, 1965.

THE COURT: Mark it.

(Bill of sale above referred to was marked for Identification only as Plaintiff's Exhibit number 15.)

Q Mrs. Ammann, I show you a paper writing undated other than for the year 1965, being a form for assignment of certain property to you by, made out for your son Mathias Corwin Ammann and ask you if that was presented to Mathias Corwin Ammann with the request that he sign it (handling)?

A Yes, it was presented to him.

Q Did he refuse to sign it?

A He refused to sign it.

page 171

MR. DELANEY: May I have it marked for identification---- no, I will offer it in evidence, if I may.

(Handed to defense counsel)

MRS. SEIDER: This is completely unexecuted. I don't know what it purports to be, and of course I must necessarily object to it. It looks like-----

THE COURT: Well, the lady has identified it as being the paper which was offered to Mathias Corwin Ammann for his

Ammann for Plaintiff - Redirect

MR. GLUCK: By whom?

THE COURT: And he refused to sign it.

MRS. SEIDER: I mean who offered this? I can't understand ----

THE COURT: I don't know. Mr. Delaney offered it.

MRS. SEIDER: Do you mind expounding on this before we pass on it/

MR. DELANEY: Miss Stackpole.

THE COURT: (to the witness) Was it offered by Miss Stackpole, as you recall?

page 172

THE WITNESS: Miss Stackpole was with me. She made out the paper. I'm not sure whether it was offered to him by me, or by her, but he----- I don't think we ever got down to that part. He just refused to sign anything.

THE COURT: (To the witness) Where was this offer?

THE WITNESS: At MR. John's, 57th Street. Twenty-four-- isn't it--West 57th in the office.

THE COURT: Who was there?

THE WITNESS: Mr. John-- no, Mr. John was not there. Mr. Sussman was there, Miss Stackpole and I.

Q Was it offered to him on October 5, 1965?

A I would say on or about that date, yes. I'm not sure of these dates until I ----

Dobbis Exam Before Trial for Plaintiff

A I had seen some riders but I wasn't at the closing so I don't know what changes were made exactly.

Q I'm talking about when you saw this Plaintiff's Exhibit 2 for identification before it was executed, do you know at that time if it was in this form?

A Basically I believe all the provisions that were in there I have read, except for some minor changes.

Q Were those minor changes made after you saw it?

page 185

A I'm not certain. I was not certain what changes were made after the closing. And I read from page 15, line 8:

Q Didn't you say you saw the letters from Miss Stackpole?

A I said I knew of letters between Mr. Gluck and Miss Stackpole of a legal matter, technicality is the way it's written, as far as the contract is concerned.

Q Do you know what was in those letters?

A No.

Q Did you ever see any of those letters?

A I don't think I have read them as of this date.

Q Do you know where they are?

A I believe counsel may have them.

Q What about the 'corporation?

A What about the corporation?

Q Does the corporation have a file on these things?

Dobbis Exam Before Trial for Plaintiff

A As far as letters are concerned--- as far as letters are concerned? page 186

Q Yes.

A No.

Q Does it have a file on this closing of any kind?

A We have a file in reference to the papers that were involved, a copy of the mortgage, a copy of the bond and a copy of the contract.

Q Where is that file?

A I have it here(indicating).

Q Do you have copies of riders that were discussed prior to the execution of the contract?

A I believe that they are attached to this contract.

Q Do you have them in your corporate file?

A I don't believe so.

Q Will you look?

A (Witness does as instructed)

MR. GLUCK: This is my office file.

THE WITNESS: That is all I have.

MR. DELANEY: Do you have an objection?

page 187

MR. GLUCK: An objection, an objection to what?

MR. DELANEY: I would like to mark for identification the record file between the corporation please-- I would like it marked for identification so we know what we are talking about.

Dobbis Exam Before Trial for Plaintiff

Page 187

"MR. GLUCK: You can't mark my whole file.

This is my property. If you call for special papers,--

"MR. DELANEY: He has already testified it was a corporate file.

"MR. GLUCK: Corporate file? It is a legal file.

"THE WITNESS: It's all I have.

"MR. GLUCK: Just a minute. We had the corporate file here the last time and you had access to it, Mr. Delaney.

"Question: Mr. Dobbis, is that a file of the Twin D. Corporation?

"Answer: The answer is no.

"Question: Does the Twin D land Corporation have any file at all?

"Answer: Yes, a file where we keep bills, tax bills, bills in reference to payment and purchase.

"Question: Does that file contain anything with (p. 188) respect to the negotiations for the purchase of this property or its closing or anything relating thereto?

"Answer: No sir.

"Question: Then you have no corporate file on the question of the purchase of the property; is that right?

"Answer: Whatever legal papers are involved are in Mr. Gluck's file.

"Question: Does the corporation have any right

Dobbs Exam Before Trial for Plaintiff

to those papers in Mr. Gluck's file?

"MR. GLUCK: I object to the form of the question.

"Answer: I don't know what you mean by right.

"Question: You had this file a few minutes ago?

"Answer: I carried it. Mr. Gluck had one envelope, and I had one.

"Question: Where did you get it?

"Answer: Mr. Gluck's office.

"Question: Where is the office of Twin D Land Corporation?

"Answer: 185 Montague Street, Brooklyn.

(page 189)

"Question: Is that in Mr. Gluck's office?

"Answer: Separate room.

"Question: In whose suite?

"Answer: Peter Gluck.

"Question: Do you mean Mr. Gluck, what you are talking about? You said Peter Gluck, do you mean the same person?

"Answer: That is correct.

"Question: You have a separate room in that office and that is where your files are kept; is that correct?

"Answer: Whatever information in reference to our business is kept, yes.

Dobbis Exam Before Trial for Plaintiff

"Question: were you there this morning?

"Answer: I stopped there this morning, yes.

"Question: Did you go in there, into that office?

"Answer: Yes.

"Question: Was that file in the office?

"Answer: No, sir.

"Question: I show you Plaintiff's Exhibit?
for identification and ask you if you know where that
(page 190) was typed?

"Answer: In reference to the whole business?

"Question: Yes.

"Answer: Part of it was typed in Mr. Gluck's office.

"Question: Which part was typed in Mr. Gluck's
office?

"Answer: I believe page 3--page 4, I should say.

"Question: You have to tell me your answer
again?

"Answer: I believe it is page 4, part of the
rider.

"Question: Now I note here a paper here called
Rider C. Is that page 4 that you referred to?

"Answer: Yes.

"Question: Are you referring to the following
page too?

"Answer: Part of it, including Item B.

"Question: Are you referring to all that is
typewritten on that page?

Dobbis Exam Before Trial for Plaintiff

"Answer: No sir. I am only referring to these (page 191) two paragraphs.

"Mr. Delaney: I would like those marked for identification.

"(The rider described above was marked as Plaintiff's Exhibit 3 and 3A which consists of first two paragraphs on the annexed page for identification.)

"Question: Now Plaintiff's Exhibit 3 for identification and 3-A, the first two paragraphs on the succeeding pages, did you see those typed in Mr. Gluck's office?

"Answer: It is the same typewriter."

MRS. SEIDER: I beg your pardon. It says "it is the same type of typewriter."

Mr. DELANEY: Excuse Me.

(Continuing)

"Answer: It is the same type of typewriter.

"Question: Is that the only reason that you know they were typed in his office?

"Answer: That is correct.

(page 192)

"Question: Did you ever discuss with anyone where they were typed?

"Answer: No sir.

"Question: Was that rider discussed in any of the letters you saw?

"Answer: I don't know. I never saw any letters.

Dobbis Exam Before Trial for Plaintiff

"Question: Did anyone tell you any discussions about that rider, Exhibit 3 and 3-A?

"Answer: No.

"Question: You said you saw some riders. Was this one of these you saw?

"Answer: I'm not certain. I said I was specifically interested in the price and terms. That was the part of the contract that I was concerned about."

Page 23, line 19:

"MR. DELANEY: I thought that Mr. Dunkenberg would come and finish the examination, and he would bring, and you promised we would have the correspondence that you had with Miss Stackpole.

"MR. GLUCK: Never. I wouldn't give you that if you stood on your head. I am going to use that at the proper time, not now. You may get it as a formal (page 193) motion. I am not producing that-- I am not asking for your confidential relationship with your client.

"MR. DELANEY: Letters to Mrs. Ammann's attorney are not confidential matters.

"MR. GLUCK: They relate to my client and they are confidential.

"Mr. Delaney: Your client can get them from you, and you are telling him not to.

"MR. GLUCK: That is right. I am not going to give you an opportunity to make up something else that can be disproved in writing. You have made up enough so far. Now the one reason--"

Dobbis Exam Before Trial for Plaintiff

He stopped there. Now on page 26, line 1:

"Question: Now I show you a copy of the paper writing entitled County Court, Justice Court, Town of Riverhead, New York, Twin D Land Corporation, 185 Montegue Street, Brooklyn, New York. Petition of landlord against M.N. Ammann Hardware, Inc., In care of R. Dobbis, 2449 Hubbard Street, Brooklyn, and another. And I ask you have you ever seen the petition of which this proports to be a copy (Counsel hands same to witness)?

"Answer: Yes. I got a copy of this to my home.
(page 194)

"Question: Do you have it there now?

"Answer: I had a copy of this sent to my home. I don't believe I have it anymore.

"Question: You are familiar with it?

"Answer: I saw what it was, yes.

"Question: You examined it at the time it was served on you?

"Answer: This was mailed to me.

"MR DELANEY: I would like it marked for identification.

("Whereupon, the paper described was marked as Plaintiff's Exhibit 5 for identification.")

Page 27, line 11:

"Question: Was 2449 Hubbard, Brooklyn the address of the corporation?

"Answer: No.

Dunkenberg Exam Before Trial for Plaintiff

"Question: What is it, the address of the M.N. Ammann Hardware, Inc.

"Answer: No.

"Question: When you received this did you receive it on behalf of the M.N. Ammann Hardware, Inc., the defendant?

(page 195)

"Answer: I just received it in the mail. I don't know how it came to me.

"Question: What did you do with it after that?

"Answer: I think I threw it away."

"Question: Do you turn over all your correspondence to Mr. Gluck?

"Answer: If it is in the legal nature."

 (Page 196) Dunkenberg Exam Before Trial - June 23, 1966

MR. DELANLY: I will start on page 14, not 13.

Page 14, line 2:

"Question: What was the conversation between Mrs. Ammann and yourself about purchasing the property the first time you remember having such a conversation?

"Answer: I do recall a time again which was very soon before we made the offer. I think that this was perhaps the time she asked me once. It probably had been up for sale for quite a time and had been out among the brokers, and she mentioned to me something about, I don't remember exactly what it was,

Dunkenberg Exam Before Trial for Plaintiff

but she said a particular broker or these brokers had the figures, and asked me if I would go over and see him and get his opinion on it for her. And I did. And he told me that at that time in his opinion the fair market value of the property was between \$50,000 and \$60,000.

(page 197)

"Question: Who was the broker?

"Answer: Well, I don't remember his name. It was a local broker in Riverhead, I think.

"Question: Do you remember which you had that conversation with him?

"Answer: Again, that was very soon. I believe it was quite soon before I made--let's see, that happened-- I reported this to her that he said the fair market value was about \$50 or \$60 thousand dollars. And at the time I think I recall saying to her 'If you sell it at a price around there will you please let me know and I will talk it over with my partner and see if it doesn't possibly make sense to us.' And then I did talk it over with my partner soon after, and we felt that the best offer we could make, we talked it over and we made our first offer which we felt was the best we could make, and that was on record and it was \$70,000.

"Question: Were you present when the paper writing of August or July, 1965 was executed?

Dunkenberg Exam Before Trial for Plaintiff

"Answer: Yes."

(page 198)

page 16, line 17:

"Question: Do you know where this paper, Plaintiff's Exhibit 2 was typed?

"Answer: You want to know where it was typed?

"Question: Yes.

"Answer: Typed in Miss Stackpole's office.

"Question: Was the entire paper writing typed in Miss Stackpole's office?

"Answer: Yes. Well, we wrote some of it at-- this of course, we wrote at the signing of the contract. That's as far as I know. All that was.

"MR. GLUCK: Do you know?

"THE WITNESS: Maybe there was a rider, I don't know.

"MR. GLUCK: Just answer the question.

"Question: I show you on what is the bottom that is marked rider some text. Do you know whose handwriting that is?

"Answer: No, I don't know for sure. I think it is either Miss Stackpole's--

"MR. GLUCK: IT is mine.

(page 199)

"Answer: (Continuing)--it is Mr. Gluck's. I do recall Miss Stackpole and Mrs. Ammann also writing. Maybe there is another copy.

"Question: Had this paper writing been prepared

Dunkenberg Exam Before Trial for Plaintiff

prior to the meeting at the Suffolk County Bank?

"Answer: The writing?

"Question: The whole writing, Exhibit 2, had it been prepared prior to the meeting at the bank?

"Answer: The whole thing?

"Question: yes.

"Answer: Yes.

"Question: Excluding these?

"Answer: Yes, excluding these handwritten changes."

Page 18, line 23:

"Question: I show you rider C and ask you if you know whether that was prepared on the typewriter?

"Answer: Well, I say I assume it was prepared along with the rest. I have no knowledge of its having been prepared elsewhere, but I don't know. I mean the fact that you point it out, I would have said the entire contract.

"Question: When did you first see it?

(page 200)

"Answer: I don't know. As I say. it could have been at either of the meetings."

Page 20, line 18:

"Question: This is Rider C?

"Answer: I can't remember one part of the contract versus the other. I know there were negotiations going on in the mails between the two lawyers and I assumed this was part of it.

Dunkenberg Exam Before Trial for Plaintiff

"Question: Were there any letters written?

"Answer: Yes, there were letters.

"Question: May I see them?

"Answer: I don't have them with me.

"Question: Did you ever see those letters?

"Answer: No. There were no letters to me, or from me. They were between the two attorneys.

"Question: Did you ever see them?

"Answer: I don't recall I don't know whether I saw them. I may have heard about them. I don't really remember.

"Question: What did you hear about them?

"Answer: I said I don't remember. I really don't know what went on. I don't think there were---no, there were no letters that I saw."

(page 201)

Page 22, line 11--I'll change that to line 9:

"Question: I may be repeating myself, but when did you first see Plaintiff's Exhibit 2/

"Answer: I said I don't remember. I don't even know if it was the same contract at the first meeting or whether I first saw it at the second meeting. I don't know.

"Question: Did you see it in the Suffolk County Bank on the 23rd of August?

"Answer: That's the date of it, you mean? I did, yea.

Dunkenberg Exam Before Trial for Plaintiff

"Question: Was it all at that time stapled together, this whole thing? Look at it?

"Answer: I don't remember if it was stapled or not. I saw all this together.

"Question: Was there any discussion at the Suffolk Bank with respect to this change in Rider C, the one about information and belief?

"Answer: I don't recall.

"Question: Did you discuss with Mrs. Ammann, the plaintiff, that she must give you the assignment of the claims of herself and Peter Ammann in order to (page 202) induce you to enter into this contract?

"Answer: In order to--you mean did I? No, I didn't personally. No, I don't recall discussing it with her personally. We discussed it at great length at the meeting.

"Question: Did you give any instructions to anybody that they were to exact that assignment as a condition of entering into the contract?

"Answer: As a condition to making the contract?

"Question: Yes.

"Answer: No, not that I recall.

"Question: Did you discuss it with your partner Mr. Dobbis?

"Answer: As part of the contract it came up. Of course it was discussed.

Dunkenberg Exam Before Trial for Plaintiff

"Question: Now you mean that this clause which you discussed was 1-D-- would you read it to yourself, Rider C, 1-D?

"Answer: Yes. Do you want me to read the whole thing?

"Question: Yes, to yourself.

"Answer: Yes. What is the question?

(page 203)

"Question: Did you have a discussion about such a statement with Mrs. Ammann as a requisite to the contract, with your partner Mr. Dobbis?

"Answer: Yes. I mean it's in the contract, it had to be discussed and put in there.

"Question: Did you discuss it with Mr. Dobbis?

"Answer: Yes.

"Question: When?

"Answer: I don't know. I mean as a -- it's a part of the contract so we discussed it. Before the contract at some time it was discussed in some way with Mrs. Ammann through her lawyers.

"Question: Have you a full and accurate and complete list of the creditors of the M.N. Ammann Hardware, Inc.?

"Answer: Except for the adjectives, yes, I think we have. I don't know how full and accurate and complete it is.

Dunkenberg Exam Before Trial for Plaintiff

"Question: Will you produce it please?

"Answer: I don't have it here.

"Question: Prior to August 23, 1965, did you have any conversation with Mrs. Ammann with respect to making a claim against an assignment of creditors (page 204) of the M.N. Ammann Hardware, Inc. for her, for their indebtedness to her?

"Answer: I don't follow your question. Did we discuss our making--please repeat.

"MR. DELANEY: I'll withdraw the question. I'll ask it again.

"Question: Prior to August 23, 1965, did you discuss with Mrs. Ammann the matter of her claim against the M.N. Ammann Hardware, Inc.?

"Answer: Only insofar as is represented in the contract. That was the fruit of any discussion that was made before that."

Page 28, line 22:

"Question: Do you know an attorney Edward J. Mallin with offices at 295 Madison Avenue?

"Answer: Yes.

"Question: Does he represent you?

"Answer: Mr. Gluck represents me.

"Question: What about Mr. Mallin, did he represent you?

"Answer: If he did it was through Mr. Gluck. I

Dunkenberg Exam Before Trial for Plaintiff

never had any personal dealings with him.

(page 205)

"Question: Did you ever talk with Mr. Mallin--"

MRS. SEIDER: (Interposing) What page are you reading at?

MR. DELANEY: It began at page 28, line 22.

MRS. SEIDER: I see, all right.

MR. DELANEY: And I'm reading now an answer at line 3, page 29:

"Answer: If he did it was through Mr. Gluck. I never had any personal dealings with him.

"Question: Did you ever talk with Mr. Mallin?"

"Answer: Have I ever talked --yes, I know the man.

"Question: When did you first talk with him?"

"Answer: You mean about this, or about anything?"

"Question: I mean about this.

"Answer: I don't think I ever talked with him."

Page 30, line 2:

"Question: Did you ever talk with Mr. Saxstein?"

"Answer: Yes.

"Question: When did you first meet him?"

"Answer: Whenever it was, you know, a few days before, a week before the dispossess.

"Question: I show you a copy of a paper and (page 206) ask you if you instructed Mr. Saxstien to

Dunkenberg Exam Before Trial for Plaintiff

bring this petition in the name of the Twin D Corporation (Mr. Delaney hands document to witness)?

"Answer: Yes.

"Question: Is that action still pending?

"Answer: No, the building is vacant now.

"Question: What happened to the action?

"Answer: Well, they moved out, so what happens to an action when there is no mere--

"Question: Did you ever recover any rent as asked for in that petition?

"Answer: No, I don't think so. Wait a minute now perhaps we did.

"MR. GLUCK: They got rent from the time the assignee went in, nothing prior. I don't know if that covers that period.

"Question: Was this action settled?

"MR. GLUCK: I think it was dismissed, discontinued or dismissed.

"Question: Was there a settlement before the action was dismissed or discontinued?

"Answer: Settlement on this? I'm not sure how to answer that.

(page 207)

"MR. GLUCK: Then answer that you don't know.

"Answer: I don't know.

"Question: How much money did you recover from the

Dunkenberg Exam Before Trial for Plaintiff

assignee for the benefit of creditors of the M.N. Ammann Hardware for rent subsequent to April 1965?

"Answer: Subsequent to April?

"Question: Yes.

"Answer: I don't know. We got some rent from the period for--from the time the assignee took over. That's all.

"Question: How much did you get?

"Answer: I don't know.

"MR. GLUCK: About \$500.

"THE WITNESS: I don't know."

Page 32, line 12:

"Question: I asked you, I believe, when you first retained Mr. Mallin in this matter?

"Answer: I think I retained Mr. Mallin--"

MRS. SEIDER: (Interposing) Just a moment.

MR. GLUCK: The word "don't" is omitted. It was put in in pencil.

MR. DELANEY: I Will read that answer again:

(page 208)

"Answer: I don't think I retained Mr. Mallin.

"Question: Do you know that Mr. Gluck retained Mr. Mallin?

"Answer: Yes, at some point.

"Question: On your behalf?

"Answer: yes.

Dunkenberg Exam Before Trial for Plaintiff

Page 208

Question: Did you ever know that Mr. Mallin made a statement at the creditors' meeting, of the creditors of the M.N. Ammann Hardware, Inc. that he represented you and your partner, or the Twin D Corporation as an assignee of the claims of Mrs. Ammann personally against the M.N. Ammann Hardware?

Answer: I don't know it personally. No, I would assume it.

MR. GLUCK: You assume what?

THE WITNESS: No, I do not know.

MR. GLUCK: If you know that. If you don't then say you don't know. That's all.

Question: Are you and Mr. Dobbis or Twin D Corporation the assignee of the claims of Mrs. Ammann against the M.N. Ammann Hardware, Inc?

Answer: Yes, I believe we are. Yes.

Question: In what amount?

Answer: I don't know.

Question: Did you ask Mrs. Ammann to file a claim against the M.N. Ammann Hardware, Inc.?

Answer: No.

Question: Did you ask anyone on her behalf? Did you ask her by asknign anyone acting for her?

Answer: No, not that I recall.

Question: Didn't you ask Mrs. Ammann to fil a

Dunkenberg Exam Before Trial for Plaintiff

page 210

claim against the assignee for the benefit of creditors of the M.N. Ammann Hardware, Inc. for \$20,000?

Answer: No.

Question: Did you have a discussion with anybody about that?

Answer: About what?

Question: About filing a claim against the assignee for the benefit of creditors of the M.N. Ammann Hardware, Inc. for \$20,000?

Answer: Well, I don't know what you mean. I don't know of any, I don't know.

Question: You don't recall any conversation about that?

Answer: About Mrs. Ammann filing a claim?

Question: Yes.

Answer: I did offer, after we took title but we had--- and after we had this, I did offer through Miss. Stackpole I believe it was, I don't remember. Mrs. Ammann gave her the right to file--"

MRS. SEIDER ? (Interposing) "I gave."

MR. DELANEY: " I gave"--- I beg your pardon.

Answer: (Continuing) I gave her the right to file a claim if she wanted to. She said she did.

page 211

Question: What, said what?

Answer: She said she did want to, I think.

Dunkenberg Exam Before Trial for Plaintiff

Question: Did she tell you that?

Answer: No.

Question: How do you know that she did?

Answer: Miss. Stackpole, her letter.

Question: Did you talk with the creditors about filing the claim against the assignee for the benefit of creditors for Mrs. Ammann's personal loan to the M.N. Ammann Hardware, Inc?

Answer: No.

Question Did anyone on your behalf have such a discussion, Mr. Dunkenberg?

Answer: Not that I know of, I don't know.

Question: Did you tell Miss Stackpole that you would not take title to this contract unless you got an assignment of a claim of Peter Ammann against the M.N. Hardware, Inc?

Answer: No.

Question: You asked for such an assignment, though?

Answer: Yes, it is in the contract.

Question: Mr. Peter Ammann never executed such assignment, did he? page 212

Answer: No.

Dunkenberg Exam Before Trial for Plaintiff

Question: DID you ask Mrs. Ammann to assign the Twin D Land Corporation some claim for \$2,914.16?

Answer: Not that I recall.

Question: You filed a claim in the assignment for the benefit of creditors for Twin D Land Corporation?

Answer: That's right.

Question: Did you receive payment on that?

Answer: No, I don't think so"

Page 39, line 13:

Question: (page 213) Did you make the assignment for the benefit of creditors of the M.N. Ammann Hardware, Inc?

Answer: Yes.

Page 40, line 6:

Question: Did you execute this assignment after you attended a meeting of creditors on September 14, 1965?

Answer: I say I don't remember the date but I executed the assignment after that meeting.

Question: That was the only meeting of creditors you went to?

Answer: Yes.

Question: he was your counselor?

Answer: Yes, he represented me".

Dunkenberg Exam Before Trial for Plaintiff

Question: Did you tell the creditors that you owned Mrs. Ammann's or Mr. Peter Ammann's claims against the M.N. Ammann Hardware, Inc?

Answer: I don't think I did. I don't think I said anything at the meeting.

Question: Did Mr. Mallin say this in your behalf?

Answer: I don't recall what he said.

Question: Was there any discussion about that?

Answer: I don't recall."

page 216

Question: I show you a paper writing purporting to be an assignment, proposed assignment, dated September 23, 1965, and ask you if this is the proposed assignment enclosed in your letter of December 13, 1965, Plaintiff's Exhibit 4 for identification (Mr. Delaney hands same to Mr. Gluck, and Mrs. Gluck hands same to witness)?

Answer: Yes, that looks like the same one.

MR. DELANEY: I would like it marked for identification.

"(Proposed assignment described above was marked as Plaintiff's Exhibit 7 for Identification)."

page217

Question: Do you know where those letters are now?

MR. GLUCK: That has been passed upon, and don't answer it.

Sussman for Plaintiff - Direct

Question: Do you know where they are now?

MR. GLUCK: Don't answer that.

page 219

(JACK SUSSMAN, called as a witness in behalf of the plaintiff, having been first duly sworn, testifies as follows:)

THE CLERK: Your Name, sir?

THE WITNESS: Jack Sussman, S-u-s-s-m-a-n.

THE CLERK: And your address?

THE WITNESS: 5207-20th Avenue, Brooklyn.

DIRECT EXAMINATION

By Mr. Delaney:

Q Will you keep your voice up and speak slowly, Mr. Sussman.

You are employed by the corporation Mr. John, Inc?

A Yes, sir.

Q And did Mr. John, Inc. have a claim against the M.N. Ammann Hardware, Inc?

A Yes, sir.

Q Were you requested to appear at the creditors meeting?

Sussman for Plaintiff - Direct

A I was.

Q Where was it?

A On Madison Avenue in the office of a lawyer, Mr. MALLIN.

Q And do you remember the date?

A It was about September 14th.

Q And who was present, as far as you remember?

A Myself, the representative from Horowitz and Chernov, Mr. Baranow (phonetic). There was somebody from (page 220) Pioneer Paint (phonetic). There was someone from a fireplace company, and Mr. Donkenberg and myself.

Q Now what did Mr. Mallin say about the meeting, at the meeting?

A As far as I can recollect Mr. MALLIN started the meeting by saying that he had called it because he had just taken over the case and he wanted to get everything straight, and he would like to make an offer for settlement. He also-----

MRS. SEIDER: (Interposing) Will you keep your voice up please, sir. We can't hear you.

THE WITNESS: I'm sorry. He started the meeting by saying he had just taken over the case, and he had called the meeting to try to get some kind of a settlement. He also said not to yell and not to make any fuss about anything. He would suggest that the people there have

Sussman for Plaintiff - Direct

have their accounts come down and check his list, the list of creditors he had, it was near \$50,000, but adding on the personal claims, the claims now came to around \$90,000

Q Now Mr. Sussman, did you have a conversation with the defendants Dunkenberg and Dobbis in the latter part of October 1965?

A Yes, I did.

Q Where did it take place?

A In Mrs. Helen Ammann's house.

Q And what was said at that meeting in the presence of Mr. Dunkenberg and Mr. Dobbis?

A Helen Ammann offered to buy back the buildigns, take them back, return the money she had received plus any expenses. She wanted the buildings back.

Q And did either Mr. Dunkenberg or Mr. Dobbis reply at that time?

A Mr. Dobbis said he wasn't going to waste his time. He had made a deal, he had business to take care of and he'd just as soon get out of there. He wasn't going to get mixed up in family affairs.

Q What did Mr. Dunkenberg say?

A Mr. Dunkenberg, while I was with him said he couldn't do anything without his partner's permission, Mr. Dobbis. I then left Mr. Dunkenberg with Helen.

Sussman for Plaintiff - Cross

Q Did Mr. Dobbis leave at that point?

A No. I spent some time with Mr. Dobbis outside (page 223) before he left.

Q Mr. Dobbis, did he leave the presence of Mr. Dunkenberg and Mrs. Ammann at that point?

A Yes, we both did.

Q And did you go with him?

A I did. We walked outside to the lawn.

Q And what conversation did you have with Mr.---

A (Interposing) I asked Mr. Dobbis if it was possible to reach any kind of a settlement to get the buildings back. He said it would take--- he would give them back for about the \$7,000 that had been spent at that time plus \$40,000.

page226 Sussman for Plaintiff - Cross

Q And if you had knowledge of this situation had it been made known to you that the title to the property had already passed and the deed had been recorded?

A I did not have that knowledge. I just heard Helen ask if she could get the buildings back.

Q Do you recall having any communications with Syrena Stackpole on the telephone regarding this?

A Yes, ma'am. I called Syrena Stackpole after the meeting at Mr. Mallin's office because I wanted to see

Sussman for Plaintiff - Cross

page 227 .

Helen Ammann and I could not reach her.

Q Did you report to Helen Ammann what happened at that meeting?

A I did.

Q And you are now referring to the meeting in Mr. Mallin's office; is that right?

A Right.

Q And did Helen Ammann tell you that she didn't want to file any claims as far as the creditors were concerned?

A She not only told me, but she called up Mr. Balan(phonetic of Masbach Hardware (phonetic), Balick or Balan of Masbach Hardware, and reiterated the fact that she did not intend to file any claims, never wanted to file any claims, and didn't intend to.

page 228 Sussman for Plaintiff - Cross

Q I asked you a question, sir. Did Peter Brandon at anytime tell you he had no intention--

A (Interposing) No, ma'am.

Q -- of filing any claim?

A No ma'am.

page 235 Sussman for Plaintiff - Cross

Q Just a moment, sir. Did you know that Peter Brandon

Sussman for Plaintiff - Redirect

filed a claim against the creditors?

A I found out less than a month ago.

Q Less than a month ago?

A Yes, ma'am.

page 242 Sussman for Plaintiff - Redirect

Q Now on or about October 5, 1965, Mr. Sussman, did Mrs. Ammann and Miss Stackpole come to the office of Mr. John, Inc. in New York City?

A That is right.

Q And at that time were you present?

A I was.

Q And did you have a discussion at that time with Mrs. Ammann and Miss Stackpole about the sale of the property which is the subject of this controversy, the property being here in Riverhead?

A Yes, sir.

Q Will you tell me what you said to Mrs. Ammann and Miss Stackpole and what they said to you?

A Miss Stackpole did not have too much to say at all. I spoke to Mrs. Ammann with Miss Stackpole there. (page 243) I told her that Peter would probably be able to get the money positively this time, a certain amount of money---

Sussman for Plaintiff - Redirect

MRS. SEIDER: (Interposing) I'm sorry, sir. At this point-- I recognize giving an attorney latitude, but we are transgressing that now, Your Honor. This is not the subject of my cross examination. I don't know why counsel is proceeding on a completely different overture here.

THE COURT: What do you say to that, sir?

MR. DELANEY: I say it's the same matter that was discussed about the 18th of October or thereabouts and that the door was opened. I wanted to ask Mr. Sussman about this conversation at all time, but I realized that no one of the defendants was present.

THE COURT: That's right. So it is not binding--

MRS. SEIDER: (Interposing), That's why we are objecting]

MR. DELANEY: Now I feel he has been examined as to what was said and what he did in the middle of October about the same matter (page 244) that I'm examining him, and this is the beginning of the question of why he called Mrs. Ammann in the middle of October. And it explains it. I think I should be permitted to make that explanation.

THE COURT: But he wasn't asked if he called Mrs. Ammann. He was asked if he called Syrena Stackpole, and he said he didn't know.

MR. DELANEY: But he said he knew he called Mrs. Ammann. And this was the outcome of this conversation of which I am now asking. It explains--this conversation about which he will

Horowitz for Defendants - Direct

testify what this conversation was with Mrs. Ammann that took place in the middle of October.

MRS. SEIDER: I merely asked, Your Honor, whether he made a call to Miss Syrena Stackpole.

THE COURT: That is my recollection.

MRS. SEIDER: I didn't ask for anything subsequent.

MR. DELANEY: And you examined him if he didn't do this for Mr. Brandon and everything else. (page 245) Now what was done can be very well explained by the witness, and that door has been opened for the explanation of this question that has been asked to reflect on his credibility.

THE COURT: No. I won't permit it. I'm sorry, Mr. Delaney.

MR. DELANEY: I defer to Your Honor's ruling.

THE COURT: You have your exception.

MR. DELANEY: Thank you.

MRS. SEIDER: I am finished with the witness, Your Honor.

THE COURT: All right, thank you.

page 246 Horowitz for Defendants - Direct

Q Will you identify yourself? Are you a member of a firm?

A I am a member of the firm of Goldman, Horowitz and Chernov, with offices at 390 East Old Country Road, Mineola, New York.

Horowitz for Defendants - Direct

Q And as such were you named, or your firm or yourself personally named as attorney for the creditors of M.N. Ammann Hardware, Inc?

A Mr. Isidore Chernob, with an "E" on Isidore, C_h-e-r-n-o, of my office was designated the assignee for the benefit of creditors, and he was very wise in selecting me as his attorney.

page 246 Horowitz for Defendants - Direct

THE COURT: Will you repeat that?

THE WITNESS: \$856,97. The amount of general unsecured claims file and allowed bt the assignee was in the sum of \$73,573.86.

Q Now among the various claims that you have ther, sir, was there a claim filed in behalf of one Peter Brandon?

A There was a claim filed on behalf of Mr. Peter Brandon by attorney Robert Morris, M-o-r-r-i-s, 1350 Avenue of the Americas, New York 10019, in the sum of \$39,853.07.

Q Could you give us the approximate date that was filed, sir?

A The first attempt to file this claim was made by attorney Morris on October 11, 1966.

Horowitz for Defendants - Direct

Page 246 Horowitz-direct

Then on October 25, Mr. Morris returned that same affidavit but this time it had been sworn to and the date had been crossed out, and it was sworn to before a notary republic dated October 25, 1966, and it set forth in the affidavit all the cash advances made to Ammann Hardware by Mr. Peter Brandon, and Mrs. Ammann in her affidavit stated that these were all personal advancements and they were not capital investments, and that these sums were actually due to Mr. Brandon and were to be accepted as far as she was concerned.

Based on that affidavit we accepted it because the books and records disclosed that these were cash advances.

Page 251

Mr. DELANEY: Apparently, but that is only a statement of act as to what the books reflect, but it's no consent to file any claim, or does it have any other factor other than they were personal advances. I know and have always known they were. But I don't feel Mrs. Ammann, in making a statement of facts from the books is bound in anyway in this case. She filed no claim.

MRS. SEIDER: That is not what my offer of the exhibit was attached to, Mr. Delaney. Will you concede on the record that your client did make a statement in court yesterday to the

Horowitz for Defendants - Cross

(page 252)

effect that she personally did nothing to bolster her son's claim, nor would she?

THE COURT: That's right. She did testify to that.

MR. DELANEY: Well, I don't know whether it was a question whether she wouldn't bolster it. She understood he wouldn't file any claim and had refused to sign the assignment.

THE COURT: And she indicated she wouldn't help him file a claim. Wasn't that the import of her testimony?

MR. DELANEY: I don't think that she had any recollection or knowledge about filing any claim. And I repeat, Your Honor, she filed none although she has a claim and is sticking to her guns and not filing it.

THE COURT: All right. I'll receive it in evidence.

Page 258 Horowitz-cross

Q Do you have the proof of claim of Ruby Dobbis for \$3,067.50?

A Yes, I have.

Q May I look at it?

A Yes (handling).

Q Now I show you the exhibit attached to the proof of claim, being a three-month note to the order of the Suffolk County National Bank, Riverhead, by M.N. Ammann Hardware, Inc., Helen W. Ammann, President, and Mathias Peter Brandon,

Secretary, dated August 1, 1965, and endorsed by Helen W. Ammann and Mathias Peter Brandon and ask if you made any inquiry as to whether this sum of money, this note had been fully paid (handling)?

A Yes, We had made inquiry of the Suffolk County National Bank. It said that it had been paid although they could not verify that it was paid by Mr. Dobbis. But since we had his affidavit and the note was paid, we accepted it since no one else had made a similar claim.

Horowitz for Defendants - Cross

page 260 (Horowitz - cross)

Q Now have you a proof of claim of the Twin D Land Corporation?

A Yes, I have.

Q May I see it?

A Certainly (handing).

Q Do you have any supporting documents on this proof of claim?

A No. We felt we didn't need it. We knew what the rental was. We had seen the lease, we knew what the rental was and we had a copy of the dispossess in which the assignee was made a party, so we knew what the rental was.

MR. DELANEY: Now may I have this marked in evidence?

THE COURT: Any objection, Mrs. Seider?

MRS. SEIDER: No.

Will you state on the record the nature of the claim, Mr. Delaney?

THE COURT: Well, it is for rent, isn't it?

THE WITNESS: It speaks for itself, It's on the exhibit, if I may interpose.

MR. DELANEY: It specifies rent?

THE WITNESS: It specifies rent and it tells the month.

MRS. SEIDER: Yes. I hadn't seen it.

(Looking) Yes, no objection at all.

Horowitz for Defendants - Cross

THE COURT: Let it be received and marked in evidence.

(Document referred to, proof of claim was received in evidence and marked Plaintiff's Exhibit 19.)

page 267 (Horowitz - cross)

Q I would just like to show you Plaintiff's Exhibit 7 and exhibit 13 in evidence, and plaintiff's exhibit 9 for identification, and ask if the claimant, for the \$2,904.16, ever brought those matters to your attention in filing the claim (handing)?

A To whom do you refer as claimant?

Q Twin D Land Corporation.

A No.

page 270 (Horowitz - redirect)

Q Do you mind telling us what the amount of that bulk offer was?

A It was \$22,500 for the hardware business --

page 299 (Daly - direct)

Q Mr. Daly, what is your position with the Chicago Title Insurance Company, Home Title Division, Riverhead?

A I'm a reader and a closer with the firm.

Q Have you brought with you your records pursuant

Daly for Defendants - Direct

That's why I -- there was a tieup for some reason between Mr. Gluck and Miss Stackpole, and Mr. Gluck's clients, which was not, didn't involve me at all, and they said they were going back to the office. I think it involved getting a certified check. I don't remember that--what the tie-up was about, and I marked their deed with a pencil mark and at the time it came back it was the same deed because I had my little pencil mark on it, which I erased. That's why I know this deed was the same deed that I saw on the 30th.

Q I am not disputing that, Mr. Daly. I just want to know when this deed was delivered to you--may I look at it please?

A Yes, sir. (Handing)

Q When did you affix the revenue stamps?

A On the 8th.

A That's right sir.

Q Now between the time when you had this deed in your hand on the 30th, and the 8th, during that period that elapsed you didn't have the deed, did you?

A No, sir.

Q And now when you received the deed subsequent to your having it in your hands on the 30th and turning it back to Miss Stackpole, on what date--no, who gave you the deed?

Daly for Defendants - Direct - Cross

to my subpoena in connection with Title number S-51645 to court this morning?

page 300 (Daly- direct)

Q And to the best of your recollection on what date was title supposed to have closed?

A On the 30th day of September.

Q On that date was Helen Ammann present?

A No, she wasn't.

page 307 (Daly-direct)

Q What is the date of the closing?

A The date of the closing is October 8th, when the deed was recorded.

page =309 (Daly-cross)

Q Who handed you the deed?

A Miss Stackpole.

Q Did she take it back from you?

A Yes.

Q Well, do you claim that the deed was delivered to you when Miss Stackpole handed it to you?

A I claim that the deed was given to me on the 30th, sir. I gave it back because the title did not officially close, because I wasn't paid for it that day.

Daly for Defendants - Cross

Gluck for Defendants - Direct

A The deed was brought down to me by the purchasers along with the mortgage, and the checks. This was a very short interval in between, sir. I had a conversation with Miss Stackpole-it was a Friday, I believe-I know-that's right I know the weekend was coming up-and I had a phone call from Miss Stackpole saying it was all right to go ahead with it. I think she had gotten the certified check and she said the two men would be sown with the deed and the mortgage to be recorded and naturally with the policy money.

Q Was that on the 8th of----

A (Interposing)That was on the 8th of October, sir.

page 313 Gluck-direct

Q Mr. Gluck, you are a member of the Bar of the State of New York?

A Yes.

Q For how many years have you practiced, sir?

A Next year will be 40 years.

Q And are you the Peter Gluck who has been referred to in the course of testimony heard in this trial yesterday?

A Yes.

Q And this morning?

A Yes.

Q Do you represent the Twin D Corporation?

A Yes.

Q And you also know Rubv Dobbis?

Gluck for Defendants - Direct

A Yes.

Q Is he related to you?

A He is my sister's son-in-law.

Q And Donald Dunkenberg, is he related to you?

A He is my son-in-law. He's married to my daughter

page 314

Q And both of the aforementioned gentlemen are officers and directors for Twin D Corporation: is that correct?

A Yes.

page 315 (Gluck-direct)

Q As best you recall will you tell us what was said and what occurred?

A Well, I told Miss Stackpole and everybody present that my clients were prepared to buy these buildings for a gross price of \$70,000, the Peconic Avenue property being then subject to a mortgage held by a bank in the sum of approximately \$16,000, that we would invest a total of \$10,000 in cash and that the difference between the mortgage on the Peconic Avenue property and the cash was to be taken by the seller in the form of a purchase money mortgage on the constant payments, quarterly payments, until it was paid.

page 316

Q Was this offer acceptable to Mrs. Ammann and her attorney Miss Stackpole?

A Well, in addition to the price there were other

Gluck for Defendants - Direct

factors involved. At that time they were involved with the Peconic Avenue property which had been shut down. There had been a hardware business conducted there, the doors, I was advised, had closed May 1st by virtue of the fact that they could no longer meet their obligations. There were questions of possession. There were questions of the tenancies in the corner building, and a question was also raised by Miss Stackpole to the effect that they really ought to get something in addition to the \$70,000 because they had made certain capital improvements, I believe consisting of a fire escape and bathroom some year or two before, and she really thought they ought to be compensated for that.

Q What occurred thereafter?

A Well, We were in proximate agreement except on a couple of things. And the main item was that both Mr. Lipetz and Miss Stackpole were concerned that leaving the purchase money mortgage of approximately 47 or \$48,000 to have. (page 317) I in turn said I cannot go along with a situation where this purchase money mortgage would be a blanket on both properties, because there is already a mortgage on the Peconic Avenue property. It's a a closed building. It's a highly specialized building. It has no tenants. If we should be unable to secure a tenant for that property we may want to sell it, and I would never be able to sell that property with those two mortgages a lien on it.

Gluck for Defendants - Direct

And I said if you insist upon that being a blanket mortgage we may as well forget the transaction.

page 318 Gluck direct

Q What happened after July 16th, 1965.

A On or about July 23rd I received a phone call from Miss Stackpole.

Q And What was said.

A The substance of the conversation was Mrs. Ammann wishes to accept your proposition. I said, "Well, now let's, before we go any further, let's review what is (p319) my proposition."

She said, "Well, you're going to pay us \$71,200, you are going to pay us \$10,000 in cash."

I said, "Just a minute. The 10,000 cash is acceptable but we will pay you \$7,000 on contract and title, and \$3,000 by our agreeing to pay off the note to the bank to save Mrs. Ammann harmless on anything on the note." The note at that time was not yet due.

page 320 Gluck direct

She said, "Well, I'm still worried about that mortgage on the corner." I said, "Is that all that bothers you?" She said, "Well, that's pretty much the main issue."

"I'll tell you what I suggest," I said, "If this meets with Mrs. Ammann's approval I will suggest to (p.321) my

Gluck for Defendants - Direct

my clients that we apread the mortgage, the purchast money mortgage on both properties but that it contain a provi- sion that in the event we should ever wish to release the Peconic Avenue property because we want to sell it, mort- gage it, whatever we want to do with it, that upon payment of an additional \$5,000, without affecting the other pay- ments that would be coming due, \$2,000 quarterly, that upon that payment your client will execute a release."

She said, "It sounds all right to me."

page 323 Gluck direct

Q Now Mr. Gluck, in this letter of July 23, 1965 which has just now been marked for identification, did you when you sent this letter have any enclosure annexed to it? (p.324)

A Yes, I did.

Q And what was the enclosure?

A The enclosure was a copy of what has now been referred to as Rider C annexed to the contract in evidence.

Q And as far as Rider C was concerned was this in relation to the M. N. Ammann Hardware Corporation?

MR. DELANEY: Well, I object on the ground that the paper speaks for itself, although we haven't been furnished with the enclosure with the letter.

Q Do you have a copy of the rider? Do you have an

Gluck for Defendants - Direct

extra copy of the rider that you enclosed?

A Well, I have part of it. The enclosures in that letter are the identical papers annexed to the two contracts, one of which is in evidence.

THE COURT: That is Rider C which was in your letter, is that right?

THE WITNESS: Yes, sir.

page 325 Gluck direct

Q May I show you the contract and ask you whether this particular contract which is in evidence was the contract that you just spoke about (handing)?

A Yes, I believe it is.

Q And that is the contract which was produced, the first one that I have given you, which was produced at the examination before trial which Mr. Delaney ended up with?

A No.

MR. DELANEY: Well, I object to the form(p.326) of the question.

THE COURT: I don't think it's necessary. I don't think it's pertinent. I will sustain the objection.

MRS. SEIDER: I'll withdraw the question.

THE COURT: Thank you.

Q You now have before you, Mr. Gluck, both contracts;

Gluck for Defendants - Direct

is that correct?

A That's right.

MRS. SEIDER: I would like to offer the copy of Miss Stackpole in evidence at this point.

(Handed to Mr. Delaney)

MR. DELANEY: This is an exhibit marked Exhibit 2 for identification, And now what is the offer?

MRS. SEIDER: With the letter of Mr. Gluck on the date of July 23, 1965.

MR. DELANEY: Well, there is no suggestion that that Exhibit 2 for identification was in the letter, is there?

THE WITNESS: No.(p.327)

MR. DELANEY: Well, that's --

MRS. SEIDER: We are talking about the riders which appear in this --

MR. DELANEY: Well, I have no objection to the plaintiff's exhibit.

THE COURT: Number 2?

MR. DELANEY: Plaintiff's Exhibit 2 for identification being received as a defendants' exhibit, that I have no objection to.

MRS. SEIDER: I also offer in evidence the letter from Peter Gluck under date of --

THE COURT: Just a moment now. Are we

Gluck for Defendants - Direct

having two separate exhibits or one exhibit?

MRS. SEIDER: We are going to have two separate exhibits.

THE COURT: All right. Then let's take the first one first. So now Plaintiff's Exhibit 2 becomes Defendants' Exhibit P in evidence.

Mark that please.

(Plaintiff's Exhibit 2 for identification above referred to, was received in evidence and marked Defendants' Exhibit P,)

page 331 Gluck direct

MRS. SEIDER: On the record, I would like to correct Mr. Delaney, if I may. This letter was refused to you on the examination before trial because you were advised that it would be used at the trial.

Is that correct, Mr. Delaney?

MR. DELANEY: No, it is not correct. They were all communications between Miss Stackpole and Mr. Gluck, they were refused by (p.332) Mr. Gluck on the ground they were confidential communications, and I read that into the record.

THE COURT: You did. Well, Mrs. Seider, do you have all of them now? Maybe you can give him all of them, to Mr. Delaney right now and

Gluck for Defendants - Direct

let him look at them.

page 337 Gluck direct

Q Now we are at the contract closing at the bank. What occurred in the course of the closing?

A Well, I had with me the copy of the contract and two, possibly three sheets of rider. I had with me the copy of the contract, copy of Rider A and a copy of Rider B as sent to me by Miss Stackpole simultaneously with the time that I sent her my proposed rider covering the matters involved with her, with the assignments, et cetera. That rider was not marked Rider C by me, but was subsequently marked Rider C in Miss Stackpole's handwriting, as will appear on the other copy. Now what its marked, I don't know.

Q Do you have that in front of you? I thought you had both copies of the contract?

A No, I think I have just one, at the moment.

Q I'm sorry, hereit is (handing). Is this the one you had reference to?

A Yes. The handwriting at the top of this sheet, which is marked Rider C, I'm quite sure that's in Miss Stackpole's writing.

page 342 Gluck direct

Miss Stackpole and I initialled every change on

Gluck for Defendants - Direct

both copies and the parties signed the contracts, including Mrs. Ammann.

page 348 Gluck direct

Q And after the incident of September 30th did there come a time when you again was in conference with--

A (Interposing) No, we did not close on September 30th. The reason was that Miss Stackpole was lacking(p.349) certificates and possibly the checks and notes to substantiate Mrs. Ammann's assignment.

At this point I said, "Well, I can't close--" I had with me at that time a certified check which I have here (indicating) for \$5,000 and was prepared to give her an uncertified check for the adjustments of some 8 or \$900.

Q And did you leave these checks with her in escrow?

A No, I did not.

Q Until she produced these papers?

A No, I did not.

Q What did you do?

A What I did was, Miss Stackpole said, "I will get these things for you. Mrs. Ammann is out of town but I will get them. What arrangement do you want to make?"

I said, "Well, I would like to avoid another trip to Riverhead." She said, "Would you be willing to leave everything with me?" I said, "Yes, I trust you. There is

Gluck for Defendants - Direct

no question about the documents," but I said, "this \$5,000 certified check I would rather take that back,(p.350) for the time being, When you are prepared to deliver the papers, you know, when you have those proofs for me, I will send them out with a certified check to replace the uncertified one, because you don't know how long it will take you, and I would just as soon not have a certified check floating around."

So I took the certified check and my clients redeposited it, and I left with Miss Stackpole fifty eight hundred and some odd dollars in two checks -- no, one check I think, plus the documents.

Q And they remained in her possession, is that right?

A That is right.

Q And did there come a time shortly following that when you received any word from Miss Stackpole regarding the documents that you have mentioned had been missing?

A Yes.

Q And when was that, Mr. Gluck?

A Three or four days after September 30th.

Q And what occurred then?

A She called me and she said, "I have everything(p351) you want with the exception of the assignment from Peter Brandon." I said, "What's the trouble?" She said, "Well, Peter is having a tantrum."

Gluck for Defendants - Direct

MR. DELANEY: A what?

THE WITNESS: A tantrum.

MR. DELANEY: A what?

THE WITNESS: A tantrum. I said, "Well, do you think you can get it?" She said, "Well, eventually of course but I haven't got it now." She said, "Just how important is this to you?" I said, "Well, it's important in this sense," I said, "we are going to try and make some arrangements with these creditors." I said, "If we do arrive at an agreement with these merchandise creditors I am not going to allow my clients to be open to a claim by Peter Ammann for substantial sums of money which I have already been warned may be an obligation of the corporation." That advice I got from Mr. Lipetz at the original meeting. That's why we embodied it in this thing (indicating.)

I said, "However, insofar as closing title to the real estate is concerned, actually (p352) no, I don't but, I said, "You must, we should get it because if Peter should never go along and either waive this claim or assign it to us, as he has agreed, we will not turn any money over to these creditors and buy a corporation which is subject then to a claim for a substantial amount of money."

Gluck for Defendants - Direct

Miss Stackpole said that she thinks she would get it. But she couldn't guarantee it. And I said, "All right, with that understanding I'm ready to close." "Fine," she said, "What arrangements do you want to make?" I said, "Well, I don't want to come out to Riverhead. I will sent the buyers out to your place with a list of documents which you owe me, eliminating therefrom Peter Ammann's assignment, and a certified check to replace the one which you hold. Thereupon, they, if you give them the papers, or meet them at the title company, they will turn them over for recording."

And I made that arrangement. They went(p353) out to see her. I did not go.

Q Now Mr. Gluck, there has been some testimony here regarding the filing of a claim for rentals amounting to some 2,000-odd dollars. Does this recall itself to you?

A Yes.

Q Will you explain to us how that came about, sir?

A Well, under the terms of the contract and the assignment which Mrs. Ammann gave to my clients they assigned to us everything, her claim against the creditors, everything that she had. When we were unsuccessful -- when the creditors finally rejected our commonlaw offer to settle and we received a notice that the time for

Gluck for Defendants - Direct

filing-- and as I had promised the creditors, if we were unable to bring them a satisfactory agreement we would make an assignment to whomever they named -- this was my agreement with the creditors' committee. And I did just that. That's the assignment that you heard talked about here.

When it came in the middle of, somewhere around the middle of December we received a notice that the last day for filing claims in the assignment I think (p.354) was December 31st, I called to Don's attention this fact, and at this time he said -- I said, "You know, you own this assignment. What do you plan to do about it?" He said, "Well, do you think it amounts to anything in dollars and cents?"

I said, "I don't know what it's going to be. It depends on what they are going to get. My experience has been that creditors don't end up with very much. However," I said, "that's something you have to decide."

He said, "Well, I would like if Ruby," - that's his partner, "if he doesn't object I would like my aunt to get whatever will come by virtue of this assignment."

I said, "Look, that's something you have to decide for yourself." I said, "Don't forget, you have undertaken all the expense in connection with these creditors and it's substantial. However, this is a personal matter between you and your aunt. You do as you please."

Thereupon Don wrote -- oh, he said, "However, what

Gluck for Defendants - Direct

about "the back rent?" And I said, "That goes with the deed and you certainly --"

MR. DELANEY: (Interposing) Your Honor- (p355)

THE WITNESS: All right.

MR. DELANEY: I think maybe we might have another question. A lot of this is hearsay. I would like to have another question. We are going into a new phase.

THE COURT: Another question?

MR. DELANEY: Yes. I think there should be a question that I can refer to as to whether it's hearsay or not.

THE WITNESS: I think there is a letter in evidence which Don sent to Miss Stackpole.

MRS. SEIDER: It's part of an exhibit.

THE WITNESS: Covering this very situation.

THE COURT: Proceed, Mrs. Seider.

Q And what happened to the determination regarding the filing of the claim for the rent? You are speaking of the occupancy --

A (Interposing) There is a letter, I'm sure which is in evidence, fairly sure there is a letter in evidence.

THE COURT: (To the witness) Just tell (p356) us what happened. That's all.

THE WITNESS: Well, I don't want to make any hearsay statements. Don sent a letter to

Gluck for Defendants - Direct

Miss Stackpole stating that it was time for the filing of claims, asking her if his aunt wished to file a claim. He said, "If so, I will return to you the broad general assignment which you made to me. However, I would file a separate assignment back from my aunt to the extent of the back rent, about \$2,900. She can file or not, as she sees fit, for the large amount, but I feel we are entitled to the \$2,900."

Q And this 2,900, did this represent rental of the space during the period that the assignee was in possession?

A No, it did not.

Q What did it represent?

A It represented back rent, I think, from the beginning of the year according to the agreement between M. N. Ammann Corporation and the owner of the real estate which hadn't been paid. We estimated it. And the assignee was satisfied. We were paid in cash as a preferred claim (p357) for the use and occupation of the premises from the date of the filing of the assignment and the end of the sale, which I think we referred to here.

Q Now Mr. Gluck, you were in court yesterday when Mr. Horowitz testified regarding the offer that had been made of \$12,500; is that correct?

A I heard his testimony, yes.

Q And that offer had been refused on behalf of

Gluck for Defendants - Direct

the creditors?

A Well, the first offer was at a meeting of creditors. It was an offer of a commonlaw settlement, before any assignment, 30 percent of the face amount of the creditors' claims, the merchandise creditors. That was rejected.

Thereupon I carried out my agreement and I made an assignment to them for the benefit of creditors through Mr. Mallin. I at that time was --

MR. DELANEY: (Interposing) I am going to move to strike out that he carried out his agreement which is something which doesn't involve the plaintiff at all, nor was it said that the plaintiff has any knowledge of it.(p358)

THE COURT: I think he testified he carried out what he considered to be his agreement with the creditors, that if he couldn't effect a commonlaw assignment that he would then make his general assignment to the benefit of creditors.

(To the witness) Isn't that it?

THE WITNESS: That is very correct.

THE COURT: I see nothing prejudicial there Mr. Delaney.

MR. DELANEY: All right, I'll withdraw it.

THE COURT: Thank you.

Q Now Mr. Gluck, if you know, what attempts were

Gluck for Defendants - Direct

made to lease this property prior to improving it?

A You are now referring to the hardware store?

Q Yes, the Ammann store?

Q Well, the defendants made those efforts. I happen to be familiar with most of them because --

THE COURT: (Interposing) What is the relevancy of this, Mrs. Seider?

MRS. SEIDER: The relevancy of it, if Your Honor please, refers to best efforts, (p359) and we are trying to demonstrate that every conceivable effort was made.

THE COURT: To rent the property?

MRS. SEIDER: To lease the property, to do whatever could be done to bring in income in connection with the property.

THE COURT: I don't think you need it, but if you want it --

MRS. SEIDER: I really don't, but I just want to make certain.

THE WITNESS: Well, I think it's fair to assume that they did everything they could for their own benefit, I'm sure.

MR. DELANEY: I move to strike that.

THE COURT: Yes.

THE WITNESS: Many things were done.

THE COURT: I don't think it's necessary to pursue that. (p360)

Gluck for Defendants - Direct

THE WITNESS: I have literature here that they sent out, and all that kind of thing.

THE COURT: That's all right.

Q Mr. Gluck, as attorney for the defendants, (p360)

A Excuse me, I don't think I finished my answer before.

Q All right.

A (Continuing) That was in the commonlaw, and when that was rejected we made the assignment, and simultaneously with the assignment Mr. Mallin sent a check. All of this is referred to in that correspondence in evidence.

MR. DELANEY: Then, Your Honor, I think the correspondence speaks for itself. Because I don't know where this leads me, and of course it's utterly -- I never heard of the commonlaw something or other at all, and I must object as not binding upon the plaintiff, and as hearsay.

THE COURT: I'll sustain it.

Proceed, Mrs. Seider.

Q I am directing your attention to the amount of improvements made to the property and what was done thereafter by the defendants, the expenditure both of time and money, if you know? (p361)

MR. DELANEY: I believe that's irrelevant. I object.

Gluck for Defendants - Direct

THE COURT: What is the relevancy, Mrs. Seider?

MRS. SEIDER: Well, if Your Honor please, I am leading up to our counterclaim in this action which is part of our proof.

THE COURT: Your counterclaim - and correct me if I'm wrong - states that you were going to tender "5,000, and directs, requests that the Court direct Mrs. Ammann to sign a release of the mortgaged premises." Is that correct?

MRS. SEIDER: Correct, sir, and if I may test the recollection of the Court, with all due respect, we have testimony in here to the affect that the property was under contract at this point for sale, and we are being held up.

THE COURT: You are not looking for a money judgment, are you?

MRS. SEIDER: We are looking for a release. We have tendered the money which was (p362) refused yesterday by Mr. Delaney. We tendered it to his client on the witness stand and he instructed her to not to accept it.

THE COURT: Well, I don't see its relevancy but if you desire to put it in evidence I'll permit you to do it.

MRS. SEIDER: Well, if Your Honor does

Gluck for Defendants - Direct

not seem to think it relevant, I will withdraw the question.

THE COURT: Thank you.

Q Do you renew your tender of \$5,000 on behalf of your clients to Mrs. Ammann?

A Yes.

Q And are you requesting this Court to grant you the relief as set forth in the amended answer in behalf of the defendants?

A Yes.

Q Now, Mr. Gluck --

MRS. SEIDER: --May I interrogate Mr.

Gluck regarding the outstanding contract that we have in this matter, as stated in my motion?

Q Mr. Gluck, are you presently under contract(p363) on behalf of your clients to sell the hardware store?

A Yes.

Q And have you been able to complete this contract?

A No.

Q Has this building been vacant?

A The building has been vacant ever since we entered this situation.

Q And for what period of time would you say it has been vacant, and how much monies have been lost as a result thereby?

A Well, it has been vacant since the day we took

Gluck for Defendants - Direct

title, which we know is either September 30th or October 8th, to the present day. The carrying charges on that building are approximately \$5,000 a year. No income of any kind whatsoever, other than the few hundred dollars we got from the assignee, has ever been obtained.

Q Now as of this date how much monies has been paid to Mrs. Ammann, exclusive of the tender of the \$5,000 certified check? (p.364)

A Well, the monies paid were \$2,000 on contract, \$5,000 on title plus \$800 and some-odd dollars in adjustments, plus \$6,000 representing three-quarter-annual payments of \$2,000 each. Totally some \$13,000, between 12 and \$13,000, I believe, if my addition is good.

Q Would it be closer to seventeen?

A Let me see -- yes, \$17,000. I'm sorry.

Q And you tendered an additional 5,000, making it \$22,000; is that correct?

A That is correct.

Q Now Mr. Gluck, at anytime at all during your dealings with Miss Stackpole were you ever lead to believe that she in any way failed to represent her client?

A What was that question again?

Q I said at any time during your dealings with Miss Stackpole was there any question in your mind whatsoever --no, I will withdraw that.

At all times you were lead to believe that

Gluck for Defendants - Direct

Miss Stackpole represented the plaintiff Helen Ammann;
is that right?

A Absolutely.

Q And all your dealings had with Miss Syrenna(p365)
Stackpole were with that viewpoint in mind; is that
right?

A I only met Mrs. Ammann personally twice in
my life, at Mr. Lipetz' office and at this contract,
prior to the case, of course.

Q Now I direct your attention to the following
as to the passage of title. Did you at any time receive
any communication from Mrs. Ammann?

A I did.

Q Do you have that with you?

A I do.

MRS. SEIDER: May I have it please?

(Handed to Mrs. Seider)

MRS. SEIDER: I would like to offer this
in evidence.

(Handed to Mr. Delaney)

MR. DELANEY: I have no objection.

THE COURT: Let it be received and marked
in evidence.

(Letter referred to, consisting of two
pages together with envelope, above referred to
were received in evidence and marked Defendants'
Exhibit U.) (p 366)

Gluck for Defendants - Cross

THE COURT: Do you wish to use this, Mrs. Seider?

MRS. SEIDER: Yes, I do, after you have looked at it.

THE COURT: I won't take the time to look at it now. I will look at it at lunch.

THE WITNESS: There is a copy of it.

page 368 Gluck cross.

Q During this period in which you had been receiving these letters which have been marked in evidence from Miss Stackpole, August 19th through October 14th, did you ever write Miss Stackpole any letter?

A Yes. I already have offered one, of July 23rd. I don't find any other copies of letters from me to her during this time. They may exist, but if they do I just don't have them. They were primarily letters from her to me, except for the original one when I forwarded my proposed rider.

page 371 Gluck cross.

Q Will you look at page 2 of your affidavit and see if you didn't swear at that time in the motion that you were making for summary judgment that July 26th was the date that was set for Mr. Lipetz' office?

A Are you going to refer me to some specific part of this?

Gluck for Defendants - Cross

Q Yes, page 2. Mr. Lipetz' name is in capital(p372) letters throughout there.

A A tentative date was set for July 26th at the office of Gordon Lipetz. I think that's so.

Q Is that correct?

A Yes, but it never did take place.

Q That meeting didn't take place?

A No, it didn't.

Q And how long afterwards did a similar meeting at Mr. Lipetz' office take place?

A I don't think it did.

MR. DELANEY: May I have that?

(Handed to Mr. Delaney)

Q Now I show you the next paragraph on page 2 and ask you if you didn't state therein that you attended (p373) this postponed meeting in Mr. Lipetz' office some time after July 26, 1965?

A There was only one meeting at Mr. Lipetz'a office. That's all I can tell you.

Q Didn't you state in that affidavit that you attended the meeting in Mr. Lipetz's office some four or five days after the July 26, 1965 meeting was postponed?

A I don't think it says that but --

Q (Interposing) Will you read the paragraph that

Gluck for Defendants - Cross

that begins -- the first paragraph beginning on the page?

A (Reading) Yes, I see it. There was one meeting at Mr. Lipetz' office. The date I'm not certain of, but there were a half a dozen other people there. If I'm wrong on the date, then I'm wrong.

Q But you did say it was some time four or five days after July 26th?

A Possibly. There was that one meeting. That's all that was had, whether it was the 16th or the 26th I'm not really sure. (p.374) Gluck-cross.

Q Now do you have in your file a copy of the enclosure that was contained in the letter to Miss Stackpole of July 23rd, 1965, marked Exhibit O in evidence?

A Well, two copies of it are annexed to the contracts, and I saw one -- here is one page -- I think around the desk there (indicating), I think this is one of the -- this is the form. I think there is another page of it around on the desk there. (indicating)

MRS. SEIDER: We will look for it during the luncheon recess.

THE COURT: Well, he testified on direct that he didn't have a complete set in his file.

Q May I see the paper you have there?

A Yes. (handing)

Q Now in the letter of August 19th, 1965, from Miss Stackpole to you, which is marked Defendants' Ex-

Gluck for Defendants - Cross

hibit R, part of it, did you ever send copies of changes in the contract to Miss Stackpole as she requested (handing)?

A I don't recall whether I sent it to her or whether we discussed it on the phone. She would probably know better. I don't recall. I do see that she suggested (p 375) it, but I don't know if I ever made a separate copy of it. But I know that we discussed it on the phone.

Q Well, did you reply in writing to that letter? These are all Miss Stackpole's letters?

A Yes, I know. I'm not sure. I'm not sure.

Q Now looking at the exhibit, Defendants' Exhibit O, on the second page, the third paragraph on that page, did Miss Stackpole say to you in a letter that she did not believe that any rider proposed by you was proper?

A The letter speaks for itself, what she thought was proper and what I thought was proper --

Q (Interposing) Well, do you remember that she did?

A I see it in the letter, yes.

Q Have you no other recollection other than you have seen it in the letter now at this moment?

A That's right, Yes. I know she referred to it and I know what I wanted, and if it wasn't satisfactory they didn't have to make the deal.

Gluck for Defendants - Cross

Q But she said it shouldn't be there; isn't that right?

A She said she didn't think so. She had a right to reject it if she -- (page 376)

Q (Interposing) Did you ever reply to this letter, Defendants' Exhibit O in writing?

A I doubt it. The wording is, she said I wonder if it should be, or I doubt, or something of that kind. Well, that was her job to wonder. I knew what I needed to protect my clients and I had to get it. That's all.

Q And you had to get that irrespective of the harm that it would do the plaintiff; is that right?

A That's right.

Q Mr. Gluck, did you testify that each and every change in the contract was initialled?

A I don't think that was my testimony. If there were changes we intended to initial them all. I think we did, but if you show me one we missed, it's possible.

Q Well, didn't you testify on your direct examination that you initialled every change?

A If I did that's what I meant, yes. I still think I did. If there is one that I didn't, then I didn't. (p 377)

Q Now I would like to show you the defendants' Exhibit P --

A (Interposing) I'm sorry. Here is that second

Gluck for Defendants - Cross

page that we were looking for. I'm sorry.

Q --And ask you if you see changes there that are not initialled?

A I don't consider that a change. You mean the typewriter part at the bottom? No, I don't think --

MR. DELANEY: May we suspend until we get this paper together because it's hard for me to hear the witness.

THE COURT: He said he didn't consider that to be a change, Mr. Delaney.

MR. DELANEY: May I have that back?

(Handed to Mr. Delaney)

Q Now I show you Plaintiff's Exhibit P in evidence--

THE COURT: That is the defendants' Exhibit.

Q --and call your attention to the provision, the purchase money mortgage shall contain the following additional provisions: 1) That at any time the purchaser or its successors shall require a release of parcel 1 to 10 (page 378) Peconic Avenue from the lien of said mortgage same shall be executed by the holder of said mortgage without cost upon payment of \$5,000 additional amortization thereon.

Now isn't that a change?

A The only thing we initialled were the hand-

Gluck for Defendants - Cross

written things or things struck out. That was typed in by Miss Stackpole in my presence. I didn't consider it a change. It was conformed in my copy. No, I don't call that a change and I didn't initial it, nor did Miss Stackpole. It was an addition, not a change.

MR. DELANEY: I should like to have this paper writing marked for identification, it being dated July blank, 1965, and the witness has testified it was enclosed in the letter of July 23, 1965 from himself to Miss Stackpole.

THE WITNESS: I didn't say that was enclosed. That's my office copy.

MR. DELANEY: I beg you pardon. I withdraw the question -- I withdraw the offer.

Q Do you have the letter of July 23rd?

A I doubt that I have any of the exhibits here.

page 379 Gluck-cross

MR. DELANEY: May I have it marked for identification.

THE COURT: Mark it for identification.

(Rider, consisting of two pages, above referred to, was marked for identification only as Plaintiff's Exhibit 21.)

Q I show you Defendants' Exhibit P and ask you if it is your testimony that when you went to the clos-

Gluck for Defendants - Cross

-ing the clauses following the statement, "The purchase money mortgage shall contain the following additional provisions," which I have read before, and the second matter about fire damage, were they in that contract when you went to the closing? (p.380)

A They were in my copy of the contract, which is not this one, but the other one (indicating.)

Q They were in that contract that was signed? Isn't that supposed to be a counterpart?

A I didn't say they were not in. They most definitely were in the contract that was signed.

Q They were not in the contract that was signed at the time you went to the title, to the contract closing?

A I told you they were in the copy which I had, which Miss Stackpole had forwarded to me and to which I added a copy of my proposed rider. And the change regarding the mortgage and the fire insurance which we worked out in the intervening period. When we got there Miss Stackpole took her copy and went in and conformed it to mine.

Q Where did she go to do this conforming?

A In the bank, somewhere in the stenographer's room, some place like that. I didn't go with her.

Q You don't know that she typed it then, do you?

A Beg Pardon?

Q You don't know that she typed it?

Gluck for Defendants - Cross

A I do not.

page 381 Gluck-cross

Q Now do you know that Mr. Dunkenberg called Peter Ammann, as is related in your letter of October 26, 1965?

A Only by hearsay.

Q Which is Exhibit V?

A I'm sorry. I thought you were finished.
Only by hearsay from Don.

Q But you referred to it in this letter Defendants' Exhibit V?

A That's correct.

Q Now do you know what he called him about?

A Well, he'll be on the stand. He'll -- I think --

THE COURT: (To the witness) If you know.

THE WITNESS: I think his mother -- his aunt --

Q Do you know?

A Well, I'll tell you as much as I know.

Q Go ahead.

A His aunt had requested him to call Peter. My understanding is as a favor to his aunt, reluctantly he called him and Peter refused to get on the phone. Now (p.382) that's all I know. I was not present. I

Gluck for Defendants - Cross

didn't think I had to adhere to rules of evidence, to the rules of evidence in writing a letter of that type.

Q Now is it your testimony that the purchase price -- that \$1,200 of the purchase price was included in the purchase price in order, or in return for the provision that there would be a release of the hardware building upon payment of a lump sum of \$5,000?

A No relationship. We sort of agreed to that after, in leaving Mr. Lipetz' office. Mr. Dobbis said if that was the only thing he thought we would get together.

Q Now first of all, on page 3 will you read the paragraph of your affidavit on your motion for summary judgment dated July 27, 1966, and I ask you if you remember including that paragraph in your affidavit (handing)?

A Yes, I do, sir.

Q Didn't you say in that affidavit that in return for giving \$1,200 additional to the \$70,000 that you would, that that was given on condition that you got the release for \$5,000?

A I don't think it says that at all.

MR. DELANEY: May I have the affidavit?

(Handed to Mr. Delaney) (p. 383)

Q Did you say that in that affidavit, that the question about the release was compromised by your

Gluck for Defendants - Cross

paying \$1,200 and obtaining the release?

A Are you reading from that affidavit? I'd like to see the wording in there, because that doesn't sound to like the exact wording.

Q May I --

A (Interposing) I would like to have it in front of me.

Q May I ask you if you made this affidavit, and did it contain this statement on page 3, "Some time thereafter deponent received a phone call from Miss Stackpole with a view to reviving the deal. After some discussion it was agreed that the price be increased by \$1,200 making the total purchase price of \$71,200 and that the question of the purchase money mortgage be compromised by having it a lien on both parcels of real estate but with a provision therein of a release of the hardware building upon payment of a lump sum of \$5,000 in addition to the regular mortgage payment. Correspondence ensued between Miss Stackpole and the writer regarding provisions of the proposed contract, and an appointment was made for all concerned to meet at the Suffolk County National Bank in Riverhead on August 23, 1965 for signing of the contract."

Isn't that what you signed and swore to as part of that affidavit in your motion for summary judgment?

Stackpole for Defendants - Direct

A Yes, it was, but it doesn't mean what you say it means.

Q Well, I read it correctly?

A I guess you did but I still say it doesn't mean what you said. We had never agreed to the \$1,200 firmly. It was just a discussion on leaving Mr. Lipetz's office. Mr. Dobbis said if everything else is in order we can get along on that.

Now we were coming down to brass tacks and getting ready for a contract, but one didn't hinge on the other.

Stackpole-direct, page 394

Q Now this offer that was made was in the amount of what, precisely, in round sums?

A While we were in Mr. Lipetz' own office the offer was \$70,000. And I protested that Mrs. Ammann had recently had a fire escape and some other permanent improvements made to the property, and Mr. Dobbis finally said, as we went out of Mr. Lipetz' office, "We'll raise it to \$71,200." And it was left at that, \$71,200, but no agreement.

page 398 Stackpole - direct

Subsequent to that I received from Mr. Gluck some -- I'd call it a rider, some statement of what

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he wanted in the contract. I then prepared a contract. It was not -- he didn't send me a contract, it was just two pages of what he wanted in the contract. I prepared a contract and sent it to him and returned to him the sheets which he had sent to me, and as was testified this morning wrote on to it, "Rider" and changed it by putting "upon information and belief" into some of the paragraphs.

Only with the contract before me can I answer the question fully.

Q Would this be the one (handing)?

A This is done in my office, Rider A, description of the property was done in my office. The one marked Rider C was what he sent to me.

And do you want to know what change I made in there?

Q Yes, would you tell us please?

A All right, the name was misspelled. the initials were incorrect. I corrected that in pen and ink. Down in, just, the line prior to B, I inserted, "Except items belonging to seller personally listed hereafter."

And in item B, I added, where it says, "Annexed an accurate and full list of the creditors," I added, "Upon information and belief."

In C as to the inventory annexed constituting

Stackpole for Defendants - Direct

a full and correct statement, I added to that,
"Upon information and belief."

I made another correction of the spelling in D, I added to it the words on the next page, "Items owned by Helen W. Ammann individually," and listed three items, "Prints, gold bench, iron bench," and so forth.

And I then returned it to Mr. Gluck.

Stackpole - direct, page 400

Q On August 23, 1965 did you then meet at the bank, the Suffolk County National Bank -- is that the bank?

A That is correct.

Q And will you tell us who was present and at what time you got to the bank?

A It was approximately 11 o'clock in the morning. Do you want to know how we sat, because Mrs. testified to that yesterday?

Q Yes, I'm very anxious to know this.

A All right. I sat on the south side of the table. Mrs. Ammann sat at my left, which was the end of the table on the west (indicating). Mr. Gluck sat directly opposite me. Next to him sat Don Dunkenberg. Mr. John Stark who was then the, had been the president of the bank and was then the chairman of the bank, who was a very close friend of Mrs.

Stackpole for Defendants - Direct

Ammann and had urged her for several years to sell the property, sat a little distance at my right and was present during practically all of the negotiations, conversation, signing and so forth.

Q And did Mrs. Ammann participate in any of these conversations?

A She certainly did. And every item in the contract was gone over with her carefully and explained to her in words of one syllable so there was no legal phraseology that she couldn't understand.

Q Now prior to your coming to the bank did you discuss with Mrs. Ammann the riders and the contents of these riders?

A The whole thing was gone over with her, that is correct, except insofar as the changes that were made that particular day.

Q Now will you tell us what changes were made that particular day in her presence?

A There was a clause which I had put in, "The buyer shall hold the seller harmless from any claims against M.N. Ammann Hardware, Inc., and shall indemnify her in the event that she shall be obliged to pay any such claims." That was stricken out in her presence and initialled by Mr. Gluck and me, because Mr. Gluck said he would not go through with the deal if he had to indemnify her or hold her harmless from any claims.

Stackpole for Defendants - Direct

Q And was that the extent of the discussion regarding this particular clause?

A Well, I don't remember anything else.

Q You were here when Mr. Gluck testified in the morning, this morning, were you not?

A Yes.

Q Concerning the reasons as to why he wanted that struck from the record -- I'm sorry, from the contract?

A Yes, I heard what he testified and I believe that that's correct. I mean, I believe that -- now that it has been brought to my attention, there were several occasions on which, for instance, in Mr. Lipetz' office it was, "Take this or else" was the idea. That is that the deal would not go through unless this provision was (page 403) stricken out.

Q Now during all of this time that you were at the bank did there come a time when the riders had to be conformed?

A Yes. There are --

Q (Interposing) How was that done and by whom please?

A Well, there are two pen written additions in here, and as to the -- as to the one on the last page we had already asked a stenographer -- I had already asked a stenographer, or a typist in the

Stackpole for Defendants - Direct

bank to type in -- perhaps I'd better start over again.

In the copy that Mr. Gluck brought out he had typed in the paragraph beginning, "The purchase money mortgage shall contain the following provisions," the words "and in the event of fire damage" in the copy that he had. So I took the copy that I still had cut into the outside office and got one of the girls out there to copy from his and put it into this contract (indicating).

Then the further contract that is added in pen and ink, well it was noon hour and I was a little embarrassed to keep asking one of the bank's employees to type something in. So I suggested that we write it in, but I told Mr. Gluck that I didn't like to write and so he dictated -- I mean I didn't like to dictate -- so he dictated and Don Dunkenberg wrote that (indicating). And I wrote this, both as to Mr. Gluck's dictation.

page 407 Stackpole - direct

Q (Interposing) Did she at any time express dissatisfaction with the deal?

A The first time I ever heard her express, ever heard of any dissatisfaction was when Peter Gluck telephoned to me in October, oh, roughly about the 25th, 26th, sometime like that, and said he had

Stackpole for Defendants - Direct

received a letter from Helen Ammann saying she wanted to, wanted him to reconvey the property to her and she would refund the money to him, that the fact that she had sold it was making trouble with her son and so she wanted the deal to be -- well, she didn't use the word rescinded, but she wanted to be -- and he called me and I was utterly surprised, because up to that point she had expressed great pleasure (p. 408) being free of the worries and responsibilities, greatly relieved to be relieved of the trouble she had had.

Q Now you were here--

A (Interposing) Pardon me. Mr. Gluck said, "How shall I answer it?" And I said, "Write directly to her. Tell her your answer."

page 409 Stackpole - direct

Q Miss Stackpole, in connection with the closing of the contract and the subsequent conveyance of the property were all checks that were received certified and otherwise turned over to your client by you?

A In due course, yes.

Q And they were accepted and retained by her?

A Yes. May I volunteer this? That at her request I wrote a letter which she signed sending the \$5,000 certified check to the Southold Savings

Stackpole for Defendants - Direct

Bank to open a new account.

Q Now speaking of the \$5,000, I want to direct your attention specifically to a clause in that contract which was the subject of discussion. Will you look at the contract please?

A Yes, I've read it.

Q Refer yourself specifically to Riders B and C.

A Yes? It's in the middle of the page.

Q Was there some discussion concerning the release of the Peconic property upon payment of \$5,000 additional? (p. 410)

MR. DELANEY: When, may we have a time please?

THE COURT: Well, she can say yes, and then we can ask her when and where.

MR. DELANEY: All right.

THE COURT: (To the witness) Was there some discussion, Miss Stackpole?

THE WITNESS: On -- I don't know whether I'm answering the question directly - on the 16th of August Mr. Gluck telephoned to me and said he would be willing -- he had objected to having the mortgage cover both properties. He telephoned me on the 16th of August stating that he was willing to have the mortgage cover both properties and

Stackpole for Defendants - Direct

agreed to pay off \$5,000 on the mortgage for a release in the event that he decided to refinance.

Mrs. Ammann at that time was at Jacob's Pellow in Lee, Massachusetts and I immediately telephoned to her. And in my diary entry it gives her telephone number and it states that she stated to me that she would accept that offer. That was on the 16th of August. That was before the contract was signed.(p.411

page 412 Stackpole - direct

Q Now following the consummation of the contract and its execution I now direct your attention to the date set for closing. What date is provided in the contract?

A September 23rd.

Q Did this close on September 23rd? (p. 413)

A No.

Q I show you this deed and I ask you to identify it (handing)?

A It was drawn in my office.

Q And who was the notary public on that deed.

A I was.

Q What?

A I was.

Stackpole for Defendants - Direct

Q And was this deed left with you by Mrs. Ammann?

A Yes.

Q And will you tell us whether she left for Lee, Massachusetts following the execution of that deed?

A Yes, again on my advice.

Q And will you tell us what your advice was predicated upon?

A It was primarily because creditors of M.N. Ammann Hardware, Inc. kept calling her on the telephone and process servers had summonses on her as president, and she was harrassed and I suggested that she get away where summonses couldn't be served on her.

Q Now do you recall attending at the office of the Home Title Company here at Riverhead on September 30th, (p. 314) 1965?

A I was present.

Q Who else was present then?

A Mr. -- oh, Mr. Gluck, Mr. Daly and I, and Don Dunkenberg, I think. Now may I check?

Q Yes, you can check your notes.

A May I say that prior to -- there was a clause in the first mortgage on 10 Peconic Avenue which gave an option to the holder of the mortgage to call the mortgage if the property was sold. Consequently, Mr. Gluck, Mr. Dunkenberg, Mr. Dobbis and I went to the

Stackpole for Defendants - Direct

the Suffolk County National Bank and conferred with the then president, one of the directors by the name of William Stark, and the chairman of the Board John Stark. And after Mr. Gluck had stated the situation they agreed that they would waive this option and permit the mortgage to stand on the premises.

All of us then went to the Home Title Company and I delivered to Mr. Gluck the statement of the insurance adjustments and also the policies on which premises were past due. They signed the mortgage and the note and the deed, and the promissory note for the chattels referred to in the bill of sale, and they gave me a check of Twin D. Properties for \$5,840.63. (p. 415)

MR. DELANEY: May I know the date of that?

THE WITNESS: I beg your pardon?

THE COURT: The date?

THE WITNESS: That was the 30th of September.

Q And were you requested to hold that check until such time as the deed would be recorded?

A No. There had been - I think it is in the contract - an agreement that Mrs. Ammann and Corwin Ammann would assign to Twin D. any claims that they had against the -- I'm sorry - any claims which they individually might have against the hardware corporation. Those assignments

Stackpole for Defendants - Direct

had not been executed and the bill of sale for, for those articles mentioned that were in the gift shop --

Q The fixtures, is that right? Yes?

A -- I therefore held the deed, the bond, - I'm sorry -- the promissory note and the mortgage and the check of fifth-eight hundred and forty dollars and some cents. And I agreed to hold them until the assignments had been executed and the bill of sale had been executed.(416)

Q Now did Helen Ammann execute her assignment?

A On the 4th of October Helen Ammann executed the assignment and the bill of sale. I think I'm correct on my date. (Looking) Yes, on the 4th, and on the 5th - shall I continue?

Q Yes, please do.

A On the 5th, at Mrs Ammann's request, I went to New York with her to get her son Corwin Ammann to sign the assignment. Shall I continue?

Q Yes, please do and tell us exactly what occurred.

A Well, we went to Mr. John's Boutique on 57th Street and went into a little room, a little bit larger than this corner of this room (indicating), with Corwin Ammann at a table. His mother sat at the other side of the table. I sat about as far away from them as Mr. Hilgeman is from me (indicating), and Mr. Sussman talked with me a matter of probably 4 to 5 hours. Mr. Sussman is a fast talker -- strike that out --

Stackpole for Defendants - Direct

THE COURT: I don't think you will need me here.

THE WITNESS: I had no business to say that. (p. 417)

Mr. Corwin Ammann said good morning to his mother. She sat there and he sat there (indicating), and he wrote all day while she was there for the several hours we were there. Eventually, she got up and went over into the other end of the room and read a magazine until I called her over to listen to the proposition which Mr. Sussman had made to me.

Q And did you in the presence of Mrs. Ammann tell Mr. Sussman that the property had already been sold and there was nothing that could be done about the matter?

A I did not.

Q What did you tell Mr. Sussman?

A I told him Mrs. Ammann would think over the proposition. And going back up, on the train - we had driven to Port Jefferson and left the car and took the train from Port Jefferson in - and coming back on the train Mrs. Ammann and I discussed Mr. Sussman's proposition, and her words to me were, "It is impossible."

Q And did there come and a time when you went to the title company on behalf of your client and told them they could record the deed? (p.418)

Stackpole for Defendants - Direct

A No.

Q What did you do?

A This takes me just a half a minute --

Q Consult your notes if you have to?

MR. DELANEY: May I inquire if those notes are an office diary?

THE WITNESS: Yes, regularly made in the regular course of business.

A It was on the 7th of October, I think, that Mr. Dunkenberg telephoned to me, or I to him that Corwin Ammann had not signed the assignment of his claim, and Mr. Dunkenberg said he was willing to accept title without that assignment. Thereupon, on the 8th of October Mr. Dunkenberg and Mr. Dobbis called at my office. They gave me in lieu of the individual check which had -- I mean the non-certified check which I had taken on the 30th of September, they gave me a certified check for \$5,000, and I think an uncertified check, if my memory is correct, for the adjustments, eight hundred-odd dollars.

And I delivered to them the deed, and I also gave them the mortgage to take to the title company for recording. (p. 419)

I also gave them a bill for drawing the bond and mortgage and they paid it.

Q Is this the bill that you make reference to (handing)?

A Yes, that's my bill.

Stackpole for Defendants - Direct

Q Now I show you this statement of closing title - it's in evidence but I would like you to also identify it for us - is that in your handwriting?

A No. The typing was done in my office but "Interest on bank mortgage to 9/30, \$79.08, and the total of \$370.84 and 584063" I believe are in the handwriting of Mr. Gluck.

I perhaps have a copy myself on which I wrote similar facts. Do you want me to look and see?

MRS. SEIDER: Mr. Delaney, I believe you have another copy of that in your file?

(Handed)

Q May I show you Mr. Delaney's copy (handing). Is this the one that was also typed in your office?

A Yes. That one is, that one does not include those, that final adjustment of the interest. If you want to give me my file -- (p. 420)

Q Your file?

A I think it's lying right on top of my briefcase -- no, it isn't. It's in the inside --

THE WITNESS: May I be excused to go and get it?

THE COURT: Yes, surely.

(The witness left the stand and returned promptly.)

THE WITNESS: May I see the other one?

MRS. SEIDER: Yes. (handing).

Stackpole for Defendants - Direct

THE WITNESS: We are just a hundred dollars off due to my bad arithmetic.

Q Now Miss Stackpole --

A (Interposing) Mr. Gluck paid a hundred dollars more than I added --

Q (Interposing) Miss Stackpole --

A I'm sorry

Q -- there was testimony this morning by Mr. Daly of the title company concerning the call made from his office on September 30th under the auspices of a credit card of yours?

A Right.

Q To Lee, Massachusetts? (p. 421)

A Correct.

Q Do you have a recollection of that having occurred?

A I certainly do.

Q And does that item appear on your telephone bill (handing)?

A It does. It had been prearranged that Mrs. Ammann would be available on the telephone because the deed was dated September 23rd, and I knew the title company would want proof that she was still alive. And so it had been arranged that I would call her, and I called from the Home Title office using my credit card as the charge.

Stackpole for Defendants - Direct

MRS. SEIDER: I offer that in evidence.
May I show it to Mr. Delaney?

MR. DELANEY: Is it a telephone bill?

MRS. SEIDER: Yes.

MR. DELANEY: I have no objection.

THE COURT: Let it be received and
marked in evidence.

(Telephone bill, above referred to, was
received in evidence and marked Defendants'
Exhibit X.)

page 424 Stackpole - direct

Q But now will you look at that please (hand-
ing). Is that the assignment you make reference to,
signed by Helen Ammann?

A Yes, and it's dated the 23rd of September.

page 431 Stackpole - direct

Q Instead I will ask you did there come a time
when you turned over to your client, pursuant to her re-
quest, the contract, the mortgage and the mortgage?

A Yes.

page 433 Stackpole - direct

Q Following this particular conversation that
you had with Mrs. Ammann, when you turned these papers

Stackpole for Defendants - Direct

over to her, did you have another conversation with her thereafter relating to the property?

MR. DELANEY: Well, can we have the date which was asked when she turned them over?

MRS. SEIDER: I think the witness testified it was on November 2nd.

THE WITNESS: No.

THE COURT: She didn't say that.

MRS. SEIDER: I'm sorry.

Q What date did you turn the papers over to her?

A On the 13th day of December, 1965.

Q Were those sent to her or were they hand-delivered?

A They were delivered to Mrs. Ammann at my office at 3:15 P.M. with a letter of transmittal which I believe is in evidence.

Q And on December 13th, 1965 did she indicate to you that she intended to bring any action in connection with this?

A No, No. On the 7th of November she told me that on the advice of Mr. Sussman she had consulted a New York lawyer. On the 12th of December she said that her New York lawyer would like to see the papers which were in my attorney's safe deposit box. -- I'm sorry, it was not the 12th. It was the preceeding -- the 13th was a Monday. It must have been Friday the 10th that she asked

Stackpole for Defendants - Cross

for the papers.

MR. DELANEY: Of which month now?

THE WITNESS: December.

THE COURT: December 10th. (p. 435)

THE WITNESS: In December, and I got them out of my safe deposit box on the 13th and delivered them to her that afternoon.

Q Now in this safe deposit box that you make reference to, did you have other papers of Helen Ammann that she had entrusted to you?

A All of her stock certificates.

Q And is it not a matter of fact that you still represent her in many instances?

A This year?

Q Well, did you represent her in 1966?

A Yes.

Q Following this incident?

A So far as I know I was representing her. I prepared her income tax returns, drew a will for her and this year I prepared her income tax return.

page 437 Stackpole - cross

Q You told Mrs. Ammann to go away so she wouldn't be here to be troubled by anybody while the thing was pending; is that right?

A When the summonses were being served on

Stackpole for Defendants - Cross

her, yes.

Q And this was during the time that this deal was pending; is that right?

A It was - let me get my dates straight. It was prior to the signing of the contract, was the first time that I suggested she go up to Lee.

The second time she wanted to go out to Buffalo to visit a brother, and I told her it wasn't necessary for her to be at the closing and urged her to go on. From Buffalo she went to Lee.

Q Well, on your direct examination didn't you say at that time you had advised her to go?

A She needed a rest and she wanted to go visit her brother. Yes, I advised her to go, true.

Q Now will you tell me on what dates you have entries in your diary with respect to this matter(p438) in 1965?

A With reference to this particular sale, or with reference to the sale of the property in general?

Q Oh, with the sale of the property in general, this matter which is embraced in this lawsuit?

A May I ask that the question be clarified?

Q Yes, certainly

A I have --

Q Miss Stackpole, I'll clarify it, Now have you been very familiar with the course of this trial? You have, haven't you?

Stackpole for Defendants - Cross

A This week, yes.

Q And you have been at the counsel table of the defendants throughout?

A That is true.

Q And you have furnished them with access to your office records with respect to this?

A That is true.

Q You never furnished Mrs. Ammann with those office records, did you?

A I have not because -- Oh, now I understand your question. Mrs. Ammann came to my office in January 1966, on the 17th of January 1966 and asked me for (p.439) copies of my diary entries for her to deliver to one Mr. Frank Delaney.

Q That's me.

A And I had my stenographer make copies of the ones that pertain to this transaction. That is the contract, the telephone calls and so forth.

Q Now --

A (Interposing) Later I sent her additional -- I'm sorry to interrupt. I see here later I found additional ones and sent them to her. So she was furnished with all of them.

Q Now will you tell me the dates of the diary entries with respect to this matter that you have there?

A May I inquire whether you mean just in relation to this one sale, or to all of the things re-

Stackpole for Defendants - Cross

lating to the possible sale?

Q Again I ask you, aren't you very familiar from your conferences with the defendants' attorneys at the counsel table for the entire course of this trial with what this trial is about?

A All right.

Q Are you?

A Now I understand, yes. (page 440)

Q But are you?

A Yes.

Q Now it's diary entries that relate to this matter?

A All right, I understand. I'm sorry I'm so stupid.

July 10, 1965 Mrs. Ammann and her nephew Don -- do you wish me to read them?

Q No, just the dates.

A All right. July 10th --

Q Just the dates that you made the entries with respect to this matter.

A -- July 14, July 15th, July 16th, July 19th, July -- Do you want the one about the certificate of stock, Peter's certificate of stock?

Q Does it?--

A (Interposing) That's July 21st, July 23rd, July 24th, July 26th, July 26th, July 27th, again about

Stackpole for Defendants - Cross

the certificate of stock, July 29th, August 4, August 11th August 12th, August 16th, August 18th, August 23rd, August 24th, August 25th, August 30th, September 1st -- Shall I continue?

Q If you please.

A (Continuing) -- September 8th, September 11th, September 17th, September 20th, September 23rd, September 24th, September 27th, September 28th, September 29th, September 30th, October 4th, October 5th, October 6th, October 8th, October 12th, October 13th, October 14th, October 18th, October 25th, October 28th, November 8th --

THE COURT: Mr. Delaney, do not these become irrelevant now after November the 8th?

MR. DELANEY: I don't believe so, Your Honor, because there was correspondence in December.

THE COURT: All right.

(to the witness) Continue, Miss Stackpole,

MR. DELANEY: I wish to explain. I'm sure I never saw these. They were never given to Mrs. Ammann, and I am sure they have been available throughout the trial and before to the defendants. They have seen them, the defendants' attorneys and the defendants. So I'm trying to even it up. I'm sorry to impose on the Court.

THE COURT: That's all right.

Stackpole for Defendants - Cross

page 442 Stackpole - cross

Q Just the dates please?

A All right. Did you get December 7th?

Q Well, November 8th I have, and is November 22nd the next entry?

A Yes.

Q All right. Now after November 22nd, what is it?

A December 7th, December 11th, 13th, 15, 17th. I(p.442) was doing so many things for her that it takes some time to figure out which ones related to this. Well --

Q Is that all in 1965 then?

A I will check, sir. There are a lot in here that are indirectly concerned, such as letters from the Internal Revenue and lighting bills and so forth that were all sent to Mr. Gluck.

Q Well, I shall for the moment be content with the ones you have mentioned down to December 17th.

Now did you make all these diary entries of yours available to the defendants in this action?

A Mrs. --

Q (Interposing) Can't you answer that?

A I don't know how to answer it, if you want a yes or no. I will tell you that when she came to my office we went over --

Q (Interposing) I'm not talking about Mrs. Ammann.

Stackpole for Defendants - Cross

I am talking about the defendants.

A Oh, the defendants. I beg your pardon.

Q Did you make these available to the defendants?

A I don't think they have ever seen any of (page 444) them, no, But the attorneys have seen them since we have been here in the courtroom.

Q And did you ever make them available to Mrs. Ammann?

A When she came to my office and --

Q (Interposing) When?

A -- and asked for them on -- I just gave you the date -- on January 17th. We went over them and I -- We selected the ones to make a list of for her to take to you. That was --

Q (Interposing) And how many were those, do you know? Well, if you have to look at papers I don't care, I'll withdraw the question.

A I have a list of them.

Q Do you have a list of the things that Mr. Gluck demanded from you as a condition to closing this contract and title?

A I don't believe so because I don't know of any list that he demanded. There was a contract -- the things he demanded in the contract.

Q But he had never given you any list of the things that he required for the closing? (page 445)

A I don't recall any if he did. And I don't think I've seen any in my papers.

Q Now will you relate what you have in your diary under

Stackpole for Defendants - Cross

the date of September 23, 1965?

A You want it read, September 23rd?

Q Yes.

A All right. "Telephoned to Mr. Sussman and told him that Mrs. Ammann is unwilling to discuss the sale with him or her son Corwin. Telephoned to Mrs. Ammann and advised her to leave town to avoid further conversations. Her sister Anita called and conferred. Mrs. Ammann came in and signed deed and affidavit of title. Left with me keys to store. Telephoned to Mr. Liebegott, L-i-e-b-e-g-o-t-t, at the Home Title and asked him if it would be possible to issue the policy with the survey exception and have the exception removed later. He stated it was. Conferred over phone with Alden Young who said he had received no authorization from Mr. Gluck to make a survey. Wrote letter to Mr. Gluck informing him that Alden Young has received no authorization to make a survey."

Q Did you see Mr. Dunkenberg on that day? (p. 446)

A Who? Mr.--

Q Dunkenberg, the defendant?

A The defendant Dunkenberg? No, I don't think so. I'm sure if I had it would be on here. Have you got the right date, September 23rd?

Q Now you have testified that this assignment Exhibit F, Defendants' Exhibit F had not been executed on the 30th day of September and that Mr. Gluck wished to have that; is that

Stackpole for Defendants - Cross

right?

A That is correct.

Q And when did you -- Did you type that assignment?

A Typed in my office, you mean?

Q Was it typed in your office?

A Yes, oh yes.

Q Do you know when it was typed in your office?

A (Looking) Well, on October 4th my diary entry says, "Prepared assignments to be executed by Corwin," and it says, "She executed bill of sale and assignment to Twin D. Now I couldn't, I don't think I can tell you what day it was typed.

Q And it wasn't executed then until the 4th (p. 447) of October; is that correct?

A That is what the diary entries say.

Q Well, then I think they are correct. Then is that an error that you acknowledged, that you took the acknowledgment on the 23rd of September?

A I don't think so, no. I mean it is very customary when you have seen a person on a certain date to insert that date even though they happened to sign it at a later date.

Q Even though the paper hadn't been drawn?

A I didn't say it hadn't been drawn. I said we prepared two assignments for Corwin to sign on the 4th of October.

Q And I thought you said that you had prepared the, this Exhibit F, and that was not ready on the 30th of

Stackpole for Defendants - Cross

September?

A Hadn't been signed by her. My diary entries --

Q (Interposing) And yet you took the acknowledgement of her signature on the 23rd of September?

A As of the 23rd, that is correct.

Q And that was taken by you after the 30th of September although she had not signed it on the 23rd; is that right?(p.448

A That is right. Do I go to jail?

Q Now I show you this paper writing and ask you if this is an assignment of the, to the Twin D Land Corporation in the sum of \$2,904.16 and ask you if you had that typed in your office (handed)?

A No sir, I did not.

Q When did you receive that?

A If I could see the letter that's on exhibit it would give me some idea what month it was. It was a letter in which Mr. Dunkenberg sent it to me, to save time.

Q I show you Exhibit 7, Plaintiff's Exhibit 7, a letter written by you on December 13th (handing). Had you then received the assignment?

A "Acknowledge receipt of your letter of December - Yes.

Q And did you receive a letter enclosing that assignment from Mr. Dunkenberg on December 13, 1965 Plaintiff's Exhibit 6 in Evidence (handing)?

A I received that letter on December 15th. This one --

Stackpole for Defendants - Cross

that is correct. I received that on December 15th.

Q Did you -- (p. 449)

A (Interposing) I wrote to him on the same day. The 15th I wrote him a letter informing him that I was mailing his letter and assignment to Mrs. Ammann and I did that day. And also sent her a copy of my letter to him.

Q Did you at any time call her attention to the fact that that assignment is dated the 23rd of September and prepared for acknowledgement on the 23rd of September, 1965?

A Pardon me. Would you repeat that? I'm sorry.

MR. DELANEY: Will you read the question?

THE COURT: Read it please.

(Whereupon, the reporter read the last question, as recorded.)

A I don't know that I did, no.

Q Now will you read your diary entry on October 4, 1965?

A Yes, sir. "Gave Mrs. Ammann a copy of the contract. She executed billof sale and assignment to Twin D. Prepared assignments - the figure 2 - to be executed by Corwin. Gave Mrs. Ammann \$40 in cash for the Lynch) phonetic) rent to 10/24/65. I talked over (page 450) the phone with Ray Magulsky (phonetic) and asked him to try to find a check on Recordax for \$6,000 dated 7/5/61 and deposited in M.N. Ammann Hardware's account. Later Mrs. Ammann telephoned that she has found the \$6,000 check loaned to Hardware, Inc. on 7/5/61.

"Will: Gave Mrs. Ammann copy of her new will dated

Stackpole for Defendants - Cross

4/5/65 by tearing it up in my presence."

Q Have you made a later will for her?

A I can't tell you. I don't know without going through my records.

Q Did you ever inform the defendants or their counsel that you had made a later will for her?

A If I made a later will I informed them so, and if I didn't I informed them as to this one.

Q And when did you give them that information?

A I can -- if you will give me a minute I can see whether I've drawn another will for her.

Q No. I am asking you now when you informed them of what you did inform them, what date?

A I beg your pardon?

Q When did you inform the defendants or their (p.451) counsel that you had made a will for Mrs. Ammann?

A Last week.

Q And where did you get the information as to when you made that will?

THE WITNESS: Will you repeat that question? I'm sorry, I don't understand.

MR. DELANEY: Yes. Will you read it please?

(Whereupon, the reporter read the last question as recorded.)

A I just read it to you.

Q I mean last week, when you told the defendants that you had made a will for Mrs. Ammann, where did you find out at

Stackpole for Defendants - Cross

that time what the date was?

A Out of my diary entries.

Q And is that the will you were informing them about, that you have just told me about?

A Let's see. Evidently the last will that I drew for Mrs. Ammann was the one I just read you, about which I just read to you, September 24, 1965.

I don't see any reference to any other will.

Q Now I show you Plaintiff's Exhibit 15 for (page 452) Identification --

MR. DELANEY: -- May I inquire, is that in evidence too, the bill of sale?

THE COURT: That's for identification only.

MR. DELANEY: Thank you.

Q (Continuing) -- and ask you if you prepared this bill of sale on the 4th of October, 1965 (handing)?

A I believe not.

Q Will you read, will you refer to and read your diary entry of October 4, 1965?

A (Reading) "Gave Mrs. Ammann a copy of the contract. She executed bill of sale and assignment to Twin D. She prepared assignments to be executed by Corwin. Gave --"

THE COURT: That's all we need, isn't it?

Miss Stackpole, did you not cover it in the first paragraph?

THE WITNESS: "Gave Mrs. Ammann a copy of the contract."

Stackpole for Defendants - Cross

THE COURT: What is the next sentence?

THE WITNESS: "She executed bill of sale (p. 453) and assignment to Twin D."

THE WITNESS: Executed - I don't know when it was prepared.

MR. DELANEY: Well, may I have it marked in evidence?

THE WITNESS: It might have been prepared months before. I don't know that.

MRS. SEIDER: No objection.

THE COURT: Let it be received and marked in evidence.

(Plaintiff's Exhibit 15, previously marked for Identification only, was received in Evidence.)

page 453 Stackpole - cross

Q Miss Stackpole, you have testified that on the 4th of October you gave Mrs. Ammann a copy of the contract?

A Correct.

Q And did she ask you for it?

A I don't know. I gave her a copy.

Q Didn't she come prior to the 13th of, or the 10th of December a couple of times to your office to ask for any papers that related to this transaction?

A She came to me on the -- (looking) -- 11th of December. Mrs. Ammann called at my office and said that her new attorney Mr. Delaney wants the original mortgage and so forth.

Stackpole for Defendants - Cross

I told her I would get them out of the safe deposit box on Monday. She also paid me \$100 on account of my bill.

Q Now prior to that and any time after the 26th of October did Mrs. Ammann come to your office to ask for papers relating to this deal?

A No.

Q When did you first --

A (Interposing) I had given her the copy of the contract on the 4th of October.

Q And did she come and ask you for anything more after that, before the 10th or 11th --

A (Interposing) No. (page 455)

Q You are sure she didn't?

A No, I am absolutely sure.

Q And have you reviewed these diary entries of yours enough to know that there is nothing in them to that effect?

A (looking) I have now reviewed them. There is nothing in there that says that she came to my office and wanted any papers. There is a letter -- She came to my office on the 1st of December about some stock.

Q No, I'm talking about anything, any papers relating to this case?

A No.

Q And did the stock relate to this case:

A No. The stock is called Carbola Company.

Stackpole for Defendants - Cross

Q Now I show you a copy of a contract and ask you if you wrote the date, the 23rd of August at the head of that paper writing (handing)?

A Is this -- That's my handwriting, yes sir.

Q Now did you give that to Mrs. Ammann?

A (No response)

Q I asked you, did you give it it to Mrs. Ammann?

A I assume that I did. It's an unconformed, incomplete copy of the contract. (page 456)

Q But you assume you gave it to her?

A I assume that's the one I gave her on the 4th of October, unconformed and --

MR. DELANEY: I would like to have it marked in evidence. (Handing to Mrs. Seider)

THE WITNESS: May I ask a question?

THE COURT: Just a moment.

MRS SEIDER: Any transaction between the attorney and her client certainly is not binding on the defendants. I don't like to be hypertechnical but I still must raise an objection.

MR. DELANEY: Well, I think that they have examined her as to her relations with her client, and I have made no objection on privilege, I have allowed it to go in. Now here is merely a question of a delivery of a piece of paper - it isn't a question of conversation. It's a material, I mean it's a concrete fact -

THE COURT: Just a moment. Objection overruled.

Stackpole for Defendants - Cross

MRS. SEIDER: We except, Your Honor.

THE COURT: Yes. (page 457)

MR. DELANEY: Did you see it?

MRS. SEIDER: No, I haven't looked at it yet.

MR. DELANEY: Well, I believe you ought to look at it.

THE COURT: Let it be received and marked in evidence.

(Contract above referred to was received in Evidence and was marked as Plaintiff's Exhibit 22.)

THE WITNESS: May I see it?

(Handed to witness)

THE WITNESS: This is my office copy, yes.

Q Now Miss Stackpole, I show you the Plaintiff's Exhibit 15 in Evidence and ask you if that is your acknowledgement on that as of the date of the 23rd of September (handing)?

A Right, sir.

Q Now have you a diary entry as of September 30, 1965?

A (Looking) Yes, sir.

Q Would you read that? (page 458)

A Yes, sir, "Peter Gluck, Messrs. Dunkenberg and Dobbis at Suffolk County National Bank conferred with Ray Magulsky, John Stark and William Stark, re option clause in mortgage. Permits Mortgagee to call mortgage if property is sold. Bank

Stackpole for Defendants - Cross

agreed to waive its option. Obtained letter from Bank stating amount due on mortgage at 10 Peconic Avenue. Went to Home Title Company. Copy delivered to Mr. Gluck, Templeton statement of insurance and the policies on which the premiums are past due. I retained the active policies. Purchasers signed mortgage note, deed and promissory note for the chattels. Received check of Twin D Propertyies, Inc. for \$5,840.63. All the foregoing delivered to S H S to hold in escrow pending assignments of claims of Helen Ammann and Corwin Ammann. Telephoned Alden Young at the request of Mr. Gluck. Price of survey to be not more than \$100. Telephoned to Mrs. Ammann at Lee, Massachusetts. She will be home tomorrow. I delivered rent schedule to Mr. Gluck. Telephoned Harold Schaeffer that Mr. Gluck wanted him to continue collecting rents for the present."

page 459 Stackpole - cross

Q Now Miss Stackpole, I show you a memorandum signed by you, abstract from diary entries from S H S, made in the regular course of business and ask you to note the entry under 9/30/1965. (handing) And I ask you if you sent those to Mrs. Ammann?

A No. I delivered them to her. She sat in my office while I, while my stenographer copied them from my book.

Q And is this your book (indicating)?

A Well

Q Is this your book that you referred to?

Stackpole for Defendants - Cross

A No, that is not my book. That is what --

Q (Interposing) Now will you read the diary entry of 9/30/65 which you gave to Mrs. Ammann?

A "Purchasers signed mortgage note, deed and promissory note for the chattels. Received check of Twin D Properties, Inc. for 5,840.63. All foregoing delivered to Syrena H. Stackpole to hold in escrow pending assignment of claims of Helen Ammann and Corwin Ammann. Telephoned to Mrs. Ammann at Lee, Massachusetts --" I could save you and the Court a lot of time if you will let me explain --

page 460 Stackpole - cross

Q Cross-examine you. Now you received these papers in escrow; is that correct/

A That was my phraseology, yes. I was to hold both the check and the papers.

Q Now didn't you inform Mrs. Ammann that on that date, the 30th of September, 1965, you took these papers in escrow?

A I doubt very much if I told Mrs. Ammann that.

Q Well, didn't you give her this piece of paper?

A Yes, it's on here, yes. I misunderstood you.

Q Before that you went over it with Mrs. Ammann and picked it out, didn't you?

A Yes, we went over them and picked them out.

Q And you knew she wanted it for her lawyer, didn't you?

A Yes, of course; she said so.

Q And you knew that I was her lawyer?

Stackpole for Defendants - Cross

A Yes, she told me.

Q And you knew that?

A At least a Mr. Frank Delaney. (page 461)

Q You knew that I was going to receive that paper as a diary entry of yours?

A I beg your pardon?

Q You knew I was to receive that paper as a diary entry of yours?

A That's right, that's correct.

Q You know what an escrow is, don't you?

A Well, I thought I did.

Q Well, You've been a practitioner for some years, did you say, or longer?

A A little longer.

Q And you have heard the word escrow?

A Yes.

Q And you have some knowledge of what an escrow is, don't you?

A Well, I thought I knew.

Q Now I ask you if at that time you were not informed by the defendants that unless they had the assignment from Mrs. Ammann and the assignment from Corwin Ammann that they would not close the title?

A That is correct.

Q And at that time you took these papers in escrow subject to that condition; is that right? (page 462)

A That is correct.

Stackpole for Defendants - Cross

page 462 Stackpole-cross

Q Now would you read your diary entry for October 5, 1965? (page 463)

A "Went to NYC with Mrs. Ammann and spent entire day at Peter Brandon's office. Mr. Sussman made a proposition which Mrs. Ammann stated was impossible to accept."

Q Is that all?

A That's -- other than my initial and the date.

Q Was there any discussion with Mrs. Ammann on that day that Mr. Gluck would not close the title until he received the assignments of Mrs. Ammann and Corwin Ammann?

MRS. SEIDER: If Your Honor please, this was not in the presence of the defendants, and I must necessarily rise to object to this. This was just in the presence of Mr. Peter Brandon Corwin Ammann, Mrs. Ammann and Miss Stackpole, and Mr. Sussman.

THE COURT: Objection overruled.

Continue.

THE WITNESS: May I ask you to repeat it?

MR. DELANEY: Will you read the question, Mr. Reporter?

(Whereupon the reporter read the question as recorded.) (page 464)

A On the 5th of October?

Q Yes.

A I believe not.

Q Was there such a discussion on a prior date?

Stackpole for Defendants - Cross

A Yes; the 4th of October, when she signed the assignment.

Q And you informed her - or I withdraw that. Did you inform her of the escrow on the 5th of October?

A I don't know how to answer that question. She knew that I had all the papers and the check.

Q How did she know that?

A Because I told her.

Q And did you tell her that you had them in escrow pending the receipt of the assignment from her of her claim and of Corwin Ammann's claims?

A Probably.

page 466 Stackpole - cross

Q Now do you have an entry on October 8th?

A Yes.

Q And what is that entry?

A Mr. Dunkenberg and Mr. Dobbis called at the office. I delivered to them the deed and the mortgage, both to be recorded by the title company. I gave them insurance policies also. They paid me bill for \$36. Mrs. Ammann telephoned that she had received a check for rent from Harvard shoe store. Twin D has decided to return the National Cash register to Mrs. Ammann rather than pay the \$750. Also delivered bill of sale to them with National Cash register stricken off."

Q Now I show You --

Stackpole for Defendants - Cross

A (Interposing) I'm sorry. May I finish it?

Q Go ahead.

A I made an error. It's on a second page. "Mrs. Ammann called at the office. I gave to her Jamesport telephone bill and copy of SHS letter to Mr. Sussman dated 10/7/65. She left with me certificate of 50 shares of Avco Corporation, number B 0189262."

Q Now I show you the Plaintiff's Exhibit 24 for Identification and ask you if you will note the entry on October 8, 1965 (handing)? (page 467)

A Right.

Q Now reading both those things together and testing your recollection, have you any recollection of anything else that happened on that day with respect to this matter?

A (Looking) I have no recollection. I might add that I, in my office there is a sheet kept which keeps a list of all the telephone calls incoming, and that's in my briefcase, and I may have had a telephone call that day but it doesn't appear on here.

Q And are those entries on both of those sheets, the exhibit for identification and your own diary entry, the complete extent of your recollection and knowledge of what happened about these papers on that day, the 8th of October?

A It is my complete recollection. I have no further recollection.

Q And will you look at your white sheets there as of the 8th of October and see if there is anything and let us

Stackpole for Defendants - Redirect

know what's on there?

A This is October -- I'm sorry. "Sale of real estate; Mr. Dunkenberg and Mr. Dobbis called at the office. I delivered to them the deed and the mortgage, both to be (p.468) recorded by the title company. I gave them insurance policies also. They paid me bill for \$36. Mrs. Ammann telephoned that she had received a check for rent from Harvard shoe store. Twin D has decided to return the National cash register to Mrs. Ammann rather than pay the \$750. Also delivered bill of sale to them with National Cash Register stricken off. Mrs. Ammann called at the office. I gave to her Jamesport telephone bill and copy of SHS'S letter to Mr. Sussman dated 10/7/65. She left with me certificate for 50 shares of Avco Corporation, number B 0189262."

They are identical.

page 474 Stackpole - redirect

Q Now Miss Stackpole, on cross examination you were asked concerning a will that you drew for Mrs. Ammann in which a recitation appeared concerning a mortgage; is that correct?

A I was asked if I had drawn a will for Mrs. Ammann later than the one that referred to a mortgage.

Q And I believe that the date that you gave was September 24, 1965; is that correct?

A Right.

Q And in this last will and testament that you drew

Stackpole for Defendants - Redirect

for her is there any reference made to a mortgage that "I now own or may acquire?"

A As I remember the wording, any mortgage which I may -- on the premises of 10 Peconic Avenue which I may own at the time of my death. "Any mortgage which I (p. 475) may own at the time of my death on 10 Peconic Avenue?"

Q Now Miss Stackpole, you are here under subpoena duces tecum?

A I'm sorry, I can't hear you.

Q I say, you are here under a judicial subpoena duces tecum?

A Yes, Ma'am.

Q And you have brought with you all of your records pertaining to this matter?

A So far as I know.

Q And as such they were made available to the defendants and their attorneys; isn't that right?

A That is correct.

page 477 Stackpole - redirect

Q When you received the riders from Mr. Gluck's office how many copies did you receive?

A One.

Q What?

A One.

Q I am referring to the riders which were attached to the contracts?

A One

Colloquy

page 484 Gluck - redirect

Q Mr. Gluck, regarding the testimony that has been adduced here today in connection with the riders affixed to the contract which were finally executed at the bank, how many copies of those riders, did you send to Miss Stackpole?

A One, I believe.

page 486 Colloquy

MRS. SEIDER: We thank the Court for its indulgence and patience in this matter. Actually this case should not have been spread over three days. To protract it any longer would not be only a travesty of justice but also a great imposition on the Court and to other attorneys waiting to have their cases tried.

page 491 Colloquy

THE COURT: Well, I think you should be given every opportunity. I think you are imposing on the Court because I think that the testimony of Miss Stackpole is that going back in the train or in the car, or wherever it was, that the plaintiff stated that she couldn't live with such an agreement or arrangement, or something. So no matter what was testified to at that meeting on October 5th it seems to be negated by testimony from the, from

Colloquy

Miss Stackpole as to what the plaintiff said. Is that not true?

MR. DELANEY: I don't -- No, I don't believe it's so. But I don't want to contradict Your Honor. I'm hazy on it.

The only thing is that I had this examination as to the October 5th occurrence and it is perfectly obvious to me from evidence I can adduce that I was not correctly answered as to the complete statements that went on in the five hour conference.

page 494 Colloquy

MR. DELANEY: There was never any proof of the escrow when they were on the stand - not until Miss Stackpole testified. It was one of my difficulties --

MRS. SEIDER: (Interposing) Forgive me, Mr. Delaney, but you insist on alluding to this as if it were an escrow belonging to the plaintiff. This was a defendants' escrow on a check which was testified to. There were to be no papers delivered as such until that condition had been met, and that condition was waived by the purchaser.

MR. DELANEY: I don't know of any escrow that's a defendants' escrow or a plaintiff's escrow, (p.495) It's an escrow and it has certain qualities under

Colloquy

the cases in the Court of Appeals.

MRS. SEIDER: I think it's a valid distinction.

MR. DELANEY: I only know that Miss Stackpole has testified that there was an escrow.

page 496 Colloquy

THE COURT: Well, if he feels this strongly about it and he feels it's a duty of his to his client, I am going to respect that. (page 497)

But I still feel you are imposing on the Court, but so far as the -- Perhaps there could be a concession as to what this man would testify to, I don't know. What are you hoping to get out of him?

MR. DELANEY: The complete and true story of the negotiation and agreement on October 5th, which I now have discovered evidence that took place.

Affirmation of No other Opinion

STATE OF NEW YORK
COUNTY OF NEW YORK

Frank Delaney affirms he is attorney of record for plaintiff-appellant and that there was no other opinion. He makes this affirmation subject to all the penalties of perjury.

Dated: New York, New York
January 29, 1968

Frank Delaney

29

AD 2ND

1049

Arguing Time
(20 Minutes)

To be argued by
PETER GLUCK

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

HELEN W. AMMANN,
Plaintiff-Appellant,
—against—

RUBY DOBBIS, DONALD DUNKENBERG, and
TWIN D. CORPORATION,
Defendants-Respondents.

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS

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212 TR 5-9393

Suffolk County Clerk's Index No. 135595/1966

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New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

HELEN W. AMMANN,
Plaintiff-Appellant,
—against—

RUBY DOBBIS, DONALD DUNKENBERG, and
TWIN D. CORPORATION,
Defendants-Respondents.

DEFENDANT-RESPONDENTS' BRIEF

Concise Statement of Questions Involved

The only question involved is whether plaintiff has proven that she was defrauded by defendants.

The trial Court said she had not and affirmatively found that she was well aware of all the proceedings surrounding the contract and was represented by an attorney of her own choice.

Statement of Facts

The statement of facts as contained in appellant's brief is a vague combination of half-truths, heresay and outright falsehoods, so many in number and so lacking in substantiation by the evidence as to make a professional response to same both difficult and space consuming.

Recognizing this utter lack of legal or factual merit to his cause appellant seeks to create by obfuscation a picture which would somehow enlist the court's sympathy. Thus

in lieu of any legal authority he ends his brief (Appellants Brief p. 38)* with the following dramatic plea:

“What is the conscience of the court?

“These are great philosophic concepts defying exact definition or citation clearly in point. Would you think it right if the admitted facts here were to be practised by her nephew upon your mother in her seventies?”

What then are the facts, entirely uncontradicted and supported by a mass of documentary proof?

1. Plaintiff though a woman of fairly advanced years, variously stated as between 68 and 72 was far from a helpless unsophisticated person. She was a club woman who had on occasions addressed large assemblages as officer and speaker (p. 48), and who had considerable previous experience with legal matters. She sometimes retained counsel and sometimes “used my own judgment which was rather good” (p. 49), to quote her.

The trial court after ample opportunity to observe plaintiff commented to her counsel (pp. 295, 296) (R. 21)

“The Court: I am not saying that you did, Sir. But I question whether she had knowledge or did not have knowledge, especially in view of the fact it was in affidavit form, and this lady is a rather competent person. I got that impression (R. 13).

Mr. Delaney: Well, that I don't know. I felt that probably the way she was described by my adversary in this motion was perhaps more in consequence of the facts of her nature, and I have not suggested that she was incompetent *and I have not suggested that—anything but that this was a colossal*

* Page numbers—Refer to original Record, also A and R numbers.

mistake, and—but when it was found and analyzed—and *I must say by me*—there were elements in it that the nature of the deal was not such that Mrs. Ammann had to be inducing them to go through with this deal by making a lot of warranties” (*Italics mine*) (p. 295) (R. 21).

2. Plaintiff had for at least 35 years been represented by Serena Stackpole an attorney in Riverhead. Not only were they attorney and client but they were the closest of friends. She continued to seek this attorney’s services even after the discovery of the alleged “fraud” in the transaction at bar.

It is interesting to note that although charges are made in the plaintiff’s affidavits and complaint which if true would subject Miss Stackpole to the most serious penalties, she is not made a party to the action.

Obviously these allegations are the creation of Mr. Delaney, acting not on plaintiff’s behalf but truly on behalf of her son Peter, through whose partner Mr. Delaney was retained (pp. 79, 80) (R. 7, 8, 11, 12).

Plaintiff was highly pleased with the transaction, as well she might be, until after the closing of title, when she requested that the property be “resold” to her. This request is contained in a letter dated October 23, 1965, from plaintiff to Mr. Gluck, the defendants’ attorney, from which it is obvious that the only reason behind her desire to set aside the sale was her son’s pressure which was causing “untold anguish” and which caused her to “fear for her son’s health” (Defendants’ Exhibit U) (R. 30, 31).

Totally absent here is any charge of fraud, inadequate price or undue pressure by Dunkenberg or his attorney.

In fact, at the close of the trial, plaintiff was on the verge of accepting the \$5,000.00 payment for the release but was dissuaded by Mr. Delaney (pp. 160, 161).

Miss Stackpole also testified without contradiction, that until the son's selfish pressure on his mother became unbearable she had been highly pleased with the deal (pp. 407, 408) (A. 157, 158).

What possible credence can be given to the vicious, reckless and entirely uncorroborated accusations made by Mr. Delaney against two fellow members of the Bar each practising for over 40 years? Neither attorney is made a party to the action nor is a conspiracy alleged, just snide intimations of misconduct so serious that Miss Stackpole, a friend of plaintiff's for so many years, could well be severely criticized, to say the least, if these charges were at all true.

As to Miss Stackpole what possible inducement to commit such acts against a dear friend of such long standing?

As to Mr. Gluck, the accused master mind of this foul deed, how can this be reconciled with plaintiff's own statement that he was always averse to the transaction (Defendants' Exhibit U)?

3. The respondents do not feel that the burden is upon them to justify a business transaction openly arrived at with a competent seller having the benefit of legal counsel of her own choosing every step of the way, even if it were not a good deal for the seller. However, since this matter has degenerated into a blurb for sympathy, with dark overtones because an aunt and a nephew are involved it becomes necessary to go into some of the details.

The ownership of the properties was beset by all sorts of difficulties as a result of which plaintiff had been try-

ing unsuccessfully to dispose of same for several years before the defendants entered the scene. The business was bankrupt; creditors were harassing plaintiff as an officer of the corporation; the real estate was losing money and would go from bad to worse as the two stores operated by the corporation ceased to pay any rent to plaintiff (pp. 142, 143), leaving one building vacant and the other half vacant.

Miss Stackpole testified that for several years prior to the sale to defendants both plaintiff and she had tried through various brokers to sell the real estate but the best offer obtainable was between \$50,000 and \$60,000. In addition a brokers commission of 6% would have to be paid (pp. 395, 396). No evidence of greater value was produced or even hinted at.

Let us compare this prospect with the sale to the defendants:

(a) The purchase price was \$71,200. Mr. Delaney finds this payment of a higher price than that offered by others was proof of evil intent, instead of what it truly was, a sincere and decent effort to Dunkenberg's part to see that his aunt received what he and his partner conceived to be a fair price.

As further proof of Dunkenberg's good faith it was testified to without contradiction by Miss Stackpole and Mr. Gluck that at the time of making the offer he insisted that his aunt first make certain that no better offer was available. When the parties were unable to agree at the original meeting the *deal was dropped and was renewed only at plaintiff's instance* (R. 16, 17, 23, 39).

(b) The defendants' offer was "net" to seller thus saving almost \$4,000 in commissions to seller and in effect raising the price to over \$75,000.

(c) The plaintiff was immediately relieved of all stress and the very considerable legal and other expenses incidental to negotiations with the creditors of the corporation. In this connection defendants undertook to use their best efforts to obtain a settlement with the creditors not only for plaintiff's benefit but primarily to try and retain the store so as to be better able to secure a tenant therefor. Lengthy negotiations with the creditors ensued and an offer of \$12,500 net to the creditors was made and rejected leaving no alternative but an assignment for benefit of creditors, which resulted in the creditors receiving much less than they would have received had they accepted the defendants' offer. The net proceeds of the sale by the creditors after deducting expenses thereof was less than the \$12,500 offered by defendants which would have involved no expense to them.

Incidentally, the plaintiff's claim, though immaterial, that she never authorized action regarding the creditors by Mr. Mallin is belied by the written authorization in evidence (Defendants' Exhibit S) (R. 29).

(d) How has plaintiff fared financially in making this sale? Instead of a troublesome, losing proposition with no net income she now has received to date *in cash the sum of \$24,000 and is the owner of an approximately \$45,000 mortgage which is amply secure.* This mortgage yields her an income of \$4,000 per year for about 13 more years (not 23 years as alleged by Mr. Delaney) when the balance becomes due.

4. The plaintiff's sworn statements are replete with categorical denials of signing a contract; of executing an assignment of her claim or of authorizing Mr. Mallin or Mr. Gluck to negotiate with the creditors. All of these statements, plus many others, are disproven by documentary evidence and later admitted by her (Defendants' Exhibit S).

At some points she states that her understanding of the contract was that either party could back out and at others she states that she thought she was bound (pp. 115, 116) and therefore she signed the deed. She alleges at other points that the deed was delivered by her attorney contrary to her instructions (Plaintiff's affidavit sworn to August 11, 1966). Here after denying that she knew of the delivery of the deed and claiming that same was delivered in violation of her instructions she states in her affidavit:

"With regard to the delivery of the deed I was badgered by my attorney and the defendant Dunkenberg but by indirection" (p. 6 of said affidavit).

Outstanding among the many proven contradictions of plaintiff's claim that she knew nothing about the delivery of the deed is the testimony of Mr. Daly, the title closer for the Home Title Company, who testified as follows concerning same (pp. 300, 301) (R. 21-23):

"Q. Will you tell us what you did in the regular course of closing your title in connection with Helen Ammann?"

A. —There was a deed that had been executed by Helen Ammann and it was dated the 23rd. And we contacted Helen Ammann—I asked Miss Stackpole to please contact Helen Ammann, to get her on the phone. And she called Massachusetts, reversed—she had a change card I believe—and she reversed the charges or had it charged to her account, and she put Helen Ammann on the phone. I spoke to Mrs. Ammann. I identified myself. I had an affidavit signed by Mrs. Ammann, because we had turned out a judgment against a person with the name Ammann. And I asked her if she was the woman who had signed this affidavit. She said yes. I asked her if the judgment was against herself, and she said no, that she had lived in Jamesport

for a great number of years and that this judgment that we had wasn't against her.

And then I asked her if Miss Stockpole was her attorney, and she said yes. And I explained that we were closing this title on the property in Riverhead, and she said that it was perfectly all right and that Miss Stackpole was her attorney and that we could close the title.

Q. Did you tell her that it was your intention to record the deed?

A. Yes.

Q. And did she at any time tell you that you were not to record this deed?

A. No, at no time did she say anything like that" pp. 300, 301).

Another instance is plaintiff's denial that she in any way assisted her son to substantiate his claim for some \$39,000 against the corporation (pp. 139, 140) which was clearly shown to be false by the testimony of Mr. Horowitz the attorney for the assignee who stated that the said claim of plaintiff's son was at first rejected and finally accepted solely on the support thereof by an affidavit of plaintiff verifying same and consenting to its filing (p. 247).

The one point that plaintiff was clear and resounding about in her testimony was that she never saw Rider C of the contract. Of course, Mr. Delaney was very helpful to her by the form of his question, his inflection and coaching. However, the falsity of this testimony is obvious for the reason that *the only place in the contract which referred to the assignments from her and her son was in said Rider C*. If she did not know of this provision until December 13, 1965, as she repeatedly testified why did she go to her son's office on or about October 4th, 1965, to plead for him to execute this assignment, which had been prepared by her attorney (p. 416)?

Plaintiff also testified that it was her impression that if her son did not execute the assignment she did not have to close title. If this were true why did she not call off the deal and refuse to close or to accept the benefits of the sale. Obviously she wanted the deal until her son baited her into trying to set it aside by retaining Mr. Delaney.

This is graphically illustrated by this quotation from plaintiff's testimony (pp. 71, 72):

“Q. When did you engage Mr. Delaney to represent you?

A. When I began to find the irregularities in the deal.

Q. You began to find what in the deal?

A. Irregularities in the deal.

Q. And what irregularities were pointed out to you and who pointed them out to you, if any, as you now allege?

A. Mr. Delaney pointed them out to me.”

Obviously plaintiff went to Mr. Delaney not because she had found fault with the deal but in order to find some way of placating her son.

Much is made regarding the elimination of the proposed clause in the contract as prepared by plaintiff's attorney requiring the purchasers to have harmless the seller from any claims by creditors of the corporation (R. 26).

Both attorneys testified that this was stricken out immediately and initialed by them after this had been fully explained to plaintiff (pp. 339, 401, 402, 405) (A. 156). As a matter of veracity can this Court believe that an attorney of any experience would permit his client to undertake such a responsibility without any proof as to what promises or agreements the seller may have made? (R. 41).

However, this question becomes academic in the light of plaintiff's statement in her verified complaint:

"7. That plaintiff was pressed and harassed by certain creditors to make payments *although she had no legal liability therefore. . .*" (Italics mine.) (See also Appellant's Brief, p. 7.)

The plaintiff was so embarrassed by her patently false testimony that she failed or refused to return to the court room at any time during the three day trial and no rebuttal of defendants' evidence was offered (p. 391).

The Law

It is the earnest contention of the defendants that the plaintiff failed to prove a *prima facie* case. This despite the fact that most of the testimony adduced by plaintiff was obvious hearsay permitted by the trial court over the objection of defendants' counsel. The court recognizing this fact, nevertheless stated that in the absence of a jury greater latitude could be extended (p. 10).

Thus the plaintiff was permitted to testify to conversations and alleged arrangements between her and her attorney not in the presence of the defendants or made known to them or by the farthest stretch of the legal imagination binding on them.

However, even after granting this latitude the trial court ruled in its decision dismissing the complaint:

1. That no fraud had been shown.
2. That plaintiff was fully familiar with the contract and the proceedings surrounding same.
3. That she was represented by an attorney of her own choice.

Thus it would appear that defendants might well spare all concerned the effort involved in citing and considering legal authorities where the issues of fact have been so clearly decided in defendants' favor.

However, in view of the scandalous and garbled accusations in the complaint, even though none were substantiated at the trial, the writer feels impelled to leave no stone unturned to refute this base and baseless claim.

POINT I

There was no evidence of fraud on the part of the defendants.

It is basic that the burden of proving fraud is on one who asserts it. It cannot be presumed and must be proven in toto. *Benz v. Mohr*, 241 App. Div. 583.

This proposition is clearly stated in *Snow v. Watner*, 127 A.D. 948, 112 N.Y.S. 41 in these words:

“Fraud is to be inferred only from ‘clear proofs’ and a defendant begins trial with the presumption of innocence; the presumption of honesty prevails unless overcome by irresistible evidence.”

The burden of proving fraud is understandably heavy, as held in the following decisions:

“Fraud is a civil wrong of the gravest character. The stigma attached to an unsuccessful defendant is a serious one. The law, therefore, has formulated stringent rules in actions for fraud, calculated to safe-guard a defendant from a result which carries with it drastic consequences.” *Uhlmann v. Hammons*, 74 N.Y.S. 2nd 66.

Also in *Shotwell v. Dixon*, 163 N.Y. 43, where the court held:

“When the evidence is capable of interpretation which makes it equally as consistent with the innocence of a party, that meaning must be ascribed to it which accords with his innocence. It can only be so established by proof of such circumstances as are irreconcilable with any other theory than the guilt of the person accused.”

See also *Berkey v. Third Ave. Railway Co.*, 244 N.Y. 84; *Burstein v. Cohen*, 188 N.Y.S. 814, 813; *Aspell v. Campbell*, 64 A.D. 393, 44, 72, N.Y.S. 76; *Graham v. Blake, et al.*, 265 A.D. 927, Aff'd 291 N.Y. 653.

Actually even if we were to accept as true plaintiff's entire testimony, and surely it is not entitled to credence, she has failed to prove any one, much less the five essential elements of a case in fraud.

In what way has she sustained anything but benefits from the transaction? In what way have defendants profited unconscionably?

POINT II

Negotiations or representations prior to the making of the contract were merged therein and parol evidence cannot vary or contradict the terms thereof.

The contract in this case was prepared by the attorney for plaintiff, was complete on its face and was executed by all concerned in the regular way. There is nothing unusual in the attorneys for the parties initialling changes particularly in the presence of their clients who saw them execute some. It affirmatively appears that the changes were thoroughly and in detail discussed by plaintiff and her attorney before the signing (pp. 401, 402).

To permit written agreements to be varied later by parol evidence would destroy our entire system of commerce and no contract would be secure.

Dunckel v. Parsons, 247 A.D. 539 (Aff'd 301 N.Y. 572);

Pelnorth v. MacGordon, et al., 6 Misc. 2nd 533;

Malakoff v. Orson's, Inc., 107 N.Y.S. 8nd 33.

In *Graf v. Hope Building Corp.*, 254 N.Y. 1, the court aptly held:

“In real estate transactions based on written documents the parties are held to their legal rights and the powers of a Chancellor are not to be applied unless the transaction is ‘unconscionable or oppressive.’”

In the instant case, neither of the foregoing conditions can remotely be found to exist.

POINT III

The delivery of the deed vested absolute title in defendants. No oral conditions accompanying the delivery will be recognized.

In *Hamlin v. Hamlin*, 192 N.Y. 168 (1908), the trial court found that the plaintiff wife had delivered to her deceased husband in his lifetime deeds to two parcels of real estate but also found that “the plaintiff did not intend that said deeds should be delivered as operative or effective deeds.” In reversing the judgment of the trial court the Court of Appeals said, in part (pp. 168-169 of 192 N.Y.):

“If we should give full effect to the plaintiff’s claim, it would be to hold the delivery by her of the deeds to have been conditional and not absolute;

but that would be violative of the settled rule in this state that a delivery cannot be made to the grantee conditionally. Any oral condition accompanying the delivery, in such case, would be repugnant to the terms of the deed and parol evidence to prove that there was such a condition attached to the delivery is inadmissible. These deeds had passed out of the plaintiff's possession and into that of the grantee, by the deliberate act of the former, and no oral condition, at the time, will be admitted to contradict the import of the written instruments."

To the same effect see:

Lafayette St. Church Society v. Norton, 202 N.Y. 379, 384 (1911);

Buszozak v. Wolo, 125 Misc. 546, 211 N.Y.S. 557, 563 (Sup. Ct., Jefferson Co., 1925).

This is one of the instances where the applicable rule of law renders immaterial the subjective state of mind of the person performing a legal act.

Dwight v. Fancher, 245 N.Y. 71, 74 (1927).

The only issue before the trial court was whether the grantor put the deed out of her possession and control and into the possession of the grantees by her personal act or that of her agent. This was decided in the affirmative by the said court and in fact is admitted by plaintiff.

Fisher v. Hall, 41 N.Y. 416, 421;

Diefendorf v. Diefendorf, 132 N.Y. 100, 108;

Hathaway v. Payne, 31 N.Y. 92, 106, 107;

Stonehill v. Hastings, 202 N.Y. 115, 121;

Matter of Schummers, 210 App. Div. 296 (Aff'd 243 N.Y. 548).

Plaintiff acknowledged Miss Stockpole as her attorney in the transaction and specifically stated, that she left everything to her attorney. The defendants are not bound by alleged undisclosed instructions by plaintiff to her attorney, even assuming the truth thereof, which is vehemently denied by Miss Stackpole and by the title company representative, Mr. Daly.

In the case of *Morben Holding Corp. v. Feldman*, 79 N.Y.S. 2nd, 19, it was held that an attorney who participated in the negotiations in connection with the sale of realty and who drew the contract of sale and the deed, and whom vendors held out as possessing general authority to effect all details in connection with sale was the authorized agent of vendors in the making and the closing of contract of sale of the realty.

To like effect see:

Dubinsky v. Blue Dale Dress Co., 292 N.Y.S. 898;

Flagg v. Nichols, 115 N.Y.S. 2nd 7;

Angerosa v. White Co., 290 N.Y.S. 204 (Aff'd 275 N.Y. 524);

First Stamford National Bank v. Pierce, 293 N.Y.S. 75.

POINT IV

The plaintiff had ratified and confirmed the contract by various affirmative acts and the acceptance of the benefits thereof.

Assuming, but denying, the truth or materiality of the alleged fraudulent statements the plaintiff did the following after admitted full knowledge thereof and of the delivery of the deed, (September 30, 1965, and October 8th, 1965) in ratification of the sale.

1. She executed an affidavit supplying information to defendants' title company regarding several exceptions raised by it.

2. She executed and acknowledged a bill of sale to certain chattels located in and on the real property and specifically excluded therefrom certain articles which she claimed as her personal effects (Plaintiff's Exhibit 15).

3. She caused to be executed and delivered the certificates of stock in the M. N. Ammann Hardware Co., Inc., signed by her and her son (Defendants' Exhibit G).

4. She signed and delivered an itemized statement of the monies due her from corporation and executed and delivered an assignment thereof to the defendants. (*Despite this fact, she executed an affidavit that she had never assigned this claim.* Affidavit sworn to August 11, 1966.) (Defendants' Exhibit F.)

5. She also delivered her cancelled check and the unpaid promissory notes of the corporation to substantiate this assignment.

6. She also executed and delivered a statement of the back rent due her from the corporation.

7. She endorsed and mailed to the defendants' attorney several checks for October rent (adjustments relating to title closing were as of September 30th, 1965). These checks were sent on October 13th, 1965, and October 14th, 1965, following the recording of the deed.

8. On October 14th, 1965, she sent the defendants the leases and her personal check for \$275.00 to cover the tenants securities which she held.

9. On October 14th, 1965, she sent to the defendants the check for an unpaid water bill in arrears together

with an adjustment of interest on the \$3,000.00 note (not yet due) to the Suffolk County National Bank.

10. She returned to the defendants their promissory note for the stated sum of \$750.00 which they had given to her for the purchase of the cash register because it had become clear in the intervening time that this item was unpaid by her and was being reclaimed.

11. She accepted and still retains the proceeds of the following checks:

(a) \$2,000.00 paid on signing the contract on August 23, 1965.

(b) \$5,000.00 representing balance on account of purchase price on closing and deposited in her bank on October 19th, 1965.

(c) \$840.63 representing adjustments in her favor on closing of title.

(d) \$2,000.00 paid on account of principal and interest on the purchase money mortgage on or about April 1st, 1966.

(e) \$2,000.00 paid on account of principal and interest on or about October 1st, 1966.

(f) \$2,000.00 paid on account of said purchase money mortgage on April 1st, 1967.

(g) Plaintiff permitted the payment by the defendants of the \$3,000.00 note owed by plaintiff and her son, Matthias Corwin Brandon Ammann to the Suffolk County National Bank, on the due date of same, and as specifically provided in the contract.

(h) \$2,000.00 paid on account of the purchase money mortgage on October 1967.

Thus the plaintiff has received to date the *sum of \$24,000 in cash from the defendants*, in addition to the many other benefits.

Reference is made in appellant's brief to the bringing of an action for damages by the defendants herein against the plaintiff. It is respectfully submitted that this is not within the issues herein and is improperly cited. However, again a misleading statement by Mr. Delaney must be corrected.

The gravamen of the said action is the bringing of a baseless, malicious lawsuit without probable cause which was intended to and did prevent and impede the sale or rental of the properties for a long period of time. The failure to produce the son's assignment affected only the possible settlement with creditors. The complaint is likewise based on the dilatory tactics of the plaintiff in failure to notice the case for trial and in opposing defendants motion for a preference, among other things.

CONCLUSION

The bringing of this lawsuit was indeed aptly described by plaintiff's attorney as "a colossal mistake."

The trouble is that it was a most costly mistake for all parties concerned, especially to the defendants. The judgment should be affirmed.

Respectfully submitted,

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 212 TR 5-9393

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APPENDIX

— 0 —

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Ammann—Direct

Extracts From Minutes

(10) * * * (Ammann Direct)

The Court: Well, we don't have a jury, Mrs. Seider, so I'm not going to be as strict as I normally would be.

Is it your position here, Mr. Delaney, that part of the fraudulent—there was fraud which induced this lady into this agreement?

Mr. Delaney: Yes.

The Court: And that it was an improper price which he advised her that it was worth?

Mr. Delaney: I think that is partially a fact, in that he could, he advised her as to a price . . . and then offered a good deal more, and then became simultaneously an adversary.

* * * * *

(11) * * *

The Court: Well, I will let you proceed. . . .

Let me see you develop what you are trying to do.

Q. Now in the summer of 1965 did you have a conversation with your nephew about this property? A. Yes.

Q. And do you remember what the conversation was? A. There were many conversations. He undertook to advise me and was very kind about it, on how to run it.

* * * * *

(13) * * *

Q. And can you remember what was said by him and by you at the first of these conversations? (. He tried to advise me as to—

* * * * *

(13) * * *

A. I do not remember exactly. A gradual process.

* * * * *

Ammann—Direct

(14) * * *

Q. Mrs. Ammann, have you any specific recollection of any conversations that you had with your nephew at your home in the summer of 1965? A. They were—there were many, and this was a gradual development from one of helpfulness—

Q. (Interposing) Now did you have any specific discussion as to what the property was worth? A. That was talked over many times. And that's all I can say.

Q. And what did your nephew say to you on any specific occasion that you remember as to his doing anything about ascertaining the value? A. I really have no idea what he said, or where—what information he had. He seemed to have certain ideas as to what he would give for the property. This developed later as we went along.

* * * * *

(16) * * *

The Court: I think the witness has already testified, Mr. Delaney, that she doesn't recall. So I think you should leave that one point.

* * * * *

(24) * * *

Q. May I have that? (Handed) Mrs. Ammann, were you at the Suffolk County National Bank on August 23, 1965? A. Yes.

Q. Who else was there besides yourself? A. Mr. Gluck, Miss Stackpole and Don Dunkenberg, as I recall.

Q. Was there—I withdraw that. At that time did you sign a contract with respect to the property of One to Ten Pecomie and also on Main Street in Suffolk County, in Riverhead? A. Yes.

* * * * *

(25) * * *

Q. Now Mrs. Ammann, do you know a lawyer named Mallin, M-a-l-l-i-n, Edward J. Mallin? A. I do not.

Ammann—Direct—Cross

Q. Did you ever meet him? A. I did not. I have not.

Q. Did you ever engage him to act as your lawyer?

A. I did not at any time.

Q. Did you ever authorize anybody to engage him as your lawyer? A. No.

(45) * * * (Ammann Cross)

Q. Mrs. Ammann, I show you this complaint dated January 15, 1966 and ask you to look at it please and tell me if that is your signature annexed to that complaint (handing)? A. That's my signature.

* * * * *

(46) * * *

Q. Then you had read all of the contents of that complaint; is that correct? Yes or no, Mrs. Ammann? A. Yes.

* * * * *

(48) * * *

Q. Do you deny that you hold and have held offices in many organizations? A. I have.

* * * * *

(48)

Q. Well, if you haven't the experience in legal matters don't you generally consult with your attorney before you do anything in connection with signing your name to any papers? A. In some cases I have; in some cases I have used my own judgment which has been rather good.

* * * * *

(49) * * *

Q. I see. Now who represented you at this particular time, prior to Mr. Delaney coming into the picture? A. Miss Stackpole.

Q. And for how many years have you known Syrena Stackpole? A. Probably 30,—

Q. And would you say— A. —35.

Q. Your relationship has been a very warm friendly relationship? A. I would say so.

Ammann—Cross

Q. And would it be fair to say that she has also represented you as your attorney on other matters unrelated to this particular one? A. Yes.

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(53) * * *

Q. As a matter of fact, is she not still your attorney in some present cases— A. (Interposing) I beg your pardon?

Q. I say isn't she still representing you in many matters? A. Yes; she is representing me in my income tax.

Q. And did Miss Stackpole also have occasion to represent you in the preparation of a last will and testament very recently? A. Oh yes, yes.

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(54) * * *

Q. In this last will and testament is there a clause in there to the effect that the mortgage, the purchase money mortgage of 48 thousand-odd dollars was given to your son Peter Ammann Brandon— A. Yes.

Q. —is that correct? A. Yes.

Q. So you had knowledge of that particular mortgage, did you not, the purchase money mortgage? A. Yes.

Q. And this purchase money mortgage emanated from this particular contract which you stated you didn't have knowledge of; is that right? A. I don't remember that part of it, no. It emanated from this particular—

Q. (Interposing) From the contract? A. For the purchase of that property.

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(56) * * *

Q. Now you admit that you were at the bank on August 23, 1965 when this contract was signed? A. Yes.

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Ammann—Cross

(57) * * *

Q. Do you know John Stark who is president of the Suffolk County National Bank at the time? A. He was with us earlier in it but I do not think he was there later.

Q. When you say earlier or later, what time would you say you got to the bank? A. I think it was—I'm not sure whether it was before noon—It was before noon.

Q. And where did this contract closing take place in the bank? A. This is the contract for sale?

Q. Yes. A. Yes. In the bank in one of the back rooms of the bank.

Q. One of the closing rooms, isn't that correct? A. Well, it's a conference room of some kind.

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(61) * * *

Q. You don't recall. I see. Do you recall anybody writing anything in, in handwriting, at the table and then having it read and conformed? A. I don't recall it. I don't recall it.

Q. Don't you really, Mrs. Ammann? A. There was discussion but I don't recall what they did.

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(63) * * *

Q. Who prepared the contracts of sale; was it your attorney who prepared them or were they prepared by an outsider? A. I don't know. They were forms as far as I know. I don't know.

Q. Well, in this complaint of yours which you verified under oath you stated that with the assistance of Peter Gluck, the father-in-law of the defendant Dunkenberg, and the defendant Dobbis caused a form of contract of sale to be prepared on the standard form of the New York Board of Underwriters.

Did you state that under oath? A. Apparently I did.

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Ammann—Cross

(64) * * *

Q. And who prepared the contract in connection with the sale of the Jamesport property? A. I'm thinking now of the earliest piece of property I owned. I think Mr. Sheinberg was my attorney at that time. Subsequently Miss Stackpole was on another piece of property.

Q. I see. And in each of these instances, when Mr. Sheinberg represented you and Miss Stackpole represented you, who prepared these contracts? A. The attorneys.

Q. The attorneys who represented you; isn't that correct? A. Yes.

Q. You being the seller? A. Yes.

Q. And you know it's customary for the seller's attorney to prepare the contracts, do you not? A. Yes.

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(71) * * *

Q. All right. Now Mrs. Ammann, when you verified this complaint and you read paragraph 13, did you state in that complaint, which was verified one month after you were in receipt of all these papers, that the contract was never executed by the parties and that no one in behalf of the purchasers had executed it and that you never had nor now have a copy of that contract? A. I can't get my dates straight in here. That's all there is to it. I don't know when this came about. The only thing I know is that I did not sign that with all of these deletions in it (indicating).

Q. When did you engage Mr. Delaney to represent you? A. When I began to find the irregularities in the deal.

Q. You began to find what in the deal? A. Irregularities in the deal.

Q. And what irregularities were pointed out to you and who pointed them out to you, if any, as you now allege? A. Mr. Delaney pointed them out to me.

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Ammann—Cross

(75) * * *

Q. Now Mrs. Ammann, what is a binder? A. Well, It's a contract between purchaser and seller holding him to a contract.

Q. Is it not a fact from your own experience in the field that it's customary to have a binder prepared, if a binder is in existence, prior to the execution of a contract? A. Yes.

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(76) * * *

A. This binder, as well as I can recollect, I was going away I think at the time and in case it was needed I signed a binder.

Q. And who prepared this so-called binder? A. I don't know which party prepared it.

Q. Did you ever see such a binder? A. I certainly signed a binder.

Q. You signed a binder? A. Yes, I presume I did but I left this to my attorney.

Q. Do you presume or do you know? A. I would say I presume.

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(77) * * *

Q. And have you ever seen this so-called illusory binder since? A. I don't know where it is. I haven't, I haven't seen it.

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(79) * * *

Q. Then suppose you tell us, Mrs. Ammann, who recommended that you go and see Mr. Delaney? A. Several people.

Q. May I have their names please? A. Oh, I don't recall them at the moment. I think Mr. John was one person who recommended him as a very able man.

Q. And who is Mr. John? A. He's president of Mr. John, Incorporated.

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Ammann—Cross

Q. And was Mr. John associated in any particular manner with a son of yours, in business? A. Yes.

Q. And is this son the Peter Brandon Corwin Ammann referred to? A. Referred to in this deal?

Q. Yes. A. Yes, because they had lost a great deal of money, both of them, in it.

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(84) * * *

Q. Mrs. Ammann, had you had occasion to list this property with numerous brokers in the vicinity? A. Yes, to find out what it would—the value of it.

Q. Isn't it a fact, Mrs. Ammann, that you had attempted to make a sale of this property under the auspices of Frank Smith? A. I had it listed, just as I have my home today, listed with many realtors to see what, how it was valued. The public—

* * * * *

Q. Had there been any attempt made to sell both parcels through a Mr. Ulrich? A. Only in that I had listed it in order to obtain the value, to find out what it was worth.

* * * * *

(88) * * *

Q. Well, you know if you sell property and somebody has paid the taxes ahead of time, or if there is fuel left or— A. Oh, yes, yes.

Q. You understand what apportionments are? A. Yes.

Q. You have sold property before. And you accepted that check, did you not? A. Yes.

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(102) * * *

Q. —on the bottom of page 8, I want you to observe the language you employed, "I never assigned my claim to the purchasers nor did my son. I did not agree so to do."

Ammann—Cross

Now did you ever make such an assignment, as you recall, or if you recall? A. I never assigned my claim to the purchasers—I certainly never had that in mind. I——

Q. (Interposing) I asked you a question, Madam. Did you or did you not assign your claim—— A. (Interposing) I don't remember assigning it.

* * * * *

Q. (Interposing) Don't presume, because, Madam, may I call your attention to the paragraph in the middle of page 8, where you said, "I had promised not to press these claims and my son had backed me up."

Is that a correct statement, that your son Corwin said he would never press any claim against the creditors? A. He certainly did not want to press a claim against the creditors. He wanted to settle with them.

Q. Well, now did he press any claim against the creditors? A. Not that I know of. I don't know that he did.

Q. You don't know that he did? A. No.

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(105) * * *

Q. Is it not a fact, Mrs. Ammann, that this \$39,000 claim was done with your affidavit? A. No, I——

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(106) * * *

Q. I show you this assignment and ask you to identify it and tell me whether that's your signature (handing)? A. That's my signature, but I had no intention of, of doing the creditors out of anything. I was not——

(139) * * *

Q. Do you recall in your verified pleadings and in the affidavits to this court making a statement that neither you or your son would ever make any claim against the corporation as a creditor? A. Well, it's in those—it's in that paper, isn't it?

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Ammann—Cross

(142) * * *

Q. Once again I ask you this question, and you are under oath, Mrs. Ammann. Isn't it a fact that you have been trying to dispose of this property since 1960? A. Only trying to find out, to determine a good price on the property.

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(143) * * *

Q. And you were losing how much money a year, would you say on the hardware store? A. I don't know what the loss was. I know that I was losing—

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(147) * * *

Q. Now Mrs. Ammann, you received all the monies you were supposed to receive under and by the terms of this contract? A. Yes.

Q. Is that correct? A. Yes.

Q. You are not out of pocket in regard to any of the terms of this contract? A. That is true.

* * * * *

The Court: Well, she has testified that she has accepted the checks and that she has been paid everything that she is entitled to be paid. So I think you have an answer to your question.

Mrs. Seider: All right, sir.

Q. Now when for the first time did you become dissatisfied with this arrangement? Wasn't it after your son Peter had gotten to work on you, as it were? A. No, I don't think it was, when I think over the whole thing. Miss Stackpole told me it was a very bad deal.

Q. Miss Stackpole told it was a bad deal? A. Yes, and she said I do not like these people. I'm not used to doing business with them and I do not like your nephew. Now

*Ammann—Cross**Sussman—Cross*

that statement she made to me, and I began to be suspicious.

Q. And when did Miss Stackpole make this statement, allegedly? A. It was during the proceedings.

Q. Well, if Miss Stackpole made this statement to you who did you not say to her, as your attorney, "Cease and desist, I don't want to go through with any more of this?"

Did you ever make that statement to her? A. Because—

Q. (Interposing) Just answer me, did you or didn't you? A. At one time I did, later on.

Q. At what time did you do it? A. After I found out that the contract to sell was not binding.

Q. Who told you the contract to sell was not binding? A. Mr. Delaney told me it was not binding.

Q. So then you went to Miss Stackpole and told her you didn't like the contract and you wanted to stop that, is that right? A. After my visit to New York, to talk over—

Q. (Interposing) So you didn't speak to Miss Stackpole, did you? You spoke to Mr. Delaney? A. Originally, originally, but I then spoke to Miss Stackpole on the way, when I went into New York to get my son's—he wanted to buy the property in.

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(152) * * *

Q. —that this contract was originally supposed to have been signed on July 23, 1965 and was adjourned to August 23, 1965—is that or is it not a fact? A. Yes, there were delays.

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(228) * * * (Sussman Cross)

Q. Now at this particular meeting that you referred to, in October, the middle of October, did you tell Mr. Dobbis that Peter was driving you crazy and that you had to bring

Sussman—Cross
Horowitz—Direct

back some kind of an answer to him? A. No, ma'am. I did tell him that Peter was driving me crazy, that I was going crazy about this whole deal, not that I had to bring back an answer. I am not responsible to Peter for answers on his own business.

* * * * *

(247) * * * (Horowitz Direct)

Q. Now among the various claims that you have there, sir, was there a claim filed in behalf of one Peter Brandon?

A. There was a claim filed on behalf of Mr. Peter Brandon by attorney Robert Morris, M-o-r-r-i-s, 1350 Avenue of the Americas, New York 10019, in the sum of \$39,853.07.

Q. Could you give us the approximate date that that was filed, sir? A. The first attempt to file this claim was made by attorney Morris on October 11, 1966.

Q. And what was the disposition? A. And I on behalf of the assignee rejected that claim, pointing out to Mr. Morris that we would require, one, a statement from Mrs. Ammann that she consented to his entering this claim, and secondly, that we would need an affidavit that these were not capital investment in the corporation but were actually legitimate loans, because if they were capital investment he would not be entitled to file a claim. He would have just lost this investment.

Q. I see. And did there come a time when this proof was submitted to you by Mrs. Ammann? A. On September blank—his letter is dated September blank—that's the best I can give you—1966. Mr. Morris sent us a, what appeared to be an affidavit signed by Mrs. Ammann but it was undated and not sworn to before a notary. So that on—I made a photocopy of that, incidentally, and returned it to Mr. Morris with a covering letter stating that in view of the fact that it had not been signed before a notary public it was not acceptable.

Horowitz—Direct—Redirect

Then on October 25 Mr. Morris returned that same affidavit, but this time it had been sworn to and the date had been crossed out, and it was sworn to before a notary public dated October 25, 1966, and it set forth in the affidavit all the cash advances made to Ammann Hardware by Mr. Peter Brandon, and Mrs. Ammann in her affidavit stated that these were all personal advancements and they were not capital investments, and that these sums were actually due to Mr. Brandon and were to be accepted as far as she was concerned.

Based on that affidavit we accepted it. . . .

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(271) * * * (Horowitz Redirect)

Q. Yes. But I am referring your attention, if I may, to the offer that was made by the defendants in this action, and that would be in and around October 1965. A. In October 1965 an offer had been made to pay 30 percent to merchandise creditors and subordinate all personal claims to those of creditors.

Q. And in dollars and cents was that offer, the approximation, about \$12,500? Is there anything you have in these that would indicate it? A. I think that merchandise creditors were about 30 to 35,000 dollars, and the offer was 30 percent.

Q. Well, then it would be approximately 12,500? A. My arithmetic is not so good, but those are the figures.

* * * * *

The Court: I am not saying that you did, sir. But I question whether she had knowledge or did not have knowledge, especially in view of the fact it was in affidavit form, and this lady is a rather competent person. I got that impression.

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Mr. Delaney: Well, that I don't know. I felt that probably the way she was described by my ad-

*Horowitz—Redirect
Daly Direct*

versary in this motion was perhaps more in consequence of the facts of her nature, and I have not suggested that she was incompetent and I have not suggested that—anything but that this was a colossal mistake, and—but when it was found and analyzed—and I must say by me—there were elements in it that the nature of the deal was not such that Mrs. Ammann had to be inducing them to go through with this deal by making a lot of warranties.

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300) * * * (Daly Direct)

Q. And to the best of your recollection on what date was title suppose to have closed? A. On the 30th of September.

Q. On that date was Helen Ammann present? A. No, she wasn't.

Q. Will you tell us what you did in the regular course of closing your title in connection with Helen Ammann? A. I—There was a deed that had been executed by Helen Ammann and it was dated the 23rd. And we contacted Helen Ammann—I asked Miss Stackpole to please contact Helen Ammann, to get her on the phone. And she called Massachusetts, reversed—she had a charge card I believe—and she reversed the charges or had it charged to her account, and she put Helen Ammann on the phone. I spoke to Mrs. Ammann. I identified myself. I had an affidavit signed by Mrs. Ammann, because we had turned out a judgment against a person with the name Ammann. And I asked her if she was the woman who had signed this affidavit. She said yes. I asked her if the judgment was against herself, and she said no, that she had lived in Jamesport for a great number of years and that this judgment that we had wasn't against her.

And then I asked her if Miss Stackpole was her attorney, and she said yes. And I explained that we were clos-

Daly Direct

ing this title on the property in Riverhead, and she said that it was perfectly all right and that Miss Stackpole was her attorney and that we could close the title.

Q. Did you tell her that it was your intention to record the deed? A. Yes.

Q. And did she at any time tell you that you were not to record this deed? A. No, at no time did she say anything like that.

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(306) * * *

Q. And between whom were these apportionments and adjustments conducted? A. Mr. Gluck was the attorney at the time. He was there, and Miss Stackpole. And the two purchasers were at the closing, and they were making the adjustments. And then—I don't know the exact reason why, but there was a postponement that day to the 30th. And I had written up—we had continued the searches down to the 30th, and I had written up their title policy, ready to close, and Miss Stackpole told me she was going to take the papers back to the office. And at that time I took their title policy away from them—I mean their lawyers' certificate because I had written it up and it hadn't been paid for.

So I held it and a few days later Miss Stackpole contacted me and she said that the parties were in her office, that she had received the check and that they would be down to pay me the fee on the title insurance, and also for us, it was all right for us to record the deed and the mortgage. And I believe it was about 20 minutes or an hour later, less than an hour, that the two purchasers came back, and it was a very simple transaction. We just—I have them the policy or the L C marked up, and I recorded the mortgage and the deed and put the interal revenue stamps on it, and what have you.

Q. And that was the conclusion of the title closing?
A. Yes, sir.

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Gluck—Direct

(316) * * * (Gluck Direct)

Q. What occurred thereafter? A. Well, we were in proximate agreement except on a couple of things. And the main item was that both Mr. Lipetz and Miss Stackpole were concerned that leaving the purchase money mortgage of approximately 47 or 48,000 as a lien solely on the corner building wouldn't provide them with the kind of security they thought they ought to have. I in turn said I cannot go along with a situation where this purchase money mortgage would be a blanket on both properties, because there is already a mortgage on the Peconic Avenue property. It's a closed building. It's a highly specialized building. It has not tenant. If we should be unable to secure a tenant for that property we may want to sell it, and I would never be able to sell that property with those two mortgages a lien on it.

And I said if you insist upon that being a blanket mortgage we may as well forget the transaction. And on this basis we all got up and started to walk out of Mr. Lipetz' office. On the way out Miss Stackpole, I think, said to Mr. Dobbis, "How about the extra money, how about \$1,200 extra on the price for these improvements?" Mr. Dobbis said, "If that becomes the only problem we'll get along."

At this point Miss Stackpole or Mrs. Ammann said, "You know, we had a better offer, we had an offer of \$72,000."

I said, "Well, if you have a better offer I assume you will take the better offer and not our offer." We walked a little further and as we got outside Mrs. Ammann said to Don, Don Dunbenberg, the defendant, "Why can't we work this thing out?" Don said to her, "First, of all, now that you have mentioned that, you or Miss Stackpole, whoever has mentioned that you might have a better offer than ours, I don't want us to make any deal until you are fully satisfied that our offer is as good as any you can get elsewhere." That's number one. He said, "Besides the

Gluck—Direct

legal propositions about the mortgage, and that, that I am leaving to Mr. Gluck, if that can be worked out at some future date, Miss Stackpole gets in touch with Mr. Gluck, if you want it, we will try and revive the deal.”

That is the way we left Mr. Lipetz' office that day.

Q. What happened after July 16th, 1965. A. On or about July 23rd I received a phone call from Miss Stackpole.

Q. And what was said. A. The substance of the conversation was Mrs. Ammann wishes to accept your proposition. I said, “Well, now let's, before we go any further, let's review what is my proposition.

* * * * *

Now Miss Stackpole said on this conversation of the 21st, she said, “Why can't we get more cash?” She said, “Couldn't you make the mortgage \$40,000 and give us some extra cash?”

I said, “No, Miss Stackpole. We can't for this reason's the \$10,000 that we put up plus the incidental expenses which will not be inconsiderable is a lot of money to these two young men. They are starting out in this thing. Besides that I must make them aware of the fact that they are walking into a property, one of which is entirely vacant. The other of which is more than 50 percent vacant, that the gross income, as I see it that we can count on at this time, will be at least 5 to 6,000 a year less than the actual expenses of carrying that property.” I said, “Now they have got to be prepared with some additional capital in the event they can't rent this property. Therefore they have got to have a reserve of so much and I cannot permit them to put up anymore cash.”

She said, “Well, I'm still worried about that mortgage on the corner.” I said, “Is that all that bothers you?” She said, “Well, that's pretty much the main issue.”

“I'll tell you what I suggest,” I said, “if this meets

Gluck—Direct

with Mrs. Ammann's approval I will suggest to my clients that we spread the mortgage, the purchase money mortgage on both properties but that it contain a provision that in the event we should ever wish to release the Peconic Avenue property because we want to sell it, mortgage it, whatever we want to do with it, that upon payment of an additional \$5,000 without affecting the other payments that would be coming ue, \$2,000 quarterly, that upon that payment your client will execute a release."

She said, "It sounds all right to me."

Subsequently we had another phone conversation—I would say within the next day or two, when she called me. She said, "Well, I think——"

Mr. Delaney: (Interposing) Could you fix the date of that?

The Witness: Within the next day or two.

Mr. Delaney: Well, a day or two from what?

The Witness: After July 23rd.

The Court: (To the witness) Approximately July 25th, we could say?

The Witness: I think Miss Stackpole called me—if I called her I'm not certain. But in any event, we decided to meet on July 26th in Riverhead to get into a contract on this basis. It was suggested I think that we have the meeting at the Suffolk County National Bank in Riverhead because they were the people, their consent would have to be obtained to the transfer.

Q. And what occurred then? A. A day after that by a phone call from Miss Stackpole, either to me directly, or from her to Don Dunbenberg which he advised me of, she said she was compelled to cancel the appointment for July 26th. I don't recall the reason. Thereupon——

* * * * *

Gluck—Direct

(335) * * *

Q. Now Mr. Gluck, as a result of your conversations and correspondence with Miss Stackpole there did come a day when you met at the bank for contract closing; is that correct? A. Yes.

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(338) * * *

Q. Now is the course of the closing and in the presence of Mrs. Ammann and her attorney Miss Stackpole what was said concerning the contents of these riders? A. Well, in the intervening conversations Miss Stackpole had advised me that the matter of the \$5,000 was satisfactory. I told her it was satisfactory to me, and I told her to insert in the copy of the contract that she had there anything additional that she wanted and I would bring my copy with the things I wanted. And at the time we met there we would conform all copies.

The very first thing, pretty near the first thing after the amenities were had, I referred to an item that appeared in the copy of the contract as prepared by Miss Stackpole, which appears two-thirds of the way down.

In Rider B, to the effect that the buyer shall hold the seller harmless from any claims against M. N. Ammann Hardware, Inc. and shall indemnify her in the event that she shall be obligated to pay any such claim. I had marked this out myself before I left my office on my copy to be sure I did not overlook it. I said immediately, "Now if you insist on this, Miss Stackpole, we may as well not waste any time. I have no way of knowing what your client has said to these creditors. She may have signed guarantees. I will not allow my clients to be involved in any guarantees that she may have had or relationship with these creditors." I said, "We have agreed that we will pay the \$3,000 note and save her harmless but I will not consent to this."

Gluck—Direct

Thereupon, Miss Stackpole and Mrs. Ammann engaged in a long conversation about it. We were all at the table. I heard part of it. I was also busy with my own affairs, but they discussed this particular thing. And then Mrs. Ammann said to Miss Stackpole, "Well, I'm not really responsible personally for these things, am I?" I don't recall what Miss Stackpole said but we all engaged in some kind of a legal discussion, and I said, I think, "Well, I'm not advising anybody but I doubt very much that if you didn't obligate yourself personally that you would be responsible, but but I cannot allow my people to be involved in it."

At that point Miss Stackpole and I, we both bracketed it, and I wrote it out on the copies. Subsequently, when we initialled everything else this was one of the things that were initialled by Miss Stackpole and myself.

Q. And your initial and her initial appears right alongside of that on both copies of the contracts which are now in evidence; is that correct, sir? A. Yes, they do. Now in addition to that Miss Stackpole had added on her copy of the contract certain things which I did not have in my copy, and since they were not objectionable to me I wrote, hand wrote some of the things that she thad in her copy. For example, she had filled in on the Rider C which I sent her—there were various facts regarding this corporation M. N. Ammann Hardware, such as the number of shares, the par value, et cetera, she added several changes and filled in several blanks apparently with her typewriter. In any event, they were there. These are the changes she refers to in on the letters in evidence in which she said, "I have made certain changes in what you have sent me. If you have made any changes in mine let me know what they are."

Q. And did you do so, Mr. Gluck? A. Yes. I had typed in among the things—which is the only thing apparently which is in issue here—for example, she had typed in on

Gluck—Direct

the bottom of Rider C which I had prepared, the following, "Items owned by Helen W. Ammann, individually, framed prints on the wall by the rear stairs and one in the office, one gold bench in dressing room, one painted iron bench." I hand wrote that in to a blank space on the copy which I had.

I had in turn typed in on my copy on the bottom of Rider C the reference to the release clause on the purchase money mortgage. Thereupon Miss Stackpole looked at it. She took this copy (indicating) and she went into another room and came back with it typed in on her copy. That accounts for the different typing.

Q. And this typing was done at the bank? A. I imagine so, I didn't go into the room with her. She went into the stenographer's room there, or whatever you call it. We were in a closing room. When she came back she had this (indicating). Then——

Q. (Interposing) About what time of the day was it now, do you recall? A. It was getting close to noon, I think. Yes.

Q. What happened after that? A. Well, then there was another provision which I wanted in there. At this point I think the stenographer had left, or we didn't want to trouble them in any event, and we decided that we would hand write it. I would dictate it and Don hand wrote it on one copy and Miss Stackpole wrote on this, a certain provision. As a matter of fact, I remember very clearly Miss Stackpole saying to Mrs. Ammann, "You know, I hate to write longhand. I ought to make you write this."

I in turn started to write. I wrote the first word of mine and I said, "You know, that's a good idea. Don, you do the writing. I hate to write." So I had written one part in any event and I dictated and Don wrote one part. Miss Stackpole wrote another, and we conformed both copies in their entirety and stapled them up.

Gluck—Direct
Stackpole—Direct

Then there was a discussion. Miss Stackpole and Mrs. Ammann went over the thing fairly thoroughly. Everything was agreeable. Miss Stackpole and I initialled every change on both copies and the parties signed the contracts, including Mrs. Ammann.

At the time she signed this contract it was in exactly for form that it is today, including Rider C. Nothing was ever changed after that day, nothing was deleted.

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(347) * * *

Q. September 30th. I'm sorry. What occurred on that date? A. Well, after the adjustments and proofs which I need in support of the contract. I had a list of approximately nine or ten items which I required.

I first asked the closer, Mr. Daly, whether he was satisfied with the form of the deed. This had all been submitted to Mr. Daly before by Miss Stackpole, and she sent me that, in one of these letters it states that she had been in there and she had had it approved by him, and requesting the possibility that I might close a little earlier. I think the delay from the 23rd to the 30th was in connection with a survey which eventually we ordered, and got from the surveyor, a copy of which I think has been offered in evidence.

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(366) * * *

Q. Did you at any time advise Mrs. Ammann that you would wait ten days? A. I was never requested, nor did I ever agree to do any such thing.

* * * * *

(386) * * * (Stackpole Direct)

Q. I would like to direct your attention to a few years prior to the conveyance of this particular property that we

Stackpole—Direct

are discussing today. Had you had occasion as her attorney, friend and counselor to make any attempts in her behalf to sell the property? A. Yes, many.

Q. How many roughly would you say there had been?
A. Better than a dozen.

Q. And was the property listed with numerous brokers in the area? A. Yes.

* * * * *

(393) * * *

Q. Now on the occasion of July 16, 1965 was there any agreement that was reached as a result of the negotiations and discussion? A. No. An offer was made, a great deal of conversation about the offer, and it was left that Mrs. Ammann would think it over. Mr. Dunkenberg said if you can get any better offer you had better take it. In substance that's what he said.

* * * * *

(394) * * *

Q. Now that was a met offer, is that correct? A. No brokerage.

Q. There was no brokerage? A. No brokerage.

* * * * *

Q. And the various brokers that you had interviewed in behalf of Mrs. Ammann had made you offers on this property heretofor? That is prior to the 16th of July, 1965? A. I hesitate because offers had been made through a broker to Mrs. Ammann.

Q. Directly? A. And subsequently the broker did talk with me. A Mr. Julian (phonetic) in Riverhead had made an offer to her—do you wish to know the amount?

Q. Yes, I would please? A. \$50,000, and he would assume the payment of the creditors, or \$60,000 and no payment to the creditors. And there was a broker involved in that offer, a Mrs. Heath (phonetic).

Stackpole—Direct

Q. And Mrs. Heath would receive 6 percent off that offer, is that correct? A. That is correct.

Q. So that when you left the office of Mr. Lipetz on July 16th, 1965 you had a firm offer of \$71,200 net to Mrs. Ammann; is that right? A. Yes——

Q. Now—— A. ——plus the payment of a \$3,000 note at the bank.

(397)

Q. Now I direct your attention to what occurred following that meeting. Did it eventuate into the drafting of a contract? A. That is correct. On the 23rd of July Mrs. Ammann came to my office and she said she was ready to accept Mr. Dunkenberg's and Mr. Dobbis' offer. I had in the meantime had some correspondence with another broker and, as a matter of fact, had an appointment to show the place to another broker the very next day. And on the 23rd when she informed me that she would accept the offer, I communicated with that broker and told them not to come to Riverhead.

I also communicated, as I recall, with Mr. Gluck and told him that Mrs. Ammann was ready to go ahead.

Subsequent to that I received from Mr. Gluck some—I'd call it a rider, some statement of what he wanted in the contract. I then prepared a contract. It was not—he didn't send me a contract, it was just two pages of what he wanted in the contract. I prepared a contract and sent it to him and returned to him the sheets which he had sent to me, and as was testified this morning wrote on to it, "Rider" and changed it by putting "upon information and belief" into some of the paragraphs.

Only with the contract before me can I answer the question fully.

Q. Would this be the one (handing)? A. This is done in my office, Rider A, description of the property was done in my office. The one marked Rider C was what he sent to me.

Stackpole—Direct

And do you want to know what change I made in there?

Q. Yes, would you tell us please? A. All right. The name was misspelled. The initials were incorrect. I corrected that in pen and ink. Down in, just, the line prior to B I inserted, "Except items belonging to seller personally listed hereafter."

And in item B I added, where it says, "Annexed an accurate and full list of the creditors," I added, "Upon information and belief."

In C as to the inventory annexed constituting a full and correct statement, I added to that, "Upon information and belief."

I made another correction of the spelling in D, I added to it the words on the next page, "Items owned by Helen W. Ammann individually," and listed three items, "Prints, gold bench, iron bench," and so forth.

And I then returned it to Mr. Gluck.

Q. Now directing your attention to August 23, am I correct in saying this contract was originally set and scheduled for closing on July 23, 1965? A. July 26th.

Q. July 26th, 1965? A. Yes.

Q. Between July 26th, 1965 and the date that the contract was closed, namely August 23rd, what ensued? A. Oh, we had negotiations with other brokers, with possible purchasers. Mr. Dunkenberg having said if she could get a better offer, we continued to try to find another buyer that would pay more.

Q. Did you find such a buyer? A. No.

Q. On August 23, 1965 did you then meet at the bank, the Suffolk County National Bank—is that the bank? A. That is correct.

Q. And will you tell us who was present and at what time you got to the bank? A. It was approximately 11 o'clock in the morning. Do you want to know how we sat, because Mrs. Ammann testified to that yesterday?

Q. Yes, I'm very anxious to know this. A. All right. I

Stackpole—Direct

sat on the south side of the table. Mrs. Ammann sat at my left, which was the end of the table on the west (indicating). Mr. Gluck sat directly opposite me. Next to him sat Don Dunkenberg. Mr. John Stark who was then the, had been the president of the bank and was then the chairman of the bank, who was a very close friend of Mrs. Ammann and had urged her for several years to sell the property, sat a little distance at my right and was present during practically all of the negotiations, conversation, signing and so forth.

Q. And did Mrs. Ammann participate in any of these conversations? A. She certainly did. And every item in the contract was gone over with her carefully and explained to her in words of one syllable so there was no legal phraseology that she couldn't understand.

Q. Now prior to your coming to the bank did you discuss with Mrs. Ammann the riders and the contents of these riders? A. The whole thing was gone over with her, that is correct, except insofar as the changes that were made that particular day.

Q. Now will you tell us what changes were made that particular day in her presence? A. There was a clause which I had put in, "The buyer shall hold the seller harmless from any claims against M. N. Ammann Hardware, Inc., and shall indemnify her in the event that she shall be obliged to pay any such claims." That was stricken out in her presence and initialled by Mr. Gluck and me, because Mr. Gluck said he would not go through with the deal if he had to indemnify her or hold her harmless from any claims.

Q. And was that the extent of the discussion regarding this particular clause? A. Well, I don't remember anything else.

Q. You were here when Mr. Gluck testified in the morning, this morning, were you not? A. Yes.

Q. Concerning the reasons as to why he wanted that struck from the record—I'm sorry, from the contract? A.

Stackpole—Direct

Yes, I heard what he testified and I believe that that's correct. I mean, I believe that—now that it has been brought to my attention, there were several occasions on which, for instance, in Mr. Lipetz' office it was, "Take this or else" was the idea. That is that the deal would not go through unless this provision was stricken out.

Q. Now during all of this time that you were at the bank did there come a time when the riders had to be conformed? A. Yes. There are——

Q. (Interposing) How was that done and by whom please? A. Well, there are two pen written additions in here, and as to the—as to the one on the last page we had already asked a stenographer—I had already asked a stenographer, ora typist in the bank to type in—perhaps I'd better start over again.

In the copy that Mr. Gluck brought out he had typed in this paragraph beginning, "The purchase money mortgage shall contain the following provisions," the words "and in the event of fire damage" in the copy that he had. So I took the copy that I still had out into the outside office and got one of the girls out ther to copy from this and put it into this contract (indicating).

Then the further contract that is added in pen and ink, well it was noon hour and I was a little embarrassed to keep asking one of the bank's employees to type something in. So I suggested that we write it in, but I told Mr. Gluck that I didn't like to write and so he dictated—I mean I didn't like to dictate—so he dictated and Don Dunkenberg wrote that (indicating). And I wrote this, both as to Mr. Gluck's dictation.

Mr. Delaney: May we have that referred to more specifically, what "that," is?

The Witness: Well, it's the bottom of——

The Court: The last handwritten paragraph.

The Witness: Thank you.

Stackpole—Direct

The Court: Of schedule C.

Mr. Delaney: On which exhibit, may I know please?

The Witness: I beg your pardon?

The Court: On both contracts.

The Witness: Mr. Dunkenberg wrote one and I wrote the other, both to Mr. Gluck's dictation.

Mr. Delaney: Could I know on what?

The Court: Defendants' Exhibits P and J.

* * * * *

Q. Now this transcription was in the presence of Mrs. Ammann? A. Yes.

Q. And—— A. (Interposing) She didn't leave the room at all.

Q. During all of this time? A. That is correct.

Q. And did you discuss with her the purposes of incorporating these provisions in the contract? A. Oh yes, I remember now. I haven't had a copy of this contract in more than six months, so I didn't remember what it was. She understood perfectly. I explained to her carefully.

* * * * *

(430) * * *

Q. Miss Stackpole, at any time after the contracts were executed was there any change whatsoever made in said contracts? A. None whatever.

* * * * *

Q. Instead I will ask you did there come a time when you turned over to your client, pursuant to the her request, the contract, the mortgage and the mortgage note? A. Yes.

Q. And do you recall the date that this was done and the circumstances leading up to it? A. On the 2nd of November which was Election Day, Mrs. Ammann came to my office about 10 o'clock in the morning and told me that the preceding day she had received a telephone call

Stackpole—Direct—Cross

from Mr. John of Mr. John, Inc., saying that her son was wrecking his business and that she must do something about it.

She then continued that the deal must be, the property must be reconveyed to her. Her words were "he is my son. I will not see him destroyed." She was hysterical. She wept. I told her there was nothing I could do for her.

She also said that if Mr. Dunkenberg would not reconvey to her his interest in the property she would never speak to his mother again—his mother being her sister.

* * * * *

(468) * * * (Stackpole Cross)

A. I did not hear Mr. Peter Brandon ask his mother for ten days, but considering our relationship and our conversation on the return trip, he would have told me if she had promised him that.

Q. She never told you that? A. No. It was on the 26th of July that he asked for the ten days, and I would be very glad to testify about that conversation because it was with me.

30-R

Defendant's Exhibit S

Riverhead, N. Y.
August 24, 1965

To whom it may concern :

Peter Gluck, Esq., and/or Edward J. Mallin, Esq., are authorized to discuss matter pertaining to creditors of M. N. Ammann Hardware, Inc.

M. N. HARDWARE, INC.

By HELEN W. AMMENN
President.

Riverhead, N. Y.
August 24, 1965

Peter Gluck, Esq.
185 Montague Street
Brooklyn, N. Y.

My dear Sir:

You are hereby authorized to discuss matters pertaining to the creditors of M. N. Ammann Hardware, Inc. This aothorization shall also extend to your assoiiate, Edward J. Mallin, Esq.

Very truly yours

M. N. AMMANN HARDWARE, INC.
By HELEN W. AMMANN
President

31-R

Defendant's Exhibit U

Sat. A. M. Oct. 23, 1965

Mr. Peter Gluck:

Dear Mr. Gluck:

Would you consider re selling to me the family property in Riverhead, and at what price?

My act in disposing of this property is causing untold anguish and certain estrangements between my son and me. His sole desire is to vindicate his father's name and to retain the property in the Ammann family.

A few days before the transfer of title, Miss Stackpole accompanied me to N. Y. to ask Peter to sign off assets in the property so that the sale might be effected, without which signature, it was my understanding from you, the deal would be dropped.

Peter refused to sign and asked for 10 days in which to raise the necessary funds to pay off creditors. I gave him that promise.

Shortly thereafter Miss Stackpole notified me that the closing date was set for Sept. 30th. I reminded her of your decision to drop the *deal* if Peter did not release his interests. She informed me that you would proceed without such release. But, that your office would call Peter prior to the closing. He claims that there is no record of such call to his office.

Won't you please help me out of this tragic position in which I am placed?

Please release to me this old family property. I will return all monies, plus your expenses, involved in the transaction.

Defendant's Exhibit U

I know you were against Don's association in a family matter, and I am dreadfully sorry, and do not want enmity over it. However, better relations will be established between Don and Peter and between mother and son if in some way we can reverse this deal.

I fear for my son's health, please help me if you can.

Sincerely yours,

s/ HELEN W. AMMANN

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To Be Argued By
FRANK DELANEY
(25 Minutes)

New York Supreme Court

Appellate Division—Second Department

HELEN W. AMMANN,

Plaintiff-Appellant,

-against-

RUBY DOBBIS, DONALD DUNKENBERG,
and TWIN D. CORPORATION,

Defendants-Respondents.

APPELLANT'S BRIEF

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Suffolk County Clerk's
Index No. 135595/1966

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

HELEN W. AMMANN,

Plaintiff-Appellant,

against

Index No.
135595-66

RUBY DOBBIS, DONALD DUNKENBERG, and
TWIN D. CORPORATION,

Defendants-Respondents.

APPELLANT'S BRIEF

QUESTIONS INVOLVED

1. Is a deed validly delivered by a voluntary escrow agent assuming the responsibility without knowledge of grantor upon unilateral waiver of the terms of the escrow by the grantee.

Answer: The Court said it was.

2. Did the contract herein bind the grantor who received only an incomplete draft omitting vital provisions which grantor never saw.

Answer: The Court said it did.

3. Does the authority of grantors lawyer by her retainer extend to the inclusion in a contract after execution of vital provisions obviously detrimental to grantor, without grantor's knowledge.

Answer: The Court said it did.

4. Was the transaction rendered void by irregularity and perjury?

Answer: The Court said it was not.

5. Was the transaction invalidated by mutual mistake of fact or overreaching of plaintiff?

Answer: The Court said it was not.

6. Was the transaction unconscionable?

Answer: The Court said it was not.

STATEMENT

This is an appeal from a judgment of Mr. Justice William R. Geiler entered in the office of the Clerk of Suffolk County on June 1, 1967 dismissing plaintiff's complaint and directing plaintiff to execute a release of a blanket mortgage given for the purchase price on certain premises at 10 Peconic Avenue, Riverhead, Suffolk County, New York, on receipt of \$5,000.

Under pain of contempt plaintiff complied with the judgment.

The action was commenced by plaintiff on January 21, 1966. Issue was joined by defendant's service of an answer on February 4, 1966. The defendants' served an amended answer on December 16, 1966, and plaintiff served a reply on January 31, 1967.

THE FACTS

Plaintiff sued to set aside her conveyance of certain real property at the southeast corner of Peconic Avenue and Main Street in Riverhead and for a decree that it be reconveyed on condition she repay the moneys paid by defendants and their reasonable expenses in connection therewith, after being credited with the rents defendants collected. She acted promptly within the month of October 1965 in which the closing, which the plaintiff did not attend, allegedly took place.

The property had been owned by the family of plaintiff's husband for 105 years, and some years he had managed to buy back any outstanding interests. The M. N. Ammann Hardware, Inc., owned by plaintiff's husband and its family predecessors, had been maintained there by his family for perhaps 150 years. This has something to do with this suit.

After the death of plaintiff's husband in 1960, she attempted to manage the property in suit and to operate, or cause to be operated, the hardware business that occupied a portion of the property, all of which she now owned by inheritance from her husband.

The hardware company fell into bad times and on May 1, 1966, was compelled to stop operation because of accumulated indebtedness, of which she had been unaware.

Due to the family connection with the property and with the hardware business, and her feeling of responsibility to her husband's name and reputation for integrity and her own in the community, the plaintiff, then seventy odd, became what in popular terms is called "a nervous wreck" from the threats of creditors, suggestions of personal liability for the debts of the hardware business that would render her penniless, and perhaps most of all, shame of the disgrace of unpaid creditors. She was at no time categorically advised that she had no respon-

sibility for corporate debts, and the constant harassment of telephone calls to her home and demands on her by creditors of the hardware corporation, and some threats, left her under the impression that she was personally liable.

In addition, many of the creditors had been suppliers of the hardware business for decades and had become personal friends, and Mrs. Ammann, without experience, and with no experienced legal advice in this area of insolvency, became increasingly incapable of dealing with the situation, the numerous calls to her home, and the demands and threats.

Mrs. Ammann owns her home at Jamesport, and lived there, with her sister, Mrs. Dunkenberg, occupying a separate cottage on her property. Mrs. Dunkenberg's son Don Dunkenberg, a defendant, was a frequent visitor, and family member, and offered his advice and help to his aunt, Mrs. Ammann, in her predicament. Mrs. Ammann relied on his help, although he was at the time either unemployed or just becoming apprenticed to the real estate business. He did not testify. He had sworn he knew nothing about it as did his associate, defendant Dobbis.

The defendant Dunkenberg was married to the daughter of Peter Gluck, Esq., the attorney for defendants herein, a lawyer of many years at the bar and experienced in real estate. Dobbis was also a relative of Mr. Gluck by marriage.

The corporate defendant was a mere shell. Mr. Gluck was the leader of the deed. He conceded in court that he would be the principal witness for defendants, but that in fact turned out to be Miss Stackpole, erstwhile attorney and friend of plaintiff, although Mr. Gluck did testify.

At any rate, in the role of a dutiful nephew helping his aunt, the plaintiff Dunkenberg undertook to inquire on her behalf (as Dunkenberg has testified on his Examination Before Trial, p. 14, line 12, read into the record, (A87, S.M. 196-197, about the value of the property. He advised her that in the broker's opinion, which he sought in her behalf, the value was between \$50,000 and \$60,000. When he informed her as her advisor of this result of his efforts to ascertain the value "on her behalf", defendant Dunkenberg became an adversary saying (Examination Before Trial, pp. 14,15 read into record (A87, S.M. 196).

"If you sell it at a price around there, will you please let me know, and I will talk it over with my partner, and see if it doesn't possibly make sense to us."

Then he and his partner offered \$70,000, some \$20,000 to \$10,000 above its value as he said he had ascertained. This appeared to be as much as a 40% bonus to plaintiff in view of his advice that the property was worth no more than \$50,000 to \$60,000 when inquiring of

her behalf.

In his decision denying the motion for summary judgment, Mr. Justice Ritchie of this Court took cognizance of plaintiff's difficulty in obtaining any information about the transaction from defendants on examination before trial, stating:

"In affidavits submitted in support of their motion for summary judgment, the defendants exhibit a precise and detailed knowledge of the negotiations culminating in the preparation of the contract. Conversely, in their examination before trial, they profess an ignorance of those negotiations and details. This conduct on the part of the defendants is not consonant with the showing that no triable issue of facts exist. Defendants' motion for summary judgment is denied."

This is symptomatic of the whole transaction.

In the circumstances in which she found herself, Mrs. Ammann, the plaintiff, was persuaded, quite erroneously, that she must sell the property in suit because of the insolvency of the hardware corporation and the danger from its creditors. This was not necessary because the hardware company only occupied part of the entire premises, and was no more than her tenant; most of the premises was free and clear; the mortgage did not exceed \$16,000 on this piece of property valued at \$70,000 or more, and she was not responsible for the corporate debts, although she was harassed for them, and not so advised.

Her one cardinal requirement was, in her state of mind, that if she sold the property that:

"THE BUYER shall hold the seller harmless from any claims against M.N. Ammann Hardware Inc., and shall indemnify her in the event that she shall be obliged to pay any such claims." (See contract, Defendants' Exhibit J, S.M. p. 157).

From the requirement, she never receded, and she never waived it. Yet in the contract, defendants' exhibit J, A71, S.M. 157, this is stricken out in pencil and initialed only by Peter Gluck, defendants' lawyer, and perhaps by Mrs. Ammann's lawyer, Syrena H. Stäckpole, whose initials appear opposite the succeeding paragraph. There are other letters opposite this clause which appear to be "AGV", to the present unidentifiable by plaintiff. The stock in trade of the hardware business has since sold for \$18,000, and the debts other than those to her son and herself were only \$23,000.

Mrs. Ammann testified that she did not consent to or authorize this deletion, (A24, S.M. 18-19) and that this provision was not so deleted in the paper writing which she signed on August 23, 1965. (Plaintiff's Exhibit 22, pp. 453, 456-457).

Mrs. Ammann further testified that the entire Rider C, of two pages, was not part of the contract she signed, consented to, or authorized, (A24, S.M. 18), or that it was ever seen by her, or exhibited to her, at or before the time she signed the contract, (plaintiff's exhibit 22, A184-185 S.M. 456-457), and that the first time she saw the paper in the form of defendants' exhibit J, A71, S.M. 157, supra) was about December

13-15, 1965 and that it contains vital provisions and revisions never discussed with her, or in any way known to her.

The document Rider C itself as stated hereinbefore, is not contained in the copy of the contract which Mrs. Ammann first received from Miss Stackpole to inform her of what she had signed. (Plaintiff's Exhibit 22, ^{A 185} Record p.457). Defendants' most cooperative and principal witness Miss Syrena Stackpole, their plaintiff's attorney in the transaction, who sat with defendants' counsel at the counsel table and advised them throughout the trial and previous thereto, testified that her office copy of the contract signed by plaintiff did not contain Rider C, and that this Exhibit 22, supra, is the copy of the contract she, Miss Stackpole, gave to plaintiff, her client, on October 4, 1965 as the contract and the depository of all plaintiff's contractual obligations in these premises.

Miss Stackpole was so cooperative with defendants that even prior to her testimony ^{A 181,} (minutes, p.451) she divulged to defendants and their counsel the contents of the will she made for plaintiff in September 1965 (before the closing).

This inexcusable breach of professional ethics by this attorney can only be excused by the fact that in her over-zealous desire to force the plaintiff to sell this property, and in her intense hostility to plaintiff's son Peter Brandon Corwin Ammann, because he wished to preserve

his father's landmark in the family, deprived her at her age of all ability to judge ethical behavior or to distinguish right from wrong. But this does not absolve defendants' counsel, the leader of the deed, from inducing this inexcusable breach of ethics and participating therein. This too is an example of the manner in which this transaction was put through, and the conduct of the escrow, to be discussed hereinafter, are concrete instances of this prejudicial procedure, in which both plaintiff's and defendants' counsel indulged together without respect to the plaintiff's rights or protection, or desires.

The contract defendants rely on is a very shoddy document, with multiple alterations of which many are not initialed by plaintiff, although it was testified by both attorneys that she was present every minute throughout the contract closing on August 23, 1965.

Mrs. Amman testified that there was no typewriter available or used at the bank (A27, S.M. 24) where she signed the contract (without Rider C), as given to her on October 4, 1965 by her attorney. (Plaintiff's Exhibit 22, A.185, S.M. p. 457).

But this Rider C (Exhibit O) is included in the counterpart of the contract upon which defendants depend. It is not identical with that in defendants' exhibit P, A125, S.M. p. 328), to which identity Mr. Gluck testified unequivocally. Inspection readily contradicts this testimony. This counterpart differs in such manner that it could not have been part of the contract plaintiff signed

on August 23, 1965.

Changes on defendants' counterpart are principally made by typewriter. Such changes are not initialed on defendants' counterpart, except in one instance, as they are in plaintiff's, and then never by any party thereto. Mr. Gluck testified without reservation that all changes were initialed but inspection discloses this was an error.

In paragraph 1e of the other counterpart, (Defendants' Exhibit J, S.M. p. 157) a date "March 30, 1965" is typed over "April"; in the other counterpart, "March" is inserted but not over any other word.

In paragraph 1e, the figure "200" is inserted in two different typewriters. Changes on the first page of Rider C are made in typewriter.

Vital is the fact that on the photostat of the counterpart in possession of the defendants' attorney and defendants' (Exhibit P, S.M. p. 328) annexed to his Motion for Summary Judgment, these vital alterations and insertions are not even initialed by the attorneys.

The second page of Rider C begins with a blank space of considerable size (perhaps 3 to 4 usable inches) indicating an intention to make insertions.

First of all, the provision vital to Mrs. Ammann in Rider B (Exhibit J, S.M. p. 157) that purchasers would hold her harmless of all claims of creditors, which is stricken out, is referred to in paragraph

2 but only to the extent that the purchasers would use "their best efforts to effectuate an acceptable adjustment" with the creditors. Even this was not done. What was done is that purchasers tried only to make a profitable bargain for themselves.

Although the plaintiff's copy of the duplicate original of the alleged counterpart, which was never seen by plaintiff before December 13, 1965, (defendants' exhibit J, S.M. p.157), contains holographic corrections which are initialed; on the defendants' counterpart (Defendant's Exhibit P, S.M. p.328), they are made by typewriter, and not initialed at all, clearly establishing they were made after the contract was signed by Mrs. Ammann, if her testimony that no typewriter was available at the bank is believed.

Next we come to the terms of the consideration to be paid by purchaser. These supposedly are fully set forth in Rider B, and defendants themselves thought so too even at the trial, when their counsel contradicted plaintiff's counsel on this point that the release provision did not appear there but only in the disputed Rider C (S.M. p.30).

In Rider C these terms of sale are altered in perhaps the most vital manner of all, in a subdivision 1 of an unnumbered paragraph. (Defendants' Exhibit J, S.M. p.157).

From the lien of the purchase money mortgage given by Twin D. Land Corporation, a corporate shell, having substantially nothing but the property which they sought to purchase, almost four-fifths of the contiguous property of plaintiff (Plaintiff's Exhibit 1) is made subject to release from the lien of the 22 year purchase money mortgage of a mortgagor corporation without assets, upon payment of only \$5,000. This release has further detrimental consequences to the remaining property. It prevents ingress and egress to vital parking facilities. Moreover, the remaining property is made less valuable by the release of the contiguous parcel in case reconstruction of the old building on Main Street becomes imperative, because the depth of the remaining Main Street property will be so shallow, varying from only 34 1/2 to 57 feet in depth. The remaining property, all that is left to support the \$43,000 mortgage for 22 years, is hemmed in by the now to be released property leaving it almost a gpre.

This vital change means that for some \$20,500, being the balance of the mortgage thereon and \$5,000, the property of 1-10 Peconic Avenue on which the Suffolk County National Bank had made a mortgage of \$18,000, and now reduced to approximately \$16,000, the purchaser could own this released property free of the purchase money mortgage or any mortgage at all. And defendants testimony on the trial is that it is to be conveyed.

Certainly this change should necessarily have been discussed carefully in the presence of all parties at the signing of the contract when it is alleged to have been inserted, in a manner that would be recalled by all the parties present. But the testimony of defendant Dunkenberg before trial, pp. 20 and 22, A89-90, read into the Record, that he knew nothing about it, confirms Mrs. Ammann's statement that she knew nothing of Rider, C, and had had no discussion of it. Defendant Dobbis knew nothing (Dobbis Exam Before Trial, p.14, A84, read into the Record).

All Dunkenberg and Dobbis knew (and Mrs. Ammann didn't even know that) was that negotiations were going on in the mails between lawyers, and Dunkenberg and Dobbis knew there were letters. Mrs. Ammann was not so informed.

Plaintiff had never been permitted to see those letters, part of which were in the possession of Mr. Gluck, until produced on Miss Stackpole's testimony on this trial.

Dunkenberg was asked at page 58 of this Examination Before Trial if he knew where these letters were. Mr. Gluck, in suppressing those letters, broke in and instructed his client, p.58, line 17, A101, read into the Record:

"MR. GLUCK: That has been passed upon, and don't answer it."

All these papers relating to this matter were suppressed by Mr. Gluck who refused to let his clients

produce anything that was in his "legal file". (Exam Before Trial, p.40, A84, read into the Record):

"MR. GLUCK: I won't produce them. I got them and I won't produce them unless there is a reason".

Defendant Dobbis had a file with him at his examination. He stated it was Mr. Gluck's file and Mr. Gluck would not let him look into it or produce any papers from it. Dobbis Exam, p. 41, A80, read into the Record. It was the only file that defendant Twin D. Land Corporation had, even of the original documents.

Mr. Dobbis, Secretary of the Corporation, refused to produce the papers that the Twin D. Land Corporation received on the closing because he didn't have them. Exam Before Trial, p.42, A80, read into the Record.

In any event, by defendants' tactics, plaintiff to this day has been unable to obtain copies of all letters of the negotiations between her attorney and purchaser's attorney with respect to this contract. Mr. Gluck testified that he did not know if there existed copies of letter replying to the many letters received from Miss Stackpole, (Defendants' Exhibit R - 6 letters). In view of the proof that there were negotiations by letter (Dunkenberg Exam Before Trial p.20, A90 and Dobbis Exam Before Trial p.15, A78, both read into the Record).

Rider C was not always affixed to the alleged contract in the present manner. The staple marks show

that at one time it was affixed to the back page of
the printed form. (Defendants' Exhibits J and P.)
It was not affixed to the copy of the contract given
to Mrs. Ammann by Miss

Stackpole. (Plaintiff's Exhibit 22.) There is absolutely no testimony at this trial that defendants' exhibits J and P were assembled, or stapled together at the closing, or when plaintiffs signed Exhibits J and P.

Despite the vital challenge to Rider C defendants chose to brush all this aside.

Rider C is prepared so that Mrs. Ammann is stated to be inducing this purchase, more a gift than a purchase, and making new representations about the hardware business, beyond the knowledge of anyone, let alone Mrs. Ammann, and ostensibly assuming certain obligations of warranty in that area, that she previously had not had. This did not help her in her quest for peace of mind.

Plaintiff is stated in Rider C to warrant ownership of personal property by the Hardware Corporation that was quite beyond her knowledge.

Plaintiff is stated in Rider C to warrant an accurate list of creditors of which she was uninformed and so was everyone else.

The alleged annexed list of creditors covered by this warranty of alleged Rider C was never annexed, is not even now made available, and to this extent the alleged contract, if Rider C is included, is incomplete in a vital detail, alone sufficient to invalidate the same.

Mrs. Ammann is made to represent that in closing, she will deliver an assignment of her claim as creditor of M.N.Ammann Hardware Inc., and deliver a like assignment

from her son. Her son refused this assignment for the defendants on October 5, 1965. Her assignment she could give, but it was morally wrong for her to assign her own claim after the prior promise to the creditors. She has made no claim on the assignee.

Mrs. Ammann will testify that she had promised the creditors that she would not file her claim in the bankruptcy, and her son refused to assign his claim to defendants as 100% owners of M.N. Ammann Hardware Inc.

Nevertheless, prior to the closing of title, defendant Dunkenberg engaged a lawyer, Edward J. Mallin, Esq., 295 Madison Avenue, New York City, who called a creditors' meeting. Mr. Mallin corrected the creditors' estimate of indebtedness from approximately \$50,000 to \$90,000, only explained by adding his approximation of the claims of plaintiff and her son.

That Peter Brandon Corwin Ammann has made such a claim on the assignee can not be attributed to plaintiff. That she made as former president of M.N. Ammann Hardware Inc. a truthful certificate that the indebtedness of the corporation to her son, Peter, was not for capital expenditures, was a certificate she could not fairly refuse. The Court will remember that Mrs. Ammann on cross examination by defendant's counsel asked if she was shocked that he had filed a claim. It is perfectly consistent that Mrs. Ammann in making the formal certificate could well have believed it was for

record purposes only, especially income taxes. Only upon inspection by her counsel at the trial of the assignment for benefit of creditor (Defendants' Exhibit I) was the fact that her son had filed a claim of almost \$40,000 in which he may receive almost \$6,000 disclosed to her.

(A58 et seq.)

The fact that is probative herein is that Mrs. Ammann did not file a claim of some \$21,000 in her own behalf for her advances and for back rent in excess of \$2,500. This she refused to do because of her promise to the creditors. If she had done so she would now be able to collect several thousand dollars., The motion of the assignee for benefit of creditors came before the same Trial Justice below, so the accuracy of these contentions was easily checked.

What is more interesting is the allowance in the assignment of the totally invalid claim of defendants for back rent of these premises. They have no assignment from Mrs. Ammann for \$2,550 for rent from May through September. (Plaintiff's Exhibit 13). All she assigned to them was \$500 for that rental period. (Defendants' Exhibit F). That indeed was the correct rent of \$100 a month.

Defendants assumption that they succeeded automatically now as owners of the hardware company, to plaintiff's right for unpaid rent prior to their taking title on October 8, 1965 is totally without foundation in law or fact.

Thus they are being allowed a claim in the assignment of \$2550 rent for which they have no title per se and no assignment. (Plaintiff's Exhibit 13)

There is no better time to discuss this fact that defendants were seeking to obtain the property without investment. The stock in trade of M.N. Ammann Hardware Inc., was sold in bulk by the assignee for \$18,000. It was worth more. This they tried to buy for \$12,500, an obvious liquid profit of \$5500. Possessed of claims of \$21,000 from Mrs. Ammann and \$40,000 from Peter Brandon Corwin Ammann, which the challenged Rider C obliged plaintiff to give them, and only \$23,000 of trade creditors, they would have recovered, as the Assignees accounting shows, \$60,000 over \$90,000 of the approximately of \$12,000 they were offering to purchase this stock in trade, or \$9600. That is a total of \$15,000 "right off the reel".

The overreaching was so bad, and Mrs. Ammann's good faith so well known, that the defendants abandoned their claim for \$21,048.41 pursuant to the assignment by Mrs. Ammann (Defendants' Exhibit F) dated September 23, 1965 and acknowledged as of that date by Miss Stackpole, which paper was admitted by her not have have been drafted and the acknowledgment taken until sometime in October.

Miss Stackpole unrelentingly upheld the propriety of this procedure. She was determined that this

transaction be closed whatever violation of her client's wishes, discussed later with respect to this escrow.

The assignment of her claims on its face, as herein, before stated, pretends to have been executed on September 23, 1965, and then acknowledged before her attorney that day. The acknowledgment is dated a week before the paper was prepared and signed by Mrs. Ammann. Mrs. Ammann was not able to obtain prior to the examination before trial, any copy of any such executed assignment, or information with respect to it. The copy she had disclosed no execution or acknowledgment. This is particularly important since Mrs. Ammann had promised the creditors she would not press this claim, and never intended to do so, and never knew Rider C contained a covenant obligating her to give her claim to defendants, and promising to obtain that of her son and give it to them. Nothing in the contract she did actually sign required her to do this, because this covenant was in Rider C, which she testified she never saw until December 1966 and was not in the contract she signed (Plaintiff's Exhibit 22). Her assignment with a statement of account was a surprise to her on July 13, 1966 when it was first obtained in an examination before trial (Defendants' Exhibit F). The closing left her additionally liable to defendants, if Rider C was authentic, for failure to give them her son's assignment of a claim of almost \$40,000, on which he will recover, on the face of the final account of the

assignee for benefit of creditors, approximately 40/73rds of \$11,000.

As the disputed Rider C provides that the covenant of plaintiff to deliver this assignment survives the closing, plaintiff is already a defendant in an action by the defendant Twin D. Land Corporation in the Supreme Court Suffolk County in the sum of \$25,000. The defense is that Rider C is not authentic. This judgment threatens to make this authenticity res adjudicata.

It is conceded by defendants that Mrs. Ammann sold the property for peace of mind, and after undue pressure and without guidance. Thus she ends up with a potential liability she never had before.

Correspondence continued between defendants' and plaintiff's attorney without her knowledge with respect to these assignments, long after the alleged closing, until a letter plaintiff received dated December 15, 1965. Defendants were then attempting to trade this \$21,048.41 assignment (Dunkenberg Exam Before Trial Exhibit 9 -- Plaintiff's Exhibit 13), for an assignment of rent from May through November for \$2,904.16. Mrs. Ammann never intended to make either claim, as her attorney well knew, and as far as Mrs. Ammann knew, neither did her son, and she never did so knowingly. This makes the letter of December 15, 1965 unintelligible. Defendants must have appreciated there was irregularity in the assignment

(Dunkenberg Exam Before Trial, Exhibit 3, Defendants' Exhibit F) to be willing to make such an unequal exchange. All this was kept from plaintiff, because she had never agreed to make such assignment herself, and to obtain that of her son, as is provided in Rider C which she challenges as non-existent as to her, ~~contain~~ ~~it~~ and likewise the alleged contract that contains it. (Defendant's Exhibits J and P).

Plaintiff signed that Exhibit but for what reason she does not know, but we elicited positive proof that plaintiff did not acknowledge it on September 23, 1965 or at any other time. We repeat it was an act plaintiff solemnly promised the creditors' committee never to do, and for which they berated Mrs. Ammann when they learned from Mr. Mallin she had apparently done so. When the creditors learned she was innocent of such double dealing, the defendants, never attempted to press the same. This is plaintiff's only knowledge of the proposed exchange transaction.

Another interesting but unexplained facet of these December negotiations, (long after the closing) is that Dunkenberg pretended in a letter of December 13, 1965 (Plaintiff's Exhibit 6) that he had only then discovered that Mrs. Ammann had assigned to them the arrears of rent. Not only is this untrue except as to the assignment of \$500 rent (Dunkenberg - Defendants' Exhibit F) but is ob-

viously, on November 3, 1965, Dunkenberg, as president of Twin D. Land Corporation, had instituted dispossess proceedings against the assignee for benefit of creditors occupying the premises and swore Twin D. Land Corporation was entitled to \$3,400 rent, from April through November, at \$425 per month by some lease never produced, (Plaintiff's Exhibit 5). Although defendants abandoned that rent action, they then without obtaining the assignment they sought, (Plaintiff's Exhibit 13), filed a claim for same in the assignment.

We believe the creditors and the assignee believed Mrs. Ammann that the transaction was without her knowledge.

The closing which took place was contrary to the instructions of Mrs. Ammann, took place on a date unknown to her.

Mrs. Ammann learned only on the last day of this trial that the closing actually took place on October 8, 1965, in violation of her instructions to Miss Stackpole. From the foregoing only did she learn that as late as December 1965, negotiations were continuing without her knowledge, and contrary to her purposes, between Miss Stackpole and defendant Dunkenberg.

But testimony for defendants was at first that the closing took place and the deed was delivered on September 30, 1965. But cross examination disclosed it

was not claimed to have been closed until October 8, 1965.

What did happen on September 30, 1965 was then an escrow was established without knowledge of plaintiff by Miss Stackpole as escrowee by defendants, one of the conditions of which was that there would be no delivery of closing papers to either plaintiff or defendants pending the assignment of claims of Helen Ammann, the plaintiff, and Corwin Ammann her son. Even then the escrow was not complete as to plaintiff's rights in that the consideration due on closing to plaintiff of \$5840.63 was not as required in the contract Mrs. Ammann signed (Plaintiff's Exhibit 22) in cash or certified check.

Moreover the purchase money mortgage was not authentically acknowledged. It was actually acknowledged on September 30, 1965, as Miss Stackpole knew, but it states it was acknowledged on September 23, 1965. It is very well to brush aside these particular discrepancies as trivia, but the number of instances, which are admitted, are cumulative, and inescapably established a lack of care for Mrs. Ammann's welfare. All7.

ASSIGNMENT FOR BENEFIT OF CREDITORS

It was Dunkenberg, as president of Twin D. Land Corporation, who made an assignment for benefit of creditors.

As stated above, on November 3, 1965 he began an action for rent of the premises against the assignee

for creditors (Plaintiff's Exhibit 5). Mrs. Ammann definitely did not wish to make any such claim against creditors.

In fact, only on December 13, 1965, did Dunkenberg seek an assignment of this rent claim for which six weeks earlier he had begun dispossess.

According to Plaintiff's Exhibit 6, the letter of December 13, 1965, Dunkenberg states he had just discovered this right.

Mrs. Ammann first learned of these negotiations in a letter to her on December 15, 1965.

The reason that defendants wished to assert these claims of some \$60,000 against the creditors is important in that they expected to get this property for next to nothing, as has been explained above.

THE ESCROW COMES TO LIGHT

On January 17, 1966, plaintiff was first informed by her attorney that on September 30, 1965 without plaintiff's knowledge or consent, her attorney became an escrowee for the defendant purchaser, and that one of the terms of the escrow was that her attorney was to hold the closing papers in escrow pending assignment of the claims of Helen Ammann and her son, Corwin Ammann.

Among the multiple irregularities and inconsistencies that confuse this transaction, the defendants

hold an alleged assignment of her claims purportedly executed on September 23, 1965 and appearing to have been acknowledged by plaintiff before her said attorney as notary on the same day, which was among these papers. We now learn it was not prepared or executed or acknowledged until October 4, 1965.

However, her attorney at the same time she informed Mrs. Ammann of the escrow, then stated that the assignment had been executed on October 4, 1965.

Plaintiff was also informed by her attorney that on the last mentioned date, she had prepared an assignment in duplicate to be executed by Corwin Ammann.

Corwin Ammann refused to execute such an assignment. There is no evidence that he ever intended to do so.

Plaintiff asserts an entire lack of knowledge of any of these facts of such escrow, or any attendant facts, before January 17, 1966. She admits there is an alleged assignment dated September 23, 1965 that bears her signature, but was not acknowledged on that date as is set forth therein. Such assignment is void.

It was not until on or about December 13, 1965 that plaintiff first saw the alleged counterpart of the contract herein, containing the insertion of the so called Rider C and other changes. See Plaintiff's Exhibit 22.

Plaintiff testified that she had no knowledge

of any obligation she had assumed to give defendants an assignment of her claims against the Hardware Corporation, which claims she had in good faith promised the creditors not to file, as heretofore explained, and to obtain for defendants the assignment of his claims by her son, as he had made the same commitment to the creditors not to make such claim. Later he changed his mind but without her knowledge as she swore.

Plaintiff testified that she was informed by her attorney that the defendants stated on October 5, 1965, and previously as well, that Mr. Gluck (for the defendants) would not close title to the property until he had Corwin Ammann's assignment. Without knowing anything of the escrow and of Rider C, she understood the title could not close.

The full terms of the escrow have never been disclosed, but the escrowee, plaintiff's attorney, had assumed a mutual duty not only for the benefit of the defendants, but of plaintiff as well.

The report of the escrow, which plaintiff learned about only on or about January 17, 1966, is stated in terms by the escrow agent that she undertook not to deliver the escrowed documents to plaintiff, and close the title, until Corwin Ammann executed the assignment prepared by the escrow holder.

Plaintiff, not knowing of the escrow, or

Rider C, relied on the escrow holder's statement that Mr. Gluck would not close without the Corwin Ammann assignment, and there was no possible closing. Nevertheless, on October 8, 1965, the escrow holder did deliver, without plaintiff's knowledge or consent, the papers in escrow, and closed the title. Action in closing title was in violation of plaintiff's specific instructions not to close, and plaintiff was advised that she was entitled to refrain from the closing as long as the assignment of Corwin Ammann was lacking, as in that circumstance purchasers would not close.

Plaintiff is well aware that the escrow holder asserts that Mr. Gluck waived the condition that he imposed, that the escrowed documents would not be released without the assignment from Corwin Ammann. But there is no testimony that defendants waived, and none that any waiver was communicated to plaintiff.

At the same time, the escrow holder asserts that this condition was imposed upon the escrow.

Thus the question arises whether the escrow holder could accept the waiver of the condition of the escrow by agreement with the purchaser only, which was a protection to plaintiff against a \$25,000 claim, though plaintiff knew nothing of it at the time of the escrow, she was still entitled to the protection it gave her, especially when it coincided with her own instructions to her attorney, the undisclosed escrowee, not to close

the title.

In *Farago v. Burke* (262 N.Y. 229, 233), the Court held:

"The law makes the depository a trustee for both parties (*Stanton v. Miller* 58 N.Y. 192); it imposes upon him a duty not to deliver the escrow to anyone except upon strict compliance with the conditions imposed."

The quotation is cited in *matter Avalon East Inc. v. Monaghan* 43 Misc. 2d 401, 406.

There seems no room for doubt that the strict terms of the escrow were not complied with, and the plaintiff also was entitled to the benefit thereof, even though imposed by defendants without her knowledge or consent.

In such circumstances there could be no waiver without plaintiff's being apprised of it.

Moreover, the condition once made was of great value to plaintiff. According to the contract, alleged against her, the validity of which she challenges, she appears to have promised an assignment of the approximate \$40,000 claim of Corwin Ammann, such promise to survive closing. Now there is a \$25,000 claim against plaintiff. As long as there was no closing, plaintiff was protected from that claim and was afforded an opportunity to relieve herself of this obliga-

tion by negotiation, which it should be remembered she did not know that she had ever assumed.

Thus the closing would seem invalid, a violation of the escrow, and done against plaintiff's express instructions.

POINT I

PLAINTIFF DID NOT EXECUTE NOR AUTHORIZE THE ALLEGED CONTRACT (DEFENDANTS' EXHIBITS J AND P) UPON WHICH THE CONVEYANCE WAS PREDICATED AND IN SEEKING PROMPTLY TO SET ASIDE THE CONVEYANCE ACTED ENTIRELY IN GOOD FAITH.

Defendant's eager and over zealous witness a Miss Stackpole, who acted at the trial and before in all respects as co-counsel to defendants, but who was plaintiff's lawyer in this transaction, with whose acts the Court charged plaintiff, swore without contradiction as witness for defendants, that she gave plaintiff a copy of the contract of sale on October ~~24~~⁴, 196~~5~~⁵ (Plaintiff's Exhibit 22 A 185-186, S.M. 456.457. It does not contain the challenged Rider C vital to defendant's case.

It was not until on December 13, that Miss Stackpole gave plaintiff for the first time defendants' exhibits J and P somewhat varying counterparts of the contract on which defendants claimed then and now (p.A124, 125, S.M. 327, 328).

There is no testimony as to when these defendants' exhibits, the alleged counterparts of the contracts on which they rely are supposed to have been assembled. Defendants felt no obligation to testify at what time the plaintiff's signature was affixed to said exhibits J and P, or in what condition the papers then were, and whether it was before or after the entire alleged contract was assembled.

Plaintiff has testified she did not execute any contract containing Rider C, and she did not know the provisions of defendants' Exhibits J and P until December 13 or 15, 1965. The defendants testified to the same lack of knowledge of the alleged contract. (Dobbis A77-79 (183-189), (Dunkenberg A88-91 S.N. 197-20) Only the lawyers, Mr. Gluck and Miss Stackpole say they knew these things, and not one initial of any party appears on the four pages of Rider C, two pages each defendants' exhibits J and P. It would seem that neither seller or purchasers were bound by any such contract, such as Exhibit J and P, containing this Rider C.

But at very least the plaintiff who received only exhibit 22, not containing Rider C, and the only alleged contract given to plaintiff prior to December 13, 1965, and according to her totally without knowledge of the terms of the missing Rider C, must be forgiven for not accepting exhibits J and P, containing

as they do this hashed up, non-identical, Rider C., containing serious modifications of the terms of payment supposedly complete in another part of the contract, (Exhibit 22).

And this variation includes the insertion of a release provision in Rider C radically undermining the security of a purchase money mortgage note on the remaining property meant to secure the debt of \$348,000 for 22 years, (to be reduced from \$48,000 to \$43,000 by a \$5,000 release payment). This purchase money mortgage was to be made by a corporation without other assets than it received on this conveyance.

The most elementary examination of the survey of the mortgaged premises (Plaintiff Exhibit 7, minutes P.7) discloses that the property remaining as security will be quite inadequate for any real improvement, hemmed in as it is by the property released as provided in the judgment. This released portion is property on which the Suffolk County National Bank loaned \$18,000 about two or three years ago. Thus it is indicated that on the signing of the contract the purchaser, a corporation without other assets, had an assured profit of at least \$9,000 if the Court takes judicial notice that a bank ordinarily will not loan more than 66 2/3% of the value of a very old business building.

Can the plaintiff's good faith in objecting to the authenticity of this transaction be seriously questioned especially when it is not denied that approximately two weeks after the closing, plaintiff's nephew and his associates as purchasers demanded \$40,000 profit to reverse this transaction. (Sussman A105, Minutes p.223)

There is hardly a man alive who would not have organized a dummy corporation to take this alleged contract and pay \$2,000 to get it, unless constrained by his own conscience in so dealing with a woman of Plaintiff's years and inexperience, whose fears were so unnecessarily played, even preyed upon.

As late as September 30, 1965, the purchasers guide and witness, Mr. Gluck, would not take the title without the assignment of Mrs. Ammann and her son. It is easily calculable that these, with the other claims in the assignment for benefit of creditors, would have yielded almost enough cash to equal the entire cash obligation of defendants, some \$8,000 on account of the claims of plaintiff and her son, and some \$750 on the other claims they will collect on the Assignment of almost \$6,000.

Moreover, Mrs. Ammann was not held harmless, but defendants claim to have agreed that they would instead use their best efforts to settle with the

creditors. Defendants made no effort to settle with the creditors. This meant, of course, for plaintiff's benefit. They did nothing for plaintiff's benefit. All they did was to try to buy the stock in trade, sold for \$18,000 by the Assignee Chernoff, for \$12,500.

It is sad to say the documents escrowed on September 30, 1965 are tainted with forgery or perjury, and this taints the whole transaction. The acknowledgment of the purchase money mortgage could not have been validly taken on September 23, 1965. The proof from defendants' principal witness, Miss Stackpole and their chosen escrowee and trustee in connection with that escrow, is unequivocally that the purchasers only signed the mortgage on September 30, 1965.

Dunkenberg was not in Riverhead on September 23, 1965 but on September 30, 1965. And it is proved by the same witness that Mrs. Ammann's Assignment was not executed until October 4, 1965, although the acknowledgment is also alleged to have been taken September 23, 1965.

Such an irregular, tainted and overreaching transaction should not bind a woman in her seventies so obviously having difficulty understanding the business. Especially a transaction which her nephew who once advised her would not reverse two weeks after the closing for less than a clear profit of \$40,000.

POINT II

THE CLOSING AND THE DELIVERY OF THE DEED WAS SUBJECT TO AN ESCROW, THE TERMS OF WHICH WERE VIOLATED, MAKING DELIVERY OF DEED INEFFECTIVE.

Defendants' principal witness, Miss Stackpole, testified to the existence of an escrow (A187-188, S.M. 459, 460) making closing of title and delivery of the deed subject to the delivery of an assignment of a claim by Peter Brandon Corwin Ammann to purchaser.

Defendants had on September 30, 1965 refused to close title without the assignments of plaintiff and Corwin Ammann. (A188, minutes p. 459). It is admitted that this was never obtained.

In her overzealous effort to accomplish the closing of this title on any terms, however prejudicial to plaintiff, Miss Stackpole violated the terms of this escrow, which had to be for the mutual benefit of both seller and purchaser. The purchaser made her trustee for it. The purchaser wanted the assignment of this claim worth at least \$6,000 (in a transaction in which the cash consideration to seller was only \$7,000) for use in the negotiation with the trade creditors which owned a stock of goods not belonging to plaintiff or under her control. The plaintiff would not have wished to close a title and subject herself to a \$6,000 liability for failure to give this assignment, if she had known there was any alleged obligation on her part to obtain it. Having

no knowledge of Rider C, not contained in the contract she had, Exhibit 22, A185,186 S.M. 456, 457, she had no knowledge of any such obligation. But on her part, the fact that the escrow was not communicated to her by her attorney does not make it less for her benefit.

The escrow holder, as defendants' principal witness, realized the effect of this breach and, at first, on the trial concealed the fact that she herself had described the transaction as an escrow. In reading from an alleged diary entry on a separate slip, she omitted to testify that she used the word escrow. But, on cross examination she admitted that this was her agreement (A188, Minutes 459) and produced a further diary entry, as follows

9-30-65 Purchasers signed mortgage, note, deed and promissory note for the chattels. Received check of Twin D. Properties, Inc. for \$5,840.63; all foregoing delivered to Syrena H. Stackpole to hold in escrow pending assignment of claims of Helen Amman and Corwin Amman. Telephoned to Mrs. Ammann at Lee, Mass.

As an escrow must be strictly construed for the benefit of both parties, this closing and the delivery of the deed could not take place without the assignment being delivered to which it was subject by its terms.

Farago v. Burke 262 NY 229, 233, supra;
Avalon East Inc. v. Monaghan 43 Misc 30-
401, 406.

The defendants made this condition as to the Peter Brandon Corwin Ammann assignment. They never had agreed, in fact they had definitely refused, to close without it. What is more they knew that plaintiff had no certain way of obtaining it.

When defendants made the escrow on September 30, 1967, as evidence of their unwillingness to close without the assignment, ^{they} and withdrew their \$5,000 certified check, which was part of the cash consideration. That they changed their mind, did not deprive plaintiff of the benefit. The delivery of the deed was invalid. ~~That~~ this is no mere technicality, and the protection of the escrow to plaintiff proved real and valuable. This Court is asked to take judicial Notice that one of the defendants, Twin D. Land Corp. has instituted on July 25, 1967 an action for \$25,000 against plaintiff in the Supreme Court Suffolk County for breach of the provision in the challenged Rider C, that she provide defendants with this identical assignment of the claim of Peter Corwin Brandon Ammann. Rider C provides that her obligation shall survive the delivery of the deed. The case is at issue.

POINT III

THIS TRANSACTION IS UNCONSCIONABLE AND EQUITY SHOULD SET IT ASIDE.

The great principles of law, and of equity,

are not narrowly confined to statements in decided cases relating to particular circumstances. They are philosophic concepts. The powers of equity may be applied to relieve a party from a transaction which is unconscionable.

Equity represents the conscience of the Court, and when strict application of legal rules will produce an unconscionable result, equity will come to the aid of the innocent party and shield him from such a result. New York Jurisprudence Vol. 20 p. 96 section 72.

Equity will intervene to protect a person in an enfeebled condition arising from advanced age against manifest improvidence, or against imposition by others, even though there is no actual fraud. New York Jurisprudence Vol. 20 p. 96 section 75. Fitzpatrick's Will 133 Misc. 772, 777; affirmed 227 App. Div. 638; reversed on other grounds 252 NY 121. The reversal was based only on the lack of jurisdiction in the Surrogate's Court as to property not part of the estate.

What is unconscionable? What is imposition?

What is the conscience of the Court?

These are great philosophic concepts defying exact definition or citation clearly in point.

It would seem that the best explanation is this. Would you think it right if the admitted facts here were to be practiced by her nephew upon your mother in her seventies?

CONCLUSION

The Conveyance should be set aside upon the restoration to defendants of all amounts paid and expenses incurred prior to the institution of this action.

Frank Delaney
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11 East 82nd Street
New York, N.Y. 10028
(212) TR 9-4600

SUPREME COURT, SUFFOLK COUNTY

HELEN W. AMMANN, BY GEILER J.S.C.
Plaintiff, DATED May 23, 1967

vs.

RUBY DOBBIS, DONALD DUNKENBERG
and TWIN D. CORPORATION,

Defendants.

FRANK DELANEY, ESQ
Attorney for Plaintiff
11 E. 82nd Street
New York, N.Y. 10028

PETER GLUCK, ESQ
Attorney for Defendants
185 Montague Street
Brooklyn, N.Y. 11201

Action for rescission of a contract for the sale of real property based upon fraud. The plaintiff has failed to sustain the burden of proof as to the allegations of fraud contained in the complaint. The plaintiff was familiar with all the proceedings with reference to the contract for the sale of real property and was represented by an attorney of her own choice. The complaint is dismissed.

The defendants' counterclaim is granted to the following extent:

The plaintiff is directed to execute and deliver a release of lien to Parcel 1 and the defendants are to tender a certified check in the sum of \$5,000 at a time and place mutually agreed upon by the parties.

This constitutes the decision of the Court pursuant to C.P.L.R. 4213.

Settle judgment.

ADDENDUM

LIST OF EXHIBITS TO BE FILED WITH THE RECORD HEREIN. EXCEPT THOSE FOR IDENTIFICATION.

For the Plaintiff

<u>Description</u>	<u>Iden.</u>	<u>Evid.</u>
1. Survey, 10/23/63		7
2. Copy of Contract of Sale (Made Defts Exhibit		16
3. Letter Stackpole to Ammann, 12/15/65		21
4. Packet of Documents & Envelope (Defts Ex also)		22
5. Petition, Justice Court, Riverhead	26	167
6. Letter, D & D Assoc. to Stackpole, 12/13/65		27
7. Letter, Stackpole to Dunkenberg, 12/15/65		28
8. Letter McCarthy & Nathanson to Ammann, 12/28/66	36	
9. Assignment, Ammann to Twin D., two pp.	38	
10. Deed		40
11. Mortgage, Suff County Nat Bank & H. Ammann	42	
12. Answer of Respondent Cherno, 3 pp.		167
13. Letter, Stackpole to H. Ammann, 12/15/65		169
14. Affidavit of H. Ammann, 9/23/65	169	305
15. Bill of sale, fixtures, 9/23/65	170	453
16. Assignment, unexecuted, 1965	173	
17. Statement at closing title	173	
18. Proof of Claim & Note, re Dobbis		260
19. Proof of Claim, Twin D		262
20. Copies of four letters		269

<u>Description</u>	<u>Iden.</u>	<u>Evid.</u>
21. Rider, 2 pp.		379
22. Copy of contract		457
23. Diary note	462	
24. Abstract Diary notes	462	
For the Defendants		
A. Check, 8/23/65, \$2,000		74
B. Two checks, \$5,000 & \$840.65, 10/8/65		91
C. Note, \$3,000		94
D. Two checks, \$2,000 each		97
E. Check, \$3,046.50		99
F. Assignment, 2 notes & check		110
G. 2 stock certificates		110
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Rockland County Clerk's Index No. 603/1966

New York Supreme Court

Appellate Division – Second Department

JENNY BERGER,

Plaintiff-Appellant,

- against -

BEN-MAR BUILDERS, INC.,

Defendant-Respondent.

RECORD ON APPEAL

HARRY EDELSTEIN

Attorney for Plaintiff-Appellant

One Railroad Square

Haverstraw, New York

(914) HA 9-5749

GRANIK, GARSON, SILVERMAN & NOWICKI

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STATEMENT UNDER RULE 5531 CPLR
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

JENNY BERGER,

Plaintiff-Appellant,

-against-

BEN-MAR BUILDERS, INC.,

Defendant-Respondent.

Statement Under Rule 5531 CPLR

1. The index number of the case in the court below is 603/1966.
2. The full names of the original parties are: Jenny Berger, plaintiff; Ben-Mar Builders, Inc., defendant. There has been no change in parties.
3. The action was commenced in the Supreme Court, Rockland County.
4. The action was commenced by the service of the summons on July 29, 1965 and a copy of the verified complaint was served on August 20, 1965. The answer was served on August 31, 1965.

Statement Under Rule 5531 CPLR

5. The nature and object of the action is to recover damages for personal injuries due to the defendant's negligence.

6. The appeal is from a judgment in defendant's favor dismissing the complaint upon motion of the defendant after trial which was entered in the office of the Clerk of Rockland County on July 1, 1966.

7. The appendix method is not being used.

NOTICE OF APPEAL
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

JENNY BERGER,

Plaintiff,

-against-

Index #603/1966

BEN-MAR BUILDERS, INC.,

Defendant.

SIRS:

PLEASE TAKE NOTICE that the above named plaintiff, Jenny Berger, hereby appeals to the Appellate Division of the New York Supreme Court in and for the Second Department, an order dismissing the plaintiff's complaint and from a judgment entered in this above entitled action in favor of the above named defendant, Ben-Mar Builders, Inc., against the above named plaintiff, Jenny Berger, entered in the office of the Clerk of the County of Rockland on the 1st day of July, 1966, and this appeal is taken from each and every part of said judgment as well as the whole thereof.

Notice of Appeal

Dated: July 7, 1966.

Yours, etc.

HARRY EDELSTEIN
Attorney for Plaintiff
One Railroad Square
Haverstraw, New York

TO: CLERK OF THE SUPREME COURT
COUNTY OF ROCKLAND
County Courthouse
New City, New York

GRANIK, GARSON, SILVERMAN & NOWICKI
Attorneys for Defendant
95 North Main Street
Spring Valley, N. Y. 10977

JUDGMENT APPEALED FROM
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

(Same Title)

The above entitled action having been regularly brought on for trial before Hon. James W. Bailey, Justice of the Supreme Court, State of New York, and a jury at a Trial Term of this Court on the 8th and 9th days of June, 1966, and a jury having been empanelled and the plaintiff having submitted her testimony and proofs and the Court having at the close of the plaintiff's case granted the defendant's motion to dismiss the Complaint and ordered final judgment to be entered accordingly in favor of the defendant and against the plaintiff, and with the costs and disbursements having been duly taxed in the sum of \$180.25.

NOW ON MOTION of Granik, Garson, Silverman & Nowicki, attorneys for the defendant, it is hereby,

ORDERED, ADJUDGED and DECREED that plaintiff's complaint be and the same hereby is dismissed upon the merits and judgment granted in favor of the defendant herein and against the plaintiff, and it is further

Judgment Appealed From

ADJUDGED that the defendant, Ben-Mar Builders, Inc., recover of the plaintiff, Jenny Berger, the sum of \$180.25 costs and disbursements and that the defendant have execution therefor.

Judgment entered this 1st day of July, 1966.

s/ August H. Hansen
Clerk
By Edith Smith,
Deputy.

Plaintiff's Address:

15 E. Funston Avenue
Spring Valley, New York

Defendant's Address:

15 Funston Avenue
Spring Valley, New York

COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

(Same Title)

Plaintiff complaining of the defendant, through her attorney, Harry Edelstein, alleges as follows:

FIRST: That at all times mentioned herein, the defendant, Ben-Mar Builders, Inc., was and still is a domestic corporation doing business under and by virtue of the laws of the State of New York.

SECOND: That at all times mentioned herein, the defendant, its agents, servants and/or employees owned, operated, controlled and maintained a certain apartment house known as 15 East Funston Avenue, Spring Valley, New York together with the walks, driveways, parking lot area and grounds surrounding it.

THIRD: That at all times mentioned herein the plaintiff was a tenant of the defendant at said premises.

FOURTH: That on the 10th day of February, 1965, the plaintiff was caused to sustain severe permanent personal injuries as the result of the negligence of the defendant, its agents, servants and/or employees.

Complaint

FIFTH: That said accident was caused wholly and solely by reason of the negligence of the defendant without any negligence on the part of the plaintiff contributing thereto.

SIXTH: That as the result of the defendant's negligence the plaintiff sustained severe permanent personal injuries, medical expenses, pain and suffering, all to her damage in the sum of Fifty Thousand (\$50,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Fifty Thousand (\$50,000.00) Dollars together with the costs and disbursements of this action.

Dated: August 16, 1965

**Harry Edelstein
Attorney for Plaintiff
One Railroad Square
Haverstraw, New York**

**TO: Granik, Garson, Silverman & Nowicki
95 North Main Street
Spring Valley, New York
Attorney for defendant.**

Verified August 19, 1965

ANSWER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

(Same Title)

Defendant, by his attorneys, Granik, Garson, Silverman & Nowicki, answering the complaint of the plaintiff, respectfully alleges as follows:

1. Denies each and every allegation contained in paragraphs designated as "FOURTH", "FIFTH" AND "SIXTH" of plaintiff's complaint.

WHEREFORE, defendant demands judgment, dismissing the complaint herein, together with the costs and disbursements of this action.

GRANIK, GARSON, SILVERMAN & NOWICKI
Attorneys for Defendant
95 North Main Street
Spring Valley, New York 10977

TO: HARRY EDELSTEIN, ESQ.
Attorney for Plaintiff
One Railroad Square
Haverstraw, New York

VERIFIED BILL OF PARTICULARS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

(Same Title)

Plaintiff, as and for her verified bill of particulars, alleges:

1. Plaintiff is 73 years old and resides at 15 East Funston Avenue, Spring Valley, New York, Apartment 13.
2. February 10, 1965, at approximately 10:00 a.m.
3. The accident took place on the circular courtyard walk approximately 5 feet from the walk leading directly to the street;.
5. The Defendant, its agents, servants and/or employees, were negligent in the ownership, operation, maintenance and control of the aforesaid premises and the sidewalks thereon, in that they caused and permitted said walks to become slippery, dangerous and unsafe for persons lawfully walking thereon; in that, after actual and/or constructive notice of the said dangerous, slippery and unsafe conditions, thereof, they failed to take any precautions for the protection of persons lawfully using

Verified Bill of Particulars

said walks and failed to give any warning of said dangerous, slippery and unsafe conditions; in that they failed to keep said walks in a clean and safe condition for the tenants and persons lawfully thereon; in that they failed to take ordinary or reasonable precaution for the safety of persons lawfully on said walks.

6. Plaintiff sustained a comminuted fracture of the trochanteric region of the left femur, with attending great pain and suffering and visible shortening of the left lower extremity and external rotary deformity. Plaintiff was placed in traction and subsequently a surgical fixation of the fracture was performed, with the insertion of a Jewett nail with a 7 inch plate and 130 degree angle. Plaintiff's post operative course was complicated by a clot formation in a varicose vein in her left leg which passed to her lung, which was causally related to her accident and injury. Upon discharge from the hospital, Plaintiff was transferred to the Ramapo Manor Nursing home for physiotherapy and gait training and, when discharged from there, was

Verified Bill of Particulars

able to walk only with the aid of an aluminum walkerette. Thereafter, Plaintiff developed pain and swelling in the area of the injury and was again admitted to the hospital where another operation was performed and the nail and screws used to fix the fracture were removed. As a result of infection and drainage in the operative wound, Plaintiff was again re-admitted to the hospital. During this third admission, further surgical procedures were necessitated, namely, incision, drainage and packing of the operative wound. Frequent wound dressings are necessitated since the wound infection has not cleared up and Plaintiff is required to use crutches to walk.

Plaintiff still complains of pain and discomfort in the injured area and plaintiff will limp when she walks and will require the assistance of a cane, all of which conditions are believed permanent in nature.

Plaintiff reserves the right to amend this part of the bill of particulars since plaintiff is still under treatment for the injury received.

7. a) Confined to hospital:

Verified Bill of Particulars

Good Samaritan Hosp.

February 10, 1965-March 17, 1965

May 30, 1965 - June 8, 1965

June 22, 1965 - July 20, 1965

Ramapo Nursing Home.-March 17, 1965-April 17, 1965.

b) & c) Plaintiff has been confined to bed and home for all periods since the date of accident to the present time, except for those periods of time when she was in the hospital and Nursing Home, and will continue to be so confined for a substantial period of time.

8. Plaintiff was incapacitated from her employment as a homemaker in her home from the date of injury to present time and will be so incapacitated for a substantial period of time.

9. a)

Dr. Julius Pomerantz, Spring Valley, N.Y.	\$ 70.00	to date
Dr. John B. McNulty, Spring Valley, N.Y.	645.00	to date
Ramapo Anesthesiologists	150.00	
Physical Therapists	35.00	
Vilardi Laboratories	9.00	
Seat elevator and commode	44.00	
Walker	11.95	
Wheel chair (4/6 - 8/6)	60.00	
Drugs	200.00	
x-rays	40.00	
blood charge	40.00	

b) Good Samaritan Hospital, Suffern, N.Y.
(next page)

Verified Bill of Particulars

2/10/65 - 3/17/65	\$1,684.60
5/30/65 - 6/8/65	516.75
6/22/65 - 7/20/65	1,264.60
Ramapo Manor Nursing Home	
3/17/65 - 4/6/65	\$ 345.00

d) As a result of the injuries sustained by plaintiff plaintiff's sister was required to care for the plaintiff. Plaintiff's sister is receiving the sum of \$60.00 per week since 4/6/65 for the care of the plaintiff, plus taxicab fares which to date are in excess of \$200.00.

Plaintiff reserves the right to amend this part of the bill of particulars since plaintiff is still under treatment for the injury received.

11. Such statutes, ordinances, etc., which require landlords to keep walks in a clean and safe condition for their tenants and the public as a whole.

12. Plaintiff claims defendant's notice of the dangerous and slippery conditions was both actual and constructive. Actual notice is claimed, on information and belief, in that defendant's agents, servants and employees were upon the said walks and/or saw the condi-

Verified Bill of Particulars

tion of said walks prior to the time plaintiff was injured. Constructive notice is claimed in that the said dangerous and slippery condition of the walks existed for a period in excess of one hour prior to plaintiff's being injured.

Dated: November 16, 1965

Yours, etc.,

HARRY EDELSTEIN
Attorney for Plaintiff
One Railroad Square
Haverstraw, New York

TO: GRANIK, GARSON, SILVERMAN & NOWICKI
Attorneys for Defendant
95 North Main Street
Spring Valley, New York

(Verified 11/29/65.)

SUPREME COURT : STATE OF NEW YORK

COUNTY OF ROCKLAND

- - - - - X

JENNY BERGER,

Plaintiff,

- against -

BEN-MAR BUILDERS, INC.,

Defendant.

- - - - - X

County Courthouse
New City, New York
Wednesday, June 8, 1966, et seq.

B e f o r e -

HON. JAMES W. BAILEY, J. S. C.
- and a jury -

A p p e a r a n c e s :

HARRY EDELSTEIN, ESQ.
Attorney for the plaintiff
1 Railroad Ave., Haverstraw, N.Y.

GRANIK, GARSON, SILVERMAN & NOWICKI, ESQS.
Attorneys for the defendant
95 No. Main St., Spring Valley, N.Y.
by: DAVID W. SILVERMAN, ESQ.

Frederick A. O'Hara
Official Reporter
Ninth Judicial District

(A jury and two alternate jurors, having been duly empanelled, were sworn.)

M O R N I N G S E S S I O N

(Mr. Edelstein opened to the jury in behalf of the plaintiff.)

(Mr. Silverman opened to the jury in behalf of the defendant.)

J E N N Y B E R G E R, 15 E. Funston Ave., Spring Valley, N.Y., the plaintiff, called as a witness in her own behalf, first having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDELSTEIN:

Q Miss Berger, I am going to ask you to talk to me so that you can keep your voice up.

A I beg your pardon?

Q I will speak loudly, and you will please keep your voice up; all right?

A All right.

Q How long have you lived at 15 East Funston Avenue?

A Since May 1960.

Q And --

A '61 I think. I am not sure now, '60 or -- we are five years there. In May it was five years. It may have

been '61.

Q Do you live alone?

A Pardon me?

Q Do you live there alone?

A No, with my sister.

Q Is that an apartment house?

A It is an apartment house.

Q And what floor do you live on?

A The second floor.

Q Now, do you remember the morning of February 10,
1965?

A Do I remember it?

Q Yes, do you?

A I do, I certainly do.

Q Can you tell me what time did you get up that morning?

A After eight o'clock.

Q Can you tell me if you heard anything or saw anything
that morning before you left the house?

A I was listening to the radio between seven and eight
o'clock in the morning, the RKO.

Q Did you hear any weather report?

A I heard the news as I hear every day, and I listened
to the weather report.

Q Do you recall what the weather report was that morning?

A It was freezing rain with icy spots.

Q You say you got out of bed about eight o'clock?

A No, I left the house --

Q No; when did you get out of bed? Did you get up and have breakfast that morning?

A Yes.

Q About what time?

A Got up after eight o'clock, I had breakfast, I got dressed, I did different things in the house.

Q And did you have occasion before you left the house to look outside the window?

A I don't remember.

Q Then did you leave the house at any time that morning?

A After ten o'clock.

Q Were you going to go somewhere special?

A I went to the hospital because my sister was undergoing an operation this morning, so I wanted to find out how she is.

Q You wanted to go to the hospital?

A Yes, Good Samaritan Hospital.

Q How were you going to get to the hospital?

A Pardon me?

Q How were you going to get to the hospital?

A I ordered a taxi.

Q When you went downstairs, was the taxi already outside?

A He was already there.

Q Now, can you tell me how you were dressed that day, just what you were wearing?

A Oh, I had a heavy coat - it was very cold - a hat, gloves.

Q What kind of shoes did you wear?

A My usual shoes, oxford.

Q Is that a low heel?

A With low heels.

Q And did you have your cane with you at that time?

A I had one because of my arthritis.

Q Did a cab come right up to your front door?

A No; I had to cross the courtyard because the taxi had to wait across the street. I had to walk to the taxi, but I never got there.

Q When you say "the courtyard," is this just paths and grass?

A No, they are walks.

Q But there is no place for any car to come up to the front door; is there?

A No.

Q The only way to get to where the cab was is to walk?

A Yes, certainly. The walks are very narrow.

Q How wide were these paths?

A I beg your pardon?

Q About how wide?

A How what?

Q How wide were the paths?

A Oh, just for one person.

Q Do you know of what they were made?

A I think something gray, some concrete or something of gray color.

Q And what was to the sides of the path?

A Just lawn.

Q Grass?

A Yes.

Q Were there any guard rails along this walk at all?

A I beg your pardon?

Q Were there any rails alongside this path?

A No, none at all.

Q Now, when you got down -- by the way, did you have to go down a flight of stairs to get to the front door?

A I had to.

Q Were there any steps to get out the front door?

A Yes, two steps, then I was on the walk.

Q Then you would be on the walk?

A Yes.

Q Now, how far was it from the bottom of the steps to where the taxicab was; do you know?

A It's quite a walk.

Q Would you have any idea in distance?

A No.

Q All right. As you got down the steps and onto the walk, did you notice anything; did you see anything about the walk?

A It was wet.

Q Anything else that you could see?

A I didn't pay much attention. I saw it's wet, but it has been raining.

Q Then did you proceed to go where the cab was?

A Of course I did .

Q And then can you tell us what happened next?

A I made a few steps, and I slipped and fell.

Q Now, when you slipped and fell, can you tell us did you fall to the ground?

A I sat down on the ground.

Q In other words, in a sitting position with your feet out in front of you; is that right?

A Yes, as I remember, and it was a terrible pain.

Q What happened next as you were sitting there on the ground?

A I called the taxi man to help me up. I was holding onto the grass; the grass was slippery, too; everything was full of ice.

Q Did somebody help you up?

A Yes, but I couldn't stand up because of the terrible pain.

Q You had pain where?

A In my hip, my left leg.

Q In your left hip?

A Yes.

Q By the way, the arthritis that you use your cane for, was that in both legs or one leg?

A Oh, it's in one knee. It isn't in the leg; it's in the right knee.

Q The right knee?

A Yes, but it isn't much if I take an aspirin it goes away.

Q But on that morning the only trouble you had with your arthritis was in your right knee; is that right?

A That's right.

Q When you fell and after you fell, you had a pain in your left leg?

A I did.

Q Did you injure your right leg at all when you fell?

A Did I what?

Q Did you injure your right leg at all when you fell?

A Not at all.

Q Now, who helped you up?

A The ambulance.

Q The ambulance came?

A Yes. The taxi driver went to the superintendent and called the ambulance, and the policeman came.

Q Was there an ambulance there also?

A Yes, he was.

Q And how long were you seated there before they came?

A To me it seems an eternity.

Q Do you have any idea in minutes?

A I really don't; I can't tell you.

Q Now, while you were seated there and waiting for the ambulance and the police officer to come, did you have occasion to look at the path?

A Yes, I did. I looked around. People came from the houses. Some neighbors came. I tried to hold on. I had

such pain in my leg I tried to hold onto the ground to the grass but everything was slippery.

Q You mean hold on while you tried to get up or while you were sitting there?

A To help me sit up. If you're in pain, you try to grasp something.

Q Now, while you were sitting there you say the grass and the walk were full of ice?

A Yes, my hands were slipping on it.

Q This ice, can you describe it to us; was it smooth, uneven or what?

A It was as far as I remember it was icy and very cold.

BY THE COURT:

Q You said the grass was covered with ice; is that what you said?

A Yes, your Honor.

BY MR. EDELSTEIN:

Q Had you been out the day before on February 9th?

A I beg your pardon?

Q The day before your accident, had you been outside?

A The day before?

Q Yes.

A I really don't know. I don't remember.

Q After the ambulance came, where did you go; where did they take you?

A To the Good Samaritan Hospital because I still wanted to find out how my sister is.

Q When you got to the hospital, were you examined by a doctor?

A They took me to the emergency room and took x-rays.

Q Of what part of your body?

A I beg your pardon?

Q Did they take x-rays of your left leg and hip?

A Yes, because I had such pain. I told them it hurts terribly.

Q After they took the x-rays, did you stay in the hospital?

A After the x-rays they took me up.

Q They admitted you as a patient; is that right?

A I beg your pardon?

Q They admitted you as a patient to the hospital?

A They did.

Q While you were there what did they do for you in the hospital?

A First my leg got in traction and it got worse and they performed an operation on my hip.

Q That would be two days after you were there?

THE COURT: What date did she say?

Q Was that February 12th, the operation; what date was that?

A It was done.

Q Whatdate?

A The 12th of February I think; two days after I had the accident.

Q When you say they operated on you, they put you to sleep; did they? Did they put you to sleep when they operated on your leg?

THE COURT: Won't the hospital record show that?

Q After the operation did you stay in the hospital for a period of time?

A For five weeks because --

THE COURT: You have answered it.

Q For five weeks?

A I was five weeks in the hospital.

Q While you were there in the hospital after the operation, did they do anything else for you there; did they give you pills, treatment?

A Of course.

Q After you got out of the hospital, where did you go?

A From the hospital I went to the Ramapo Nursing Home.

Q And how long did you stay there?

A Three weeks.

Q And after you got out of the Ramapo Nursing Home did you go home?

A I did.

Q Did there come a time when you went back into the hospital?

A Yes, the leg was swelling very badly and I had terrible pains in the leg.

Q Was that around --

A This was Memorial Day I think.

Q May 30, 1965?

A I think so, yes.

Q Did they operate on you at that time, you were in the hospital again?

A The doctor took the pins out of my bones.

Q And how long were you there?

A Ten days.

Q Where did you go when you left the hospital then?

A I went home.

Q Now, did you go back to the hospital a third time?

A Yes, I did, I had to.

Q When was that?

A Oh, it was in June, I think I was home about two weeks.

Q And how long did you stay in the hospital the third time?

A To the 20th of July.

Q While you were in the hospital on the third time did they operate at that time?

A I was the third time in the hospital, yes.

Q No, did they operate a third time?

A Yes, they did.

Q Was it Doctor John McNulty of Spring Valley who treated you for your leg?

A Yes.

Q Other than Dr. McNulty did any other doctor treat you?

A Yes, a medical doctor.

Q Who was that?

A Dr. Bomergrants because I got the shingles.

Q That had nothing to do with the accident though?

A No.

Q But Dr. McNulty treated you for this injury to your leg?

A Yes, he did.

Q Did you receive any bills from Dr. McNulty?

A If I had bills?

Q Yes.

A Of course I had.

Q Do you know what those bills amount to?

A I don't remember. He made house calls --

Q No, do you have any idea what those bills amounted to?

A He was very understanding --

Q No, Miss Berger, do you know how much the bills were?

THE COURT: Well, there is a way of proving that too.

MR. EDELSTEIN: All right, I'll let it go.

Q Miss Berger, other than Dr. McNulty you had the hospital bills that you paid; is that right, that you took care of, just yes or no?

A The hospital bill?

Q You had hospital bills, yes or no?

A I don't know what you mean.

Q Let me ask you this. Did you pay the Ramapo Nursing Home?

A Yes, this I had to pay myself.

Q Do you know how much you paid them?

A Three weeks.

Q And how much was it a week?

A \$115.00 a week.

Q So you paid them \$345.00; is that right?

A Yes, and I paid the physical therapist also.

Q When you say physical therapist?

A Miss Correia.

Q Is that Jane Correia?

A Yes.

Q Do you know how much you paid her?

A She came to the nursing home and then to my house.

She gave me all kinds of movement.

Q Do you know how much her bill was?

A I guess about \$50.00 or something, could be more, maybe less; I don't remember.

Q Now, in addition to all this did you have to get any special appliances?

A Yes, I had to rent a wheelchair for four months; I had a walker.

Q The wheelchair, where did you rent that from?

A I was four months in the wheelchair.

Q Who rented it to you?

A Leeds.

Q A drug store?

A Yes.

Q Was that on a weekly basis?

A No, monthly basis.

Q Do you know how much that was?

A It was \$15.00 a month.

Q Then you say you had a walker?

A I had a walker --

THE COURT: Are you seeking to prove these things through this medium; are you trying to prove these damages this way?

MR. EDELSTEIN: No, I won't get into the amounts. I just want to show what was used.

THE COURT: I just want to know what you are doing.

Q Has Dr. McNulty discharged you yet?

A No, now I'm able to go to his office. He used to come to the house but now I take a taxi to his office and make it easier for him.

Q When was the last time that he treated you at the house?

A I don't know, four weeks ago I was the last time in his office but before he come to the house.

Q Has he been in your house any time this year?

A Oh, yes, he was.

Q Now, when you were there four weeks ago did he discharge you?

A As a matter of fact I have an appointment on Friday in his office.

Q Now, how is your left leg now?

A I still have the wound.

Q The wound?

A Yes. I have an infection --

Q Miss Berger, you say you have a wound now?

A Yes.

Q That's where the operation was?

A The wound is still there.

Q It is still open?

A Yes.

Q Do you have any bandages?

A Yes, when I walk it holds me back, the open wound it hurts me back.

Q Do those dressings have to be changed every day?

A My sister changes the dressings for me every day.

Q Do you have any pain in your leg?

A Of course I have.

Q Does the pain get worse sometimes or a steady pain?

A Sometimes it's very bad and sometimes it isn't.

CROSS-EXAMINATION BY MR. SILVERMAN:

Q Miss Berger, all the questions I'm going to ask you --

A I beg your pardon?

Q I'll talk a little louder. I say all the questions I'm going to ask you have to do with the day of the accident; al right, and that takes us back, I think, to February 10, 1965, is that the day of the accident?

A The 10th of February 1965. I never forget it anyway.

Q You say that you had heard the radio sometime about eight o'clock in the morning?

A No, I always listen to the radio between seven and eight o'clock whenever I wake up.

Q It was then that you heard this weather report about rain and freezing weather?

A Yes.

Q Now, you then after this got up, got your breakfast and whatever else you did in the morning; right?

A I did.

Q And you left your apartment house, oh, ten o'clock, after ten o'clock?

A After ten o'clock.

Q What, 10:15, somewhere around there?

A I guess so.

Q And you were going, as you said, to the hospital to see your sister; is that correct?

A That's right.

Q And she was being operated on that morning?

A Yes.

Q And you wanted to be at the hospital I take it?

A That's right.

Q And you had called a cab so that it could take you to the hospital?

A That's right.

Q As you got dressed to go outside did you have on your heavy coat? I think you said you had a heavy coat on?

A I had a heavy coat; I had a hat and gloves and a pocketbook.

Q And you had your cane?

A I had my cane.

Q Were you wearing your glasses?

A Certainly.

Q Were you wearing the same glasses that you are wearing here in the courtroom?

A Yes, that's right.

Q And you went down, what is it, one flight of stairs inside the building?

A Yes.

Q Then you came to the door which leads outside?

A Yes.

Q And when you got outside I think you said to your attorney that it was cold?

A It was very cold.

Q I think you told me before that it was still raining a little bit at that time?

A I think so but I don't remember.

Q I'd like to get that straight with you if I can. Do you remember, oh, I guess it was sometime a few months ago you were in our office and I asked you some questions and your attorney asked you some questions?

A That's right.

Q And we were discussing this accident, the two attorneys and yourself; do you remember that?

A Yes, I do.

Q Do you remember myself asking you this question, page 6, counsel, do you remember my asking you this question:

"Question: Can you tell me when you opened the front door and you walked outside do you remember what the weather was at that time? Answer: What can I

say, it was cold.

'Question: Was it raining? Answer: Maybe it was. It must have been a drizzle or something.'

Do you remember my asking you those questions?

A Yes, I do.

Q And you giving me those answers?

A Yes.

Q Is it your best recollection now that when you walked outside it was drizzling or some little bit of water coming down?

A Yes, if I say so it must be right. Can you imagine that I had a shock when I fell?

Q I can understand that, Miss Berger, but one thing I would like to ask you that question again, as best you recall now it was drizzling a little bit at the time just as you walked out the door; is that correct?

A Yes.

Q Now, as you walked out of the door there are two steps; is that right?

A Yes.

Q Which lead to this cement walk?

A Yes.

Q And you stood up on top of the steps and looked out?

A Yes.

Q Did you look out to see the taxicab out there?

A Yes.

Q And was the taxicab driver sitting in the cab?

A He was.

Q And did you see the walk which you had to walk down to go to the taxicab at that time?

A I had to see it.

Q All right. Do you remember anything unusual about it?

A No, it was wet.

Q Then you went down the two steps; right?

A Yes.

Q And as you went down the two steps you were then on the walk; is that right?

A That's right.

Q And when you got down those two steps you could still see the taxicab driver?

A Yes.

Q And was he still sitting in his cab?

A Yes.

Q He hadn't gotten out or anything like that?

A No, why should he; it's cold for him too.

Q As you looked down the walk going to the taxicab did it still just look wet to you?

A Yes.

Q Then I think you told us that you took maybe two or three steps?

A It seems so to me.

Q Then you slipped or fell; right?

A That's right.

Q One more thing, do you remember at that same meeting at our office when the attorneys were there and you were there my asking you this question and your giving me this answer:

'Question:" This is page 10, counsellor. 'When you fell on the sidewalk or as you say you were sitting on the sidewalk, was there any snow on either side of you or anything?''

A There was no snow --

Q Let me finish. Your answer was 'No. Question: Did you see what was beneath you; did you see what you had fallen on? Answer: No, it was wet.'

A I was sitting on it; how can I see what's below me?

Q In other words, let me ask you the same question today. You are sitting there and I'm here and let me ask you the same question. Your legs went from under you, you say, is that right? How did you fall; did your legs go out from under you?

A That's right.

Q And did you see what your legs slipped on?

A How could I see, I was sitting on it.

Q And when they lifted you up did you see what you had fallen on?

A I really didn't look back. It was the first time on my life I didn't think of looking; I was sitting there I felt with my hand the ground and the grass; everything was covered with ice.

MR. SILVERMAN: May I move, your Honor, that that portion be stricken as not responsive to my question.

THE COURT: Yes, motion granted.

Q After you had fallen several people came and then I think you said people came and ambulance people and then they took you to the Spring Valley Hospital; is that right?

A Yes, the hospital in Suffern.

Q I'm sorry, the Good Samaritan Hospital in Suffern?

A Yes.

Q As you were walking on this walk just before you fell, did you have your cane in your right hand?

A Yes.

Q And were you using the cane?

A I think so.

Q Now, how long had you used the cane before this accident?

A Maybe a year or so; I don't remember.

Q And this was because of some pain in your right leg?

A In my right knee.

Q And I think you said that this was arthritis or something?

A Arthritis.

Q And you had been using the cane for about a year before the accident?

A Yes.

Q Whenever you went out did you take the cane with you?

A Yes, most of the time;

Q This cane would help you walk; in other words, it would help you when you were walking?

A I leaned on it.

Q You leaned on it?

A Yes.

Q And as you were taking the walk down the steps were you leaning on the cane?

A I don't think so.

MR. SILVERMAN: I have no further questions.

A Maybe I was, maybe I was --

THE COURT: You have answered it.

MR. SILVERMAN: Thank you very much.

REDIRECT EXAMINATION BY MR. EDELSTEIN:

Q Miss Berger, when you were sitting on the ground during the time you are waiting for the ambulance and the police to come, did you have occasion to feel the ground with your hands?

A Yes, around me.

Q And did you feel anything unusual?

A Yes, of course; it was icy; it was slippery. I felt the ice on the grass.

Q Could you see it after you felt it -- did you see the ice after you felt it around you?

A Yes, I did.

MR. EDELSTEIN: That's all.

MR. SILVERMAN: I have no further questions, your Honor.

THE COURT: We'll adjourn until 1:30 or as soon as you can have your lunch and return to the courtroom. And I ask the jury, please, do not discuss this case or any phase of it at this luncheon recess, or any other recess or adjournment of the court.

We stand adjourned until 1:30.

(The trial recessed for lunch.)

A F T E R N O O N S E S S I O N

J A M E S T. M c C O N V I L L E, 35 Laurel Lane, Midland Park, N.J., called as a witness in behalf of the plaintiff, first having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDELSTEIN:

Q Mr. McConville, by whom are you employed?

A I'm employed by Orange and Rockland Utilities, Inc.; I work at Spring Valley.

Q Are you here pursuant to a subpoena of some records served on Orange and Rockland yesterday?

A Yes, I am.

Q Do you have those records with you?

A Yes, sir, I do.

MR. EDELSTEIN: May we have this marked plaintiff's

Exhibit 1 for identification?

(The Orange and Rockland Utilities, Inc. records were marked plaintiff's Exhibit 1 for identification.)

MR. SILVERMAN: I have no objection to them going in evidence.

Q May I ask this. Are these records kept in the regular course of business of Orange and Rockland's department at Spring Valley concerning weather reports?

A Yes, sir. Could I clarify that a little bit --

Q No, I'll get into the specifics.

I want to know if that's what they deal with?

A Yes.

MR. EDELSTEIN: Then I would offer them in evidence.

MR. SILVERMAN: I have no objection.

(Exhibit 1 for identification was received in evidence and marked plaintiff's Exhibit 1.)

Q Now, Mr. McConville, are you familiar with these records?

A Yes, sir, I am.

Q Can you tell me what these records show with regard to weather conditions as they existed in Spring Valley in February of 1965?

A These records show the actual air temperature as

recorded at Spring Valley. There are also notations here as to what the precipitation was in any one hour during a 24-hour period starting at 8:00 a.m. on the 9th and ending 8:00 a.m. on the 11th.

BY THE COURT:

Q What year?

A 1965. We also show on here wind velocity and wind direction.

BY MR. EDELSTEIN:

Q Now, can you tell me what those records show with regard to the temperature starting, say, from 7:00 p.m. on February 9th of 1965?

A We would have to start on February 9th of 1965 at 8:00 a.m.

Q Well, does the sheet show 7:00 p.m. at night?

A Oh, at night, I'm sorry. At 7:00 p.m. on the 9th of February 1965 our log indicates the temperature was 39 degrees.

Q And was there any precipitation at that time?

A No precipitation at that time.

Q By precipitation we mean whether or not snow, rain or sleet was falling?

A That's correct; none.

Q Now, can you tell me what the temperature was at

10:00 p.m. on February 9th and what precipitation there was, if any?

A On that same date at 10:00 p.m. the temperature was 37 degrees and again no precipitation.

Q Now, reading down that list. When did any precipitation start, if any?

A According to our log sheet at 12:00 midnight precipitation started.

Q What type of precipitation?

A The log indicates it was drizzle.

Q What was the temperature at that time?

A At that time the temperature was 35 degrees.

Q Do you know how long that drizzle continued?

A According again to our log the drizzle continued for approximately four hours, after that the notation indicates that there was none.

Q So up until about 4:00 a.m. of February 10th there was a slight drizzle, and what was the temperature at 4:00 a.m.?

A At 4:00 a.m. the temperature was 32 degrees.

Q Then there is a period of time after 4:00 a.m. when there was no precipitation?

A That's correct.

Q Did the temperature remain the same, go up or go down

as of 8:00 a.m.?

A The temperature dropped off slightly to 31 degrees.

BY THE COURT:

Q Between 4:00 o'clock and 8:00 you mean, or what?

A Yes, that's correct.

BY MR. EDELSTEIN:

Q Can you tell me at 8:00 a.m. on February 10th what was the temperature and was there any precipitation?

A At 8:00 a.m. on the 10th of February 1965 the temperature was 31 degrees and the log indicates there was sprinkles.

Q 9:00 a.m. what was the temperature and was there any precipitation?

A At 9:00 a.m. the temperature was 32, precipitation indicated here is light rain.

Q And at 10:00 a.m.?

A At 10:00 a.m. 32 degrees, light rain.

Q The next item there would be at 11:00 a.m.; is that right?

A That's right.

Q What was it at that time?

A At 11:00 a.m. the same date 32 degrees temperature, again light rain.

Q Can you tell me how this temperature is recorded?

A Yes. It's a Bristol Temperature Recorder, a sensing element which senses the change in temperature, and through a liquid-filled system positions a pen on a chart, the chart being driven by an electric motor which simply turns it by hours to create a 24-hour record.

Q So that the temperature readings that you read from come from the round discs which are part of this temperature recording?

A That's correct.

Q And the entries in pen or pencil, whatever they are recorded in, would be made by an employee who would look at this chart and put it alongside the time?

A That's correct.

MR. EDELSTEIN: That's all.

CROSS-EXAMINATION BY MR. SILVERMAN:

Q May I see your records? (Exhibit 1 handed to counsel.)

These gauges you were talking about make a record of the temperatures upon these pieces of paper?

A That's correct.

Q You have only brought the records I see here from February 9 and February 10; is that right?

A That's correct.

Q What is the starting hour on February 9th that you

give us? It says 8:00 a.m. February 9th; is that the beginning time of these records?

A That's correct.

Q That shows precipitation and other items together with temperature; right, beginning at 8:00 a.m. February 9th?

A That's correct.

Q And it goes then where it says 1:00 a.m. on that sheet; that would be 1:00 a.m. of February 10th?

A That's correct.

Q And it goes over to the next sheet which of course is February 10th and where it would say 1:00 a.m. there would be February 11th?

A That's correct.

Q Were you asked to bring in any of the records covering February 8th?

A No, sir, I wasn't.

Q Now, according to your records, am I correct that the weather conditions on February 10th at 8:00 a.m. were 31 degrees plus sprinkles; is that correct?

A That's correct.

Q And as we get to 9:00, 10:00, 11:00, 12:00 o'clock we have temperatures of 32 degrees with light rain?

A That's correct.

Q These are air temperatures; is that correct?

A That's correct.

Q And 32 degrees is freezing, Fahrenheit?

A That's correct.

MR. EDELSTEIN: I have no further questions, your Honor.

Your Honor, may we stipulate, Orange and Rockland has graciously furnished us with a photostatic copy because they need these for their records?

MR. SILVERMAN: No objection.

(The photostats were substituted for the originals and marked plaintiff's Exhibit 1.)

R O S E S H E R M A N, 15 E. Funston Ave., Spring Valley,
N.Y., called as a witness in behalf of the plaintiff,
first having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDELSTEIN:

Q Miss Sherman, in February of 1965 did you live at 15 East Funston Avenue?

A Yes.

Q And how long had you lived there before that date?

A I lived there seven years.

Q Now, prior to February 10, 1965 did you know the plaintiff, Miss Jenny Berger?

A Yes; I was looking at her from the building --

Q No, did you know her?

A Oh, yes, sure, neighbors.

Q The apartment you live in, is it on the first or second floor?

A The second floor.

Q Which way does it face?

A I don't know.

Q Well, if you look out your windows what do you see?

THE COURT: In other words, you are seeking to establish that she lived in the same apartment that the plaintiff lived in?

MR. EDELSTEIN: The same building.

Q On February 10, 1965, did you have occasion to see Miss Jenny Berger at any time that morning?

A Yes; when I looked out through the window was ten o'clock, and I saw she went down and she fell. So I went down, and I hollered for help. So I don't know who came, there came a policeman, there came -- Mike came, the superintendent, and he called the ambulance.

Q Now, Miss Sherman, you say you saw Miss Berger walking downstairs?

A Yes.

Q Did you see her walking before she fell?

A No; I saw her walk to take the taxi, the taxi was waiting for her. I think the taxi driver called the super.

Q What I'm trying to get at, Miss Sherman, did you see her walking before she fell?

A I saw her went down from the building; that's all that I saw.

Q Then you saw her fall?

A Yes.

Q Now, did you go downstairs after that?

A Yes, when I see she was laying on the floor; I went down and I hollered for help.

Q Did you have occasion to look at the walk where she had been when you went downstairs?

A I'll tell you, it was so slippery I can't see nothing there, was slippery -- it didn't look like slippery. It was looking like wet and underneath was ice; that's what I saw.

MR. EDELSTEIN: That's all.

CROSS-EXAMINATION BY MR. SILVERMAN:

Q Tell me, did you see Mrs. Berger using her cane as she was walking down?

A I didn't see -- I didn't see she shall have something
-- I see she went down; I didn't look if she has a cane or not.

Q Did you watch her as she walked down the steps?

A Yes; she was walking, then I saw when she fell.

Q How about the cab driver, was he in his cab?

A I think he was in the cab, yes. I hollered to him
he should call somebody.

Q Did you call somebody?

A I just hollered because it was slippery; I was afraid
to walk.

Q It was slippery outside?

A Yes.

Q And you were afraid to go outside?

A That's right.

MR. SILVERMAN: Thank you very much.

MR. EDELSTEIN: No further questions.

R O N A L D B R A N D T, 337 Ferdon Ave., Fremont, N.Y.,
called as a witness in behalf of the plaintiff,
first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EDELSTEIN:

Q Officer, in February of 1965 by whom were you
employed?

A Spring Valley Police.

Q On February 10, 1965 what was your tour of duty?

A Working the eight to four shift days.

Q 8:00 a.m. in the morning to 4:00 p.m. in the afternoon?

A That's correct.

Q Officer, on February 10, 1965 were you sent in your official capacity to 15 East Funston Avenue?

A Yes, I was.

Q By the way, are you here pursuant to personal subpoena served upon you, and do you have any records with you pursuant to a subpoena served on the police department?

A Yes, sir.

Q Officer, do you have the police blotter of February 10, 1965?

A The blotter, no, I don't.

Q Do you have any records of the police report?

A Yes, I have the car report for that shift that day.

Q Is that a record kept in the regular course of business by the police officer in the car that he makes out?

A Yes.

Q And is that made out by you?

A Yes, it is.

Q Will you tell us just what happened when you got to 15 East Funston Avenue?

A Well, I received a call to go there in reference to a woman that had fell. I arrived there, I parked the car, and I seen a woman laying approximately thirty feet from the sidewalk. I got out of the car and started running up the sidewalk to the woman, and I went to her aid as she was laying on the sidewalk.

Q You say she was thirty feet from the sidewalk; you mean from the roadway?

A Yes, that's correct.

Q In other words, she was between the roadway and the entrance to the building?

A Yes.

Q By the way, the lady with the cane, is that the lady whom you saw that day?

A Yes.

Q Can you tell me, officer, when you got to the scene what was the condition of the walks or the walk where she was lying?

A They were very slippery.

Q In your car sheet report is there anything as to the condition you found on February 10, 1965?

MR. SILVERMAN: May I object, your Honor, and let the witness testify as to his recollection.

THE COURT: Sustained.

Q What is your recollection as to what you actually saw on that day?

A That this sidewalk was a sheet of ice.

Q Did you have any difficulty getting over to where the plaintiff was?

A Yes, I slipped.

Q After you came there was an ambulance then called?

A Yes.

Q And was she taken to the hospital?

A Yes, she was.

MR. EDELSTEIN: That's all.

CROSS-EXAMINATION BY MR. SILVERMAN:

Q May I see your records, officer?

(Same handed to counsel.)

Q Are these your only records?

A Yes, that's correct.

Q Do you happen to remember the weather conditions of this day, February 10, 1965?

A No, I don't.

Q Suppose I were to tell you that the weather conditions at ten o'clock that morning, nine o'clock that morning, eleven o'clock that morning were 32 degrees with light rain, would

that refresh your recollection as to the type of weather that was had that day?

A Possibly. As I said, I don't remember what type of weather it was.

Q Do you happen to remember what the other sidewalks at this particular point of time at ten o'clock in the morning were on February 10th; do you happen to remember whether other sidewalks in the town were like a sheet of ice?

A No, I don't.

Q Do you happen to recall anything about any other parts of the town?

A No.

Q All you have is a recollection of this particular occurrence?

A That's correct.

Q And you have no idea what the weather conditions or what the condition of sidewalks, roads were in any other part of the town?

A No.

MR. SILVERMAN: That's all.

REDIRECT EXAMINATION BY MR. EDELSTEIN:

Q Officer, this record is made in your handwriting and filed with the police department?

A Yes, that's correct.

Q Now I notice that this is a photostat. Did you have anything to do with making the photostat?

A Yes, I made the copy.

Q From the original book?

A Yes.

MR. EDELSTEIN: I would offer this in evidence.

MR. SILVERMAN: I would object on the grounds the officer has already testified, your Honor.

BY THE COURT:

Q The record merely contains what you have told us here today?

A Yes.

Q Nothing more?

A No.

THE COURT: Sustained.

MR. EDELSTEIN: Thank you, officer.

Your Honor, I have no further witnesses at this time. I thought I would go much longer than this.

THE COURT: It is rather disappointing; we are all here ready to go.

MR. EDELSTEIN: May I have a five minute recess and maybe I can save some other time?

THE COURT: Surely. We'll take a short recess.

(A short recess was taken.)

THE COURT: We are going to adjourn for the afternoon. I again request you not to talk about the case or seek to find out anything about it except through the evidence produced in the courtroom. See you tomorrow morning.

(The trial adjourned until Thursday, June 9, 1966.)

Same appearances.

S E C O N D D A Y
Thursday, June 9, 1966

(The trial continued.)

M O R N I N G S E S S I O N

MR. EDELSTEIN: At this time, your Honor, I would like to read from the examination before trial taken of the defendant superintendent on March 15, 1966 sworn to by him on April 6, 1966 before a notary public.

THE COURT: You have no objection, Mr. Silverman?

MR. SILVERMAN: None. I don't know what portions counsel is going to read.

THE COURT: He'll probably tell you.

MR. EDELSTEIN: Page 3.

'Question: In what capacity were you employed on February 10, 1965?

A I am a superintendent."

And this refers to stipulation by Mr. Silverman that he's employed by Ben-Mar Builders, Inc. Question on page 4:

'Question: Did you have anything to do with the maintenance of the walks that led from the house, 15 East Funston Avenue? Just yes or no. Answer: Yes.

'Question: Did you have anything to do with snow removal? Answer: Yes."

Then on page 5 referring to February 10, 1965.

'Question: On that particular day what time did you start working? Answer: Well, I had a call to go eight o'clock to work. I had to go to plow some snow over the parking lot by my boss.

'Question: Was that part of 15 East Funston Avenue? Answer: No.

'Question: You had to go some place else? Answer: Yes.

'Question: Where was that town? Answer: Spring Valley.

'Question: What time did you go out that morning? Answer: About eight o'clock.

'Question: When you went out at eight o'clock, can you tell me what the weather condition was? Answer: It was a very slight drizzle. It was just like you have a little frost in the early morning.

'Question: When you went out, was there any ice on the ground? Answer: Not on the walks; I didn't see any.

'Question: Did there come a time when you came back to 15 East Funston Avenue that morning of February 10th after you went to plow the snow? Answer: I don't know what time I got back; I didn't look at the clock.

'Question: Can you recall whether or not it was before or after twelve o'clock? Answer: I don't know; I can't pin myself down.

'Question: Did anyone notify you on February 10, 1965, just yes or no, that Mrs. Jenny Berger had fallen? Answer: Somebody remarked that a woman fell.

'Question: When you got back on February 10, '65, can you tell me what the general condition of the walks leading from 15 East Funston Avenue were, if you recall? Answer: I can't recall.

'Question: How far from 15 East Funston Avenue was this place you went to plow a parking lot? Answer: You know where Shopper's Paradise is?

'Question: Yes. Answer: It's directly opposite across the street from Shopper's Paradise.

'Question: On Route 59? Answer: On Route 59.

'Question: While you were plowing the parking lot, what was the general weather condition with regard to temperature; was it cold; do you have any idea? Answer: I couldn't tell you.

'Question: Did it stop raining at any time that morning? Answer: Yes.

'Question: Do you know about what time? Answer: I don't know.

'Question: As you drove back to 15 East Funston Avenue, did you have any occasion to notice whether or not there was any ice generally that had frozen as a result of the rain?

Answer: In what respect, where?

'Question: Just generally? Answer: Well, all over town it was some patches of ice.

'Question: On February 10, 1965 before you left at eight o'clock in the morning, did you spread any sand or salt on any of the walks at 15 East Funston Avenue; just yes or no? Answer: No.

'Question: Had you spread any salt, sand or salt the night before? Answer: Yes.

'Question: Do you know about what time it was that you spread it? Answer: No; I didn't look at the clock.

'Question: Would it have been after dark or before dark? Answer: I don't know; it was quite a while, that's all I know. I sprinkled this chemical that's made by Dow Chemical.

'Question: Is it like rock salt? Answer: No; it is better than a rock salt.

'Question: Is it a powder? Answer: No, it is little pellets.

'Question: Do you know what happens to these pellets; it disappears or melts? Answer: Melts completely.

'Question: And you recall you spread them the night before? Answer: Sure.

'Question: Do you recall whether you spread any pellets on February 10, 1965 at any time? Answer: I couldn't tell you.

'Question: Just yes or no. Were you present at any time when Mrs. Berger was still seated out on the sidewalk before the ambulance came, do you recall? Answer: I don't remember.

'Question: On the morning of February 10, 1965, did you at any time before you left at eight o'clock determine what the temperature was outside? Answer: No.

'Question: At that time did you have any outside thermometer near your apartment? Answer: No, I didn't have any.

'Question: From October 9, 1964 until February 1965, would you be instructed when to spread the salt or this chemical by somebody else, or would you put it down based upon your own determination? Answer: I did it on my own, and other times my employer made sure I didn't forget.

'Question: Then at any time after you came back to 15 East Funston Avenue on February 10, 1965, did you ever have any conversation with a Mrs. Rose Sherman? Answer: I don't remember."

That's all.

MR. SILVERMAN: Your Honor, I would like at this time to read one question with respect to the same material which was read by counsel.

THE COURT: Very well.

MR. SILVERMAN: It is on page 6.

'Question: Did you see any snow on the walk? Answer: No, I didn't see any snow.'

MR. EDELSTEIN: Your Honor, at this time I would like to offer in evidence the hospital records from the Good Samaritan Hospital of the plaintiff, Jenny Berger.

MR. SILVERMAN: I have no objection to the hospital records going in, your Honor.

(Hospital records dated 2/10/65, 5/30/65 and 6/22/65 were received in evidence and marked plaintiff's Exhibits 2, 3, and 4 respectively.)

MR. EDELSTEIN: At this time, your Honor, I would offer in evidence three bills of the Good Samaritan Hospital covering the period that we had in the previous exhibit.

MR. SILVERMAN: No objection.

(Three bills were received in evidence and marked plaintiff's Exhibit 5.)

MR. EDELSTEIN: At this time, your Honor, the

plaintiff will rest except for the testimony of Dr. McNulty.

MR. SILVERMAN: At this time, your Honor, would you hear motions outside of the presence of the jury?

THE COURT: It might be appropriate. The jury may step out.

(The jury retired to the jury room and the following took place in chambers, the Court and counsel present.)

MR. SILVERMAN: At this time, your Honor, since the plaintiff has rested with the exception of the medical proof which he intends to offer, the defendant at this time would like to make a motion to dismiss the complaint in this action on the grounds that the plaintiff has failed to establish a prima facie case.

This motion is made upon the grounds that it is plaintiff's own testimony that she was aware of the freezing rain outside, and she so testified. With her own infirm condition, her arthritis, her use of a cane, she undertook these hazards in any event. The reasons may be commendable, but she certainly had knowledge of the risk, and she undertook that risk and went outside.

The plaintiff has introduced as part of his own prima facie case the weather records which certainly cover this particular area. They indicated at seven

in the morning there was a drizzle with some 32 degrees temperature, and that commencing at eight o'clock running through eleven or twelve the temperature was thirty-two degrees and it was a light rain. Therefore, this accident happened during the actual freezing rain itself, and I believe the law is quite clear that a landlord is entitled to a reasonable time from the cessation of a storm to clear up an ice condition or to clear up snow that might be falling.

In the cases that we submitted to your Honor in our memoranda, the one most directly on point was Bressler against Rule Realty Company which was affirmed by the Court of Appeals where the Appellate Division stated that 'The accident occurred while rain was still falling with freezing temperature. The defendant was not negligent, therefore, in failing to remove the ice or to throw ashes or sawdust thereon. Plaintiff was also guilty of contributory negligence in failing to safeguard herself against the obvious slippery condition of the steps.' I believe that case is directly on point with the one that has been tried before your Honor.

I think there is another point to be kept in mind. We are dealing basically with the obligation of a landlord. The obligation of a landlord has sometimes been

held to be the removal of ice if it becomes bumpy or ridgy or in itself a danger. However, we have none of that here, because the plaintiff testified that apparently it was just a sheet of ice, and certainly this ice was made or was formed during the very same storm which was in progress when she was injured.

I think there is no question but that she certainly had knowledge of the risk, and she assumed it herself by going out in the ice, and I think one other point that the plaintiff has also established that there was ice all over Spring Valley. This I think would be the logical import of his reading as part of his case a portion of the examination before trial of the defendant wherein he stated that there was ice all over the town in spots. And the law has held if this walk is in no worse condition at the time than the streets and roads and everything else in the town, the landlord is not negligent.

I think on all these grounds that the complaint of the plaintiff in this matter should be dismissed.

MR. EDELSTEIN: May I be heard, your Honor?

THE COURT: Yes.

MR. EDELSTEIN: With regard to the defendant's motion concerning that the entire area of Spring Valley

had a similar condition, the testimony does not show that. The testimony shows that the defendant's employee states that there were patches of ice. He did not say that the conditions were the same. There has been no testimony that this condition existed throughout the village. As a matter of fact, the police officer was asked whether there was any similar condition anywhere else and said he did not recall or did not know. And there has been no testimony showing the condition was the same.

With regard to the question of the freezing rain, the cases have held that where the storm -- the landlord is under no obligation until the storm stops. However, the examination of the weather reports in evidence will reveal that this was no storm, that there was only a sprinkle that started at 8:00 a.m. and then a light drizzle, the wind velocity was of no great proportion. I think it ranged from three to five miles an hour, six miles an hour.

The defendant's employee testified, and I read into the record that portion, that he remembers on two occasions he answered he remembers spreading Dow Chemical pellets which melts ice completely the night before. Examination of the weather report showed the night

before the air temperature was anywhere from thirty-five to thirty-eight degrees. The only purpose he would have spread them would be to melt ice.

Now, once he was aware that there was an icy condition the night before at least twelve hours before this thing occurred, he then went out the next morning at eight o'clock, and the records show the temperature dropped below freezing, admits there was like a little frost out. He admits that in his deposition which I read into the record. Therefore, the landlord's employee was on notice. They were on notice the night before there was an icy condition and undertook to do something. Knowing the pellets would only melt the water but not dispose of it.

At the same time when he went out the next morning and seeing the frost he was on further notice that he should have done something to this walk for the protection of ingress and egress of the tenants thereon on a private walkway.

With regard to the testimony of the plaintiff that she undertook knowing possible risks outside, this is a question of contributory negligence for the jury because her act was not a careless or reckless one. It's up to

the jury to determine whether her act was an act of an unreasonable person. She used her cane. There has been no testimony that she walked speedily or ran or did anything that a reasonable person would not have done. She was going to visit her sister in the hospital. And I believe that that question whether a reasonable person would have done the same thing would be a question for the jury.

THE COURT: I reserve on the motion.

(Off the record discussion.)

MR. SILVERMAN: Counsel for the plaintiff has asked a stipulation to the effect that the injuries which are shown in the hospital records are causally related to this accident, and I will so stipulate other than the shingles which are shown in the record. And, of course, if there is anything in the records with respect to her arthritis this is not causally related to the accident.

MR. EDELSTEIN: I'll so stipulate, solely concerned with the leg that was fractured.

MR. SILVERMAN: I will stipulate that the doctor's bill was approximately \$710.00 which is a fair and reasonable value for the services that he rendered.

(A short recess was taken.)

(The trial continued in open court in the presence of the jury.)

MR. EDELSTEIN: If it please the Court, the plaintiff's and the defendant's attorneys have stipulated if Dr. McNulty would have testified he would have testified that the injuries contained in the three hospital records are the injuries that Mrs. Berger sustained as a result of this accident except for shingles.

THE COURT: Very well.

MR. EDELSTEIN: We have also stipulated, your Honor, that the hospital bills for Good Samaritan Hospital, the first hospitalization was \$1684.60, the second one was \$516.75 and the last one was \$1,264.60.

We have also stipulated that the reasonable value of Dr. McNulty's services was \$715.00.

THE COURT: Thank you.

MR. EDELSTEIN: With the permission of the Court, I would just like to read briefly from the hospital records.

THE COURT: All right.

MR. EDELSTEIN: This first record is from the admission of February 10, 1965, the day of the accident. It shows 'Time admitted to Good Samaritan Hospital

11:30 a.m. Final diagnosis: Trochanteric fracture femur left.

'Secondary diagnosis or complications: Thrombophlebitis.

'Operations or treatment: Open reduction fracture.

'Remarks: Seventy-three years old who slipped on ice, comminuted fracture trochanter. Ambulatory with walker. Discharged to Ramapo Manor.

'Condition on discharge: Improved."

On a page entitled 'History and Physical: Present illness -- the patient slipped and fell on an icy sidewalk shortly prior to admission. She experienced immediate pain in her left hip. She was unable to stand or walk. She was taken directly to the hospital."

Operative report on February 12, 1965, surgeon Dr. McNulty. 'Title of operation: Hip pinning insertion of Jewett nail.

'Pre operative diagnosis: Fractured left femur.

'Findings: There was a comminuted fracture of the trochanteric region of the left femur. The fracture was displaced and markedly comminuted.

'Procedure: When patient was anesthetized, she was placed on the fracture table and the fracture

reduced by exerting traction and abduction. It was then attempted to nail the fracture with the assistance of x-rays ... a jewett nail with a seven inch plate and 130 degree angle was then driven into the neck of the femur and then attached to the proximal shaft and trochanteric region."

This is a report of consultation Dr. H. Wolf on March 2, 1965. "Findings: This seventy-three year old white woman was admitted 2/10 because of a fracture of the left femur. This was reduced surgically, and the patient had been well until yesterday, when she suddenly started having fever, coughing, chest pain. The cough was non productive. The fever went to 103, then came down this morning to 99...

"The left calf is warmer to touch than the right, and there was 1.5 cm difference in the circumference of the calf. The surgical wound overlying the left hip, there was no tenderness or evidence of skin infection.

"Impression: Pulmonary embolus, thrombosis phlebitis of the left calf."

X-ray on February 23, 1965, left hip. "A-P. and lateral views reveal intertrochanteric and subtrochanter-

ic fracture with a Jewett nail in place. The shaft fragment is somewhat displaced laterally and abducted. The nail passes through the neck into the inferior posterior portion of the head."

This is on orders for treatment on 2/11/65.

"Demerol 50 mgm. Atropine grains 1/150. 2/12 continue blood transfusion."

The next record is the record of May 30th -- by the way, on the first record the discharge date was March 17, 1965. The next record is May 30, 1965, and the discharge record is June 8, 1965. Admission diagnosis: Nail in fractured femur, phlebitis.

"Final diagnosis: Healed trochanteric fracture femur left.

"Operations or treatment: Removal of Jewett nail.

"Condition on discharge: Improved."

Physician's statement signed by J. McNulty on 5/30/65. "Left leg swollen. Pitting edema to knee. No undue calf tenderness. Tender over suphemous vein, inner thigh. Also tender over operative scar center thigh. No local heat.

"X-ray - healed fracture. Thrombophlebitis.

Deep wound infection. Plan - remove nail with drainage."

Operative report June 1, 1965: "Surgeon Dr. McNulty.
Finding: A Jewett nail was transfixing a trochanteric fracture which had healed according to x-ray. There was pronounced scarring about the blade of the nail on the shaft of the femur.

'Procedure: The lower part of the operative incision was reopened and the blade portion of the nail was exposed. The transfixing screws were removed and then the nail was extracted."

X-ray report on June 3, 1965. "Left hip. The Jewett apparatus has been removed. The configuration of the fractured zone is similar to the study made May 7, 1965. The peripheral callus laterally is somewhat more extensive. There are still suggestions that portions of the fracture line are not obliterated. One of the wire fixing devices of the plate to the shaft is still present."

Follow up x-ray 6/5/65, left femur, reveals healing fracture to be unchanged as compared with previous study.

"A drill point is embedded in the proximal shaft."

And the last hospital report June 22, 1965, discharged July 20, 1965. "Admission diagnosis: Fractured

hip. Wound infection.

"Condition on discharge: Improved."

Operative report Dr. McNulty on June 25, 1965.

"Type of operation I/D hip abscess.

"Preoperative diagnosis: Abscess left hip.

Operative wound infection."

Consultation of Dr. Wolf on July 1, 1965 -- I won't read this. This has something to do with something unrelated.

SUPREME COURT : STATE OF NEW YORK

COUNTY OF ROCKLAND

- - - - - X

JENNY BERGER,

Plaintiff,

- against -

MOTION

BEN-MAR BUILDERS, INC.,

Defendant.

- - - - - X

County Courthouse
New City, New York
Thursday, June 9, 1966

B e f o r e -

HON. JAMES W. BAILEY, J. S. C.
- and a jury -

A p p e a r a n c e s:

HARRY EDELSTEIN, ESQ.
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GRANIK, GARSON, SILVERMAN & NOWICKI, ESQS.
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95 No. Main St., Spring Valley, N.Y.
by: DAVID W. SILVERMAN, ESQ.

Frederick A. O'Hara
Official Reporter
Ninth Judicial District

MR. EDELSTEIN: That's all, your Honor. The plaintiff rests.

MR. SILVERMAN: At this time, your Honor, the defendant also rests and renews the motions made heretofore.

THE COURT: Do you wish to put your motions on the record again, please?

MR. SILVERMAN: At this time the defendant once again moves with respect to the complaint that it be dismissed not only on the grounds that he has failed to prove a prima facie case but also on the grounds that the record here is exceedingly clear, and that the evidence preponderates against the plaintiff that there is no liability; and further, she is guilty of contributory negligence, and we move to dismiss.

THE COURT: Do you wish to be heard?

MR. EDELSTEIN: Your Honor, I believe the testimony clearly shows that the defendant's superintendent had knowledge of the slippery condition the night before when he placed the pellets on the ground. That when he left at eight o'clock in the morning the weather reports in evidence clearly establish that the temperature had further dropped; and the testimony here has

shown that the condition had worsened and there were no steps taken to remedy it; and I believe it's a question for the jury.

THE COURT: I feel that the evidence is not sufficient to establish a question of fact as to the negligence, any negligence on the part of the defendant owner or employee of the owner of the apartment house, because it has been definitely established through the medium of the testimony of the plaintiff that it was freezing rain at the time she heard the radio in the morning at eight o'clock, and according to the evidence offered on behalf of the plaintiff as to the temperatures during the ensuing hours it was freezing and raining; and my recollection is, if I am correct, that the plaintiff left the premises at or about ten o'clock in the morning. And according to the evidence of the weather report, at that time the temperature was 32 degrees with a light rain and continued to rain throughout the entire balance of the forenoon and at about the time she sustained her fall.

The courts hold that an accident occurring while rain is still falling with freezing temperature the defendant is not negligent in failing to remove the ice

or to do anything to attempt to counteract the slippery condition by throwing ashes or sawdust or other substance thereon, and the failure to apply ashes or anything of that character during a storm may not be regarded as negligence, because the continuation of the storm would soon render the walks as slippery as before.

And it has also been held within a brief period after a storm has ceased there is no obligation for a few hours on the part of the owner or person in control of the premises to take any necessary precautions; they are allowed a reasonable length of time in which to attempt to overcome any serious condition.

Under those circumstances unfortunately as much as we are all sympathetic to the serious injuries sustained by the plaintiff I do not feel there has been a suitable cause of action established through the medium of the testimony which you have offered in support of your plaintiff's case, and we may not let sympathy enter into our deliberations; and under the circumstances I'll grant defendant's motion.

MR. EDELSTEIN: May I take my exception.

(The jury was discharged with the thanks of the Court.)

**Stipulation and Agreement Certifying Correctness of
Transcript, Pursuant to Rule 5525(c) CPLR.**

IT IS HEREBY STIPULATED AND AGREED, pursuant to Rule 5525(c) CPLR, that the foregoing transcript be and the same is hereby certified as correct.

Dated: January 15, 1968

HARRY EDELSTEIN
Attorney for Plaintiff-Appellant.

GRANIK, GARSON, SILVERMAN & NOWICKI
Attorneys for Defendant-Respondent.

SUPREME COURT: STATE OF NEW YORK
APPELLATE DIVISION:SECOND DEPARTMENT

-----x
JENNY BERGER,

Plaintiff-Appellant,

-against-

STIPULATION

BEN MAR BUILDERS, INC. ,

Defendant-Respondent.
-----x

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties herein that reproducing the exhibits containing the weather report and hospital bills and records be dispensed with and that the original exhibits be handed up to the Court on the argument by either party, with the same force and effect as if incorporated in the record on appeal.

Dated: January 15, 1968.

[Signature]
Attorney for Plaintiff-Appellant

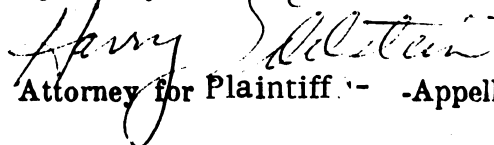
[Signature]
Attorneys for Defendant-Respondent

Certification Pursuant to Rule 2105 CPLR.

I, Harry Edelstein ,
attorney for the plaintiff-

appellant in this action, do hereby certify, pursuant to Rule 2105 CPLR, that the foregoing printed record/papers on appeal has been personally compared by me with the originals on file in the office of the Clerk of the County of Rockland and found to be true and complete copies of said originals and the whole thereof of the notice of appeal, the judgment roll, the transcript of proceedings, the order appealed from and all the papers which were used in the court below and which are specified in the order appealed from and the whole thereof, now on file in the office of the Clerk of the County of Rockland.

Dated: January 15, 1968.


Attorney for Plaintiff - Appellant.

To be argued by
GEORGE MALINSKY
Time: 20 minutes

New York Supreme Court

Appellate Division – Second Department

JENNY BERGER,

Plaintiff-Appellant,

- against -

BEN-MAR BUILDERS, INC.,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

HARRY EDELSTEIN

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GEORGE MALINSKY

Of counsel

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STATEMENT UNDER RULE 5531 CPLR
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

JENNY BERGER,

Plaintiff-Appellant,

-against-

BEN-MAR BUILDERS, INC.,

Defendant-Respondent.

Statement Under Rule 5531 CPLR

1. The index number of the case in the court below is 603/1966.
2. The full names of the original parties are: Jenny Berger, plaintiff; Ben-Mar Builders, Inc., defendant. There has been no change in parties.
3. The action was commenced in the Supreme Court, Rockland County.
4. The action was commenced by the service of the summons on July 29, 1965 and a copy of the verified complaint was served on August 20, 1965. The answer was served on August 31, 1965.

Statement Under Rule 5531 CPLR

5. The nature and object of the action is to recover damages for personal injuries due to the defendant's negligence.

6. The appeal is from a judgment in defendant's favor dismissing the complaint upon motion of the defendant after trial which was entered in the office of the Clerk of Rockland County on July 1, 1966.

7. The appendix method is not being used.

STATEMENT PURSUANT TO CPLR 5528

NEW YORK SUPREME COURT
APPELLATE DIVISION : SECOND DEPARTMENT

- - - - -x

JENNY BERGER, _____

Plaintiff-Appellant,

-against-

BEN-MAR BUILDERS, INC.,

Defendant-Respondent.

- - - - -x

Statement Pursuant to CPLR 5528

In this negligence action to recover damages for personal injuries by a tenant in the defendant's apartment house resulting from a fall on an icy walk in the courtyard leading to the sidewalk wherein plaintiff appeals from a judgment in defendant's favor upon the court's dismissal of the complaint at the end of the case when the defendant rested without offering any evidence the pivotal, determinative questions involved in this appeal are:

1. Whether there was a question of fact as to the defendant's negligence and
2. Whether there was a question of fact as to plaintiff's contributory negligence.

The trial judge answered the first question negatively and did not reach the second question.

NATURE OF ACTION AND FACTS

On February 10, 1965, plaintiff, who was a tenant in the defendant's apartment house, fell on an icy walk in the courtyard leading to the sidewalk, and sustained grievous injuries including a fracture of the left femur and thrombo phlebitis. The fracture was reduced surgically. She developed pulmonary embolus and thrombosis phlebitis of the left calf. Later plaintiff was again operated. An infection developed. The hip became abscessed. Defendant's trial counsel conceded the injuries were "casually related to this accident." Plaintiff was hospitalized from February 10, 1965 to March 17, 1965; May 30, 1965 to June 8, 1965 and from June 22, 1965 to July 20, 1965. The hospital bills totalled \$3,465.95. After the first period of hospitalization she was confined to a nursing home. The bill was \$345. The doctor's bill was \$715. It was stipulated that all bills were reasonable.

Before detailing the evidence as to the cause of the fall, we call attention to the rule succinctly

stated in DeRosa v. Fordham University, 18 App. Div. 2d 1056, 238 N.Y.S. 2d 778, that upon appeal where plaintiff challenges the correctness of the dismissal of his case at the close of the evidence:

" . . . the issue to be resolved here is whether the plaintiff made out a prima facie case. This court, in reviewing the record, is bound 'to take the facts in a light most favorable to the plaintiff and, in determining whether the facts proved constitute a cause of action, give him the benefit of every favorable inference which may reasonably be drawn' (Osipoff v. City of N.Y., 286 N.Y. 422, 425; also Sagorsky v. Malyon, 307 N.Y. 584 * * * . "

In 7 Carmody-Wait, at pages 699, 700, it is stated, and many authorities cited in support thereof, that:

"Upon a motion to dismiss the complaint at the close of the plaintiff's case, the truth of the evidence put in by the plaintiff is assumed, and the plaintiff must have in addition the advantage of every reasonable inference that can be drawn from the facts proven. This motion presents a question of law, that is, whether, admitting all the facts presented, and giving to the plaintiff the most favorable inferences deducible from the evidence, the plaintiff has failed to establish a prima facie case. It is only where there is no evidence in law which, if believed, will sustain a verdict, that the court is called upon to non-suit. Conversely, where the evidence adduced by the plaintiff establishes a prima facie case, it is error to dismiss the complaint."

At the end of plaintiff's case the defendant argued that plaintiff did not establish a prima facie case of the defendant's negligence and that plaintiff assumed the risk because she ventured forth in a freezing rain. The trial judge reserved decision on the motion. The defendant then rested without offering any evidence and renewed the motion, stating (p. 80):

"At this time the defendant once again moves with respect to the complaint that it be dismissed not only on the grounds that he has failed to prove a prima facie case but also on the grounds that the record here is exceedingly clear, and that the evidence preponderates against the plaintiff that there is no liability; and further, she is guilty of contributory negligence, and we move to dismiss."

The trial judge granted the motion on the first ground. The reasons for granting the motion were put in these words (p. 81):

"I feel that the evidence is not sufficient to establish a question of fact as to the negligence, any negligence on the part of the defendant owner or employee of the owner of the apartment house, because it has been definitely established through the medium of the testimony of the plaintiff that it was freezing rain at the time she heard the radio in the morning at eight o'clock, and according to the evidence offered on behalf of the plaintiff as to the temperatures during the ensuing hours it was freezing and raining;

and my recollection is, if I am correct, that the plaintiff left the premises at or about ten o'clock in the morning. And according to the evidence of the weather report, at that time the temperature was 32 degrees with a light rain and continued to rain throughout the entire balance of the forenoon and at about the time she sustained the fall.

"The courts hold that an accident occurring while rain is still falling with freezing temperature the defendant is not negligent in failing to remove the ice or to do anything to attempt to counteract the slippery condition by throwing ashes or sawdust or other substance thereon, and the failure to apply ashes or anything of that character during a storm may not be regarded as negligence, because the continuation of the storm would soon render the walks as slippery as before.

"And it has also been held within a brief period after a storm has ceased there is no obligation for a few hours on the part of the owner or person in control of the premises to take any necessary precautions; they are allowed a reasonable length of time in which to attempt to overcome any serious condition."

However, when one reads the record and examines the exhibits it is readily apparent that plaintiff's fall does not necessarily rest upon and be solely attributable to the falling freezing rain. For the record testimony from all witnesses and the exhibits show that no storm was pending and that ice had been present at least 12 hours before plaintiff fell which the defendant's employee tried to remove.

In opposing the motions to dismiss, both at the end of plaintiff's case and after the defendant rested, trial counsel for the plaintiff pointed to salient evidence which, it is our respectful submission, the trial judge either ignored or glossed over. The argument of plaintiff's trial counsel that the defendant's negligence and plaintiff's freedom of contributory negligence should have been left to the jury is amply supported by the record.

We direct attention to the questions and answers of the plaintiff where she testified that the weather report on the radio announced that "it was freezing rain with icy spots" (p. 20); that she wore oxford shoes with low heels and had her cane when she left the house; that to get to the taxicab she walked on a concrete path in the courtyard, which was wide enough for only one person and had no guard rails, on both sides of which was grass (p. 20-22, 36). She further testified that after she had taken a few steps she slipped and fell; she then called to the taxi-man to help her up and she "was holding onto the grass; the grass was slippery, too; everything was full of ice" (p. 24) and that "the grass and walk were full of ice" (p. 26). On cross-examination

she testified "it was drizzling a little bit at the time just as (she) walked out the door" (p. 38) and admitted that on her examination before trial in response to a question whether when she was sitting on the walk after falling there, was any snow on either side of (her) or anything, she answered "no" and stated she "did not see what was beneath" (her) (p. 40). Of course, this did not establish that she did not slip on ice. Moreover on redirect examination she testified (p. 43):

"Q. Miss Berger, when you were sitting on the ground during the time you were waiting for the ambulance and the police to come, did you have occasion to feel the ground with your hands? A. Yes, around me.

Q. And did you feel anything unusual? A. Yes, of course; it was icy; it was slippery. I felt the ice on the grass.

Q. Could you see it after you felt it-- did you see the ice after you felt it around you? A. Yes, I did."

According to the weather records at 7 P.M. on February 10, 1965, the temperature was 39° and at 10 P.M. it was 37°. At midnight it started to drizzle. The temperature was then 35°. This drizzle, which was "a slight drizzle" continued to 4 A.M. at which time it was 32°. It then

stopped drizzling. At 8 A.M. of the morning of the accident the temperature was 31°. The log indicated "there was sprinkles, at 9 A.M., at 10 A.M. and 11 A.M. a light rain was falling and the temperature was 32° " (p. 46-50).

According to the testimony of one witness the walk on which plaintiff fell "was looking like wet and underneath was ice, that's what I saw" (p. 53).

The police officer who came to the scene of the accident testified that the walk was "very slippery" (p. 56) and was "a sheet of ice" and that he slipped while getting to where the plaintiff was (pp. 56 and 57). He was unable to say whether sidewalks elsewhere in the town were slippery (p. 56).

The testimony of the defendant's superintendent given upon an examination before trial was to the effect that he was charged with the responsibility of maintaining the walks that led from the house to the public sidewalk, but that on the day of the accident at about 8 A.M. he went to plow snow in the parking lots owned

of the storm would soon render the walks as slippery as before.

And it has also been held within a brief period after a storm has ceased there is no obligation for a few hours on the part of the owner or person in control of the premises to take any necessary precautions; they are allowed a reasonable length of time in which to attempt to overcome any serious condition."

apparently was referring to Bressler v. Rule Realty, Inc. 219 App. Div. 529, 220 N.Y.S. 461, aff'd with opinion in 248 N.Y. 619, which was cited by defendant in support of his motion to dismiss. In that case plaintiff slipped and fell on icy entrance steps of defendant's apartment house in which she was living. There a judgment for plaintiff was reversed on the law and facts and the complaint dismissed. The opinion (per curiam) states:

"The accident occurred while rain was still falling with freezing temperature. The defendant was not negligent, therefore in failing to remove the ice or to throw ashes or sawdust thereon (Kelly v. Manhattan R'way, 112 N.Y. 443, 20 N.E. 383, 3 L.R.A. 74.

Plaintiff was also guilty of contributory negligence in failing to safeguard herself against the obvious slippery condition of the step."

According to the headnote of that case, at the time she fell she did not notice the ice, nor look at

by the defendant. At that time "It was a very slight drizzle." He admitted that before he left at 8 A.M. he did not spread any sand or salt on any of the walks. The night before, but at what time he was unable to say, he sprinkled some chemical made by Dow Chemical on the walks; these were pellets and melted ice. He didn't remember spreading any on these pellets on the walk before he left at 8 A.M. It was his responsibility to do this (pp. 63-65).

On these facts the court should have submitted the case to the jury.

ARGUMENT
POINT I

THE RULE THAT A LANDLORD IS NOT LIABLE FOR INJURIES SUSTAINED BY A TENANT WHO FALLS WHILE RAIN IS FALLING IN FREEZING TEMPERATURE HAS NO APPLICATION.

The trial judge in granting the motion to dismiss stated as follows but cited no case (p. 81):

"The courts hold that an accident occurring while rain is still falling with freezing temperature the defendant is not negligent in failing to remove the ice or to do anything to attempt to counteract the slippery condition by throwing ashes or sawdust or other substance thereon, and the failure to apply ashes or anything of that character during a storm may not be regarded as negligence, because the continuation of the

of the storm would soon render the walks as slippery as before.

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Plaintiff was also guilty of contributory negligence in failing to safeguard herself against the obvious slippery condition of the step."

According to the headnote of that case, at the time plaintiff fell she did not notice the ice, nor look at

the steps, because her mind was on her business although it had been raining and freezing when plaintiff came home the previous night. It is therefore apparent that in the cited case a storm of long duration was raging. This case is inapposite.

It is to be noted that in Kelly v. Manhattan Railway Co., 112 N.Y. 443, cited in Bressler, the plaintiff slipped on an icy stairway leading to the defendant's railroad. Sleet and snow had fallen during the night until about 4 A.M. The accident occurred between half past five and six o'clock in the morning. The court reversed a judgment affirming a jury verdict for the plaintiff and granted a new trial and stated:

" * * * The defendant had furnished a covered stairway with hand rails and pieces of rubber on each step to prevent slipping, and the failure to throw ashes or sawdust or something of that character upon the steps during the storm can not be regarded as negligence, because the continuance of the storm would soon render the steps as slippery as before; and it seems to us that culpable negligence can not be predicated upon the failure to clean off the steps between the time the storm ceased, which was between three and four o'clock in the morning, and the time when the accident happened. So brief a period as that, at such a time in the night, can not, we think, be regarded as any

evidence of a lack of that reasonable care which the defendant was bound to exercise."

More apposite to the case at bar than the cases heretofore cited are Amodeo v. New York City Transit Authority, 10 App. Div. 2d 982, 203 N.Y.S. 2d 204 and Pfeffer v. City of New York, 25 App. Div. 2d 889, 270 N.Y.S. 2d 564.

In Amadeo, as in the case sub judice, the trial judge dismissed the complaint upon defendant's motion, made at the end of the case after defendant had rested without offering testimony. The plaintiff fell during a snowfall on an icy step of a stairway leading from an elevated railroad platform to the street. The stairway was covered on top but open at the sides. The snow began to fall about 10 P.M. the day before the accident and continued up to 6 P.M. that day when the plaintiff fell while descending the steps, which were covered with ice about three or four inches thick. Almost seven inches of snow had fallen.

In reversing, this Court pointed out, "There was no evidence that any measures had been taken during the day to alleviate the condition," and stated:

"The instant case is to be distinguished from those where nothing could reasonably be done to alleviate the condition due to the unusual severity of the snowstorm (e.g., *Henkin v. City of New York*, 286 App. Div. 1027, 145 N.Y.S. 2d 37, affirmed, 1 N.Y. 2d 784, 153 N.Y.S. 2d 52); or because sleet and snow turned to ice as soon as it reached the ground (e.g., *Falina v. Hollis Diner, Inc.*, 281 App. Div. 711, 118 N.Y.S. 2d 137, affirmed, 306 N.Y. 586, 115 N.E. 2d 686; *Bressler v. Rule Realty Co.*, 248 N.Y. 619, 162 N.E. 548; *Kelly v. Manhattan Ry. Co.*, 112 N.Y. 443, 20 N.E. 383, 3 L.R.A. 74). Furthermore, in our opinion a jury might find that the condition of the stairway had existed long enough, under the circumstances of this case, to charge the defendant with notice of the danger."

Again in Pfeffer, this Court reversed a judgment in defendant's favor upon the dismissal of the complaint at the close of the plaintiff's case. The plaintiff had fallen on a patch of ice covered by light snow. The ice had existed a minimum of twenty-four hours and perhaps longer. This Court stated that

" . . . whether the City had adequate opportunity to remove the ice was a question for the jury (cases omitted), as was the question as to whether the existing ice and newly-fallen snow were concurrent causes. (*Smith v. City of New York*, 282 App. Div. 495, 125 N.Y.S. 2d 123, aff'd, 307 N.Y. 843, 122 N.E. 2d 335) * * *."

Pfeffer and Smith are extremely pertinent because in the case at bar as in those cases the jury would have

been able to find that ice was on the path the night before and was made more hazardous by the drizzle. In Smith the Court affirmed a judgment for plaintiff, and stated:

"Even if we assume that the rain may have contributed to the hazzard to some degree, we think the case was one where the accumulated snow might be found to be a concurrent cause. In Ring v. City of Cohoes, 77 N.J. 83, 88, it was said: 'When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate - the one being a culpable defect in a highway, and the other some occurrence for which neither party is responsible - the municipality is liable provided the injury would not have been sustained, but for such defect.' * * *."

The foregoing authorities, we respectfully submit, mandate a reversal of the judgment dismissing the complaint upon defendant's motion since the case should have been submitted to the jury.

CONCLUSION

The judgment appealed from should be reversed and a new trial ordered with costs.

Respectfully submitted,

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29 AD 2ND 1049

To be argued by

DAVID W. SILVERMAN

Time: 10 minutes

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

JENNY BERGER,

Plaintiff-Appellant,

—against—

BEN-MAR BUILDERS, INC.,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

JENNY BERGER,

Plaintiff-Appellant,

—against—

BEN-MAR BUILDERS, INC.,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

Preliminary Statement

This Brief is respectfully submitted in support of the defendant-respondent's contention that the Trial Court did not err in its granting the defendant's motion to dismiss the plaintiff's complaint.

Facts

The plaintiff, Jenny Berger, is a resident at 15 East Funston Avenue, Spring Valley, New York, having lived there since May of 1960 (p. 18). The defendant corporation owns and manages the aforesaid premises.

On the 10th of February, 1965, the plaintiff after leaving her apartment, fell on the walk leading to the public sidewalk and sustained personal injuries.

The plaintiff testified that it was her usual custom upon awakening each morning to listen to the news and weather

forecast before getting out of bed, and this usually occurred between 7:00 and 8:00 A.M. (p. 19). On the morning of February 10, 1965, the plaintiff testified that she had listened to the weather forecast as usual (p. 19). In this connection, on her direct examination, the plaintiff testified as follows:

“Question—Do you recall what the weather report was that morning?

Answer—It was freezing rain with icy spots” (p. 20) (see also p. 35).

Subsequently, the plaintiff had breakfast, dressed and performed various chores in her apartment (p. 20). Shortly after 10:00 A. M., the plaintiff left the apartment in order to visit her sister (p. 20).

When the plaintiff left her apartment she was wearing a heavy coat, a hat, gloves, low heeled shoes and was using a cane (p. 21). The cane was used by the plaintiff to assist her in walking because of an arthritic right knee (pp. 24, 26).

A taxicab having been called by the plaintiff prior to her leaving the apartment, was waiting for her in the street. As the plaintiff alighted the front steps of the apartment building and started to follow the walk which crossed the courtyard to the street, she slipped and fell (p. 23). Prior to her fall she observed the wetness of the pavement but she stated “I didn’t pay much attention” (p. 23).

At the trial, having been asked what she slipped on, the plaintiff stated as follows (p. 41):

“Question—And did you see what your legs slipped on?

Answer—How could I see, I was sitting on it.

Question—And when they lifted you up, did you see what you had fallen on?

Answer—I really didn't look back. It was the first time in my life. I didn't think of looking; I was sitting there, I felt with my hand the ground and the grass; everything was covered with ice."

Plaintiff's direct testimony indicates the grass was icy (p. 24), as well as everything else (p. 26). The only recollection of plaintiff was that it was icy and cold (pp. 26, 37). At the time of the accident it is plaintiff's recollection that it was still raining (pp. 37, 38), which is buttressed by plaintiff's introduction of the weather records.

As part of the plaintiff's case, weather records of Orange and Rockland Utilities, Inc. were introduced in evidence. Records taken in Spring Valley wherein the apartment house was located (pp. 45-46) consisted of actual air temperatures and precipitation in any one hour both before and after the accident; commencing at 8:00 A. M. on February 9, 1965 and ending 8:00 A. M., February 11, 1965 (pp. 45, 46).

According to the testimony of James T. McConville of Orange and Rockland Utilities, Inc., there was freezing temperatures and light rain during the morning hours of February 10, 1965 at the very time the plaintiff sustained her fall. His testimony (p. 48) clearly indicates rain and freezing temperatures from 8:00 A. M. on the day of the accident, continuing past 11:00 A. M. with the accident herein occurring shortly after 10:00 A. M.

At page 7 of plaintiff-appellant's Memoranda of Law, there is submitted to this court without the slightest substantiation in the record, the following statement:

“However, when one reads the record and examines the exhibits it is readily apparent that plaintiff’s fall does not necessarily rest upon and be *solely* attributable to the falling freezing rain. For the record testimony from all witnesses and the exhibits show that no storm was pending and that ice had been present at least 12 hours before plaintiff fell which the defendant’s employee tried to remove.” (Italics plaintiff-appellant’s.)

It is this statement, unsubstantiated in the record, that must serve as the keystone of plaintiff-appellant’s position.

We point out to the court that the records of Orange and Rockland Utilities, Inc. maintained its office in very close proximity to the place of the accident and introduced by plaintiff as its exhibit, indicates the day before this accident, February 9, 1965, that there was no precipitation (pp. 46, 47). Commencing at midnight on the 9th and up until approximately 4:00 A. M. in the morning, it was “drizzling” but the temperature was above freezing (p. 47). It again started to sprinkle at 8:00 A. M. on the morning of the accident, the weather went to freezing and the sprinkle and freezing weather continued until at least 11:00 A. M. some one-half hour after this accident (p. 48). The plaintiff herself testified that at the time of her fall that it was very cold (pp. 26, 37), and she could not testify as to the condition of the walk on the day previous; namely, February 9, 1965 (p. 26). The other witnesses who testified; namely the witness Sherman (pp. 51-53) was not even asked to describe the previous condition of the walk. The police officer who testified, Officer Brandt (pp. 54 *et seq.*) did not even remember the weather conditions of

the day of the accident other than it was slippery (p. 56). No inquiry as to the prior condition of the walk was made.

There is not one fact in evidence in this record which would substantiate the plaintiff-appellant's statement that something else other than the freezing rain in existence at the time of the accident could have been the proximate cause. When plaintiff-appellant italicizes "solely," the court should at least be informed as to what the other causes might have been.

POINT I

The court did not err in holding an absence of liability on the part of the defendant.

Plaintiff's testimony in this case established that the accident occurred while it was raining, and when the temperature was at freezing.

In such cases as *Bressler v. Rule Realty Co., Inc.*, 219 App. Div. 529, aff'd 248 N. Y. 619, the court held that an accident which occurred while it was raining and the temperature was below freezing was one in which the plaintiff could not recover. The Appellate Division held, in a per curiam decision:

"The accident occurred while rain was still falling with freezing temperature. The defendant was not negligent, therefore, in failing to remove the ice or to throw ashes or sawdust thereon. Plaintiff was also guilty of contributory negligence in failing to safeguard herself against the obvious slippery condition of the steps."

Also cited is *Kelly v. Manhattan Railway Co.*, 112 N. Y. 450. In that particular case the court held:

“The failure to throw ashes or sawdust or something of that character upon the steps during the storm cannot be regarded as negligence, because the continuation of the storm would soon render the steps as slippery as before” (p. 452).

The court goes on and holds that the accident happened some two hours after the storm had ceased and stated that:

“So brief a period as that, at such a time in the night, cannot, we think, be regarded as any evidence of a lack of that reasonable care which the defendant was bound to exercise.”

Similar cases have held that not only is the defendant relieved of any obligation of removing ice during a storm, but he has a reasonable time thereafter to remove the ice. This doctrine has been enunciated in such cases as *Valentine v. The State of New York*, 197 Misc. 972; *McAuley v. United Cigar Stores Co.*, 204 App. Div. 356; and *Green v. Green*, 212 App. Div. 381.

The Appellate Division, Second Department, in *Falina v. Hollis Diner, Inc.*, 281 App. Div. 711, dealt with a factual situation wherein steps were glossed over with ice. In that case the Appellate Division held:

“Appellant was not under a duty to correct the ice surfaces until a reasonable time after the cessation of the storm.”

In a similar case, of *Henkin v. City of New York*, 286 App. Div. 1027, the court held that two hours after a storm was insufficient time to charge the defendant with responsibility for removing ice.

See, also, *Hoffman v. Bachrach*, 20 A. D. 2d 790.

We have cited cases involving municipalities and to show their applicability we cite *Dwyer v. Woollard*, 205 App. Div. 546, where the court states:

“There can be no doubt, therefore, that in certain instances ice accumulations in a yard commonly used by tenants must seasonably be removed by the landlord. This duty, however, cannot be greater than the obligation of municipalities in relation to ice which forms upon its sidewalks.”

Throughout this case it has been established by the plaintiff that the ice which was formed was natural and was free of what we will call lumps and bumps. With respect to this contention, we submit the case of *Dwyer v. Woollard*, 205 App. Div. 546, where the court held that the landlord is not liable for natural accumulations of snow and ice, but he has a duty to remove rough and bumpy accumulations of snow and ice, such as hummocks or ridges in the path of the user of a walk. There is nothing in the case at bar which alludes to such a state of facts.

The facts of the case at bar clearly indicate rain and freezing weather at the time of plaintiff-appellant's fall. There is a complete absence of any prior dangerous condition of the walk to which the ice forming adhered to.

In *Hallock v. Ballachey*, 258 App. Div. 774, the court, passing upon ice and snow which had accumulated, stated:

“It is unreasonable to expect sidewalks and outside steps to be kept entirely free from snow and ice in this climate in the winter time.”

A similar statement is to be found in *Valentine v. State of New York*, 197 Misc. 972, where the court held:

“Further, there are cases holding that a landlord in control of yards and walks and areas of leased premises is under no duty toward the tenants with respect to natural accumulations of ice, unless unusually ridgy and lumpy.”

The *Valentine* case also continued, at page 975, to hold that the landlord would not be liable if the conditions of his walk were no worse than the prevailing conditions in the area.

See, also, *Schwable v. St. Augustine's Church*, 288 N. Y. 554.

See, also, *Van Slyke v. New York Central Railroad*, 21 A. D. 2d 147; *Dwyer v. City of New York*, 18 A. D. 2d 902, 237 N. Y. S. 2d 836.

POINT II

The plaintiff has not shown an absence from contributory negligence.

The plaintiff has established, by her own testimony, that she was aware of the dangers and had been forewarned. The plaintiff's condition, unfortunately, is one of an aged, arthritic woman, who, because of personal obligations braced the elements to attend her sister at the hospital. To hold the landlord responsible for the injuries she sustained would be to violate the many previous holdings that knowledge of the danger, and assumption of the risk preclude recovery.

In *Cohen v. The State of New York*, 19 Misc. 2d 530, 193 N. Y. S. 2d 329, where the Court of Claims dealing with an accident which occurred in a four family house held:

“Under the circumstances, the Court finds no negligence upon the part of the State. Even if the State had been negligent, claimant was guilty of contributory negligence in that he failed to exercise due care in his descent of the steps, particularly since he was well aware of the prevailing condition thereof. *Bressler v. Rule Realty Co., Inc.*, 219 App. Div. 529, 220 N. Y. S. 461, affirmed 248 N. Y. 619, 162 N. E. 548. He who fails to safeguard himself against or to avoid what is obviously a known danger must be held liable for ensuing injury. *Powers v. Montgomery Ward & Co., Inc.*, 251 App. Div. 120, 295 N. Y. S. 712, affirmed 276 N. Y. 600, 12 N. E. 2d 595; *Griffin v. State of New York*, 250 App. Div. 244, 295 N. Y. S. 304.”

See, also, *McFarlane v. City of Niagara Falls*, 247 N. Y. 340, at pages 347 through 349; *Griffin v. State*, 250 App. Div. 244; *Powers v. Montgomery Ward*, 251 App. Div. 120; *Preuschoff v. Wank*, 16 A. D. 2d 691; *Utica Mutual Insurance Co. v. Amsterdam Color Works*, 284 App. Div. 376; *Conroy v. Saratoga Springs Authority*, 259 App. Div. 365.

CONCLUSION

It is respectfully submitted to the court that the facts introduced in evidence by the plaintiff-appellant clearly indicate an absence of liability on the part of the defendant-respondent. The plaintiff-appellant's pre-existing knowledge of a dangerous condition and an accident which occurred because of a fall on ice during the actual storm itself, must dictate the conclusion that there is an absence of freedom from contributory negligence.

Respectfully submitted,

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