State of New York - Court of Appeals
Supreme Court of the State of New York

Robert A. Ficalora as assignee of Montauk Friends of Olmsted Parks, inc., a not-for-profit corporation established under the laws of the State of New York

Plaintiff,

- against -

The town board government of East Hampton
and
Sunbeach Montauk II, inc., as claimant fee title holder to the Hither Plain Reservation and Bathing Reservation properties in Montauk.

Defendants.

Notice of Appeal (1)

A. D. 2nd 99-02065
Suffolk 98-14806

PLEASE TAKE NOTICE that on this fifth day of February, 2001, Robert A. Ficalora, *pro se*, assignee and authorized representative of the Montauk Friends of Olmsted Parks corporation under the laws of the State of New York, does herewith and hereby notice an appeal to the Court of Appeals of the decision and order of the Second Judicial Department of the Appellate Division dated October 23rd, 2000, on the ground that the application of CPLR 321(a) as ground for dismissal is unconstitutional denial of equal protection of the law under the Constitution of the State of New York and the United States of America given the many assignments of the corporation's cause shown in the record (CPLR § 5601(b)(2), U. S. Constitution 14th Amendment, N.Y. Constitution Article 1 § 11, See: Kamp v. In Sportswear, 39 A.D. 2d 869, *revg for reasons stated in dissent at App.. Term* 70 Misc. 2d 898). The Appellate Division entered a decision and order denying a motion for reconsideration or leave to appeal in the above matter on December 21st, 2000, which was served by mail by defendant's counsel on January 8th, 2001.

Robert A. Ficalora, *pro se*

State of New York - Court of Appeals
Supreme Court of the State of New York

Robert A. Ficalora as assignee of Montauk Friends of Olmsted Parks, inc., a not-for-profit corporation established under the laws of the State of New York

Plaintiff,

- against -

The town board government of East Hampton
and
Sunbeach Montauk II, inc., as claimant fee title holder to the Hither Plain Reservation and Bathing Reservation properties in Montauk.

Defendants.

Notice of Appeal (2)

A. D. 2nd 99-02065
Suffolk 98-14806

PLEASE TAKE NOTICE that on this fifth day of February, 2001, Robert A. Ficalora, *pro se*, assignee and authorized representative of the Montauk Friends of Olmsted Parks corporation under the laws of the State of New York, does herewith and hereby notice an appeal to the Court of Appeals of the decision and order of the Second Judicial Department of the Appellate Division dated October 23rd, 2000, on the ground that the Town of East Hampton's claim of jurisdiction over Montauk and the constitutional repeals of Article 1 § 15 and Article 1 § 13 of the Constitution of the State of New York is and were unconstitutional under the state and federal constitutions (CPLR § 5601(b)(1)). The Appellate Division entered a decision and order denying a motion for reconsideration or leave to appeal in the above matter on December 21st, 2000, which was served by mail by defendant's counsel on January 8th, 2001.

Robert A. Ficalora, *pro se*

State of New York - Court of Appeals
Supreme Court of the State of New York

Robert A. Ficalora as assignee of Montauk Friends of Olmsted Parks, inc., a not-for-profit corporation established under the laws of the State of New York

Plaintiff,

- against -

The town board government of East Hampton
and
Sunbeach Montauk II, inc., as claimant fee title holder to the Hither Plain Reservation and Bathing Reservation properties in Montauk.

Defendants.

Affirmation of Service

A. D. Case No. 99-02065

I, Robert A. Ficalora, do affirm under the penalty of perjury that on February 5th, 2001, I did forward a copies of a Notice of Appeal (1) and Notice of Appeal (2) in the above captioned matter by depositing same in a sealed postage paid envelope in the care of the United States postal service to:

ESSEKS, HEFTER & ANGEL, ESQS.
Attorneys for *Sunbeach Montauk Two, inc.*
108 East Main Street - P.O. Box 279
Riverhead, New York 11901

CAHN, WISHOD & KNAUER
Attorneys for the *town board government of East Hampton*,
425 Broad Hollow Road - Suite 315
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Robert A. Ficalora

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RICHARD C. CAHN
EUGENE L. WISHOD
TODD A. KNAUER

BRIAN T. EGAN

January 8, 2001

Mr. Robert A. Ficalora
P.O. Box 2612
Montauk, New York 11954

Re: Robert A. Ficalora v. The Town Board
Government of The Town of East Hampton
and Sunbeach Montauk II, Inc.
Docket No. 99-02065

Dear Mr. Ficalora:

We serve herewith Decision and Order on Motion of the Appellate Division, Second Department, with notice of entry in connection with the above-entitled appeal.

Very truly yours,

Richard C. Cahn

RCC/pdm
Enclosure

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

3681G
U/mm

LAWRENCE J. BRACKEN, J.P.
LEO F. McGINITY
DANIEL F. LUCIANO
SANDRA J. FEUERSTEIN, JJ.

1999-02065

DECISION & ORDER ON MOTION

Robert A. Ficalora, etc., appellant, v
Town Board Government of East Hampton,
respondent, et al., defendant.

Motion by the appellant, in effect, for reargument of an appeal from an order of the Supreme Court, Suffolk County, dated February 1, 1999, which was determined by decision and order of this court dated October 23, 2000, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

BRACKEN, J.P., McGINITY, LUCIANO and FEUERSTEIN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

December 21, 2000
FICALORA v TOWN BOARD GOVERNMENT OF EAST HAMPTON

October 23, 2000

FICALORA v TOWN BOARD GOVERNMENT OF EAST HAMPTON

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

2843B

U/hu

AD2d Argued - September 5, 2000

LAWRENCE J. BRACKEN, J.P.

LEO F. McGINITY

DANIEL F. LUCIANO

SANDRA J. FEUERSTEIN, JJ.

1999-02065

DECISION & ORDER

Robert A. Ficalora, etc., appellant, v Town Board Government of East Hampton,

respondent, et al., defendant.

Robert A. Ficalora, Montauk, N.Y., appellant pro se.

Cahn Wishod & Knauer, LLP, Melville, N .Y. (Richard C. Cahn of counsel), for respondent.

In an action, inter alia, for a judgment declaring that the title to certain property held by the defendant Sunbeach Montauk II, Inc., is invalid, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Underwood, J.), dated February 1, 1999, which denied his motion for the court to recuse itself, and granted the cross motion of the defendant Town Board Government of East Hampton to dismiss the complaint .

ORDERED that the order is affirmed, with costs.

Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter on the issue of recusal (see, People v Moreno, 70 NY2d 403, 405; Fisk v Slye, 234 AD2d 983; see also, Colburn v Blum , 233 AD2d 890). The plaintiff failed to demonstrate that the Supreme Court erred in refusing to recuse itself from the case. The plaintiff's dissatisfaction with the Supreme Court's act of striking two provisions for temporary restraining orders contained in a previous order to show cause, standing alone, is insufficient to demonstrate a basis for recusal.

The Supreme Court also properly dismissed the complaint. CPLR 321(a) provides, with exceptions not applicable here, that a corporation or voluntary association shall appear by an attorney. A corporation can validly assign a claim, even if the assignment is undertaken to circumvent the statutory prohibition against a corporation appearing for itself (see , Traktman v City of New York, 182 AD2d 814, 815; Medical Facilities v Pryke, 172 AD2d 338). In this case, however, there was no valid assignment, as the complaintexpressly stated that the plaintiff, who is not an attorney, was designated to represent the corporation before the court for the purposes for which the corporation was established (see, CPLR 321 [a]; see also, Montauk Friends of Olmstead Parks v Brooklyn Historical Socy., 95 NY2d 821; Matter of Ficalora v Planning Bd. of Town of E. Hampton, 94 NY2d 891; Hilton Apothecary v State of New York, 89 NY2d 1024).

BRACKEN, J.P., McGINITY, LUCIANO and FEUERSTEIN, JJ., concur.

ENTER:

James Edward Pelzer

Clerk

Montauk Friends of Olmsted Parks, Inc.
P.O. Box 2612
Montauk, NY 11954
(631) 668-3119
email: trustees@montauk.com

Montauk Friends of Olmsted Parks
MFOP
Montauk's Trustee Corporation
Est. 1852/1994

Resolution of Assignment

11/7/2000

On November 7th, 2000, we, the undersigned board of directors of the Montauk Friends of Olmsted Parks/Montauk Trustee corporation, having convened and considered the common law of the State of New York as established by in Kamp as assignee of AAA Stretch, inc., Appellant v. In Sportswear, inc., Respondent 39 A.D.2d 869, 332 N.Y.S.2d 983, *reversing on dissenting opinion of Mr. Justice Lupiano*, 70 Misc 2d 898, 899; 335 N.Y.S.2d 306, our past assignment of corporate causes before the Supreme Court of the State of New York to our acting president Robert A. Ficalora in attempted conformity with the law, and the decision and order of the Appellate Division of the Supreme Court of the State of New York entered on October 23rd, 2000, which dismissed our past assignments as invalid, do herewith attest our

Resolve: that Mr. Ficalora is and for the present shall continue to be assigned the power and responsibility to represent this corporation in all of the corporation's matters before the court including and especially its pending cause in the matter of Robert A. Ficalora as Assignee of the Montauk Friends of Olmsted Parks corporation vs. the town board government of the Town of East Hampton, et. ano., filed with the Suffolk County Clerk as cause no. 98-14806, and that he shall do so in return for one dollar and other good and valuable consideration.

Steve Corwin

Helen Ficalora

William Grimm

Daniel Grimm

Richard Monahan

FRIENDS OF OLMSTED PARKS INC. CORPORATE SEAL NEW YORK

HERMAN A. KAMP, as Assignee of AAA STRETCH, INC., Appellant, *v.* IN SPORTSWEAR, INC., Respondent.

Supreme Court, Appellate Term, First Department, January 28, 1972.

Corporations — appearance by attorney — in absence of denial that corporation assigned chose in action to plaintiff, its sole stockholder, to avoid requirement that corporation appear by attorney, suspicion that assignment is contrary to public policy is confirmed and assignment is invalid; plaintiff lacks legal capacity to sue.

In the absence of a denial of defendant's averments that plaintiff is the sole stockholder, director and officer of his corporate assignor and that the purpose of the assignment of the chose in action was to avoid the statutory requirement (CPLR 321, subd. [a]) that corporations appear by attorney, the suspicion is confirmed that the assignment is in contravention of the public policy of CPLR 321 and is invalid. Plaintiff therefore lacks legal capacity to sue.

APPEAL from an order of the Civil Court of the City of New York, New York County (CHARLES S. WHITMAN, JR., J.), entered June 22, 1971, which granted a cross motion by defendant for summary judgment and denied a motion by plaintiff for an order to preclude and to strike out the defendant's answer.

Herman A. Kamp, appellant in person. *Ruben Schwartz, Martin W. Fogel* and *Paul R. Kaplan* for respondent.

Per Curiam. The assignment of a chose in action by a corporation to one of its stockholders, directors or officers who thereupon maintains suit in his individual name, *pro se,* is reasonably suspect as an attempted evasion of CPLR 321 (subd. [a]) requiring corporations to appear by attorney. The plaintiff-assignee here does not deny defendant's averments that he is the sole stockholder, director and officer of his corporate assignor, and that the purpose of the assignment was to circumvent the statutory prohibition against corporations appearing pro se. Nor does he attempt to offer any explanation which might dissipate the suspicion of an attempt to flout the provisions of CPLR 321 (subd. [a]) which we deem declaratory of the public policy of this State. (See *Oliner* v. *Mid-Town Promoters,* 2 N Y 2d 63.) In the absence of such a denial and explanation the suspicion is confirmed that the assignment is in contravention of public policy, hence invalid. Thus the plaintiff lacks legal capacity to sue. The order should be affirmed, with $10 costs.

LUPIANO, J. (dissenting). Apart from the fact that the affidavits failed to supply facts sufficient to support the finding that the assignments were made to circumvent the provisions of CPLR 321 preventing a corporation from appearing in person, the motive for the assignments is immaterial (*Schwartz*

v. *Fletcher,* 238 App. Div. 554, 557; *Birdsall* v. *Read,* 188 App. Div. 46; *Meisels* v. *Harris,* 136 N. Y. S. 2d 655; *Hoppe* v. *Russo-Asiatic Bank,* 200 App. Div. 460, affd. 235 N. Y. 37; *Wagner* v. *Braunsberg,* 5 A D 2d 564). The assignments, patently valid, transferred all of the interests of the assignor to the plaintiff and he thereby acquired the right to enforce the claims by action (General Obligations Law, § 13-105). Nor does public policy require us to invalidate the assignments. Significantly, the statute (CPLR 321, subd. [a]), does not extend the prohibition against a corporation appearing for itself in our courts to an assignee (cf. General Corporation Law, § 218). The objection to a corporation appearing in person is that it is not a natural person and must act through its agents; therefore, in legal matters it must act through licensed attorneys. But when it assigns its cause of action to a natural person, for whatever reason, the statute authorizes the latter to prosecute the action in person.

I, therefore, dissent and vote to reverse the order to the extent of denying the cross motion and remitting the motions in chief to the court below for consideration and determination.

GOLD, J. P., and QUINN, J., concur in *Per Curiam* opinion; LUPIANO, J., dissents in memorandum.

Order affirmed, with $10 costs.

In the Matter of LLOYD A. HAMILTON, JR., et al., Petitioners, *v.* HENRY L. DIAMOND, as Commissioner of Environmental Conservation of the State of New York, et al., Respondents.

Supreme Court, Special Term, Albany County, July 20, 1972.

Waters and watercourses — erection of seawall — Commissioner of Environmental Conservation issued permit for construction of seawall on Hudson River; regulations of Commissioner implement Constitution and Environmental Conservation Law in regard thereto — reliance of Commissioner on determination of acting central permit agent is proper — determination was not arbitrary.

1. Section 4 of article XIV of the Constitution and section 10 of the Environmental Conservation Law envision the wise use, development and control of the State's natural resources and the prevention of unreasonable depletion, defilement and damage. The rules and regulations of the Commissioner of Environmental Conservation providing for the issuance of a permit to construct a seawall on a portion of under water property in the Hudson River are valid implementations of the State policy expressed therein.

2. The Commissioner's grant of a permit, relying upon the acting central permit agent's determination rather than that of a hearing officer, is the determination of the Commissioner.

complexity of the medical issues on trial. The charge in this case was palpably inadequate.

Reversal is also warranted because the plaintiff's attorney made several unfair comments during the course of his summation. If this were a case where liability had been shown with any degree of clarity, these improper remarks probably would have been attributed to excessive zeal and forgiven as harmless. But in a case where the plaintiff has produced an expert witness who is unconvincing at best, it was particularly unbecoming for the plaintiff's attorney to suggest that it was the defendant's expert who was "shading the truth", or to accuse the defendant's expert of being the "hired gun". Counsel's remark that the defendant's expert's "idea of truth and justice is that this is a game to be played" was likewise improper. " 'When misconduct of counsel in * * * summation so violates the rights of the other party to the litigation that extraneous matters beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned' " *(Escobar v Seatrain Lines,* 175 AD2d 741, 744, quoting *Kohlmann v City of New York,* 8 AD2d 598).

For the foregoing reasons, the judgment appealed from is reversed, on the law, and as a matter of discretion, and a new trial granted. Thompson, J. P., Bracken, Harwood and Copertino, JJ., concur.

14 HENRY TRAKTMAN, Respondent, v CITY OF NEW YORK, Appellant.—In an action to recover damages for breach of contract, the defendant appeals, by permission, from an order of the Appellate Term of the Supreme Court for the Second and Eleventh Judicial Districts, dated June 21, 1991, which affirmed an order of the Civil Court, Kings County (Fuchs, J.), entered July 6, 1990, which denied the defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (3).

Ordered that the order is affirmed, with costs.

Metropolitan Heat and Power Company, Inc., assigned to the plaintiff, its employee, a claim for $12,000 against the defendant. Thereafter, the plaintiff commenced this action to recover on the claim. The defendant moved to dismiss the complaint, claiming that the assignment violated Judiciary Law § 489 and CPLR 321 (a). The Supreme Court denied the motion and the Appellate Term affirmed.

We find that the defendant's motion was properly denied. Judiciary Law § 489 prohibits individuals who are directly or indirectly engaged in the business of collection and adjustment of claims from taking an assignment for the purpose of bringing an action. Despite the fact that the plaintiff has commenced litigation on several assigned claims, the evidence presented fails to establish that the plaintiff is engaged in the business of collecting claims or that the plaintiff took the assignment for the purpose of bringing an action.

Further, the assignment does not violate CPLR 321 (a), which prohibits a corporation from appearing *pro se.* We find that the statutory prohibition does not extend to an assignee of a corporation, despite the fact that the assignment may have been made to circumvent the statutory prohibition against a corporation appearing *pro se (see, Medical Facilities v Pryke,* 172 AD2d 338; *Kamp v In Sportswear,* 39 AD2d 869, *revg* 70 Misc 2d 898, *on dissenting opn at App Term).*

Thus, we conclude that the assignment was valid, and the defendants' motion was properly denied. Thompson, J. P., Lawrence, Miller and Ritter, JJ., concur.

15 CHARLES W. TURNER et al., Appellants, v FEDERATED DEPARTMENT STORES, INC., Defendant, and ORBACH, INC., Respondent. (And a Third-Party Title.)—In a negligence action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Kings County (Garry, J.), dated April 12, 1990, which granted the defendant Orbach's motion for summary judgment dismissing the complaint insofar as it is asserted against it.

Ordered that the order is affirmed, with costs.

The plaintiff, a New York City police officer, responded to a burglary call at an Abraham & Strauss store (hereinafter A&S) located in Queens County where he allegedly sustained personal injuries when he fell through an acoustical tile ceiling. The A&S store is part of a shopping complex which also houses an Orbach store, a common mall area, and a parking garage.

The plaintiff contends that the defendant Orbach, Inc. retained sufficient control of the premises to be held liable for his injuries. Under the facts of this case, we find no basis for imposing liability on Orbach, Inc., which did not occupy, own, or control the property where the accident occurred *(Balsam v Delma Eng'g Corp.,* 139 AD2d 292). Consequently, the court correctly granted summary judgment dismissing the complaint as against Orbach, Inc. Eiber, J. P., O'Brien, Copertino and Pizzuto, JJ., concur.

16 In the Matter of Surety Agency Petitioner [illegible]

quantity of proof presented at trial with respect to the various offenses.

We have reviewed the additional arguments raised on appeal in defendant's *pro se* supplemental brief and find them to be without merit. Concur—Sullivan, J. P., Carro, Ellerin, Ross and Kassal, JJ.

29 MEDICAL FACILITIES, INC., Appellant, v JOHN W. PRYKE, Respondent.—Order, Supreme Court, Bronx County (Anita Florio, J.), entered February 22, 1990, which denied plaintiff-appellant's motion to vacate the CPLR 3404 dismissal of this action, unanimously reversed, on the law, the facts, and in the exercise of discretion, the motion is granted, and the matter is restored to the trial calendar, with leave to Owen J. McCormack to prosecute it *pro se,* without costs.

Plaintiff-appellant, Medical Facilities, Inc., a Bronx community health care center operated by its owner and sole shareholder, Owen J. McCormack, brought this action in July 1981 against its insurer, Underwriters At Lloyds, London, which party was subsequently substituted by defendant-respondent, John William Pryke. Plaintiff sought to recover pursuant to an insurance policy in effect on July 21, 1975, when it sustained losses due to a fire which caused extensive damage to its premises. Although the insurer had satisfied plaintiff's property damage claim, it disclaimed liability for losses asserted under the "business interruption" and "rent" provisions of the policy.

In a prior appeal to this Court, defendant challenged the denial of its motion for summary judgment dismissing the complaint on the grounds that there existed no triable issues of fact and that the matter was time-barred under the statute of limitations. The trial court's denial of summary judgment was sustained, both at this appellate level (95 AD2d 692) and by the Court of Appeals (62 NY2d 716).

Following defendant's appeals, depositions were conducted and, on August 22, 1986, plaintiff served a note of issue and certificate of readiness upon defendant, and the case was placed on the trial calendar of May 6, 1987. By that date, however, plaintiff's attorney had withdrawn from the case, and Owen McCormack appeared *pro se* on behalf of plaintiff to request an adjournment so that he could retain counsel. Before he was able to do so, however, McCormack was diagnosed as having cancer, and was required to undergo extensive medical care, including surgery.

begin making inquiries as to the status of the case, and he eventually learned that it had been dismissed in May 1988, as an abandoned case within the meaning of CPLR 3404.

At issue before this Court is the denial of McCormack's motion to restore the case to the trial calendar. In ruling that McCormack had failed to establish both the existence of a meritorious cause of action and the absence of prejudice to defendant, the IAS part did not determine whether McCormack had standing to appear on behalf of the plaintiff, but assumed, *arguendo,* this fact for the purpose of the motion. Upon examination of this record, we conclude that McCormack properly appeared, and that the IAS part improperly denied the motion to vacate.

The record contains an assignment of the corporate plaintiff's cause of action to its sole shareholder, Owen J. McCormack. It is facially valid and we are unable to discern any reason why it should not be honored. *(See, Kamp v In Sportswear,* 39 AD2d 869, *revg for reasons stated in dissent at App Term* 70 Misc 2d 898.)

With respect to whether plaintiff has established a meritorious cause of action, as required for the vacatur of dismissal pursuant to CPLR 3404 *(see, Mamet v Mamet,* 132 AD2d 479, 480), our examination of the record leads us to further conclude that plaintiff has met this burden. Plaintiff's insurance policy contained coverage for the losses claimed, and this Court's prior affirmance of the denial of defendant's motion for summary judgment was predicated upon a determination that there exist material triable issues of fact.

Moreover, we are unpersuaded that a different result is mandated by plaintiff's alleged failure to file proofs of loss, an argument defendant also raised in the prior appeal. Pursuant to Insurance Law § 172 (1) (now § 3407 [a]), an insured's failure "to furnish proofs of loss to the insurer * * * shall not be deemed to invalidate or diminish any claim of such person under [an insurance] contract, unless such insurer * * * shall * * * give to such person insured a written notice that it or they desire proofs of loss to be furnished by such person to such insurer * * * *[on] a suitable blank form or forms*". (Emphasis added.)

The within insurer-defendant did not provide proof of loss forms until 18 months after the fire, and those provided were not blank, as required by statute, but filled in with amounts considered inadequate by plaintiff.

dice, that the age of this litigation is in part attributable to defendant's appeals, and that both the transcript of the deposition of its now-retired representative and the insurance contract which forms the basis for this litigation, are available. Concur—Milonas, J. P., Asch, Kassal and Rubin, JJ.

30 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SANTOS SANCHEZ, Appellant.—Judgment of the Supreme Court, Bronx County (Phylis Bamberger, J.), rendered May 11, 1989, convicting defendant, after jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing defendant to concurrent indeterminate terms of imprisonment of from two to six years, respectively, unanimously affirmed.

The prosecutor's comments on summation, challenged by defendant on appeal, were by and large made in response to statements made by defense counsel during summation and, within the context of this case did not improperly diminish the People's burden of proof. In any event, any error was cured by the trial court's subsequent proper instruction to the jury *(see, People v Bojku,* 156 AD2d 269, 270, *lv denied* 75 NY2d 964).

No objection was raised at trial to the prosecutor's comment in which he referred to a Jackie Gleason episode. Therefore, any issue raised with respect thereto is not preserved for appellate review. Were we to consider such statements, in the interest of justice, we would find that the comments did not exceed the bounds of permissible rhetorical comment *(see, People v Ramos,* 168 AD2d 359) and were a fair response to defense counsel's charge that the People's case was a fabrication *(People v Soriano,* 166 AD2d 187, *lv denied* 76 NY2d 991). Concur—Milonas, J. P., Ross, Kassal, Smith and Rubin, JJ.

31 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v EMILIO GONZALEZ, Appellant.—Judgment, Supreme Court, Bronx County (Peggy Bernheim, J.), rendered on July 22, 1987, convicting defendant, upon a plea of guilty, of robbery in the first degree and sentencing defendant to an indeterminate term of imprisonment of 5 to 10 years, unanimously affirmed.

We are unpersuaded that the sentence imposed was unduly

Further, defendant was sentenced in accordance with his plea bargain and within statutory guidelines. "Having received the benefit of his bargain, defendant should be bound by its terms." *(People v Felman,* 141 AD2d 889, 890, *lv denied* 72 NY2d 918.) Concur—Milonas, J. P., Ross, Kassal, Smith and Rubin, JJ.

32 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v EMILIO GONZALEZ, Appellant.—Judgment, Supreme Court, New York County (Jerome Marks, J.), rendered on October 8, 1987, convicting defendant, upon a plea of guilty of two counts of robbery in the second degree and sentencing defendant to concurrent indeterminate terms of imprisonment of 1½ to 4½ years to run consecutive to a previously imposed judgment of the Supreme Court, Bronx County (Peggy Bernheim, J.), convicting defendant of robbery in the first degree, and sentencing him to an indefinite term of imprisonment of 5 to 10 years, unanimously affirmed.

We are unpersuaded that the sentence imposed was unduly harsh or severe. Taking into account, "among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction", we perceive no abuse of discretion warranting a reduction in sentence. *(People v Farrar,* 52 NY2d 302, 305.)

Further, defendant was sentenced in accordance with his plea bargain and within statutory guidelines. "Having received the benefit of his bargain, defendant should be bound by its terms." *(People v Felman,* 141 AD2d 889, 890, *lv denied* 72 NY2d 918.) Concur—Milonas, J. P., Ross, Kassal, Smith and Rubin, JJ.

33 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JUAN DIAZ, Also Known as MIGUEL CALIMANO, Also Known as CALIMANO DIAZ, Appellant.—Upon reargument, the decretal paragraph of the decision and order of this court, entered February 7, 1991, which reversed defendant's conviction of burglary in the second degree, criminal trespass in the second degree and possession of burglar's tools, and remanded for a new trial, is unanimously vacated, and the following is substituted in its place: "Judgment, Supreme Court, New York County (Albert Williams, J.), rendered January 13, 1989