SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 9, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1634 Mohammad Fofana, Index 1186/06
Plaintiff-Respondent,

-against-

41 West 34th Street, LLC, et al.,
Defendants-Appellants,

Newmark & Company Real Estate, Inc., et al.,
Defendants.

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellants.

Vogel & Rosenberg, New York (Stuart DiMartini of counsel), for respondent.

Order, Supreme Court, Bronx County (Nelson S. Román, J.), entered September 16, 2008, which denied the motion of defendants-appellants 41 West 34th Street, LLC, GSL Enterprises, Inc., Winoker Realty Co., Inc., and Midboro Holdings Co., LLC, for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, the motion granted, and the complaint and all cross claims against said defendants dismissed. The Clerk is directed to enter judgment in favor of defendants-appellants accordingly.

Plaintiff Mohammad Fofana instituted this action to seek damages for injuries sustained when he fell into the freight elevator shaft of 64 W. 35th Street in Manhattan on February 6, 2004. The land on which the building was situated was owned by defendant 41 West 34th Street, and leased to defendant Midboro. Midboro owned the building, which Winoker managed. Defendant Alliance Elevator Co. was responsible for maintaining the freight elevator. GSL had transferred the subject property to 41 West 34th Street in 2001. Fofana had been to the building regularly before the date of the accident, bringing customers in order to purchase bootleg CDs and DVDs from "Mr. Ba," whose office was on the 4th floor. On the day of the accident, Fofana brought two customers to Mr. Ba's. After nobody answered the door, Fofana went to look for Mr. Ba while his customers stayed behind. Fofana then saw Mr. Ba, who said that he would tell his brother to let Fofana into the office. When Fofana returned to Mr. Ba's office, Robert Haynes, an individual who also sold CDs and DVDs, opened the door. Fofana's customers were already inside. Haynes, who allegedly was trying to take away Fofana's customers, apparently would not let Fofana into the office. When Fofana tried to enter, Haynes pushed him into the hallway, where a scuffle ensued. Eventually both Fofana and Haynes fell against the elevator door, which had been closed. The door opened, and both individuals then fell into the shaft.

On December 3, 2004, Fofana commenced an action against, inter alia, 41 West, GSL, and Winoker, and on February 28, 2006, he commenced a separate action against Midboro. Both actions were filed in Supreme Court, New York County.

Previously, on August 5, 2004, Haynes had commenced a personal injury action in Supreme Court, Bronx County, against several of the same defendants. Eventually, the *Haynes* action was consolidated in the Bronx with plaintiff's two New York County actions. Fofana was impleaded as a third-party defendant in the *Haynes* action.

By notice dated October 5, 2006, the defendants in the *Haynes* action moved for summary judgment on the grounds, inter alia, that the evidence established that the freight elevator complied with the elevator code in effect when built, and contained no defects at the time of the accident. They contended that the elevator door was caused to be opened by the force of being struck by plaintiff's and Haynes's weight, as the two fought.

On August 17, 2007, the trial court granted the motion, on the ground, inter alia, that there was no evidence that defendants had any notice that the fourth floor hoistway doors had been defective prior to the incident. In an order entered May 19, 2009, this Court upheld the dismissal of the complaint, finding that defendants had made a prima facie showing that the

accident was not caused by any defect in the hoistway door (62 AD3d 519, 521 [2009]). In particular, the Court noted that an elevator inspector from the New York City Department of Buildings who had inspected the accident scene within 80 minutes after the accident, found that the sliding panel for the elevator door "was bent and protruded into the hoistway in a manner indicating that a substantial horizontal force had been exerted against the sliding panel" (*id.* at 520). The Court also observed that the evidence indicated that there had not been any problems with the hoistway doors before the accident occurred (*id.*).

By notice dated August 31, 2007, two weeks after the trial court granted summary judgment in the *Haynes* action, the defendants in the *Fofana* action moved to amend their answers to assert the affirmative defenses of collateral estoppel and res judicata, and, upon the granting of said relief, for dismissal on those grounds pursuant to CPLR 3211(5).

By order entered January 15, 2008, the court granted leave to amend, but denied the motion to dismiss. In so doing, the court found that, as discovery in the *Fofana* action had not been completed at the time of the *Haynes* motion, Fofana was not in a position to meaningfully litigate the issues raised on the motion to dismiss.

Subsequently, on February 19, 2008, defendants, who did not appeal from the January 15 order, moved for leave to file a

summary judgment motion and, upon the granting of leave, for summary judgment dismissing the complaint. In support of their motion, defendants noted that the *Haynes* note of issue had been filed on March 7, 2006, while the note of issue in this case was only filed on May 7, 2007. They also observed that the *Haynes* summary judgment motion had been served on all parties to the action, including Fofana, who was a third-party defendant in that action.

Defendants argued they had a reasonable belief that plaintiff, a party to the *Haynes* action, would be bound by the *Haynes* decision, which was dispositive of all the issues herein. Thus, they claimed, they made a motion to dismiss pursuant to CPLR 3211(a)(5), rather than a motion for summary judgment pursuant to CPLR 3212. They aver that this reasonable belief constitutes "good cause" for the delay in moving for summary judgment. In opposition, Fofana argued that defendants failed to show why they could not have sought alternative relief when filing the motion to dismiss, and that the excuse was akin to inexcusable law office failure.

The trial court denied the motion as untimely, finding that the proffered excuse constituted law office failure, with the result that the requisite good cause to entertain the motion had not been shown. The court reasoned that defendants should have recognized that the motion to dismiss could be denied, and thus

the motion for summary judgment should have been made with the prior motion. We reverse.

CPLR 3212(a) provides that the "court may set a date after which no [dispositive] motion may be made," and, "[i]f no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." In *Brill v City of New York* (2 NY3d 648 [2004]), the Court of Appeals made clear that the statutory deadline should be strictly enforced, in order to prevent the filing of "[e]leventh-hour summary judgment motions," a practice that "ignores statutory law, disrupts trial calendars, and undermines the goals of orderliness and efficiency in state court practice" (*id.* at 650-651). It concluded that the "good cause" called for by CPLR 3212(a) requires a "satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*id.* at 652) (*see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]). This Court has subsequently observed that "courts may not excuse a late motion, no matter how meritorious, upon a perfunctory claim of law office failure" (*Azcona v Salem*, 49 AD3d 343, 343 [2008]).

In this case, however, it is undisputed that defendants made a timely motion to dismiss on the grounds of collateral estoppel. Moreover, in defending the "failure" to make a simultaneous

motion for summary judgment, they noted that Fofana, as a third-party defendant in the *Haynes* action, had been served with the motion papers. Regardless of whether he chose to submit papers in opposition to the motion, he was put on notice that the defendants were taking the position that the elevator door was not defective prior to the accident, and that the accident occurred as a result of the force exerted by the weight of the two combatants as they fell against the door. He thus had the opportunity to litigate the issue, and yet declined. Furthermore, since the note of issue had not yet been filed in his own action, Fofana still had the opportunity to pursue further discovery with regard to this defense, in the event such a motion was made in his own case.

Thus, defendants' averment that they had good cause not to file a motion for summary judgment contemporaneously with the motion to dismiss is valid. The disposition of the *Haynes* summary judgment motion provided sufficient grounds either to invoke collateral estoppel or to dismiss the *Fofana* case. The conditions for the applicability of collateral estoppel are an identity of issue which has been necessarily decided in the prior action and is decisive of the present action, and a full and fair opportunity to contest the decision now said to be controlling (*Schwartz v Public Admin. of County of Bronx*, 24 NY2d 65, 71 [1969]). The issue of whether the elevator was defective was at

the heart of the *Haynes* case, and Fofana was a party to that action. Even as a third-party defendant he had a vested interest in opposing any contention that the elevator door was not the cause of the accident. Like the codefendants in *Schwartz*, he was in every respect an antagonist to the defendants/third-party plaintiffs who impleaded him, and who asserted that the elevator door was not defective (*id.* at 72).

We therefore conclude that defendants were not guilty of law office failure in not also moving for summary judgment.

Fofana nonetheless argues that even if the motion for summary judgment is entertained on the merits, there are factors in his case which distinguish his claim from that which was asserted by Haynes. While the parties all agree that the direct cause of the accident was the force exerted upon the freight elevator doors, Fofana contends that a question of fact exists as to whether defendants violated industry standards in failing to upgrade the resistance forces of the hoistway doors at the time of a significant prior renovation. Fofana's expert, Harlan Fair, asserted that industry standards required that "maintenance, repairs, and replacements shall conform to . . . Code requirements at the time of any alteration," that ASME A17.1-2000 required that new components be installed in conformity with the standard requiring that the doors withstand 560 pounds of resistance, and that "[a]ltered elements of existing elevators

shall comply with ASME A17.1 . . ." Yet, nothing in the foregoing language required the owner to upgrade the force resistance of the doors when the doors themselves were not actually replaced, and when there is no evidence that the doors were previously demonstrated to be defective. We thus conclude that the sole proximate cause of the accident was the combatants' exertion of force against the elevator door, and direct that summary judgment should be granted.

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

ENTERED: MARCH 9, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1147N Harold Rivera, et al., Index 22336/02
Plaintiffs-Appellants,

-against-

Dr. Lee Markowitz, et al.,
Defendants-Respondents,

Dr. Debra Spicehandler, et al.,
Defendants.

McMahon, Martine & Gallagher, Brooklyn (Patrick W. Brophy of counsel), for appellants.

Goldberg Segalla LLP, Albany (Matthew S. Lerner of counsel), for Dr. Lee Markowitz, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for Dr. Reese Wayne and Montefiore Medical Center, respondents.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered September 25, 2008, which dismissed the complaint with prejudice as against defendants Markowitz and Wayne, unanimously modified, on the law, to the extent that the complaint is dismissed without prejudice to the trustee commencing an action within the time frame provided in CPLR 205(a), and otherwise affirmed, without costs.

Plaintiffs Harold Rivera and Carolyn Rivera commenced this medical malpractice action in July 2002. Ms. Rivera filed a Chapter 7 bankruptcy petition in October 2005 and received a discharge in February 2006. Mr. Rivera filed for bankruptcy in September 2006 and received a discharge in December 2006.

Neither plaintiff scheduled this malpractice action as an asset in his or her bankruptcy filing.

The motion court properly exercised its discretion in granting leave to amend the answer to assert the affirmative defense of lack of capacity (*see Rudin v Hospital for Joint Diseases*, 34 AD3d 376 [2006]). Plaintiffs' failure to schedule this medical malpractice action as an asset in their bankruptcy petitions deprived them of capacity to sue (*see Whelan v Longo*, 7 NY3d 821 [2006]; *Barranco v Cabrini Med. Ctr.*, 50 AD3d 281 [2008]), and, in light of such defect, the trustees could not be substituted for plaintiffs in this action (*see Gazes v Bennett*, 38 AD3d 287 [2007]; *Pinto v Ancona*, 262 AD2d 472, 473 [1999]).

The order is modified to the extent of dismissing the complaint without prejudice so that it may be commenced by the trustee pursuant to CPLR 205(a) (*see Genova v Madani*, 283 AD2d 860 [2001]; *Tulis v Nyack Hosp.*, 271 AD2d 684 [2000]; *Pinto v Ancona*, 262 AD2d at 473]), and is otherwise affirmed.

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

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

ENTERED: MARCH 9, 2010

CLERK

Friedman, J.P., McGuire, Acosta, DeGrasse, JJ.

1280N- Schlam Stone & Dolan, LLP, Index 104013/07
1280NA Plaintiff-Respondent, 590411/07
1280NB 106060/07

-against-

Penquin Tenants Corporation,
Defendant-Appellant.

- - - - -

Penquin Tenants Corporation,
Third-Party Plaintiff Appellant,

-against-

David Goldsmith, et al.,
Third-Party Defendants-Respondents.

- - - - -

Penquin Tenants Corporation,
Plaintiff Appellant,

-against-

David Goldsmith, et al.,
Defendants-Respondents.

Appeals having been taken to this Court by the above-named appellant from orders of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about May 6, and May 7, 2009,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 24, 2010,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MARCH 9, 2010

CLERK

Andrias, J.P., Sweeny, Nardelli, Catterson, DeGrasse, JJ.

1524 The People of the State of New York, Ind. 1444/07
Respondent,

-against-

Isidro Rodriguez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Evert J. Christensen of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 27, 2008, convicting defendant, after a jury trial, of four counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 3½ to 7 years, unanimously affirmed.

In March 2007, a detective was assigned to investigate an unspecified crime in his precinct. He interviewed the complainant who identified "Devine Perez" as a suspect and provided a photograph of Perez and Perez's telephone number. The detective called the number and the person who answered identified himself as Perez and stated that he was in Connecticut and would not be able to return to New York to speak with the detective.

On March 19, 2007, the detective apprehended the suspect he

was looking for and determined that his actual name was Isidro Rodriguez, the defendant. The detective explained that he had received information as to where the suspect might be in Manhattan and, as he was driving to the location, with the suspect's photograph in hand, he spotted defendant, whom he recognized as the suspect, and they made eye contact with each other. The detective got out of his car and followed defendant, who turned several times and looked back at the detective. The detective then stopped defendant, who was wearing a tan corduroy suit, and arrested him for the crime he had been investigating.

In a search incident to the arrest, the detective recovered from defendant's wallet identification in his true name, Isidro Rodriguez. From defendant's pocket, the detective recovered a New York State driver's license, a non-driver New York State Motor Vehicle identification card, a Social Security card, and a Permanent Resident card, each of which was in the name "Louis D. Amadou." Upon examination, the detective determined each of the documents in Amadou's name to be fake. The Social Security card had no photograph on it, but the other documents bore pictures of defendant wearing a tan corduroy suit jacket. In addition, the detective recovered a number of nearly identical loose photographs of defendant wearing a tan corduroy jacket, which were sized to fit identification cards.

During pedigree questioning, defendant said that his name

was "Isidro Pedro Rodriguez." During the ride to Central Booking, defendant volunteered that he was "worried about the IDs that were found in his pocket." A redacted version of a letter sent by defendant to the court prior to trial was introduced into evidence in which defendant admitted that upon searching him "the detectives retrieved my wallet consisting or containing of a forged driver's license, New York State Identification card, Social Security Card as well as a forged INS card . . ." Defendant also asked in the letter that the court to intervene and allow him to take a guilty plea.

A person commits the crime of criminal possession of a forged instrument in the second degree "when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10" (Penal Law § 170.25). "Knowledge and intent are two separate elements that must each be proven beyond a reasonable doubt by the People" and "knowledge alone is not sufficient to hold [a] defendant criminally liable for possessing a forged instrument" (*People v Bailey*, 13 NY3d 67, 71, 72 [2009] [rejecting the argument that "the requisite intent for possessing a forged instrument can be drawn from defendant's presence in a shopping district, his (knowing) possession of counterfeit bills, and his larcenous intent"]; *see also People v Brunson*, 66 AD3d 594 [2009]).

In the case before us, only the element of intent is at issue. Intent "is the product of the invisible operation of [the] mind" (*People v Samuels*, 99 NY2d 20, 24 [2002] [internal quotation marks and citation omitted]). As such, direct proof is rarely available and the requisite proof may be circumstantial (*see People v Sanchez*, 86 NY2d 27, 32-33 [1995]). While a defendant's intent must be specific to the crime, the specific intent required for possession of a forged instrument is a state of mind that may "be inferred from the act itself . . . [or] from the defendant's conduct and the surrounding circumstances" (*People v Bracey*, 41 NY2d 296, 301 [1977] [internal quotation marks and citation omitted]; *see People v Barnes*, 50 NY2d 375, 381 [1980]; *People v Dallas*, 46 AD3d 489, 491 [2007] *lv denied* 10 NY3d 809 [2008]; *see also People v Tunstall*, 278 AD2d 585, 586-587 [2000], *lv denied* 96 NY2d 788 [2001]). Further, the intent to defraud or deceive need not be targeted at any specific person; a general intent to defraud suffices and the statute does not require that the defendant actually attempt to use the forged documents (*see People v Dallas*, 46 AD3d at 491; *see also People v Wellington*, 41 AD3d 517 [2007], *lv denied* 9 NY2d 883 [2007]).

Applying these principles, legally sufficient evidence was presented at trial from which the jury could rationally infer that defendant possessed the forged identification cards with the intent to defraud, deceive or injure another.

First, the identity cards recovered were undisputedly fakes and served no purpose other than to establish the identity of the holder. Because the need for such proof arises only when the bearer seeks to obtain some privilege, right, benefit or entitlement, the jurors could rationally conclude that there was no reason for defendant to knowingly possess *four* false identity documents unless he intended to present then as real, i.e., to defraud or deceive another (*see People v Dallas*, 46 AD3d at 491 ["only conceivable purpose" for possession of "a set of documents creating two different identities for the same person" was that "they would be passed off as the genuine articles in order to deceive or defraud anyone to whom they were presented, and there would be no reason for anyone to buy them without planning to use them in that manner"]).

Second, it is highly significant on the issue of intent that three of the four concededly fake identification cards bore photographs of defendant wearing what appeared to be the same corduroy jacket that he was wearing on the day he was arrested, as did the four additional loose photographs, sized to fit identification cards, recovered from defendant's pocket. From this, the jury could rationally conclude that defendant had been actively involved in the fabrication of the fake identification cards, which he intended to use for some deceptive purpose (*see People v Colon*, 306 AD3d 213, 214 [2003]).

Lastly, the jury could rationally conclude that defendant had a motive to create a false identity for the specific purpose of evading law enforcement authorities in connection with the Devine Perez investigation. This may be inferred from the detective's testimony that he telephoned the suspect known to him as Perez and advised him that he wanted to speak to him, and that he apprehended the suspect he was looking for and determined that his actual name was Isidro Rodriguez, the defendant. That defendant knew that the police were looking for him is further supported by the detective's testimony that when he spotted the suspect, the pair made eye contact, and the suspect repeatedly looked back at the detective as he walked away.

Thus, viewing the totality of these circumstances, which distinguish this matter from *People v Brunson* (65 AD3d at 595), it was reasonable for the jury to conclude that there was no other logical explanation for defendant's possession of the four identification cards, except to defraud, deceive or injure others.

People v Bailey (13 NY3d 67 [2009], *supra*), does not mandate a different conclusion. Although the detective in this case did not see defendant present any of the identification cards to any person or public authority and had no information that defendant had ever done so, *Bailey* does not make the actual use of the forged instrument a prerequisite to a finding of deceitful

intent. The majority in *Bailey* distinguished *Bracey* and *Dallas* on the ground that the criminal intent in those cases was specific to the crime committed, whereas the only reasonable inference to be drawn in *Bailey* was that the defendant's conduct was common to larceny, a crime completely unrelated to possession of a forged instrument. However, the Court of Appeals did not abrogate the holdings of *Bracey* or *Dallas* that intent may be inferred and that the statute does not require that the defendant actually attempt to use the forged documents in order to prove an intent to defraud, deceive or injure. Indeed, to require defendant to actually use or attempt to use the forged instrument would by judicial action alter the elements of the legislatively enacted crime, which requires only that with the requisite knowledge and intent, a defendant "utters or possesses any forged instrument of a kind specified in section 170.10" (Penal Law § 170.25).

Taken as a whole, the court's main and supplemental charges conveyed the proper standards and properly instructed the jury that the People had the burden to prove beyond a reasonable doubt that the statutorily required intent to defraud, deceive or injure had to coincide with defendant's possession of the fraudulent documents (*see People v Fields*, 87 NY2d 821, 823 [1995]). Given the court's repeated statements that the People had to prove that defendant possessed the requisite intent at the

time of the possession, we find no reasonable possibility that the jury could have misunderstood the court's use of the words "if needs be" or "if the opportunity arose" as reducing or relieving the People of their obligation to prove the intent element of the charge.

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

ENTERED: MARCH 9, 2010

CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1929 Kathleen Toner, Index 24868/04
Plaintiff-Respondent,

-against-

National Railroad Passenger Corp., et al.,
Defendants-Appellants.

Jeffrey Samel & Partners, New York (Jadah Z. Cohen of counsel), for appellants.

Michael G. O'Neill, New York (Valentine J. Wallace of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 9, 2009, which denied defendants' motion for summary judgment, reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Tom, J.P. and Manzanet-Daniels, J. concur in a separate memorandum by Tom, J.P. as follows:

TOM, J.P. (concurring)

Plaintiff slipped and fell at the bottom of a stairway at the 7th Avenue entrance to Penn Station at West 32nd Street in Manhattan. While the parties disputed whether it was raining at the time of the accident and whether warning signs were displayed, it was agreed that mats had been placed at the bottom of the staircase and that workers were mopping the floor. In opposition, plaintiff contended that defendants failed to take effective measures to remedy the hazardous condition by their positioning of the mats so as to leave an exposed area of floor at the foot of the stairs.

Defendants made a prima facie showing of entitlement to judgment as a matter of law (*Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 464 [2009]). Plaintiff's contention that the mats were placed approximately three feet from the bottom of the staircase is insufficient to rebut this showing. The law imposes only the obligation to take reasonable measures to remedy a hazardous condition, and the failure to take any particular precaution which transcends that standard, even if customary, "cannot serve as a basis for liability" (*id.* at 466; *see also Bernhard v Bank of Montreal*, 41 AD3d 180 [2007]).

Andrias and McGuire, JJ. concur in a separate memorandum by McGuire, J. as follows:

McGUIRE, J. (concurring)

I agree with the other concurring memorandum but think some additional discussion is appropriate. Even assuming the storm-in-progress doctrine relied on by defendants is not applicable to a storm involving only rain (*see Hilsman v Sarwil Assoc., L.P.*, 13 AD3d 692, 693-694 [3d Dept. 2004]), defendants established entitlement to summary dismissal nonetheless. Property owners have no obligation to provide a constant remedy for conditions created by tracked-in rainwater (*Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 107 [2000]). Furthermore, property owners are not liable for slip-and-fall injuries unless they created the hazard or had notice of it but failed to exercise reasonable care to remedy it (*see Garcia v Delgado Travel Agency*, 4 AD3d 204 [2004]; *Wasserstrom v New York City Tr. Auth.*, 267 AD2d 36, 37 [1999], *lv denied* 94 NY2d 761 [2000]; *see also Miller v Gimbel Bros.*, 262 NY 107 [1933]). Here the evidence shows actual notice to defendants of a wet and slippery condition. The issue is thus whether they took reasonable precautions to remedy that condition.

Defendants' evidence that they had placed mats at the bottom of the staircase, put up wet floor warning signs and cones, and had workers mopping the floor near the spot where plaintiff fell supports a prima facie showing of entitlement to judgment as a

matter of law (*Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 464 [2009]). For her part, plaintiff acknowledged that she saw a worker mopping the floor, but testified that a mat was placed approximately three feet from the bottom of the staircase and that she slipped on the wet floor between the mat and the bottom of the staircase. In addition, she insisted she did not see any wet floor signs in the area of the accident. The mere fact that plaintiff did not see such signs does not rebut defendants' evidence that the signs were there. The only disputed factual issue concerned the placement of the mats; in contrast to plaintiff's testimony, defendants' evidence was that the mats were flush against the bottom of the staircase. This dispute over the precise position of the mats, however, is insufficient to establish a triable issue of fact to defeat defendants' prima facie showing. "The reasonable care standard does not require a defendant to cover all of its floors with mats to prevent a person from falling on tracked-in-moisture; nor does it require a defendant to place a particular number of mats in particular places" (*id.* at 465 [citations omitted]; *see also*

Amsel v New York Convention Ctr. Operating Corp., 60 AD3d 534 [2009], *lv denied* 13 NY3d 710 [2009]).

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

ENTERED: MARCH 9, 2010

CLERK

Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1975 Carmen Figueroa, Index 22501/06
Plaintiff-Respondent,

-against-

East 168th Street Associates, L.P., et al.,
Defendants-Respondents,

Precision Elevator Corp.,
Defendant-Appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph P. Wodarski of counsel), for appellant.

Gottlieb Siegel & Schwartz, LLP, Bronx (Stuart D. Schwartz of counsel), for Carmen Figueroa, respondent.

Gannon Rosenfarb & Moskowitz, New York (Peter J. Gannon of counsel), for East 168th Street Associates, L.P. and AMS Realy Company, LLC, respondents.

Order, Supreme Court, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about May 29, 2009, which denied defendant Precision Elevator's motion for summary judgment on its cross claim for contractual indemnification and contribution, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff tripped and fell as she exited an elevator owned and managed by the realty defendants and maintained by Precision. Precision correctly asserts that the service contract with the building owners specifically exempted, inter alia, the pre-existing misleveling of the elevator. That contract provides that Precision "shall not be responsible for leveling of cars at

landings, eccentricities in operation of car doors, shaft doors or their locking devices and for any situation that may occur that cannot be revealed by the ordinary inspection offered with this service."

Plaintiff-respondent misquoted the above paragraph to the motion court when plaintiff's counsel changed "and for any" to "or any other" thus framing the clause in the disjunctive rather than in its conjunctive as it was originally drafted and executed by the parties. Despite Precision pointing out the misquotation, plaintiff's counsel continued to misquote the paragraph in his appellate brief. The contract as drafted clearly placed responsibility for the misleveling elevator on the owner, not Precision, the service company. Furthermore, Precision urged the owner to upgrade the elevator to eliminate the problem of misleveling but the owner declined Precision's proposal prior to plaintiff's accident.

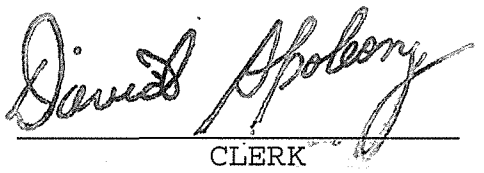
Plaintiff's reliance on General Obligations Law § 5-323 is also misplaced. The contract merely exempts pre-existing conditions from Precision's responsibility. It does not purport to immunize Precision from its own negligence.

Plaintiff's claim solely involves an accident resulting from misleveling, for which, as noted, the owner was responsible. The contract provided that Precision would be "indemnif[ied] against any claim . . . for personal injury . . . arising out of this

contract unless such . . . injury arises from [Precision's] sole negligence." Therefore Precision was entitled to summary judgment on its cross claim for contractual indemnification and contribution.

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

ENTERED: MARCH 9, 2010



CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2304 The People of the State of New York, Ind. 43/08
Respondent,

-against-

Reggie Rogers,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lisa A. Packard of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Hilary Hassler of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Daniel P. FitzGerald, J. at plea and sentence), rendered June 30, 2008, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The arresting officer's testimony that defendant was the only person on one side of a particular block at a particular moment was not implausible. In any event, in this case probable cause does not turn on whether defendant was literally the only person present, or instead was merely the only person who met the undercover officer's

description. In either case, the description, which included defendant's "furry" jacket, was sufficiently specific, given the close spatial and temporal proximity between the sale and the arrest, to provide probable cause (*see e.g. People v Rampersant*, 272 AD2d 202 [2000], *lv denied* 95 NY2d 870 [2000]). There was sufficient proximity to make it "highly unlikely that the suspect had departed and that, almost at the same moment, an innocent person of identical appearance coincidentally arrived on the scene" (*People v Johnson*, 63 AD3d 518, 518 [2009], *lv denied* 13 AD3d 797 [2009]).

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

ENTERED: MARCH 9, 2010

David Spolonz
CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2305 Mercedes Lorenzo, Index 16276/07
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for appellant.

Max D. Leifer, P.C., New York (Ira H. Zuckerman of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 20, 2008, which denied defendant's motion for summary judgment dismissing the complaint with leave to renew upon the completion of discovery, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

The complaint alleged that plaintiff, a teacher, fell on a stairway which was improperly maintained or repaired in the school where she was employed.

The complaint should have been dismissed because defendant is not a proper party and was not legally responsible for the maintenance and repair of the premises (*see Flores v City of New York*, 62 AD3d 506 [2009]; *Bailey v City of New* York, 55 AD3d 426 [2008]). The fact that defendant's answer did not deny its legal responsibility for the premises is not significant since it

denied knowledge and information sufficient to form a belief as to the truth of the allegations concerning its responsibility for the premises, and plaintiff could not have reasonably relied on the contents of defendant's answer in choosing to assume that defendant was responsible for maintaining the premises (*see Tahmisyan v City of New York*, 295 AD2d 600, 601 [2002]).

Further discovery is not warranted since plaintiff presented only conjecture and speculation regarding defendant's potential liability for the allegedly defective condition of the stairway (*see Alvord & Swift v Stewart M. Muller Constr. Corp.*, 46 NY2d 276, 281-282 [1978]).

We have considered plaintiff's other arguments and find them meritless.

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

ENTERED: MARCH 9, 2010

CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2306 In re La-Me M.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Carol Lipton, Brooklyn, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about February 11, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts, which, if committed by an adult, would constitute the crimes of attempted assault in the first and second degrees, assault in the second degree and criminal possession of a weapon in the fourth degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence. There is no basis for disturbing the court's determinations concerning credibility. Although appellant's personal role consisted of hitting the victim with his fist, the credible evidence, including that of a police officer who saw the entire incident, clearly established appellant's accessorial liability (*see* Penal Law § 20.00) for the acts of another

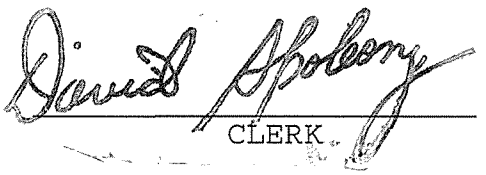
participant who struck the victim with a bat.

To the extent the record permits review, we find that appellant received effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The placement was a proper exercise of discretion that was the least restrictive alternative consistent with appellant's needs and those of the community, given the seriousness of the crime as well as appellant's lack of remorse and pattern of behavioral problems.

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

ENTERED: MARCH 9, 2010



Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2307 Gerard Fenty, Index 100908/05
Plaintiff-Appellant,

-against-

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

The Department of Transportation, et al.,
Defendants.

- - - - -

The City of New York, et al.,
Third-Party Plaintiffs,

-against-

Hilltop Construction and General
Contracting, Inc., etc.,
Third-Party Defendant-Respondent.

- - - - -

CDE Air Conditioning,
Second Third-Party Plaintiff,

-against-

Grand Piping Corp.,
Second Third-Party Defendant-Respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Malapero & Prisco, LLP, New York (Andrew L. Klauber of counsel), for The City of New York and Morris Park Contracting Corp., respondents.

O'Connor Redd, LLP, White Plains (Peter Urreta of counsel), for The Liro Group, respondent.

Mauro Goldberg & Lilling LLP, Great Neck (Anthony F. DeStefano of counsel), for LaFata-Corallo Plumbing-Heating, Inc., respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for CDE Air Conditioning, respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Hilltop Construction and General Contracting, Inc., respondent.

Cascone & Kluepfel, LLP, Garden City (Olympia Rubino of counsel), for Grand Piping Corp., respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered July 3, 2008, which, to the extent appealed from as limited by the briefs, granted the motions and cross motions by defendants City, Morris Park Contracting, Liro Group, Lafata-Corallo Plumbing-Heating and CDE Air Conditioning for summary judgment dismissing the complaint against them, and denied plaintiff's cross motion for partial summary judgment against those defendants as to liability on his Labor Law §§ 240(1) and 241(6) claims, unanimously affirmed, without costs.

On the § 240(1) claim, plaintiff's injury-producing accident was not attributable to the risk arising from the elevation differentials at his worksite that brought about the need for the safety device in the first place, but rather was caused by the separate, unforeseeable hazard of hot steam emanating from a ruptured pipe, leading to plaintiff's decision to jump from the bucket lift (*see Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825 [2008]; *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]). As to the § 241(6) claim, at the time of the accident, the work being conducted at the site did not constitute demolition, as required for application of the

relied-upon section of the Industrial Code (12 NYCRR), § 23-3.2(a)(2) (*see e.g. Baranello v Rudin Mgt. Co.*, 13 AD3d 245 [2004], *lv denied* 5 NY3d 706 [2005]). Finally, absent evidence that any of the owners, contractors or subcontractors created or had notice of the defective condition, the Labor Law § 200 and common-law negligence claims as against these defendants were properly dismissed (*see e.g. Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553 [2009]).

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

ENTERED: MARCH 9, 2010

David Gpoleny
CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2308 DePetris & Bachrach, LLP, Index 111194/08
Plaintiff-Appellant,

-against-

Claudia Srour, et al.,
Defendants,

Charles B. Manuel, Jr., et al.,
Defendants-Respondents.

DePetris & Bachrach, LLP, New York (Ronald E. DePetris of counsel), for appellant.

Shiboleth LLP, New York (Charles B. Manuel, Jr. of counsel), and respondent pro se.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 3, 2009, insofar as it granted defendants-respondents, Charles B. Manuel, Jr. and Shiboleth LLP's motion to dismiss the complaint as against them and denied plaintiff's cross motion for leave to serve a supplemental complaint, unanimously modified, on the law and the facts, to the extent of denying defendants-respondents' motion to dismiss the fourth, fifth, sixth and seventh causes of action, reinstating said causes of action, and otherwise affirmed, without costs.

Plaintiff law firm, which is seeking to recover unpaid legal fees for services rendered, has commenced the instant action against its client, defendant Claudia Srour, as well as defendants-respondents, who referred the client to the plaintiff law firm and represented defendant Jacques Nasser in a lawsuit by

Srour's employer, Merrill Lynch Pierce Fenner & Smith, against members of the Nasser family, including defendant Ezequiel Nasser, who were Srour's customers at Merrill Lynch. In a pre-answer motion pursuant to CPLR 3211, defendants-respondents moved to dismiss the complaint as against them.

On a CPLR 3211 motion to dismiss which is addressed to the pleadings, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff with the benefit of every possible inference. Whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Applying these standards, the motion court erroneously dismissed the fourth and fifth causes of action which allege claims against defendants-respondents for breach of the implied warranty of authority and for tortious misrepresentation of authority and assurances of payment, respectively. These causes of action seek to hold defendants-respondents liable for their own action in misrepresenting that they had authority from the Nassers to enter into a contract in which the defendants, Jacques and Ezequiel Nasser would pay plaintiff law firm $75,000 ($37,500 each) of the legal fees incurred by plaintiff's client Srour.

Under the doctrine of implied warranty of authority, a person who purports to make a contract, representation, or

conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party and is subject to liability to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal (*see* Restatement (Third) of Agency § 6.10 [2006]).

Under the doctrine of tortious misrepresentation and assurances of payment, if the person who falsely claims to have power to bind another knows that the claim is untrue, the person has made a fraudulent misrepresentation and is subject to liability to those who, justifiably relying on the representation, suffer a loss as a consequence (*see* Restatement (Third) of Agency § 7.01 [2006]).

The complaint alleges that defendants-respondents represented to plaintiff law firm that they had authority from the Nassers to promise payment of $75,000 of the legal fees incurred by plaintiff's client when, in fact, they lacked the authority to bind the Nassers. Thus, the complaint alleges a viable claim for breach of the implied warranty of authority. The complaint also alleges that defendants-respondents falsely represented to plaintiff law firm that they specifically discussed the subject matter of their authority and representations with the Nassers. Thus, the complaint alleges a

viable clam for tortious misrepresentation of authority and assurances of payment.

To the extent the motion court relied on the principle of apparent authority, lack of consideration and the statute of frauds to dismiss these causes of action, such was error. The doctrine of apparent authority is irrelevant because the fourth and fifth causes of action are not seeking to hold the principals (the Nassers) liable on the ground that defendants-respondents had apparent authority from the Nassers to make promises of payment. Rather, these causes of action are seeking to hold the agents, defendants-respondents, liable for contracts or representations they purported to make on behalf of the principal (the Nassers) while acting without authority from the principal. Therefore, the fact that the Nassers never manifested to plaintiff law firm that defendants-respondents were authorized to act on the Nassers' behalf has no bearing on the viability of the fourth and fifth causes of action. Moreover, regardless of whether or not there was consideration running to the Nassers, defendants-respondents can still be held liable for their own tortious conduct in making deliberate misrepresentations of fact that they had authority to make the promises that the Nassers would pay $75,000 of the legal fees incurred by plaintiff's client (*see* Restatement (Third) of Agency §§ 6.10, 7.01 [2006]). In addition, the statute of frauds does not come into play since

the fourth and fifth causes of action are not seeking to enforce the unwritten agreement by the Nassers to pay plaintiff's client's legal fees against the Nassers. These causes of action state a claim against the defendants-respondents regardless of whether there is an enforceable contract with the Nassers.

The sixth cause of action against defendants-respondents for tortious interference with defendant Jacques Nasser's contract with plaintiff law firm to pay $37,500 of the legal fees incurred by plaintiff's client was also improperly dismissed by the motion court. In order for there to be a viable claim there must be a valid contract between Jacques Nasser and plaintiff law firm. Pursuant to General Obligations Law § 5-701(a)(2), every agreement, promise or undertaking which is a special promise to answer for the debt of another is void unless it is in writing. Under a long-standing exception to the statute of frauds, however, the promise need not be in writing if it is supported by new consideration moving to the promisor and beneficial to him, and the promisor has become in the intention of the parties a principal debtor primarily liable (*see Martin Roofing v Goldstein*, 60 NY2d 262, 264 [1983], *cert denied* 466 US 905 [1984]; *Carey & Assoc. v Ernst*, 27 AD3d 261 [2006]). At the very least, the allegations in the complaint raise an issue of fact concerning whether Jacques Nasser agreed to act as a guarantor in the event plaintiff's client did not pay her legal fees, in which

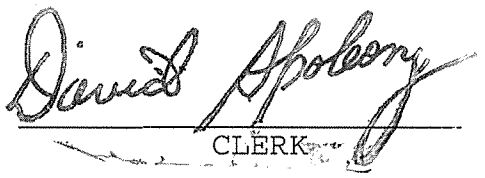
case there was no enforceable contract, or whether in seeking to secure the benefit of the cooperation of plaintiff's client in connection with the lawsuit against him by her employer, Jacques Nasser offered to lift the burden of the obligation to pay legal fees from plaintiff's client and pay the law firm directly, in which case the contract would not be barred by the statute of frauds (*see Rowan v Brady*, 98 AD2d 638, 639 [1983]). Therefore, the sixth cause of action for tortious interference with contract is reinstated.

Finally, the motion court erroneously dismissed the seventh cause of action against defendants-respondents which alleges tortious interference by defendants-respondents with the attorney-client relationship between plaintiff law firm and its client, defendant Srour. Insofar as the complaint alleges that defendants-respondents, knowing that Srour was represented by plaintiff law firm, met with Srour alone, without informing plaintiff law firm of the meeting, and approximately three days later, Srour discharged plaintiff law firm, it is sufficient at this stage of the proceedings, to state a viable claim, and therefore the seventh cause of action is reinstated.

We have considered plaintiff law firm's remaining contentions and find them unavailing.

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

ENTERED: MARCH 9, 2010



CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2309 In re Christopher T.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about February 26, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of sexual abuse in the second degree and attempted sexual misconduct, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The fact that the court dismissed counts of the petition alleging that appellant engaged in other forms of unlawful sexual conduct during this incident does not warrant a different conclusion.

Given the age of the victim and the sexual nature of the charges, it is understandable that the presentment agency needed to use some leading questions to draw out all the facts (*cf. People v Greenhagen*, 78 AD2d 964, 966 [1980], *lv denied* 52 NY2d 833 [1980]), and this did not cast doubt on the reliability of the victim's testimony.

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

ENTERED: MARCH 9, 2010

CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2310 The People of the State of New York, Ind. 524/08
Respondent,

-against-

Martin Lawrence, etc.,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about March 5, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

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

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

ENTERED: MARCH 9, 2010

David Spoleny

CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2313- Linda R., Index 300415/02
2313A- Plaintiff-Appellant,
2313B-
2313C -against-

Ari Z.,
Defendant-Respondent.

Bruce A. Young, New York, for appellant.

Rhonda R. Weir, Brooklyn, for respondent.

Chemtob, Moss, Forman & Talbert, LLP, New York (Susan M. Moss of counsel), Law Guardian.

Order, Supreme Court, New York County (Laura E. Drager, J.), entered August 21, 2009, which, in a child custody proceeding, found that the father should have unsupervised visitation with the subject child after a transition period managed by an "intervention therapist," unanimously modified, on the law, to delete the portion of the order that provides for the intervention therapist to determine when unsupervised visitation is to begin, and otherwise affirmed, without costs. Order, same court and Justice, entered July 31, 2009, which, inter alia, appointed an intervention therapist to supervise the immediate ending of the father's supervised visitation, unanimously modified, on the law, to delete the phrase "and shall follow her directions" in the sixth decretal paragraph, and otherwise affirmed, without costs. Order, same court and Justice, entered October 29, 2009, which, inter alia, temporarily awarded the

father decision-making custody with respect to the child's mental health issues, unanimously modified, on the law, to delete the portion of the order requiring that the child's passport be turned over to the mother's attorney, and otherwise affirmed, without costs. Order, same court and Justice, entered November 13, 2009, which, insofar as appealed from as limited by the briefs, directed that the mother's counsel was not to attend the intervention therapy sessions, unanimously affirmed, without costs.

"[T]he determination of whether visitation should be supervised is a matter left to Family Court's sound discretion, and its findings, to which deference is to be accorded, will not be disturbed on appeal unless they lack a sound basis in the record" (*Matter of Custer v Slater*, 2 AD3d 1227, 1228 [2003] [internal quotation marks and ellipsis omitted]). Here, despite the Law Guardian's view to the contrary (*see id.*; *Baker v Baker*, 66 AD3d 722, 723-724 [2009]), the court's finding that the child should transition to unsupervised visitation with the father has ample support in the record, including the opinion of the court-appointed forensic psychologist and the testimony of impartial witnesses that the child seemed comfortable and relaxed while visiting with her father. Further, there is no indication that the court "ignored" evidence of the child's feelings toward her father; rather, in providing for a gradual transition to

unsupervised visitation, the court explicitly took the child's feelings into account.

However, the court improperly delegated to a mental health professional its authority to determine issues involving the best interests of the child, i.e., when unsupervised visitation should commence (*see Matter of Held v Gomez*, 35 AD3d 608, 608-609 [2006]; *Matter of Henrietta D. v Jack K.*, 272 AD2d 995 [2000]), and we modify accordingly. The parties may, if so advised, make another application to the court regarding unsupervised visitation, at which time the court may render a decision on that issue, with the assistance, if necessary, of further reports from the intervention therapist.

With respect to the child's passport, the parties' settlement stipulation allows the mother to travel with the child to Canada for 10 days at a time, and there has never been any suggestion by the father himself or his attorney that the mother is a flight risk or has any intention of removing the child to Canada (*cf. Anonymous v Anonymous*, 120 AD2d 983, 984 [1986]; *Kresnicka v Kresnicka*, 42 AD2d 607 [1973]. Accordingly, we modify to delete the directive concerning the child's passport.

"[N]o agreement of the parties can bind the court to a disposition other than that which a weighing of all of the factors involved shows to be in the child's best interest" (*Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]). Thus, a

child is not bound by the support and custody terms of an agreement between parents, and courts can modify these terms in the best interests of the child (*see* Family Ct Act § 461[a]; *Matter of Boden v Boden*, 42 NY2d 210, 212 [1977]; *cf. Sassian v Sassian*, 126 AD2d 984 [1987]). The record contains a sound basis for finding that, during the transition period from supervised to unsupervised visitation, and subject, of course, to further order of the court, it is in the best interests of the child that the terms of the stipulation with respect to her mental health be modified so as to give the father decision-making authority.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: MARCH 9, 2010

CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2314 In re Gennady Gorelik, Index 102528/08
Petitioner-Appellant,

-against-

New York City Support Collection Unit, et al.,
Respondents-Respondents.

Gennady Gorelik, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for New York City Support Collection Unit, respondent.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for New York State Department of Taxation and Finance, respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan Madden, J.), entered December 16, 2008, which, in a proceeding challenging, inter alia, an October 2007 determination of respondent New York City Support Collection Unit (SCU) rejecting petitioner's challenge to SCU's April 2005 decision to grant petitioner's former wife a cost-of-living adjustment of petitioner's child support obligation, inter alia, dismissed the petition as moot, unanimously affirmed, without costs.

Petitioner challenges SCU's April 2005 COLA adjustment on the ground that it was made during the pendency of his application for a downward modification of his original child support obligation. The downward modification application was granted, albeit not to the extent sought by petitioner, in July

2008, retroactive to the July 2004 filing of the application. Since the COLA adjustment was not a factor in the downward modification proceeding, i.e., the original support obligation was recalculated without regard for the 2005 COLA adjustment, the issue of whether SCU could issue the COLA adjustment while petitioner's application for a downward modification was pending is moot.

This is not an issue that typically evades review (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). The only reason the issue was not reviewed here is because petitioner failed to file objections to SCU's adjustment, although given notice of his right to do so under Domestic Relations Law § 240-c(3).

We note that in July 2006, and again in November 2006, petitioner moved in the downward modification proceeding to vacate SCU's COLA adjustment, as well as the enforcement warrant issued by respondent New York State Department of Taxation and Finance, and did not appeal the denial of those motions. We also note that nothing in Domestic Relations Law § 240-c supports petitioner's argument that a COLA adjustment is precluded by a pending motion in court for a downward modification.

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

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

ENTERED: MARCH 9, 2010

CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2315 The People of the State of New York, Ind. 911/98
Respondent,

-against-

Norris Burton,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

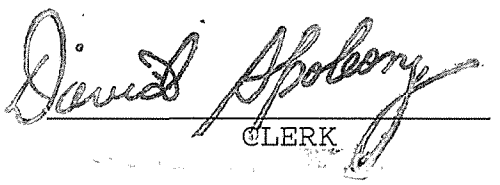
Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about December 18, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The hearing court providently exercised its discretion (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 (2008) in denying defendant's request for a downward departure. Although defendant argues that his age and physical condition would militate against his reoffending, these factors did not prevent him from committing a sexual offense while incarcerated (*see People v Johnson*, 44 AD3d 571 [2007], *lv denied* 10 NY3d 701 [2008]; *People v Adams*, 44 AD3d 1020 [2007], 9 NY3d 818 [2008]). Defendant's claim that, notwithstanding his guilty plea, he was innocent of the underlying rape is an

inappropriate basis for a downward departure. "Facts previously . . . elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated" (Correction Law § 168-n[3]).

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

ENTERED: MARCH 9, 2010



CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2316 Marcella Panescu, et al., Index 15396/07
Plaintiffs-Respondents,

-against-

Villa Livery Corp., et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Paul A. Victor, J.), entered on or about September 2, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 17, 2010,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MARCH 9, 2010

CLERK

Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2317 Carlos Santiago, Index 18349/04
Plaintiff-Appellant,

-against-

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

Luis Diaz, et al.,
Defendants.

Mallilo & Grossman, Flushing (Francesco Pomara, Jr. of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Stephen J. McGrath of counsel), for City of New York, respondent.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Milea Truck Sales Corp. and M.T.S. Realty Corp., respondents.

Law Offices of Peter D. Assail, LLC, New York (Peter D. Assail of counsel), for Cibao Meat Products Inc., respondent.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for 38-40 Food Corp., respondent.

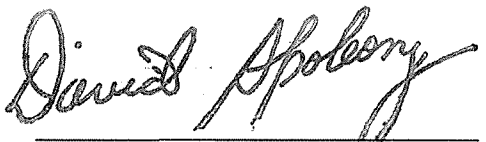
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about March 6, 2009, which granted defendants-respondents' motions pursuant to CPLR 3126 dismissing the complaint as against them, unanimously affirmed, without costs.

The complaint was properly dismissed for persistent, unexplained noncompliance with four disclosure orders, including a self-executing conditional order of dismissal that was granted

on default and became absolute (*see AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904 [2009]; *Min Yoon v Costello*, 29 AD3d 407 [2006]).

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

ENTERED: MARCH 9, 2010



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Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2318 Rosemarie Siwek, Index 307042/08
Plaintiff-Respondent,

-against-

Lascell L. Phillips, et al.,
Defendants-Appellants.

Litchfield Cavo LLP, New York (James F. Regan of counsel), for appellants.

Daniel P. Buttafuoco & Associates, PLLC, Woodbury (Ellen Buchholz of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered February 3, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for a default judgment against defendant Ardsley and denied defendants' cross motion to compel plaintiff to accept their answer nunc pro tunc and to transfer the action to Westchester County, unanimously modified, on the law, the motion for a default judgment against Ardsley denied, the cross motion granted to the extent of compelling plaintiff to accept Ardsley's answer nunc pro tunc, and otherwise affirmed, without costs.

In view of the strong public policy favoring resolution of cases on their merits, the court improvidently exercised its discretion in granting default judgment. Ardsley explained that its delay was due to failure to receive a copy of the summons and complaint within 30 days of service from the Secretary of State,

after which it then provided the pleadings to its insurance carrier, which gave them to its counsel, who interposed an answer. This was a valid excuse for the delay (*see Di Lorenzo, Inc. v Dutton Lbr. Co.*, 67 NY2d 138 [1986]). Furthermore, because the delay was brief (*see Princeton Venture Research v Kaye, Scholer, Fierman, Hays & Handler*, 256 AD2d 222 [1998]) and plaintiff alleged no prejudice resulting therefrom (*see Cirillo v Macy's, Inc*, 61 AD3d 538, 540 [2009]; *Acker v Van Epps*, 45 AD3d 1104 [2007]), a default judgment should not have been entered.

Although Ardsley made a timely demand for a change of venue from the Bronx, it did not timely move for such relief. A defendant "may move to change the place of trial within fifteen days after service of the demand," unless the plaintiff consents to the change of venue within five days of service of the demand (CPLR 511[b]). Ardsley's motion for a change of venue, made 35 days after service of the demand, must be rejected as untimely (*see Singh v Becher*, 249 AD2d 154 [1998]).

THIS CONSTITUTES THE DECISION AND ORDER
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Tom, J.P., Friedman, Sweeny, Nardelli, Abdus-Salaam, JJ.

2319N- 2319NA
Leona Brunson,
Plaintiff-Respondent,

-against-

John D. Reilly, et al.,
Defendants-Appellants.

- - - - - -

Morris Duffy Alonso & Faley,
Nonparty-Appellant.

Index 107872/04

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina and Andrea M. Alonso of counsel), for appellants.

The Bostany Law Firm, New York (Jacqueline S. Antonious of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 5, 2009, which granted plaintiff's motion for attorney's fees and directed nonparty appellant, defendants' counsel in this personal injury action, to pay plaintiff's counsel $7,500, unanimously reversed, on the law, without costs, the motion denied, and the sanction vacated. Appeal from order, same court and Justice, entered April 17, 2009, which, upon reargument, reduced the award of attorney's fees to $3,750 on the condition that it be paid within 30 days of the order, unanimously dismissed, without costs, as academic.

The scant record before us does not demonstrate that defense counsel's conduct was frivolous and does not justify the imposition of a 22 NYCRR subpart 130-1 sanction. Further, the court failed to set forth the reasons why it found that counsel's

conduct was frivolous and undertaken primarily to delay or prolong the resolution of the litigation (which was resolved by jury verdict on May 16, 2006) or to harass or maliciously injure another, despite the explanations counsel offered for the delays (*see* 22 NYCRR 130-1.1; 130-1.2; *542 Holding Corp. v Prince Fashions, Inc.*, 57 AD3d 414, 416 [2008]; *Behar v Greer*, 243 AD2d 357 [1997]). The court also failed to set forth the reasons why it found the amount of sanctions imposed appropriate (*see* 22 NYCRR 130-1.2; *NYCTL 1997-1 Trust v Seijas*, 307 AD2d 876 [2003]; *Day v NYP Holdings*, 290 AD2d 342 [2002]). Finally, the imposition of sanctions was not entered as a judgment (*see* 22 NYCRR 130-1.2; *Behar*, 243 AD2d at 357).

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ENTERED: MARCH 9, 2010

David Spoleory
CLERK