SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 22, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

5539 The People of the State of New York, Ind. 770/04
Respondent,

-against-

Rashawn Cannon, etc.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered December 16, 2009, as amended December 22, 2009, resentencing defendant to a term of 7 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]), and we do not find that term to be excessive.

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5541-
5541A

In re Tyrique Alexandra B., and Another,

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

Alexandra B. B., etc.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Magovern & Sclafani, New York (Frederick J. Magovern of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Hal Silverman of counsel), attorney for the children.

_____

Orders of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about January 6, 2010, which terminated respondent mother's parental rights to the subject children upon a fact-finding determination of her mental retardation, and committed the children's guardianship and custody to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The uncontroverted testimony of the court-appointed psychologist provided clear and convincing evidence that respondent is unable, at present and for the foreseeable future,

to provide proper and adequate care for the subject children by reason of her mental retardation (*see* Social Services Law § 384-b[4][c], [6][b]*; Matter of Jasmine Pauline M.*, 62 AD3d 483, 484 [2009]). Contrary to respondent's argument, the evidence established that her mental retardation originated during her developmental period, as defined in Social Services Law § 384-b(6)(b).

A dispositional hearing was not required in order to find that termination of respondent's parental rights is in the best interests of the children, despite their bond with their mother, given her inability to care for them (*see Matter of Aaron Tyrell W.*, 58 AD3d 419, 420 [2009]; *Matter of Leomia Louise C.*, 41 AD3d 249, 250 [2007]).

We have reviewed respondent's remaining arguments and find them unavailing.

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5544 The People of the State of New York, Ind. 1200/06
Appellant,

-against-

Cesar Rios,
Defendant,

234 East 178th St., LLC.,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for appellant.

Neal S. Comer, White Plains, for respondent.

_____

Order, Supreme Court, Bronx County (Margaret L. Clancy, J.), entered on or about February 23, 2010, which granted defendants' CPL 330.30(1) motion to set aside a jury verdict convicting defendants of criminally negligent homicide and reckless endangerment in the second degree, unanimously affirmed.

This case arises out of a fire in a building owned by the corporate defendant and managed by defendant Rios, who previously owned the building. The fire, which caused the deaths of two firefighters and serious injuries to four more, started in apartment 3-I and spread to apartment 4-L.

Although the fire was caused by illegal and unsafe electrical installations made by the tenant in 3-I, the People's theory at trial was that the deaths and injuries were caused by

an illegal and unsafe partition created by a different tenant in 4-L. Therefore, regardless of Rios's knowledge or lack of knowledge of the electrical conditions in apartment 3-I, under the circumstances of the case the People were required to prove that Rios (and, through him, the corporate defendant) knew about the partition in 4-L and failed to remove it. The People proceeded under a theory of actual knowledge of the unsafe conditions, rather than failure to ascertain them.

In setting aside the verdict, the court correctly concluded (26 Misc 3d 1225[A], 2010 NY Slip Op 50256[U][2010], *11-15) that there was no evidence that Rios knew of the partition in 4-L. The inferences upon which the People rely are impermissibly speculative. Furthermore, the People called the building's superintendent, who testified that he knew about the partition in 4-L but never told Rios about it. Even if the jury discredited that testimony, such disbelief would not supply affirmative proof of the contrary proposition. Although "[j]ury verdicts are not

to be set aside lightly, . . . they are not sacrosanct," and "we cannot . . . permit a jury verdict to stand based upon speculation and conjecture" (*People v Marin*, 102 AD2d 14, 33 [1984], *affd* 65 NY2d 741 [1985]).

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5545 In re Gina C.,
Petitioner-Respondent,

-against-

Michael C.,
Respondent-Appellant.

_____

Law Offices of Joseph J. Mainiero, New York (Joseph J. Mainiero and Anthony Hilton of counsel) for appellant.

Yisroel Schulman, New York Legal Assistance Group, New York (Christina Brandt-Young of counsel) for respondent.

Elisa Barnes, New York, attorney for the child.

_____

Appeal from order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about September 1, 2010, which, upon respondent's default, granted the attorney for the child's motion for summary judgment awarding custody of the child to petitioner, unanimously dismissed, without costs.

Respondent failed to oppose or otherwise address the motion. Thus, the order was entered upon default and is not appealable (CPLR 5511; *Matter of Anthony M.W.A. [Micah W.A.]*, 80 AD3d 476 [2011]; *Matter of Jessenia Shanelle R. [Wanda Y.A.]*, 68 AD3d 558 [2009]). Respondent's remedy was to move before Family Court to vacate his default and, if the motion were denied, to appeal from the order denying it (*Matter of Shabazz v Blackmon*, 274 AD2d 770, 771 [2000], *lv dismissed* 95 NY2d 945 [2000]).

In any event, this Court could not have conducted a meaningful review of this matter because respondent failed to meet his obligation to assemble a proper record on appeal, including all the transcripts of the proceedings (*see Sebag v Narvaez*, 60 AD3d 485 [2009], *lv denied* 13 NY3d 711 [2009]; *Lynch v Consolidated Edison, Inc.*, 82 AD3d 442 [2011]).

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5546-
5547 People of the State of New York, Respondent, Ind. 3377/02

-against-

Michael Stroud,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Daniel FitzGerald, J.), rendered March 6, 2009, resentencing defendant to a term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5548 The People of the State of New York, Ind. 3294/04
Respondent,

-against-

Gary Handberry,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 20, 2009, resentencing defendant to a term of 6 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]), and we do not find that term to be excessive.

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5551 The People of the State of New York, Respondent, Ind. 4745/07

-against-

Bishme Ayers, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about April 9, 2009, 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: SEPTEMBER 22, 2011

CLERK

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

5552 The People of the State of New York, Ind. 1128/08
Respondent,

-against-

Luis G. Barbosa,
Defendant-Appellant.

_____

Steven Banks, The legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about September 25, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: SEPTEMBER 22, 2011

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

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

5553 Omrie Morris, et al., Index 14026/06
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant-Appellant.

_____

Baxter, Smith & Shapiro, P.C., Hicksville (Margot L. Ludlam of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered September 1, 2010, which denied so much of defendant's motion for summary judgment as sought to dismiss the Labor Law §§ 240(1) and 200 and common-law negligence causes of action and the Labor Law § 241(6) cause of action predicated upon Industrial Code (12 NYCRR) §§ 23-1.7(d)(e)(1) and (2) and 23-2.7(b), unanimously modified, on the law, to grant the motion as to the Labor Law § 200 and common-law negligence causes of action, and otherwise affirmed, without costs.

Plaintiff Omrie Morris was injured when a temporary wooden step on which he was standing shifted as he and another employee were moving an air tank up a concrete stairway from the basement of the work site to the first floor. There is an issue of fact as to whether the temporary step had been placed at the bottom of

the concrete stairway to aid employees in ascending the stairway to different levels of the site, and thus constituted a device to protect employees against elevation-related risks within the meaning of Labor Law § 240(1) (*see Megna v Tishman Constr. Corp. of Manhattan*, 306 AD2d 163 [2003]; *see also McGarry v CVP 1 LLC*, 55 AD3d 441 [2008]).

In view of the evidence that the temporary step was unstable and that snow and debris accumulated in the working areas and in the hallways and other passageways that plaintiff and the other employee had to traverse to reach the air tanks, defendant failed to demonstrate that Industrial Code (12 NYCRR) §§ 23-1.7(d)(e)(1) and (2) and (f), which address slipping, tripping and other hazards, and vertical passages, and § 23-2.7(b), which addresses temporary stairway construction, are inapplicable to the facts of this case and thus do not support the Labor Law § 241(6) cause of action.

The record demonstrates only that defendant had general

supervisory authority at the work site, which is insufficient to trigger liability under Labor Law § 200 and common-law negligence principles (*Burgalassi v Mandell Mech. Corp.*, 38 AD3d 363 [2007]).

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5554 The People of the State of New York, Ind. 10816/98
Respondent,

-against-

James Mixon,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 4, 2009, resentencing defendant to an aggregate term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5555 The People of the State of New York, Respondent, Ind. 307/08

-against-

Mikal Smith, Defendant-Appellant.

_____

Leonard J. Levenson, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Britta Gilmore of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered March 16, 2009, convicting defendant, after a jury trial, of burglary in the third degree, robbery in the second degree, criminal impersonation in the first degree and petit larceny, and sentencing him, as a second violent felony offender, to an aggregate term of 9 years, unanimously modified, on the law, to the extent of vacating the burglary conviction and dismissing that count of the indictment, and otherwise affirmed.

Except as to the burglary conviction, the verdict was based on legally sufficient evidence and was not against the weight of the evidence. Defendant, together with an accomplice, impersonated police officers in order to effect physical control over the victim. They compelled him to submit to a patdown, and in the process they took property from his person. This

satisfied the force element of second-degree robbery (*see People v Lomba*, 183 AD2d 672 [1992], *lv denied* 80 NY2d 906 [1992]; *People v Lazarcheck*, 176 AD2d 691, 692 [1991], *lv denied* 79 NY2d 1003 [1992]). The theft was not merely a larceny by trick, because the removal of property was accomplished not only by impersonating police officers, but also by physically restraining the victim during the patdown.

The evidence did not satisfy the unlawful entry element of burglary. Defendant only entered the common areas of an apartment building. There was no evidence that the general public was excluded from these areas (*see People v Maisonet*, 304 AD2d 674 [2003], *lv denied* 100 NY2d 584 [2003]). At the time of the robbery, the victim's building had no doorman, buzzer or intercom system, and the front door to the building was always unlocked. There was no evidence of any "no trespassing" signs. The fact that defendant had no legitimate reason to be in the building did not establish unlawful entry (*id; see also* Penal Law

§ 140.00[5]).

We have considered and rejected defendant's remaining claims.

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5556 The People of the State of New York, Respondent, Ind. 4260/09

-against-

Douglas Davis, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about February 2, 2010, 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: SEPTEMBER 22, 2011

CLERK

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

5558 The People of the State of New York, Respondent, Ind. 4930/97

-against-

Felix Suya, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Richard Lee Price, J.), entered on or about January 20, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

As conceded by the people, defendant's 1999 robbery conviction did not constitute an "exclusion offense" that rendered him ineligible for resentencing pursuant to CPL 440.46. Nevertheless, the court properly exercised its discretion in concluding that substantial justice dictated denial of

defendant's application for resentencing (*see People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). Defendant's criminal record is very serious and includes violent crimes. In addition, his prison disciplinary record is extraordinarily poor.

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5559-
5560 The People of the State of New York, Respondent,

Ind. 4658/04

-against-

David Delmoral,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Daniel FitzGerald, J.), rendered July 17, 2009, resentencing defendant to a term of 6 years, with 2½ years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5561 The People of the State of New York, Respondent, Ind. 4082/07

-against-

Alex Rivera, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about January 21, 2009, 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: SEPTEMBER 22, 2011

CLERK

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

5562N- 5562NA- 5562NB
Nancy Intrator, Index 350235/03
Plaintiff-Respondent,

-against-

Richard Intrator,
Defendant-Appellant.

_____

Law Offices of Jeannine Chanes, P.C., New York (Jeannine Chanes of counsel), for appellant.

Law Offices of Valerie Porter, New York (Gabriel Greenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered May 11, 2010, which, to the extent appealed as limited by the briefs, granted plaintiff's motion to hold defendant in contempt of the judgment of divorce and so-ordered stipulation based on his failure to make maintenance and equitable distribution payments and directed him to pay down his arrears in the amount of $395,660, with an initial purge payment of $80,000 and then at a rate of $10,000 per month, in addition to his regular child support and maintenance obligations, and implicitly denied defendant's cross motion seeking to hold plaintiff in contempt, unanimously affirmed, with costs. Orders, same court and Justice, entered on or about January 7, 2010 and December 22, 2009, directing defendant to make interim payments to plaintiff, unanimously affirmed, with costs.

Plaintiff and defendant were married in September 1974 and have two children. Prior to the marriage, plaintiff received a Bachelor's degree and during the marriage, she obtained a Master's degree in business administration. Defendant received a Bachelor of Science degree prior to the marriage and obtained a Master's in business administration after the parties were married. During the marriage, defendant earned a substantial income. Plaintiff was employed full-time during the first several years of the marriage, but thereafter worked part-time or on a freelance basis, earning significantly less than defendant.

In April 2003, plaintiff commenced this action for divorce. The parties thereafter entered into a stipulation as to child support and custody, and left issues relating to, inter alia, equitable distribution and maintenance for the court. At the time of the trial on these issues, defendant was not employed.

In a decision after trial, dated May 12, 2005, the court found that defendant was "an accomplished financial consultant and investment banker . . . and has an earnings ability, no less than $350,000 per year." A judgment of divorce was entered on August 10, 2005, directing defendant to pay, inter alia: maintenance of $5,000 per month until he turned 60, at which time payments were to be reduced to $3,500 per month; half the proceeds of the sale of a boat, if sold, or half of the net

equity if not sold; and $2,500 per month for child support.

In September 2007, after defendant failed to satisfy a money judgment relating to equitable distribution of the boat, plaintiff moved to recover related arrears and hold defendant in contempt for failing to make the boat payment. By so-ordered stipulation, dated November 15, 2007 (the stipulation), the parties reached an agreement, as "an accommodation to defendant," but "not to absolve him of, or to modify, his obligations under the Judgment of Divorce."

In the stipulation, defendant agreed that plaintiff was entitled to a judgment in the amount of $131,000 (the settlement amount) and that he would "use his best efforts to earn the moneys necessary to pay down the [] Settlement Amount as quickly as possible, and . . . get and stay current with . . . his ongoing financial obligations under the . . . Judgment of Divorce." In addition, defendant agreed that, at a minimum, he would "endeavor in good faith to continue to pay plaintiff no less than $2,500 per month, which is his base child support obligation." He also "agree[d] in good faith to apply as much of his cash flow as possible toward the payment of all amounts due plaintiff as quickly as possible."

We find no grounds to disturb the court's determination that defendant failed to use his best efforts and act in good faith to

meet his obligations under the judgment of divorce. The court's determination rested largely on its assessment of the credibility of the witnesses, which is afforded great weight on appeal (*Antes v Antes*, 304 AD2d 597, 597-598 [2003]). Defendant's insistence that the stipulation required the court to first consider his "actual earnings" is unsupported and it ignores the court's finding, based on defendant's lack of credibility, that his actual earnings could not be determined. Notably, the court considered that after the parties entered into the stipulation, defendant was gainfully employed, earning approximately $20,000 per month, yet during that time, he met only his child support obligations, failing to comply with his obligations to plaintiff. Additionally, the court found that after this employment ended, it was "almost impossible to tell . . . [h]ow much [defendant] earn[ed]."

Although the stipulation provides that plaintiff waived "her right to seek to have defendant held in contempt of court by reason of his failure to make" a payment related to the equitable distribution of the boat, her subsequent application seeking to hold defendant in contempt for, inter alia, failing "to sell the [b]oat," was not barred by the stipulation nor was it rendered frivolous by the court's prior finding that the boat had been

sold based on the subsequent discovery that defendant still held title to the boat.

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

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

ENTERED: SEPTEMBER 22, 2011

CLERK

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

5563 In re Thomas Cross, Index 401662/10
[M-3483] Petitioner,

-against-

Hon. Ann T. Pfau, Chief Administrative Judge
of the Office of Court Administration, et al.,
Respondents.

_____

Thomas Cross, petitioner pro se.

John W. McConnell, Office of Court Administration, New York (Shawn Kerby of counsel), for respondents.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: SEPTEMBER 22, 2011

CLERK

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5058-
5059 Trilby J. Tener, M.D., Index 104583/10
Plaintiff-Appellant,

-against-

Miriam Cremer, M.D., et al.,
Defendants.

- - - - -

NYU Langone Medical Center,
Nonparty Respondent.

_____

Wagner Davis, P.C., New York (Bonnie Reid Berkow of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (William F. Cusack of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 14, 2010, reversed, on the law, without costs, and the matter remanded to Supreme Court for a hearing on whether the information plaintiff seeks is "inaccessible" and hence whether nonparty New York University Langone Medical Center has the ability to comply with the subpoena. Order, same court and Justice, entered September 24, 2010, reversed, on the law, without costs, and the order of transfer vacated.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
Richard T. Andrias
Karla Moskowitz
Helen E. Freedman, JJ.

5058-5059
Index 104583/10

_____x

Trilby J. Tener, M.D.,
Plaintiff-Appellant,

-against-

Miriam Cremer, M.D., et al.,
Defendants.

- - - - -

New York University Langone Medical Center,
Nonparty Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 14, 2010, which denied her motion to hold nonparty New York University Langone Medical Center in contempt for failing to comply with a judicial subpoena, and from an order, same court and Justice, entered September 24, 2010, which transferred the action to the Civil Court pursuant to CPLR 325(d).

Wagner Davis, P.C., New York (Bonnie Reid Berkow of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (William F. Cusack and Ricki E. Roer of counsel), for respondent.

MOSKOWITZ, J.,

This appeal provides us with the first opportunity to address the obligation of a nonparty to produce electronically stored information (ESI) deleted through normal business operations. The action underlying this discovery dispute concerns a statement about plaintiff that someone posted on a website known as Vitals.com on April 12, 2009. Plaintiff claims this statement defamed her.[1]

Plaintiff claims that through discovery she managed to trace the Internet protocol (IP) address of the computer from which the allegedly defamatory post originated "to a computer in the custody and control of New York University." This computer had accessed the Internet through a portal located at Bellevue Medical Center and registered to nonparty New York University Langone Medical Center (NYU). According to NYU's Chief Information Security Officer, NYU had installed the Internet portal at Bellevue for the convenience of its residents who train there. The portal is a network address translation (NAT) portal that is essentially a switchboard through which a person can access the Internet. While only NYU personnel with proper security codes can gain access to NYU's computer system and

[1] For the purposes of this appeal, we assume that plaintiff has stated a valid claim for defamation.

medical records, anyone using a computer plugged into an ethernet outlet at Bellevue can access other web sites through the NYU portal. On April 12, 2009, as many as 2,000 NYU personnel and an untold number of Bellevue physicians, staff, and visitors could have accessed a web site through the NYU portal. In fact, the portal is capable of allowing access to up to 65,000 users at any one time.

On April 30, 2010, plaintiff served a subpoena on NYU seeking the identity of all persons who accessed the Internet on April 12, 2009, via the IP address plaintiff previously identified.[2] With the subpoena, plaintiff served a preservation letter advising NYU that the identity of the person who posted the remarks was at issue and that NYU should halt any normal business practices that would destroy that information.

When NYU did not produce the information, plaintiff moved for contempt. In opposition to plaintiff's contempt motion, NYU's Chief Information Security Officer stated that "[c]omputers that simply access the web through NYU's portal appear as a text file listing that is automatically written over every 30 days. NYU does not possess the technological capability or software, if

[2] The record is unclear whether the IP address plaintiff uncovered refers to the IP address of the exact computer that posted the allegedly defamatory material or more broadly to NYU's Internet portal.

such exists, to retrieve a text file created more than a year ago and 'written over' at least 12 times."

Plaintiff, in reply, submitted an affidavit from a forensic computer expert opining that NYU could still access the information using software designed to retrieve deleted information. The expert stated that "the term 'written over' is deceptive" because what really occurs is that "'old' information or data is typically allocated to 'free space' within the system." Plaintiff's expert suggested using "X-Rays Forensic" or "Sleuth Kit" to retrieve the information from unallocated space.

Supreme Court denied the contempt motion in part because it found that NYU did not have the ability to produce the materials plaintiff demanded and that "this allegation is unrefuted as a reply affidavit contradicting such allegation has not been supplied."[3]

Supreme Court was incorrect. As just mentioned, plaintiff had interposed an affidavit in reply from an expert detailing the steps NYU could take to obtain the data, including the utilization of forensic software.

In its papers in opposition to the motion, NYU offered no evidence that it made any effort at all to access the data,

[3] NYU does not dispute plaintiff's assertion that the subpoena was not facially defective.

apparently because it believed it could not, as a nonparty, be required to install forensic software on its system. However, the cases that NYU cites to support its assertion that it need not install forensic software are outdated. The most recent is from 1993, nearly 20 years ago (*see Carrick Realty Corp v Flores*, 157 Misc 2d 868 (Civ Ct, New York County 1993). Thus, as discussed below, there are several unanswered questions regarding NYU's ability to produce the requested documents.

The party moving for civil contempt arising out of noncompliance with a subpoena duces tecum bears the burden of establishing, by clear and convincing evidence, that the subpoena has been violated and that "the party from whom the documents were sought had the ability to produce them" *(Yalkowsky v Yalkowsky*, 93 AD2d 834, 835 [1983]; *see also Gray v Giarrizzo*, 47 AD3d 765, 766 [2008]).

In this day and age the discovery of ESI is commonplace. Although the CPLR is silent on the topic, the Uniform Rules of the Trial Courts, several courts, as well as bar associations, have addressed the discovery of ESI and have provided working guidelines that are useful to judges and practitioners. Indeed, in 2006, the Conference of Chief Justices approved a report entitled "Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information." New York's Uniform Rules

For the Trial Courts specifically contemplate discovery of ESI. Rule 202.12(c)(3) allows a court, where appropriate, to establish the method and scope of electronic discovery (Uniform Rules for Trial Courts [22 NYCRR] § 202.12 [c][3]).

The Uniform Rules addressing the discovery of ESI are fairly recent. They took effect in 2009. However, the Commercial Division Rules have addressed discovery of ESI for some time. Rule 8(b) of the rules contains requirements similar to those in the Uniform Rules. The Commercial Division for Supreme Court, Nassau County has built on Commercial Division rule 8(b) to develop the most sophisticated rules concerning discovery of ESI in the State of New York. That court also publishes in depth guidelines for the discovery of ESI (the Nassau Guidelines). While aimed at parties, the Nassau Guidelines are appropriate in cases, such as this, where a nonparty's data is at issue.

ESI is difficult to destroy permanently. Deletion usually only makes the data more difficult to access. Accordingly, discovery rules contemplate data recovery. For instance, the Uniform Rules include the "anticipated cost of data recovery and proposed initial allocation of such cost" in the scope of electronic discovery (Uniform Rules for Trial Courts [22 NYCRR] § 202.12[c][3]).

The Nassau Guidelines urge that parties should be prepared

to address the production of ESI that may have been deleted. The Nassau Guidelines state that at the preliminary conference, counsel for the parties should be prepared to discuss:

> "identification, in reasonable detail, of ESI that is or is not reasonably accessible, without undue burden or cost, the methods of storing and retrieving ESI that is not reasonably accessible, and the anticipated costs and efforts involved in retrieving such ESI."

(New York State Supreme Court, Commercial Division, Nassau County, Guidelines for Discovery of Electronically Stored Information [ESI]), effective June 1, 2009, II[c][4]).

The Nassau Guidelines also suggest that the parties be prepared to discuss "the need for certified forensic specialists and/or experts to assist with the search for and production of ESI" (*id*. at II [c][13]) Most important, the Nassau Guidelines do not rule out the discoverability of deleted data, but rather suggest a cost/benefit analysis involving how difficult and costly it would be to retrieve it:

> "As the term is used herein, ESI is not to be deemed 'inaccessible' based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data" (*id*. at IV).[4]

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[4] The prestigious Sedona Conference also recommends analyzing accessibility as a relative concept and includes the ease with which the data can be searched as a factor:

> "The relative accessibility of a source of potentially discoverable information is best evaluated by assessing the burdens involved in viewing, extracting,

The Federal Rules of Civil Procedure take a similar, although slightly more restrictive, approach. Rule 45 provides specific protections to non-parties. A person responding to a subpoena "need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost" (Fed Rules Civ Pro rule 45[d][1][D]). Moreover, "non-party status is a significant factor in determining whether the burden imposed by a subpoena is undue" (*Whitlow v Martin*, 263 FRD 507, 512 [CD Ill 2009]). Nevertheless, a federal court may still "order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C)" (Fed Rules Civ Pro rule 45[d][1][D]). Rule 26(b)(2)(C)(i)-(iii) requires a court to limit any discovery: (1) "that is unreasonably cumulative or duplicative," (2) "can be obtained from some other source that is more convenient, less burdensome or less expensive," (3) "where the party has already had ample opportunity to obtain the information by discovery in the action" or (4) when "the burden or expense of the proposed discovery

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> preserving, and searching the source as well as other relevant factors imposed by the location, including the dispersion and the volumes involved."

(The Sedona Conference Working Group, THE SEDONA CONFERENCE COMMENTARY ON: PRESERVATION, MANAGEMENT AND IDENTIFICATION OF SOURCES OF INFORMATION THAT ARE NOT REASONABLY ACCESSIBLE, at pg. 9 (July 2008).

outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues." The Advisory Committee Notes explain that the costs of retrieving the information are properly part of this analysis.

Meanwhile, some federal courts have suggested strict limits on the discovery of specific types of data that are typically overwritten or ephemeral. For example, the Seventh Circuit Electronic Discovery Pilot Program has adopted several "principles" to guide litigants through the discovery of ESI. In particular, Principle 2.04 governing the scope of preservation states that certain categories of ESI "generally are not discoverable in most cases." (Seventh Circuit Electronic Discovery Committee, *Seventh Circuit Electronic Discovery Pilot Program*, 14-15, Oct. 1, 2009). These categories include:

1. "Deleted," slack," fragmented," or "unallocated" data on hard drives;
2. Random access memory (RAM) or other ephemeral data;
3. On-line access data such as temporary internet files, history, cache, cookies etc;
4. Data in metadata fields that are frequently updated automatically, such as last-opened dates;
5. Backup data that is substantially duplicative of data that is more accessible elsewhere; and
6. Other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business (*id.*).

However, the federal courts may still order the discovery of data from these sources in an appropriate case (*see Victor Stanley, Inc. v. Creative Pipe, Inc.* 269 FRD 497, 524 [D Md. 2010]["[t]he general duty to preserve may also include deleted data, data in slack spaces, backup tapes, legacy systems, and metadata."]); *Columbia Pictures, Inc. v. Bunnell*, 245 FRD 443 [CD Cal. 2007] [ordering production of server log data]). We also note Judge Scheindlin's groundbreaking decision in *Zubulake v UBS Warburg, LLC*, 217 FRD 309, 316 [SDNY 2003] [in developing framework for cost/benefit analysis, court noted that discovery obligations apply not only to "electronic documents that are currently in use, but also [to] documents that may have been deleted and now reside only on backup disks."]).

Based on the specific facts of this case, we find that the Nassau Guidelines provide a practical approach. To exempt inaccessible data presumptively from discovery might encourage quick deletion as a matter of corporate policy, well before the spectre of litigation is on the horizon and the duty to preserve it attaches. A cost/benefit analysis, as the Nassau Guidelines provide, does not encourage data destruction because discovery could take place regardless. Moreover, similar to rule 26(b)(2)(C)(iii), the approach of the Nassau Guidelines, has the benefit of giving the court flexibility to determine literally

whether the discovery is worth the cost and effort of retrieval.

Here, plaintiff has variously described the information it seeks as stored in a "cache" file, as "unallocated" data or somewhere in backup data. Data from these sources is difficult to access. But, plaintiff's only chance to confirm the identity of the person who allegedly defamed her may lie with NYU. Thus, plaintiff has demonstrated "good cause" (*see* Fed Rules Civ Pro rule 45[d][1][D]) necessitating a cost/benefit analysis to determine whether the needs of the case warrant retrieval of the data.

However, the record is insufficient to permit this court to undertake a cost/benefit analysis. Accordingly, we remand to Supreme Court for a hearing to determine at least: (1) whether the identifying information was written over, as NYU maintains, or whether it is somewhere else, such as in unallocated space as a text file; (2) whether the retrieval software plaintiff suggested can actually obtain the data; (3) whether the data will identify actual persons who used the internet on April 12, 2009 via the IP address plaintiff identified; (4) which of those persons accessed Vitals.com and (5) a budget for the cost of the data retrieval, including line item(s) correlating the cost to

NYU for the disruption.[5] Some of these questions (particularly [1] and [2]) may involve credibility determinations. Until the court has this minimum information, it cannot assess "the burden and expense of recovering and producing the ESI and the relative need for the data" (Nassau Guidelines) and concomitantly whether the data is so "inaccessible" that NYU does not have the ability to comply with the subpoena. That NYU is a nonparty should also figure into the equation (*see Whitlow* 263 FRD at 512). Of course in the event the data is retrievable without undue burden or cost, the court should give NYU a reasonable time to comply with the subpoena.

Further, it is worth mentioning that CPLR 3111 and 3122(d) require the requesting party to defray the "reasonable production expenses" of a *nonparty*. Accordingly, if the court finds after the hearing that NYU has the ability to produce the data, the court should allocate the costs of this production to plaintiff and should consider whether to include in that allocation the cost of disruption to NYU's normal business operations. In this latter consideration, the court should also take into account that plaintiff waited one year before sending the subpoena and

[5] It is likely inappropriate to allow outside forensic computer experts access to NYU's computers because of privacy concerns.

preservation letter.

The court also erred in transferring the case to Civil Court. Although the complaint seeks damages, it also seeks equitable relief that is not within the jurisdiction of Civil Court (*see* CPLR 325[d]; *W.H.P. 20 v Oktagon Corp.*, 251 AD2d 58, 59 [1998]).

Accordingly the order of the Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 14, 2010, that denied plaintiff's motion to hold nonparty NYU in contempt for failing to comply with a judicial subpoena, should be reversed, on the law, without costs, and the matter remanded to Supreme Court for a hearing on whether the information plaintiff seeks is "inaccessible" and hence whether NYU has the ability to comply with the subpoena. The order of the same court and Justice, entered September 24, 2010, that sua sponte transferred the action to the Civil Court pursuant to CPLR 325(d), should be

reversed, on the law, without costs, and the order of transfer vacated.

All concur.

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

ENTERED: SEPTEMBER 22, 2011

CLERK