SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 2, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Nardelli, Williams, McGuire, JJ.

2811N The People of the State of New York, by Andrew M. Cuomo, Attorney General of the State of New York, Petitioner-Respondent, Index 402936/06

-against-

Marcus Garvey Nursing Home, Inc., Respondent-Appellant.

Holland & Knight LLP, New York (Daniel L. Kurtz of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Laura R. Johnson of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 24, 2006, which granted the petition directing compliance with a subpoena and denied the cross motion to quash, unanimously affirmed, without costs.

Tom, J.P. and Williams, J. concur in a separate memorandum by Tom, J.P. as follows:

TOM, J.P. (concurring)

The Attorney General issued the subject subpoena in the course of an investigation of financial impropriety and mismanagement at respondent nursing home, as well as possible patient abuse (*see* Public Health Law § 2803-c). The Attorney General's office is empowered to apply to enjoin such fraudulent or illegal activities, to take proof and to issue subpoenas "[i]n connection with any such application" (Executive Law § 63[12]). The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC § 1302d *et seq.*) authorizes the production of medical records where they are reasonably related to a "legitimate law enforcement inquiry" (45 CFR 164.512 [f][1][ii][C][1]; *see Matter of La Belle Creole Intl., S.A. v Attorney-General of State of N.Y.*, 10 NY2d 192, 196-197 [1961]).

We agree with Supreme Court that when investigating possible violations of law at a health related facility (*see e.g.* 42 USC § 1320a-7b), the Attorney General's office functions as a "health oversight agency" within the meaning of HIPAA (45 CFR 164.501; 164.512[d]). The Attorney General has demonstrated "authority, relevancy, and some basis for inquisitorial action" (*Matter of A'Hearn v Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn.*, 23 NY2d 916, 918 [1969], *cert denied* 395 US 959 [1969]), and except where "the futility of the process to uncover anything legitimate is inevitable or obvious or where the

information sought is utterly irrelevant to any proper inquiry" a subpoena will not be quashed (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal quotation marks and citations omitted]). Finally, we note that the requirement of Executive Law § 63(12) that a party under investigation "engage in repeated fraudulent or illegal acts" refers to the party operating the business, here respondent nursing home, not to a person in its care. While the subpoenaed records involve incidents of patient misconduct, they reflect respondent's failure to protect the rights guaranteed to patients under Public Health Law § 2803-c. Thus, we regard the incidents as relevant to, and indicative of, the overall pattern of mismanagement under investigation, not as mere isolated lapses in patient care.

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

McGUIRE, J. (concurring)

I agree with Justice Tom's concurrence that the order of Supreme Court should be affirmed, but reach that conclusion for different reasons.

Justice Tom's concurrence upholds the issuance of the subpoenas solely on the ground of the Attorney General's authority under Executive Law § 63(12). I would not rely on that statute. The Attorney General argues that Executive Law § 63(12) is not limited to consumer fraud cases, and I do not quarrel with the argument at that level of generality. But it is far from obvious that the Attorney General's authority under Executive Law § 63(12) is so sweeping as to authorize the issuance of subpoenas to respondent seeking the medical records of four residents relating to two incidents of, as the Attorney General characterizes it in his brief, "sexually aggressive behavior" by two of the four residents. More particularly, I have serious doubts that these two incidents satisfy the statute's requirements of either "repeated . . . *illegal acts*" or "persistent . . . *illegality*" (Executive Law § 63[12] [emphasis added]).[1]

Notably, the Attorney General does not venture any explanation of the "illegal" character of the "sexually

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[1]The Attorney General does not rely on his authority under Executive Law § 63(12) to seek relief on account of "repeated *fraudulent* . . . acts" or "persistent *fraud*" (emphasis added).

aggressive behavior" engaged in by the two residents. If the Attorney General's authority under this statute is so sweeping, it would appear that the Attorney General could issue subpoenas to any hospital or nursing home whenever he had reason to believe that two patients had been harassed by another patient or that one patient had twice been harassed by another patient. Moreover, under the Attorney General's view of his powers under Executive Law § 63(12), it appears to be irrelevant that the ostensibly "illegal" conduct was not committed by the party being investigated. That is hard to square with the terms of the statute, which authorizes the Attorney General to bring suit and investigate "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business" (Executive Law § 63[12]). Although it is not clear what conduct would satisfy the requirements of repeated illegal acts or persistent illegality under the Attorney General's view, presumably the Attorney General does not contend that two instances of patient neglect or negligent medical care occurring in a hospital or nursing home would be sufficient.

Justice Tom's concurrence, however, apparently embraces that extraordinary contention. It first correctly recognizes that "the requirement of Executive Law § 63(12) that a party under investigation 'engage in repeated fraudulent or illegal acts'

refers to the party operating the business, here respondent nursing home, not to a person in its care." It then goes on to state that the two "incidents of patient misconduct" establish the requisite illegal acts by respondent because they "reflect respondent's failure to protect the rights guaranteed to patients under Public Health Law § 2803-c." Presumably Justice Tom is referring to paragraph (h) of subdivision 3 of § 2803-c, which provides in relevant part that "[e]very patient shall be free from mental and physical abuse." I respectfully submit that it is far from obvious that any nursing home or hospital in this state engages in "illegal acts" within the meaning of Executive Law § 63(12) whenever, over some indefinite but perhaps protracted period of time, a patient commits two acts, or two patients each commit one act, that can be characterized as "mental [or] physical abuse."

Instead, I would uphold the validity of the subpoenas under N-PCL 112(b)(6). The subpoenas are part of a broader investigation -- one respondent concedes is proper -- into financial and governance issues. In litigating his motion to compel compliance with the subpoenas and the cross motion to quash, the Attorney General made a strong showing of significant financial and governance irregularities. At least under these circumstances, in pursuing his investigation into both possible mismanagement by respondent's board members and officers and

diversion of charitable funds from its mission as a nursing home, the Attorney General is entitled to assess the extent to which mismanagement and misuse of charitable funds may have resulted in compromised patient care. Determining the scope of the harm done, after all, may inform and thus is relevant to a decision by the Attorney General concerning the appropriate remedial measure (*see* N-PCL 112[a] [authorizing various remedial measures in an action or special proceeding brought by the Attorney General under the N-PCL]).

N-PCL 112(b)(6) provides that "[i]n connection with any such *proposed* action or special proceeding [authorized by N-PCL 112(a)], the attorney-general may . . . issue subpoenas in accordance with the civil practice law and rules" (emphasis added). *Matter of Abrams v Alliance for Progress* (136 Misc 2d 1022, 1025 [1987]), which respondent relies on, states in dicta that the Attorney General's authority to issue subpoenas under N-PCL 112(b)(6) "presuppose[s] a decision by the Attorney-General to bring the proceedings to the adjudicative stage." In my view, however, the Attorney General's authority to issue subpoenas under N-PCL 112(b)(6) does not depend on an antecedent decision actually having been made to commence one of the specified actions or special proceedings. The word "proposed" certainly does not require the conclusion that such a decision must have been made, and the statute does not state that the Attorney

General may issue subpoenas "in connection with any such action or special proceeding that has been commenced." To condition the Attorney General's authority to issue a subpoena on an antecedent decision to commence one of the specified actions or proceedings would at least sometimes cause the Attorney General to commence or decide to commence an action or proceeding before being satisfied that doing so was appropriate. For these reasons, and because of the broad scope of the Attorney General's authority over not-for-profit corporations (*see Matter of McDonell*, 195 Misc 2d 277, 278-279 [2002]), I would construe the word "proposed" to mean "potential."

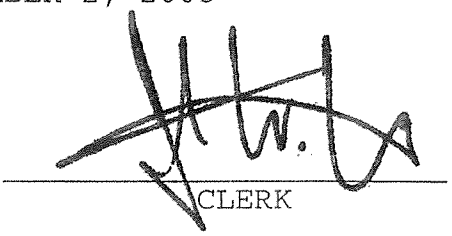
I also would reject respondent's argument, advanced as an independent ground for reversal, that the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*) (HIPAA) forbids it from disclosing to the Attorney General the medical records sought by the subpoena. The Attorney General argues that HIPAA does not bar disclosure of the records sought for two reasons: because the Department of Law is a "health oversight agency" as that term is defined by the relevant regulation (45 CFR 164.501), and the Attorney General is a "law enforcement official" within the meaning of the same regulation. Under that regulation, a "law enforcement official" is "an officer or employee of any agency or authority . . . empowered by law to . . . [i]nvestigate or conduct an official inquiry into a

potential violation of law" or to "[p]rosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law."

Respondent expressly states in its reply brief that it "does not dispute that the Attorney General is a 'law enforcement official' within the meaning of HIPAA." It contends, however, that it nonetheless may not disclose the medical records because they are not "relevant and material to a legitimate law enforcement inquiry" (45 CFR 164.512[f][1][ii][C][1]). Thus, this argument is not an independent ground for reversal but rather collapses into respondent's challenge to the legitimacy of the investigation that resulted in the subpoenas. As that challenge is without merit, respondent's contention that HIPAA precludes compliance with the subpoenas also is without merit. As respondent's reliance on the disclosure prohibitions of HIPAA is easily disposed of on this ground, I would not decide the less simple question of whether the Department of Law is a "health oversight agency."

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

ENTERED: DECEMBER 2, 2008



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Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

4183-
4183A Yuko Ito, individually and and derivatively on behalf of Keystone International, LLC, Plaintiff-Appellant, Index 124399/02

-against-

Sam Suzuki, et al., Defendants-Respondents,

Nomura Suzuki Properties, Ltd., et al., Defendants.

Law Offices of Thomas Hoffman, P.C., New York (Thomas Hoffman of counsel), for appellant.

Storch Amini & Munves PC, New York (Jason Levin of counsel), for Sam Suzuki and Katsuko Suzuki, respondents.

McManus, Collura & Richter, P.C., New York (Scott C. Tuttle of counsel), for Markowitz & Roshco and Daniel Roshco, respondents.

Wilson Elser LLP, New York (Brett A. Scher of counsel), for Kudman Trachten, LLP, respondent.

Meister Seelig & Fein, LLP, New York (Howard S. Koh of counsel), for Stuart I. Rich, respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 24, 2006, insofar as it dismissed the third, fourth, fifth, sixth and seventh causes of action as against the attorney defendants, unanimously affirmed, without costs. Order, same court and Justice, entered November 2, 2007, insofar as it denied plaintiff's motion for renewal and for leave to amend the complaint, unanimously modified, on the law, to the extent of granting plaintiff leave to file the proposed fourth

amended complaint, and otherwise affirmed, without costs. Cross appeals from above orders unanimously dismissed, without cost, as abandoned.

Plaintiff, who does not speak English, was induced to make an investment of $1 million to acquire a two-thirds interest in Keystone International LLC and to sign an operation agreement that gave defendant Sam Suzuki permanent managing control of its affairs. Keystone took title to a property consisting of 41 condominium units owned by an entity controlled by Hiroyoshi Hasegawa. The transaction was in derogation of "a clear and unequivocal court order" enjoining transfer of the property due to the pendency of divorce proceedings (*Hasegawa v Hasegawa*, 281 AD2d 594, 595 [2001]). Plaintiff brought this action in November 2002, which defendants removed to federal court, requiring amendment of the complaint to conform to federal pleading requirements and, again, to reflect dismissal of RICO claims. Following remand by the District Court in late 2005, plaintiff filed her third amended complaint, and defendants brought this pre-answer motion to dismiss (CPLR 3211[a][1], [7]), which Supreme Court granted in relevant part. Plaintiff then interposed a motion to renew, which also sought amendment of the complaint to reflect a change in the law concerning standing to sue a limited liability company.

The complaint adequately pleads a cause of action for fraud,

alleging that Sam Suzuki used plaintiff's funds to obtain property with a cloud on its title (because of the injunction against transfer and the filing of a lis pendens), for an inflated price and under financing terms onerous to plaintiff. It further asserts that Suzuki diverted funds from Keystone to satisfy personal obligations, which included payment of a $1.7 million settlement of a fraudulent conveyance claim brought by Hiroyoshi Hasegawa's wife.

The third amended complaint asserts claims of fraud and conspiracy to defraud (third and fourth causes of action) against defendants Daniel Roshco and his firm, Markowitz & Roshco, and Stuart I. Rich, and his firm, Kudman Trachten, LLP (collectively, the attorney defendants). Rich and his firm are charged with legal malpractice and breach of fiduciary duty (fifth, sixth and seventh causes of action) and, in the proposed fourth amended complaint, with aiding and abetting breach of fiduciary duty.

It is apparent that plaintiff was not individually represented by counsel with respect to either the formation of Keystone or the transfer of the subject property. Defendant Daniel Roshco represented plaintiff in the sale of her New York condominium apartment to secure funding for her investment in Keystone, obtaining her unlimited power of attorney to permit sale of the premises in her absence.

Both plaintiff and her brother were present when the

purchase of the Hasegawa property closed in September 2000. Although Roshco was not in attendance, he was paid $8,500 out of Keystone funds for work previously performed for the LLC. It was defendant Rich, Suzuki's attorney, who actually provided representation for Keystone at the closing. The complaint alleges that Rich released escrow funds to Suzuki before the closing was even scheduled whereby, plaintiff asserts, she "lost all leverage to withdraw from the purchase agreement."

The complaint alleges that Suzuki, represented by Rich, defrauded plaintiff, who maintains that she was represented by Roshco during that period. A fair reading of the allegations against the attorney defendants is that they failed to disclose the extent to which the transaction was detrimental to plaintiff. Lacking, however, is the assertion of any misrepresentation by either Roshco or Rich that was calculated to induce plaintiff's detrimental reliance so as to support a claim of fraud (*cf. Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 100 [2003]) and, absent any underlying tort, the conspiracy claim is likewise without foundation (*see Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [2006]).

A claim for attorney malpractice arises out of the contractual relationship between the parties, whether documented by a retainer agreement or not (*Moran v Hurst*, 32 AD3d 909, 911 [2006]). Absent actual representation by Rich and Kudman

Trachten, plaintiff's claims of legal malpractice are untenable as against those defendants (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 595 [2005]), as is the redundant cause of action for breach of fiduciary duty (*see Brooks v Lewin*, 21 AD3d 731, 733 [2005], *lv denied* 6 NY3d 713 [2006]; *Tabner v Drake*, 9 AD3d 606, 611 [2004]).

Affording plaintiff the benefit of every favorable inference (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]), we accept as true the complaint's allegations that Rich knew or should have known that the active assistance he provided to Suzuki was harmful to her interests (*see Franco v English*, 210 AD2d 630, 633 [1994]). Rich and Kudman Trachten were engaged by Suzuki to represent Keystone in the purchase of the Hasegawa property, and Suzuki, as Keystone's manager, was charged with a fiduciary duty to plaintiff. A cause of action for aiding and abetting breach of fiduciary duty merely "requires a prima facie showing of a fiduciary duty owed to plaintiff, . . . a breach of that duty, and defendant's substantial assistance . . . in effecting the breach, together with resulting damages" (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, __ AD3d __, 865 NYS2d 14 [1st Dept 2008]; *Kaufman v Cohen*, 307 AD2d 113, 125 [2003]). Owners of a fractional interest in a common entity are owed a fiduciary duty by its manager (*see Caprer v Nussbaum*, 36 AD3d 176, 189 [2006]), and it is now settled that a member of

a limited liability company has standing to maintain a derivative action on its behalf (*Tzolis v Wolff*, 39 AD3d 138 [2007], *affd* 10 NY3d 100 [2008]). According the allegations of the complaint their most favorable intendment (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], *cert denied* 459 US 1146 [1983]), we find that it sufficiently pleads that to the extent Rich and Kudman Trachten knowingly assisted Suzuki to structure the transaction in a manner that was detrimental to plaintiff's interests, they may be held liable for aiding and abetting the breach of Suzuki's fiduciary duty to her as the owner of Keystone's majority interest (*Kaufman*, 307 AD2d at 125).

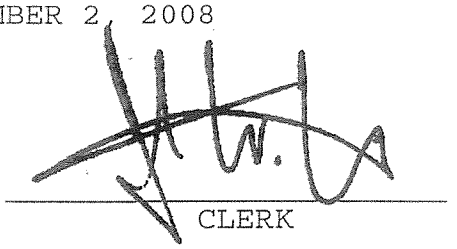
We find plaintiff's motion to amend the complaint to be timely (CPLR 3025[b]; *see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007]). As noted, this matter was litigated in federal court until late 2005, defendants interposed this motion to dismiss in February 2006, and plaintiff's capacity to bring derivative claims on behalf of Keystone has only recently been resolved (*Tzolis*, 10 NY3d at 109). Given that the detailed facts concerning the extent of the attorney defendants' involvement in the fraudulent scheme are peculiarly within the knowledge of other parties (*see Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]) and the substance of the alleged wrongdoing is set forth in the affidavits of plaintiff and her brother, the circumstances surrounding the proposed cause

of action are sufficiently stated to support amendment of the complaint (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-355 [2005]; *cf. Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1998]). Moreover, at this stage of the proceedings, before joinder of issue and discovery, Rich and Kudman Trachten will not sustain prejudice as a result of the amendment (*see Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1990]).

We dismiss the cross appeals as abandoned for failure to raise grounds for affirmative relief in the briefs (*see Rivera v Anilesh*, 32 AD3d 202, 204-205 [2006], *affd on other grounds* 8 NY3d 627 [2007]).

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

ENTERED: DECEMBER 2, 2008



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Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4690 The People of the State of New York, Ind. 6146/05
Respondent,

-against-

Maria Taussi-Casucci,
Defendant-Appellant.

Stanley Neustadter, New York (Jason C. Yoder of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 12, 2006, convicting defendant, after a jury trial, of grand larceny in the second degree and 44 counts of forgery in the second degree, and sentencing her a term of 3 to 9 years concurrent with 44 concurrent terms of 2 to 6 years, unanimously affirmed.

Defendant makes a two-pronged claim that she was deprived of her right to counsel. First, she claims that, as a matter of law, she was without the services of a licensed attorney at trial because her lead counsel, Carlos Perez-Olivo, never reported his disbarment in another jurisdiction, thereby avoiding reciprocal disbarment. Second, she claims that, as a matter of fact, this attorney rendered ineffective assistance, as did a second attorney who represented her at sentencing.

Shortly after defendant's trial, this Court disbarred Perez-

Olivo for reasons not related to this case (*Matter of Perez-Olivo*, 34 AD3d 141 [2006]). The effective date of this Court's order fell between defendant's trial and sentencing; at the time of the trial, Perez-Olivo was not under suspension in New York and was licensed to practice law. However, in 2001, he was disbarred in Puerto Rico (*In re Perez-Olivo*, 155 DPR 887 [2001]), but he never complied with the notification requirement of 22 NYCRR 603(3)(d). As a result, no reciprocal disciplinary proceeding was ever instituted; the ultimate New York disbarment was on other grounds.

"Counsel, as the word is used in the Sixth Amendment can mean nothing less than a licensed attorney at law." (*People v Felder*, 47 NY2d 287, 293 [1979]). Defendant essentially argues that at the time of her trial, Perez-Olivo had already been "constructively" disbarred, because had he reported his Puerto Rican disbarment, his reciprocal disbarment in New York would allegedly have been inevitable.

As we observed in a case where we declined to find, retrospectively, a constructive absence of counsel based on an attorney's posttrial suspension for mental disability, "we do not see a sufficiently compelling or persuasive reason to create a new per se rule to cover the instant situation." (*People v Lopez*, 298 AD2d 114, 116 [2002], *lv denied* 99 NY2d 616 [2003]). Reciprocal discipline by this Court is never automatic; it occurs

only after satisfaction of the procedural requirements set forth in 22 NYCRR 603.3, and upon an order of this Court setting forth the effective date of the disciplinary action. The attorney is entitled to litigate issues set forth in 22 NYCRR 603.3(c). We see no reason to grant defendant a new trial based solely on assumptions, however plausible, as to what would have occurred under circumstances that never did occur.

Turning to defendant's claim that Perez-Olivo rendered ineffective assistance in fact, we find that claim unreviewable on direct appeal because it involves matters outside the record concerning Perez-Olivo's trial strategy and preparation (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). In particular, Perez-Olivo could have reasonably concluded that a motion pursuant to CPL 60.45(2)(a) to suppress defendant's confession to civilians would have been futile and unhelpful to her defense. In any event, the alleged errors and omissions did not deprive defendant of a fair trial or cause her any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]). The evidence of defendant's guilt

was overwhelming, and "[c]ounsel may not be expected to create a defense when it does not exist" (*People v DeFreitas*, 213 AD2d 96, 101 [1995]), *lv denied* 86 NY2d 872 [1995]).

At sentencing, defendant was represented by an attorney other than Perez-Olivo, and the record establishes that this attorney rendered effective assistance. We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 2, 2008

CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4691 Mary Purcell,
Plaintiff-Respondent,

Index 116764/04

-against -

York Building Maintenance Corp.,
Defendant-Appellant,

CSB (America) Corp., etc.,
Defendant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Anna A. Higgins of counsel), for appellant.

Allyn, Hausner & Montanile, LLP, White Plains (Joseph A. Montanile of counsel), for respondent.

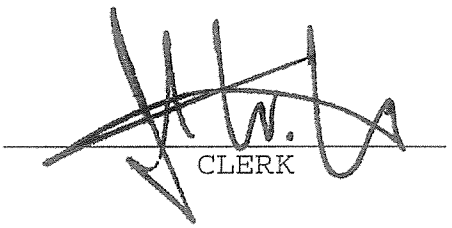
Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered on or about June 12, 2008, which, in an action for personal injuries allegedly caused by a slippery floor, denied the motion of defendant-appellant, a janitorial services contractor, for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant York Building Maintenance Corp. dismissing the complaint as against it.

Plaintiff's deposition testimony that the floor on which she slipped was "very shiny" and "over waxed," without more, does not support an inference of negligent waxing or polishing (*see Davies v City of New York*, 39 AD3d 390 [2007], *lv denied* 9 NY3d 808). Nor may such inference be made on the basis of plaintiff's

testimony that a carpet and a yellow "caution" or "slippery" sign were placed on the floor shortly after her fall (*see Fernandez v Higdon El. Co.*, 220 AD2d 293 [1995]). We have considered plaintiff's other evidence and arguments and find them unavailing.

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

ENTERED: DECEMBER 2, 2008



Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4692 In re Carlos S.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

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

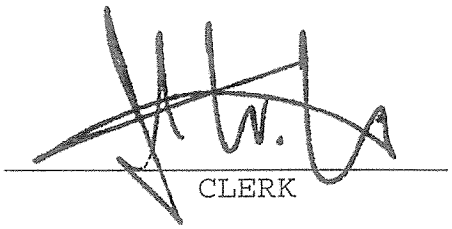
Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about December 20, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed an act, which, if committed by an adult, would constitute the crime of obstructing governmental administration in the second degree, and placed him on probation for a period of 18 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]). Appellant's physical acts of interference with the officers' performance of their duty clearly satisfied the elements of Penal Law § 195.05 (*see Matter of Quaniqua W.*, 25 AD3d 380 [2006]). The court's dismissal of a resisting arrest charge does not warrant a different conclusion,

because appellant's argument in this regard merely speculates as to the reason for the dismissal (*see People v Rayam*, 94 NY2d 557 [2000]), and, in any event, because resisting arrest and obstructing governmental administration have different elements (*see Matter of Johnetta T.*, 192 AD2d 416 [1993]).

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

ENTERED: DECEMBER 2, 2008



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Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4693 P. Sherman Brown, et al.,
Plaintiffs-Appellants,

-against-

Business Leadership Group, et al.,
Defendants-Respondents,

Derek Couzens,
Defendant.

Index 602470/05

Dady & Garner, PA, New York (W. Michael Garner of counsel), for appellants.

Collier & Basil, P.C., New York (Robert J. Basil of counsel), for Business Leadership Group, Juliette Dennett, Mark Fitzmaurice, Peter Naylor, Jack Ross and Angus Ross, respondents.

Arent Fox LLP, New York (Eugene R. Scheiman of counsel), for Dale Carnegie & Associates, Inc., respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered December 4, 2007, which granted defendants-respondents' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Plaintiff P. Sherman Brown entered into a licensing agreement with defendant Dale Carnegie & Associates, Inc. (DCA) in 1990 for the right to use the DCA name, materials and courses at training centers in two defined territories in England. The agreement provided that upon its expiration or termination Brown would be entitled to a continuing license fee (CLF) from his successor licensee. When Brown's agreement expired, in 1998, his territories were assigned to two different individuals; in 2001,

defendant Business Leadership Group (BLG) and one of those individuals formed a joint venture that acquired the territories. In May 2003, BLG alone entered into a license agreement with DCA for Brown's former territories and operated them until August 2005, when because of BLG's poor performance, DCA had them transferred back to itself. DCA assigned Brown's former territories to another licensee in December 2006.

Brown complains of DCA's selection of BLG as his successor and of the 15-month delay in selecting BLG's successor, which resulted in the partial loss of his CLF payments. However, contrary to his contention, the evidence fails to raise an inference that DCA acted in negligent disregard of his rights, thereby breaching the implied covenant of good faith and fair dealing (*see generally Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *Pernet v Peabody Eng'g*, 20 AD2d 781 [1964]).

Nor does the evidence raise an inference that in operating the business BLG failed to use its "best efforts," pursuant to the 2003 agreement between DCA and BLG, in which Brown's right to CLF payments is included, since the agreement's "best efforts" clause does not contain "objective criteria against which [BLG's] efforts can be measured" (*Timberline Dev. v Kronman*, 263 AD2d 175, 178 [2000]; *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 113 [1998]). The Territory Revenue Potential (TRP),

the amount the business would be expected to generate in the territory, and the Guaranteed Minimum Production (GMP), by which DCA mandated certain annual gross revenues, do not constitute such objective criteria. Moreover, these provisions regulating DCA's required revenues so as to generate royalties for the license were entirely between DCA and BLG. If Brown benefitted from them at all, it was only incidentally, since BLG's efforts to meet these standards would generate revenue from which his CLF would be calculated. But Brown had no right to enforce these standards, particularly the GMP. In any event, a sponsor could, despite its best efforts, fail to meet the TRP or GMP because of market forces (*see Ohanian v Avis Rent A Car Sys., Inc.*, 779 F2d 101, 108 [2d Cir 1985]).

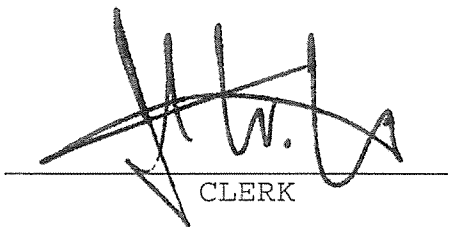
Brown's contention that his CLF must be calculated as a percentage of the "aggregate income" generated from all the territories operated by BLG, not only those that formerly belonged to him, depends on an interpretation of the term "aggregate income" that is unreasonable, reading his 1990 agreement with DCA and BLG's 2003 agreement with DCA as a whole (*see Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438 [1994]; *Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170 [2003]). Indeed, by Brown's own admission, the CLF was intended to compensate a former licensee for the business and goodwill it had built up and for its inability under the

agreement to assign or sell the business itself.

Absent liability to Brown on BLG's part, the individual defendants-respondents, who guaranteed the 2003 agreement between BLG and DCA, cannot be held liable. In any event, a personal guarantee "is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *see also Levine v Segal*, 256 AD2d 199 [1998]). The guarantee agreements here stated that the guarantees "shall inure to the benefit of DC&A, its successors and assigns." Since DCA was expressly not obligated to pay any portion of the CLF, neither may the guarantors be so obligated. Brown's interpretation, that the absence of the word "only" in the above-quoted statement means that the guarantees might also inure to his benefit, would render the statement meaningless or superfluous (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [2007]; *East 41st St. Assoc. v 18 E. 42nd St.*, 248 AD2d 112, 114 [1998]).

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

ENTERED: DECEMBER 2, 2008



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4695 Mariette Torres, Index 111780/05
Plaintiff-Appellant,

-against-

Washington Heights Business Improvement District Management Association, Inc.,
Defendant-Respondent.

Joelson & Rochkind, New York (Kenneth Joelson of counsel), for appellant.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for respondent.

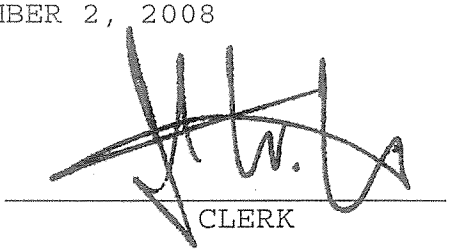
Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered May 22, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary dismissal was properly granted in this matter where plaintiff was injured when she tripped on a plastic bag during a street fair that was hosted and sponsored by defendant. Although defendant, as a licensee who obtained permission to use the designated streets to sponsor and host the fair, owed a duty of care to maintain the area in a reasonably safe condition (*see Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]), the evidence demonstrates that defendant established its entitlement to summary judgment by showing that it had no constructive notice of the defective condition (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499 [2008]). The general awareness of litter in the

streets is insufficient to raise a triable issue as to whether defendant had constructive notice of the plastic bag that caused plaintiff's fall (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]; *Melendez v New York City Hous. Auth.*, 23 AD3d 211 [2005]).

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

ENTERED: DECEMBER 2, 2008



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4696 Danny Taylor, Index 18498/00
Plaintiff-Appellant, 8207/00

-against-

Lehr Construction Corp.,
Defendant,

Wood-Pro II Installers Inc., et al.,
Defendants-Respondents.

[And a Third-Party Action]

Bisogno & Meyerson, Brooklyn (Elizabeth Mark Meyerson of counsel), for appellant.

MacCartney & MacCartney, Kerrigan & MacCartney, Nyack (William K. Kerrigan of counsel), for Wood-Pro II Installers Inc., respondent.

Richard M. Duignan, New York, for William Summerville, Inc., respondent.

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about October 10, 2006, insofar as appealed from as limited by the briefs, after a jury trial, dismissing the complaint as against defendants Wood Pro II Installers, Inc. (Wood Pro) and William Summerville, Inc. (Summerville), unanimously affirmed, without costs.

Plaintiff was injured when, while working at a construction site, he was struck in the back by an uninstalled door frame that had been left in an open doorway. Plaintiff commenced this action against, inter alia, Wood Pro, the company hired to install the door frames at the site, and Summerville, the

manufacturer of the door frame.

The verdict in favor of Wood Pro was based upon a fair interpretation of the evidence (*see e.g. McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). Wood Pro's principal testified that neither he nor Wood Pro workers placed the subject door frame in the open doorway, and that it was Wood Pro's practice to lean the wooden door frames against a solid wall rather than against a doorway. Issues of credibility are for the jury and its resolution of such issues is entitled to deference (*see White v New York City Tr. Auth.*, 40 AD3d 297 [2007]). It was error for the court to charge the jury on comparative fault as there was no evidence of any act on plaintiff's part showing negligence. However, the error was harmless in light of the verdict finding no negligence on the part of Wood Pro (*see Silverstein v Marine Midland Trust Co. of N.Y.*, 35 AD3d 840 [2006]).

The court properly granted Summerville's motion to dismiss the action as against it at the close of plaintiff's case. There was no evidence that Summerville was negligent or violated a statutory or contractual duty to plaintiff (*see Vargas v New York City Tr. Auth.*, 54 AD3d 579 [2008]).

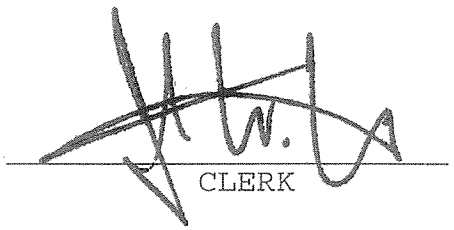
The record further establishes that contrary to plaintiff's contentions, he had no viable claims under Labor Law § 241(6) against either Wood Pro or Summerville. Neither had the

authority to supervise or control plaintiff's work, and they were not owners or general contractors at the construction site (*see e.g. Andrade v Triborough Bridge & Tunnel Auth.*, 35 AD3d 256, 257 [2006]).

We have considered plaintiff's remaining arguments, including that the court improperly denied his request to reopen his case to establish liability on Summerville's part, and find them unavailing.

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

ENTERED: DECEMBER 2, 2008



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4697-
4698 The People of the State of New York, Ind. 6058/05
Respondent,

-against-

Regina Santos,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), entered July 17, 2006, convicting defendant, after a jury trial, of insurance fraud in the third degree and falsifying business records in the first degree, and sentencing her to a term of 5 years' probation and a $5000 fine, unanimously affirmed.

The jury's verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's guilt was established by the testimony of multiple witnesses, and we find no basis for disturbing the jury's decision to credit those witnesses.

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

ENTERED: DECEMBER 2, 2008

CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4700-
4700A Mark Buller, Index 601783/02
Plaintiff-Appellant,

-against-

John Giorno, et al.,
Defendants,

Elliott Meisel, et al.,
Defendants-Respondents.

Pryor Cashman LLP, New York (Joseph Z. Epstein of counsel), for appellant.

Dolgenos Newman & Cronin LLP, New York (Jeffrey Newman of counsel), for respondents.

Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered August 22, 2007, dismissing the amended complaint against the Meisel defendants, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 6, 2007, which granted said defendants' motion, unanimously dismissed, without costs, as subsumed within the appeal from the judgment.

Plaintiff seeks damages and equitable relief in connection with the sale of an apartment to defendant Giorno Poetry Systems Institute in 1996. On a prior appeal in this case, we held that the fourth cause of action against the Giorno defendants and the

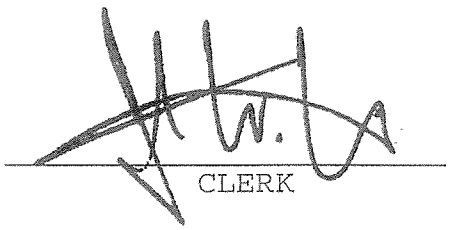
seventh cause of action against plaintiff's fellow shareholders and the corporate owner of the building were time-barred (28 AD3d 258 [2006]).

The doctrine of law of the case does not apply, as the Meisel defendants' motion herein involved the conduct and liability of parties other than those involved in our prior ruling (*see Brown v Sears Roebuck & Co.*, 297 AD2d 205, 208-209 [2002]). Nevertheless, the allegations of tortious interference with contract and breach of fiduciary duty are both subject to a three-year statute of limitations (*see* 28 AD3d at 258-259). Plaintiff's contention that the essence of his claim against the Meisel defendants is actual fraud, a claim not pleaded herein, cannot serve as a basis for denial of the motion (*see Hassan v Bellmarc Prop. Mgt. Servs., Inc.*, 12 AD3d 197, 198 [2004]). Even if fraud had been pleaded, it would be insufficient to defeat the motion, as the allegations of fraud are incidental to those of breach of fiduciary duty (28 AD3d at 259; *see Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 119-120 [1985], *affd* 67 NY2d 981 [1986]). The Meisel defendants' representation of Giorno Poetry was disclosed in the Contract of Sale, and they gave no indication they were withdrawing as counsel for Giorno Poetry, so the requisite "intent to deceive" is lacking and a claim for actual fraud cannot be sustained.

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

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

ENTERED: DECEMBER 2, 2008



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4701 Manuel Mejia, Index 21633/99
Plaintiff,

-against-

Andrew R. Levenbaum,
Defendant-Respondent,

Tam Restaurants, Inc., et al.,
Defendants-Appellants,

Grotto D'Oro Bay Corp., et al.,
Defendants.

Fogarty, Felicione & Duffy, P.C., Mineola (Patrick J. Fogarty of counsel), for appellants.

Camacho Mauro Mulholland, LLP, New York (Eric L. Cooper of counsel), for respondent.

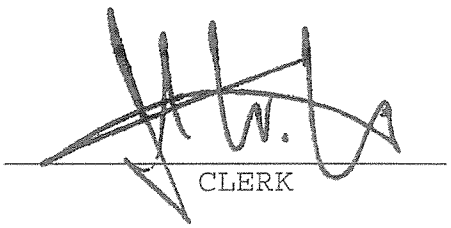
Order, Supreme Court, Bronx County (Alan Saks, J.), entered November 29, 2007, which, insofar as appealed from, in an action for personal injuries, granted defendant Andrew Levenbaum's motion to renew his prior motion for summary judgment on his cross claim against defendants Tam Restaurants, Inc. and Plum Third Street, Corp. for common-law indemnification, and, upon renewal, granted Levenbaum's motion to the extent of awarding him summary judgment on the cross claim as against Tam Restaurants, unanimously affirmed, with costs.

This Court previously determined that Levenbaum bears no liability to plaintiff and that Plum Third, which is owned by Tam Restaurants, directed plaintiff's work at the time that he was

injured (30 AD3d 262 [2006]). Accordingly, since Levenbaum is free from active negligence and Plum Third had direct control over the work giving rise to the injury, summary judgment on the issue of Levenbaum's cross claim for common-law indemnification against Tam Restaurants was not premature (*see Rodriguez v Metropolitan Life Ins. Co.*, 234 AD2d 156 [1996]; *see also Tighe v Hennegan Constr. Corp.*, 48 AD3d 201, 202 [2008]).

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

ENTERED: DECEMBER 2, 2008



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4702 In re Frances V. Rappo, Petitioner, Index 107670/07

-against-

The New York State Division of Human Rights, Respondent.

Frances V. Rappo, petitioner pro se.

Determination of respondent State Division of Human Rights, dated April 3, 2007, which dismissed petitioner's employment discrimination claims, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Rolando Acosta, J.], entered on or about September 17, 2007), dismissed, without costs.

To the extent petitioner pro se claims that her former employer, New York City Human Resources Administration (HRA), failed to reasonably accommodate her disability, this claim must fail, because at the time she made her request, Executive Law § 292(21) did not require an employer to provide "reasonable accommodations" (*see Riddick v City of New York*, 4 AD3d 242, 247 [2004]). In any event, substantial evidence supports the determination that HRA was not required to provide petitioner with a job transfer as a reasonable accommodation, since petitioner failed to demonstrate that she could not perform the

essential duties of her job and that she would be able to perform the essential duties of another job (*see Pimentel v Citibank, N.A.*, 29 AD3d 141, 147-148 [2006], *lv denied* 7 NY3d 707 [2006]; *Pembroke v New York State Off. of Ct. Admin.*, 306 AD2d 185 [2003]).

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

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

ENTERED: DECEMBER 2, 2008

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4703 In re Francis Greenburger, Index 55446/90
Petitioner-Respondent,

-against-

The Tax Commission of the
City of New York, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Robert J. Paparella of counsel), for appellants.

Goldberg Weprin & Ustin LLP, New York (Matthew Hearle of counsel), for respondent.

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered June 1, 2007, which denied respondents' motion to dismiss the consolidated proceedings for lack of standing, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

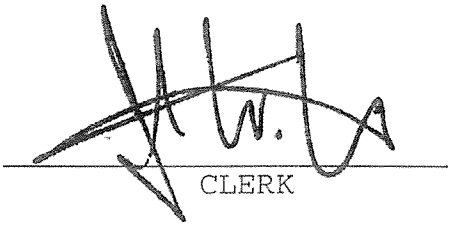
While there is no question that petitioner's pecuniary interest was affected by the tax assessment against the subject property, petitioner, a fractional lessee, failed to establish that it has standing to maintain these tax certiorari proceedings by demonstrating either that the lease "expressly confers the right to assert the lessor's undivided property interest in a challenge of the assessment" or that it "is required to pay directly the taxes levied against the lessor's undivided parcel" (*Matter of Waldbaum, Inc. v Finance Adm'r of City of N.Y.*, 74 NY2d 128, 132 [1989]).

Article 6.01(d) of the parties' lease provides that petitioner "shall have the right to direct Landlord to contest or review any and all Taxes . . . by legal proceedings or in such manner as Landlord in its opinion shall deem advisable," at petitioner's expense. This provision does not grant petitioner the right to commence a certiorari action in its own name (*compare Matter of Ames Dept. Store, No. 418 v Assessor of Town of Greece*, 261 AD2d 835 [1999], *and Matter of K-Mart Corp. v Board of Assessors of County of Tompkins*, 176 AD2d 1034 [1991]). Nor do letters from the landlord consenting to the litigation, written years after commencement of the proceedings, retroactively confer standing (*see e.g. Matter of Midway Shopping Center v Town of Greenburgh*, 11 Misc 3d 1071[A], 2006 NY Slip Op 50501(U), *10 [2006]).

While petitioner pays the overwhelming proportion of the taxes and the landlord is a tax-exempt entity, petitioner is not required to pay the taxes directly to the taxing authority; he pays the taxes to the landlord (*see Waldbaum*, 74 NY2d at 132).

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

ENTERED: DECEMBER 2, 2008



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4704 The People of the State of New York, Ind. 4338/05
Respondent,

-against-

Robert Trinidad,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered February 16, 2006, convicting defendant, after a jury trial, of two counts of sexual abuse in the first degree, and sentencing him to concurrent terms of 2 years, unanimously affirmed.

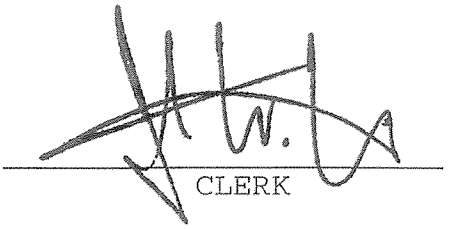
The prosecutor cross-examined a defense witness about his failure to mention his exculpatory version of the incident to other civilians at the scene who were accusing defendant of misconduct. Defendant's claim that this impeachment required the prosecutor to lay a foundation pursuant to *People v Dawson* (50 NY2d 311 [1980]) is unpreserved (*see People v Miller*, 89 NY2d 1077 [1997]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. *Dawson* concerns the impeachment of witnesses by their failure to report exculpatory alibi information to law

enforcement authorities, and there is nothing in *Dawson* or its rationale to suggest that it should be applied to a witness's contacts with other civilians. To the extent defendant is arguing that the cross-examination of this witness or the prosecutor's summation asserted that the witness subsequently failed to bring his exculpatory information to the attention of law enforcement, defendant's claims are unsupported by the record.

We have considered and rejected defendant's remaining arguments, including those related to the court's jury charge.

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

ENTERED: DECEMBER 2, 2008



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4705 Jonathan Kinlay, et al., Index 602886/04
Plaintiffs-Appellants,

-against-

Ronald Henley, et al.,
Defendants-Respondents,

Henley Wilmott Capital, LLC, et al.,
Defendants,

Caissa Fund Management, LLC, et al.,
Nominal Defendants.

Jonathan Kinlay, New York, appellant pro se, and for Investment Analytics (Bermuda) Ltd., appellant.

Law Offices of Harry Issler, PLLC, New York (David K. Bowles of counsel), for respondents.

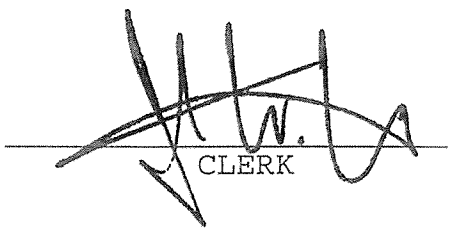
Order, Supreme Court, New York County (Herman Cahn, J.), entered November 21, 2007, which granted defendants-respondents' motion to dismiss all claims pleaded by the corporate plaintiff, unanimously reversed, on the law, with costs, the motion denied, and the claims of the corporate plaintiff reinstated.

The individual plaintiff is the owner and chief executive officer of the corporate plaintiff. Two months after plaintiffs' attorney was relieved by the court, defendants moved to dismiss the claims of the corporation pursuant to CPLR 321(a), which requires a corporation to appear by an attorney. The corporation then assigned all of its claims in the action to the individual plaintiff, admittedly to evade CPLR 321(a), a perfectly

legitimate tactic (*Kamp v In Sportswear*, 39 AD2d 869 [1972], *revg on dissenting opn at App Term*, 70 Misc 2d 898 [1972]; *see also Medical Facilities v Pryke*, 172 AD2d 338 [1991]; *Traktman v City of New York*, 182 AD2d 814 [1992]). Nevertheless, the motion court dismissed the corporation's claims, finding the assignment to be "obviously a ploy" to avoid the law. On appeal, defendants acknowledge that good consideration was given for the assignment and do not otherwise challenge its validity. Instead they appear to argue that the appeal should be dismissed because the corporation fell into default once it purported to maintain the action without counsel, that the motion court's dismissal of the corporation's claims was in effect a default judgment, that no appeal lies from a default judgment, and that the corporation's remedy is to retain counsel and move to vacate its default. The argument is contrary to the above authorities and lacks merit. The individual plaintiff has obtained all of the corporation's claims, and thus CPLR 321(a) does not apply.

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

ENTERED: DECEMBER 2, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 2, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
James M. Catterson
Dianne T. Renwick,
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 3687N/05
Respondent,

-against- 4706

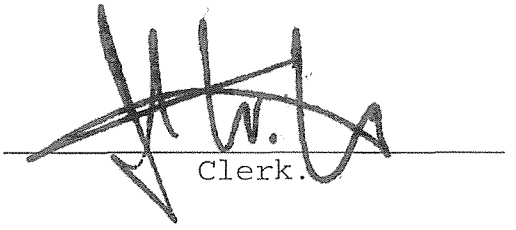
Wander Duran De La Rosa,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael R. Ambrecht, J.), rendered on or about June 28, 2006,

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.

ENTER:



Clerk.

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

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4707 The People of the State of New York, Ind. 5101/06
Respondent,

-against-

Richard Howze,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered March 20, 2007, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's challenge for cause to a prospective juror who had been the victim of property crimes. The panelist never said anything that would "cast serious doubt on [her] ability to render an impartial verdict" (*People v Arnold*, 96 NY2d 358, 363 [2001]), and, in any event, she then gave the court an unequivocal assurance of her impartiality. Given the totality of her responses, the panelist's assurance was not rendered equivocal by her use of the phrases "I don't think I could not be

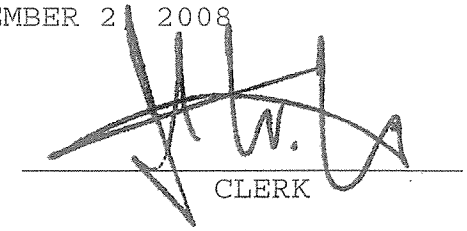
impartial," and "I will do my best" (*see People v Chambers*, 97 NY2d 417, 419 [2002]).

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it primarily involves matters outside the record concerning counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). During the trial, counsel observed some type of interaction between a juror and a witness in the hallway outside the courtroom and called it to the court's attention, but only asked if the court could try to keep jurors and witnesses separated. On appeal, defendant argues that his trial counsel should have requested an inquiry into the incident, and could not have had a reasonable strategic reason for failing to do so. We disagree, because counsel may have concluded that the incident was innocuous and that an inquiry could have led to, for example, embarrassing, antagonizing or even disqualifying a juror counsel may have viewed as favorable to the defense. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal

standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: DECEMBER 2[illegible] 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 2, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
James M. Catterson
Dianne T. Renwick,
Helen E. Freedman, Justices.

The People of the State of New York, SCI 4999/05
Respondent,

-against- 4708

Parnell Haynesworth,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about September 27, 2007,

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.

ENTER:

Clerk.

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

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4709N In re The Hanover Insurance Company, Index 114853/06
Petitioner-Respondent,

-against-

Robert Lewis,
Respondent-Appellant.

Susan R. Nudelman, Westbury, for appellant.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for respondent.

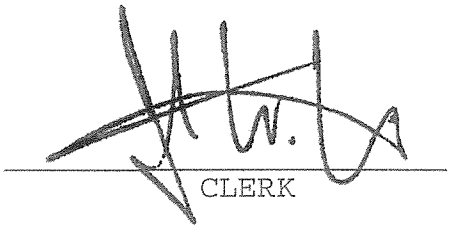
Order and judgment (one paper), Supreme Court, New York County (Lottie E. Wilkins, J.), entered August 22, 2007, granting the petition brought pursuant to CPLR article 75 to permanently stay uninsured motorist arbitration, unanimously affirmed, without costs.

Physical contact is a condition precedent to the arbitration of this uninsured motorist claim, and whether or not there was physical contact between the insured vehicle and an alleged "hit and run" vehicle is an issue of fact to be decided by the court (*see Matter of Empire Mut. Ins. Co. [Zelin]*, 120 AD2d 365 [1986]; *see also Lumbermens Mut. Cas. Co. v Nespolini*, 281 AD2d 365 [2001]). Here, the evidence at the framed-issue hearing establishes that the court's determination that the vehicle driven by respondent did not come into contact with another vehicle at the time of the accident was supported by a fair interpretation of the evidence, and there is no basis to disturb

the hearing court's credibility determinations (*see e.g. Claridge Gardens v Menotti*, 160 AD2d 544 [1990]). Respondent acknowledged that he told the police officer who responded to the scene of the accident that he had only been cut off, and the police report, which was entered into evidence without objection, is consistent with respondent's testimony.

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

ENTERED: DECEMBER 2, 2008



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4711N-
4711NA Melissa Stampf, Index 111041/07
Petitioner-Respondent,

-against-

Metropolitan Transportation Authority, et al.,
Respondents-Appellants.

Mark D. Hoffer, Jamaica (Brian K. Saltz of counsel), for appellants.

Philip J. Dinhofer, LLC, Rockville Centre (Philip J. Dinhofer of counsel), for respondent.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered October 30, 2007, which granted petitioner's motion for leave to serve a late notice of claim on respondent Metropolitan Transportation Authority (MTA), and determined that the action against respondent Long Island Rail Road Company (LIRR) was timely instituted and that the motion to serve a late notice of claim on the LIRR was unnecessary, unanimously modified, on the law, to deny petitioner's motion to serve a late notice of claim on the MTA with respect to all causes of action except that for malicious prosecution, and otherwise affirmed, without costs. Order, same court and Justice, entered January 16, 2008, which denied respondents' motion to renew, unanimously affirmed, without costs.

The motion court properly determined that the action against the LIRR was timely commenced. There is no requirement that a

notice of claim be served upon LIRR, a subsidiary of the MTA (*see* Public Authorities Law § 1276[6]), and the detailed letter sent to the LIRR by petitioner's former attorney constituted the requisite demand on the LIRR (*see* Public Authorities Law § 1276[1]), and tolled the one-year statute of limitations, giving petitioner up to one year and 30 days after her claim accrued to serve her complaint against it (*see Burgess v Long Is. R.R. Auth.*, 79 NY2d 777 [1991]; CPLR 204[a]).

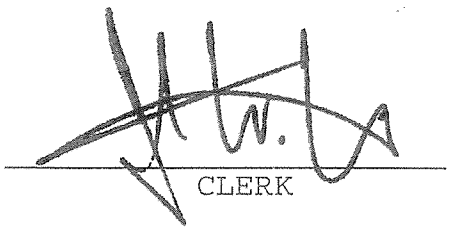
However, we modify to the extent indicated because petitioner's motion to serve a late notice of claim with respect to her claims, except that for malicious prosecution, on the MTA was untimely. The MTA is a distinct legal entity from the LIRR for the purposes of suit (Public Authorities Law § 1266[5]; *see Montez v Metropolitan Transp. Auth.*, 43 AD2d 224, 226 [1974]), and the service of her demand letter on the LIRR was ineffective to toll either the time to commence her action or the time within which to move to serve a late notice of claim on the MTA. Regarding the claim for malicious prosecution, since that cause of action did not arise until there was a favorable termination of the criminal charges against petitioner, the motion was timely (*see* CPLR 215[3]). Petitioner's failure to demonstrate a reasonable excuse for failing to move earlier is not fatal to her request, where the MTA's investigation at the time provided it with actual knowledge

of the events at issue and where the MTA is not prejudiced.

We have considered respondents' remaining arguments, including the claim that the motion to renew was improperly denied, and find them unavailing.

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

ENTERED: DECEMBER 2, 2008



CLERK

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

4712 The People of the State of New York, Respondent, Ind. 5397/06 5398/06

-against-

Sammie Chisolm, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Peter Newman of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgments, Supreme Court, New York County (Maxwell Wiley, J. on consolidation and expert witness motions; Ruth Pickholz, J. at jury trial and sentence), rendered November 20, 2007, convicting defendant of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to present expert testimony on eyewitness identification. This case involves two closely related incidents; only the incident that led to the grand larceny conviction involved an identification issue. There was significant corroborating evidence (*see e.g. People v Allen*, 53 AD3d 582, 584 [2008]) of defendant's guilt of the larceny, namely, both a surveillance videotape and defendant's admission

that placed him in very close spatial and temporal proximity to the crime, and the fact that defendant's clothing and physical features, as clearly shown on the videotape, closely matched the detailed description provided by the larceny victim's husband shortly after the incident. We have considered and rejected defendant's arguments as to alleged discrepancies in the description. Furthermore, aside from corroborating evidence, the facts of this case are also distinguishable from those of *People v LeGrand* (8 NY3d 449 [2007]) in terms of the circumstances of the eyewitness identification itself (*see People v Austin*, 46 AD3d 195, 200 [2007]), because, unlike the identification in *LeGrand*, which occurred some seven years after the crime, here the victim's husband saw the perpetrator in daylight with his wife's wallet moments after it was taken, had an opportunity to observe his features during a two-block chase, and gave a detailed description of him shortly after the incident. Further, within a few weeks of the crime, the victim's husband identified defendant from the videotape as well as in a lineup. Defendant failed to preserve his argument that the hearing court's ruling deprived him of his constitutional right to present a defense, and we decline to review it in the interest of justice (*see People v Lane*, 7 NY3d 888, 889 [2006]). As an alternative holding, we also reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

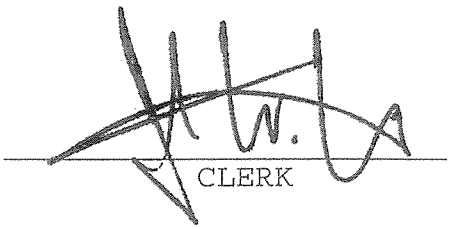
To the extent the claim of ineffective assistance of counsel can be resolved on the present record, defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). He was not prejudiced by defense counsel's failure to move to preclude the videotape identification of defendant in the grand larceny case on the ground of lack of CPL 710.30(1)(b) notice, since the properly noticed lineup identification, the in-court identification and the corroborating videotape itself would have been admissible in any event (*see e.g. People v Alvarado*, 235 AD2d 237 [1997], *lv denied* 89 NY2d 1031 [1997]).

The court properly granted the People's motion to consolidate the indictments. The court properly granted consolidation pursuant to CPL 200.20(2)(b), since evidence relating to the stolen property case, namely the surveillance video and defendant's admission, was admissible as material evidence in the larceny case (*see e.g. People v Johnson*, 46 AD3d 415, 416 [2007]). The court also correctly determined that each crime constituted proof of the other because both involved the taking of wallets under very similar, distinctive circumstances at about the same time and place (*see People v Screahben*, 35 AD3d 246 [2006], *lv denied* 8 NY3d 884 [2007]). The indictments were also properly consolidated pursuant to CPL 200.20(2)(c) as

legally similar, and defendant failed to make a sufficient showing to warrant a discretionary severance (*see* CPL 200.20[3]; *People v Lane*, 56 NY2d 1, 8 [1982]; *People v Streitferdt*, 169 AD2d 171, 176 [1991], *lv denied* 78 NY2d 1015 [1991]).

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

ENTERED: DECEMBER 2, 2008



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

4715-
4715A In re Christie A. M., and Another,

Children Under the Age
of Eighteen Years, etc.,

Herbert M.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), Law Guardian.

Orders of disposition, Family Court, Bronx County (Allen Alpert, J.), entered on or about December 13, 2007, insofar as appealed from as limited by the briefs, terminating respondent's parental rights to the subject children after a fact-finding determination of abandonment, and committing custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

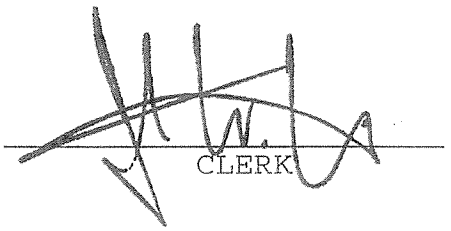
With respect to the male child, the finding of abandonment is supported by clear and convincing, indeed undisputed, evidence that during the six-month period immediately preceding the filing

of the petition, respondent, who at all relevant times has been serving a lengthy prison sentence, had no contact whatsoever with that child. With respect to the female child, while there was conflicting testimony as to when and how often respondent telephoned her, Family Court, crediting portions of the testimony of both respondent and the first foster parent, found that respondent telephoned at most once or twice a week during the first five or six weeks of the abandonment period, for a total of five to ten calls, after which the first foster parent, respondent's aunt, and then her successor, the aunt's daughter, stopped accepting respondent's collect calls from prison, and that respondent had no further contact with either the child or the agency during the abandonment period. Even if, contrary to Family Court's finding, we were to accept respondent's assertion that, unable to make telephone contact with the child, he wrote several letters to her, any such letter-writing, considered along with the five or ten phone calls, constituted contact too sporadic and insubstantial to avoid the presumption of abandonment (*see Matter of Kerry J.*, 288 AD2d 221, 221-222 [2001]). Such letter-writing, however, does undermine respondent's claim that he was unable to contact the child after the foster parents began refusing his collect phone calls (*see Matter of Anthony M.*, 195 AD2d 315, 315-316 [1993]).

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

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

ENTERED: DECEMBER 2, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 2, 2008.

Present - Hon. Peter Tom, Justice Presiding
Eugene Nardelli
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 1730/07
Respondent,

-against- 4716

Candice Ellison,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about September 12, 2007,

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.

ENTER:

Clerk.

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

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

4718 The People of the State of New York, Ind. 2294/05
Respondent,

-against-

Male Sunter,
Defendant-Appellant.

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

Male Sunter, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered July 11, 2006, convicting defendant, after a jury trial, of robbery in the first and second degrees and criminal possession of a weapon in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of 25 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the first-degree robbery conviction to 20 years, and otherwise affirmed.

The verdict 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 jury's credibility determinations.

The court's *Sandoval* ruling balanced the appropriate factors

and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court only permitted the prosecutor to elicit two car theft convictions, which were highly probative of defendant's credibility and neither unduly prejudicial nor excessively stale.

The court properly exercised its discretion in denying defendant's mistrial motion based on the prosecutor's summation. There was nothing in the summation that deprived defendant of a fair trial. The challenged remarks generally constituted fair comment on the evidence and reasonable inferences to be drawn therefrom, and were responsive to defense arguments (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The case turned on credibility, and the prosecutor did not shift the burden of proof by pointing out logical gaps in defendant's testimony and in defense counsel's arguments. The court properly instructed the jury as to the burden of proof, and the jury could not have been misled in that regard, even though some of the prosecutor's phrasing should have been avoided.

With respect to defendant's pro se arguments, his claim that the court should have instructed the jury on justification is meritless, his ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside

the record, and his remaining claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

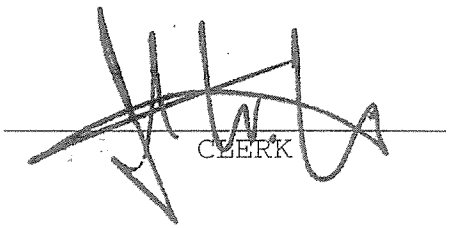
We find the sentence excessive to the extent indicated.

M-5408 *People v Male Sunter*

Motion seeking to correct pro se supplemental reply brief granted.

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

ENTERED: DECEMBER 2, 2008



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

4719-
4719A-
4719B Mary June Bayuk, Index 116975/06
Plaintiff-Appellant,

-against-

Marvin Gilbert, M.D.,
Defendant-Respondent.

Reingold & Tucker, Brooklyn (Abraham Reingold of counsel), for appellant.

Wilson, Elser, Moskowitz Edelman & Dicker, LLP, New York (Richard Ng of counsel), for respondent.

Judgment, Supreme Court, New York County (Stanley L. Sklar, J.), entered March 27, 2008, dismissing this action, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered August 14 and on or about November 13, 2007, which respectively granted defendant's motion to dismiss the complaint and denied plaintiff's motion to renew and serve an amended complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The summons and complaint were filed approximately 16 months after the 2½-year statute of limitations expired. For estoppel to preclude the assertion of a statute of limitations defense, plaintiff must establish by clear and convincing evidence (*see Central Fed. Sav. v Laurels Sullivan County Estates Corp.*, 145 AD2d 1, 6 [1989], *lv denied* 76 NY2d 704 [1990]) that she failed

to commence her action in a timely fashion "due to a fraud, deception or misrepresentation perpetrated by defendant" (*Phillips v Dweck*, 300 AD2d 969 [2002]; *see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]).

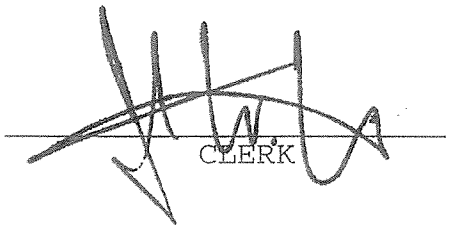
Plaintiff failed to plead either fraud or fraudulent concealment (*see Florio v Cook*, 48 NY2d 792 [1979]), instead alleging only medical malpractice based on defendant's failure to appreciate information contained in a radiology report. Moreover, as evidence that defendant intentionally withheld information concerning an X ray revealing her cancer and misrepresented this fact to her, plaintiff offered nothing more than speculation that defendant must have reviewed her chart in a July 2003 conversation with another doctor concerning surgical revision of her hip replacement (*see Simcuski*, 44 NY2d at 453).

Since the complaint fails to allege either fraud or damages separate and apart from those arising from the alleged malpractice, there is no basis for invoking the doctrine of equitable estoppel to toll the statute of limitations (*see Rizk v Cohen*, 73 NY2d 98 [1989]; *Chesrow v Galiana*, 234 AD2d 9, 10-11 [1996]). Without such evidence, the proposed amendment of the complaint to add a claim of fraudulent misrepresentation based on alleged record tampering to conceal the malpractice is not only vague and conclusory, but has no merit (*see Cellupica v Bruce*, 48 AD3d 1020 [2008]).

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

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

ENTERED: DECEMBER 2, 2008



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

4721 The People of the State of New York, Respondent, Ind. 1348/06

-against-

Michael Wilson, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 16, 2007, convicting defendant, after a jury trial, of conspiracy in the second degree, and sentencing him to a term of 7 to 21 years, unanimously affirmed.

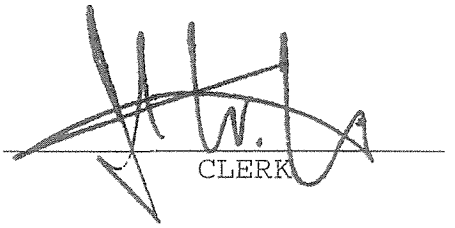
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that defendant was part of the charged conspiracy, and that he was not merely an independent dealer who happened to obtain his supply of drugs from the conspirators. There was specific evidence that defendant was personally involved in preparing drugs for sale and providing them to street-level dealers. Defendant's arguments on this issue are similar to arguments this Court rejected on a codefendant's appeal (*see People v Council*, 52 AD3d 222 [2008], *lv denied* 11 NY3d 735 [2008]).

Defendant's statutory double jeopardy claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it without merit (*see Matter of Robinson v Snyder*, 259 AD2d 280 [1999], *lv denied* 93 NY2d 810 [1999]). To the extent that defendant is raising an ineffective assistance of counsel claim regarding this issue, that claim is also without merit.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 2, 2008



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

4722 Lederer de Paris Fifth Avenue, Inc., Index 126008/02
Plaintiff-Appellant,

-against-

Jordan and Hamburg, LLP, et al.,
Defendants-Respondents.

[And Another Action]

Robbins & Associates, P.C., New York (James A. Robbins of counsel), for appellant.

Beekman & Kaufman, LLP, Roslyn Heights (Stephanie J. Kaufman of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 6, 2007, which, in these consolidated actions for legal malpractice and unpaid legal fees, denied plaintiff Lederer de Paris Fifth Avenue's motion for partial summary judgment on the issue of defendants' negligence and granted defendants' cross motion for summary judgment dismissing the legal malpractice complaint and on Jordan and Hamburg's claim for unpaid legal fees, unanimously affirmed, with costs.

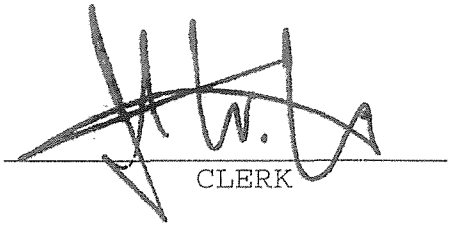
Plaintiff's contention that the motion court failed to consider plaintiff's principal's deposition testimony is belied by the motion court's observation that none of plaintiff's exhibits, which included the deposition excerpts, was dispositive. In any event, the deposition testimony plaintiff relies on was not sufficient to make a prima facie showing of

entitlement to summary judgment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Smith v Cohen*, 24 AD3d 183 [2005]).

The record supports the motion court's conclusion that Lederer failed to establish that its failure to produce certain documents in the underlying action, resulting in the preclusion order, was the result of defendants' negligence rather than the "intransigence" of plaintiff's principal. In any event, Lederer fails to show that it suffered any actual damages as a result of defendants' conduct (*see Postel v Jaffe & Segal*, 237 AD2d 127 [1997]).

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

ENTERED: DECEMBER 2, 2008



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

4725 The People of the State of New York, Ind. 5382/90
Respondent,

-against-

Evaristo Jardin,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Dana Levin of counsel), for respondent.

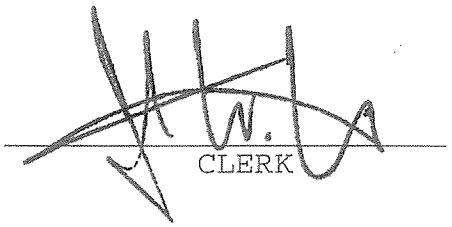
Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about March 22, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's arguments against an upward departure are improperly raised for the first time on appeal (*see* CPLR 4017, 5501[a][3]; Correction Law § 168-n[3]; *People v Hernandez*, 44 AD3d 565 [2007], *lv denied*, 10 NY3d 708 [2008]). In any event, the court properly exercised its discretion in upwardly departing from defendant's presumptive risk level, based on the seriousness of a prior conviction involving the death of one victim and serious injury to another, and of the underlying sex crime. These aggravating factors were not adequately accounted for in the risk assessment instrument, which did not fully capture the

seriousness of defendant's conduct (*see People v Balic*, 52 AD3d 201 [2008]; *People v Ferrer*, 35 AD3d 297 [2006], *lv denied*, 8 NY3d 807 [2007]).

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

ENTERED: DECEMBER 2, 2008



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

4726 Peter F. Davey, Index 117426/05
Plaintiff-Appellant,

-against-

Mary F. Kelly, et al.,
Defendants-Respondents.

Peter F. Davey, appellant pro se.

Mary F. Kelly, White Plains, respondent pro se. Kelly & Knaplund, White Plains (Mary F. Kelly of counsel) for Kelly & Knaplund, respondent.

John A. Raimondo, White Plains, for Bruce P. Bendish and Goodrich & Bendish, respondents.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about October 15, 2007, which, after a hearing, granted defendants' application to find plaintiff in civil contempt for violating a legal mandate of the court and directed plaintiff to purge the contempt, within 10 days, by paying counsel fees and costs to defendants in an amount totaling $28,309.97, unanimously affirmed, with costs.

The record establishes that plaintiff was expressly prohibited by two prior court orders from filing any litigation relating to his divorce action without first obtaining permission from the court, and that plaintiff, without obtaining said permission, filed actions asserting collateral attacks on the divorce proceedings to the detriment of the remedies accorded

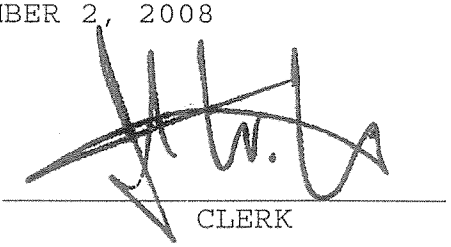
defendants by the court's prohibitory orders (*see Richards v Estate of Kaskel*, 169 AD2d 111, 121 [1991], *lv dismissed in part, denied in part* 78 NY2d 1042 [1991]; Judiciary Law § 753[A][1]).

The court properly declined to assign counsel to plaintiff in light of his admissions regarding his financial status (*see People ex rel. Lobenthal v Koehler*, 129 AD2d 28, 31-33 [1987]).

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

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

ENTERED: DECEMBER 2, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 2, 2008.

Present - Hon. Peter Tom, Justice Presiding
Eugene Nardelli
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 1095/07
Respondent,

-against- 4728

Sherman Batts,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about November 28, 2007,

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.

ENTER:

Clerk.

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

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

4729 Joan Randell, et al., Index 106069/05
Plaintiffs-Respondents,

-against-

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

London Fischer LLP, New York (Marc M. Mahoney of counsel), for appellants.

The Cochran Firm, New York (Joseph S. Rosato of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered July 22, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The injured plaintiff allegedly tripped and fell in a depression next to a manhole cover as she was crossing a street in lower Manhattan. The road had been milled for paving the night before, and asphalt ramps had been placed around the manhole covers in order to smooth the transition. Shortly after the accident, the injured party's husband observed the gap to be 4 to 5 inches deep, 8 inches wide, and 10 inches long. Plaintiffs' description of the time, place and circumstances of the accident presents triable issues of fact as to whether the defect was trivial (*see Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165 [2000]), and whether the temporary road work had been

negligently performed (*see Mendoza v City of New York*, 170 AD2d 198 [1991]; *Sternbach v Cornell Univ.*, 162 AD2d 922 [1990]).

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

ENTERED: DECEMBER 2, 2008

CLERK

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

4730 The People of the State of New York, Ind. 4582/05
Respondent,

-against-

Yehidie F. Novoa,
Defendant-Appellant.

Howard D. Simmons, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Elizabeth Squires of counsel), for respondent.

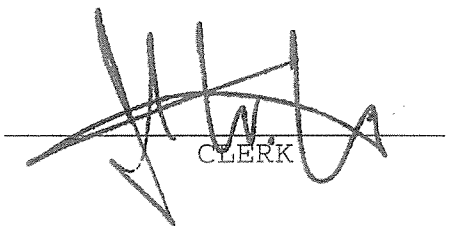
Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about June 5, 2006, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art. 6-C), unanimously affirmed, without costs.

The court properly assessed points under the risk factor for drug and alcohol abuse, based on extensive evidence of persistent drug use including defendant's own admissions to the Probation Department (*see People v Conway*, 47 AD3d 492 [2008], *lv denied* 10 NY3d 708 [2008]; *People v Arnold*, 35 AD3d 827 [2006], *lv denied* 9 NY3d 813 [2007]), and it providently exercised its discretion in declining to grant a downward departure (*see People v Guaman*, 8

AD3d 545 [2004]). Defendant's remaining contention is without merit.

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

ENTERED: DECEMBER 2, 2008



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

4731N Sonia Ramirez, etc. Index 15326/05
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant,

City of New York, et al.,
Defendants.

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

Miller, Montiel & Strano, P.C., Roslyn Heights (David M. Strano of counsel), for respondent.

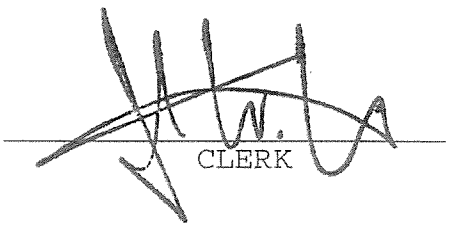
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about October 19, 2007, which, inter alia, directed defendant to produce documents and, insofar as appealed from, sua sponte directed that "affidavits on searches . . . comply with 'Lewis' case," unanimously reversed, on the facts, without costs, and the quoted phrase deleted.

Unlike the situation in *Lewis v City of New York* (17 Misc 3d 559 [2007]), the record in this case does not show that the party obligated to produce documents "'has repeatedly failed to comply with discovery orders'" (*id.* at 564, quoting *Figdor v City of New York*, 33 AD3d 560, 561 [2006]). Under the circumstances, it was an improvident exercise of discretion to impose the requirements of *Lewis* on defendant. Plaintiff's assertion that defendant, in fact, has failed to comply with discovery orders is based on

matters outside the record and therefore cannot be considered on appeal (*see Walker v City of New York*, 46 AD3d 278, 282 [2007]; *Scotto v Mei*, 219 AD2d 181, 183-184 [1996]). However, we decline to strike plaintiff's entire brief. In light of our disposition of the appeal, we need not reach defendant's constitutional argument.

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

ENTERED: DECEMBER 2, 2008



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

4732N In re Allstate Insurance Company, Index 23023/06
Petitioner-Respondent,

-against-

Martin Harris, et al.,
Respondents,

National Grange Mutual Insurance Company,
Respondent-Appellant,

Vincenzo Materia, et al.,
Respondents-Respondents.

Law Office of Eric N. Wolpin, New York (Thomas G. Connolly of counsel), for appellant.

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck (Sara Luca Salvi of counsel), for Allstate Insurance Company, respondent.

Paul I. Marx, White Plains, for Materia respondents.

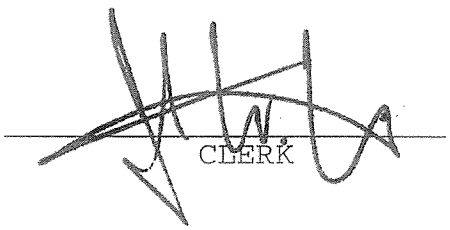
Order, Supreme Court, Bronx County (Alan J. Saks, J.), entered April 3, 2007, which granted petitioner Allstate Insurance Company's application for a permanent stay of arbitration, unanimously affirmed, with costs.

We decline to reach respondent National Grange Mutual Insurance Company's argument, advanced for the first time on appeal, that an insurer need not file a notice of termination with the Commissioner of the Department of Motor Vehicles after the insured has failed to pay a renewal premium on a policy that had been in force for six months. Were we to consider this argument, we would find it without merit, as it relies on a

version of Vehicle and Traffic Law § 313(2)(a) that has not been in effect since 1998 (see L 1998, ch 509).

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

ENTERED: DECEMBER 2, 2008



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Richard T. Andrias
David B. Saxe
John W. Sweeny, Jr.
Leland G. DeGrasse, JJ.

4352
Index 604415/05
590264/07
590302/07

Castle Village Owners Corp.,
Plaintiff,

-against-

Greater New York Mutual
Insurance Company, et al.,
Defendants.

- - - - - -

[And a Third-Party Action]

- - - - - -

Langan Engineering and Environmental
Services, Inc., et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Mueser Rutledge Consulting Engineers,
Second Third-Party Defendant-Appellant.

Second third-party defendant Mueser Rutledge Consulting Engineers appeals from an order of the Supreme Court, New York County (Helen E. Freedman, J.), entered February 15, 2008, which, insofar as appealed from, denied its motion to dismiss the second third-party complaint in its entirety.

Donovan Hatem, LLP, New York (David M. Pollack, Allison B. Feld and James A. Cardenas of counsel), for appellant.

Sedgwick, Detert, Moran & Arnold, LLP, New York (Jason D. Turken, Lawrence Klein, Scott D. Greenspan and Aaron F. Mandel of counsel), for respondents.

LIPPMAN, P.J.

On May 12, 2005, a 250-foot section of the retaining wall bordering the Castle Village co-op complex collapsed onto the Henry Hudson Parkway, causing a major artery providing access into and out of Manhattan to be shut down and inconveniencing thousands. Remarkably, although there was damage to parked vehicles, no one was injured or killed.

Plaintiff Castle Village commenced this action against, among others, Langan Engineering and Environmental Services, Inc. and Langan Engineering and Environmental Services, P.C. Langan had been providing engineering services for Castle Village, including monitoring and maintaining the retaining wall, from approximately 2002 until the collapse. Langan, in turn, brought this third-party action for contribution against Mueser Rutledge Consulting Engineers (MRCE), the engineers who had designed and implemented certain corrective measures for the stability of the retaining wall in 1985 when Castle Village was in the process of converting from a rental building to a co-op. The primary issue presented for review is whether the motion court properly denied MRCE's motion to dismiss under CPLR 3211(h).

In 1985, WLS Associates, the owner of Castle Village and the sponsor of the conversion, submitted an offering plan to the New York State Department of Law. In connection with the proposed

conversion, the tenants retained an engineer, John J. Flynn, P.E., to inspect the site. Flynn issued a report raising certain concerns about the condition of the property, including the structural integrity of the retaining wall. The report noted that there were signs of movement and instability in the wall and recommended that a separate structural analysis be conducted to determine the type of repairs that would be necessary.

Langan alleges that the Department of Law delayed the conversion because of the concerns raised by Flynn's report. The Department of Law then retained MRCE to study the condition of the retaining wall and to design and inspect the repairs. The sponsor agreed that it would accept MRCE's recommendations and fund the ensuing repair work. Langan asserts that the sponsor pressured MRCE to generate a report quickly to allow the conversion process to move forward. MRCE inspected the site and issued a report recommending several repairs, including patching cracks with mortar and placing rock bolts into the wall, but opined that the wall was "in good condition" in light of its age and showed "no signs of instability." This report ultimately was included in the Castle Village offering plan.

MRCE subsequently provided the sponsor with drawings depicting proposed repairs to certain sections of the wall, including the section that later collapsed. One of the proposed

measures was to insert eight rock anchors at least four feet into the bedrock behind the wall. The remediation, undertaken by a contractor subject to MRCE's supervision and inspection, began in June 1986. The co-op conversion took place in December 1986, while repairs were ongoing. MRCE monitored the progress of the work and completed its final inspection of the remediation in February 1987.

Langan asserts that, although MRCE supervised the remediation, none of its representatives actually observed the installation of the rock anchors or tested them once they were in place. Approximately 19 months after repairs were completed, MRCE provided Castle Village with a letter stating that it had inspected and accepted the remedial work. Shortly thereafter, MRCE also sent an amended inspection report to the New York City Department of Buildings certifying that it had inspected the work and that the work "conform[ed] to Code requirements." Langan alleges, however, that the rock anchors were too short for their intended purpose and did not penetrate into the bedrock behind the wall.

Castle Village retained Langan in 2002 to perform engineering services with respect to the wall and other portions of the property. Langan monitored the wall through a series of surveys and determined that some movement was occurring. In

April of 2005, Castle Village again requested that Langan visit the property. At that time, Langan conducted additional surveys and concluded that the wall was moving more rapidly. In addition, there were visible cracks and sinkholes in the land above the retaining wall, which caused Langan to recommend immediate remedial action. Langan designed an emergency bracing system, but the wall collapsed before the system could be implemented.

Castle Village brought suit against Langan, among others, asserting claims for breach of contract and professional negligence. Langan commenced this third-party action against MRCE seeking contribution. As is here relevant, MRCE moved to dismiss the third-party complaint pursuant to CPLR 3211(h), which relief was denied on the ground that the complaint's allegations were sufficient to establish "a substantial basis in law" for Langan's claim. Supreme Court also found that MRCE owed a duty of care to Castle Village, since there was a relationship between them approaching privity, and that Langan's contribution claim was not barred by the economic loss doctrine.

As noted, MRCE's motion to dismiss was made under CPLR 3211(h) - a provision that imposes a heightened standard of review. CPLR 3211(h) applies to claims against a licensed architect, engineer, land surveyor or landscape architect for

personal injury, wrongful death or property damage, when the professional's conduct occurs more than 10 years prior to the date of the claim. Under CPLR 3211(h), the movant must demonstrate that the action is against a statutorily enumerated design professional and that it requires service of a notice of claim pursuant to CPLR 214-d(1).[1] To maintain the action, the party responding to the motion must then show that "a substantial basis in law exists to believe that the performance, conduct or omission complained of . . . was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant . . ." (CPLR 3211[h]).

Sections 214-d, 3211(h) and 3212(i) were added to the CPLR in 1996 to ameliorate the effects of the existing law, which

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[1] As is relevant here, CPLR 214-d(1) provides that:

"[a]ny person asserting a . . . third-party claim for contribution or indemnification arising out of an action for personal injury, wrongful death or property damage, against a licensed architect, engineer, land surveyor or landscape architect . . . which is based upon the professional performance, conduct or omission by such licensed architect, engineer, land surveyor or landscape architect . . . occurring more than ten years prior to the date of such claim, shall give written notice of such claim . . . at least ninety days before the commencement of any action or proceeding . . . The notice of claim shall identify the performance, conduct or omissions complained of, on information and belief, and shall include a request for general and special damages."

permitted a negligence action against a design professional to accrue three years after an injury, regardless of the amount of time intervening between the completion of the work and the injury (Senate Mem in Support, L 1996, ch 682, 1996 McKinney's Session Laws of NY, at 2614). The Senate memorandum in support of this legislation recognized that the pre-1996 law tended to facilitate marginal claims against design professionals based on defects arising long after their work was completed and the improvements for which they were initially responsible had been in the owner's possession and subject to the owner's use and maintenance (*see id.*).

The "substantial basis" standard set forth in CPLR 3211(h) constitutes a departure from the standard ordinarily applicable to the review of CPLR 3211 motions to dismiss for failure to state a cause of action. Rather than determine whether the allegations of the complaint when viewed most favorably to the plaintiff fall within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), a court reviewing the sufficiency of a complaint under CPLR 3211(h) must look beyond the face of the pleadings to determine whether the claim alleged is supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (Senate Mem in Support, *supra*). While under this standard a

plaintiff need not demonstrate that the claim is supported by a preponderance of the evidence (*id.*, citing *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]), "a fair inference to be drawn from the legislative history is that CPLR 3211(h) was intended to heighten the court's scrutiny of the complaint and thereby make it easier to dismiss a CPLR 214-d action than other types of negligence actions" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 214-d, at 460).

The Senate memorandum's citation to *300 Gramatan Ave.* suggests that the "substantial basis" standard was intended to import the substantial evidence standard applicable in reviewing administrative determinations (*see* 45 NY2d at 180; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 214-d, at 459). *300 Gramatan Ave.* explains the substantial evidence standard in some detail, indicating that it "consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably - probatively and logically" (45 NY2d at 181). However, more helpful, given the procedural posture of the present case, may be *300 Gramatan's* "practical test" - whether the allegations and evidence presented

would require submission to a jury as a question of fact (*see id.*).

Here, Langan satisfied the heightened requirements of CPLR 3211(h). The complaint alleges with specificity and in detail that MRCE departed from the professional standard of care and that its conduct was a proximate cause of Castle Village's injury. It alleges that MRCE failed to properly design the structural repairs, failed to properly inspect and supervise the contractor's repair work, and then failed to test the rock anchors once they were installed. More specifically, Langan asserts that the rock anchors were too short for their designed purpose and did not provide stabilization for the wall.

These allegations were supported by the affidavit of Langan's expert, Francis D. Leathers, P.E., a registered professional engineer. Leathers also opined that MRCE failed to meet the standard of care in its initial assessment of the wall because it relied solely on visual evidence of deterioration instead of performing tests, such as borings or probes. He further asserted that the wall was not as stable as it would have been if the rock anchors had been properly designed and placed, that the collapse happened sooner than it would have if the rock anchors had been designed and installed properly, and that, with proper design and installation, the rock anchors would have

afforded Langan more time to complete the emergency stabilization measures in progress at the time of the collapse. Leathers found MRCE's actions "a substantial contributing factor to the May 12, 2005 collapse of the retaining wall."

The allegations of the complaint and the expert affidavit provide a "substantial basis" to believe that MRCE was negligent in the performance of its professional design duties and that the negligence was a proximate cause of the damage. Thus, Langan demonstrated that its claim has sufficient merit to allow it to proceed, and the court properly denied MRCE's motion to dismiss.

In opposition to Leathers's opinion, MRCE submitted the affidavit of its own engineering expert, Thomas D. O'Rourke, Ph.D. O'Rourke found that MRCE met the standard of care expected of professional engineers when it initially assessed the condition of the retaining wall and when it performed services relating to the repair in 1985-1987. He stated that Langan had sufficient time between 2002 and 2005 to take corrective action to prevent the collapse. O'Rourke also opined "that MRCE did not contribute substantially, or in any other way, to the failure of the Castle Village retaining wall." While O'Rourke's affidavit disputes Leathers's conclusions, it does not warrant dismissal of the action. It simply raises issues of fact that are not suitable for determination at this stage of the litigation.

MRCE asserts that Langan is not entitled to contribution because MRCE did not owe a duty of care to Castle Village and because Langan's negligence cause of action is essentially a breach of contract claim. However, the evidence that MRCE knew when it undertook the work on the retaining wall that the work was critical to the approval of the conversion plan, continued to inspect the site after Castle Village was the owner, and that MRCE's report was included in the offering plan, demonstrates a direct relationship between MRCE and Castle Village that approached privity and supports the finding that MRCE owed Castle Village a duty of care (*see Samuels v Fradkoff*, 38 AD3d 208 [2007]). In other words, Castle Village was an intended beneficiary of the contract between MRCE and the sponsor (*see Board of Mgrs. of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488, 489 [1992]).

Nor is Langan's contribution claim barred by the economic loss doctrine, since, as a design professional, MRCE "may be subject to tort liability for failure to exercise reasonable care, irrespective of [its] contractual duties" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]), and the damages sought by Langan are not limited to the benefit of the bargain (*see Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.*, 295 AD2d 229, 229 [2002]).

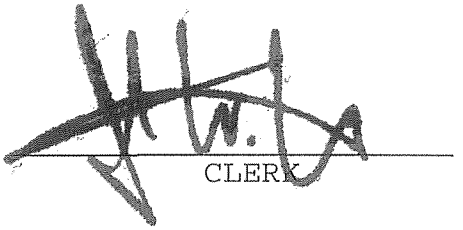
In view of the foregoing, we need not address the parties' contentions regarding the admissibility of the investigative reports.

Accordingly, the order of the Supreme Court, New York County (Helen E. Freedman, J.), entered February 15, 2008, which, insofar as appealed from, denied the motion of second third-party defendant Mueser Rutledge Consulting Engineers to dismiss the second third-party complaint in its entirety, should be affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 2, 2008



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