SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 4, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4376 Norman Seabrook, Individually and as President of the Correction Officers' Benevolent Association, et al., Plaintiffs-Appellants,

-against-

City of New York, et al., Defendants-Respondents. Index 108881/06

Koehler & Isaacs LLP, New York (Liam L. Castro of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

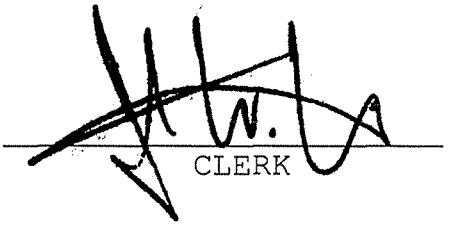
Order, Supreme Court, New York County (Karen S. Smith, J.), entered May 7, 2007, which granted defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint, unanimously affirmed, without costs.

The agency policy of not allowing an employee to consult with a union representative after a question is posed and before an answer must be given, at an interrogation conducted pursuant to Mayoral Executive Order No. 16, was reasonably designed to promote truthful responses by discouraging coaching. This did

not deprive the employee of his right to union representation under Civil Service Law § 75(2) or *National Labor Relations Bd. v J. Weingarten, Inc.* (420 US 251 [1975]). While plaintiff relies on *Commonwealth of Pennsylvania v Pennsylvania Labor Relations Bd* (826 A2d 932 [PA 2003]), which holds the opposite, that case is not binding on this court and we reject its reasoning.

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

ENTERED: DECEMBER 4, 2008



Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4607 Sonia Williams, Index 3455/06
Plaintiff-Appellant,

-against-

Lex Williams,
Defendant-Respondent.

Law Office of Jacob Rollings, Mount Vernon (Jacob Rollings of counsel), for appellant.

Gordon & Gordon, Bronx (Jeffrey Gordon of counsel), for respondent.

Order, Supreme Court, Bronx County (Ellen Gesmer, J.), entered June 15, 2007, which denied plaintiff's motion to vacate and set aside the parties' stipulation of settlement on the ground of mutual mistake, affirmed, without costs.

Plaintiff failed to demonstrate that she and defendant were mistaken as to a material fact when they entered into the 2007 stipulation of settlement (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]). The record establishes that the parties were aware of the 2005 agreement, pursuant to which plaintiff paid defendant $30,000 to relinquish all rights to the marital residence, when they executed the 2007 stipulation, which provides for plaintiff to pay defendant "50% of net equity above current existing mortgage debt (APPRO $268,000) with[in] 60 days of appraisal," that they

entered into the 2007 stipulation with the advice of counsel, after several hours of discussion and following allocution by the court, and that the court advised them that the earlier agreement was not acknowledged as required by Domestic Relations Law § 236(B)(3). Contrary to plaintiff's argument, there was no requirement for the 2007 stipulation to be acknowledged (*see Rubenfeld v Rubenfeld*, 279 AD2d 153 [2001]).

All concur except McGuire, J. who dissents in part in a memorandum as follows:

McGUIRE, J. (dissenting in part)

I agree that the order from which plaintiff-appellant appeals should be affirmed and with the majority's reasoning. I write separately, however, because I would award costs on this appeal to defendant-respondent.

The appellant presses two claims for setting aside the so-ordered stipulation the parties entered into in open court when both were represented by counsel: mutual mistake of fact and the absence of an acknowledgment. Both of these claims are wholly devoid of merit and at least border on the frivolous. While I recognize that we generally do not award costs in matrimonial appeals, we certainly do award costs in some matrimonial appeals (*see e.g. Selinger v Selinger*, 44 AD3d 341 [2007]; *Dvir v Dvir*, 41 AD3d 217 [2007]; *Kesten v Weingarten*, 40 AD3d 546 [2007]; *Hearst v Hearst*, 40 AD3d 269 [2007], *lv denied* 10 NY3d 708 [2008]; *Nimkoff v Nimkoff*, 39 AD3d 292 [2007]; *Mars v Mars*, 39 AD3d 232 [2007]; *Vorburger v Vorburger*, 37 AD3d 178 [2007]; *Grant v Grant*, 37 AD3d 167 [2007]). Having prevailed on this appeal, respondent should be awarded costs (*see* CPLR 8107) as partial compensation for the costs he needlessly incurred in responding to appellant's baseless even if not frivolous claims. To not award costs, moreover, is unfair to the litigants in matrimonial

appeals who are required to pay costs when they fail to prevail on claims that are more substantial than those pressed by appellant on this appeal.

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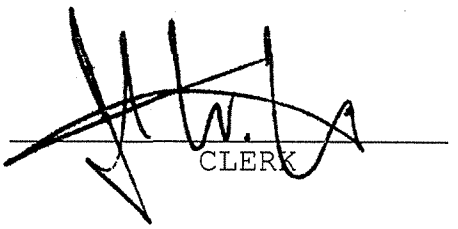

Mazzarelli, J.P., Andrias, Saxe, Catterson, JJ.

2218 The People of the State of New York, Ind. 11/05
Respondent,

-against-

William Glover,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Judgment, Supreme Court, New York County (Budd G. Goodman, J., at plea and sentence; Laura A. Ward, J., at suppression hearing), rendered December 20, 2005, convicting defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Following this Court's remand (46 AD3d 362 [2007]), the hearing court properly denied defendant's suppression motion. There is no basis for disturbing the credibility determinations made by a judicial hearing officer and adopted by the court, including the finding that the open container violation at issue occurred in a public place and that the arresting officers learned that defendant was wanted on two outstanding warrants. The inventory search of defendant's bag was properly executed

pursuant to established Police Department procedure, was supported by sufficient documentation and was not conducted as a ruse to discover incriminating evidence (*see People v Johnson*, 1 NY3d 252, 256 [2003]).

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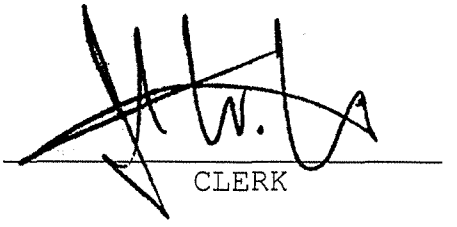

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Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4289 Rachel Sky, Index 107396/06
Plaintiff-Respondent,

-against-

Mark Tabs,
Defendant-Appellant.

Kelly, Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for appellant.

The Zaloudek Law Firm, P.C., New York (Steven J. Zaloudek of counsel), for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 20, 2008, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

On June 3, 2003, plaintiff and defendant were involved in a motor vehicle accident in which a vehicle driven by plaintiff was struck by a vehicle driven by defendant. Plaintiff commenced this action against defendant to recover damages for neck and back injuries she allegedly sustained as a result of that accident. Defendant moved for summary judgment dismissing the complaint, arguing, among other things, that plaintiff's injuries were not caused by the accident. In support of his motion, defendant submitted plaintiff's deposition testimony in which she

stated that she had been injured in three accidents prior to the motor vehicle accident involving defendant. In April 1997 plaintiff was involved in a motor vehicle accident that caused injuries to her neck and back. In May or July 2001 plaintiff was in another motor vehicle accident that also caused injuries to her neck and back. Later in 2001 plaintiff slipped and fell, again sustaining injuries to her neck and back. Notably, plaintiff obtained chiropractic care and physical therapy for the neck and back injuries she sustained as a result of these three accidents. In fact, only three weeks prior to the June 2003 accident, plaintiff received chiropractic treatment for the neck and back injuries she sustained in the slip and fall accident.

Additionally, defendant submitted the July 10, 2003 MRI report of a radiologist consulted by plaintiff's treating physician. The report indicated that plaintiff had a herniated disk at C6-C7, a minimal bulge at T3-T4 and "small central bulges" at L3-L4 and L4-L5 caused by degenerative disease. The radiologist compared the July 9, 2003 MRI films on which his report was based to MRI films of plaintiff's spine taken prior to the June 2003 accident on March 22, 2002, and concluded that there was "no significant interval change" in plaintiff's spine

between the films.[1]

In opposition, plaintiff submitted the joint sworn-to-report of a physician and a chiropractor averring that plaintiff had certain limitations in the range of motion in both the cervical and lumbar portions of her spine, and, as a result, "suffers from a 15% permanent whole person impairment as it relates to the cervical spine, of which 10% is preexisting, and 5% is directly and causally related to the [June 2003 accident] . . . [and] an 11% permanent whole person impairment as it relates to the lumbar spine, of which 8% is preexisting, and 3% is directly and causally related to the [June 2003 accident]." That report, however, does not even mention let alone discuss the above-noted prior accidents that caused injuries to plaintiff's neck and back.[2]

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[1]Defendant also submitted the affirmations of two neurologists who examined plaintiff at defendant's behest. The first neurologist averred, among other things, that the June 2003 accident "did not produce a neurological diagnosis, limitation or disability." The second neurologist averred, among other things, that plaintiff suffered soft tissue injuries as a result of the June 2003 accident, but the neurologist detected "[n]o residual signs of any injuries from [that] accident" and determined that plaintiff "did not sustain any permanent or temporary impairment due to th[at] accident."

[2]Under the "Past Medical history" section of their report, the physician and chiropractor listed the following prior injuries of plaintiff: "Left distal fibula tendon tear requiring surgery in 1996. History of migraine headaches. History of right ring finger fracture in the fourth grade. History of left foot stress fracture in the fifth grade."

Supreme Court denied defendant's motion, finding triable issues of fact with respect to whether plaintiff suffered a serious injury. We conclude that defendant made a prima facie showing of entitlement to summary judgment dismissing the complaint and, in opposition, plaintiff failed to raise a triable issue of fact. Accordingly, we reverse.

Defendant submitted evidence, including plaintiff's own deposition testimony, that she sustained neck and back injuries in three separate accidents in the six years and two months prior to the motor vehicle accident giving rise to this litigation. Plaintiff obtained chiropractic care and physical therapy for those injuries, and, only three weeks prior to the June 2003 accident, plaintiff received chiropractic treatment for the neck and back injuries she sustained in the 2001 slip and fall accident. Evidence of plaintiff's prior neck and back injuries, coupled with the July 2003 MRI report in which plaintiff's consulting radiologist concluded that there was "no significant interval change" in her spine between the films taken approximately one year and two months prior to the June 2003 accident and the July 2003 films, was sufficient to establish defendant's prima facie showing of entitlement to judgment as a matter of law (*see Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007] ["Once a defendant has presented evidence of a pre-

existing injury, even in the form of an admission made at a deposition, it is incumbent upon the plaintiff to present proof to meet the defendant's asserted lack of causation"] [internal citation omitted]; *Figueroa v Castillo*, 34 AD3d 353, 353-354 [2006] ["Defendants' submissions included excerpts from plaintiff's deposition, as well as medical reports by plaintiff's doctors, and described another automobile accident one month before the subject accident, wherein she sustained similar knee and back injuries, and a fall on the same knee subsequent to the latest accident. These established additional contributing factors, interrupting the chain of causation between the subject accident and claimed injury, thereby shifting the burden of proof to plaintiff"]; *see also Ronda v Friendly Baptist Church*, 52 AD3d 440, 441 [2008] ["Defendants carried their initial burden of showing that plaintiff's shoulder tendon tear and other injuries were not proximately caused by the subject accident, by submitting reports of plaintiff's previous line-of-duty injuries and the opinion of their examining orthopedist, based in part on the MRI report describing arthritic changes in the shoulder joint as degenerative, that the shoulder injury was among plaintiff's preexisting conditions"] [internal citation omitted]).

In opposition, plaintiff failed to raise a triable issue of fact since her experts failed to address how her "current medical

problems, in light of her past medical history, are causally related to the subject accident" (*Style v Joseph*, 32 AD3d 212, 214 [2006]). The most glaring deficiency in plaintiff's opposition is that her experts did not discuss her prior neck and back injuries at all (*see Becerril v Sol Cab Corp.*, 50 AD3d 261, 261-262 [2008] ["plaintiff conceded at his deposition that he sustained injuries to his neck and back in a prior accident, and an MRI conducted shortly after the subject accident showed degenerative disc disease. In these circumstances, it was incumbent upon plaintiff to present proof addressing the asserted lack of causation"]; *Brewster*, 44 AD3d at 352; *see also Donadio v Doukhnych*, ___AD3d___, 2008 NY Slip Op 07612 [2d Dept, Oct. 7, 2008] ["The plaintiffs relied solely on the affirmed medical report of the injured plaintiff's treating physician. That report failed to acknowledge that the injured plaintiff had been involved in two other accidents in which he injured his neck, back, and shoulders. In light of this omission, the treating physician's conclusion that the injuries and range of motion limitations to the injured plaintiff's neck, back, and shoulders observed during his examinations were the sole result of the subject accident was speculative"]). To be sure, plaintiff's experts assert that certain percentages of the limitations in range of motion were "directly and causally related" to the June

2003 accident. But this assertion is conclusory, premised on an incomplete history of plaintiff's prior relevant injuries and is insufficient to raise a triable issue of fact (*see Micciola v Sacchi*, 36 AD3d 869, 871 [2007]; *Gray v South Nassau Communities Hosp.*, 245 AD2d 337, 337 [1997]; *see also Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] ["Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment"]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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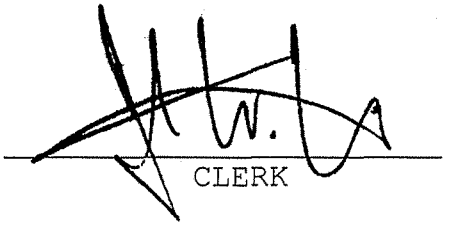

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4733 The People of the State of New York, Ind. 4296/06
Respondent,

-against-

Troy Brown,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), and Brooklyn Law School, Brooklyn (Will A. Page of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 29, 2007, convicting defendant, after a jury trial, of criminal mischief in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 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]). There is no basis for disturbing the jury's determinations concerning credibility, including its resolution of inconsistencies in testimony and its rejection of defendant's justification defense. The evidence satisfied the damage element of third-degree criminal mischief where the victim gave firsthand testimony that he spent on repairs approximately

$990, which was almost four times the $250 statutory threshold, and the surrounding circumstances warranted the inference that this figure was the actual and reasonable cost of repairs (*see People v Garcia*, 29 AD3d 255, 263 [2006], *lv denied* 7 NY3d 789 [2006]; *People v Jennis*, 299 AD2d 921 [2002], *lv denied* 99 NY3d 583 [2003]).

The court properly denied defendant's request for a missing witness charge, since the record shows that the testimony of the uncalled witnesses would have been entirely cumulative, and would have neither contradicted nor added to that of the other witnesses (*see People v Macana*, 84 NY2d 173, 180 [1994]).

The court properly denied defendant's CPL 330.30(3) motion to set aside the verdict based on newly discovered evidence. As defendant concedes, the alleged newly discovered evidence was simply the identity of a previously unidentified potential witness. There was no indication of what the witness would say, and the witness's identity, by itself, plainly did not qualify as the type of exculpatory evidence set forth in the statute. Defendant improperly sought to use the motion as a substitute for

interviewing the witness to determine what, if anything, he knew about the case. Defendant's remaining arguments about the court's disposition of the motion are without merit.

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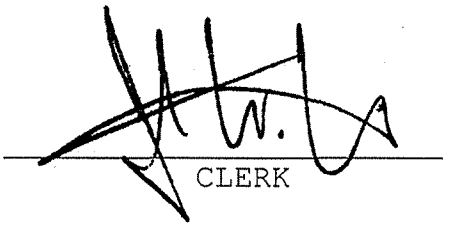

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4734 Michael Hurley, Index 106538/05
Plaintiff,

-against-

Best Buy Stores, L.P., et al.,
Defendants.

- - - - -

Schimenti Construction Company, LLC, 590952/05
Third-Party Plaintiff-Respondent,

-against-

Sage Electrical Contracting, Inc.,
Third-Party Defendant-Appellant.

- - - - -

Best Buy Stores, L.P., et al., 591014/05
Second Third-Party Plaintiffs-Respondents,

-against-

Sage Electrical Contracting, Inc.,
Second Third-Party Defendant-Appellant.

Camacho Mauro Mulholland, LLP, New York (Kathleen M. Mulholland of counsel), for appellant.

McManus, Collura & Richter, P.C., New York (Nicholas P. Chrysanthem of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 4, 2008, which, to the extent appealed from as limited by the briefs, granted so much of defendants/third-party plaintiffs and second third-party plaintiffs' motion for summary judgment on their third-party claims for contractual indemnification against Sage Electrical Contracting, unanimously

reversed, on the law, without costs, the motion denied, and the matter remanded for further proceedings.

The contractual indemnification provision, which applies to claims "arising out of or in consequence" of performance by Sage of its work on the project, is broad enough to apply here, where plaintiff was injured while performing electrical work for Sage on the project (*see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268 [2007]). However, defendants never moved for summary judgment dismissing the common law negligence and Labor Law § 200 causes of action against them, or otherwise established their freedom from negligence as a matter of law (*see Brennan v 42nd St. Dev. Project, Inc.*, 10 AD3d 302 [2004]). Since there is a possibility plaintiff could prevail on a theory of negligent coordination of demolition and electrical projects that resulted in a dangerous condition allowing a lighting fixture to swing down and hit plaintiff, the grant of summary judgment on the indemnification

claims was premature (*see McKenna v Lehrer McGovern Bovis*, 302 AD2d 329, 331 [2003]).

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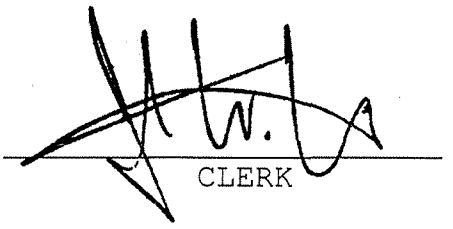

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4735-
4736 In re Nehemiah C.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Dwayne C., et al.,
Respondents-Appellants,

Cardinal McCloskey Services,
Petitioner-Respondent.

Randall S. Carmel, Syosset, for Dwayne C., appellant.

Jay A. Maller, New York, for Renee C., appellant.

David H. Berman, Larchmont, for respondent.

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

Order of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about January 26, 2007, which, insofar as appealed from as limited by the briefs, upon a finding of permanent neglect, terminated respondents' parental rights to the subject child and committed his custody and guardianship to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent mother did not appear at the fact-finding hearing, and does not now challenge the finding of permanent

neglect as against her. Regarding respondent father, clear and convincing evidence supported the finding of permanent neglect against him. Despite the diligent efforts of the agency to encourage and strengthen the parental relationship, the father failed to complete a drug-treatment program and missed more than a majority of his scheduled visits with his son (*see Matter of Angel P.*, 44 AD3d 448 [2007]; *Matter of Distiny Angelina N.*, 18 AD3d 755 [2005], *lv denied* 5 NY3d 706 [2005]). Furthermore, the father's proposal that his aunt and uncle would care for the child was not a viable plan for the child's future in light of their serious medical conditions (*see e.g. Matter of Monica Betzy D.*, 291 AD2d 289 [2002]; *Matter of LeBron*, 140 AD2d 276, 278 [1988]).

The evidence at the dispositional hearing was preponderant that termination of respondents' parental rights was in the child's best interests, where the child has lived almost his entire life with the foster mother, who has tended to his special needs (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). The evidence further demonstrates that in addition to their health issues, the father's aunt and uncle did not have a close relationship with respondents or their other children, and while they were more educated and had a more reliable employment history than the foster mother, that is not a sufficient basis

upon which to remove the child from the only home he has known and from a foster mother with whom he has bonded (*see Matter of Zarlia Loretta J.*, 23 AD3d 317 [2005]).

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

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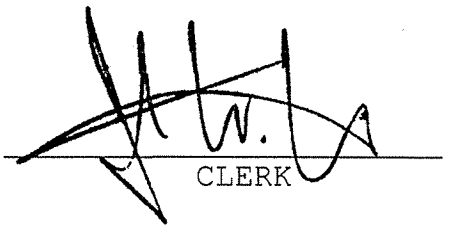


Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4737 Susan Wiener, Index 350396/04
Plaintiff-Respondent-Appellant,

-against-

Jack Wiener,
Defendant-Appellant-Respondent.

Franklin S. Bonem, New York, for appellant-respondent.

Robert M. Preston, New York, for respondent-appellant.

Judgment, Supreme Court, New York County (Marilyn Dershowitz, Special Referee), entered July 12, 2007, which, inter alia, distributed the parties' property and declined to award counsel fees, unanimously modified, on the law and the facts, to give defendant credit for $54,000 of his separate premarital savings and 50% of the payments that he made on the loan for the marital residence after plaintiff moved out, to increase defendant's interest in plaintiff's enhanced earning capacity from $45,900 to $111,100, to reduce plaintiff's distributive share of defendant's retirement assets from $240,000 to $139,505.15, and to give defendant credits of $3,570 with respect to gifts given to him by his mother, $2,500 with respect to plaintiff's friend's repayment of a $5,000 loan made by the parties, $3,445 with respect to the Goldman Sachs shares, and $9,000 with respect to plaintiff's bonus for 2003, and otherwise

affirmed, without costs.

Defendant placed the proceeds from the sale of his premarital apartment ($218,000) into the parties' joint account; he admitted that the money became "part of a fungible bulk." In addition, the parties then purchased a stock fund with money from the joint account. Under the circumstances, this commingling caused defendant's property to become marital property (*see e.g. Chiotti v Chiotti*, 12 AD3d 995, 996-997 [2004]; *Rheinstein v Rheinstein*, 245 AD2d 1024, 1025-1026 [1997]). Even if, arguendo, defendant placed the proceeds from the sale of his premarital apartment into the parties' joint account because of plaintiff's promises and threats, there is no indication that he agreed to purchase the stock fund due to plaintiff's promises and threats. Since the stock fund subsequently declined in value, it would be unfair to plaintiff to give defendant the full value of the money that was used to purchase the stock fund.

It is true that plaintiff did not rebut defendant's testimony that he transferred an additional $184,000 ($130,000 plus $54,000) of his premarital savings to the parties' joint account because of her promises and threats. However, the Special Referee, who heard and saw the witnesses, could have decided not to credit defendant's testimony. Moreover, defendant presented no documentary evidence showing that the $130,000 was

his separate property. By contrast, he submitted an exhibit showing that the $54,000 came from his separate account. In addition, plaintiff admitted that approximately $50,000 of the funds used to purchase the marital residence came from defendant's premarital savings account and that defendant could get a credit in that amount. Under the circumstances, defendant should be given credit for $54,000 (*see e.g. Mink v Mink*, 163 AD2d 748, 749 [1990]).

The parties made a total down payment of $291,600 on the marital residence. If $54,000 came from defendant's separate property, defendant contributed 60% of the purchase price, and plaintiff contributed 40% ($291,600 - $54,000 = $237,600 [marital portion] ÷ 2 = $118,800 [plaintiff's contribution] ÷ $291,600 = 40%). There is $900,000 of equity in the marital residence to be divided between the parties. If it were divided 60-40 between defendant and plaintiff, defendant would get $540,000, and plaintiff would get $360,000. If, on the other hand, each party were given credit for his/her original contribution (plaintiff: $118,800; defendant: $172,800 [$118,800 + $54,000]), and the appreciation ($608,400 [$900,000 - $118,800 - $172,800]) were divided equally between the parties, defendant would get $477,000 ($304,200 + $172,800), and plaintiff would get $423,000 ($304,200 + $118,800). The difference between the two approaches ($63,000)

is neither a "spectacular windfall" for plaintiff (*Butler v Butler*, 171 AD2d 89, 92 [1991]) nor an "unjust result" (*id.*). Therefore, it was not an improvident exercise of the Special Referee's discretion (*see id.* at 90) to divide the appreciation of the marital residence equally between the parties.

Defendant should be given credit for 50% of the payments that he made on the loan for the marital residence after plaintiff moved out (*cf. e.g. Johnson v Chapin*, 49 AD3d 348, 360 [2008]).

Plaintiff's expert's valuation of the enhanced earning capacity (EEC) from plaintiff's MBA was "fatally flawed" (*Morales v Morales*, 230 AD2d 895, 896 [1996], *lv denied* 90 NY2d 804 [1997]) because he used the base line earnings of actuaries having 11 years of experience, when plaintiff was never an actuary. However, defendant's expert's final report was also flawed: he used one anomalously high year of plaintiff's earnings -- earned three years before the commencement of this action and five years before trial -- as the top line earnings. The most reasonable evidence in the record of plaintiff's EEC is defendant's expert's alternative calculation based on top line earnings of $177,000. This calculation results in an EEC of $1,111,000. We decline to disturb the percentage of EEC (10%)

awarded by the Special Referee (*see e.g. Brough v Brough*, 285 AD2d 913, 916 [2001]).

Defendant entered into evidence a letter from his former employer showing the amount that he contributed to his retirement savings during each year of the marriage. This is better evidence than plaintiff's testimony that defendant would save about $50,000 to $60,000 per year. In 1996, defendant contributed $34,042.96, but the parties married on August 4, so only five-twelfths (August-December), or $14,184.56, is marital property. From 1997 through 2003 (i.e., during the full years of the marriage), defendant contributed a total of $234,503.52. In 2004, defendant contributed $51,980.97, but plaintiff filed this divorce action on July 21, so only seven months (January-July), or $30,322.23, should be included. The grand total is $279,010.31. Defendant admitted that he told plaintiff during their marriage that his retirement funds were for the two of them. Therefore, plaintiff should be awarded half of $279,010.31, or $139,505.15.

During the marriage, plaintiff worked at, inter alia, Schroders and Goldman Sachs. Defendant seeks half the value of (I) a rollover from plaintiff's Schroders IRA and (ii) her Goldman Sachs 401(k). However, he is comparing apples to oranges: he seeks half of the most recent *value* of plaintiff's

retirement savings, but he offers plaintiff only a portion of the *contributions* that he made to his retirement savings during the marriage (i.e., none of the appreciation on the contributions). Since defendant presented no evidence of the amount of the contributions that plaintiff made to her retirement accounts during the marriage, he failed to meet his burden of proof.

Defendant established that his mother gave him $8,570 via a series of checks. However, his evidence also showed that $5,000 of this amount was deposited into the parties' joint account. This commingling caused the $5,000 to become marital property (*see e.g. Glazer v Glazer*, 190 AD2d 951, 953 [1993]; *Di Nardo v Di Nardo*, 144 AD2d 906, 907 [1988]). Therefore, defendant is entitled to a credit of only $3,570, not $8,570.

The parties jointly lent $5,000 to plaintiff's friend, but the friend repaid the loan to plaintiff alone, and plaintiff deposited the repayment into her own separate account. Plaintiff admitted at trial that defendant was entitled to half of the repayment. Therefore, defendant should be given a credit of $2,500.

During the marriage, plaintiff acquired Goldman Sachs stock. In her most recent net worth statement, she valued it at $6,890. Defendant should be given a credit for half of that amount, or $3,445.

In early 2004, defendant's bonus for 2003 was deposited into the parties' joint account. After plaintiff left the marital residence, she removed $100,000 from the joint account. Plaintiff deposited her bonus for 2003 ($18,000) into her own separate account. Under the circumstances, defendant should be given a credit of $9,000.

We have considered defendant's remaining arguments, including those relating to 2004 taxes and plaintiff's jewelry, and find them unavailing.

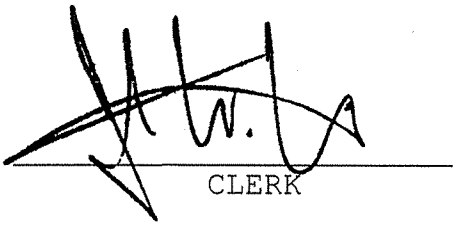
Turning to the cross appeal, we reject plaintiff's argument that she is entitled to part of defendant's post-divorce severance package because the first, originally offered $180,000 of the package was in exchange for defendant's years of service. *Olivo v Olivo* (82 NY2d 202 [1993]) rejected a "'length of service' test for marital property" (*id.* at 208). "Instead, the test . . . is whether the compensation in question is a form of deferred compensation" (*id.*). As defendant was not entitled to even the original $180,000 severance package unless he signed, and did not revoke, a separation agreement and general release, the original $180,000 severance offer was akin to the "separation payment" that *Olivo* deemed not to be marital property (*id.* at 205, 208).

The Special Referee did not improvidently exercise her

discretion by refusing to order defendant to pay plaintiff's counsel fees (*see e.g. Garrison-Horgan v Horgan*, 234 AD2d 957, 959 [1996]; *Carman v Carman*, 22 AD3d 1004, 1009 [2005]).

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

ENTERED: DECEMBER 4, 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 4, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
Luis A. Gonzalez
John T. Buckley
John W. Sweeny, Jr., Justices.

The People of the State of New York,
Respondent,

Ind. 5920/05
3470/06

-against-

4738-
4739

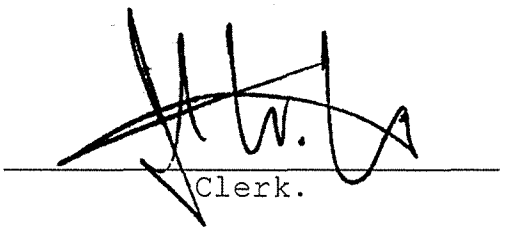
Dwight Cromer,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about March 18, 2008,

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., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4742 IBEX Construction, LLC, et al., Index 106481/06
Plaintiffs-Appellants-Respondents,

-against-

Utica National Assurance Company,
Defendant-Respondent-Appellant.

French & Rafter, LLP, New York (Howard K. Fishman of counsel), for appellants-respondents.

Lustig & Brown, LLP, Orangeburg (James M. Haddad of counsel), for respondent-appellant.

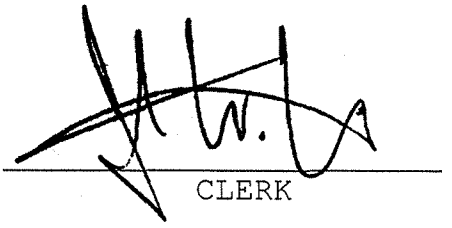
Order, Supreme Court, New York County (Louis B. York, J.), entered February 27, 2008, which denied plaintiffs' motion for summary judgment declaring that defendant was obligated to defend and indemnify plaintiff IBEX Construction in the underlying personal injury action, and denied defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant plaintiffs' motion, and otherwise affirmed, without costs.

The allegations in the personal injury complaint, and the subsequent trial thereof, make clear that the plaintiff in the underlying action claimed he fell from an improperly secured ladder provided by his employer, defendant's insured and a subcontractor of IBEX. In a post-trial appeal, this Court held that IBEX was liable to the employee, pursuant to Labor Law §

240(1) (*see Bradley v IBEX Constr., LLC*, 54 AD3d 626, 627 [2008]). Thus, IBEX is an additional insured as defined by the policy, i.e., one "held liable for [the insured's] acts or omissions arising out of . . . ongoing operations performed by [the insured] or [its] subcontractors" (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Defendant's duty to defend IBEX was triggered by the allegations in the underlying complaint, which brought the claims potentially within the scope of coverage (*id.*).

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

ENTERED: DECEMBER 4, 2008



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4743 In re Burton Borkan, Index 116713/07
Petitioner,

-against-

The State of New York, et al.,
Respondents.

Sidney Baumgarten, New York, for petitioner.

Andrew M. Cuomo, Attorney General, New York (Cecelia C. Chang of counsel), for respondents.

Determination of respondent Department of State, dated November 15, 2007, denying petitioner's application to renew his private investigator's license upon a finding that he lacks the requisite good character and integrity (General Business Law § 72[1]), unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Eileen Bransten, J.], entered February 7, 2008), dismissed, without costs.

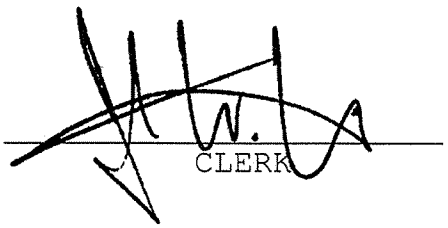
Substantial evidence supporting the determination includes petitioner's stipulation agreeing to, inter alia, the dissolution of a not-for-profit corporation that he purportedly ran for the purpose of preventing cruelty to children, in settlement of an action brought by the Attorney General against the corporation

alleging, according to the stipulation, that petitioner, inter alia, engaged in conduct that gave the false impression that the corporation was a police department or other agency of the State. The evidence also includes a press release issued by the Attorney General's office announcing the stipulation and stating, inter alia, that the corporation did not engage in any legitimate child protective work yet solicited contributions as if it did, and that petitioner distributed badges, identification cards and parking placards to the corporation's members that misused the State's seal and name. It does not avail petitioner that the stipulation recites that it is not an admission of liability -- surely a reasonable person could accept the stipulation and press release as adequate to support the conclusion that petitioner does not have the good character and integrity required of private investigators (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). No basis exists to disturb the Administrative Law Judge's findings discrediting petitioner's testimony that he did not engage in the wrongdoing recited in the stipulation and press release (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). The penalty of

denial of license renewal does not shock our sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

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

ENTERED: DECEMBER 4, 2008



Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4744 In re B. G., Index 311144/05
Plaintiff-Respondent,

-against-

A. M. O.,
Defendant-Appellant.

Louise Belulovich, New York, for appellant.

Todd R. Parkin, New York, for respondent.

Order, Supreme Court, New York County (Laura E. Drager, J.), entered September 19, 2007, which, in this matrimonial action, denied defendant's application for visitation with his children either in person or by telephone, permitted defendant to write four letters a year to the children that were to be reviewed by the law guardian and plaintiff with no requirement that the children respond, and authorized that, upon each child attaining the age of 16, defendant may seek modification of the access schedule, unanimously affirmed, without costs.

The court's decision to deny defendant visitation at the present time, after hearing the testimony of the parties and the law guardian, observing defendant as a witness, and, after conducting a post-trial *Lincoln* hearing (*see Matter of Lincoln v Lincoln*, 24 NY2d 270, 272 [1969]) with defendant's eldest child in the presence of the law guardian, has a sound and substantial

basis in the record (*see Ceasar A.R. v Raquel D.*, 179 AD2d 574 [1992]). It was defendant's rape of plaintiff, and the continued threat of physical and psychological harm, coupled with the fact that the children have been doing very well in their new home that were taken into account as relevant circumstances bearing on the best interests of the children. The court's primary concern was for the children's physical and psychological safety, as well as the safety of plaintiff, and there is nothing in the record to indicate that defendant has received anything other than "self-help" for the issues that compelled the attack on his wife and the continued harassment of his family from prison (*see Gregory C. v Nyree S.*, 16 AD3d 142 [2005], *lv denied* 5 NY3d 702 [2005]).

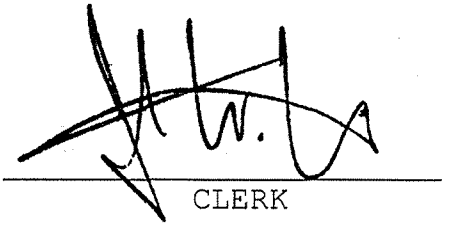
The court providently exercised its discretion in denying defendant's application for a forensic evaluation (*see James Joseph M. v Rosana R.*, 32 AD3d 725, 727 [2006], *lv denied* 7 NY3d 717 [2006]; Family Court Act § 251). The record establishes that the court had sufficient information upon which to make a comprehensive and independent review of the children's best interests, and defendant's behavior was a far greater indicator of his fitness as a parent than would be a forensic report. Furthermore, the law guardian found no need to make any application for a forensic examination, and the court conducted its own interview of defendant's son in the presence of the law

guardian.

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

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

ENTERED: DECEMBER 4, 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 4, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
Luis A. Gonzalez
John T. Buckley
John W. Sweeny, Jr., Justices.

The People of the State of New York, Ind. 3837/05
Respondent, 5375/05

-against- 4745

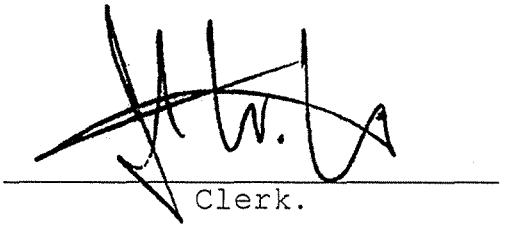
Efrain Mendez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about April 6, 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.

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 4, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
Luis A. Gonzalez
John T. Buckley
John W. Sweeny, Jr., Justices.

The People of the State of New York, Ind. 6001/06
Respondent,

-against- 4746

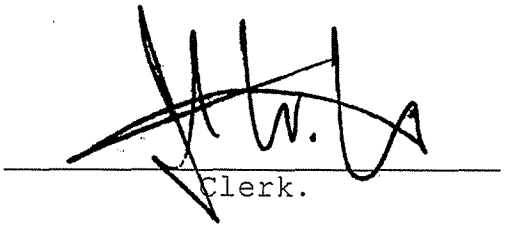
Charles Torain,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered on or about July 20, 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., Friedman, Gonzalez, Sweeny, JJ.

4747 Betsy Combier, Index 108510/07
Plaintiff-Appellant,

-against-

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

Betsy Combier, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

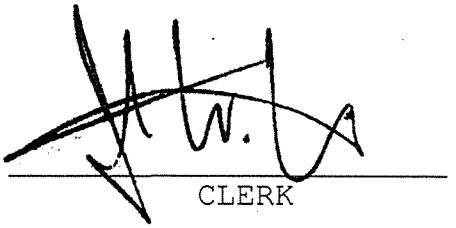
Order, Supreme Court, New York County (Karen S. Smith, J.), entered October 3, 2007, which denied plaintiff's motion to compel disclosure and granted defendants' cross motion to dismiss the complaint, unanimously affirmed, without costs.

Even were the complaint construed to be an Article 78 petition alleging refusal to furnish requested Parents Association financial records in violation of Chancellor's regulation A-660, it would have to be dismissed for failure to

exhaust the grievance procedures set forth in the pertinent regulation (*see Villalba v New York City Dept. of Educ.*, 50 AD3d 279 [2008]).

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

ENTERED: DECEMBER 4, 2008



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4750 In re Anthony Altieri, Index 105563/07
Petitioner-Appellant,

-against-

City of New York Civil Service Commission, et al.,
Respondents-Respondents.

Meringolo & Associates, P.C., Brooklyn (Antonino D'Aiuto of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dana B. Morris of counsel), for respondents.

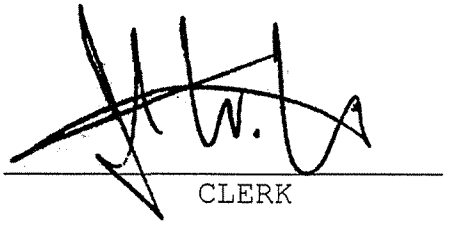
Order and judgment (one paper), Supreme Court, New York County (Walter B. Tolub, J.), entered September 27, 2007, which granted respondents' cross motion to dismiss an article 78 proceeding seeking to annul respondents' determination disqualifying petitioner from consideration for the position of sanitation worker on medical grounds, unanimously affirmed, without costs.

The proceeding was properly dismissed for lack of allegations sufficient to show that petitioner's cardiac condition does not rationally support the disqualification. In arriving at their determinations, respondents were entitled to rely on the opinion of respondent Department of Sanitation's medical director that petitioner's appointment as a sanitation

worker would put him at serious risk. The conflicting opinion of petitioner's treating medical physician does not tend to show that respondent "acted illegally or capriciously or adopted a professional opinion not founded on a rational basis" (*McCabe v Hoberman*, 33 AD2d 547 [1969]). In view of the foregoing, petitioner's medical disqualification cannot be the predicate of a discrimination claim under Executive Law § 296(1)(a) (*see Bellamy v City of New York*, 14 AD3d 462 [2005]; *O'Sullivan v City of New York*, 38 AD3d 467, 469 [2007], *lv denied* 9 NY3d 804 [2007]).

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

ENTERED: DECEMBER 4, 2008



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4751 The People of the State of New York, Ind. 2000/01
Respondent,

-against-

James Prince,
Defendant-Appellant.

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

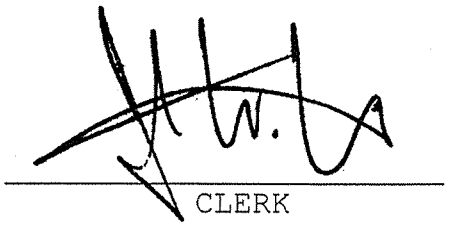
Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about August 14, 2007, which denied defendant's motion to be resentenced pursuant to the Drug Law Reform Act of 2005 (L 2005, ch 643, § 1), unanimously affirmed.

Defendant is ineligible for resentencing. We decline defendant's invitation to revisit our holding in *People v Quinones* (49 AD3d 323 [2008], *lv dismissed* 10 NY3d 868 [2008]), which involves the same issue raised on this appeal.

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

ENTERED: DECEMBER 4, 2008



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4752 In re New York State Urban Development Corporation, doing business as Empire State Development Corporation, etc., Petitioner-Respondent, Index 401141/03

-against-

Nawam Entertainment, Inc., doing business as Euro World, etc., Claimant-Appellant.

- - - - -

4753N In re New York State Urban Development Corporation, doing business as Empire State Development Corporation, etc., Petitioner-Appellant,

-against-

Nawam Entertainment, Inc., doing business as Euro World, etc., Claimant-Respondent.

Goldstein, Goldstein, Rikon & Gottlieb, P.C., New York (Joshua H. Rikon of counsel), for appellant-respondent.

Carter Ledyard & Milburn LLP, New York (Susan B. Kalib of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Leland G. DeGrasse, J.), entered January 9, 2008, dismissing a condemnation claim for the value of fixtures in leased premises operated by claimant as an adult video establishment and awarding condemnor costs of $950, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 2, 2006, which

denied condemnor's motion to vacate the parties' stipulation insofar as it fixed the costs of claimant's video booths, unanimously dismissed, without costs, as academic.

The clauses in claimant's lease providing that all compensation awarded on a taking of the premises belonged to the landlord, and waiving the tenant's right to participate in any such award, only preclude claimant from asserting leasehold claims and from participating in any fee simple award payable to the landlord; they do not preclude claimant from asserting trade fixture claims (*see Matter of City of New York [Allen St.]*, 256 NY 236, 243 [1931]; *Gristede Bros. v State of New York*, 11 AD2d 580 [1960]; *United States v Certain Property, etc.*, 344 F2d 142, 150-151 [2d Cir 1965]). Nor do the lease clauses making fixtures and improvements the property of the landlord upon installation while reserving to the tenant the right to remove "trade fixtures not attached or affixed to the building" equate or reduce trade fixtures to noncompensable personalty that is not in any manner or form attached or affixed to the building (*see Marraro v State of New York*, 12 NY2d 285, 292-293 [1963]; *Allyn v State of New York*, 11 AD2d 831 [1960]). Nevertheless, we affirm dismissal of the trade fixture claims, most of which involve 16 video booths and their wiring and video systems. Concerning these booths, the trial court credited the testimony of condemnor's appraiser that

they were secured to the floor only by screws, and rejected the testimony of claimant's principal that the booths were sealed to the floor with silicone such that moving them would cause their bottoms to rip away. The record also establishes that claimant's store was not specially designed to house the booths, that the booths were of standard issue as opposed to any special design, and that the booths were connected by wires to VCRs and electricity and could be moved around. Given such characteristics, the booths cannot be deemed trade fixtures (*see Matter of the City of New York [Kaiser Woodcraft Corp.]*, __ NY3d __, 2008 NY Slip Op 08157, *7 [2008], quoting *Matter of City of New York [Whitlock Ave.]*, 278 NY 276, 281-282 [1938]; *see also Matter of New York City Tr. Auth. [Superior Reed & Rattan Furniture Co.]*, 160 AD2d 705, 706 [1990]). It does not avail claimant that the booths, if removed, would lose substantial value because they were placed in a certain order to maximize the efficiency of the space, would be difficult to sell as secondhand goods, and are obsolete (*see Kaiser Woodcraft, id.* at *7-9). Other items claimed were correctly rejected as obvious personalty (e.g., a rubberized floor mat, fire extinguishers, a window fan, hand trucks), or because they had become an integral part of the building (e.g., an electric wall receptacle, a sprinkler system, circuit breaker distribution panels, a central air conditioning

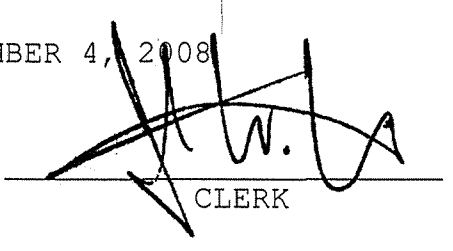
system, aluminum framed glass entry doors, wooden baseboard trim, a drywall partition) (*see Marraro*, 12 NY2d at 291 [separate award cannot be made for fixtures if what are claimed to be fixtures have become part of the realty]), and therefore, under claimant's lease, were the landlord's property. Concerning the items that the parties stipulated were fixtures (e.g., a roll-up steel security gate, a window sign, security mirrors, wall paneling, ceramic tiling, recessed fluorescent lighting), claimant failed to meet its burden of showing that it had installed or owned such items, and thus cannot be compensated for them. Indeed, at trial, claimant presented no receipts, bills, or other evidence demonstrating that it paid for or personally installed or constructed these items. Finally, the trial court properly awarded costs to condemnor. Absent a provision in the Eminent Domain Procedure Law on the subject of costs, CPLR 8101 governs (EDPL 703).

M-4124 ***NY State Urban Dev. Corp., etc. v Nawam Ent., Inc., etc.***

Motion seeking leave for preference denied.

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

ENTERED: DECEMBER 4, 2008



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4754N Ana Velazquez, Index 16282/03
Plaintiff-Appellant,

-against-

St. Barnabas Hospital,
Defendant-Respondent.

Abdul K. Hassan, Jamaica, for appellant.

Garbarini & Scher, PC, New York (William D. Buckley of counsel), for respondent.

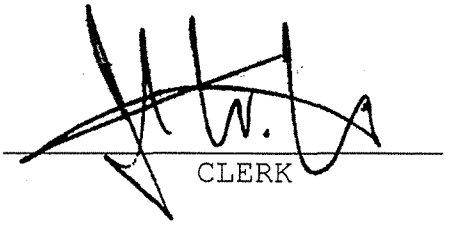
Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered August 10, 2007, which, in an action alleging unlawful disclosure of medical information, granted defendant's motion pursuant to CPLR 2104 to enforce the parties' settlement and confidentiality agreement, and denied plaintiff's cross motion to, inter alia, enforce the agreement without the confidentiality provisions, unanimously affirmed, without costs.

The requirements of CPLR 2104 were met when, following a conference and the acceptance of the settlement by plaintiff's counsel, the court marked the case settled (*see Hawkins v City of New York*, 40 AD3d 327 [2007]; *Popovic v New York City Health & Hosps. Corp.*, 180 AD2d 493 [1992]). There is no dispute as to the settlement amount agreed to by the parties, and the record, including the affirmation of plaintiff's counsel, confirms that

it was contemplated that the settlement agreement would include a confidentiality agreement, which plaintiff's counsel later deemed inappropriate in hindsight (*see Heimuller v Amoco Oil Co.*, 92 AD2d 882, 884 [1983]). Furthermore, despite plaintiff's claims to the contrary, we find no other basis upon which to invalidate the agreement (*see generally Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

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

ENTERED: DECEMBER 4, 2008



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
David Friedman
James M. Catterson
Karla Moskowitz, JJ.

3318
Index 29562/02
83599/03

x

Luis Espinosa,
Plaintiff-Appellant,

-against-

Azure Holdings II, LP, et al.,
Defendants,

Pygros Construction, et al.,
Defendants-Respondents.

[And a Third-Party Action]

x

Plaintiff appeals from an order of the Supreme Court, Bronx County (Nelson S. Roman, J.), entered October 5, 2006, which, insofar as appealed from, denied his cross motion for partial summary judgment as to liability on his cause of action under Labor Law § 240(1), granted defendants' motion and cross motions for summary judgment dismissing the complaint and all cross claims, and dismissed the third-party complaint.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellant.

Armenakis & Armenakis, New York (Amy D. Carlin & James J. Armenakis of counsel), for Pygros Construction, respondent.

Carol R. Finocchio, New York, and Law Office of Thomas K. Moore, White Plains (Marie R. Hodukavich of counsel), for Strategic Construction Corp., respondent.

FRIEDMAN, J.

Plaintiff, a worker on a gut rehabilitation project, was injured when the sidewalk on which he was standing collapsed due to the failure of the cellar vault below it. On this appeal, plaintiff argues that he should have been granted summary judgment as to liability on his Labor Law § 240(1) cause of action based on this incident, while defendants argue that the IAS court correctly granted them summary judgment dismissing that claim. Also at issue on this appeal is the IAS court's grant of summary judgment dismissing plaintiff's causes of action under Labor Law § 241(6), Labor Law § 200, and common-law negligence.

Consistent with this Court's recent decision in *Jones v 414 Equities LLC* (__ AD3d __, 2008 NY Slip Op 08197 [2008]), we hold that neither side is entitled to summary judgment on the § 240(1) claim, as the record gives rise to a triable issue as to whether the failure of the cellar vault beneath the sidewalk -- a completed, permanent building structure -- was reasonably foreseeable. We also hold that summary disposition of the § 200 and common-law negligence claims was inappropriate, as the record does not establish as a matter of law that defendants either had or did not have notice of the risk of the cellar vault's collapse. We affirm, however, the dismissal of plaintiff's claim under Labor Law § 241(6).

On the day of the accident, plaintiff, an employee of the

project's demolition sub-subcontractor, third-party defendant Avian Construction Corp., was instructed to straighten out the metal debris containers that were placed on the concrete sidewalk outside the building referred to in the record as "building number two" (hereinafter, building no. 2). As plaintiff stepped onto the sidewalk, it collapsed beneath him into building no. 2's cellar vault. Demetre Beryeles, a principal of the project's subcontractor, defendant Pyrgos Construction Corp. (which hired Avian, plaintiff's employer), testified that a post-accident inspection revealed that there had been a failure of the horizontal steel support beam that held up the sidewalk slab situated over the cellar vault. According to Beryeles, the steel support apparently had been weakened by corrosion.

The evidence shows that no pre-accident signs of a dangerous condition were visible on the surface of the portion of the sidewalk that collapsed. Plaintiff testified that he never noticed any "holes or cracks" in the cement of that area of the sidewalk, although he walked over it about 20 times. Beryeles testified, without contradiction, that "the concrete on the top of the vault looked not really bad," and that he received "the impression that that sidewalk was good" from the fact that the City of New York had installed a sidewalk bridge there a "few years earlier." Beryeles further testified that, in building no. 2, neither the horizontal steel support for the sidewalk (which collapsed) nor the ceiling of the cellar vault was inspected

before the accident occurred. Neither was there any testimony that any pre-accident circumstances or complaints gave an indication of unsoundness in the horizontal steel support in the cellar vault of building no. 2 or any of the other four buildings involved in the project.

As to the general condition of the five buildings, it is undisputed that they were all in advanced stages of internal disrepair and were undergoing a gut rehabilitation. John J. Frezza, a principal of the general contractor, defendant and third-party plaintiff Strategic Construction Corp. (which hired Pyrgos), testified that he inspected the buildings before work began, and saw that "[t]hey were in a pretty bad state of disrepair, they were unoccupiable." With regard to building no. 2 in particular, Frezza testified that the building was in a state of "interior collapse," meaning that the interior floor beams, the "core" of the building, had fallen through. According to Frezza, "you could look [into the building] through the first floor window and see the sky."

After discovery, defendants moved and cross-moved for summary judgment dismissing the complaint and all cross claims, and plaintiff cross-moved for partial summary judgment as to liability on his cause of action under Labor Law § 240(1). The IAS court denied plaintiff's cross motion and granted defendants' motion and cross motions, resulting in dismissal of the complaint. This appeal by plaintiff ensued.

Turning first to the causes of action under Labor Law § 200 and common-law negligence, we conclude that building no. 2 had reached such an extreme stage of obvious deterioration -- essentially, it was no more than a shell around a collapsed interior -- that a jury could rationally find that defendants (all of which knew of the interior collapse) had constructive notice of the possibility of the unsoundness of any structural element of the building, including the horizontal steel support in the cellar vault ceiling. Under these circumstances, such constructive notice could rationally be found to exist even in the absence of any observable sign that the sidewalk and its underlying support were unsound. Still, because the sidewalk (which, as indicated, was in good condition) and its underlying support were not part of the building's interior, we cannot say that the record establishes as a matter of law that defendants had constructive notice of the dangerous condition that resulted in the accident. Hence, the question of constructive notice should be resolved by a trier of fact. Given the existence of a triable issue as to constructive notice of the dangerous condition that caused the accident, it follows that neither side was entitled to summary judgment on the causes of action under Labor Law § 200 and common law negligence.[1]

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[1]It should be noted that, since the accident was caused by a dangerous condition of the premises, rather than by the work methods used, plaintiff need not establish that the defendant owners exercised supervision and control over his work in order

As to the cause of action under Labor Law § 240(1), that statute does not create an exception to the fundamental principle of tort law that "a defendant is liable only for the 'normal and foreseeable consequences' of its acts" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [2007], *lv denied* 10 NY3d 710 [2008], quoting *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). Accordingly, "the determination of the type of protective device required for a particular job [and thus whether § 240(1) is implicated] turns on the foreseeable risks of harm presented by the nature of the work being performed" (*Buckley*, 44 AD3d at 268).

Consistent with the principle that liability under Labor Law § 240(1) arises only where "the risk of injury from an elevation-related hazard was foreseeable" (*Shipkoski v Watch Case Factory Assoc.*, 292 AD2d 587, 588 [2002]), this Court recently held, in *Jones v 414 Equities LLC* (*supra*), that, to prevail on a § 240(1) claim based on an injury resulting from the failure of a completed and permanent building structure (in that case, the collapse of a floor), the plaintiff must show that the failure of

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to prevail against those defendants on his claim under Labor Law § 200 (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202-203 [2005]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [2004]; *Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149, 150 [2000]). With respect to the defendant general contractor (Strategic) and the defendant subcontractor (Pyrgos), a triable issue exists on this record as to whether these defendants exercised sufficient supervision and control over the work to support a finding of liability under § 200 against them.

the structure in question "was a foreseeable risk of the task he was performing" (2008 NY Slip Op 08197, *12) creating a need for protective devices of the kind enumerated in the statute. As noted in *Jones*, there is prior case law to that effect (*see Balladares v Southgate Owners Corp.*, 40 AD3d 667, 669-670 [2007] [§ 240(1) claim based on collapse of basement floor dismissed]; *Shipkoski*, 292 AD2d at 589 [plaintiff denied summary judgment on § 240(1) claim arising from collapse of third floor of vacant building]). These decisions are consistent with the Court of Appeals' construction of "the 'braces' referred to in section 240(1) to mean those used to support elevated work sites not braces designed to shore up or lend support to *a completed structure*" (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995] [emphasis added]).

In *Balladares v Southgate Owners Corp.* (*supra*), the plaintiff, while working on a demolition project in a basement, was injured when "the basement floor that he was standing on collapsed, causing him to fall into a hole" (40 AD3d at 669). The Second Department held that the defendants were entitled to summary judgment dismissing the § 240(1) claim because they "establish[ed] that the collapse of the basement floor was not a risk that gave rise to the need for the enumerated safety devices, but was, rather, a separate, unrelated hazard" (*id.* at 669). The court continued:

> "Although injury resulting from the collapse of a floor may give rise to liability under Labor Law § 240(1) *where the circumstances are such that there is a foreseeable need for safety devices*, the plaintiff failed, in opposition [to defendants' summary judgment motion], to raise a triable issue of fact in this regard" (*id.* at 669-670 [emphasis added; citations omitted]).

In *Shipkoski v Watch Case Factory Assoc.* (*supra*), the plaintiff's employer had contracted to board up broken windows in a vacant building. The plaintiff "allegedly was injured when, as he was walking on the deteriorated third floor measuring windows for the installation of plywood, the floor gave way and he fell through" (292 AD2d at 588). The Second Department affirmed the denial of the plaintiff's motion for summary judgment on his § 240(1) claim on the ground that there were "issues of fact as to whether Labor Law § 240(1) is applicable" (*id.*). The court explained:

> "Here, there are issues of fact as to whether the building was in such an advanced state of disrepair and decay from neglect, vandalism, and the elements that the plaintiff's work on the third floor exposed him to a foreseeable risk of injury from an elevation-related hazard, and whether the absence of a type of protective device enumerated under Labor Law § 240(1) was a proximate cause of his injuries" (*id.* at 589).

Balladares and *Shipkoski*, like this Court's decision in *Jones*, illustrate that, where an injury results from the failure of a completed and permanent structure within a building -- even a building undergoing demolition (as in *Balladares*) or one in a dilapidated condition (as in *Shipkoski*) -- a necessary element of a cause of action under Labor Law § 240(1) is a showing that

there was a foreseeable need for a protective device of the kind enumerated by the statute. Thus, in *Balladares*, where the plaintiff failed to show that there was any reason to anticipate a collapse of the basement floor, the § 240(1) claim was dismissed. In *Shipkoski*, by contrast, where the building was in a state of disrepair, that condition was sufficient to raise a triable issue as to whether the plaintiff's work "exposed him to a foreseeable risk of injury from an elevation-related hazard" (292 AD2d at 589) but was not sufficient to entitle the plaintiff to judgment on the § 240(1) claim as a matter of law. Here, as in *Shipkoski*, the evidence of building no. 2's advanced state of disrepair raises a triable issue as to whether the structural failure that caused the sidewalk to collapse was foreseeable but does not establish the foreseeability of the collapse as a matter of law (*see also Jones*, 2008 NY Slip Op 08197, *12 [plaintiff was correctly denied summary judgment on his § 240(1) claim because he "failed to make a prima facie showing that the collapse of the floor was a foreseeable risk of the task he was performing"]). Hence, neither side is entitled to summary judgment on the § 240(1) cause of action, and that claim should proceed to trial.

The IAS court correctly granted defendants summary judgment dismissing plaintiff's Labor Law § 241(6) claim, inasmuch as each of the Industrial Code provisions on which plaintiff relies was either inapplicable to this case or not sufficiently specific to

support a statutory violation under the circumstances (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]).

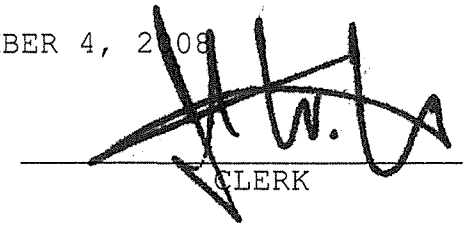
Finally, because we are reinstating certain of plaintiff's claims, we necessarily reinstate the cross claims and the third-party complaint. The IAS court denied as moot all portions of defendants' cross motions relating to indemnification and should now have an opportunity to consider those issues.

Accordingly, the order of Supreme Court, Bronx County (Nelson S. Roman, J.), entered October 5, 2006, which, insofar as appealed from, denied plaintiff's cross motion for partial summary judgment as to liability on his cause of action under Labor Law § 240(1), granted defendants' motion and cross motions for summary judgment dismissing the complaint and all cross claims, and dismissed the third-party complaint, should be modified, on the law, to the extent of denying defendants summary judgment dismissing the causes of action under Labor Law § 240(1), Labor Law § 200, and common-law negligence, such causes of action reinstated, all cross claims and the third-party complaint reinstated, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 4, 2008



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