SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 11, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4328 In re Jessica J., and Another,

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

Lillie J.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order of disposition, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about February 28, 2007, which, upon a fact-finding determination that respondent mother neglected the subject children, placed the children in the custody of the Commissioner of Social Services pending the completion the next permanency hearing scheduled for August 27, 2007, insofar as it brings up for review the fact-finding determination, unanimously modified, on the law, the finding of derivative neglect with respect to Raeign McN. vacated and,

except as so modified, affirmed, without costs, and the matter remanded for further proceedings consistent herewith. The balance of the appeal is dismissed as moot, without costs.

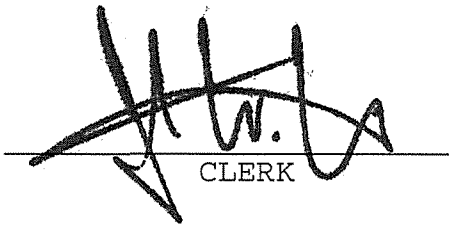
The terms of the dispositional order have been rendered moot by a subsequent order continuing the placement of the children (*see Matter of Angelyna G.*, 46 AD3d 304 [2007]; *Matter of D./B. Children*, 303 AD2d 229 [2003]). We further observe that respondent's challenge to the order of disposition is unpreserved since she never objected to the order or otherwise contested the placement of the children (*see e.g. Matter of Mary Alice V.*, 222 AD2d 594 [1995], *lv denied* 87 NY2d 811 [1996]).

The finding that respondent neglected Jessica was supported by a preponderance of the evidence (*see Matter of Evan F.*, 48 AD3d 811 [2008]; *Matter of John N.*, 19 AD3d 497, 498-499 [2005]; Family Court Act § 1012[f][i][A]). The court appropriately took note of the detrimental effect of respondent's threat, made in the children's presence, to kill both them and herself rather than allow them to be taken from her. Respondent's decision to keep Jessica, who has special needs, from attending school for 44 days with no alternative plan for her education was an unreasonable overreaction to an incident in which a school bus driver left the child at the wrong bus stop. The evidence also shows that respondent refused offers of carfare, was unwilling to walk the child to or from the school, which was located six

blocks from the family's abode, and failed to make any effort to ensure that Jessica's basic educational needs were met (*compare Matter of Alexander D.*, 45 AD3d 264 [2007]). However, while this Court is concerned that both children receive an adequate education, no evidence was received establishing that respondent's younger daughter, Raeign, had excessive absences from school. In the absence of any indication that Raeign's basic educational needs went unmet, Family Court's implicit finding of derivative neglect lacks record support (*cf. Matter of Ember R.*, 285 Ad2d 757, 759 [2001], *lv denied* 97 NY2d 604 [2001]).

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

ENTERED: DECEMBER 11, 2008



Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4496 Paul Grant, etc., Index 127474/02
Plaintiff-Appellant,

-against-

Charles Rattoballi,
Defendant-Respondent.

Chamberlain D'Amanda Oppenheimer & Greenfield, Rochester (Steven A. Lucia of counsel), for appellant.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Alex K. Ross of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 23, 2007, which denied plaintiff's motion to vacate a prior order sua sponte dismissing the complaint, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion granted, and the complaint reinstated.

In this action for misappropriation of corporate assets, the order dismissing the complaint for failure to appear at a court conference should be vacated where the party shows a reasonable excuse for the default and a meritorious cause of action (*see Polir Constr. v Etingin*, 297 AD2d 509, 511 [2002]). Plaintiff submitted an affidavit of merit sufficiently setting forth his claims alleging, inter alia, that defendant had used corporate funds for personal purposes and liquidated plaintiff's retirement fund.

The power of a nisi prius court to dismiss an action sua sponte should be used sparingly and only in extraordinary circumstances (*Rienzi v Rienzi*, 23 AD3d 450 [2005]. Supreme Court has the authority to dismiss an action based on a plaintiff's failure to attend a scheduled court appearance (*see* 22 NYCRR 202.27), and may do so without providing notice to the parties of its intention in that respect (*see Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785 [2003]). Here, however, *both* parties failed to attend the conference, and there is no evidence that either one was aware a conference had been scheduled. Plaintiff explained that he did not receive notice of the court conference, there is no indication in the record that such notice was sent to either party (*see Levy v New York City Hous. Auth.*, 287 AD2d 281 [2001]), and defendant does not argue to the contrary. Furthermore, it is undisputed that plaintiff had attended every previous conference.

In its sua sponte dismissal order of May 2006, the court cited a pattern of contumacious conduct on plaintiff's part, which resulted in delays and the waste of judicial resources. While a court may, in certain circumstances, dismiss an action sua sponte based on a plaintiff's willful and contumacious failure to comply with disclosure orders (*see Macias v New York City Tr. Auth.*, 240 AD2d 196 [1997]), the court never warned plaintiff that his pleading might be dismissed based on failure

to comply with disclosure orders (*cf. Goldstein v CIBC World Mkts. Corp.*, 30 AD3d 217 [2006]). Moreover, it is not clear from the record that plaintiff alone was responsible for the delays, or that his conduct was willful or contumacious, and defendant should not obtain a benefit for his own contribution to the discovery disputes and consequent delays.

Additionally, as plaintiff correctly notes, the court could not have dismissed the complaint pursuant to CPLR 3216 because plaintiff was never served with a written demand to resume prosecution of the action and file a note of issue within 90 days (*see* CPLR 3216[b][3]). General delay is not a ground for dismissal of the complaint where a plaintiff has not been served with a 90-day demand to serve and file a note of issue (*see Chase v Scavuzzo*, 87 NY2d 228, 233 [1995]).

The court further stated in its dismissal order that plaintiff "attempted ex parte communications with the Court" but did not specify when or how, and there is no indication that it took any action as a result of these alleged attempts. Plaintiff believes that the alleged ex parte communications to which the court referred are instances when his counsel, pursuant to the court's directive, contacted the court to obtain "so-ordered" subpoenas from the court; he denies any other attempted ex parte communication with the court. If plaintiff is correct, the court should neither have faulted him for those communications nor

based its dismissal of the complaint on them. In any event, because the court acted sua sponte, plaintiff had no opportunity to defend against this charge.

Finally, the court stated in its sua sponte order that the case was "beyond standards and goals," apparently referring to the differentiated case management rule requiring that a civil case be given a particular designation based on its perceived complexity, which in turn suggests a time limit on completion of disclosure (*see* 22 NYCRR 202.19). The standards and goals component of the differentiated case management rule provides a "roadmap and timetable for arriving at a conclusion in civil cases" and thus facilitates the speedy resolution of those cases (Horowitz, *Burden of Proof*, 80 NY St BJ 16, 18 [Sept. 2008]). The issue of whether an action should be dismissed, however, must be decided based on the particular facts of the action.

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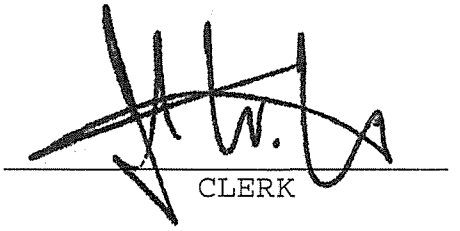

CLERK

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

4565 In re Israel M.,

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

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

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

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered February 28, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of assault in the second degree and menacing in the third degree, and placed him on probation for a period of 12 months, unanimously reversed, on the law and in the exercise of discretion, without costs, the finding of juvenile delinquency and placement on probation vacated, and the matter remanded with the direction to order an adjournment in contemplation of dismissal.

At the fact-finding hearing, Eddie, the victim and appellant's classmate, testified that, on March 12, 2007, he was on his way to a morning class when another classmate, Robert, caused him to trip and fall. While Robert and appellant

prevented him from getting up by holding his arms, a third classmate, Christopher, came from behind and slashed Eddie in the right shoulder with a pocket knife.[1] Eddie sustained a one centimeter superficial laceration on his right upper chest, which he did not discover until he sat in class and saw blood. During the incident, however, Eddie did not fear his classmates, nor did he feel they wanted to hurt him. Instead, Eddie believed that they were "play fighting," as they all had done in the past, and that it was possible that he was accidentally struck by the knife while "play fighting." A week prior to the incident, Eddie had been present when Christopher bought the pocket knife, and they both had handled it on numerous occasions by opening a flashlight on its handle. Eddie never saw appellant handle the pocket knife, and there is no evidence that appellant was present when Christopher purchased the knife.

During his interview by the Department of Probation, appellant accepted responsibility for his actions. He explained that prior to the incident, Christopher had suggested "scaring" Eddie because that morning Eddie had prevented them from working during computer class. Appellant admitted tripping and holding Eddie while Christopher punched him, but he explained that they were just "playing around" and he did not know that Christopher

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[1] After a fact-finding hearing, Robert was acquitted of all charges, while Christopher was found guilty of the charges enumerated above.

had a knife. At the conclusion of the dispositional hearing, Family Court adjudicated appellant a juvenile delinquent and placed him on probation for 12 months. Appellant now challenges the dispositional order, asserting that such disposition is not "the least restrictive available alternative," as it fails to take into account the best interests of the juvenile and the need for protection of the community (*see* Family Ct Act § 352.2[2][a]). We agree.

The record indicates that appellant had not previously been in trouble in school or home. The incident was his first contact with the juvenile system and an apparent aberration in behavior. Indeed, appellant comes from a stable home environment. His school record indicates excellent attendance and good grades, and he indicated an intent to attend college. Moreover, appellant has expressed remorse for his conduct and insisted that he has learned a good lesson from the incident. Since the incident, appellant has been participating in the Police Athletic League Youth Program, where he has received weekly individual and group counseling. His counselor described him as one of his best youths.

As this Court has noted, Family Court Act § 352.2(2)(a) "requires that in all cases where the protection of the community is not threatened, 'the court shall order the least restrictive available alternative . . . consistent with the needs and best

interests of the respondent'" (*Matter of Gomez*, 131 AD2d 399, 401 [1987]; *see also Matter of Deborah C.*, 261 AD2d 138 [1999]). While recognizing appellant's otherwise unblemished record, Family Court adjudicated him a juvenile offender and ordered probation based solely on the seriousness of the crime, i.e., that had it been committed by an adult it would be considered a felony. However, although not to be condoned, appellant's involvement was minor. Indeed, appellant had no knowledge that his classmate intended to use a pocket knife during their concerted efforts to "scare" the victim for preventing them from working during their computer class. In fact, both the victim and appellant believed that the incident was in the nature of "play fighting." Under the circumstances, appellant's involvement can be fairly characterized as "an act of thoughtlessness committed by an adolescent fooling around with some friends" (*Matter of Justin Charles H.*, 9 AD3d 316, 317 [2004]).

Given appellant's relatively minor involvement in the victim's injuries, and considering that this was his first offense on an otherwise unblemished record, that he comes from a stable home and school environment, and that his post-incident conduct has been exemplary, a finding of juvenile delinquency with a 12-month placement on probation was neither the least restrictive alternative nor the appropriate disposition (*see*

Matter of Anthony M., 47 AD3d 434 [2008]; *Matter of Joel J.*, 33 AD3d 344 [2006]; *Matter of Letisha D.*, 14 AD3d 455 [2005]). Since an ACD may only be entered prior to the entry of a finding of juvenile delinquency (Family Ct Act § 315.3[1]), we vacate that finding.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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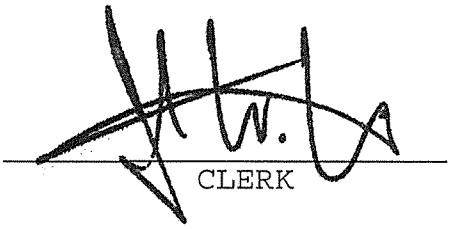

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Tom, J.P., Andrias, Friedman, Catterson, Acosta, JJ

4580 The People of the State of New York, Ind. 1458/04
Respondent,

-against-

Gerard Spann,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Charles H. Solomon, J. at plea and sentence), rendered May 3, 2005, convicting defendant, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

Given the testimony of a trained and experienced member of a police Street Narcotics Enforcement Unit that, from a rooftop vantage point in a drug-prone location, he observed defendant retrieve two small objects from the area of his buttocks and hand them to a man and a woman in exchange for an unknown sum of United States currency, there is ample support in the record for the hearing court's determination that the officer had probable

cause to arrest and search defendant (*see People v Jones*, 90 NY2d 835 [1997]).

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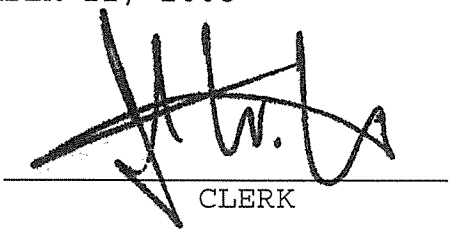

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Tom, J.P., Andrias, Friedman, Catterson, Acosta, JJ.

4585-
4586 Lorraine Chanin Rachimi, Index 350597/03
Plaintiff-Appellant,

-against-

Peter Rachimi,
Defendant-Respondent.

Elliott Scheinberg, Staten Island, for appellant.

Ira E. Garr, New York, for respondent.

Judgment, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered March 7, 2007, inter alia, granting plaintiff a divorce on grounds of cruel and inhuman treatment, awarding her maintenance of $1,500 per month and the apartment in Cedarhurst, awarding defendant the marital apartment in Manhattan and ownership of the Facility Cab Corporation (FCC) or any subsidiary thereof, and ordering the parties to sell their residence in upstate Woodstock and share equally the balance of those proceeds in accordance with their May 31, 2005 stipulation, unanimously modified, on the law, the Cedarhurst apartment found to be plaintiff's separate property not subject to equitable distribution, the interests in the Manhattan apartment adjusted to 33 1/3% for plaintiff and 66 2/3% for defendant, and otherwise affirmed, without costs, and the matter remanded for further proceedings including entry of an amended judgment. Appeal from order, same court and Referee, entered on or about February 7,

2007, unanimously dismissed, without costs, as subsumed within the appeal from the judgment.

This action to dissolve this 20-year marriage was commenced in 2003, when the parties were in their sixties. At the outset, we reject plaintiff's argument for reversal on grounds that the Referee failed to identify the Domestic Relations Law § 236 (B)(5)(d) factors relied on in his award of equitable distribution, and to give his reasons for such award (Domestic Relations Law § 236[B][5][g]). Contrary to plaintiff's argument, these factors "do not have to be specifically cited when the factual findings of the court otherwise adequately articulate that the relevant statutory factors were considered" (*Rosenkranse v Rosenkranse*, 290 AD2d 685, 686 [2002]), especially "where a comprehensive record and extensive factual findings provide a basis for informed review" (*Matter of Gulli v Gulli*, 118 AD2d 970, 971 [1986]). The Referee set forth all his factual findings, indicated which testimony he found credible and which was not, cited the appropriate factors to be considered in making an equitable distribution award, and ultimately identified the facts he was relying on in making his award. That he did not specifically state which § 236(B)(5)(d) factor he was relying on regarding each individual component of the equitable distribution award is not fatal. The relevance of each pertinent factor is clear from the extensive record.

Given all the circumstances and our award of one-third of the marital apartment to plaintiff, we reject plaintiff's contention that the Referee erroneously awarded 100% of FCC to defendant.

We find merit, however, in plaintiff's contention that the Referee erroneously concluded the Cedarhurst apartment was a marital asset subject to equitable distribution. While property acquired during the marriage is presumed to be marital in nature (Domestic Relations Law § 236[B][1][c]; *Lischynsky v Lischynsky*, 120 AD2d 824, 826 [1986]), plaintiff's testimony and documentary evidence that she scrupulously maintained the proceeds from the sales of three properties she owned prior to the marriage separate and apart from marital assets, and traced those funds to the subsequent purchase of the Cedarhurst apartment, successfully rebutted the presumption that the apartment was marital property (*see e.g. Sarafian v Sarafian*, 140 AD2d 801, 804-805 [1988]).

We also find that the Referee improperly awarded defendant 100% of the marital apartment on Manhattan's Upper East Side. Considering the relevant § 236(B)(5)(d) factors, a distributive award to plaintiff of one-third (33 1/3%) of the fair market value of that apartment, determined as of the time of trial (*Wegman v Wegman*, 123 AD2d 220, 232 [1986]), would be equitable under the circumstances. She is entitled to at least some portion of the marital apartment because of her advancing age,

poor health, and absence from the work force for most of her adult life, with little prospect of finding employment to generate enough money for her own support. Contrary to the Referee's conclusion, plaintiff did contribute, financially and otherwise, to the household throughout the course of the marriage. A one-third share is sufficient, however, given that plaintiff has other funds and property in her own name and will be receiving $1,500 per month in maintenance until either of the parties dies or she remarries, and the Referee's finding that she did not contribute equally to the marriage (*see Adjmi v Adjmi*, 8 AD3d 411 [2004]).

Finally, the Referee correctly awarded the Bank Hapoalim account to defendant as his separate property. Even assuming the doctrine of judicial estoppel applies with respect to the contrary position taken by defendant in his prior divorce proceeding that he had no assets (*see Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 [1998], *lv dismissed* 92 NY2d 962 [1998]), the appropriate remedy is not to transform his separate assets into marital assets.

Plaintiff's invocation of the doctrine of unclean hands is similarly misplaced. She does not argue that defendant deliberately committed perjury in an effort to place assets out of her reach in this action, which would preclude him, as a matter of public policy in order to protect the integrity of the

court, from claiming rightful ownership of that property (*see Moo Wei Wong v Wong*, 293 AD2d 387 [2002]). Rather, she argues that his alleged perjury in the prior divorce action was an effort to place assets out of the reach of his *former* wife, and thus the doctrine is inapplicable here.

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

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

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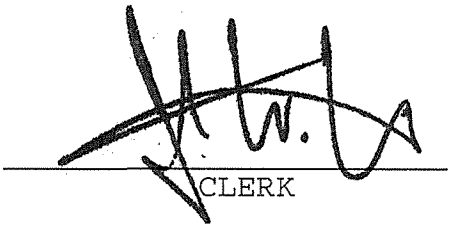

CLERK

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

4694 The People of the State of New York, Ind. 5185/06
Respondent,

-against-

Antoine Best,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael Corriero, J. at hearing; Renee A. White, J. at jury trial and sentence), rendered June 19, 2007, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

In this case of possession of a gravity knife (*see* Penal Law § 265.00[5]), the court correctly instructed the jury that the knowledge element was defendant's knowledge that he possessed a knife, but not knowledge that the knife met the definition of a gravity knife (*see People v Berrier*, 223 AD2d 456 [1996], *lv denied* 88 NY2d 876 [1996]; *cf. People v Wood*, __ AD3d __, 2008 NY Slip Op 09658). We have considered and rejected defendant's

constitutional challenges to that instruction.

The court properly exercised its discretion when it determined that unspecified expert testimony concerning design and manufacture of knives would not assist the jurors in determining whether the particular knife possessed by defendant had the characteristics of a gravity knife (*see People v Austin*, 46 AD3d 195, 199-201 [2007], *lv denied* 9 NY3d 1031 [2008]; *People v Hall*, 251 AD2d 242, 243 [1998], *lv denied* 92 NY2d 982 [1998]). Defense counsel's vague description of the proposed testimony did not warrant a conclusion that this testimony would have been admissible. The court's proper exercise of its discretion did not violate defendant's right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The officer's observation of a clip and part of a knife protruding from defendant's pocket, which he believed to be a gravity knife based on prior experience, provided, at least, a founded suspicion of criminal activity, permitting the officer to make a non-forcible stop and a common-law inquiry. Any body contact between the officer and defendant was minimal and did not constitute a seizure (*see People v Cherry*, 30 AD3d 185 [2006], *lv denied* 7 NY3d 811

[2006]). The officer properly asked if he could see the knife, and defendant consented (*see People v Casimey*, 39 AD3d 228 [2007], *lv denied* 8 NY3d 983 [2007]).

There was nothing constitutionally deficient about the court's interested witness charge concerning defendant's testimony (*see People v Blake*, 39 AD3d 402, 403 [2007], *lv denied* 9 NY3d 873 [2007]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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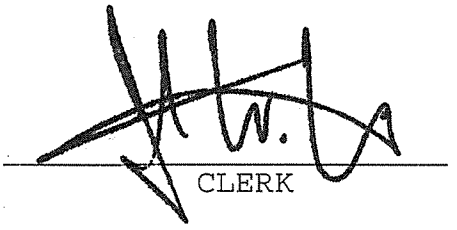

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Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4778 The People of the State of New York, Ind. 2263/04
Respondent,

-against-

Diana Noakes, also known as Adele Chandler,
also known as Adell Robinson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Frances Y. Wang of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert G. Seewald, J.), rendered July 7, 2006, convicting defendant, after a jury trial, of assault in the first degree, and sentencing her, as a second violent felony offender, to a term of 13 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 identification and credibility, including its evaluation of the victim's testimony that, at the time of the crime, she knew her assailant's first name. Moreover, the victim's identification of defendant was corroborated by circumstantial evidence.

The court properly denied defendant's challenge for cause to a prospective juror with a background in occupations related to

law enforcement. The panelist provided unequivocal assurances of his impartiality and ability to follow the court's instructions on such matters as the burden of proof (*see People v Washington*, 35 AD3d 288 [2006], *lv denied* 8 NY3d 951 [2007]), and he never manifested any difficulty in applying the presumption of innocence. While defendant challenges the sincerity of the panelist's voir dire responses, the trial court "saw and heard the panelist, credited his assurances, and there is no basis for disturbing its determination." (*id.* at 288).

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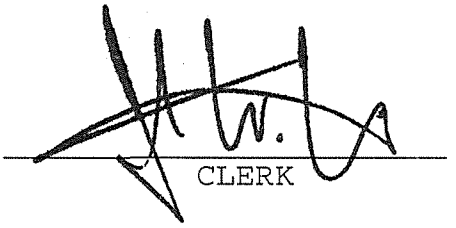

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4780 Emily Rivera, Index 26549/00
Plaintiff-Respondent, 42022/03

-against-

City of New York,
Defendant,

New York City Housing Authority,
Defendant-Appellant.

- - - - -

New York City Housing Authority,
Third-Party Plaintiff-Appellant,

-against-

Gazebo Contracting, Inc.,
Third-Party Defendant-Respondent.

Cullen and Dykman LLP, Brooklyn (Joseph Miller of counsel), for appellant.

Napoli Bern Ripka, LLP, New York (Denise A. Rubin of counsel), for Emily Rivera, respondent.

Daniel J. Sweeney, White Plains, for Gazebo Contracting, Inc., respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered December 21, 2007, which, in an action for personal injuries sustained in a trip and fall over a speed bump on premises owned and managed by defendant, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, and granted third-party defendant asphalt contractor's motion for summary judgment dismissing the third-party complaint, unanimously modified, on

the law, to grant defendant's motion for summary judgment, and otherwise affirmed, without costs. The Clerk is directed to enter a judgment dismissing the complaint and third-party complaint.

The speed bump is located on a pedestrian walkway leading from the front door of the building where plaintiff's sister lives. Although it was nighttime when plaintiff exited the building, the lights in the building's hallway were on, as were nearby street lights. Defendant established its prima facie entitlement to summary judgment by showing that the speed bump was plainly observable and did not pose any danger to someone making reasonable use of his or her senses. A photograph of the scene depicts a speed bump spanning the width of the walkway plainly visible in the illumination cast by two nearby street lights (*see Tagle v Jakob*, 97 NY2d 165, 169-170 [2001]; *Garrido v City of New York*, 9 AD3d 267 [2004]). In opposition, plaintiff failed to adduce evidence sufficient to raise an issue of fact as to the existence of a dangerous or defective condition on the walkway (*see Bastone v 1144 Yonkers Ave.*, 266 AD2d 327 [1999], *lv denied* 97 NY2d 605 [2001]; *Delia v 1586 N. Blvd. Co. LLC*, 27 AD3d 269 [2006]). The third-party complaint for common-law and

contractual indemnification was properly dismissed on a finding that third-party defendant contractor never performed any work on the speed bump.

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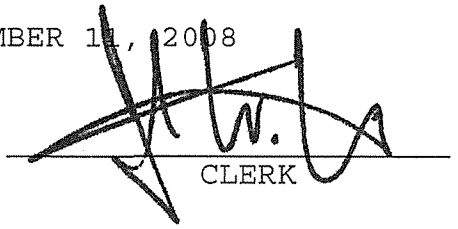


CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4781 In re Victoria Marie P.,

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

Andrew S. P., et al.,
Respondents-Appellants,

Seamen's Society for Children
and Families,
Petitioner-Respondent.

[And Another Action]

Randall S. Carmel, Syosset, for Andrew S. P., appellant.

Neal D. Futerfas, White Plains, for Dorothy P., appellant.

John R. Eyerman, New York, for respondent.

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

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about July 11, 2007, which, upon a fact-finding determination that respondents permanently neglected their children Victoria P., Claudette P., and Vincent P., terminated their parental rights with respect to Victoria P. and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The determination of permanent neglect was supported by clear and convincing evidence that petitioner agency discharged

its duty to undertake "diligent efforts" to strengthen the parental relationship and that, these efforts notwithstanding, respondents failed to plan for the children's future (Social Services Law § 384-b[7]; *see Matter of Star Leslie W.*, 63 NY2d 136 [1984]). The agency scheduled weekly visits with the children until visitation was suspended by the court following respondents' disruptive behavior (*see Matter of Emma L.*, 35 AD3d 250, 251 [2006], *lv dismissed in part, denied in part* 8 NY3d 904 [2007]). It referred respondents for substance abuse treatment, a parenting skills program, domestic violence programs, an anger management program for respondent father, and an agency housing specialist, and provided a birth parent advocate who assisted them in understanding their role in achieving the return of the children (*see In re Jah'lil Dale Emanuel McC.*, 44 AD3d 547 [2007]). Respondents frequently were late for visits or canceled them altogether and, when they attended, behaved disruptively, which upset the children and resulted in a court-ordered suspension of the visits. Further, they failed to comply with court orders, most notably by delaying or refusing to sign consent forms for the release of records from drug treatment programs, switching drug programs without completing any one program by the time the termination petition was filed, and failing to submit to court-ordered hair-follicle drug tests.

Contrary to respondent mother's contentions, she was not

prejudiced by the delay in completion of the proceedings, which was due in large part to respondents' decisions to change counsel, and the court did not err in proceeding with summations after the mother discharged the last in a series of attorneys assigned to represent her (*see Emma L.*, 35 AD3d at 252).

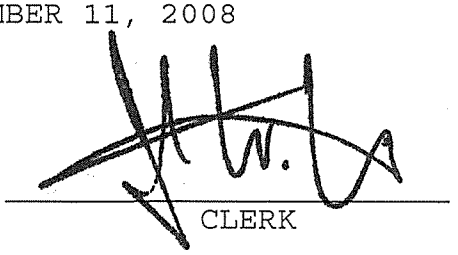
The court properly admitted case records, which had been reviewed by all counsel, upon the consent of the mother's counsel (*see Matter of Jaquone Emiel B.*, 288 AD2d 57, 58 [2001], *lv denied* 97 NY2d 608 [2002]).

A preponderance of the evidence supports the determination that the termination of parental rights, to facilitate the adoptive process, is in Victoria's best interests (*see Star Leslie W.*, 63 NY2d at 147-148). Victoria is thriving in the loving and stable environment provided by the foster family; she has lived with the family for nearly her entire life and has almost no relationship with respondents (*see Matter of Olivia F.*, 34 AD3d 234 [2006]; *Matter of Galeann F.*, 11 AD3d 255 [2004], *lv*

denied 4 NY3d 703 [2005]). There is every indication that the foster parents will continue to facilitate visitation among the siblings after Victoria's adoption.

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

ENTERED: DECEMBER 11, 2008



CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, JJ.

4782 Han Soo Lee, et al., Index 113585/03
Plaintiffs-Appellants,

-against-

Riverhead Bay Motors, et al.,
Defendants,

Riverhead Pooh, L.L.C., et al.,
Defendants-Respondents.

Law Offices of Kenneth A. Wilhelm, New York (Barry Liebman of counsel), for appellants.

Nicoletti Gonson Spinner & Owen LLP, New York (Edward L. Owen, III of counsel), for respondents.

Judgment, Supreme Court, New York County (Robert D. Lippmann, J. at jury trial; Edward H. Lehner, J. on judgment), entered September 7, 2007, to the extent appealed from as limited by the brief, awarding plaintiffs damages for past pain and suffering and for future pain and suffering over 28.5 years against defendants Riverhead Pooh L.L.C. and Yoda L.L.C., unanimously reversed, on the law and the facts, without costs, the judgment vacated to that extent, and the matter remanded for a new trial as to past and future pain and suffering, future loss of services, past and future lost wages and future medical costs.

While the trial court dismissed plaintiff Han Soo Lee's claim for lost wages on other grounds, it misrepresented the law when it suggested to the jury that plaintiff was precluded from

recovering lost wages because of his immigration status (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 362 [2006]). The court erred in failing to provide a curative instruction explaining that working in the United States without the proper documentation is neither a crime pursuant to the Immigration Reform and Control Act (8 USC § 1324a *et seq.*) (*see id.* at 361) nor a bar to the recovery of damages in a civil action for personal injuries, and this error caused undue prejudice to plaintiff.

The court improperly precluded the testimony of plaintiff's treating orthopedic surgeon as to his need for future back surgery. The requirement of future back surgery was set forth in expert disclosure pursuant to CPLR 3101(d), which included two of the surgeon's reports and the surgeon's explanation that he was trying less invasive treatments before resorting to surgery (*see McGee v Family Care Servs.*, 246 AD2d 308 [1998]).

Similarly, the court improperly precluded the testimony of another treating orthopedic surgeon as to plaintiff's need for future hip replacement surgery. The need for future hip surgery was raised in plaintiff's bill of particulars, which stated that plaintiff developed post-traumatic degenerative arthritis of the hip and would require a hip replacement in the future (*see Holshek v Stokes*, 122 AD2d 777, 778-779 [1986]). The surgeon should have been permitted to testify also as to the permanency

of plaintiff's pain, his limp, and his future need of a cane.

The court also improperly precluded the testimony of plaintiff's treating physiatrist, a doctor of osteopathy, as to plaintiff's need for future physical therapy, on the ground that he was not a medical doctor (*see Escobar v Allen*, 5 AD3d 242 [2004]).

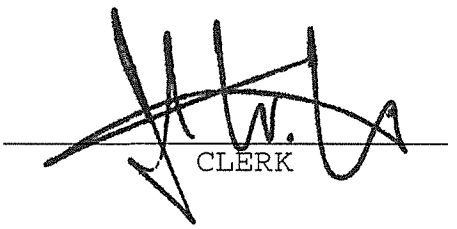
The court properly precluded plaintiff's expert economist from testifying, as plaintiff failed to provide a proper foundation for the expert's testimony (*see Delvalle v White Castle Sys.*, 277 AD2d 13 [2000]).

Plaintiffs do not appeal from that portion of the judgment that awarded $100,000 for past loss of services and $126,000 for past medical expenses.

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

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

ENTERED: DECEMBER 11, 2008



Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4783 In re Greenwich House Holding Corp., Petitioner-Respondent, -against- New York City Water Board, et al., Respondents-Appellants. Index 119154/06

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellants.

Goldberg & Bokor, LLP, Long Beach (Scott Goldberg of counsel), for respondent.

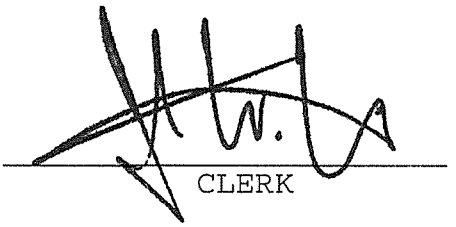
Judgment, Supreme Court, New York County (Louis B. York, J.), entered August 14, 2007, which granted petitioner's application to annul respondent Water Board's determination surcharging petitioner for failing to timely install a water meter, unanimously reversed, on the law and the facts, without costs, the application denied and the petition dismissed.

Respondents' decision not to accept petitioner's Election of Metered Billing form as a request for meter installation was not arbitrary and capricious (*see Matter of MHG Family Ltd. Partnership v New York City Water Bd.*, 46 AD3d 472 [2007]). Nor does estoppel apply (*see Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]; *Matter of 333 E. 89 Realty v New York City Water Bd.*, 272 AD2d 549, 550 [2000], *lv denied* 95 NY2d 762 [2000]), particularly since respondent Department of Environmental Protection's pre-deadline March 31, 2000 notice

should have alerted petitioner that the Election of Metered Billing form was not being regarded as a request for meter installation. The calculation of petitioner's wastewater charge based on 159% of its water charge, including the surcharge for failing to timely install the meter, was neither arbitrary, capricious, nor a violation of law (*see Haav 575 Realty Corp. v New York City Water Bd.*, 38 AD3d 481 [2007]). To the extent that the decision of the Appellate Division, Second Department, in *Matter of Pistilli Assoc. III, LLC v New York City Water Bd.* (46 AD3d 905 [2007]) calls for a different result, we disagree.

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

ENTERED: DECEMBER 11, 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 11, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
John W. Sweeny, Jr.
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 5778/05
Respondent,

-against- 4784

Ramon Perez,
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 (Gregory Carro, J.), rendered on or about July 26, 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.

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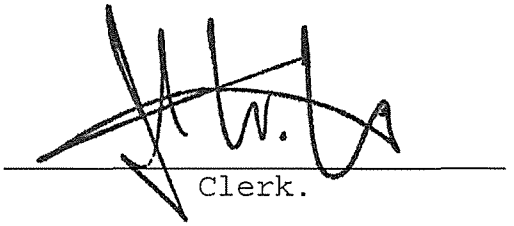


Clerk.

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

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4785 The People of the State of New York, Ind. 6588/04
Respondent,

-against-

James Syphrett,
Defendant-Appellant.

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered September 28, 2005, convicting defendant, after a jury trial, of robbery in the first degree, criminal possession of a weapon in the third degree and grand larceny in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The evidence was legally sufficient to establish that defendant used force to take or retain the property, as required to prove robbery, and the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Testimony that defendant bumped a store employee with such "severe force" that she nearly landed on her manager who was walking a half step behind her, and that defendant then grabbed

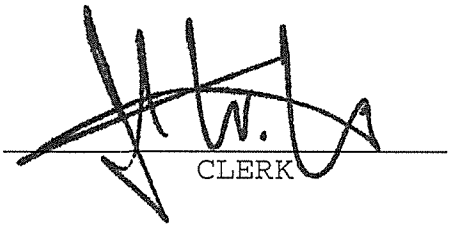
her bag, established a forcible taking (*see People v Odom*, 30 AD3d 226 [2006], *lv denied*, 7 NY3d 903 [2006]). Additionally, defendant fled with the bag containing nearly $6,000 and displayed a box cutter to the manager, who was pursuing him, at the same time that a passerby grabbed the bag of money from defendant's hand. This supports a conclusion that defendant used force to retain the property rather than merely to escape (*see People v Brandley*, 254 AD2d 185 [1998], *lv denied* 92 NY2d 1028 [1998]). The record fails to support defendant's contrary description of the sequence of events.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's strategy (*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]). The actions of counsel challenged by defendant on appeal were reasonable strategic decisions. In particular, we see no reason to fault counsel for pursuing acquittals on all counts and avoiding any line of defense that would have led, at least, to a grand larceny conviction, thus exposing his client to possible sentencing as a discretionary persistent felony

offender. In any event, defendant has not established that even if his counsel's actions were unreasonable, they affected the outcome of the case, caused defendant any prejudice or deprived him of a fair trial.

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

ENTERED: DECEMBER 11, 2008



Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4786 In re Proskauer Rose, LLP, Petitioner, Index 103381/08

-against-

Tax Appeals Tribunal of the City of New York, et al., Respondents.

Proskauer Rose LLP, New York (Steven E. Obus of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Andrew G. Lipkin of counsel), for respondents.

Determination of respondent Tax Appeals Tribunal of the City of New York, dated November 5, 2007, sustaining deficiencies of New York City unincorporated business tax found by respondent Commissioner of Finance of the City of New York as a result of disallowing certain unincorporated business deductions claimed by petitioner, 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 [Emily Jane Goodman, J.], entered June 5, 2008), dismissed, without costs.

Petitioner law firm did not sustain its burden of establishing its entitlement to the specific deductions it claims (*see* Administrative Code of City of NY § 11-529[e]; *Matter of Colt Indus. v New York City Dept. of Fin.*, 66 NY2d 466, 471 [1985]). The payments to retired partners under the Optional

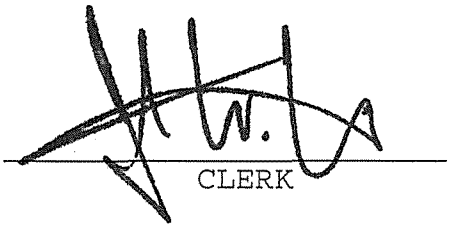
Service Plan cannot be for goodwill, because section 13 of the partnership agreement expressly prohibits payments for goodwill (*Matter of Citrin Cooperman & Co., LLP v Tax Appeals Trib. Of City of N.Y.*, 52 AD3d 228 [2008]). The Tax Appeals Tribunal's interpretation that the subject payments were for services rendered by the retiring partners is supported by substantial evidence and has a rational basis in the law (*see Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984]). Petitioner's contention that the payments were made to compensate the retiring partners for their contribution to the intangible value of the firm is unavailing because a contribution to the intangible value of the firm has its basis in the doing of work and the performing of services. Further, the calculation of the payments to the retiring partners takes into account their earnings and years of services. Thus, the payments fit squarely within the plain language of Administrative Code § 11-507(3) ("No deduction shall be allowed . . . for amounts paid or incurred to a proprietor or partner for services or for use of capital").

Petitioner's federal tax deductible contributions to deferred compensation plans on behalf of active partners, while made not to the partners but directly to the plans, clearly are for the direct benefit of the partners and thus are also not

deductible under Administrative Code § 11-507(3) (*see Matter of Horowitz v New York City Tax Appeals Trib.*, 41 AD3d 101 [2007], *lv denied* 10 NY3d 710 [2008]).

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

ENTERED: DECEMBER 11, 2008



CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4789 Edgardo L. Rivera, Index 24540/05
Plaintiff-Respondent,

-against-

Super Star Leasing, Inc., et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Orde, Supreme Court, Bronx County (Mark Friedlander, J.), entered February 20, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants, through the affirmed reports of a radiologist, orthopedic surgeon and neurologist, made a prima facie showing of entitlement to summary judgment regarding plaintiff's claim of serious injury on the theory of "permanent consequential limitation of use of a body organ or member" (Insurance Law § 5102[d]).

However, plaintiff's expert raised a triable issue of fact on this theory of serious injury. Plaintiff's expert, who reviewed the relevant medical records and examined plaintiff as recently as September 2007, provided both quantitative and qualitative range of motion limitations in his report. He opined that plaintiff's symptoms were caused by the accident, and concluded that plaintiff had sustained permanent consequential

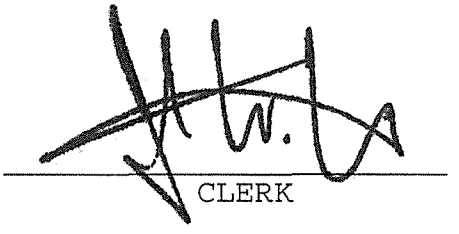
limitation of use of his cervical and lumbar spine and right shoulder (*see Garner v Tong*, 27 AD3d 401 [2006]; *Gonzalez v Vasquez*, 301 AD2d 438 [2003]). To the extent the expert incorporated into his affirmation several unsworn reports of other doctors who examined plaintiff, these unsworn reports were not the only evidence submitted by plaintiff in opposition to the motion, and may be considered to deny a motion for summary judgment (*see e.g. Largotta v Recife Realty Co.*, 254 AD2d 225 [1998]).

Furthermore, the motion court properly concluded that defendants failed to demonstrate a prima facie entitlement to summary judgment on plaintiff's 90/180-day claim. Defendants' experts did not examine plaintiff until approximately two years after the accident and could offer no conclusions regarding plaintiff's condition in the 180 days following the accident (*see Loesburg v Jovanovic*, 264 AD2d 301 [1999]).

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

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

ENTERED: DECEMBER 11, 2008



CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4790 In re Kiesha G.-S., etc.,
Petitioner-Respondent,

-against-

Alphonso S.,
Respondent-Appellant.

Anne Reiniger, New York, for appellant.

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about March 20, 2007, which denied respondent's motion to vacate a five-year order of protection on behalf of petitioner and the parties' children that was entered on default, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for a hearing to determine whether the court obtained personal jurisdiction over respondent.

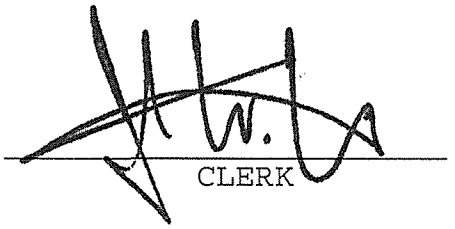
There is no documentation showing that the incarcerated respondent was served with the summons to appear at this family offense proceeding (*see Chase Manhattan Bank v Carlson*, 113 AD2d 734, 735 [1985] ["(a)bsent proper service of a summons, a default judgment is deemed a nullity and once it is shown that proper service was not effected the judgment must be unconditionally vacated"]). Although the record does contain a copy of an order to produce, there is no evidence that such order was ever served, or that respondent was made aware that he had to request to be

produced (*see Matter of Jung*, __ NY3d __, 2008 NY Slip Op 8155, *8 [2008]).

Furthermore, even were it determined that service and notice were properly effected, respondent's motion should still be granted and he is entitled to a hearing in connection with the family offense petition. Respondent's attempts to respond to the proceedings when he was made aware of them showed that his failure to appear was not willful and constituted a reasonable excuse to vacate the default (*see Matter of Precyse T.*, 13 AD3d 1113 [2004]; *Matter of Commissioner of Social Servs. of City of N.Y. v Rafael B.*, 186 AD2d 253, 254 [1992]), and he also raised viable arguments challenging the sufficiency of petitioner's contentions. Nor is there any indication that petitioner would be prejudiced in the event respondent is relieved of the default.

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

ENTERED: DECEMBER 11, 2008



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Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4791 The People of the State of New York, Ind. 2332/06
Respondent,

-against-

Anthony Barnes,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 26, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to a prison term of 16 years to life, unanimously affirmed.

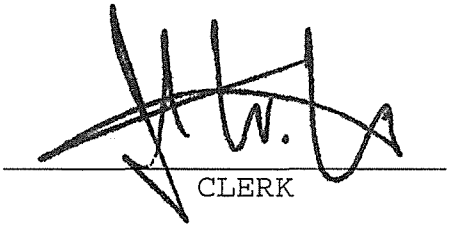
The court properly exercised its discretion in admitting testimony regarding the contents of a 911 call. There was no violation of defendant's right of confrontation, because the evidence was not offered for its truth (*see Tennessee v Street*, 471 US 409 [1985]), but for the legitimate non-hearsay purpose of completing the narrative and explaining why the police approached and then pursued defendant (*see People v Tosca*, 98 NY2d 660 [2002]; *People v Rivera*, 96 NY2d 749 [2001]; *see also United States v Reyes*, 18 F3d 65, 70-71 [1994]). The primary issue in the case was police credibility, and this testimony was necessary

to prevent undue speculation and unfair inferences by the jury. The court appropriately rejected defendant's suggestion that the testimony be limited to the officers' receipt of an unspecified 911 call, since this limitation would have placed a mystery before the jury and invited speculation. Any prejudicial effect was minimized by the court's through limiting instructions, which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

The court also properly exercised its discretion in denying defendant's request for an adverse inference charge based on the erasure of the 911 tape. There was no bad faith on the part of the People, who made reasonable efforts to obtain the tape before it was erased, there was no prejudice to defendant, who received a copy of the Sprint report of the call, and there is nothing to support defendant's claim that the actual recording would have had any additional exculpatory or impeachment value (*see e.g. People v Diaz*, 47 AD3d 500 [2008], *lv denied* 10 NY3d 861 [2008]).

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

ENTERED: DECEMBER 11, 2008



CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4792 In re Ved Parkash, Index 8092/06
Petitioner-Appellant,

-against-

New York City Water Board et al.,
Respondents-Respondents.

Goldberg & Bokor, LLP, Long Beach (Scott Goldberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

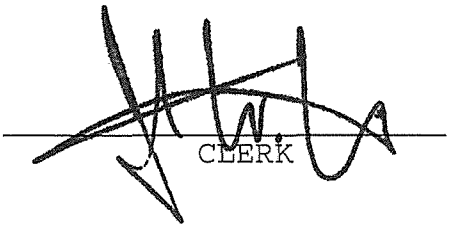
Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 25, 2007, which denied petitioner's application to annul respondent Water Board's determination calculating petitioner's wastewater charge based on 159% of petitioner's water charge, including a surcharge for having failed to timely install a water meter, and dismissed the petition, unanimously affirmed, without costs.

Respondent's determination was neither arbitrary, capricious, nor a violation of law (*see Haav 575 Realty Corp. v New York City Water Bd.*, 38 AD3d 481 [2007]). To the extent that the decision of the Appellate Division, Second Department, in

Matter of Pistilli Assoc. III, LLC v New York City Water Bd. (46 AD3d 905 [2007]) calls for a different result, we disagree.

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

ENTERED: DECEMBER 11, 2008



Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4793 The People of the State of New York, Respondent, Ind. 6668/02

-against-

Kenneth Page, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered January 4, 2006, convicting him, after a jury trial, of murder in the second degree and robbery in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 25 years to life, unanimously affirmed.

To the extent defendant is challenging the sufficiency of the evidence, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. In addition, we find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The People's case included defendant's admissions to an acquaintance and extensive circumstantial evidence. There is no basis for disturbing the jury's credibility determinations concerning the testimony of the civilian witnesses as well as that of the police witnesses who

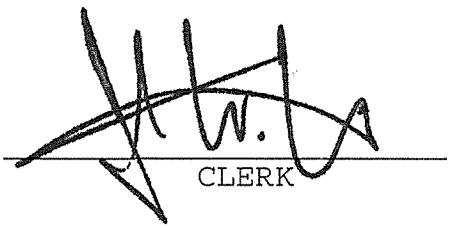
gathered physical evidence.

The trial court properly denied defendant's request for a missing witness charge regarding the son of the main prosecution witness, on the ground that the uncalled witness was not under the People's control (*see People v Gonzalez*, 68 NY2d 424, 429 [1986]). The uncalled witness's mother was not a victim of the crime, and there were no circumstances warranting an expectation that the uncalled witness would testify favorably to the People.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 11, 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 11, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
John W. Sweeny, Jr.
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 2806/06
Respondent,

-against- 4794

David Smith, also known as
James Johnson,
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 (Maxwell Wiley, J.), rendered on or about April 18, 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.

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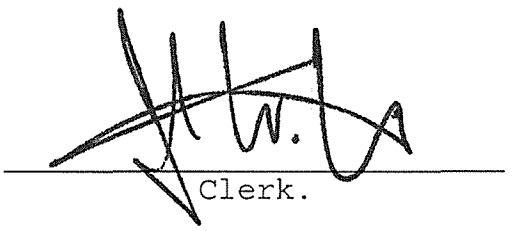


Clerk.

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

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4795 In re SB&W Realty Corp., Index 112188/06
Petitioner-Appellant,

-against-

New York City Water Board, et al.,
Respondents-Respondents.

Goldberg & Bokor, LLP, Long Beach (Scott Goldberg of counsel), for appellant.

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

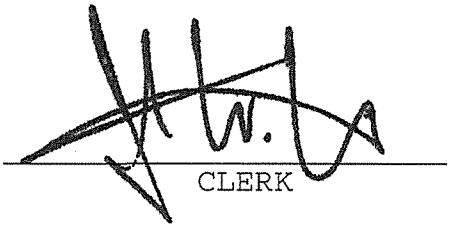
Judgment, Supreme Court, New York County (Rolando T. Acosta, J.), entered May 21, 2007, which denied petitioner's application to annul respondent Water Board's determination surcharging petitioner for failing to timely install a water meter, and dismissed the petition, unanimously affirmed, without costs.

The determination is rationally based (*see generally Matter of MHG Family Ltd. Partnership v New York City Water Bd.*, 46 AD3d 472 [2007]) on evidence that the meter that was installed on petitioner's property before the June 30, 2000 deadline was not sealed and did not have a remote reading device, and since it could not be read, was useless. Petitioner's claim that it had no way of knowing that the meter, allegedly installed by respondent's contractor, was not installed properly is undermined by respondent's notices to petitioner, which should have alerted petitioner that respondent believed no meter was installed on

petitioner's property. Indeed, petitioner's original argument against the surcharge was that it had timely asked respondent to install a meter. The calculation of petitioner's wastewater charge based on 159% of its water charge, including a surcharge, was neither arbitrary, capricious, nor a violation of law (*see Haav 575 Realty Corp. v New York City Water Bd.*, 38 AD3d 481 [2007]). To the extent that the decision of the Appellate Division, Second Department, in *Matter of Pistilli Assoc. III, LLC v New York City Water Bd.* (46 AD3d 905 [2007]) calls for a different result, we disagree.

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

ENTERED: DECEMBER 11, 2008



CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4796 The People of the State of New York, Ind. 676/02
Respondent,

-against-

Wilnerson Occelin, also known as Tyrone Evans,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

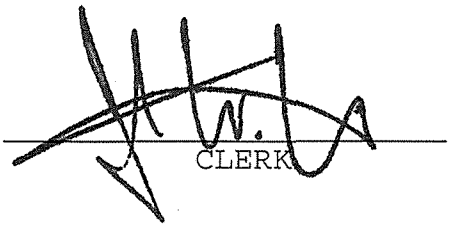
Judgment, Supreme Court, New York County (Michael Corriero, J. at suppression hearing; John Cataldo, J. at plea and sentence), rendered February 15, 2007, convicting defendant of robbery in the first degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 6 years, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including its finding that defendant orally waived his *Miranda* rights prior to any questioning. The totality of the circumstances establishes that the statements were voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). The record refutes defendant's claim that the voluntariness of his statements was

impaired by an injury he sustained at the time of the crime and by his alleged lack of sleep; the hearing evidence included, among other things, detailed testimony as to his demeanor when he was interviewed, as well as evidence that he had no difficulty writing a lengthy statement.

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

ENTERED: DECEMBER 11, 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 11, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
John W. Sweeny, Jr.
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York,
Respondent,

Ind. 1558/06
SCI 2728/06

-against-

4797
4798

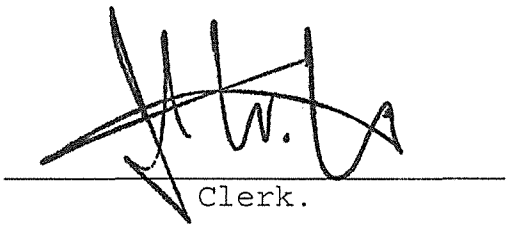
Michael L.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 30, 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 judgments so appealed from be and the same are hereby affirmed.

ENTER:



Clerk.

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

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4799N Luis F. Galicia, Index 103507/06
Plaintiff-Appellant,

-against-

Rota Holding Corp. #2,
Defendant-Respondent.

Barton Barton & Plotkin, LLP, New York (Randall L. Rasey of counsel), for appellant.

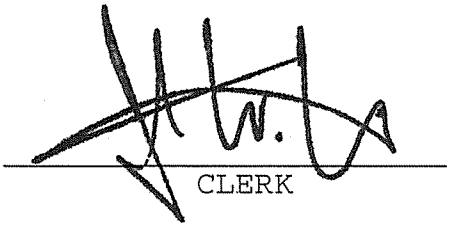
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 16, 2007, which, to the extent appealed from, denied plaintiff's request for attorney fees and costs under Real Property Law § 234, unanimously reversed, on the law, with costs, the request for attorney fees granted, and the matter remanded for further proceedings.

Not only does the lease in question expressly provide for reciprocal attorney fees, but § 234 provides that any residential lease entitling a landlord to seek attorney fees implies a reciprocal covenant requiring the landlord to compensate a successful tenant for such fees and expenses (*see Cier Indus. Co. v Hessen*, 136 AD2d 145, 150 [1988]). The statute thus applies to the substantial attorney fees incurred in this case because defendant landlord would have been entitled to such fees had it been successful in a similar action against plaintiff tenant for breach of the lease. Moreover, § 234 is applicable to court proceedings in which a party to an administrative proceeding

before the Division of Housing and Community Renewal seeks to enforce, modify or vacate that agency's determinations, as in the proceedings herein (*see Chechak v Hakim*, 269 AD2d 333 [2000]). Plaintiff has not waived his right to these fees (*see Dowling v Yamashiro*, 116 Misc 2d 86, 89 [1982]), and an avenue for this relief would even be available in a plenary action (*see Calce v Futterman*, 235 AD2d 343 [1997]).

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

ENTERED: DECEMBER 11, 2008



CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4800N Bankers Trust Company of California, NA as Trustee, Plaintiff-Respondent, Index 108129/01

-against-

Wen Zhou, et al., Defendants.

- - - - - -

Michael Wong, Intervenor-Appellant.

Sanford Solny, New York, for appellant.

Druckman & Sinel, LLP, Westbury (Robert D. Aronin of counsel), for respondent.

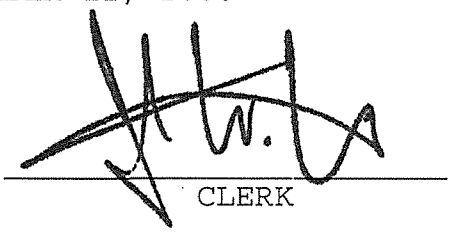
Order, Supreme Court, New York County (Judith J. Gische, J.), entered May 17, 2007, which, insofar as appealed from, denied intervenor's motions to set aside a foreclosure sale, unanimously affirmed, with costs.

There were no defects in the Notice of Sale, which, in compliance with a prior order, notified bidders of the existence of a prior mortgage that plaintiff believed had been satisfied and the fact that the title company would indemnify a purchaser against any risk with respect thereto. Plaintiff's advertising of its lien as a first mortgage, coupled with the indemnification letter from the title company, sufficiently established that the lack of a properly filed satisfaction of the prior mortgage did not render title unmarketable (*cf. Lovell v Jimal Holding Corp.*, 127 AD2d 747 [1987]). The motion court correctly held that

intervenor failed to show that the claimed defects in the Terms of Sale had a chilling effect on the bidding, or that intervenor was otherwise substantially prejudiced thereby (RPAPL 231[6]; *see Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 406-407 [1983]). We have considered intervenor's other arguments and find them unavailing.

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

ENTERED: DECEMBER 11, 2008



CLERK

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

4801 The People of the State of New York, Respondent, Ind. 189/02

-against-

Carl Johnson, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

Order, Supreme Court, New York County (Renee A. White, J.), entered on or about September 12, 2006, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although defendant disputes a 10-point assessment under the risk factor for forcible compulsion, that challenge, if accepted by this Court, would only reduce his point score to 90 points, which is more than enough for a level two classification. Accordingly, we need not determine whether there was clear and convincing evidence of forcible compulsion.

Defendant did not establish any special circumstances warranting a discretionary downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). The court did not place undue emphasis on the points it assessed

for defendant's prior record, and the mitigating factors he cited were taken into account by the Risk Assessment Guidelines. We have considered and rejected defendant's remaining arguments.

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

ENTERED: DECEMBER 11, 2008

CLERK

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

4802 Calvin Chang, et al., Index 16518/05
Plaintiffs-Appellants,

-against-

Jajaira F. Rodriguez, et al.,
Defendants,

Youngsoo S. Lee, et al.,
Defendants-Respondents.

Day & Associates, P.C., Great Neck (Eric S. Hack of counsel), for appellants.

Purcell & Ingrao, P.C., Mineola (Terrance J. Ingrao of counsel), for respondents.

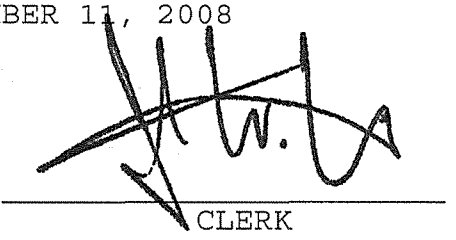
Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about November 15, 2007, which, insofar as appealed from, in an action for personal injuries sustained as a result of a three-car collision, granted the cross motion of defendants Youngsoo S. Lee and Alamo Financing, L.P. (Alamo) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

It is undisputed that plaintiffs were in the front vehicle when the middle vehicle, owned by Alamo and operated by Lee, struck plaintiffs' vehicle in the rear after having been struck in the rear by the third car, driven by defendant Rodriguez. In a chain-reaction collision, as here, responsibility presumptively rests with the rearmost driver, Rodriguez (*see Mustafaj v Driscoll*, 5 AD3d 138 [2004]). The police accident report

includes a statement apparently made by defendant Rodriguez. This statement, which is the sole support for plaintiffs' contention that they raised a triable issue as to Lee's negligence, is hearsay when offered against defendants Alamo and Lee by plaintiffs, and thus was insufficient to defeat the summary judgment motion (*see Bates v Yasin*, 13 AD3d 474 [2004]; *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 396 [2003], *lv dismissed in part and denied in part* 100 NY2d 636 [2003]).

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

ENTERED: DECEMBER 11, 2008



CLERK

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

4803-
4804-
4805 In re Damien P. C.,
Petitioner-Respondent-Appellant,

-against-

Jennifer H.S.,
Respondent-Appellant-Respondent.

Lee A. Rubenstein, New York, for appellant-respondent.

Warren L. Millman, Brooklyn, for respondent-appellant.

Rosemary Rivieccio, New York, Law Guardian.

Order, Family Court, New York County (Helen C. Sturm, J.), entered on or about April 1, 2008, which, to the extent appealed from, granted respondent mother full residential custody of the subject children, and granted petitioner father *a)* final decision-making authority as to the children's extracurricular activities, *b)* three out of four consecutive weekends from Thursday evening until Monday morning drop-off at school, *c)* either Thanksgiving or Christmas with the children each year, and *d)* a restriction against the mother relocating with the children more than 35 miles from his residence, unanimously affirmed, without costs.

Contrary to the father's contention, the Law Guardian's advocacy of positions favoring the mother did not indicate improper bias. Nor was there any basis for refuting the court's

finding that the forensic expert's testimony was credible. Under the factors to be considered in determining custody (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]), the parties were equally qualified, with one exception. Regarding who would better facilitate the relationship between the children and the non-custodial parent, the court agreed with the forensic expert's findings that the mother was the superior parent, based on evidence that she invited the father to the children's birthday parties and encouraged him to visit on numerous occasions while she had custody, whereas he withheld information about schooling and refused her admittance to the apartment when they were with him. The grant of residential custody to the mother was proper, supported by the record, and was balanced with ample rights of access to the father at holidays and year-round.

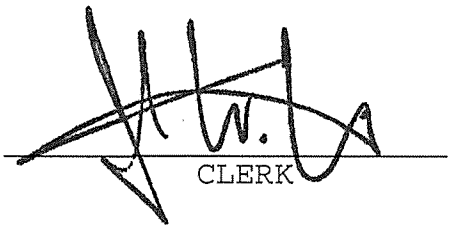
The mother contends the court erred with regard to the particular days and schedule of the father's visitation, his role in planning extracurricular activities, and the split of holidays. In light of the father's intense involvement in the children's lives, as well as the parties' equal split of time with the children over the past five years, we find the court's allocation to have been a proper exercise of discretion.

With regard to the geographical limitation on the mother's relocation, she points to a Yorktown Heights house 41 miles away in which she can stay with the children. Given the proximity of

the respective parental residences to each other, the court providently exercised its discretion in limiting the mother's relocation to a reasonable distance of 35 miles from the father's home.

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

ENTERED: DECEMBER 11, 2008



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

4807 The People of the State of New York, Ind. 2240/06
Respondent,

-against-

Charles Tjaden,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Seth J. Applebaum of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 23, 2007, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 8 years, unanimously 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 determinations concerning credibility and identification. Defendant's guilt was established by eyewitness testimony that was corroborated by circumstantial evidence.

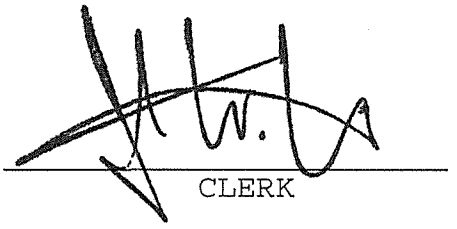
Defendant's challenges to the court's charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Viewed as a whole (*see People v Samuels*, 99 NY2d 20, 25-26 [2002]), the

court's instructions on the intent element of burglary conveyed the appropriate legal standards. Defendant also claims that his attorney was ineffective for failing to object to the alleged deficiencies in the instructions on intent. However, the circumstances of the case suggest the possibility of strategic considerations, not reflected in the record, for the lack of objection, rendering this claim unreviewable on direct appeal (*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]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 11, 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 11, 2008.

Present - Hon. David Friedman, Justice Presiding
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 1212/04
Respondent,

-against- 4808

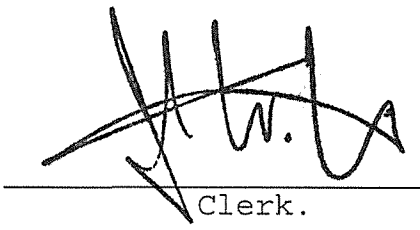
Jose Lanfranco, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about October 17, 2005,

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.

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

4809 In re Edwin Camacho, Index 51578/07
Petitioner-Respondent,

-against-

Ray Kelly as Commissioner of the N.Y.P.D., et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for appellants.

Edwin Camacho, respondent pro se.

Order, Supreme Court, Bronx County (Patricia A. Williams, J.), entered on or about October 5, 2007, which denied respondents' cross motion to dismiss this proceeding, granted the petition, and directed respondents to return all the items contained in invoice number M792727, with the exception of handcuffs, to petitioner's designated representative, unanimously modified, on the law, the grant of the petition vacated, and otherwise affirmed, without costs, and the matter remanded for further proceedings consistent herewith before a different Justice.

Petitioner in this Article 78 proceeding seeks the return of property taken from him upon his arrest. The property, some of which was returned to his designated representative, was vouchered under numbers M792726, M792727 and M792728. Even though petitioner failed to follow precisely the Police

Department's procedural rules on return of items from the property clerk (38 RCNY 12-35), respondents had sufficient notice that he was seeking the return of all his property, and thus his petition was not rendered moot by the return of the property listed only on voucher # M792726.

The pro se petitioner never explicitly referred to voucher # M792727 in his correspondence, and never provided a release for the property seized under that voucher, but he did repeatedly inform respondents that he sought the return of "all my property that you're in possession of." His letter to the Commissioner requested the return of his personal property taken from him and vouchered under "Property Clerk Invoice # M792726, etc. . ." Two of the items he identified in that letter -- gold shields that represented his Basic Life Support Instructor and Fire and Safety credentials -- were not listed in voucher # M792726 but were included in # M792727.

Voucher # M792726 bore a notation that there were additional invoices related to this case, namely, M792727 and M792728, thus putting respondents on notice that petitioner's demand included more than just the property listed on M792726. On appeal, petitioner states that at the time of his requests, he was unaware that his property was not all listed on a single voucher, and he never received a copy of the vouchers, which itself would be a violation of 38 RCNY 12-32(d).

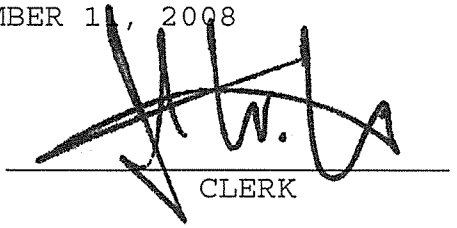
Petitioner's failure to provide a district attorney's release for the items in voucher # M792727 does not bar his claim, since no criminal proceeding related to the property is still pending (*see Matter of DeBellis v Property Clerk of City of N.Y.*, 79 NY2d 49, 58 [1992]). Procedural barriers erected in the path of such claimants "ought to be justified by some countervailing State interest and strictly applied only where that interest is implicated" (*id.* at 57).

The court did err, however, in granting the petition. The court should have permitted respondents to answer the petition, and no disposition on the petition should have been granted until after such time (CPLR 7804[f]; *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100 [1984]). While respondents put much of their substantive defense into their cross motion, and the court's decision focused on the fact that the items sought were neither contraband nor evidence in any pending investigation, hearing or trial, the court was unable, on this record, to determine whether these items were instrumentalities of a crime or whether the

property clerk had good reason to refuse their return (*see* 38 RCNY 12-36).

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

ENTERED: DECEMBER 11, 2008



CLERK

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

4811 Luis Vega,
Plaintiff-Respondent,

Index 107643/02
590616/07

-against-

Jason Ramirez, et al.,
Defendants,

Ark Restaurants, Corp., etc., et al.,
Defendants-Appellants.

[And a Third-Party Action]

White and Williams LLP, New York (Michael J. Kozoriz of counsel), for appellants.

Law Office of Arnold E. DiJoseph, P.C., New York (Cory E. Skolnick-Haber of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 17, 2008, which denied motions by defendants-appellants nightclub and security company for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, the motions granted and the complaint dismissed as against defendants-appellants. The Clerk is directed to enter judgment accordingly.

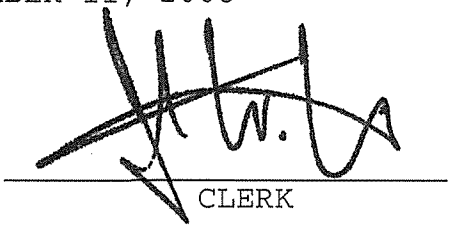
No issues of fact are raised relating to whether the stabbing of plaintiff outside the nightclub was a foreseeable result of any security breach (*see Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]). The stabbing ended a five to six-minute fight that started after 3:00 a.m. near the nightclub's exit door and quickly spilled outside where numerous other people became

involved, including non-patrons. There is no evidence of either prior similar incidents or possible threats of violence that night to which appellants were alerted, and indeed both plaintiff and his companion testified that the fight broke out suddenly and unexpectedly (*see id.*). By all accounts, the five or six security guards assigned to the nightclub that night were enough to deal with any form of disorderliness that could be reasonably expected (*see id.*), the magnitude and intensity of the fight quickly erupted beyond what that number could quell, and the guards acted appropriately to secure the premises and the patrons inside against the violence taking place just outside by locking the nightclub's doors and remaining inside. There is no evidence that appellants were under a duty to police the outside of the premises and secure it against non-patron transgressors, and it is speculation for plaintiff to argue that additional security guards would have prevented the escalation of a fight that involved too many people for plaintiff and his companions to number precisely (*see Stafford v 6 Crannel St.*, 304 AD2d 997, 999 [2003]). Even assuming a failure to provide reasonable security, any such failure was not a substantial cause of plaintiff's injuries. Plaintiff's own testimony established that he could have remained within the safety of the nightclub at the time the fight broke out and spilled outside, and that he considered such option because of the apparent intensity of the fighting and the

overwhelming number of adversaries outside, yet he elected to go outside and join the fight. In so choosing, plaintiff severed any causal connection between the appellants' alleged negligence in providing reasonable security and his injuries (*see generally Turcotte v Fell*, 68 NY2d 432 [1986]).

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

ENTERED: DECEMBER 11, 2008



CLERK

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

4812 The People of the State of New York, Ind. 5967/06
Respondent,

-against-

Michael Dugan,
Defendant-Appellant.

Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered December 20, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 7 years, unanimously affirmed.

The court properly denied defendant's motion to suppress the physical evidence recovered from his vehicle after it was stopped at a checkpoint. There is no basis for disturbing the credibility determinations made by a judicial hearing officer and adopted by the court (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), with regard to the circumstances of the checkpoint stop as well as the ensuing search.

The police testimony satisfied the elements of a valid checkpoint stop. The testimony established that the primary purpose of the checkpoint was roadway safety and enforcement of

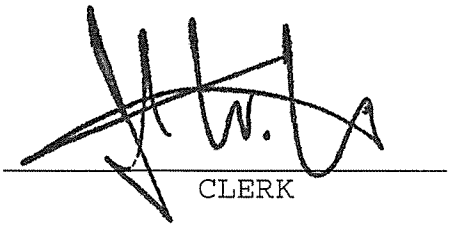
vehicular laws and regulations rather than general crime control (*see City of Indianapolis v Edmond*, 531 US 32, 41 [2000]), that the checkpoint was effective in advancing those interests (*see People v Scott*, 63 NY2d 518 [1984]), and that the degree of intrusion on drivers' liberty and privacy interests was minimal (*id.* at 526-527). Furthermore, one of the officers testified that he kept a written record of the checkpoint stops that had taken place. The fact that this record could not be produced "does not render [the procedure] invalid" (*People v Serrano*, 233 AD2d 170, 171 [1996], *lv denied* 89 NY2d 929 [1996]). The officer's testimony satisfied the requirement that "the procedure followed be uniform and not gratuitous or subject to individually discriminatory selection" (*id.*).

The hearing evidence also established that there was probable cause to search defendant's car. An officer testified that, during the checkpoint stop, he detected the odor of marijuana emanating from the vehicle and observed what appeared to be a marijuana cigar on the console (*see People v Feili*, 27 AD3d 318 [2006], *lv denied* 6 NY3d 894 [2006]; *People v Shabazz*, 301 AD2d 412, 413 [2003], *lv denied* 100 NY2d 566 [2003]). The officer testified that he had extensive training and experience

in detecting the smell of marijuana, and it is of no consequence that he did not specify whether this background involved burned or unburned marijuana.

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

ENTERED: DECEMBER 11, 2008



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

4814 The People of the State of New York, Ind. 2994/05
Respondent,

-against-

John Stewart,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Laura Greenberg of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered February 16, 2006, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 5 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 rejection of defendant's testimony, in which he claimed he acted in self-defense and did not take any property. The prosecution's evidence established that after the elderly victim slightly moved a jacket lying on a bench in order to sit down, defendant approached, claimed the jacket was his, hit the victim with enough force to knock him unconscious, and immediately took the victim's watch and wallet. This evidence supports the conclusion

that defendant's intent was to use force "for the purpose of" taking property (*see* Penal Law § 160.00; *People v Smith*, 79 NY2d 309, 315 [1992]), and that the theft was not an afterthought to using force in anger over the disturbance of the jacket. Even if defendant's observation of the victim touching the jacket may have led defendant to target this particular victim, that would not undermine the inference that defendant hit the victim for the purpose of taking property.

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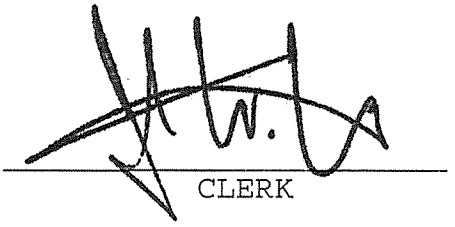

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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on December 11, 2008.

Present - Hon. David Friedman, Justice Presiding
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 1086/07
Respondent,

-against- 4817

Enrique Mercado,
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 (Charles Tejada, J.), rendered on or about September 24, 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.

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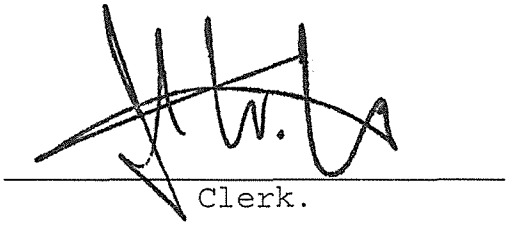


Clerk.

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

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

4819 Tico, Inc., et al., Index 650235/06
Plaintiffs-Appellants,

-against-

Charles R. Borrok, et al.,
Defendants-Respondents.

Bennett D. Krasner, Atlantic Beach, for appellants.

White & Case, LLP, New York (John D. Rue of counsel), for Charles R. Borrok, Andrew S. Borrok and 425 Park Avenue Company, L.P., respondents.

Vedder Price, P.C., New York (Dan L. Goldwasser of counsel), for HJ Behrman & Partnership, LLP, respondent.

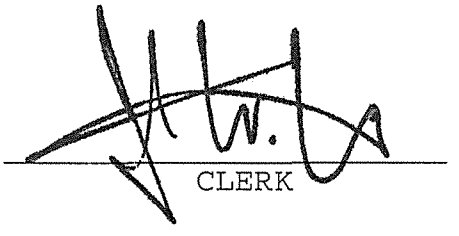
Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 27, 2007, insofar as appealed from as limited by the briefs, dismissing the complaint as against defendants-respondents with prejudice pursuant to an order, same court and Justice, entered June 14, 2007, which, in a derivative action by limited partners of respondent 425 Park Avenue Company alleging breach of fiduciary duty and related business torts, granted respondents' motion to dismiss the complaint, unanimously modified, on the law, to the extent of deleting the provision that the dismissal is with prejudice, and otherwise affirmed, without costs.

Although the court properly determined that plaintiffs lacked standing on the basis that they did not make a formal demand on all of the general partners and failed to demonstrate

that such a demand would have been futile, dismissal of the complaint with prejudice was improper. A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes (*see Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 465 [1985]; *Pullman Group v Prudential Ins. Co. of Am.*, 297 AD2d 578 [2002], *lv dismissed* 99 NY2d 610 [2003]). If given effect, however, the provision of the judgment that the dismissal was "with prejudice" would bar plaintiffs from thereafter filing an amended complaint even if they would have standing at that time. For this reason alone the provision should be deleted from the judgment. Thus, we need not address the question of whether, having concluded that plaintiffs lacked standing to bring this action and thus that dismissal was necessary, Supreme Court properly went on to determine the issue of whether dismissal should be with prejudice.

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

ENTERED: DECEMBER 11, 2008



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

4821N Miguel Figueroa, et al., Index No. 15884/00
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

Arnold E. DiJoseph, III, New York, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

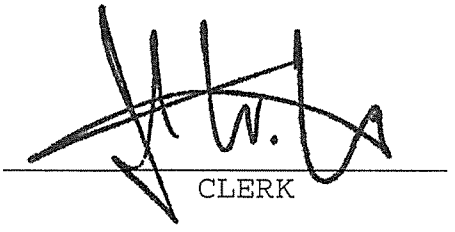
Order, Supreme Court, Bronx County (Janice L. Bowman, J.), entered May 7, 2007, which, in an action for personal injuries sustained when plaintiffs' car was hit in the rear by an unmarked police car, denied plaintiffs' motion pursuant to CPLR 3126 to strike defendant's answer, unanimously affirmed, without costs.

We note the four-year delay in litigation activity between the preliminary conference order (directing, inter alia, the depositions of "all parties" and production of the memo books of the officers who were in the police car) and the deposition of the officer who was driving the police car, and the five-month delay between that deposition and plaintiffs' service of a notice to produce mirroring the notice they had served four and a half years earlier. As the reasons for this inordinate delay do not appear, we can not accept plaintiffs' argument that the loss of the officers' memo books and the unavailability for deposition of the second officer in the car were due to the delay caused by

defendant's allegedly contumacious defiance of production notices and court orders that began to issue only five months before plaintiffs made their first motion to strike and less than a year before they made the instant motion to strike. In compliance with the preliminary conference order, defendant produced an officer for deposition, and it was under no obligation to produce the other officer (*see Colicchio v City of New York*, 181 AD2d 528, 529 [1992]) until directed by the court to do so "if still employed," and if not, then his last known address. Defendant's production of this former officer's last known address was in compliance with this directive. Similarly, with regard to the memo books, the court's compliance orders expressly recognized the possibility of their nonexistence, and defendant's providing of an affidavit of the still-employed officer that he could not locate his memo book after a diligent search was in compliance with those orders. We have considered plaintiffs' other arguments and find them unavailing.

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

ENTERED: DECEMBER 11, 2008



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

4822N Michele Gray, Index 16328/03
Plaintiff-Appellant,

-against-

Lawrence Jaeger, D.O., et al.,
Defendants-Respondents.

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of counsel), for appellant.

Brown & Tarantino, LLC, White Plains (Ann M. Campbell of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 28, 2008, which granted defendants' motion to compel a physical examination of plaintiff in connection with their appearance at inquest, unanimously reversed, on the law, without costs, and the motion denied.

On a prior appeal (17 AD3d 286), this Court struck defendants' answer. As a result, they are now foreclosed from pursuing discovery in preparation for the inquest (*see Hall v Penas*, 5 AD3d 549 [2004]), including a physical examination of plaintiff.

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

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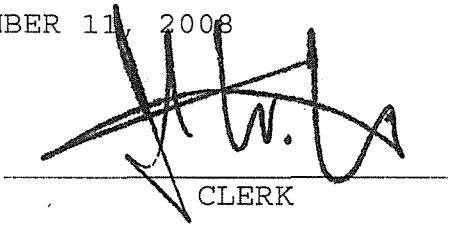

CLERK

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

4823N Factory Mutual Insurance Company, etc., Petitioner-Appellant, Index 600866/08

Utica Mutual Insurance Company, Respondent-Appellant,

-against-

Mutual Marine Office, Inc., Respondent-Respondent.

Meckler, Bulger Tilson Marick & Pearson LLP, Chicago, IL (John E. DeLascio, of the Illinois Bar, admitted pro hac vice, of counsel), for Factory Mutual Insurance Company, appellant.

Hunton & Williams LLP, New York (Robert J. Morrow and Walter J. Andrews, of the District of Columbia Bar, admitted pro hac vice, of counsel), for Utica Mutual Insurance Company, appellant.

Riker, Danzig, Scherer, Hyland & Peretti LLP, New York (Glenn A. Clark, of the New Jersey Bar, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 30, 2008, which denied the petition to stay arbitration and granted respondent Mutual Marine's cross motion to compel arbitration, unanimously affirmed, with costs.

The court properly interpreted the arbitration clause with respect to the arbitrability of matters "not specifically covered" in the underlying agreement; the contrary interpretation proffered by the insurers would render the word "specifically" meaningless (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). Mutual Marine's interpretation was not precluded by its

unsuccessful argument in another case (*see Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [2006]). Arbitration was not barred by the inclusion of a reformation claim (*see Matter of SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d 788, 792-793 [1976]), the timeliness of which was for the arbitrators to evaluate in the absence of an explicit provision that the issue is reserved for a court of law (*see Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252-253 [2005]).

In view of the foregoing, we need not address appellants' other contentions, which are, in any event, unavailing.

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

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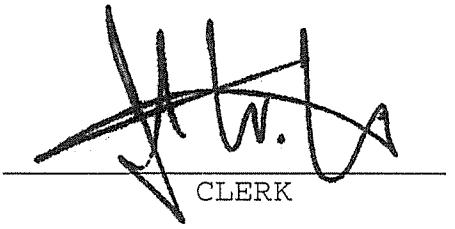

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Eugene Nardelli
James M. McGuire
Karla Moskowitz
Dianne E. Renwick, JJ.

4225-
4226
Ind. 103748/00

x

Joaquin Valenzuela,
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

x

Defendant appeals from an order of the Supreme Court, New York County (Robert D. Lippmann, J.), entered November 16, 2006, which denied its motion to set aside the verdict, and from a judgment, same court and Justice, entered January 16, 2007, which, on a jury verdict, awarded plaintiff judgment as to liability.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman, Pamela Seider Dolgow, David Depugh and Elizabeth S. Natrella of counsel), for appellant.

The Pagan Law Firm, P.C., New York (Tania M. Pagan of counsel), for respondent.

MOSKOWITZ, J.

We reverse and remand this case for a new trial because the misconduct of plaintiff's counsel so tainted the proceedings that it deprived defendant of a fair trial.

On May 16, 1999, plaintiff was injured when he fell during a softball game in the middle softball field in Fort Washington Park. The accident occurred while plaintiff was running from second base to home plate. After rounding third base, approximately five to six feet from the bag, he tripped when his left foot fell into a ditch. He felt his left ankle crack. Plaintiff claimed that the ditch, that he had not previously noticed, was approximately 14 inches wide and deep, and 20 feet long. Plaintiff claimed that defendant the City of New York was negligent in failing to maintain the field and that this negligence directly resulted in his accident and subsequent injury. Plaintiff denied telling anyone at the hospital where he received treatment about how the accident happened.

The trial in this case commenced on July 19, 2006. During his opening, plaintiff's attorney gave an extensive description of plaintiff's injuries. Immediately after opening statements, the trial judge bifurcated the issues of liability and damages. During the trial, plaintiff's counsel repeatedly acted as a witness. For example, when the City's attorney cross-examined

plaintiff about a photo and asked where third base would have been, plaintiff's attorney objected and repeatedly stated that that portion of the photograph represented the pitcher's mound. When the City's attorney objected that plaintiff's attorney was testifying to his own personal knowledge, plaintiff's attorney interjected: "You were never there" and "I was there. That's the pitcher's mound." The court overruled the City's objection and stated that that portion of the photo was not third base. The City's attorney renewed his objection outside the presence of the jury.

The City also read into evidence portions of plaintiff's December 18, 2000 deposition in which plaintiff stated that shortly after he fell, an ambulance arrived, but a Parks Department pickup truck removed him from the area because the ambulance could not physically enter the park. Despite this testimony from plaintiff that he was taken off the field in a vehicle, when the City attorney stated in his closing argument that "[t]he so-called ditch or defect that we've been hearing about the whole trial, that was the pickup truck that was testified to that drove in to pick up the plaintiff from the first base area," plaintiff's attorney moved for a mistrial, to strike the City attorney's comments and accused the City's attorney of lying. Plaintiff's counsel stated that the City's

comments were "an absolute fabrication, your Honor, that a truck could enter that property." Upon the City attorney's objection that plaintiff's attorney was testifying, plaintiff's attorney reiterated, in front of the jury, "[a]s an officer of the court, your Honor, I'm telling your Honor that that is an absolute fabrication." The court failed to give a curative instruction. Subsequently, outside the presence of the jury, the parties agreed that the court would tell the jury that the reference to the "truck" would be to a small, green Parks Department truck. The court so instructed the jury.

Defendant called Catherine O'Leary, a registered nurse at New York Presbyterian Hospital who helped treat plaintiff in the emergency room. She testified that she wrote on plaintiff's emergency triage sheet: "6:40 p.m. Patient injured left ankle while playing baseball, sliding into third base." O'Leary likely learned through an interpreter that the injury occurred while plaintiff was sliding into third base because O'Leary does not speak Spanish and plaintiff does not speak English. In an effort to refute this testimony that was obviously damaging to his case, plaintiff's attorney, during his summation, claimed there is no word in Spanish for "sliding into third base."

During his closing, plaintiff's attorney also made the following statements:

> "It is something to win or lose based upon fact and truth. It is another thing to win or lose based upon misconceptions and half truths and sometimes things that you know cannot be.
>
> "And when we began this, when I told you that I would - that I had the burden and I would present evidence, the one thing I didn't tell you is that I would create half truths and I would create things to try to fool you. That's not something I do. That's not something I ever will do. And that's not something that was done here.
>
> "And I challenge you now, if you think that is what happened, if you think that is what I did or that's what [plaintiff] did, then I ask you, you can get up now, you can go in there and just say, 'I don't want to,' whatever it is, then leave. If you believe that that's the kind of person I am or that gentleman is."

On the City's objection that this was not about character, plaintiff's attorney withdrew his statement, but then continued, "If you believe that [plaintiff] - because he's challenging his credibility - if he is that kind of person, then we can stop now . . ."

Later, in his summation, plaintiff's attorney reiterated his own prior statement that the photo depicted the pitcher's mound and not third base. He also implied that there was a fence through which no vehicle could enter by questioning why the City did not ask Mr Reyes, a Parks Department employee, the following question: "Why don't you tell us, sir, that there is a fence right here through which you cannot come?" The court sustained the City's objection to plaintiff's attorney testifying based on

his own observation of the field.

The jury found that the City had failed to maintain the softball field in a reasonably safe condition, that the City had actual or constructive notice of the defect and that the City's negligence was a substantial factor in causing plaintiff's injuries. It also found that plaintiff, himself, was negligent and that his negligence was a substantial factor in causing his own injury. The jury apportioned negligence 80% to the City and 20% to plaintiff.

On August 14, 2006, the City moved to set aside the jury verdict, and for entry of judgment as a matter of law in favor of the City, or, in the alternative, for a new trial, on the grounds, among other things, that the statements of plaintiff's attorney tainted the jury and that bifurcation was an abuse of discretion because the discussion of damages during opening statement prejudiced the City's case.

In opposition, in defense of his objection during the City's summation, plaintiff's attorney argued that defense counsel's statements regarding the area where the "pickup truck" allegedly picked up plaintiff were misleading.

In a decision and order dated August 28, 2006, the court denied the City's motion, finding that the statements by plaintiff's attorney did not taint the jury and that the City's

claimed basis for overturning the verdict - that bifurcation was improper - was "without any merit" as "[n]either side mentioned anything specific about damages in their openings." The court subsequently entered the liability judgment on January 16, 2007.

The decision of the court was in error. In appearing as a lawyer before a tribunal, a lawyer shall not assert personal knowledge of the facts in issue, except when testifying as a witness, and shall not assert a personal opinion as to the credibility of a witness (Code of Professional Responsibility, DR 7-106[c](3) (4) [22 NYCRR § 1200.37(c)(3),(4)]; *see also People v Paperno*, 54 NY2d 294, 300-01 [1981]; *People v Blake*, 139 AD2d 110, 114 [1988]. This conduct amounts to a subtle form of testimony, as to which the opposing party cannot cross-examine (id., citing *Paperno* at 301). In ruling on a motion for a new trial based on attorney misconduct, the trial court must determine, in its discretion, whether counsel's conduct created "undue prejudice or passion which played upon the sympathy of the jury" (*Marcoux v Farm Servs. and Supplies, Inc.*, 290 F Supp 2d 457, 463 [SDNY 2003]). We review for abuse of discretion.

This Court cannot condone plaintiff's counsel's violation of these basic ethical and disciplinary rules. Further, our examination of the record, as detailed above, indicates that plaintiff's counsel so tainted the course of the trial that he

effectively destroyed any chance for a fair outcome. Plaintiff's counsel interjected his own view of the facts as to how he perceived the field when he visited it with his expert the day before the trial and tried to bolster his own credibility when he claimed that he had been to the accident site, even though the court had precluded plaintiff's expert from testifying about the condition of the field because the visit had occurred years after the accident. A particularly egregious impropriety occurred during the defense's summation, when the City suggested that the truck that picked up plaintiff after the accident caused the rut in the ground. Plaintiff's counsel twice claimed that the City was fabricating evidence because no truck could enter the field. Counsel made this statement even though testimony from his own client indicated that a Parks Department truck had picked plaintiff up from the field. Moreover, counsel unequivocally vouched for his own credibility and sought to bolster it as well by improperly invoking his status as a member of the bar. Thus, counsel expressly asserted in the presence of the jury that "[a]s an officer of the Court," he was "telling" the court that the City's counsel was fabricating evidence.

During plaintiff's closing, counsel again alluded to his knowledge of the field and implied that there was a fence that a pick up truck could not pass through. Counsel also alluded to

his unsworn testimony that a photo depicted the pitcher's mound, not third base.

To add insult to injury, presumably in an effort to offset O'Leary's testimony that plaintiff told her he broke his ankle sliding into third base, plaintiff's counsel stated in his closing that there was no word in Spanish for sliding into third base even though there was never any evidence in the record on this point. During plaintiff's closing, counsel once again vouched for his and his client's credibility by stating he never created half truths or tried to fool the jury and had not done so in this case. While counsel withdrew this statement upon the City's objection, he then reiterated that if the jury thought plaintiff was that type of person they could stop now.

Plaintiff's attorney intended these remarks to influence the jurors by considerations not legitimately before them. This warrants a new trial (*see People v Paperno*, 54 NY2d 294, 300-1 [1981]; *Clarke v New York City Transit Authority*, 174 AD2d 268, 276-8 [1992]; *Senn v Scudieri*, 165 AD2d 346, 355-7 1991]). In view of this disposition, we need not reach the issue of whether it was proper for the court to have bifurcated the trial after plaintiff's counsel made references to damages and the extent of plaintiff's injuries in his opening statement.

Accordingly, the judgment of the Supreme Court, New York

County (Robert D. Lippmann, J.), entered January 16, 2007, on a jury verdict, awarding plaintiff judgment as to liability, should be reversed, on the law and the facts, without costs, the judgment vacated, defendant's motion to set aside the verdict granted and the matter remanded for a new trial. Appeal from order, same court and Justice, entered November 16, 2006, that denied defendant's motion to set aside the verdict, unanimously dismissed, without costs, as academic in view of the foregoing.

All concur.

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

ENTERED: DECEMBER 11, 2008