SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 18, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4845 The People of the State of New York, Ind. 3464/06
Respondent,

-against-

William Taylor,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Michael Sachs of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Robert Stolz, J. at jury trial and sentence), rendered February 20, 2007, convicting defendant of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. Following a radio run, three police officers, defendant and the complainant were all standing together on a street. Immediately after the complainant accused defendant of

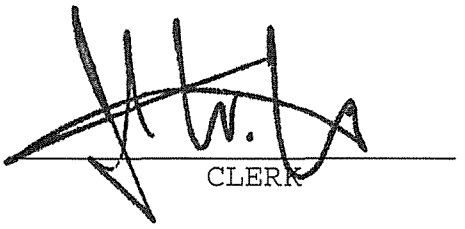
stealing his wallet, an officer turned to defendant and asked "What's going on here?". Defendant replied that he was only helping the complainant to recover his wallet, which had been stolen and discarded by someone else. For several reasons, we reject defendant's argument that the officer was required to give *Miranda* warnings before asking "What's going on here?".

First, defendant was not in custody. A reasonable innocent person in defendant's position would not have thought he was in custody (*see People v Yukl*, 25 NY2d 585 [1969] *cert denied* 400 US 851 [1970]), but rather "that the police were still in the process of gathering information about the alleged incident prior to taking any action." (*see People v Dillhunt*, 41 AD3d 216, 217 [2007], *lv denied* 10 NY3d 764 [2008]). Regardless of the questioning officer's unconveyed belief (*see Stansbury v California*, 511 US 318, 325 [1994]) that defendant was a suspect and was not free to leave, none of the officers restrained defendant or did anything to suggest to him that his freedom of movement had been restricted in any way. Second, even assuming there was a seizure, it was no more than an investigatory stop

that did not require *Miranda* warnings (*see Berkemer v McCarty*, 468 US 420, 439-440 [1984]; *People v Bennett*, 70 NY2d 891 [1987]). Finally, there was no interrogation requiring warnings because the officer's simple inquiry was made to clarify the situation (*see People v Johnson*, 59 NY2d 1014 [1983]).

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

ENTERED: DECEMBER 18, 2008



CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4846 Verina Hixon, Index 120547/01
Plaintiff-Respondent,

-against-

Congregation Beit Yaakov, a New York Non-Profit Religious Corporation, et al.,
Defendants,

Urban Foundation Engineering, LLC,
Defendant-Appellant.

[And a Third-party Action]

McDonough Marcus Cohn Tretter Heller & Kanca, L.L.P., New Rochelle (Frank T. Cara of counsel), for appellant.

Paul Coppe, New York, for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 27, 2007, which, insofar as appealed from as limited by the briefs in an action for property damage to plaintiff's cooperative apartment allegedly caused by defendants' construction work on an adjacent building, denied the motion of defendant Urban Foundation Engineering, LLC (Urban) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Urban, the subcontractor charged with installing the foundation system for the new structure adjacent to plaintiff's apartment building, failed to meet its initial burden of establishing, prima facie, that the performance of its inherently dangerous excavation work (*see Klein v Beta I LLC*, 10 AD3d 509,

510 [2004]), did not contribute to the damage to plaintiff's apartment. Although, pursuant to a preclusion order, plaintiff is prevented from offering her own testimony about damages, the motion court appropriately concluded that the preclusion order would not prohibit plaintiff from offering competent evidence at trial, i.e., insurance company reports, to establish damages (*see e.g. Ramos v Shendell Realty Group, Inc.*, 8 AD3d 41 [2004]). Furthermore, contrary to Urban's contention that the series of floods that damaged plaintiff's apartment after its construction work constituted superseding acts that relieved it from liability, the record shows that the floods occurred both before and after the subject construction work.

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

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

ENTERED: DECEMBER 18, 2008

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4847 Menahem Neuman, individually,
Plaintiff-Appellant,

Menahem Neuman, on behalf of all
others similarly situated,
Plaintiff,.

-against-

Century 21 Department Stores LLC,
Defendant-Respondent.

Index 106849/05

Erlanger Law Firm PLLC, New York (Robert K. Erlanger of counsel), for appellant.

James D. Butler, P.A., New York (Paul A. Liggio of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered October 10, 2007, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion in limine as moot, unanimously affirmed, without costs.

Defendant established prima facie that it had reasonable grounds to detain plaintiff as a suspected shoplifter (General Business Law § 218; *see Johnson v Lord & Taylor*, 25 AD3d 435 [2006]). Plaintiff failed to raise a triable issue as to the reasonableness of the detention (*see Conteh v Sears, Roebuck & Co.*, 38 AD3d 314 [2007], *lv denied* 9 NY3d 814 [2007]). He voluntarily signed a confession that he intended to steal the merchandise, after which defendant called the police, who arrived

30 minutes later.

Defendant established its defense without the evidence that plaintiff sought to exclude.

We have considered plaintiff's remaining arguments and find them without merit.

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

ENTERED: DECEMBER 18, 2008

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4848 In re Evelyse Luz S.,

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

Evelyn G.,
Respondent-Appellant,

St. Dominic's Home,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose LLP, New York (Andy S. Oh of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about October 17, 2007, which, upon a fact-finding of permanent neglect, terminated respondent's parental rights to the subject child and transferred custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

While the agency was not required to make reasonable efforts to return the child to her home because respondent's parental rights to two of her other children had been involuntarily terminated (*see* Family Court Act §§ 1039-b[a], [b][6]), it established by clear and convincing evidence that it exercised diligent efforts to encourage and strengthen respondent's relationship with the child and that despite these efforts

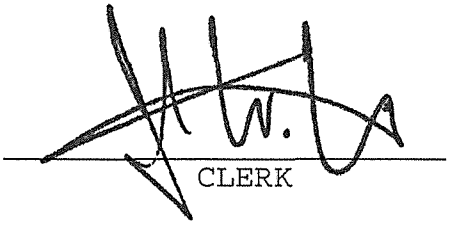
respondent failed to plan for the child's future (*see* Social Services Law § 384-b[7]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). The agency's service plan required respondent to visit with the child regularly, to complete a drug treatment program and remain sober, and to keep the agency apprised of her whereabouts. Respondent's attendance at the visits arranged by the agency was inconsistent, she failed to complete a drug program, and she failed to remain in contact with the agency, which was able to locate her eventually through its own efforts.

The finding that termination of respondent's parental rights is in the child's best interests was supported by a preponderance of the evidence showing that the child has been with the foster mother since infancy and has bonded with her and her other children and that the foster mother wishes to adopt the child (*see Matter of Elizabeth Amanda T.*, 44 AD3d 507 [2007]; *Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2007]).

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

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

ENTERED: DECEMBER 18, 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 18, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
John T. Buckley
Karla Moskowitz
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 607/06
Respondent,

-against- 4850

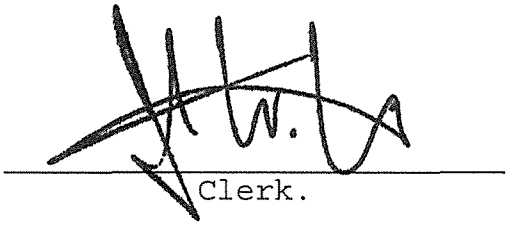
Travis Davis,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (John Cataldo, J.), rendered on or about March 1, 2007,

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

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

ENTER:



Clerk.

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

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4851 The People of the State of New York, Ind. 5377/06
Respondent,

-against-

Chris Martinez,
Defendant-Appellant.

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

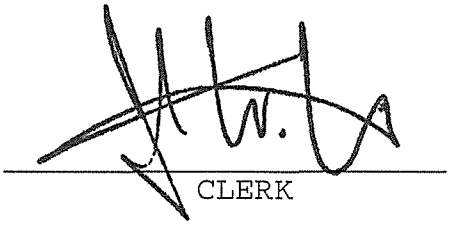
Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 19, 2007, convicting defendant, upon his guilty plea, of robbery in the first degree, and sentencing him to a term of 5 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request for youthful offender treatment (*see People v Drayton*, 39 NY2d 580, 584 [1976]), given the seriousness of the crime.

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

ENTERED: DECEMBER 18, 2008



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Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4852-
4852A Premiere Eglise Baptiste Haitienne de Manhattan (First Haitian Baptist Church of Manhattan), Plaintiff-Respondent, Index 109554/06 110099/06

-against-

George Joseph, Defendant-Appellant.

- - - - -

George Joseph, Plaintiff-Appellant

-against-

Active Committee of the Premiere Eglise Baptiste Haitienne de Manhattan (First Haitian Baptist Church of Manhattan), et al., Defendants-Respondents.

Jennifer Ajah, Jamaica, for appellant.

Clyde Jay Eisman, New York, for respondents.

Order and judgment (one paper), Supreme Court, New York County (Rolando T. Acosta, J.), entered March 27, 2007, which, in the first-captioned action, upon granting plaintiff church's motion for summary judgment, declared that defendant (Joseph), a suspended church member, holds no management authority in the church and that an amended certificate of incorporation of the church, filed by Joseph, is null and void, enjoined Joseph from interfering with the church's management of its temporal affairs and from disturbing church's worship services, and directed Joseph to return all church property in his possession,

unanimously affirmed, with costs. Order, same court (Edward H. Lehner, J.), entered May 9, 2007, which, in the second-captioned action, brought by Joseph and seeking to hold the church, its pastor and its president in contempt, denied Joseph's motion to vacate a 22 NYCRR 202.27(c) dismissal, unanimously affirmed, with costs.

The first-captioned action, which was brought by the church and seeks declaratory relief resolving Joseph's authority over the church's temporal affairs and injunctive relief restraining him from interfering in such affairs and from disturbing church services, turns almost entirely on the meaning and effect of a stipulation settling a prior action between the parties and the church's former pastor, since deceased, who was also Joseph's father and from whom Joseph claims to have derived his authority over church affairs under a power of attorney. It appears that upon filing the action, the church made a virtually simultaneous motion that, while not denominated as one for summary judgment, effectively sought all of the relief sought in the complaint; that Joseph then served an answer containing a counterclaim that also sought a declaration of his rights under the stipulation, and opposition to the motion that did not object to the church's pre-answer motion for summary judgment and indeed purported to lay bare his proof; and that the motion court notified the parties on the return date of the motion that it was going to

treat the church's motion as one for summary judgment, to which notice neither party objected. Under these circumstances, the court's treatment of the church's motion as one for summary judgment was not procedurally improper (*see Miller v Nationwide Mut. Fire Ins. Co.*, 92 AD2d 723, 724 [1983], distinguishing *Duell v Hancock*, 83 AD2d 762 [1981]; *see also Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320-321 [1987]).

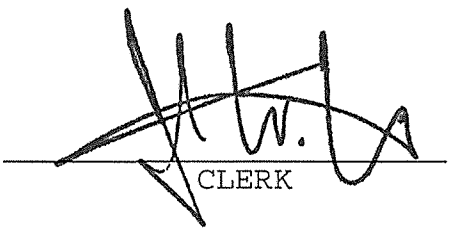
On the merits, the stipulation confirmed the church's appointment of an "active pastor" as successor to Joseph's father; designated Joseph's father as a "counseling pastor" whose duties were to "give counseling" and "make suggestions" relating to church activities and programs "on a monthly base (sic) or whenever it is convenient for the congregation"; and provided for Joseph's appointment as a Sunday school teacher subject to his completing a one-year qualifying course, which he never took. Thus, under the clear terms of the stipulation, Joseph never qualified for the position of Sunday school teacher, and no other position was conferred on him. Nor was any position or authority conferred on Joseph by the durable power of attorney given to him by his father after the stipulation had been executed, since, by then, by virtue of the stipulation, Joseph's father was merely a "counseling pastor" with only advisory and consultative powers, and thus lacked the authority to appoint Joseph to serve as "legal counselor" or otherwise put him in control of church

affairs. The 2001 court order on which Joseph also relies, and which was granted without opposition from the church, merely restrained the church from interfering with Joseph's rights under the stipulation, and thus has no independent import. Finally, as a Baptist church, the church's congregation has control over its spiritual matters, including the termination of membership for violation of church discipline (*see Walker Mem. Baptist Church, Inc. v Saunders*, 285 NY 462, 473 [1941]). Consistent with the congregation's vote to suspend Joseph's membership, Joseph was properly enjoined from disturbing the church's worship services.

The second-captioned action, which was commenced by Joseph during the pendency of the first-captioned action, seeks to hold the church and others in contempt of the 2001 order, and was dismissed when the parties did not appear at a preliminary conference. Joseph's motion to vacate the dismissal was properly denied since he cannot show any meritorious claim that the church, or any its officers or members, are in contempt of the 2001 order (*see Saunders v Riverbay Corp.*, 17 AD3d 137 [2005]).

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

ENTERED: DECEMBER 18, 2008



Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4853-
4853A

Index 116207/06

David Wadler,
Plaintiff-Appellant,

-against-

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

Brad A. Kauffman, New York, for appellant.

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

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 3, 2008, which denied plaintiff's motion for summary judgment on the issue of liability and granted defendants' cross motion to dismiss the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 5, 2008, which denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

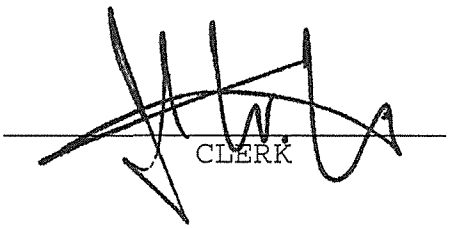
Plaintiff, a police officer, was injured while driving his assigned police car across a security barrier at the entrance to the parking garage at One Police Plaza. The four-foot-high barrier had been lowered to permit plaintiff to pass but was raised again before his car cleared it, and the front end of the car was jerked into the air. Plaintiff is barred by the firefighter's rule from recovering on his common-law negligence

claims because "the acts undertaken in the performance of police duties placed him [] at increased risk for that accident to happen" (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 440 [1995]; *Melendez v City of New York*, 271 AD2d 416, 417 [2000]; *Simons v City of New York*, 252 AD2d 451 [1998]; *see also Grogan v City of New York*, 259 AD2d 240 [1999]).

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

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

ENTERED: DECEMBER 18, 2008



Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4854 The People of the State of New York, Respondent, Ind. 1660/06

-against-

David Agramonte, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Giti Baghban of counsel), for respondent.

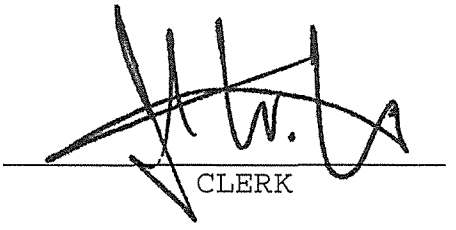
Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; Michael J. Obus, J. at plea and sentence), rendered October 26, 2006, convicting defendant of attempted criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. An officer saw defendant holding his hand over the front of his waist, partially obscuring what appeared to the barrel of a derringer protruding from his waistband. Although this object ultimately turned out to be a distinctively shaped belt buckle, the hearing court examined the buckle and made a determination that, from the officer's vantage point at the time of the incident, the buckle would have reasonably appeared to be a firearm. We find no reason to disturb that factual determination

(*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Moreover, the officer simply made a common-law inquiry, but defendant ignored the officer's attempts to engage him and, prior to any police action constituting a seizure, he "actively fled from the police" (*People v Moore*, 6 NY3d 496, 500-501 [2006]), which heightened the level of suspicion (*see People v Sierra*, 83 NY2d 928, 930 [1994]). Accordingly, defendant's abandonment of contraband during his flight from pursuit was not precipitated by any unlawful police conduct.

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

ENTERED: DECEMBER 18, 2008



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Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4855 Yasha Pinkhasov, Index 117524/05
Plaintiff-Appellant,

-against-

Junior Weaver, et al.,
Defendants-Respondents,

Gavriel Pinkhasov,
Defendant.

Goidel & Siegel, LLP, New York (Steven E. Cohen of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 24, 2007, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established a prima facie entitlement to summary judgment by submitting the affirmed reports of a neurologist and orthopedist, which were in compliance with CPLR 2106 (*cf. Offman v Singh*, 27 AD3d 284 [2006]). The doctors reviewed plaintiff's medical records, examined him and performed detailed and objective tests before concluding that plaintiff had full range of motion in his cervical and lumbar spine. Defendants also

submitted plaintiff's deposition testimony in which he stated that he was only confined to bed for three to four days following the accident (*see Copeland v Kasalica*, 6 AD3d 253 [2004]).

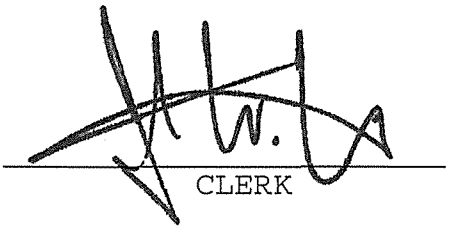
In opposition, plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury. Plaintiff's unsworn MRI reports were properly not considered by the motion court (*see Grasso v Angerami*, 79 NY2d 813 [1991]), and the affirmation of plaintiff's medical expert failed to provide objective medical proof to support plaintiff's claim of permanent injury. Although plaintiff's expert stated that plaintiff had decreased range of motion in his cervical and lumbar spines, he failed to detail with any specificity these limitations (*see Rodriguez v Abdallah*, 51 AD3d 590, 592 [2008]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [2005]).

Furthermore, as noted, plaintiff was only confined to bed for three to four days after the accident, and absent objective medical evidence, his subjective statements that he was unable to perform his usual and customary daily activities during the statutorily relevant time period, is insufficient to establish a serious injury under the 90/180 prong of Insurance Law § 5102(d) (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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

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

ENTERED: DECEMBER 18, 2008



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Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4856-
4856A Index 601416/04

Federal Insurance Company,
Interpleader Plaintiff,

-against-

Tyco International Ltd.,
Interpleader Defendant-Appellant,

L. Dennis Koslowski, et al.,
Interpleader Defendants,

Frank E. Walsh, Jr.,
Interpleader Defendant-Respondent.

Beveridge & Diamond, P.C., New York (John H. Kazanjian of counsel), for appellant.

Warner Partners, P.C., New York (Kenneth E. Warner of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Helen E. Freedman, J.), entered August 20, 2007, inter alia, directing that Federal Insurance Company reimburse Frank E. Walsh, Jr. $2,857,806.73 in defense costs in certain underlying actions, unanimously affirmed, with costs. Appeal from decision, same court and Justice, dated April 23, 2007, which granted Walsh's motion for summary judgment declaring him eligible for coverage and apportioning insurance proceeds between him and Tyco International Ltd., unanimously dismissed, without costs, as taken from a nonappealable paper.

Outside director Walsh's violation of the Martin Act did not bar his recovery of defense costs under the Federal Insurance

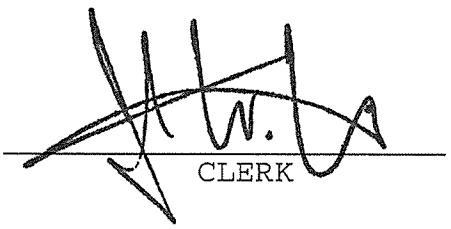
directors and officers liability insurance obtained by Tyco. Strictly construing the policy exclusions (*see Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003]) and according meaning to each of their terms (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]), the motion court correctly interpreted the exclusions of claims "based on, arising from, or in consequence of" a wrongful act, rather than the language of "interrelated" and explicitly "causally connected" wrongful acts contained in the limit on liability section of the coverage provisions, in finding that there are civil claims against Walsh that are not covered and civil claims against him that are covered. Walsh's conduct represents only a portion of the acts for which liability is sought to be imposed and was of a different character from that of most of the wrongs alleged in the actions against the corporation, its executives, its accountants and some of its directors.

In equitably distributing the policy proceeds, the court correctly found that the policy gives priority to the claims of "insured persons" over those of the insured corporation, properly considered the corporation's access to excess coverage, and properly declined to consider the order in which the insureds submitted their defense bills (*see Agricultural Ins. Co. v Matthews*, 301 AD2d 257, 260 [2002]).

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

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

ENTERED: DECEMBER 18, 2008



Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4858 The People of the State of New York, Ind. 5284/05
Respondent,

-against-

Maurice Reynolds,
Defendant-Appellant.

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

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

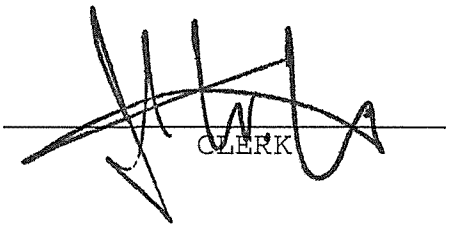
Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 21, 2006, convicting defendant, upon his plea of guilty, of three counts of robbery in the first degree, and sentencing him to concurrent terms of 7 years, with 5 years' post-release supervision, unanimously modified, on the law, to the extent of vacating the period of post-release supervision and otherwise affirmed, and the matter remanded for further proceedings in accordance with this decision.

We perceive no basis for reducing the sentence. However, as the People concede, defendant is entitled to a remand for the sole purpose of reconsideration of the length of the term of post-release supervision (*see People v Stanley*, 309 AD2d 1254 [2003]). Since the sentencing court characterized the five-year period it imposed as "mandatory," it may not have realized that

it had the discretion to impose a post-release supervision term of as little as two and one-half years (Penal Law § 70.45[2][f]).

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

ENTERED: DECEMBER 18, 2008



Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4859 Barbara Mitchell, Index 106829/06
Plaintiff-Respondent,

-against-

Atlantic Paratrans of NYC, Inc., et al.,
Defendants-Appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia Raicus of counsel), for appellants.

Jason Levine, New York, for respondent.

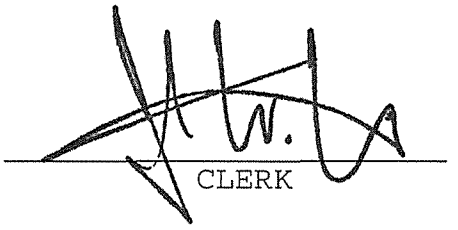
Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 26, 2007, which denied defendants' motion for summary judgment dismissing the complaint for lack of a serious injury as defined by Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

In opposition to the defendants' prima facie showing that plaintiff did not suffer a serious injury causally related to the subject accident, plaintiff failed to raise a triable issue of fact (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]). While it is undisputed that plaintiff was afflicted with certain spinal defects, the cause thereof, according to defendants' neurologist, was congenital malformation and not the event in question. It is uncontested that plaintiff had scoliosis and spina bifida, congenital conditions. The conclusory statements of plaintiff's

experts, unsupported by any probative evidence, that plaintiff's limitations were causally related to the accident are insufficient to defeat summary judgment (*see Carter v Full Serv., Inc.*, 29 AD3d 342, 344 [2006], *lv denied* 7 NY3d 709 [2006]).

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

ENTERED: DECEMBER 18, 2008



Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4860 Hava Shelkowitz, Index 114418/05
Plaintiff-Appellant,

-against-

Errol Rainess,
Defendant-Respondent.

Besen and Trop, LLP, Garden City (Robert E. Trop of counsel), for appellant.

Ira B. Pollack & Associates, PLLC, Port Chester (Ira B. Pollack of counsel), for respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered July 18, 2007, which, insofar as appealed from as limited by the briefs in an action for personal injuries allegedly sustained in a slip and fall on an accumulation of snow and ice in front of defendant's building, granted defendant's cross motion to dismiss the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was proper where plaintiff did not effect service of the summons and complaint upon defendant within 120 days after the filing of the action (CPLR 306-b). Nor is an extension of time for service warranted in the "interest of justice" (*id.*). The request for an extension of time was not made until opposition to defendant's cross motion to dismiss, which was approximately 20 months after the filing of the action (*see Slate v Schiavone Constr. Co.*, 4 NY3d 816 [2005]; *Pecker*

Iron Works, Inc. v Namasco Corp., 37 AD3d 367 [2007]).

Furthermore, contrary to plaintiff's contention, CPLR 207 is not applicable as there is no evidence that defendant was either absent from the state within the meaning of the statute, or that he was listed under a false name.

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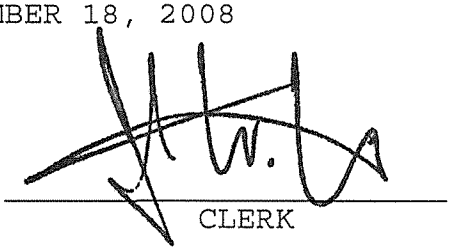

CLERK

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 18, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
John T. Buckley
Karla Moskowitz
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 5996/06
Respondent,

-against- 4861

Charles Sanchez,
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 (Edward J. McLaughlin, J.), rendered on or about April 11, 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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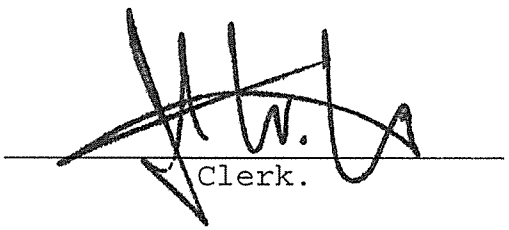

Clerk.

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

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4862 In re Frederick Franklin, Index 400676/03
Petitioner-Appellant,

-against-

Ann Schwartz, Records Access Officer, etc.,
Respondent-Respondent.

Frederick Franklin, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered March 5, 2007, which denied petitioner's motion to hold respondent, the Records Access Officer of the New York County District Attorney's Office, in contempt for disobedience of this Court's prior order directing disclosure pursuant to the Freedom of Information Law (*decided sub nom. Matter of Franklin v Miner*, 21 AD3d 276 [2005], *lv denied* 7 NY3d 735 [2006]), unanimously affirmed, without costs.

No reason appears to doubt respondent's assertion that despite an extensive search of the District Attorney's case files relating to the three indictment numbers specified in petitioner's requests, she was unable to locate the requested minutes of a 1982 plea taken by a certain witness at petitioner's trial. Indeed, it appears from the parties' extensive correspondence that respondent at all times endeavored to comply with petitioner's requests in accordance with this Court's prior

order--she ordered and reviewed various case files in an attempt to locate the requested plea minutes; she located and turned over related documents, including the minutes of the witness's sentencing; and she credibly explained to respondent that the District Attorney's Office does not order the transcript of every court proceeding. Respondent's statement that she was unable to find the requested documents, despite a diligent search, sufficed to satisfy the District Attorney's obligations under FOIL, which, by its terms, does not require an entity to prepare records it does not possess or maintain (Public Officers Law § 89[3]; *see Matter Lugo v Galperin*, 269 AD2d 338 [2000], *lv denied* 95 NY2d 755 [2000]).

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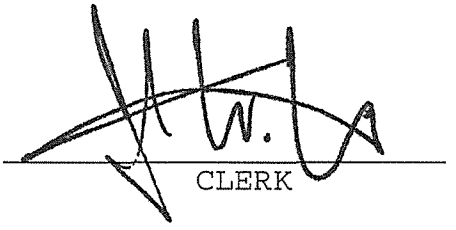

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4863N Kevin Tejeda, an infant under the age of 14 years by his parent and natural guardian, Ana Pichardo, et al., Plaintiffs-Appellants, Index 22319/97

-against-

Woodycrest Realty, L.L.C., Defendant-Respondent.

John Bernard Fenwick, Yonkers, for appellants.

Goldberg & Carlton, PLLC, New York (Robert H. Goldberg of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered June 5, 2007, which, in an infant's action for personal injuries, denied plaintiff's motion to vacate his default on his motion to set aside the settlement of the action, vacate the releases, give defendant credit for the amount paid in settlement, and restore the action to the calendar, unanimously reversed, on the law and the facts, without costs, the motion to vacate the default granted, and plaintiff's original motion granted to the extent of directing defendant to pay the balance of the settlement amount of $41,418.72 within 60 days, and if defendant fails to make such payment, then the settlement and releases are to be vacated and the action is to be restored to the calendar, upon plaintiff's payment of $18,581.28 to defendant, or, in the alternative at plaintiff's option, a

judgment may be entered against defendant for $41,418.72, with interest from October 18, 2001.

The action was settled pursuant to an infant's compromise order entered on or about March 26, 2001. Defendant's insurer sent plaintiff's former attorney three checks totaling slightly more than the settlement amount, one for $4,257.07 payable to New York City Department of Social Services, another for $18,581.28 payable to plaintiff's former counsel, and the last for $37,161.95 payable to plaintiff's guardian. The checks stated on their face that they would be "void if not presented within 90 days." Defendant's insurer delayed mailing the checks, so plaintiff's former attorney had only 35 days to deposit them before they became void. Plaintiff's former attorney promptly deposited the check payable to his firm, but the other checks were not deposited and became stale. Plaintiff's former attorney then requested replacement checks on October 18, 2001, but, before new checks were issued, defendant's insurer went into liquidation. Subsequent proceedings to compel the Liquidation Bureau to issue replacement checks started out well but were ultimately unsuccessful when the Liquidation Bureau learned that defendant's insurer was not licensed to do business in New York.

In June 2005, plaintiff, by new counsel, moved by order to show cause to vacate the settlement and releases, grant defendant a credit for the $18,581.28 received by plaintiff's former

attorney, and restore the action to the calendar. However, the motion was denied when plaintiff failed to appear on the return date. Plaintiff then moved by order to show cause to vacate his default, submitting the affirmation of his attorney that the failure to appear was due to a communication error between him and the per diem attorney engaged to appear on the return date, but the motion court refused to sign the order to show cause. This Court then granted the order to show cause, set a briefing schedule, and directed the motion court to decide plaintiff's motion to vacate his default on his June 2005 motion to vacate the settlement (39 AD3d 210). For unclear reasons, plaintiff filed a new order to show cause replicating the June 2005 order to show cause, except that it did not contain plaintiff's attorney's affirmation attesting to the miscommunication with the per diem attorney. The motion court denied the motion to vacate the default because of the lack of any explanation for the failure to appear on the return date, and also for lack of a meritorious claim in that plaintiff's predicament was caused by his former attorney's delay in depositing the entire settlement amount before the checks became stale.

The motion court should have considered the affirmation of plaintiff's attorney submitted on plaintiff's original order to show cause to vacate his default, which, we find, sets forth a reasonable excuse, namely, law office failure (CPLR 2005; *see*

Harwood v Chaliha, 291 AD2d 234 [2002]). We also find that plaintiff's claim is meritorious since he never agreed to what was effectively a 35-day time limit for depositing the settlement checks. That condition was unilaterally imposed by the insurer now in liquidation, and the failure of that condition due to some delay by plaintiff's former attorney, who had no reason to suspect the insurer's imminent takeover in liquidation, should not result in plaintiff's forfeiture of most of the consideration for the settlement. Plaintiff settled with defendant, not the insurer, and defendant is responsible for providing the balance of the settlement amount.

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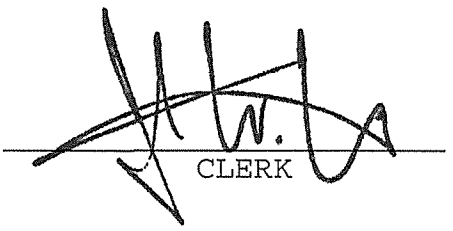

Lippman, P.J., Tom, Buckley, Moskowitz, Renwick, JJ.

4864N 1319 Third Avenue Realty Corp., Index 119585/02
Plaintiff-Appellant,

-against-

Chateaubriant Restaurant Development Company, LLC,
Defendant-Respondent,

Ahmed Qasemi,
Nonparty-Appellant.

Avrom R. Vann, New York, for appellant.

Sanders Ortoli Vaughn-Flam Rosenstadt LLP, New York (Eric Vaughn-Flam of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered September 25, 2007, which adjudged appellants in civil contempt and referred the issue of damages to a referee, unanimously modified, on the law, to limit the award to costs, expenses and attorney fees incurred as a result of appellants' disobedience of the court's 2006 order and judgment, and otherwise affirmed, without costs.

By failing to appear at two scheduled closings, appellants disobeyed an order and judgment, dated November 16 and December 5, 2006, which respectively ordered that a closing take place on November 30 and December 7, 2006. These dispositions expressed an unequivocal mandate of which appellants were well aware, and the disobedience prejudiced defendant's right to close on the sale of the premises, thus justifying the ruling of contempt (*see*

Matter of McCormick v Axelrod, 59 NY2d 574, 583 [1983]).

Appellants contend that they could not proceed with the closing because certain preconditions had not occurred and because there were issues with the title. However, they failed to demonstrate a good faith effort to comply with the court's order and judgment by, for example, appearing at the closing and attempting to resolve these purported issues.

Although appellant Qasemi is not a party to the action, he is the sole owner and principal of plaintiff, and can be punished for plaintiff's disobedience of the order and judgment. While Qasemi was not personally served with these dispositions, it is undisputed that plaintiff was served and was aware of the mandates contained therein. It defies credulity that Qasemi himself was unaware of the orders (*see Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V.*, 304 AD2d 482 [2003]). Furthermore, since there were no issues of fact to be resolved at a hearing, it was proper for the court to make a finding of contempt without a hearing (*Cashman v Rosenthal*, 261 AD2d 287 [1999]).

However, in referring the matter to a referee for a determination of damages, the court should have limited defendant's recovery to costs and fees related to the disobedience of the order and judgment, and should not have awarded all costs, expenses and fees "resulting from the various motions, appeals and the trial on damages," which dated back to

2005 (*Clinton Corner H.D.F.C. v Lavergne*, 279 AD2d 339, 341 [2001]; *Alpert v Alpert*, 261 AD2d 247 [1999], *lv dismissed* 94 NY2d 859 [1999]).

We have considered appellants' remaining contentions and find them unavailing.

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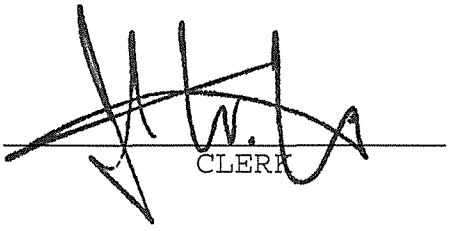

Tom, J.P., Friedman, Buckley, Catterson, JJ.

3908 James Agate, Index 104289/05
Plaintiff-Appellant,

-against-

Herrick, Feinstein LLP,
Defendant-Respondent,

Arthus Jakoby, Esq, et al.,
Defendants.

Mark E. Kressner, Bronx, for appellant.

Herrick, Feinstein LLP, New York (Susan T. Dwyer of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered September 11, 2006, which, in an action for legal malpractice arising out of defendants' joint representation of plaintiff and another client (Edward A. Kaminsky) in a dispute involving their purchase of securities that was resolved by arbitration, granted defendants' motion for summary judgment dismissing the amended complaint, unanimously affirmed, without costs.

We affirm for reasons stated in *Kaminsky v Herrick, Feinstein LLP, et al.* (Appeal No. 3909, decided simultaneously herewith), namely, the failure to demonstrate any legal basis upon which a trier of fact might find that the alleged omission of defendants to present further expert testimony concerning plaintiffs' damages would have resulted in a higher award by the

arbitration panel. Thus, since plaintiff cannot establish that, but for the alleged negligence of his attorneys, the outcome of the underlying matter would have been substantially different (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *N.A. Kerson Co. v Shayne, Dachs, Weiss, Kolbrenner, Levy & Levine*, 45 NY2d 730, 732 [1978]), his cause of action is deficient, and dismissal is required (*Katash v Richard Kranis, P.C.*, 229 AD2d 305, 306 [1996], *lv dismissed* 89 NY2d 981 [1997]).

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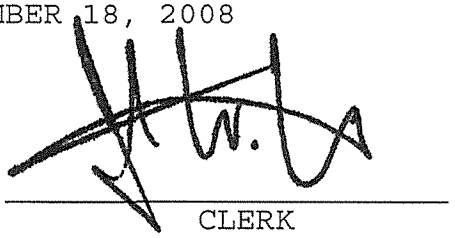

CLERK

Mazzarelli, J.P., Friedman, Nardelli, Williams, Freedman, JJ.

4253 The People of the State of New York, Respondent, Ind. 1063/03 2297/03

-against-

Mark Ochoa, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

Mark Ochoa, appellant pro se.

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

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered January 20, 2006, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 10 years (plus five years of post-release supervision), 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]). Defendant failed to preserve the sufficiency issue, and we decline to review it in the interest of justice. Alternatively, we find that when viewed in the light most favorable to the People, the evidence permitted a "valid line of reasoning and permissible inferences which could lead a

rational person to the conclusion reached by the jury" (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see also Danielson*, 9 NY3d at 349). Robbery in the second degree, on the theory that defendant forcibly stole property with the aid of another person actually present, was supported by unrefuted testimony that the codefendant inexplicably apologized to complainant Ruballo shortly before the crime, raising the inference that he knew what was about to happen; that complainant Cruz observed defendant and his codefendant talking quietly immediately before the codefendant began wresting the property from Cruz and defendant's restraint of Ruballo as soon as she responded to the clamor; that Cruz was certain that defendant, the only other person present at the time, facilitated the robbery by pulling Cruz's jacket over his head from behind as he and the codefendant struggled; and that both assailants fled together after the codefendant beat and kicked Cruz to gain control of the property and wounded Cruz with a box cutter or razor dispenser provided by defendant.

Similarly, the weight of the credible evidence supported the verdict, (*see Danielson*, 9 NY3d 342, 348 [2007]), since acquittal would not have been unreasonable here, we must weigh the conflicting testimony, review any rational inferences that may be drawn from the evidence, evaluate the strength of such conclusions, and based upon the weight of the credible evidence,

decide whether the jury was justified in finding the defendant guilty beyond a reasonable doubt. The principal evidentiary issues raised by defendant on appeal are the inconsistencies in Cruz's and Ruballo's various pretrial accounts of the robbery and the purportedly weak, conflicting evidence that defendant played any role in the robbery. In their trial testimony, both witnesses explained the inconsistencies as an attempt to conceal the fact that the site of the robbery (Ruballo's apartment) was essentially a "crack house" and admitted their drug histories; Cruz also professed to being "confused" by the questions. We, like the jury, find this explanation, as well as the testimony cited above, credible, and also find that the evidence leads to the rational and plausible conclusion, beyond a reasonable doubt, that defendant acted with the codefendant in committing the crime.

We find lacking in merit the assertion that the prosecutor improperly used Cruz's and Ruballo's prior consistent statements to buttress their testimony, and in any event, that any error was harmless under the circumstances. As noted, Cruz and Ruballo admitted in the course of their trial testimony its inconsistency with their pretrial accounts of the robbery, and explained their earlier fabrications, which essentially altered the time of day and the location within the building where the robbery occurred.

However, those fabrications were collateral to the core allegations of their testimony supporting the robbery charge - namely, that inside the building at the address and on the date specified, the codefendant forcibly stole Cruz's video game console by beating and cutting him, aided by defendant who was actually present - from which they never deviated. The cross-examinations of Cruz and Ruballo refuted the fabrications, but never refuted the core allegations. Moreover, the tenor of the prosecutor's redirect was not necessarily the rehabilitation of the two witnesses or the bolstering of their testimony. These efforts were directed at leaving the jury with the unrefuted core allegations supporting the charges by readily conceding Cruz's and Ruballo's liabilities and fabrications, and offering a plausible explanation for the latter. Specifically, on redirect, the prosecutor did not attempt to correct Cruz's false allegations to the grand jury, but sought to show that there were matters he was not "confused" about, which were consistent with his direct testimony. As to Ruballo, the prosecutor did not use her prior statement to the police to establish that she told the complete truth on direct about the circumstances surrounding the crime; rather, she asked Ruballo to reiterate the portions of her statement that were true and untrue (hardly different from defense counsel's cross-examination of Ruballo). The portion she confirmed as true was the basic information provided in the

statement and on direct - e.g., her name, the defendants' names, the address of the building, and the location in the building where the incident occurred.

The trial court correctly found, after conducting a CPL 330.30 hearing, that defendant's contention that he was deprived of his right to be present at a material stage of the proceedings lacked merit, in addition to being waived as unpreserved. The jury foreperson's note was properly found to address a ministerial matter - the procedure to be followed in announcing the verdict - rather than a substantive one (*People v Collins*, 99 NY2d 14, 17-19 [2002]; *People v Bonaparte*, 78 NY2d 26, 30-31 [1991]), and defense counsel's failure to make the requisite objection or otherwise seek relief from the court's ruling in a timely manner waived such claim (*see People v Campbell*, 48 AD3d 204, 205 [2008], *lv denied* 10 NY3d 860 [2008]).

Defendant's pro se contention that he was afforded ineffective assistance of counsel cannot be adequately reviewed upon the record submitted. By failing to seek CPL 440.10(1)(a) relief, he failed to present a record of counsel's explanation for his trial tactics (*see People v Holman*, 14 AD3d 443 [2005], *lv denied* 4 NY3d 887 [2005]). To the extent we can review this claim based upon the record submitted, we find that counsel did provide meaningful representation at trial, as evidenced by defendant's acquittal of the most serious charges submitted to

the jury, as well as the effective cross-examination of the complainants.

We have reviewed the balance of defendant's argument and find it without merit.

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

FREEDMAN, J. (dissenting)

I respectfully dissent, because I believe the trial court committed reversible error by allowing the prosecutor to bolster the testimony of Ruballo and Cruz, the two main witnesses against defendant, by introducing their prior consistent statements.

The jury's verdict, which convicted defendant of robbery in the second degree for robbing Cruz of his "Xbox" video game console and money in Ruballo's presence, by acting in concert with codefendant Nicholas Figueroa[1], was based on the testimony by Ruballo and Cruz, who were the only witnesses to the incident. As defense counsel pointed out during cross-examination at trial, portions of Cruz's and Ruballo's testimony were internally inconsistent, or conflicted with each other's trial testimony, testimony at an earlier suppression hearing, or their own prior statements to the police investigating the incident or to the grand jury. For example, Cruz testified at trial that the robbery occurred both at about 8:00 a.m. and at 2:30 p.m. He also gave inconsistent accounts of whether defendants were waiting in the apartment where the incident commenced when Cruz and Ruballo arrived, or whether they were standing on the stoop in front of the apartment building and followed them into the

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[1]Codefendant Figueroa, who was also convicted of second degree robbery as well as other crimes (*see People v Figueroa*, 48 AD3d 324 [2008]), did not raise the bolstering issue on his appeal.

apartment. He first testified at trial that defendant joined Figueroa in kicking him during the robbery, but later indicated that only Figueroa kicked him, and at various times stated that defendant and Figueroa had stolen $ 50 and $ 200 from him. Cruz also made inconsistent statements about what weapons defendant and Figueroa carried, the extent of defendant's involvement, and whether Cruz knew or had any relationship with the robbers.

Ruballo also made a number of inconsistent statements as to the sequence of events during the robbery, her relationship with defendant and Figueroa, and whether she had seen them take any money from Cruz.

On redirect examination of Cruz, the prosecutor questioned Cruz about prior statements he had made that conformed to his trial testimony, asking him whether those prior statements were correct. Defense counsel objected, stating that the prosecutor was not permitted to ask about prior consistent statements, but the objection was overruled.

On redirect examination of Ruballo, the prosecutor proposed to "go through" Ruballo's written statement to the police "to clarify what's incorrect and what is correct." Defense counsel objected, stating, "The district attorney can not rehabilitate a witness with a prior inconsistent statement by picking out prior consistencies unless I claim recent fabrication on the witness stand. I'm not doing that. "The court overruled the defense

objection, noting that the "District Attorney is simply trying to ascertain which part of the statement is truthful and which part was not as already testified by this witness." The prosecutor then led Ruballo through several assertions in the statement, asking whether they were correct or incorrect. Counsel objected on the basis that "prior consistencies on an inconsistent statement are inadmissible," but the objection was overruled.

The prior statements constituted improper bolstering and should not have been admitted. Generally, a party may not rehabilitate a witness's testimony by showing that the witness previously made statements to the same effect (*People v McDaniel*, 81 NY2d 10, 16 [1993]; *People v McClean*, 69 NY2d 426, 428 [1987]; *People v Harris*, 242 AD2d 866 [1997], lv denied 91 NY2d 892 [1998]). However, after a witness's testimony is directly or inferentially assailed as a recent fabrication, the witness may be rehabilitated with prior consistent statements that predated the motive to falsify (*McDaniel*, 81 NY2d at 18; *McClean*, 69 NY2d at 428). In applying the exception, "it is important to identify when the motive to fabricate arose," and where "the motive may exist from the outset, . . . rehabilitation with consistent statements may be impossible" (*McDaniel*, 81 NY2d at 18).

While defendant's counsel did, in fact, confront Cruz with his prior inconsistent statements, he never suggested that Cruz had recently fabricated his account of the robbery. To the

contrary, defendant's position was that Cruz had lied from the time he first made statements to the police. The People's argument that the prosecutor merely gave Cruz an opportunity to "clarify what he was not confused about when he testified before the Grand Jury" is unavailing. The People cannot circumvent the rule against bolstering by characterizing the re-examination as a showing that Cruz was confused about some of his statements, but not all of them.

The prior consistent statements brought out on Ruballo's redirect were even more problematic, since the prosecutor went through Ruballo's written statement to the police while characterizing certain allegations as false, and thereby implied that the remaining statements were true.

The prosecution's bolstering cannot be excused as harmless error. The evidence against defendant was not overwhelming[2] and depended entirely on Cruz's and Ruballo's testimony. Cruz's and Ruballo's credibility as witnesses is at issue because they (along with the two defendants) were crack cocaine users; in fact, Ruballo described the apartment where the incident began as

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[2]The evidence against codefendant Figueroa was considerably stronger. For example, both Cruz and Ruballo testified that Figueroa had beaten and kicked Cruz, but their testimony conflicted as to whether defendant had done more than hold Ruballo back while Figueroa attacked Cruz. Moreover, at the sentencing hearing, Figueroa admitted that he had physically attacked Cruz and cut him, and he also stated that defendant was "innocent" and had not been involved with the incident between Figueroa and Cruz.

a "crack house." The jurors deliberated for three days and twice sent notes that they were deadlocked; quite possibly their impasse was caused at least in part by their wrestling with the witnesses' confusing and contradictory testimony. For that reason, I am of the opinion the matter should be remanded for a new trial.

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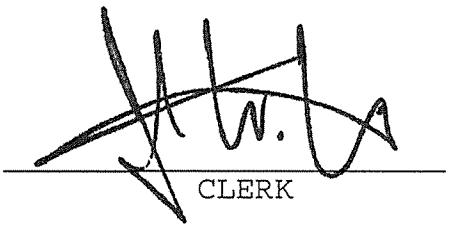
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 18, 2008



CLERK

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

4287 Delvin Sweeney, Index 23941/00
Plaintiff-Appellant,

-against-

Bruckner Plaza Associates, et al.,
Defendants-Respondents,

JNS Recovery Corp., et al.,
Defendants.

Richard L. Giampa, P.C., Bronx (Zachary Giampa and Richard L. Giampa of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Christine Bernstock of counsel), for Bruckner Plaza Associates, respondent.

Boeggeman, George & Corde, P.C., White Plains (Cynthia Dolan of counsel), for Zerega Recovery Corp., respondent.

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered September 25, 2006, granting the motion of defendants Bruckner Plaza Associates and Zerega Recovery Corp. for a directed verdict at the close of plaintiff's evidence and dismissing the complaint, reversed, on the law, without costs, the motion denied, the complaint reinstated, and the matter remanded for a new trial.

This action was commenced by plaintiff, a quadriplegic, to recover damages for personal injuries sustained as the result of Zerega's towing of plaintiff's customized van from a handicapped space at the parking lot of a shopping center owned and operated by Bruckner. When plaintiff called the police to inform them

that his vehicle had been towed, he was instructed to wait at the shopping center. However, plaintiff decided to retrieve the van himself from the yard to which the van had been transported after Zerega's tow truck driver told him that the yard was only two blocks way. Plaintiff claims that as a consequence of retrieving the van he developed pneumonia and suffered tremendous strain on his hands and arms.

Defendants' motion for a directed verdict on the ground that plaintiff failed to make out a prima facie case on his claims for trespass to chattel and negligence was improperly granted. Plaintiff's evidence was sufficient to show that defendants lacked authority to remove plaintiff's vehicle (*see* New York City Administrative Code § 19-169.1[b] [owner or operator of private parking facility prohibited from towing or causing to be towed vehicles from facility unless a sign is conspicuously posted stating, among other things, the name, address and telephone number of the tow operator]), and that the towing of the vehicle was therefore tortious. We disagree with the trial court that, as a matter of law, the towing did not proximately cause plaintiff's injuries, or that plaintiff's decision to retrieve his van was an intervening act that broke the causual nexus between the towing and plaintiff's injuries.

The issue of "[p]roximate cause is a question of fact for

the jury where varying inferences are possible." (*Rose v Brown & Williamson Tobacco Corp.*, 53 AD3d 80, 106 [2008] [internal quotation marks omitted]). Violation of the Administrative Code or the Rules of the City of New York constitutes some evidence of negligence (*Cruz v City of New York*, 13 AD3d 254 [2004]). "As a general rule, the question of proximate cause is to be decided by the finder of fact, once negligence has been shown" (*Equitable Life Assur. Socy. of U.S. v Nico Constr. Co.*, 245 AD2d 194, 196 [1997]). In determining proximate cause where there is an intervening act, liability turns on whether the intervening act was a foreseeable consequence of the defendant's negligence, and, as such, is generally a question for the finder of fact (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Defendants contend that plaintiff's retrieval of his vehicle was an intervening act. Whether this was a "normal or foreseeable consequence of the situation created by the defendant[s'] negligence" (*id.*), however, is a factual issue, especially in light of the requirements of Administrative Code § 19-169.1(b). It may be foreseeable that a person like plaintiff whose vehicle has been towed, may attempt to retrieve the vehicle, in circumstances like plaintiff was in, particularly when that person is constrained to rely on information provided by the tow operator's driver that the tow yard was only two blocks away, and in the absence of a statutorily required

conspicuously posted sign giving, among other things, the address of the tow operator.

A directed verdict is only appropriate where there is no rational process that would lead the trier of fact to find for the nonmoving party (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 210 [2004]. In considering the motion "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 (1997). We do not find it unreasonable as a matter of law for plaintiff to brave the cold for what he thought was only a few blocks, especially since his specialized, unfoldable, motorized wheelchair and his physical condition made it extremely difficult for him to travel in anything other than a customized vehicle. Thus, it cannot be said as a matter of law that plaintiff's actions were so extraordinary as to break the causual nexus between defendants' actions and plaintiffs resultant injuries (*Derdiarian*, 51 NY2d at 315).

All concur except Catterson and McGuire, JJ. who dissent in a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting)

I disagree with the majority that Supreme Court erred in granting defendants' separate motions at the close of plaintiff's case for dismissal of the causes of action for trespass to chattel and negligence based on events that occurred on December 23, 1997. Accordingly, I respectfully dissent in part.

On December 23, 1997, plaintiff, his teenage brother and a six-year-old boy (whose legal guardian was plaintiff) drove to a shopping center owned by defendant Bruckner. Plaintiff was a wheelchair-bound quadriplegic who drove his specially-equipped, handicap accessible van to the shopping center. The van had neither handicap license plates (*see* Vehicle and Traffic Law § 404-a) nor a government-issued placard (*see* Vehicle and Traffic Law § 1203-a) allowing him to park the van in a parking space designated for vehicles with either of those credentials (*see* Vehicle and Traffic Law § 1203-b ["Parking spaces for the handicapped shall be those parking spaces according to a holder of a handicapped parking permit provided in accordance with section one thousand two hundred three-a or as provided in section four hundred four-a of this chapter"]). However, at approximately 5:55 p.m., plaintiff parked the van in a parking space designated for vehicles with those credentials.

After plaintiff and his companions exited the store at 6:45 p.m., they returned to the parking lot to find the van missing.

The group searched the lot for the van for approximately 15 minutes, but did not find it. At approximately 7:00 p.m., plaintiff, using his cell phone, called "911" to report the van stolen. The police dispatcher plaintiff spoke to told him to wait at the shopping center for police officers to arrive.

Shortly after plaintiff called "911," a woman in the parking lot told plaintiff that his van had been towed and pointed to a tow truck in the lot that the woman believed had towed the van. Plaintiff talked to the driver of the tow truck, who apparently worked for defendant Zerega Recovery Corp.; the driver told plaintiff that he had towed the van and he refused to bring the van back to the shopping center. The tow truck driver, however, indicated to plaintiff that Zerega's storage lot was two blocks from the shopping center. Neither plaintiff nor his brother saw any sign in the parking lot indicating the name, address and telephone number of the tow operator of the lot. Following this conversation with the tow truck driver, plaintiff, at approximately 7:25 p.m., called "911" to inform the police that the van had not been stolen but towed and that he wanted the police to assist him in getting his van back. Again, the police dispatcher told plaintiff to wait at the shopping center for police officers to arrive.

At approximately 7:40 p.m., plaintiff and his companions decided to leave the shopping center and travel on the sidewalks

to retrieve the van. Although the temperature was very cold, plaintiff did not have a jacket because he had left it in the van. The distance from the shopping center to Zerega's lot ultimately proved to be, in plaintiff's estimation, approximately 1.2 miles. The sidewalks were, in plaintiff's opinion, "messed up"; the sidewalks had many "bumps, cracks, holes" and other depressions that "[a]ffected [plaintiff] a lot[, caused him a] lot of pain ... [and made him] very uncomfortable." Plaintiff wheeled himself most of the way between the shopping center and Zerega's lot, but his brother assisted him part of the time. When they reached Zerega's lot, a Zerega employee returned the van to plaintiff without charge.

Plaintiff commenced this action against Bruckner and Zerega seeking damages under a number of causes of action. Plaintiff claimed that, as a result of his exposure to the elements, the rough trip over the city sidewalks and the physical labor he expended in wheeling himself, he sustained injuries to his hands, wrists and forearms and contracted bronchitis. Plaintiff also asserted claims against Zerega based on an incident that transpired at Zerega's lot the day after the van was towed, i.e., December 24. Supreme Court granted in part and denied in part defendants' separate motions for summary judgment dismissing the complaint, and we affirmed (20 AD3d 371 [2005]). As a result of the orders on the summary judgment motions, plaintiff's causes of

action for negligence and trespass to chattel remained. Supreme Court subsequently granted Zerega's motion in limine to preclude plaintiff from presenting evidence regarding his negligence cause of action against Zerega based on events that occurred on December 24, 1997. Plaintiff then proceeded to trial on his negligence claim based on the events of December 23, 1997 and his claim of trespass to chattel.

At trial, plaintiff's negligence cause of action was based on defendants' alleged failure to comply with Administrative Code of the City of New York § 19-169.1(b), which prohibits the owner or operator of a private parking lot from towing or causing to be towed any vehicle from the lot unless a conspicuously posted sign is present in the lot indicating, among other things, the name, address and phone number of the tow operator of the lot. Plaintiff posited two negligence theories based on that Code provision. The first theory is that defendants were not permitted to tow the van because there was no sign in Bruckner's lot complying with § 19-169.1(b) and, as a result of the unlawful towing of the van, plaintiff was "forced" to travel to Zerega's lot to retrieve it. The second theory is based on the absence of a sign in Bruckner's lot that, as required by § 19-169.1(b), stated the address of Zerega's lot and Zerega's telephone number. Because he did not have that information, plaintiff asserts that he was unable either to assess accurately how far Zerega's lot

was from the shopping center or to call Zerega and request the return of the van. The absence of the sign, according to plaintiff, "forced [him] to embark on an unknown journey to retrieve" the van, and, as a result of that journey, sustain personal injuries. Under his trespass to chattel cause of action, plaintiff claims that, based on the absence of a sign complying with § 19-169.1(b), his van was unlawfully towed, he was thus temporarily and unjustifiably deprived of possession of the van, and that the deprivation resulted in the personal injuries he sustained.

At the close of plaintiff's case, defendants separately moved pursuant to CPLR 4401 to dismiss the claims that went to trial. With respect to the negligence claims, defendants argued that plaintiff's decision to leave the shopping center to retrieve the van was, under the particular circumstances, unforeseeable and that the hazards that actually caused plaintiff's injuries were the bumps, cracks, holes and other depressions in the public sidewalks that he traversed from the shopping center to Zerega's lot. With respect to the trespass to chattel claim, defendants argued that it should be dismissed because the van was not damaged as a result of their conduct. Supreme Court granted the motions. Plaintiff appeals from the judgment that was subsequently entered dismissing the complaint.

A motion for judgment during trial pursuant to CPLR 4401 "is

appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). In my view, Supreme Court correctly granted defendants' motion pursuant to CPLR 4401 because, on the evidence adduced during plaintiff's case, there was no rational process by which the jury could have based a finding in favor of plaintiff.[1] Specifically, plaintiff failed to make a prima facie showing that his injuries were proximately caused by defendants' alleged tortious conduct.

> "The concept of proximate cause, or more appropriately legal cause, has proven to be an elusive one, incapable of being precisely defined to cover all situations. This is, in part, because the concept stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct. Depending upon the nature of the case, a variety of factors may be relevant in assessing legal cause. Given the unique nature of the inquiry in each case, it is for the finder of fact to determine legal cause, once the court has been satisfied that a prima facie case has been established. To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 314-315 [1980] [internal citations omitted]).

In ascertaining whether a defendant's conduct was a substantial

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[1]Contrary to plaintiff's suggestion, our prior affirmance of Supreme Court's order denying in part defendants' separate motions for summary judgment (20 AD3d 371) did not preclude the trial court from granting defendants' motions pursuant to CPLR 4401 (*see S.L. Benfica Transp., Inc. v Rainbow Media, Inc.*, 13 AD3d 348 [2002]).

factor in causing the events that produced a plaintiff's injuries, the court must consider (1) the aggregate number of factors involved that contributed to the injuries and the effect that each had in producing those injuries, (2) whether the defendant created a continuous force active up to the time of the injuries, or whether the situation was acted upon by other forces for which the defendant is not responsible, and (3) the lapse of time between the defendant's negligence and the point at which the plaintiff sustained the injuries (*Mack v Altmans Stage Light. Co.*, 98 AD2d 468, 470-471 [1984], citing Restatement (Second), Torts, § 433 and the comment to PJI 2:70).

The absence of a sign complying with § 19-169.1(b) left plaintiff at the shopping center without the name, address and telephone number of the tow operator, Zerega. But the absence of that sign caused no injuries to plaintiff. Plaintiff's injuries were caused by (1) the public sidewalks, which had many "bumps, cracks, holes" and other depressions, that plaintiff traveled over, (2) the physical labor plaintiff exerted in wheeling himself over those public sidewalks, and (3) the cold temperatures to which plaintiff was exposed from the time he exited the store until he entered his van after retrieving it from Zerega's lot. Clearly, defendants did not create a continuous force active up to the time plaintiff sustained his injuries; rather, other forces for which defendants were not

responsible caused plaintiff's injuries -- the condition of the public sidewalks, plaintiff's exertion of physical labor and the cold weather. Additionally, there was an appreciable lapse of time between defendants' alleged negligence in failing to have in the shopping center parking lot a sign complying with § 19-169.1(b) and plaintiff's exposure to the forces that directly caused his injuries. Plaintiff exited the store at approximately 6:45 p.m. and did not leave the shopping center until almost one hour later at 7:40 p.m. During that 55-minute period, plaintiff spoke to a police dispatcher twice and on both occasions the dispatcher told plaintiff to wait at the shopping center for police officers to arrive. At bottom, the "immediately effective cause of plaintiff's injuries" was not the alleged negligence of defendants (*Ventricelli v Kinney Sys. Rent A Car*, 45 NY2d 950, 952 [1978]); stated differently, defendants' alleged negligence was not a "direct cause" of plaintiff's injuries (*Martinez v Lazaroff*, 48 NY2d 819, 820 [1979]). Concomitantly, their alleged negligence was not, as a matter of law, a proximate cause of plaintiff's injuries. Indeed, a finding that defendants' alleged negligence was a proximate cause of plaintiff's injuries is inconsistent with the policy considerations underpinning the law of proximate cause "that serve to place manageable limits upon the liability that flows from negligent conduct" (*Derdiarian*, 51 NY2d at 314).

Contrary to plaintiff's assertion, defendants' alleged negligence in failing to have in the shopping center parking lot a sign that complied with § 19-169.1(b) did not "force" plaintiff to leave the shopping center to retrieve the van. The absence of the sign did nothing more than deprive plaintiff of information regarding the tow operator of the parking lot. Plaintiff left the shopping center on his own accord after being advised twice by the police dispatcher to wait at the shopping center for police officers to arrive and was subsequently exposed to forces over which defendants had no control.

Even assuming that a material issue of fact existed regarding whether defendants' alleged negligence was a substantial factor in causing plaintiff's injury, the negligence cause of action was properly dismissed. When the intervening act of a plaintiff contributes to his injuries, liability can only be imposed on the defendant if the plaintiff's act was a foreseeable consequence of the situation created by the defendant's alleged negligence (*Boltax v Joy Day Camp*, 67 NY2d 617, 619 [1986]; *see Kriz v Schum*, 75 NY2d 25, 36 [1989]). Here, plaintiff, after alerting the police of his predicament and being told to wait at the shopping center for police officers to arrive, left the safety of the shopping center to travel an uncertain distance in his wheelchair over public sidewalks on a cold winter's evening without a jacket. In my view, plaintiff's reaction to the

particular situation he was confronted with was unreasonable and thus was not a foreseeable consequence of defendants' failure to post a sign (*see Miecznikowski v Robida*, 278 AD2d 793 [2000], *lv denied* 96 NY2d 709 [2001]).

Instructive on this score is *Cheng v Metro. Transp. Auth.* (213 AD2d 581 [1995]). In *Cheng*, plaintiff's decedent was a passenger on a Long Island Rail Road train heading from New York City to the Town of Huntington. Due to a fire in the wheels of the last car of the train, the train stopped approximately one mile west of the Huntington station. While other passengers waiting for service to be restored remained on the train or outside of the train at the site where it stopped, 50 to 100 of the passengers, including plaintiff's decedent, walked on the tracks to the station. Plaintiff's decedent subsequently suffered a heart attack and died. Plaintiff commenced an action against, among others, the Metropolitan Transportation Authority (MTA), claiming that, as a result of the MTA's alleged negligence in operating and maintaining the train, the decedent walked to the station instead of being dropped off there by the train and, in the course of walking, suffered the heart attack due to the physical exertion of the walk. The Second Department affirmed a judgment of Supreme Court dismissing plaintiff's complaint as against the MTA following a nonjury trial. The Court stated that the decedent's heart attack and death were not reasonably

foreseeable consequences of the MTA's alleged negligence (213 AD2d at 582).

I appreciate that the question of proximate cause is generally a question of fact for a jury (*see Derdiarian*, 51 NY2d at 312), a point the majority repeatedly stresses. However, where, as here, "the evidence as to the cause of the accident which injured plaintiff is undisputed, the question as to whether any act or omission of the defendant was a proximate cause thereof is one for the court and not for the jury" (*Rivera v City of New York*, 11 NY2d 856, 857 [1962]; *see Sheehan v City of New York*, 40 NY2d 496, 502 [1976]). In my view, the evidence at trial regarding the cause of plaintiff's injuries was clear. Plaintiff's injuries were caused by: (1) the particular condition of the public sidewalks that plaintiff traveled over, (2) the physical labor plaintiff exerted in wheeling himself over those public sidewalks, and (3) the cold temperatures to which plaintiff was exposed because of his decision to retrieve the van from Zerega's lot and because he was not wearing a jacket. Thus, the question of whether defendants' alleged negligence was a proximate cause of plaintiff's injuries was properly resolved as a matter of law by Supreme Court.

With respect to the cause of action for trespass to chattel, defendants raise an interesting issue -- whether a plaintiff may recover damages for personal injuries under that cause of action.

To be sure, plaintiff does not seek to recover for property damage, i.e., damage to the van, under his cause of action for trespass to chattel; rather, plaintiff seeks to recover damages for personal injuries he sustained as a result of his trip from the shopping center to Zerega's lot to retrieve the van.

To recover damages under a cause of action for trespass to chattel, a plaintiff must demonstrate that he or she sustained an "actual injury" as a result of the defendant's tortious conduct (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]). Generally, the "actual injury" element is satisfied by evidence that the chattel was damaged as a result of the tortious conduct or that the plaintiff was deprived of the use of the chattel for some period of time. Section 218 of the Restatement (Second) of Torts states that

> "One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, ... (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest."

The comment to § 218(d) states that

> "If the actor has committed a trespass as defined in § 217 [,e.g., dispossessing another of a chattel], he is subject to liability to the person in possession of the chattel if he thereby causes bodily harm to the possessor ... It is immaterial that the harm so caused was neither intended by the actor nor the result of his negligent or reckless conduct while trespassing." (*See also*, 1 Dobbs, et al., 1 The Law of Torts, § 60, 124-125 [2001]).

At least with respect to the types of recoverable damages, the

PJI charge on trespass to chattel is consonant with the Restatement. That charge provides that "[a] person who, without justification or consent, intentionally physically interferes with the use and enjoyment of personal property in the possession of another commits a trespass and *is liable for any damage caused by that conduct*" (PJI 3:9 [emphasis added]). The comment to that charge notes that the "[d]amages recoverable are those proximately resulting from the trespass" (2 PJI2d 3:9, at 98 [2008]). In light of this authority and the absence of any indication that the law of this State is otherwise, it appears that damages for personal injuries may be recoverable under a cause of action for trespass to chattel.

I need not, however, decide this novel issue. Even assuming that damages for personal injuries are recoverable under a cause of action for trespass to chattel, for the reasons discussed above, plaintiff's injuries did not "proximately result[]" from defendants' alleged tortious conduct (2 PJI2d 3:9, at 98). Thus, dismissal of the trespass to chattel cause of action was appropriate.

I agree with the majority's tacit conclusion that Supreme Court erred in granting Zerega's pretrial motion in limine to preclude plaintiff from presenting evidence regarding his negligence cause of action against Zerega based on events that occurred on December 24, 1997, the day after the van was towed.

In deciding defendants' separate motions for summary judgment dismissing the complaint, Supreme Court denied those aspects of the motions that sought dismissal of the negligence claims, and we affirmed. Thus, plaintiff was entitled to present his case on that claim of negligence. By granting Zerega's pretrial motion in limine to preclude plaintiff from eliciting evidence on that claim, Supreme Court deprived plaintiff of that right.

Accordingly, I would modify the judgment to the extent of reinstating plaintiff's cause of action for negligence against Zerega premised on the December 24, 1997 incident, and otherwise affirm the judgment.

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

ENTERED: DECEMBER 18, 2008

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

4410 The People of the State of New York, Ind. 7063/01
Respondent,

-against-

Champagne Smith,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (John A.K. Bradley, J. at hearings; Ruth Pickholz, J. at jury trial and sentence), rendered March 15, 2006, convicting defendant of murder in the second degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 25 years to life, affirmed.

Since there was sufficient corroboration of defendant's guilt, including consciousness-of-guilt evidence and partially incriminating statements to the police, the exclusion of expert testimony on the reliability of eyewitness identification does not require reversal. Furthermore, there were highly reliable multiple eyewitness identifications. In *People v Abney* (___ AD3d ___, 867 NYS2d 1 [2008]), this Court determined that an eyewitness identification was reliable where the witness saw the perpetrator face to face in a well-lit stairwell and identified

him in an array of photos an hour after the incident, and again three weeks later in a lineup. Here, the reliability of the eyewitnesses is even greater; not only were there multiple eyewitnesses, but each witness observed the perpetrator at close range on a well-lit street. Moreover, one of the eyewitnesses recognized defendant from the neighborhood, and shortly after the shooting, all three eyewitnesses identified the perpetrator in a lineup. We note that defendant's reliance on *People v LeGrand* (8 NY3d 449 [2007]) is misplaced because unlike the instant case, the eyewitness identifications in *LeGrand* were made some *seven years* after the incident and only after one of the multiple eyewitnesses was able to identify the defendant in a lineup and photo array.

At trial, defendant attacked the credibility of two of the prosecution witnesses by asking the jury to draw an inference that they had received lenient treatment on unrelated cases in return for their testimony. The witnesses themselves, and prosecutors assigned to their cases, testified that there were no cooperation agreements and that the dispositions of the witness's cases had nothing to do with their status as witnesses. During deliberations, the jury asked for an explanation of "cooperation agreements." The court responded with an instruction stating, among other things, that "there was no evidence that any witness in this case testified under a formal cooperation agreement." As

requested by the jury, the court also directed a readback of all the testimony relevant to this issue. To the extent that defendant presently argues that the court should have told the jury it could infer that a cooperation agreement existed based on the evidence, that argument is unpreserved because he never requested such an instruction, 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 reject defendant's argument that the court's instruction, as given, warrants reversal. The instruction that there was no "formal" agreement was literally true but misleading, because it failed to address the possible inference that there was an implied or informal agreement, notwithstanding the witnesses' and the prosecutors' disclaimers. However, there was no prejudice to defendant, because the instruction did not eliminate from the jury's consideration the existence of an informal or implied agreement (*see e.g. People v Lilly*, 264 AD2d 684 [1999], *lv denied* 94 NY2d 825 [1999]), especially since the instruction was accompanied by readbacks of testimony on this very issue. In any event, any error in the instruction was harmless, because there was overwhelming evidence of defendant's guilt, and the testimony of the two witnesses at issue was only a portion of the extensive proof.

The trial court properly permitted a witness to testify while wearing a disguise consisting of a wig and false facial

hair. Initially, we conclude that there is no evidence that the disguise impaired the jury's ability to assess the witnesses' demeanor, and we accordingly reject defendant's Confrontation Clause argument. The People made a sufficient showing that the disguise was justified by the necessities of the case (*see People v Morales*, 246 AD2d 302 [1998], *lv denied* 91 NY2d 975 [1998]). There was a heightened need to protect the security of this witness; we note that on appeal defendant does not challenge the court's ruling permitting the witness to testify under a pseudonym, and in a closed courtroom. While defendant claims that the witness's disguise suggested to the jury that defendant was dangerous, he did not avail himself of the court's offer to deliver a curative instruction. While a jury's note indicated that it was aware the witness wore a disguise, any prejudice was alleviated by the court's supplemental instruction. In any event, any error was harmless in view of the overwhelming evidence of defendant's guilt.

The hearing court properly denied defendant's motion to suppress the lineup identification made by one of the witnesses, or to reopen the *Wade* hearing, based on a belated disclosure that the witness recognized two of the five fillers. This circumstance did not render the lineup unduly suggestive (*see*

People v Floyd, 173 AD2d 211 [1991], *lv denied* 78 NY2d 966 [1991]; *People v Norris*, 122 AD2d 82, 84 [1986], *lv denied* 68 NY2d 916 [1986]). A review of the lineup photograph indicates that all participants were sufficiently similar in appearance, and any differences in height were minimized by the fact that the participants were seated.

The prosecutor's summation comments that defendant now challenges as shifting the burden of proof were made in fair response to defense counsel's summation, and they did not violate any constitutional right of defendant. Furthermore, the court's curative instructions were sufficient to prevent any prejudice. Defendant's remaining challenges to the prosecutor's opening statement and summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The trial court's denial (11 Misc 3d 1087[A], 2006 NY Slip Op 50758[U], *9-*11) of defendant's CPL 330.30(2) motion to set aside the verdict on the ground of juror misconduct was proper.

All concur except Moskowitz, J. who concurs in a separate memorandum as follows:

MOSKOWITZ, J. (concurring)

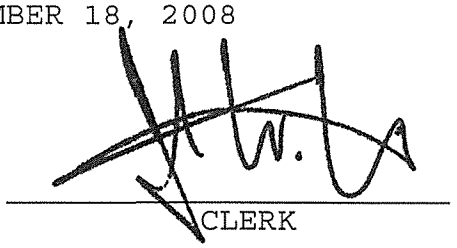
I concur with the result because there were multiple eyewitness identifications and other corroborating evidence in this case. However, I write separately because I disagree with the majority's legal analysis. As the majority readily recognizes, this case involved "highly reliable multiple eyewitness identifications" and additional evidence such as "partially incriminating statements to the police." Accordingly, the majority affirmed the conviction. However, in support of upholding the conviction, the majority cited to this Court's recent decision in *People v Abney* (__AD3d __, 867 NYS2d 1 [2008]), a case where I dissented, and which is not applicable to this case. *Abney* involved a single eyewitness who was the victim of a violent robbery in the subway. The victim, who was only 13, picked her assailant out of a lineup a full three weeks after the crime. When the trial court rejected expert testimony on eyewitness identification, there was no corroborating evidence before it. Here, by contrast, there was extensive corroborating evidence. Therefore, the issue in *Abney* - namely, whether to allow expert testimony concerning the accuracy of eyewitness identification in a single-eyewitness case (and in my view with no other corroborating evidence)- is simply not an issue in this case.

The Court of Appeals has held that a court should consider

whether to allow expert testimony about eyewitness reliability "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime" (*People v LeGrand*, 8 NY3d 449, 452 [2007]). This case is more like *People v Tocci* (52 AD3d 541 [2008]), in which the court denied the defendant's request for an expert witness where there were 11 eyewitnesses and other corroborating evidence (*see also People v Miller*, 8 AD3d 176 [2004], *mod on other grounds*, 6 NY3d 295 [2006], where one of two identifying witnesses had known the defendant for many years and *People v Austin*, 38 AD3d 1246 [2007], *lv denied* 8 NY3d 981 [2007], where there were four identifying witnesses). Indeed, as the *Tocci* court's "*cf.*" cite to *LeGrand* demonstrates (52 AD3d at 542), that court did not consider the necessity of expert testimony to be an issue. Nor is it here. However, it was in *Abney*. Therefore, I concur, but disagree with the majority's reliance on *Abney*, because the situation in that case, with its analysis of *LeGrand*, is simply not the same as in this one.

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

ENTERED: DECEMBER 18, 2008



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Andrias, J.P., Saxe, Gonzalez, Catterson, Acosta, JJ.

4487 In re Anita Vazquez, Index 113892/06
Petitioner,

-against-

New York City Housing Authority
(Robert Fulton Houses),
Respondent.

The Dandridge Law Firm, New York (Sherilyn Dandridge of counsel), for petitioner.

Ricardo Elias Morales, New York (Nadja Schulz of counsel), for respondent.

Determination of respondent Housing Authority, dated June 21, 2006, which, terminated petitioner's public housing tenancy on the ground of nondesirability, unanimously modified, on the law, the penalty of termination vacated, the matter remanded to respondent for imposition of a lesser penalty, and this proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of Supreme Court, New York County [Shirley Werner Kornreich, J.], entered June 5, 2007), otherwise disposed of by confirming the remainder of the determination, without costs.

Respondent initially served petitioner with a notice charging her with chronic rent delinquency, which was later amended to include non-desirability based upon information in a September 10, 2004 Daily News article that petitioner had been charged with unauthorized use of an ATM card. The decision to

terminate petitioner's tenancy was based on her guilty plea to this felony offense (grand larceny in the third degree). The Hearing Officer determined that petitioner had cured her rent delinquency problems at the time of the decision.

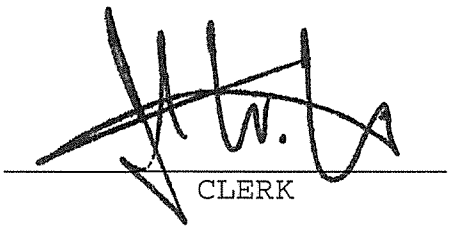
Despite substantial evidence of petitioner's guilty plea, the penalty imposed by respondent was disproportionate to the offense. The procedures for terminating a tenancy permit but do not require termination upon a finding of nondesirability. The tenant may be given probation, where there is "reason to believe that the conduct or condition which led to the charge of non-desirability may not recur or may have been cured, or that the tenant is taking or is prepared to take steps to correct or cure such conduct or condition."

Apart from being current in all rent due and having a source of income from SSI and public assistance, petitioner has cured the conditions that led to the determination of nondesirability: she has paid full restitution to the complaining witness, and has complied with all the conditions of her probation. There are also other mitigating factors in favor of probation rather than termination of petitioner's tenancy: she has no prior criminal record, and her criminal conduct appears to have been an isolated aberration (*see Matter of Peoples v New York City Hous. Auth.*, 281 AD2d 259 [2001]). Both petitioner and her uncle, whom she lives with and cares for, suffer from disabilities. Petitioner

is further afflicted with depression and stress, (*see Matter of Milton v Christian,* 99 AD2d 984 [1984]) which may in part be caused by her son's current deployment to Iraq. Petitioner has a strong family support system as evidenced by her daughter quitting college to work in order to aid petitioner in paying restitution as part of her criminal case. Termination of petitioner's tenancy under these circumstances is shocking to the judicial conscience and to one's sense of fairness (*Matter of Peoples,* 281 AD2d 259; *Matter of Spand v Franco,* 242 AD2d 210 [1997], *lv denied* 92 NY2d 802 [1998]).

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

ENTERED: DECEMBER 18, 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 18, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Luis A. Gonzalez
James M. Catterson
James M. McGuire
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 2797/02
Respondent,

-against- 4865.1

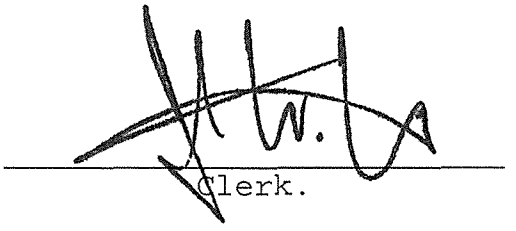
Ronald Jarvis,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered on or about January 7, 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.

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4866.1 The People of the State of New York, Respondent, SCI. 3586/07

-against-

Lisa Walton,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Brenda Soloff, J. at plea; A. Kirke Bartley, J. at sentence), rendered on or about September 11, 2007, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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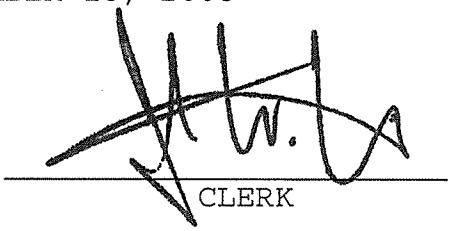
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 18, 2008



CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4867.1 JP Morgan Chase Bank, N.A., etc., Index 20169/06
Plaintiff-Appellant,

-against-

Anna Bruno, etc., et al.,
Defendants,

Citibank, N.A.,
Defendant-Respondent.

Sanders, Gutman & Brodie, P.C., Brooklyn (D. Michael Roberts of counsel), for appellant.

Mound Cotton Wollan & Greengrass, New York (Sara F. Lieberman of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered September 28, 2007, which granted defendant Citibank's motion to vacate the judgment of foreclosure and sale entered against it on default and for leave to interpose an answer, unanimously reversed, on the law, with costs, and the motion to vacate denied.

On August 25, 2006, plaintiff commenced this action to foreclose a mortgage given to it by defendant Anna Bruno. The action was also commenced against Anna Bruno's husband, Joseph Bruno. While the mortgage listed only Anna Bruno as the mortgagor, plaintiff asserted causes of action for reformation to add Joseph Bruno as a mortgagor and for an equitable mortgage against him. Citibank, which held a money judgment against Joseph Bruno, was also named as a defendant. Plaintiff

personally served Citibank's designated agent (*see* CPLR 318) on August 30, 2006; Citibank's deadline to answer was September 19, 2006 (*see* CPLR 320[a]). After Citibank failed to answer, plaintiff obtained summary judgment on its complaint, and a judgment of foreclosure and sale, dated April 30, 2007, was entered in the Bronx County Clerk's Office on May 7, 2007.

By an order to show cause dated May 24, 2007, Citibank moved under CPLR 5015 to vacate the judgment of foreclosure and sale. In support of the motion, Citibank submitted the affidavit of one of its assistant vice presidents, who averred Citibank "only recently learned of this action through the efforts of Day Pitney[, i.e., Citibank's counsel], who advised Citibank of the action after an examination of court websites." The vice president also averred that Day Pitney could not represent Citibank in this action because of a conflict of interest and that another firm Citibank sought to retain in this matter also had a conflict of interest that prevented the firm from representing Citibank. According to the vice president, on or about April 20, 2007, Citibank retained a firm to represent it in this case. Citibank also submitted the affirmation of its counsel, who asserted that because only Anna Bruno was listed as a mortgagor, plaintiff "may enforce its interest, but only as to [her] interest in the Premises. Thus, [plaintiff's] lien does not encumber Joseph Bruno's rights to the Premises. [Plaintiff]

is now improperly seeking to reform the mortgage to add Joseph Bruno as a mortgagor, which was clearly intended to be given only by Anna Bruno. [Plaintiff] is not entitled to an equitable lien on the entire premises because its rights were fixed at the time the mortgage was executed and cannot be enlarged to give [plaintiff] more rights then it is entitled to." Plaintiff opposed the motion, arguing that Citibank failed to demonstrate both a reasonable excuse for its default and a potentially meritorious defense. Supreme Court granted the motion without discussion or analysis.

To vacate a judgment entered on a defendant's failure to answer the action, the defendant must establish both a reasonable excuse for the default and a potentially meritorious defense (*see e.g. Stillman v City of New York*, 39 AD3d 301 [2007]). Here, Citibank established neither. Plaintiff submitted an affidavit of service that stated that Citibank's designated agent was personally served with the summons and complaint on August 30, 2006. Citibank's vice president stated that, "[w]hile there appears to be an affidavit of service, the persons responsible for this matter at Citibank only recently learned of this action through the efforts of [its former counsel], who advised Citibank of the action after an examination of court websites." This statement does not provide any explanation for Citibank's default, let alone a reasonable explanation. Moreover, no

affidavit was submitted by Citibank's designated agent who was personally served, "the persons responsible for this matter at Citibank," or Citibank's former counsel. While Citibank may have offered a reasonable excuse for its delay between February 2007 and May 2007 in moving to vacate its default due to the problems it apparently encountered in retaining counsel, its failure to offer any excuse, let alone a reasonable one, for its default in timely answering the action is fatal to its claim that the default is excusable (*see generally Okun v Tanners*, 11 NY3d 762 [2008]).

Additionally, Citibank failed to offer a potentially meritorious defense. Citibank's perfunctory assertions that plaintiff cannot prevail under its cause of action for either reformation of the mortgage or an equitable mortgage against Joseph Bruno do not demonstrate any potentially meritorious defense to the action (*see CIT Group/Commercial Services, Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302 [2006]; *Fekete v Camp Skwere*, 16 AD3d 544, 545 [2005]).

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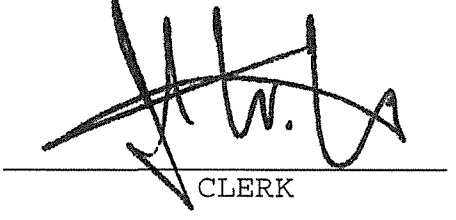


CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4868.1 Russell D. Palmer, Claimant-Appellant, Claim 113249

-against-

The State of New York, Defendant-Respondent.

Russell D. Palmer, appellant pro se.

Andrew M. Cuomo, Attorney General, Albany (Rajit S. Dosanjh of counsel), for respondent.

Order of the Court of Claims of the State of New York (S. Michael Nadel, J.), entered March 17, 2008, which granted defendant's motion to dismiss the claim for failure to state a cause of action, unanimously affirmed, without costs.

Claimant pro se alleges that the untimely sealing of his criminal case file by the Clerk of the Bronx Criminal Court pursuant to CPL 160.50 prevented him from timely filing his malicious prosecution claim pursuant to 42 USC § 1983.

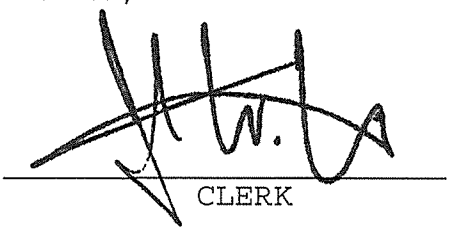
A cause of action under 42 USC § 1983 accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his action" (*Pearl v City of Long Beach*, 296 F3d 76, 80 [2002], *cert denied* 538 US 922 [2003] [internal quotation marks and citations omitted]). Thus, the statute of limitations on claimant's federal malicious prosecution claim began to run "when the underlying criminal action [was] conclusively terminated"

(*Murphy v Lynn*, 53 F3d 547, 548 [1995], *cert denied* 522 US 1115 [1998]), i.e., where "an order dismissing the entire accusatory instrument against [him] ... was entered" (CPL 160.50[3][a]). For purposes of determining when the underlying action was terminated, the sealing of the record is irrelevant (*see* CPL 160.50[1]). Claimant's federal claim was dismissed as time-barred because it was brought more than three years after the underlying criminal charges against him were dismissed (CPLR 214[5]; *see Pearl*, 296 F3d at 79).

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

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

ENTERED: DECEMBER 18, 2008



CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4869.1 In re Kaylina Desire Shonte J.,

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

Jessica Isabella T.,
Respondent-Appellant,

Children's Aid Society,
Petitioner-Respondent.

Lisa H. Blitman, New York, for appellant.

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

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

Order, Family Court, New York County (Jody Adams, J.), entered on or about February 15, 2007, which terminated respondent's parental rights and committed the subject child's guardianship and custody to the petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, and the appeal from the underlying fact-finding determination of permanent neglect dismissed, without costs.

There can be no review of the finding of permanent neglect, made upon respondent's default at the fact-finding hearing (*Matter of Baby Girl F.*, 17 AD3d 224 [2005]). Termination of parental rights is amply supported by the record, which reveals diligent efforts by the agency to encourage the parental

relationship and provide numerous services, despite respondent's noncooperation and indifference (*Matter of Byron Christopher Malik J.*, 309 AD2d 669 [2003]). Respondent failed to plan for the future or maintain visitation (Social Services Law § 384-b[7][a]), and was thus unable to assume responsibility for a child who is now thriving in her pre-adoptive environment.

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

ENTERED: DECEMBER 18, 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 18, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Luis A. Gonzalez
James M. Catterson
James M. McGuire
Rolando T. Acosta, Justices.

The People of the State of New York, SCI. 1519/07
Respondent,

-against- 4870

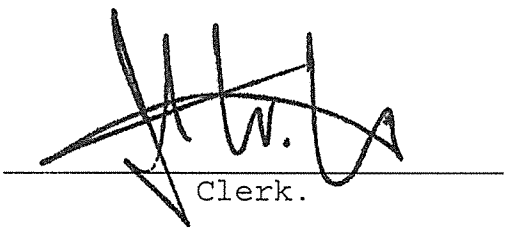
Claudell Pena, also known as
Claudell Espinal,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about April 26, 2007,

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

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

ENTER:



Clerk.

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

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4872.1 Joann Guerriero, Index 13812/05
Plaintiff-Appellant,

-against-

Ferdinand Jand, et al.,
Defendants-Respondents.

Eppinger, Rengold & Korder, Larchmont (Mitchell L. Korder of counsel), for appellant.

Keane & Beane, P.C., White Plains (Eric L. Gordon of counsel), for Jands', respondents.

Gannon Rosenfarb & Moskowitz, New York (Nicholas Gisonda of counsel), for Tom Pierce Management, LLC., respondent.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered on or about October 12, 2007, which, insofar as appealed from as limited by the briefs, in an action for personal injuries sustained as the result of a trip and fall on an interior staircase, granted the Jand defendants' motion for summary judgment dismissing the complaint as against them, and granted summary judgment dismissing the complaint as against defendant Tom Pierce Management (TPM) pursuant to CPLR 3212(b), unanimously affirmed, without costs.

Plaintiff fell on a marble step that contained a hairline crack and allegedly a small v-shaped chip, and her deposition testimony showed that the accident occurred in a lighted area that she traveled several times a day. The Jand defendants established a prima facie entitlement to summary judgment since

the alleged defect, which was six inches long and 1/64th of an inch wide, was trivial, did not constitute a trap or nuisance, and was not actionable as a matter of law *(see Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Martin v Lafayette Morrison Hous. Corp.*, 31 AD3d 300 [2006]). Plaintiff failed to raise a triable issue of fact in opposition.

Although TPM's motion for summary judgment was untimely, in light of the evidence showing the trivial nature of the defect, the court properly granted summary judgment to TPM pursuant to CPLR 3212(b) *(see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [2006]).

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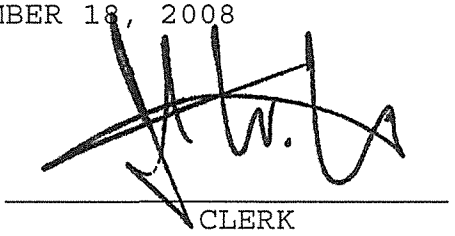

CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.,

4873.1 Thomasina Zummo, Index 14337/06
Plaintiff-Appellant,

-against-

Everett H. Holmes, et al.,
Defendants-Respondents.

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

White & McSpedon, P.C., New York (Tracey Lyn Jarzombek of counsel), for respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered September 20, 2007, which, in an action for personal injuries arising out of a motor vehicle accident, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, the motion granted and the matter remanded for further proceedings.

Plaintiff made a prima facie showing of entitlement to summary judgment on the issue of liability. Plaintiff was driving in the right lane when defendant Holmes, who was driving a tractor trailer in the lane to plaintiff's left, attempted to merge into plaintiff's lane when his lane ended, at which point the tractor trailer struck plaintiff's vehicle (*see Williams v New York City Tr. Auth.*, 37 AD3d 827 [2007]; Vehicle and Traffic Law § 1128[a]). In opposition, defendants failed raise a triable

issue of fact as to comparative negligence on the part of plaintiff (*see Neryaev v Solon*, 6 AD3d 510 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
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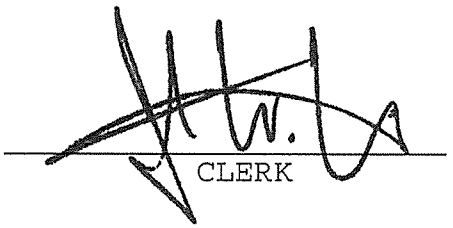

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4874.1 The People of the State of New York, Ind. 894/06
Respondent,

-against-

Jose Nunez,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Micki A. Scherer, J.), rendered on or about July 18, 2006, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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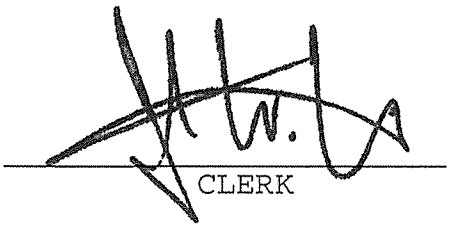

CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4875.1-
4875.1A Maria DeCarvalhosa,
Plaintiff-Respondent,

Index 106052/03

-against-

Renata Adler,
Defendant-Appellant.

Kathy L. McFarland, Woodstock, for appellant.

Howard Stern, White Plains, for respondent.

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered April 24, 2007, as amended December 21, 2007, awarding plaintiff the principal sum of $85,000, and bringing up for review a posttrial order, same court and Justice, entered April 13, 2007, which, inter alia, found for plaintiff on her claim for unpaid rent and dismissed defendant's counterclaims, and order, same court and Justice, entered August 3, 2007, which granted defendant's motion to vacate the April 13, 2007 order on the ground of newly discovered evidence only to the extent of correcting an error in calculation and reducing the amount of rent owed from $90,000 to $85,000, unanimously affirmed, with costs.

The court's decision in favor of plaintiff on her claim for rent arrears was based on a fair interpretation of the evidence presented at trial and rested in large measure on credibility

determinations (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Greenfield v Philles Records*, 288 AD2d 59 [2001]).

Whether defendant was bankrupt during the 16 months for which she claimed to have been paying $5,000 a month in rent was relevant on the issue of unpaid rent, and the probative value of this evidence was not substantially outweighed by the risk of prejudice. To the extent the court believed that defendant's bankruptcy petition was an "admission" that she owed rent, this was harmless error, since the petition was not the basis for the court's finding that defendant had not paid rent. Indeed, the evidence was overwhelming that defendant, who holds a J.D. degree, did not make monthly rent payments by placing envelopes containing $5,000 in cash under a neighbor's door. Apart from the inherent implausibility of her testimony in this regard, defendant was confronted at trial with her own deposition testimony in which she stated that she did not recall paying the rent to that neighbor. Defendant was confronted as well with her own letter to plaintiff stating that she would be depositing rent into an escrow account. By her own admission defendant did not do so.

The record demonstrates that the primary cause of defendant's failure to discover the new evidence on which she based her posttrial motion was her own lack of due diligence, not plaintiff's misconduct (*see* CPLR 5015[a][2]). Moreover, in light

of the absence of documentary evidence of the payment of rent, defendant's deposition testimony contradicting the substance of the new evidence, and the court's assessment of her credibility, the new evidence would not have changed the result of the trial.

The court's dismissal of defendant's counterclaim based on plaintiff's failure to file plans for alterations to the premises was correct. Even if the failure to file plans constituted a certificate of occupancy violation under the Multiple Dwelling Law, the evidence showed that the violation had been cured. The court also correctly dismissed defendant's counterclaims for partial constructive eviction and breach of the implied warranty of habitability. Its finding that the various defects of which defendant complained were too minor to substantially and materially deprive her of the beneficial use and enjoyment of the upper portion of the premises was based on a fair interpretation of the evidence and rested largely on credibility determinations.

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

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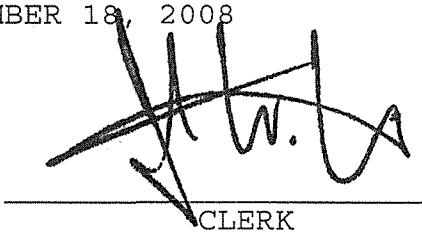

CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4876.1-
4876.1A Kristin Polidori,
Plaintiff-Appellant,

Ind. 113960/05

-against-

Societe Generale Group, et al.,
Defendants,

SG Americas Securities, LLC,
Defendant-Respondent.

Bernadette Panzella, New York, for appellant.

Dreier LLP, New York (Andrew J. Bernstein of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered November 23, 2007, which, insofar as appealed from as limited by the briefs, confirmed the order of the Special Referee to supervise disclosure imposing costs against plaintiff's attorney pursuant to 22 NYCRR part 130, unanimously affirmed, with costs. Order, same court and Justice, entered May 27, 2008, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to remove the Special Referee, unanimously affirmed, with costs.

Conduct of plaintiff's attorney warranting an award of costs includes, inter alia, her failure to appear at one court conference and her lateness at another, and obstreperous conduct at and premature termination of plaintiff's deposition (*see*

O'Neill v Ho, 28 AD3d 626 [2006]; *cf. Figdor v City of New York*, 33 AD3d 560 [2006]). The notice requirements of part 130 were satisfied and a formal hearing was not required (*see RCN Constr. Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 777 [2006]; *Citibank [S.D.] v Ousterman*, 279 AD2d 886, 887 [2001]). The Special Referee's occasional expressions of frustration with counsel's conduct do not show bias. We have considered plaintiff's other arguments and find them without merit.

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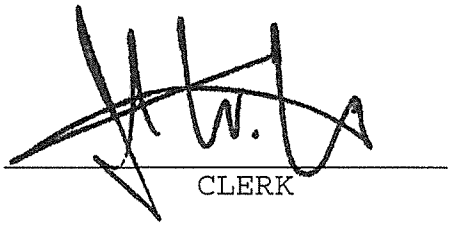

CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4877.1 The People of the State of New York, Ind. 5928/06
Respondent,

-against-

Shantae Splunge,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered July 2, 2007, convicting defendant, upon her plea of guilty, of two counts of robbery in the first degree, and sentencing her to concurrent terms of 9 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]), in view of the violence and other aggravating circumstances involved in the two robberies of which defendant was convicted. We also perceive no basis for reducing the sentence.

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

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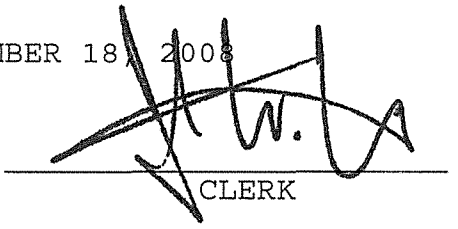


CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4878.1 In re Paul Ruine, Index 403466/06
Petitioner-Appellant,

-against-

Sarah Hines, Assistant District Attorney
of New York County, etc.,
Respondent,

Jonathan Davis, Record Access Officer, etc.,
Respondent-Respondent.

Paul Ruine, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for Jonathan Davis, respondent.

Judgment, Supreme Court, New York County (Paul Feinman, J.), entered on or about July 6, 2007, which denied and dismissed the petition brought pursuant to CPLR article 78 to compel disclosure of documents pursuant to the Freedom of Information Law, unanimously affirmed, without costs.

Petitioner commenced the instant proceeding by order to show cause and petition. The order to show cause directed, among other things, that personal service be made by ordinary first class mail upon respondent Police Department records access officer and the Corporation Counsel. However, petitioner did not effect service as directed in that he failed to serve the order and petition on the Corporation Counsel and sent incomplete papers to the Police Department. The mode of service provided for in an order to show cause is jurisdictional and must be

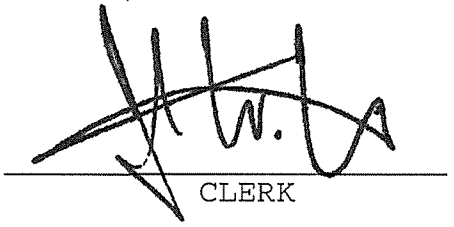
literally followed (*see* CPLR 304, 403[d]; *European Am. Bank v Legum*, 248 AD2d 206 [1998]). Petitioner's pro se status is not an excuse for noncompliance (*see Goldmark v Keystone & Grading Corp*, 226 AD2d 143 [1996]), and his incarceration did not prevent him from complying with the mandated service requirements (*see* Matter of Thomas v Selsky, 34 AD3d 904 [2006]). Finally, we conclude that petitioner has abandoned his appeal with respect to respondent Hines.

M-5354 - Ruine v Hines, et al.,

Motion seeking poor person relief granted to the extent of permitting the appeal to be heard on the original record and reproduced appellant's briefs previously filed.

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

ENTERED: DECEMBER 18, 2008



CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4879.1 Lily Salm, Index 111294/05
Plaintiff-Appellant,

-against-

Mark S. Moses, D.D.S.,
Defendant-Respondent.

Greenwald Law Offices, Chester (Gary Greenwald of counsel), for appellant.

Kolenovsky, Spiegel & Caputo, LLP, New York (Kelly A. Caputo of counsel), for respondent.

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered October 1, 2007, after a jury verdict in defendant's favor, unanimously affirmed, without costs.

The trial court properly limited the scope of cross-examination of defendant's expert by precluding inquiry into the fact that he and defendant were insureds and shareholders in the same dental malpractice insurance company. The court acted within its discretionary authority (*see Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980]), and "achieved a fair balance between the plaintiff's right to attack the expert witness's credibility and the prejudicial effect of introducing the fact of [the

defendant]'s insurance coverage" (*Cerasuoli v Brevetti*, 166 AD2d 403, 404 [1990]).

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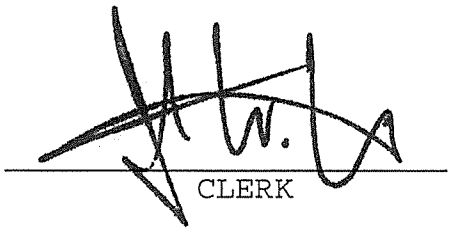

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Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4880.1 The People of the State of New York, Respondent, Ind. 4391/06

-against-

Robert Hickman, etc., Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

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

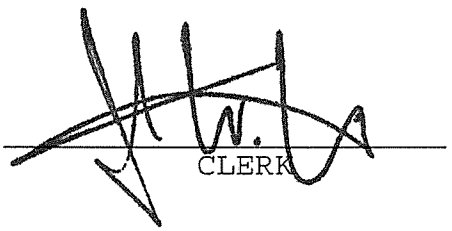
Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered October 22, 2007, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of 4 years, unanimously affirmed.

At the first of two plea proceedings in this case, defendant made a valid waiver of his right to appeal. Since the second proceeding expressly incorporated by reference the allocution conducted at the first proceeding, defendant's waiver of his right to appeal is enforceable (*see People v Morrison*, 48 AD3d 288 [2008], *lv denied* 10 NY3d 867 [2008]; *People v Givens*, 36 AD3d 454 [2007], *lv denied* 8 NY3d 922 [2007]). In any event, regardless of whether defendant has validly waived his right to appeal, we reject both of the issues he raises. The imposition of mandatory surcharges and fees by way of court documents, but

without mention in the court's oral pronouncement of sentence, was lawful (*see People v Harris*, 51 AD3d 523 [2008], *lv denied* 10 NY3d 935 [2008]), and we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 18, 2008



Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4881.1 The People of the State of New York, Respondent, Ind. 1519/07

-against-

Raymond Medina, Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered December 18, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 1½ years, unanimously affirmed.

The imposition of mandatory surcharges and fees by way of court documents, but without mention in the court's oral pronouncement of sentence, was lawful (*see People v Harris*, 51 AD3d 523 [2008], *lv denied* 10 NY3d 935 [2008]). Moreover, in this case the court actually imposed these assessments at sentencing, but merely omitted the dollar amounts.

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

ENTERED: DECEMBER 18, 2008

CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4883N.1 Joshua Evan Margolis, Index 100232/07
Plaintiff-Appellant,

-against-

United Parcel Service, Inc., et al.,
Defendants-Respondents.

Sonin & Genis, Bronx (Robert J. Genis of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 15, 2007, which granted defendants' motion to change venue to Nassau County, unanimously reversed, on the law, without costs, and the motion denied.

In this personal injury action involving a vehicular accident in Nassau County, plaintiff properly placed venue in New York County based on the location in that county of the corporate defendant's principal office (*see* CPLR 503[c]). In seeking a discretionary change of venue pursuant to CPLR 510(3), defendants failed to show that material nonparty witnesses would be inconvenienced by testifying in New York County instead of Nassau (*see Martinez v Dutchess Landaq, Inc.*, 301 AD2d 424 [2003]). There was no evidence presented that any witness would be inconvenienced by testifying in New York County. Furthermore, one witness cited by defendants was defendant Ciaccio, who is both a party and an employee of the corporate defendant, and

another was an employee of the corporate defendant who was not a witness to the accident. Defendants did not identify the remaining police and medical witnesses, did not explain the materiality of their testimony, and did not set forth their willingness to testify or whether they had even been contacted.

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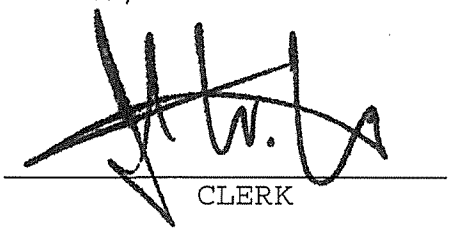
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 18, 2008



CLERK

Mazzarelli, J.P., Gonzalez, Catterson, McGuire, Acosta, JJ.

4884N.1 CSP Technologies, Inc., et al., Index 117053/06
Petitioners-Appellants,

-against-

Ihab M. Hekal,
Respondent-Respondent.

Holland & Knight LLP, New York (David D. Howe of counsel), for appellants.

The Law Offices of Tedd S. Levine, LLC, Garden City (Tedd S. Levine of counsel), for respondent.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered January 11, 2008, which granted the petition to vacate a prior order of the arbitrators directing exchange of information, only to the extent of granting respondent's cross motion for discovery to be conducted under the supervision of the arbitrators, unanimously reversed, on the law, with costs, the petition and the cross motion denied, and this proceeding dismissed.

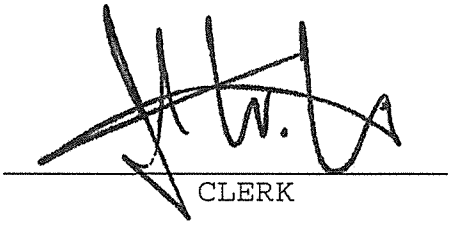
The court lacked authority to entertain the petition to review an intermediary ruling of the arbitrators on a procedural matter (*see Mobil Oil Indonesia v Asamera Oil [Indonesia]*, 43 NY2d 276 [1977]; *Avon Prods. v Solow*, 150 AD2d 236, 239-240 [1989]). Such intervention is not authorized by the CPLR, and is proscribed as a matter of policy. The relief "would disjoint and unduly delay the proceedings, thereby thwarting the very purpose

of" arbitration (*Mobil Oil Indonesia*, 43 NY2d at 282).

With respect to the cross motion, the court erroneously determined that the arbitrators lacked authority to direct the parties to produce documents. Although the CPLR does not itself authorize arbitrators "to direct the parties to engage in disclosure proceedings" (*De Sapio v Kohlmeyer*, 35 NY2d 402, 406 [1974]), no statute or policy prevents parties from charting their own procedural course in arbitration by voluntarily agreeing to abide by the rules of the arbitral forum, including, as in this case, rules permitting the arbitrators to direct the exchange of information (*see* Commercial Arbitration Rule R-21(a)(I) of the American Arbitration Association). The strong policy of this State requires the courts to enforce arbitration agreements as written, and to leave to the arbitrators the interpretation and application of the procedural rules of the arbitral forum (*Matter of Sobel [Charles Schwab & Co., Inc.]*, 37 AD3d 877, 878 [2007]; *Matter of Faberge, Inc. [Felsway Corp.]*, 149 AD2d 369, 370 [1989], *lv denied* 74 NY2d 610 [1989]).

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

ENTERED: DECEMBER 18, 2008



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DEC 18 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
John T. Buckley
James M. Catterson, JJ.

3909
Index 150010/06

Edward A. Kaminsky,
Plaintiff-Appellant,

-against-

Herrick, Feinstein LLP, et al.,
Defendants-Respondents.

Plaintiff appeals from a judgment of the Supreme Court, New York County (Louis B. York, J.), entered January 17, 2008, granting defendants' motion for summary judgment dismissing plaintiff's first cause of action for legal malpractice and dismissing the complaint, and bringing up for review an order, same court and Justice, entered February 27, 2007, which granted defendants' pre-answer motion for dismissal of plaintiff's second cause of action for damages under Judiciary Law § 387 and third cause of action for rescission.

Brian J. Isaac, New York, and Schwartz & Ponterio, PLLC, New York (Matthew F. Schwartz of counsel), for appellant.

Herrick, Feinstein LLP, New York (Susan T. Dwyer and Jennifer Smith Finnegan of counsel), for respondents.

TOM, J.P.

In this action for legal malpractice, plaintiff claims that his attorneys' failure to offer sufficient expert testimony concerning the valuation of his damages resulted in an inadequate arbitration award. However, plaintiff fails to offer any viable legal basis upon which the arbitration panel could have reached a substantially different result. Thus, plaintiff cannot establish that the outcome of the proceedings would have been more favorable but for defendants' asserted failure to present evidence, and the complaint must be dismissed.

This dispute has its origins in two identical verbal agreements entered into by nonparty Spencer Segura with plaintiff and James Agate, under which each was to receive 5% of Segura's $2 million interest in NextLevel Communications, a telecommunications company, for an investment of $100,000. Segura held his stake in NextLevel by virtue of his 20% interest in Spencer Trask Investors, LLC which, according to the complaint, is a special purpose entity formed to purchase an ownership interest in NextLevel. The shares were ultimately distributed in an initial public offering (IPO) consisting of NextLevel stock and accompanying warrants.

Plaintiff discussed his proposed investment in NextLevel with Segura on a number of occasions in the year and a half since

their verbal IPO agreement was made. Plaintiff asserts that Segura reneged on the deal in mid-October 1999, refusing to accept plaintiff's tender of a $100,000 check. Instead, Segura proposed that plaintiff accept a cash settlement together with the right to purchase an unspecified amount of shares at the IPO price in exchange for his consent to rescind their agreement.

Plaintiff declined this and other proposed settlement offers and instituted an action on the verbal agreement. He retained defendant Herrick, Feinstein LLP, a firm that had formerly employed him as an associate, to represent him. The firm commenced an action in Supreme Court in early November 1999 seeking $5 million in damages. It named Segura and Spencer Trask Securities as defendants and stated causes of action for breach of contract and specific performance. The NextLevel IPO took place on November 10, 1999. The complaint alleges, "Shortly after the IPO, plaintiff's investment in Next Level would have been worth tens of millions of dollars. Segura offered to settle the case for approximately $3.25 million and plaintiff rejected the offer."

Several months later, it became clear that Segura had also reneged on his agreement to sell 5% of Investor's stake in NextLevel to James Agate, with the result that Agate sought to join in plaintiff's lawsuit. Herrick, Feinstein, LLP filed a

similar complaint on behalf of Agate in late February 2000, and Supreme Court later consolidated the actions. In late 2000, confronted with a motion by Segura to compel arbitration under the terms of the brokerage agreements signed by plaintiff and Agate as clients of Spencer Trask Securities, plaintiff consented to have the matter heard by an NASD arbitration panel.

The arbitrators conducted extensive hearings, amassing a record of some 4,839 pages. Because Segura did not dispute the existence of his verbal agreements with Agate and plaintiff, the arbitration primarily concerned the determination of damages sustained as a result of the prospective investors' loss of the opportunity to participate in the NextLevel IPO. Segura took the position that damages should be assessed as of the time of breach, that is, on a pre-IPO basis; plaintiff sought damages based on the price at which NextLevel shares actually traded, that is, on a post-IPO basis. Thus, on plaintiff's direct case, his expert calculated damages based on the market price of NextLevel stock on two alternative dates--February 9 and May 10, 2000. After Segura presented his own expert, who testified that plaintiff would not have been able to liquidate his NextLevel stock and warrants on those dates due to various restrictions barring their sale, plaintiff sought to present a rebuttal witness to testify concerning the use of option strategies to

overcome the transfer restrictions. The arbitration panel refused to hear from the proposed witness, noting that plaintiff had the opportunity to present such evidence on his case-in-chief and during cross-examination of Segura's expert witness. In August 2003, the panel issued an award in favor of plaintiff and Agate, directing Segura to pay $294,000 in compensatory damages and $50,000 in punitive damages to each.

Plaintiff and Agate, unhappy with the amount assessed as damages, commenced a special proceeding challenging the award on the ground of arbitral misconduct (CPLR 7511[b][1][iii]), asserting that by precluding testimony from his proposed rebuttal witness, the arbitrators had refused to hear pertinent and material evidence. Supreme Court denied the petition and confirmed the award (4 Misc 3d 1019A, 2004 NY Slip Op 50963[U] [2004] [Cahn, J.], *affd* 26 AD3d 188 [2006]).

Supreme Court based its ruling on procedural due process grounds, reasoning that the petitioners had not established that they were "prejudiced by corruption, fraud, misconduct, partiality or an abuse of power by the arbitrator" (2004 NY Slip Op 50963[U] *4, citing CPLR 7511[b]). The court noted that the petitioners had been on notice during the pendency of the case and throughout the arbitration hearings of the position taken by Segura that damages should be calculated on the basis of

NextLevel's pre-IPO valuation on the date of breach. Instead of addressing this issue on their direct case, the court observed, the petitioners "gambled on the Panel adopting their post-breach damage analysis" (*id.* at *6). Finally, the court found a failure to demonstrate that the proposed testimony was material and necessary, rather than merely "intended to bolster testimony and issues that had already been raised during petitioners' case-in-chief" (*id.*). The court concluded that a full and fair opportunity to put in a case had been afforded and that no misconduct by the arbitrators had been shown.

This Court affirmed the decision, noting:

> "Petitioners failed to meet their burden of showing, with clear and convincing proof, that the arbitrators' refusal to hear the rebuttal expert witness constituted misconduct by preventing them from eliciting pertinent and material testimony in this hearing which consumed 24 days over a 15-month period. Petitioners could have called this witness during their case in chief. Rebuttal testimony cannot be utilized simply to challenge the credibility of another witness, namely, respondent's expert" (26 AD3d at 189 [internal citations omitted]).

Having failed to prevail against Segura in arbitration, this litigation against counsel ensued. Agate brought an action sounding in legal malpractice in early 2005, and plaintiff commenced the within action over a year later. Plaintiff's

verified complaint seeks compensatory and punitive damages for legal malpractice, treble damages for violation of Judiciary Law § 487, and rescission of the retainer agreement under a theory of economic duress. The complaint names Herrick, Feinstein LLP, partners Arthur G. Jakoby, Harvey S. Feuerstein, and Susan T. Dwyer, and the members of the firm's managing committee (collectively, Herrick) as defendants. The complaint blames Herrick, in the first cause of action, for the failure to present a sufficient direct case before the NASD arbitration panel "to establish the full measure of the damages suffered by plaintiff as a result of Segura's breach." The second cause of action alleges that Herrick engaged in a "pattern of deceitful or collusive conduct" by failing to disclose information obtained from Agate that would have caused plaintiff to withdraw his consent to the firm's joint representation of their interests and seeks treble damages under Judiciary Law § 487. The third cause of action asserts that plaintiff was coerced into entering into a retainer agreement whereby he was obligated to pay Agate's legal fees and seeks rescission of the contract. The complaint demands compensatory damages of not less than $25 million on the first and second causes of action and $1.2 million on the third cause of action, together with punitive damages of $10 million on each cause of action.

Herrick brought a pre-answer motion to dismiss the second and third causes of action on the record (CPLR 3211[a][1], [7]), which Supreme Court granted. Herrick answered and immediately brought this motion for summary judgment seeking dismissal of the remaining malpractice cause of action. The firm argued that it had presented ample evidence of plaintiff's damages, including the availability of option strategies to realize his gains from the price appreciation of NextLevel stock as well as expert testimony concerning the pre- and post-IPO value of his interest in the corporation. Supreme Court, in the order appealed from, granted the motion. Invoking the doctrine of stare decisis, the court noted that the action is predicated on the same facts as the attorney-malpractice claim advanced by Agate and adhered to the same findings it made upon granting Herrick's motion for summary judgment dismissing Agate's complaint. Specifically, the court found that plaintiff, like Agate, "cannot prove any malpractice by Herrick proximately caused him any injury," and that the record fails to support the suggestion that the arbitration award would have been greater had representation been provided by other counsel.

The court, in dismissing Agate's complaint, also seems to have applied the doctrine of collateral estoppel, holding that Justice Cahn's ruling in the special proceeding to vacate the

arbitration award was dispositive of whether Agate, and by derivation plaintiff, had sustained any prejudice as a consequence of the arbitrators' rejection of testimony from the proposed expert rebuttal witness. While this Court agrees with Supreme Court's dismissal of plaintiff's complaint, our affirmance rests on different grounds. We note that the special proceeding decided only that the arbitrators' exclusion of further testimony by the expert witness was not prejudicial because plaintiff and Agate had been afforded the opportunity to present evidence of damages during their case-in-chief. The special proceeding neither addressed nor decided the issue of whether either prospective investor sustained any monetary loss as a result of his attorneys' failure to adduce additional testimony on the subject of the valuation of their respective interests in NextLevel. Thus, there is no identity of issue necessary to sustain application of the collateral estoppel doctrine (*Weiss v Manfredi*, 83 NY2d 974, 976 [1994]; *see also Katash v Kranis*, 229 AD2d 305, 306 [1996], *lv dismissed* 89 NY2d 981 [1997]).

Plaintiff's theory of recovery is that the arbitration panel awarded him an unreasonably low amount of damages because Herrick failed to introduce evidence to support an award based on the post-IPO value of his stock, i.e., the market price.

Specifically, as alleged in the complaint, Herrick failed to adduce testimony from plaintiff's expert witness that despite statutory and contractual restrictions on the sale of stock following the IPO (a two-year statutory restriction for the common stock and a 180-day contractual "lockup period" for both the stock and warrants), plaintiff could have realized the market price for his shares, either in a private sale or through the use of stock options. Plaintiff contends that the firm "also failed to provide a pre-IPO expert valuation of [his] Next Level shares and warrants in case the panel adopted the 'date of breach' theory propounded by [Segura]," requiring an assessment of damages at a point in time before the stock began trading. Noting that Segura's breach of his agreement with plaintiff occurred *before* the NextLevel IPO took place, whereas it was not apparent that Segura had dishonored his agreement with Agate until several months *after* the IPO, the complaint intimates that Herrick's representation of Agate involved the firm in a conflict of interest. Plaintiff suggests that Herrick promoted Agate's interests over his own by seeking to have damages evaluated on a post-IPO basis, failing to present sufficient expert testimony concerning his expected return from the proposed investment at the time Segura breached the agreement.

Although the calculation of damages is central to this

appeal, the extensive briefs submitted by the parties neglect to discuss what method the arbitrators should have employed to assess the damages sustained as a result of Segura's failure to deliver the NextLevel shares and warrants at the IPO price. Plaintiff fails to set forth any legal basis upon which the arbitrators might properly have awarded damages on a post-IPO basis, i.e., as determined by the price at which NextLevel shares traded during the lockup period or thereafter. Nor does plaintiff offer any theory under which the arbitrators might properly have rendered a higher award on a pre-IPO basis, i.e., as determined by plaintiff's expected return from his investment at the time the agreement with Segura was breached. Despite his ample briefs and the expansive record, plaintiff has not set forth a sufficient factual predicate demonstrating that Herrick "acted negligently, contenting [himself] with conclusory allegations which are legally insufficient to charge an attorney with negligence and malpractice" (*Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 378 [1977]). In short, having failed to show why additional expert testimony would have afforded grounds for a higher award, plaintiff cannot establish that he sustained any loss as a result of his attorneys' alleged omissions, and dismissal of his claim of legal malpractice is

required (*Jones Lang Wootton USA v LeBoeuf, Lamb, Green & MacRae*, 243 AD2d 168, 182 [1998], *lv dismissed* 92 NY2d 962 [1998]).

Herrick argues that "we cannot know the specific reasons that led [the arbitrators] to reject for [*sic*] a post-IPO damage award and to adopt a pre-IPO damages award." However, the nearly 5,000-page record of the arbitration proceedings suggests otherwise. As plaintiff notes, the record contains testimony that arrives at precisely the same figure reached by the arbitrators in determining compensatory damages. While their award seems to be predicated, in part, on facts not in evidence, the record further indicates that the panel applied appropriate methodology in making the damages assessment.

Analysis appropriately begins with the observation that recovery for professional malpractice against an attorney requires that a client prove three elements: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages" (*Mendoza v Schlossman*, 87 AD2d 606, 607 [1982]). The cause of action requires the plaintiff to establish that counsel "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and to meet the exacting standard that "'but for' the attorney's negligence" the outcome of the matter would have been substantially different

(*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *see N. A. Kerson Co. v Shayne, Dachs, Weiss, Kolbrenner, Levy & Levine*, 45 NY2d 730, 732 [1978]).

It is plaintiff's contention that the arbitration panel awarded him a mere $294,000 in compensatory damages rather than the "tens of millions of dollars" the shares were worth immediately following the IPO because of an alleged deficiency in the proof introduced by Herrick. While the arbitration panel did not state the grounds upon which it arrived at its award, the record of the proceedings provides insight into the panel's reasoning.

Plaintiff testified that, performing a rough calculation, he expected his position in NextLevel IPO shares to be worth about $500,000. Robert E. Conner, an expert in options trading, hedging and derivatives, also testified for plaintiff on the subject of damages. During cross-examination of this witness, Segura's attorney noted that the number of shares plaintiff was to receive multiplied by the price contemplated in the IPO prospectus (approximately $10 a share) amounted to some $580,000. Subtracting plaintiff's investment of $100,000 yields an expected return of $480,000, directly supporting plaintiff's rough calculation of his expected return. Segura's attorney also pointed out that another of plaintiff's witnesses, Kevin

Kimberlin of Spencer Trask, had testified that there was only a 70% likelihood that the IPO would actually take place. Therefore, counsel applied a 30% discount to the expected gross return, yielding a net of $420,000. Counsel then suggested that yet another 30% discount would be appropriate because Kimberlin had testified that the stock plaintiff was to receive consisted of restricted shares and warrants, meaning that sale was subject to the aforementioned contractual and statutory restrictions on transfer for a considerable period of time after the date of the IPO. Applying the second 30% discount yields a net return of $294,000, the exact amount awarded by the arbitrators as compensatory damages to both plaintiff and Agate.

This estimation of damages, presented by Stephen P. Younger, on behalf of Segura, drew prompt objections by plaintiff's attorney, Herrick partner Arthur G. Jakoby, who stated: "Mr. Kimberlin didn't testify that there would be a 30 percent discount. He said there's a chance the IPO wouldn't go off. That doesn't translate, by definition, to a 30 percent discount." Mr. Jakoby further objected that the estimation was "based on all these assumptions that Mr. Younger made up. Are they fact now or assumptions?"

Kimberlin testified that, as of the mid-October breach, the likelihood the IPO would take place was "60, 70 percent."

However, the parties identify no statement by the witness endorsing the further 30% discount suggested by Segura's attorney as the appropriate share price adjustment to allow for security transfer restrictions. Thus, the award rendered by the arbitration panel seems to have been at least partially based on facts not in evidence. However, the propriety of the award is not at issue, any question of arbitral misconduct having been previously resolved in favor of confirmation. The only issue is whether the panel could have reached a different result had Herrick put in additional evidence concerning damages, as plaintiff maintains.

The parties do not discuss the proper legal foundation for an award of damages for breach of an agreement to deliver IPO shares. However, Herrick points out that, during the arbitration proceedings, the firm "had presented the Panel with yet another option for pre-IPO valuation: the $59 price of NextLevel's stock on the opening day of the IPO" (citing *Pollen v Aware, Inc.*, 53 Mass App Ct 823, 762 NE2d 900 [2002]). The *Pollen* court merely decided that where an option contract to purchase shares at an initial offering had been breached, the use of the closing price on the first day of trading "was not clearly erroneous" and declined to disturb the trial court's determination of damages (*id.* at 831).

No New York case involving the assessment of damages for breach of a contract to deliver shares in an IPO at the initial offering price has been located. However, a number of cases have dealt with analogous situations, including *Boyce v Soundview Tech. Group, Inc.* (464 F3d 376, 387 [2d Cir 2006]), which concerned the breach of an option to purchase shares in a corporation about to go public. The Circuit Court began by observing, "It is settled Second Circuit law that in a breach of contract case, damages are calculated at the time of the breach" (*id.* at 384), the same criterion applicable under New York law (*see Simon v Electrospace Corp.*, 28 NY2d 136, 145 [1971]). The parties agreed that the contract was breached two months prior to the IPO and, consistent with New York law, that the plaintiff's damages were to be calculated by subtracting the exercise price of the option from the market price of the stock (*Boyce*, 464 F3d at 385). The Circuit Court stated that the actual value at which the shares traded subsequent to the IPO was not a proper measure of damages because that would involve the application of hindsight, contrary to New York law (*id.* at 386). Under comparable circumstances, the Fourth Department has held that a trial "court correctly rejected the valuation theories advanced by defendants' experts to the effect that the value should be based on the actual economic conditions and performance of [a]

business . . . rather than on what knowledgeable investors anticipated the future conditions and performance would be at the time of the breach" (*Aroneck v Atkin*, 90 AD2d 966, 967 [1982], *lv denied* 59 NY2d 601 [1983]).

Applying these principles to the matter at bar, the appropriate time to assess the value of Segura's performance to plaintiff was the date his cause of action accrued, at the time of breach, and the arbitrators properly rejected evidence of the value of NextLevel shares after trading began (*Simon*, 28 NY2d at 145). A post-IPO valuation was not warranted because, had plaintiff wished to own the shares and profit from their appreciation in subsequent trading, he could have purchased them in the open market. "The proper measure of damages for breach of contract is determined by the loss sustained or gain prevented at the time and place of breach . . . The rule is precisely the same when the breach of contract is nondelivery of shares of stock" (*id.* at 145). As the Court of Appeals went on to observe, the "cause of action should not and may not be converted into carrying a market 'call' or 'warrant' to acquire the stock on demand if the price rose above its value as reflected in his cause of action" (*id.* at 146). Thus, plaintiff was properly awarded the value of his shares insofar as it could be estimated on a pre-IPO basis; evidence of the subsequent market value of

the shares was simply not germane, and the arbitrators properly declined to consider it.[1]

As to the pre-IPO valuation of the shares, Herrick interposed timely objections to the use of the 30% discounting suggested by Segura's attorney. Moreover, Herrick alerted the arbitrators to an alternative valuation method based on the closing price of the shares on the first day of trading, as suggested by the *Pollen* case, even though the measure of damages employed by the Massachusetts Court is not consistent with New York law, as discussed in *Boyce* and *Simon*. In short, plaintiff has failed to establish any legal basis upon which a trier of fact might conclude that the asserted omission by Herrick caused him to receive an inadequate damages award; nor has he provided any grounds for his intimation that further expert testimony would have produced the award of greater compensatory damages. In the absence of an ascertainable loss, plaintiff has failed to set forth any basis upon which this Court might conclude that, "but for the attorney's negligence, what would have been a

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[1] Although Agate claims that his contract with Segura was not breached until months after the IPO, the latest date on which the breach could have occurred is the date of the offering, when performance of the contract to deliver IPO shares was due. Permitting the date of performance to be extended beyond the IPO date would effectively give the injured plaintiff "a market 'call' or 'warrant,'" in contravention of *Simon* (28 NY2d at 146).

favorable outcome was an unfavorable outcome" (*Zarin v Reid & Priest*, 184 AD2d 385, 386 [1992]), his underlying cause of action is therefore deficient, and his legal malpractice action must be dismissed (*Katash*, 229 AD2d at 306).

As to the order brought up for review, plaintiff's claim of deceit, dismissed by Supreme Court at the pleading stage, is based on Herrick's failure to disclose its knowledge of an agreement between Segura and Agate "to cut Kaminsky out of the Next Level deal" and of a meeting of Agate with Segura's attorneys after the IPO for the purpose of assisting them "to prepare an affidavit saying there was no deal between Segura and Kaminsky." Plaintiff suggests that withholding information from a client and the favoring of one client over another is an independent basis to sustain a cause of action for legal malpractice (citing *Sitar v Sitar*, 50 AD3d 667 [2008]).

For purposes of a motion under CPLR 3211, it is assumed that there was a conflict of interest amounting to a violation of the Code of Professional Responsibility. In that case, "liability can follow where the client can show that he . . . suffered actual damage as a result of the conflict" (*Tabner v Drake*, 9 AD3d 606, 610 [2004]). Thus, it is clear that the absence of resulting damages is fatal to plaintiff's cause of action for

legal malpractice (*Sumo Container Sta. v Evans, Orr, Pacelli, Norton & Laffan, P.C.*, 278 AD2d 169, 170-171 [2000]).

As to plaintiff's cause of action under Judiciary Law § 487, he has not alleged "a chronic and extreme pattern of legal delinquency" (*Solow Mgt. Corp. v Seltzer*, 18 AD3d 399, 400 [2005], *lv denied* 5 NY3d 712 [2005]). Likewise, the inability to demonstrate consequential damages renders the cause of action deficient a as matter of law (*see Jaroslawicz v Cohen*, 12 AD3d 160 [2004]; *Havell v Islam*, 292 AD2d 210 [2002]).

Plaintiff's cause of action on the retainer agreement is predicated on economic duress. He claims that he was coerced into signing an agreement to assume responsibility for payment of Agate's future legal fees "by means of a wrongful threat precluding the exercise of his free will" (*Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971]). Specifically, he alleges that Herrick threatened to withdraw as counsel during the pendency of the arbitration proceedings. He concludes that the resulting prejudice to his case was sufficiently severe so as to overcome his ability to exercise free will, with the result that he was compelled to enter into the retainer agreement. Be that as it may, plaintiff implicitly ratified the agreement by waiting three years to seek its rescission, and he is barred from

maintaining the cause of action (*see Matter of Guttenplan*, 222 AD2d 255, 257 [1995], *lv denied* 88 NY2d 812 [1996]; *Sosnoff v Carter*, 165 AD2d 486, 491-492 [1991]).

Accordingly, the judgment of the Supreme Court, New York County (Louis B. York, J.), entered January 17, 2008, granting defendants' motion for summary judgment dismissing plaintiff's first cause of action for legal malpractice and dismissing the complaint, and bringing up for review an order of the same court and Justice, entered February 27, 2007, which granted defendants' pre-answer motion for dismissal of plaintiff's second cause of action for damages under Judiciary Law § 487 and third cause of action for rescission, should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 18, 2008

CLERK