SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 29, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Gonzalez, Buckley, JJ.

3738 The People of the State of New York, Ind. 25943C/05
Respondent,

-against-

Gregory Cameron,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), and Cadwalader, Wickersham & Taft LLP, New York (Mary M. Teague of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), entered September 6, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony offender, to a term of 4½ years, unanimously affirmed.

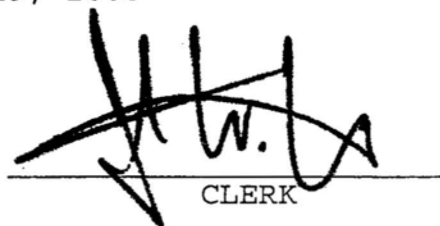
Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The challenged remarks generally constituted fair comment on the evidence and permissible responses to defense

arguments, and the summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 29, 2008



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

3739 457 Madison Avenue Corp., Index 116882/05
Plaintiff-Respondent,

-against-

Lederer De Paris, Inc., etc., et al.,
Defendants-Appellants.

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

Greenberg Traurig, LLP, New York (Kenneth A. Philbin of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Marylin G. Diamond, J.), entered January 12, 2007, declaring that defendant subtenant was not entitled to exercise its option to extend the term of its sublease with plaintiff net lessee, and awarding damages in favor of plaintiff and against the subtenant and its guarantors, the individual defendants, of $2,112,771.05, representing fixed rent due, additional rent due in the form of real estate tax escalations, operating expense escalations and late charges, and attorneys' fees, unanimously affirmed, with costs.

The motion court correctly held that the unambiguous no-waiver clause in the sublease eliminated any issues of fact as to whether plaintiff waived its right to the annual increase in fixed rent by not demanding payment thereof for the first five

months of the rent year in question (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]; *Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 70 [2003], *lv dismissed* 2 NY3d 794 [2004] [distinguishing *Simon & Son Upholstery v 601 W. Assoc.*, 268 AD2d 359 (2000)]). As defendants were in default under the sublease at the time they exercised the sublease renewal option, they were precluded from exercising such option under the terms of the renewal provision. We have considered defendants' other arguments and find them unavailing.

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

ENTERED: MAY 29, 2008

CLERK

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

3740 Carmine Christiano, et al., Index 21993/03
Plaintiffs-Appellants-Respondents, 85087/06

-against-

Random House, Inc., et al.,
Defendants-Respondents.

- - - - -

Random House, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Total Safety,
Third-Party Defendant,

Plaza Construction Corp.,
Third-Party Defendant-Respondent-Appellant.

Jasper & Jasper, P.C., New York (Michael H. Zhu of counsel), for appellants-respondents.

Jones Hirsch Connors & Bull P.C., New York (William E. Bell of counsel), for respondent-appellant.

Fabiani Cohen & Hall, LLP, New York (Jonathon Groubert of counsel), for Random House, Inc., Amsi Investors, L.P., The Related Companies, L.P., Related/Amsi, L.P., 56th Street Associates, L.L.C., Amsi Land Heritage LLC and Bertelsmann 56th Street Commercial, L.L.C., respondents.

Burke, Lipton, McCarthy & Gordon, White Plains (Robert A. McCarthy of counsel), for Fisher Brothers respondents.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered August 1, 2007, which denied plaintiffs' motion for partial summary judgment and third-party defendant Plaza Construction's cross motion for summary judgment, unanimously

affirmed, without costs.

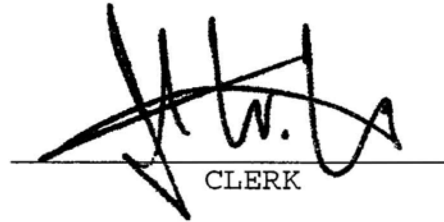
The evidence, as exemplified by the plaintiff worker's own deposition testimony, does not establish that the accident occurred when he was standing on the floor of a soffit interior that collapsed beneath him. To the contrary, it appears that he was standing on the steel beam within the soffit's interior, which did not shift, break or collapse when he fell (*compare Gomez v 2355 Eighth Ave., LLC*, 45 AD3d 493 [2007]; *Becerra v City of New York*, 261 AD2d 188 [1999]). Issues of material fact exist as to whether this plaintiff was a recalcitrant worker or the sole proximate cause of the accident, including whether immediately prior to the accident he had on his person adequate safety devices provided by defendants that he unilaterally decided to discard in the interest of completing his assigned tasks more quickly (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *Gonzalez v Rodless Props., L.P.*, 37 AD3d 180 [2007]). Accordingly, summary resolution of the § 240(1) claim is unwarranted.

M-2188 - *Christiano v Random House, Inc., et al.*

Motion seeking stay and other related relief dismissed as moot.

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

ENTERED: MAY 29, 2008



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

3741 Kinder Morgan Energy Partners, LP, et al., Plaintiffs-Appellants, Index 113387/06

-against-

Ace American Insurance Company,
Defendant-Respondent.

Phillips Nizer LLP, New York (Michael S. Fischman of counsel), for appellants.

O'Melveny & Myers LLP, New York (Gary Svirsky of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 23, 2007, which, upon granting plaintiffs' motion for reargument, adhered to its prior order dismissing the complaint without prejudice, unanimously affirmed, without costs.

Judiciary Law § 470, which recognizes a nonresident attorney's right to practice law in New York, has been interpreted in this Judicial Department as requiring such attorney at least to maintain an office in this state for such purpose (*Lichtenstein v Emerson*, 251 AD2d 64 [1998]). Failure to

maintain such a local office requires dismissal of an action commenced by such attorney, without prejudice to commencing anew (*Neal v Energy Transp. Group*, 296 AD2d 339 [2002]).

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

ENTERED: MAY 29, 2008

Lippman, P.J., Tom, Gonzalez, Buckley, JJ.

3742 The People of the State of New York, Ind. 4386/05
Respondent,

-against-

Davon Fields,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered April 27, 2006, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 14 years, unanimously affirmed.

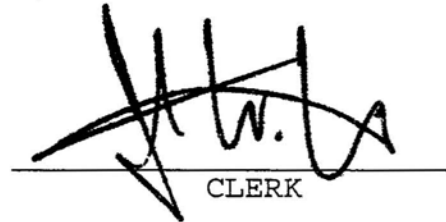
Defendant failed to preserve his claim that he was not properly adjudicated a second violent felony offender, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. In the circumstances presented (*see People v Booker*, 301 AD2d 477 [2003], *lv denied* 100 NY2d 592 [2003]) it is appropriate to consider defendant's New Jersey indictment, which clearly

establishes that his first-degree robbery conviction in that state was for the equivalent of a New York violent felony.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 29, 2008



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

3743 In re Miriam M.,
Petitioner-Appellant,

-against-

Warren M.,
Respondent-Respondent.

Weil, Gotshal & Manges, LLP, New York (Mark J. Fiore of counsel), for appellant.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about June 25, 2007, which, upon granting petitioner a two-year order of protection against respondent, declined to include in the conditions of the order that respondent stay away from petitioner's domestic partner (Ms. Diaz) and declined to make a finding of aggravating circumstances, unanimously modified, on the law, to the extent of adding a condition to the order of protection directing respondent to stay away from Ms. Diaz and her place of employment, and otherwise affirmed, without costs.

Following a fact-finding hearing, respondent was found to have committed the family offenses of disorderly conduct and harassment in the second degree against petitioner, his sister. It was established that respondent screamed and threatened petitioner while making violent motions with his hands in close

proximity to petitioner, and then twice struck Ms. Diaz in the face. In declining to include in the conditions of the order of protection that respondent stay away from Ms. Diaz, the court erred in concluding that it was constrained in its ability to issue such relief. Indeed, the Family Court has the authority to impose reasonable conditions when they are "likely to be helpful in eradicating the root of family disturbance" (*Matter of Leffingwell v Leffingwell,* 86 AD2d 929, 930 [1982]), and Family Court Act § 842(a) provides that the Family Court may order respondent to stay away from "any. . .specific location," which under the circumstances should include Ms. Diaz and her place of employment, as it would go toward achieving the purpose of fully protecting petitioner (*see* Family Court Act § 842[j]). However, contrary to petitioner's contention, respondent could not be directed to refrain from committing family offenses against Ms. Diaz since a family offense is defined as one between spouses or former spouses, between parent and child, or between members of the same family or household, which does not include domestic partners (*see* Family Court Act § 812[1]; § 842[c]). Nor could the court have ordered respondent to refrain from communicating with Ms. Diaz (*see* 22 NYCRR 205.74[c]).

There exists no basis upon which to disturb the court's refusal to make a finding of aggravating circumstances. As

noted, Ms. Diaz does not fall within the statutory definition of "member[] of the same family or household" (*see* Family Court Act § 812[1]), and accordingly, respondent's conduct toward her cannot constitute an "exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court could constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household" (Family Court Act § 827[a][vii]).

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

ENTERED: MAY 29, 2008

CLERK

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

3744 The People of the State of New York, Respondent, Ind. 3131/06

-against-

Daniel Castro,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about January 3, 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.

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

ENTERED: MAY 29, 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 May 29, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
Luis A. Gonzalez
John T. Buckley
Dianne T. Renwick, Justices.

The People of the State of New York, Respondent, Ind. 3123/06

-against- 3745

Carlos Marks,
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 (Daniel P. FitzGerald, J.), rendered on or about October 26, 2006,

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

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

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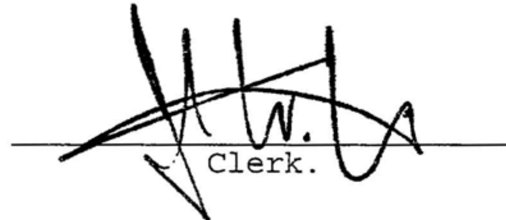


Clerk.

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

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

3746-
3746A Weiser LLP, Index 601805/05
Plaintiff-Appellant,

-against-

Jeffrey S. Coopersmith, et al.,
Defendants-Respondents.

Greenberg Traurig LLP, New York (Leslie D. Corwin of counsel), for appellant.

Torys LLP, New York (David Wawro of counsel), for respondents.

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered June 21, 2007 and August 13, 2007, which, after a nonjury trial, granted defendants' motion pursuant to CPLR 4401 to dismiss the complaint, except to the extent of directing entry of judgment in the amount $30,513.16 for defendants' retention of certain of plaintiff's accounts receivable, unanimously modified, on the law, to reinstate the first cause of action for breach of the restrictive covenant in article 14.1 of the subject partnership agreement and seeking damages in accordance with article 14.4 thereof, and the second and third causes of action for breach of fiduciary duty, the $30,513.16 award vacated, the matter remanded for further proceedings with respect to the first, second and third causes of action, and otherwise affirmed, with costs in favor of plaintiff payable by defendants.

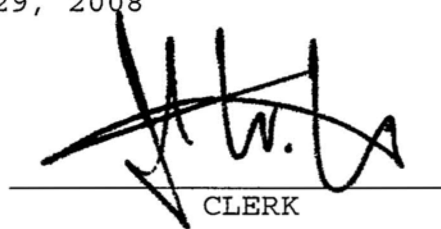
The trial court found that plaintiff accounting firm (Weiser) failed to establish a prima facie case against the individual defendants (Coopersmith, Simon and Vogel; collectively the former partners), and the firm they formed, for enforcement of the restrictive covenant and liquidated damages clause in Weiser's 2003 Second Amended and Restated Partnership Agreement (WPA). This was error. The evidence showed, prima facie, that the restrictive covenant was ancillary to the Merger Agreement between Weiser and the former accounting firm of Lopez, Edwards, Frank & Co. LLP (Lopez), and is enforceable because not more extensive than reasonably necessary to protect Weiser's legitimate interest in enjoying the assets and goodwill it had acquired pursuant to the merger (*see Purchasing Assoc. v Weitz*, 13 NY2d 267 [1963]; *Mohawk Maint. Co., Inc. v Kessler*, 52 NY2d 276 [1981]). That the former partners held only a minority interest in Lopez and Weiser does not render *Purchase Assoc.* inapplicable (*see Delta Resources v Harkin*, 118 AD2d 133 [1986]; *Payment Alliance Intl. Inc. v Ferreira*, 530 F Supp 2d 477, 483-484 [SD NY 2007], citing *Misys Intl. Banking Sys., Inc. v TwoFour Sys., LLC*, 6 Misc 3d 1004[A], 2004 NY Slip Op 51723[U] [Sup Ct, NY County 2004]). Moreover, Weiser's 1998 partnership agreement was explicitly referred to in the Merger Agreement, signed simultaneously with the Merger Agreement by the Lopez partners,

including Cooperman and Vogel, and bound its signatories to any amendments thereto, i.e., the WPA; likewise, Simon signed an Admission Agreement in which he consented to be bound by the 1998 partnership agreement on terms that the evidence shows were met. We note that we would reach the same result even if we were to review Weiser's evidence under the more exacting test applicable to employment contracts (*see BDO Seidman v Hirshberg,* 93 NY2d 382, 393 [1999]). Weiser's evidence also showed, prima facie, that the amount stipulated as liquidated damages was tied to what an arm's length purchaser would have paid for a lost client account as a firm asset on a sale of Weiser's practice, and, as such, is a reasonable measure of the anticipated probable harm from a breach of the restrictive covenant (*id.* at 396). Weiser's evidence also made out prima facie claims for breach of fiduciary duty based on the former partners having engaged in acts, prior to their voluntary withdrawal from Weiser, that conflicted with Weiser's interests, including using its staff and equipment to set up their new firm and soliciting its clients and employees to follow them to their new firm (*see Birnbaum v Birnbaum*, 73 NY2d 461, 465, 466 [1989]; *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 120-121 [1995]; *Don Buchwald & Assoc., Inc. v Marber-Rich*, 11 AD3d 277, 278 [2004]). Such acts by the former partners amounted to more than merely informing Weiser's

clients and employees of their impending withdrawal (*see Graubard, id.* at 120), and were a plain violation of the WPA. The trial court correctly dismissed Weiser's remaining causes of action. We have considered Weiser's various evidentiary arguments and find them unavailing.

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

ENTERED: MAY 29, 2008



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Lippman, P.J., Tom, Gonzalez, Buckley, JJ.

3747 The People of the State of New York, Respondent, Ind. 4406/01

-against-

Phenroy Day, Jr., Defendant-Appellant.

Paul S. Brenner, New York, for appellant.

Phenroy Day, Jr., appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Jacob Kaplan of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Joseph Fisch, J.), rendered July 24, 2003, convicting defendant, after a jury trial, of 10 counts of criminal possession of a weapon in the third degree, 2 counts of criminal possession of a weapon in the fourth degree, and 12 counts of criminal sale of a firearm in the third degree, and sentencing him to an aggregate term of 72⅔ to 84 years, unanimously affirmed.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). "Counsel may not be expected to create a defense when it does not exist" (*People v DeFreitas*, 213 AD2d 96, 101 [1995], *lv denied* 86 NY2d 872 [1995]). The record reveals that defense

counsel, in consultation with his client, carefully reviewed the available strategic options, which were very limited in the face of the overwhelming evidence of defendant's extensive trafficking in firearms. There is no indication that a different strategy would have had any hope of success.

We perceive no basis for reducing the sentence, which, we note, is deemed by operation of law to be a sentence of 20 years (*see* Penal Law § 70.30[1][e][ii][A]).

Defendant's pro se arguments are without merit.

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

ENTERED: MAY 29, 2008

CLERK

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

3748 The People of the State of New York, Ind. 4358/05
Respondent,

-against-

Jason Bonilla,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York and Heller Ehrman LLP, New York (Gina M. Parlovecchio of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered March 13, 2006, convicting defendant, after a jury trial, of assault in the second degree (two counts), reckless endangerment in the first degree and resisting arrest, and sentencing him, as a second violent felony offender, to an aggregate term of 7 years, unanimously affirmed.

The court properly rejected defendant's request for a justification charge since there was no reasonable view of the evidence, viewed in a light most favorable to defendant, that would support such a charge (*see People v Cox*, 92 NY2d 1002 [1998]). Such a defense would have called upon the jury to speculate as to an alternative scenario that was not supported by any evidence. Neither the physical evidence nor any testimony

supported such a view.

Defendant's challenge to the court's reasonable doubt charge is unpreserved and we decline to review it in the interest of justice. The court satisfied its obligation to instruct the jury that the People had the burden of proving defendant's guilt beyond a reasonable doubt, and there was no mode of proceedings error exempt from preservation requirements (*see People v Brown*, 7 NY3d 880 [2006]; *People v Agramonte*, 87 NY2d 765, 769-770 [1996]; *People v Thomas*, 50 NY2d 467, 472 [1980]).

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

ENTERED: MAY 29, 2008

CLERK

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

3749 Massimiliano Sacca, Index 100104/05
Plaintiff-Respondent,

-against-

41 Bleeker Street Owners Corp.,
Defendant-Appellant.

Michelle S. Russo, Port Washington, for appellant.

Pazer & Epstein, P.C., New York (Matthew J. Fein of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 24, 2007, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiff was struck by a falling window screen as he walked past defendant's property on Bleecker Street in October 2004. There is no evidence that defendant had actual or constructive notice of a defective condition in time to discover and remedy it prior to the accident, nor any evidence that it created the condition (*Martinez v Morris Ave. Equities*, 30 AD3d 264 [2006]). That the screen may have come from one of the co-operative

tenant's apartments does not constitute notice to defendant of a defective condition (*Delosangeles v Asian Ams. for Equality, Inc.*, 40 AD3d 550 [2007]). The theory of res ipsa loquitur is inapplicable because it has not been established that the screen and its mechanism were within defendant's exclusive control (*Radnay v 1036 Park Corp.*, 17 AD3d 106 [2005]).

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

ENTERED: MAY 29, 2008

CLERK

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

3750 In re West 97th Street Realty Corp., Index 102207/07
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.

- - - -

Central Park Gardens Tenants' Association,
Intervenor-Respondent-Respondent.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

Gary R. Connor, New York (Caroline M. Sullivan of counsel), for DHCR, respondent.

Hartman, Ule, Rose & Ratner, LLP, New York (Jacques F. Rose of counsel), for Central Park Gardens Tenants' Association, respondent.

Order and judgment (one paper), Supreme Court, New York County (Eileen Bransten, J.), entered October 30, 2007, dismissing this proceeding to challenge denial of an application for an ancillary service exemption, unanimously affirmed, without costs.

DHCR's determination that the garage operator was not an independent contractor, and that the ancillary service exemption under Rent Stabilization Code (9 NYCRR) § 2520.6(r)(4)(xi) does not apply to a garage formerly subject to regulation under the Mitchell Lama Law, was not arbitrary and capricious or without a

rational basis in the administrative record. The interpretation of statutes and regulations by an agency responsible for administering them is entitled to great deference and must be upheld where, as here, it is reasonable (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428-429 [2007]).

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

ENTERED: MAY 29, 2008

CLERK

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

3751 The People of the State of New York, Respondent, Ind. 457/01 1954/01

-against-

Edward McCarthy, Defendant-Appellant.

Larry Sheehan, Bronx, for appellant.

Robert M. Morgenthau, District Attorney, New York (Sean Sullivan of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J. at suppression hearing; Charles Solomon, J. at consolidation motion, nonjury trial and sentence), rendered July 30, 2002, convicting defendant of 15 counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 4 to 8 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the trial court's determinations concerning credibility and identification.

The hearing court properly denied defendant's suppression motion. We similarly find no basis for disturbing the hearing

court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1997]).

The court properly granted the People's motion to consolidate the indictments. The court properly permitted consolidation on the ground of overlapping evidence, pursuant to CPL 200.20(2)(b). Each of these pickpocketing incidents involved a distinctive modus operandi, consistently employed by a two-man team. The similarities in the crimes were such that the evidence of each was admissible as to the others (*see People v Beam*, 57 NY2d 241, 250-253 [1982]). The court also correctly determined that, in any event, the larcenies were properly joined as legally similar pursuant to CPL 200.20(2)(c), and defendant failed to make a sufficient showing to warrant a discretionary severance (*see* CPL 200.20(3); *People v Lane*, 56 NY2d 1, 8-9 [1982]; *People v Streitferdt*, 169 AD2d 171, 176 [1991], *lv denied* 78 NY2d 1015 [1991]).

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

ENTERED: MAY 29, 2008

CLERK

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

3752N Shinell Thomas, Index 24926/01
Plaintiff-Respondent,

-against-

Northeast Theatre Corp., etc., et al.,
Defendants-Appellants.

Epstein Becker & Green, P.C., Stamford, Connecticut (Kathryn E. White of counsel), for appellants.

Fellows, Hymowitz & Epstein, P.C., New City (Joanne R. Horowitz of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered August 23, 2006, which, insofar as appealed from, denied defendants' motion to dismiss the complaint for failure to state a cause of action, and granted plaintiff's cross motion to amend the complaint to assert a claim based on General Business Law § 395-b, unanimously reversed, on the law, without costs, defendants' motion granted, and plaintiff's cross motion denied. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiff alleges that while in defendant cinema chain's employ, she was surreptitiously videotaped in a room used by employees to change from their street clothes into their uniforms, and that when she learned of this taping she suffered severe emotional distress. Although not germane to either

motion, defendant cinema asserts that the room was supposed to be used to store supplies and as an office for both male and female customer service employees, denies knowledge on the part of its upper level management that the room was being used as a changing room, notes that segregated restrooms/changing rooms were furnished elsewhere on the premises, and asserts that the camera was installed for a brief period of time at the behest of defendant Hare, the manager of the theater where plaintiff worked, due to suspicions of theft and cash handling violations by one of the customer service employees, and was dismantled immediately after the thief was caught. Hare asserts that he did not know the area was being used as a changing room until the camera was installed.

We reverse the grant of plaintiff's motion to amend. General Obligations Law § 395-b, which prohibits premises owners or managers from knowingly permitting installation of a viewing device "for the purpose of surreptitiously observing the interior of any fitting room, restroom, toilet, bathroom, washroom, shower, or any room assigned to guests or patrons in a motel, hotel or inn," does not create a private right of action (*Hering v Lighthouse 2001, LLC*, 21 AD3d 449, 450 [2005]). Although section 395-b has been held to set forth a duty that may serve as a basis for a claim of negligent infliction of emotional distress

(*id.* at 450-451), any such claim would be barred by the exclusivity provisions of the Workers' Compensation Law (*see Tompkins v International Bus. Machs. Corp.*, 247 AD2d 465 [1998]). To the extent plaintiff also claims that defendants acted intentionally to inflict emotional distress, any such claim would be barred by the one-year statute of limitations (*see Dana v Oak Park Marina*, 230 AD2d 204, 210 [1997]). In view of the foregoing, we need not address defendants' argument that a changing room is not one of the protected areas of privacy designated in section 395-b. Plaintiff's other claims -- violation of her "civil rights," the utterance by Hare of humiliating, harassing and debasing comments during the period of the videotaping, and the cinema's negligent hiring and supervision of Hare and any other employees responsible for the videotaping -- are deficient because New York does not recognize a common-law right to privacy (*id.* at 208; *Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d 436, 441 [2000]). We note that

plaintiff does not appeal from the part of the order that denied the part of her cross motion that sought leave to interpose a claim of sexual harassment.

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

ENTERED: MAY 29, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Catterson, Moskowitz, JJ.

3137 Barbara Granato, Index 302974/01
Plaintiff-Appellant, 350680/06

-against-

Pasquale Fabio Granato,
Defendant-Respondent.

[And Another Action]

Malcolm S. Taub LLP, New York (Malcolm S. Taub of counsel), for appellant.

Diahn W. McGrath, New York, for respondent.

Dora M. Lassinger, East Rockaway, Law Guardian.

Order, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered on or about August 22, 2007, which, to the extent appealed from as limited by the brief, granted defendant's motion to direct plaintiff to sell a home in Connecticut that she received pursuant to the parties' separation agreement, deemed plaintiff's child support obligations as having been settled by stipulation, reserved decision on plaintiff's applications for maintenance and child support arrears and pendente lite counsel fees, and granted plaintiff's motion to vacate the note of issue while denying her application for the imposition of sanctions against defendant's counsel for allegedly filing it in a frivolous manner, unanimously modified, on the law and the facts,

defendant's motion to direct plaintiff to sell the Connecticut home denied, that portion of the order that deemed child support issues as having been resolved by agreement vacated, and otherwise affirmed, without costs.

The separation agreement pursuant to which plaintiff received the Connecticut home was incorporated but not merged into the judgment of divorce. Therefore, it survives as a separately enforceable contract that cannot be set aside by motion but only by a plenary action in which an adequate record may be developed to evaluate defendant's claims of fraud, unconscionability and overreaching (*Frieland v Frieland*, 200 AD2d 484 [1994]).

The record establishes that the parties' stipulation regarding the schooling of their children and defendant's obligation to pay the expenses associated therewith does not resolve all outstanding child support issues. The resolution of such issues also must await trial in the plenary action.

To the extent that the order reserved decision, it is not appealable (CPLR 5701[a][2]; *Cobb v Kittinger*, 168 AD2d 923 [1990]).

The court did not improvidently exercise its discretion in declining to impose sanctions against defendant's counsel.

M-1016 - Granato v Granato

Motion for adjournment and related relief denied.

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

ENTERED: MAY 29, 2008

CLERK

Tom, J.P., Williams, Catterson, Acosta, JJ.

3629 Ramon Rodriguez, et al., Index 116252/04
Plaintiffs-Appellants,

-against-

Hamada Abdallah,
Defendant,

Jose Cruz,
Defendant-Respondent.

Eric H. Green, New York (Hiram Anthony Raldiris of counsel), for appellants.

Law Office of John P. Humphreys, New York (Evy Kazansky of counsel), for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 30, 2007, which granted defendants' motions for summary judgment dismissing the complaint on the ground that the injured plaintiff, a taxi driver who was the victim of a rear-end collision while his taxi was stopped at a red light, did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

The record evidence supports the motion court's determination that defendants established their entitlement to summary judgment as a matter of law. Defendants' experts - a neurologist, an orthopedic surgeon and a radiologist, each board certified - submitted affirmed, objective medical reports

sufficient to disprove plaintiffs' claims of serious injury on the theories of permanent consequential limitation of use of body organ or member, significant limitation of the use of a body function or system, and the 90-out-of-180-day period of disability immediately following injury. Plaintiffs' objective medical evidence - an affidavit by his treating physician, Dr. Melamed, a family practitioner - failed to raise a material issue of fact as to any of these theories (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]).

In particular, plaintiff failed to rebut defendants' objective medical proof that some 33½ months after the accident, the neurologist, after performing various tests on the injured plaintiff, found his neurological condition to be "essentially normal"; the orthopedic surgeon, after examination, found that any spinal injuries (sprains and strains) from the accident had healed and that disc bulges in the lumbar spine were degenerative and not traumatic; and that the radiologist, after review of an MRI taken less than two months after the accident, found no evidence of acute traumatic injury to the lumbar spine, that the disc bulges in the lumbar spine were "chronic and degenerative in origin," and that there was "no causal relationship between the claimant's alleged accident and the findings on the MRI examination." Specifically, Dr. Berkowitz, the radiologist,

explained that she found "no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous tear or epidural hematoma."

Dr. Melamed stated in his affidavit that he treated the injured plaintiff's symptoms - pain, tenderness and spasms in the posterior cervical spine with highly restricted movement of the head and neck - for six months with physical therapy, chiropractic and acupuncture. He also alleged that he instructed this plaintiff to refrain from activities that caused discomfort, and the patient exercised his discretion by staying home from work for three months. Dr. Melamed's review of the MRI led him to conclude that the disc bulges were caused by the accident, not by the aging process; however, unlike Dr. Berkowitz, he offered no objective medical support for his opinion on this issue. Finally, Dr. Melamed stated that on the patient's last visit, approximately five weeks before he was examined by defendants' medical experts, he performed undisclosed range-of-motion tests in response to complaints of back pain with numbness and tingling aggravated by "pulling, pushing, stretching, cold and humidity." Dr. Melamed found a 30% restriction in the lumbosacral spine and a 15% restriction in the posterior cervical spine. He concluded, without detailing an objective basis for his assessment, that these conditions were caused by the injured plaintiff's accident,

and that they would require physical therapy into the indefinite future, rendering the patient permanently disabled.

Plaintiffs' proof, therefore, was insufficient to establish a material issue of fact regarding an Insurance Law § 5102(d) serious injury under any of the theories alleged. It failed to rebut defendants' doctors' conclusions as to the causation of the bulging disc condition or to objectively link it to the accident (*Carrasco v Mendez*, 4 NY3d 566 [2005]; *Montgomery v Pena*, 19 AD3d 288, 290 [2005]; *see also Otero v 971 Only U, Inc.*, 36 AD3d 430 [2007]). It failed to properly explicate the range-of-motion test results cited by disclosing the tests used and how the assessment was made (*see Toure*, 98 NY2d at 350). Thus, the evidence failed to sufficiently establish permanent consequential limitation of use of a body organ or member, or significant limitation of use of a body function or system. It also failed to establish a medically substantiated, non-permanent impairment satisfying the 90-out-of-180-day category (*Cruz v Calabiza*, 226 AD2d 242 [1996]; *cf. Loesburg v Jovanovic*, 264 AD2d 301 [1999]), offering instead an apparently self-imposed absence, based upon the injured plaintiff's subjective complaints of pain and

discomfort (*see Abramson v Premier Car Rental*, 261 AD2d 562 [1999]; *McLoyrd v Pennypacker*, 178 AD2d 227 [1991], *lv denied* 79 NY2d 754 [1992]; *Kimball v Baker*, 174 AD2d 925 [1991]).

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

ENTERED: MAY 29, 2008

CLERK

Saxe, J.P., Gonzalez, Nardelli, McGuire, JJ.

3661 Rose Savino, etc., Index 23616/06
Plaintiff-Respondent,

-against-

Precision Testing & Balancing, Inc.,
Defendant-Appellant,

Louis Fred Bromberg, et al.,
Defendants.

Howard M. Katz, New York, for appellant.

Milton D. Ottensoser, New York, for respondent.

Appeal from order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about September 29, 2007, which, to the extent appealed from, granted plaintiff's motion for summary judgment against defendant Precision Testing & Balancing, Inc., deemed to be an appeal from judgment, same court and Justice, entered on or about October 18, 2007 (CPLR 5501[c]), and so considered, said judgment unanimously reversed, on the law, without costs, the judgment vacated, the motion denied with leave to renew, and the matter remanded for further proceedings in accordance herewith.

In this action for breach of contract brought by the wife of a deceased shareholder of defendant corporation, the shareholders' agreement provided that upon the death of the first

shareholder, the corporation was required to purchase from the deceased shareholder's personal representative all the capital stock owned by the decedent at the time of his death. According to the agreement, the closing on the redemption was to take place "on the 30th day after the appointment of a personal representative of the deceased shareholder," unless the parties agreed otherwise.

After the decedent's death in 2001, plaintiff and her attorney sent letters to defendants on several occasions identifying plaintiff as the decedent's personal representative and requesting payment from defendant corporation. Defendants refused payment, with the corporate defendant taking the position that its obligation to pay was never triggered because plaintiff never submitted proof of her status as the decedent's personal representative, despite multiple requests.

Plaintiff commenced the instant action in 2006, and defendants answered and counterclaimed for a setoff based on the decedent's alleged negligent failure to maintain a life insurance policy, which would have funded, at least in part, the redemption payable by the corporation. All parties moved for summary judgment, and plaintiff, in her reply papers, allegedly produced letters testamentary issued to her. On appeal, defendant corporation denies that plaintiff has produced any proof of her

status as personal representative, and the letters purportedly submitted are not included in the record on appeal.[1] Supreme Court granted plaintiff's motion for summary judgment and denied the corporate defendant's cross motion, finding that plaintiff had submitted sufficient evidence establishing herself as the personal representative of the deceased. The court declined to rule on the corporate defendant's counterclaim for a setoff, holding that no motion relating to such claim was before it.[2]

Plaintiff's motion for summary judgment against defendant corporation should have been denied. Under the agreement, defendant's obligation to close only ripened "on the 30th day after the appointment of a personal representative of the deceased shareholder," and there is no evidence in this record when that appointment occurred, if at all. Even if we accepted the representation in plaintiff's bill of particulars that letters testamentary were issued to her, such evidence was not produced until well into this litigation, effectively depriving defendant of any opportunity to close on the transaction in accordance with the agreement. While plaintiff's alleged belated

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[1]While it is the appellant's obligation to compile the record on appeal (CPLR 5530[a]), a dissatisfied respondent may move to strike or expand the record.

[2]The court also granted the individual defendants' motions for summary judgment.

submission of the letters may have justified denial of the corporate defendant's dismissal motion, it did not establish, as a matter of law, any prior breach of the agreement by such defendant that would warrant summary relief.

Accordingly, the matter must be remanded for further proceedings. Plaintiff is directed to produce evidence of her status as personal representative, and, if successful, defendant should be afforded 30 days either to close in accordance with the terms of the agreement or to continue its defense of the action. We nostra sponte grant leave to plaintiff to renew her motion for summary judgment in the event defendant chooses the latter course.

Although the motion court declined to rule on the setoff issue, upon a search of the record we hold that defendant failed to raise an issue of fact whether it is entitled to a setoff based on the decedent's alleged negligence in permitting the insurance policy on his life to lapse. Under the agreement, maintenance of the insurance policy was neither included in the decedent's duties as an employee nor a prerequisite to payment of the death benefit (*see Chesapeake Ins. Co. v Curiale*, 210 AD2d 91, 93 [1994]).

In light of our vacatur of the judgment, it is unnecessary to address defendant's arguments concerning the alleged errors in

the judgment. We have considered defendant's remaining contentions and find them unavailing.

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

ENTERED: MAY 29, 2008

CLERK

Gonzalez, J.P., Catterson, McGuire, Moskowitz, JJ.

3686 Takahisa Onishi, et al., Index 17578/05
Plaintiffs-Respondents,

-against-

N & B Taxi, Inc., et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Michael I. Josephs of counsel), for appellants.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about September 28, 2007, which denied defendants' motion for summary judgment dismissing the complaint for lack of serious injury (Insurance Law § 5102[d]), unanimously modified, on the law, plaintiff's claim for non-permanent injury (90/180 claim) dismissed, and otherwise affirmed, without costs.

Defendants established their entitlement to summary judgment dismissing plaintiff's 90/180-day claim based upon the revelation in plaintiff's deposition testimony and bill of particulars that he stayed home from work for only 11 days after the accident (*see Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669 [2007]). Plaintiff failed to raise a triable issue of fact as to whether he was incapacitated from performing all of his usual and customary activities for at least 90 out of 180 days following the accident. Although he testified that he was advised by his

physicians to refrain from landscaping and heavy lifting, and that he was somewhat restricted in the activities of his daily living, such evidence is insufficient to raise a triable issue of fact as to whether plaintiff sustained a "90/180" injury (*Thompson v Abbasi*, 15 AD3d 95, 101 [2005]; *see also Gorden v Tibulcio*, __ AD3d __, 2008 NY Slip Op 03382, *3 [April 17, 2008]).

However, with regard to plaintiff's claim of permanent injury, the motion was properly denied. Defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing that claim by submitting, among other things, the affirmed report of their expert who examined plaintiff. Contrary to the finding of Supreme Court, the mere fact that defendants' expert did not address findings in diagnostic and operative reports indicating that plaintiff had a herniated disc does not mean that defendants failed to meet their initial burden. A herniated disc, by itself, is insufficient to constitute a "serious injury"; rather, to constitute such an injury, a herniated disc must be accompanied by objective evidence of the extent of alleged physical limitations resulting from the herniated disc (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Servones v Toribio*, 20 AD3d 330 [2005]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-50 [2005]). Thus, we recently rejected

the notion that a defendant cannot meet its initial burden on summary judgment of demonstrating the absence of "serious injury" where the defendant's expert fails to address diagnostic reports indicating that the plaintiff has herniated or bulging disks (*Style v Joseph*, 32 AD3d 212 [2006]; *see Santana v Khan*, 48 AD3d 318 [2008]).

Nix v Yang Gao Xiang (19 AD3d 227 [2005]), cited by Supreme Court, is distinguishable. In *Nix*, this Court determined that a defendant's expert's report was insufficient to demonstrate that the plaintiff did not sustain a "serious injury" because the "report was conclusory, failed to indicate what, if any, objective tests were relied upon, and failed to address the objective findings of plaintiff's MRI and CT scan, which showed disc herniations and bulges." In other words, the report suffered from multiple infirmities. Here, however, defendants' expert's report was neither conclusory nor failed to demonstrate the absence of "serious injury." Similarly, *Patterson v Rivera* (49 AD3d 337 [2008]) and *Wadford v Gruz* (35 AD3d 258 [2006]) are distinguishable since the defendants' experts in those cases failed to address not only MRI reports indicating herniated discs but other evidence of serious injury as well.

In opposition to defendants' prima facie showing of entitlement to judgment as a matter of law dismissing his claim

of permanent injury, plaintiff raised a triable issue of fact, principally on the strength of the affirmation of his neurologist. Defendants' claim that plaintiff has a pre-existing medical condition that accounts for some or all of the injuries plaintiff claimed were caused by the accident was not raised by defendants before Supreme Court. Furthermore, defendants abandoned their claim, raised in their reply papers before Supreme Court, that plaintiff's experts failed to explain a gap in treatment.

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

ENTERED: MAY 29, 2008

CLERK

Gonzalez, J.P., Catterson, McGuire, Moskowitz, JJ.

3690 Marylou Amarosa, et al., Index 113452/00
Plaintiffs-Respondents-Appellants, 590364/06

-against-

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

Tishman Construction Company,
Defendant-Appellant-Respondent,

Columbus Construction Corp.,
Defendant-Respondent.

[And A Third-Party Action]

Burns, Russo, Tamigi & Reardon, LLP, Garden City (Jeffrey M. Burkhoff of counsel), for appellant-respondent.

Daniel H. Gilberg, New York, for respondents-appellants.

Law Office of John P. Humphreys, New York (Evy Kazansky of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered February 15, 2007, which, insofar as appealed from, granted the motion of defendant Columbus Construction Corporation (Columbus) for summary judgment dismissing the complaint as against it, and denied the motion of Tishman Construction Company n/k/a Tishman Realty & Construction Co., Inc. (Tishman) for summary judgment dismissing the complaint as against it, unanimously modified, on the law, Tishman's motion granted, and otherwise affirmed, without costs. The Clerk is directed to

enter judgment accordingly.

Plaintiff asserts that she fell into a pothole and hit her shoulder on a manhole cover while crossing West 43rd Street at 8th Avenue in Manhattan on September 9, 1999. Columbus made a prima facie showing of entitlement to summary judgment by submitting the affidavit of its risk manager stating that his search of the company's records turned up no records of work at that location dating back to 1999. Further, the time sheets of the company's employees for the month prior to the accident showed that all of the employees had been working in the Bronx. In opposition, plaintiffs presented no evidence tending to show that Columbus was working in the area in or around September 1999. Absent such evidence Columbus is entitled to summary judgment (*see Robinson v City of New York*, 18 AD3d 255 [2005]).

Similarly, Tishman was entitled to summary judgment. The summons and complaint as filed failed to name any Tishman defendant that could possibly be connected with the accident site, and Tishman was entitled to summary judgment on this ground alone (*Blount v Bovis Lend Lease Holdings, Inc.*, 35 AD3d 310 [2006]).

Initially, we note that the amended verified complaint as filed lists "Tishman Construction Company" as a party defendant. However, the summons and complaint served on Tishman bear the

handwritten annotation "S/H/A Tishman Construction Company N/K/A Tishman Realty & Construction Co., Inc." It is uncontroverted that Tishman Construction Company does not exist; that Tishman Construction Corporation of New York was the construction manager for a project located at 3 Times Square; that Tishman Westside Construction, LLC was involved in the construction of the Westin Hotel at the southeast corner of 43rd Street and 8th Avenue; and, that Tishman Realty & Construction Co., Inc. was not involved in any construction or repair work at the site of the accident.

The mere fact that New York City issued permits to "Tishman Construction" to store materials on the sidewalk in proximity to the accident site is insufficient to raise a question of fact as to whether Tishman performed any work at the site (*Bermudez v City of New York*, 21 AD3d 258 [2005]), or that such work was the cause of the pothole in question.

Furthermore, the unrebutted affidavit of the project superintendent for the Tishman construction at 3 Times Square established that the 3 Times Square Project was at the opposite end of West 43rd Street, at least 400 feet from the site of the accident. The permits attendant to that project only applied to an area extending 164 feet west from Seventh Avenue. There is no evidence of record that tends to show that the construction at 3 Times Square was a proximate cause of a pothole in the street 400

feet westward.

Finally, while there may be an issue of fact on when the construction began on the Westin Hotel (Tishman maintaining that it did not begin until nine months after the accident), there is no evidence of record that any construction work caused the offending pothole. Even when we credit plaintiff's testimony that the hotel was already being built at the time she fell, she merely testified that it appeared that the roadway itself was also under construction. This is insufficient to rebut Tishman's proof that it performed no work in the street at the location of the accident, at the time of the accident.

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

ENTERED: MAY 29, 2008

CLERK

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3753 The People of the State of New York, Ind. 7877/98
Respondent,

-against-

David Johnson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and O'Melveny & Myers LLP, New York (Steven A. Rosenstein of counsel), for appellant.

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

Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about January 22, 2007, which denied defendant's motion for resentencing under the 2005 Drug Law Reform Act (L 2005, ch 643), unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the application in light of defendant's role as a leader of an extensive and violent drug trafficking enterprise (*see People v Arana*, 45 AD3d 311 [2007], *lv dismissed* 9 NY3d 1031 [2008]). The record does not support defendant's arguments that the court failed to appreciate

the proper standard for determining his application, or that it based its decision on a misunderstanding of the length of defendant's present sentence.

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

ENTERED: MAY 29, 2008

CLERK

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3754 Adelaide Productions, Inc., et al., Petitioners-Respondents, Index 114522/05

-against-

BKN International AG, Respondent-Appellant.

Meier Franzino & Scher, LLP, New York (Steven K. Meier and Davida S. Scher of counsel), for appellant.

Manatt, Phelps & Phillips, LLP, New York (Lauren Reiter Brody of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Richard B. Lowe III, J.), entered January 30, 2008, which granted petitioners' motion to confirm a Special Referee's report, denied respondent's cross motion to reject the report, and awarded petitioners the principal sum of $2,265,588 (€1,545,000), unanimously affirmed, with costs.

In a prior decision (39 AD3d 254), we reversed the grant of a money judgment and referred the matter for a fact-finding hearing. Respondent never objected during that hearing, nor in its post-hearing submissions, to the Special Referee's ruling that it bore the burden of proof. Accordingly, that point has not been preserved for appellate review (*see Matter of Bowes v Dennison*, 20 AD3d 845, 846 [2005]; *Isaacson v Karpe*, 84 AD2d 868, 869 [1981].

With respect to the report, the Referee clearly defined the issues and resolved matters of credibility, and the ample support of those findings in the record warranted confirmance (*Nager v Panadis*, 238 AD2d 135 [1997]).

We have considered respondent's remaining contentions and find them without merit.

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

ENTERED: MAY 29, 2008

CLERK

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3755 In re Valerie Deitch, Index 405244/06
Petitioner,

-against-

Robert Doar, as Commissioner of
New York State Office of Temporary
and Disability Assistance, et al.,
Respondents.

Harlem Legal Services, New York (Judith Lacoff of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for municipal respondent.

Decision of respondent State Commissioner, dated August 14, 2006, upholding the determination of respondent City Commissioner to reduce petitioner's public assistance benefits in order to recoup a rent advance, withdrawn, and the petition in this proceeding (transferred to this Court by order of Supreme Court, New York County [Nicholas Figueroa, J.], entered May 18, 2007) unanimously granted, without costs, to the extent of directing the City respondent to restore petitioner's benefits.

All parties agree that the State respondent should be permitted to withdraw its decision (*see* 18 NYCRR 358-6.6[a]), thus obviating that portion of the petition seeking annulment of that decision. The State respondent agrees that the City

respondent should be directed to restore petitioner's benefits and the City respondent has presented no reason why it should not be so directed.

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

ENTERED: MAY 29, 2008

CLERK

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3757 The People of the State of New York, Ind. 2477/06
Respondent,

-against-

Wayne Jackson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Amy E. Howlett, New York, for appellant.

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

Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered November 16, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 2 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its resolution of inconsistencies in testimony.

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

ENTERED: MAY 29, 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 May 29, 2008.

Present - Hon. David Friedman, Justice Presiding
Milton L. Williams
James M. Catterson
Rolando T. Acosta, Justices.

---x

The People of the State of New York,
Respondent,

Ind. 6191/06

-against-

3758

Juan Cruz,
Defendant-Appellant.

---x

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marcy L. Khan, J.), rendered on or about July 13, 2007,

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

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

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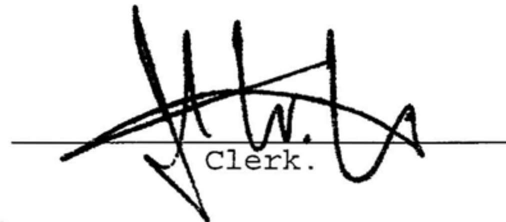


Clerk.

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

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3761 The People of the State of New York, Respondent, Ind. 5432/00

-against-

Elvis Winter, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Stacy Kaplan of counsel), for respondent.

Judgment, Supreme Court, New York County (William Leibovitz, J.), rendered January 19, 2001, convicting defendant, after a jury trial, of assault in the first degree and tampering with a witness in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 11 years and 3½ to 7 years, respectively, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Although no witness saw defendant holding a sharp object, the evidence supports the conclusion that it was defendant who cut the victim.

The court properly declined to modify its *Sandoval* ruling following the prosecutor's opening statement. Defendant does not

challenge the original ruling itself, and there was nothing in the prosecutor's opening that would require the court to provide a more favorable ruling. Moreover, the court struck the allegedly prejudicial portion of the opening, with a curative instruction that the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

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

ENTERED: MAY 29, 2008

CLERK

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3762-
3762A Cement Shoes, Inc., Index 601812/03
Plaintiff-Respondent,

-against-

Jackson Mak, et al.,
Defendants-Appellants.

Perry Ian Tischler, Bayside, for appellants.

Law Office of Arnold N. Kriss, New York (John C. Theodorellis of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 13, 2007, after a nonjury trial, awarding plaintiff the principal sum of $100,069, unanimously modified, on the law, to the extent of dismissing the complaint as against Andy Mak, and otherwise affirmed, with costs in favor of plaintiff payable by defendant Jackson Mak. The Clerk is directed to enter an amended judgment accordingly. Appeal from order, same court and Justice, entered September 19, 2006, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The finding that defendants' delay in consenting to an assignment, a breach of the assignment clause in plaintiff's lease, caused the proposed assignee to abandon the deal to purchase plaintiff's business was based on a fair interpretation

of the evidence. The damages, based on the purchase price in an existing contract, were not speculative (*see generally Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]), and were within the contemplation of the parties.

The claim against Andy Mak, who was not a party to the lease, should have been dismissed as he was an agent for a disclosed principal.

We have considered defendant Jackson Mak's other contentions and find them unavailing.

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

ENTERED: MAY 29, 2008

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3763 The People of the State of New York, SCI 6241/05
Respondent,

-against-

Edward Wade,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jung Park of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J. at plea; Laura Ward, J. at sentence), rendered June 5, 2006, convicting defendant of attempted criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to concurrent terms of 4½ years and 4 years, respectively, unanimously affirmed.

In light of defendant's background, which included absconding from a drug program, the sentencing court properly exercised its discretion when it denied defendant's request to

enter a comprehensive alcohol and substance abuse treatment program (*see* Penal Law § 60.04[6]). We perceive no basis for reducing the sentence.

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

ENTERED: MAY 29, 2008

CLERK

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3767 The People of the State of New York, Ind. 6657/06
Respondent,

-against-

Andrew Hollins,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered on or about July 3, 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.

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

ENTERED: MAY 29, 2008

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3768 Egidio A. Farone, Index 109058/04
Plaintiff-Respondent,

-against-

Hunter Mountain Ski Bowl, Inc., et al.,
Defendants-Appellants.

Carol A. Schrager, New York, for Hunter Mountain Ski Bowl, Inc., appellant.

McGuireWoods LLP, New York (Richard L. Jarashow of counsel), for Samuel C. Morris, appellant.

Stephen H. Weiner, New York, for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 11, 2007, which denied defendants' motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

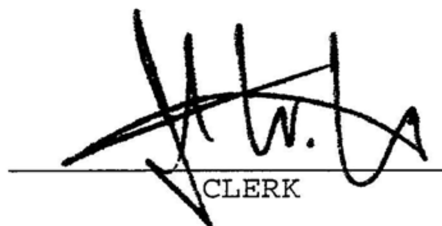
Plaintiff seeks recovery for injuries sustained when struck by a fellow skier, defendant Morris, at an area operated by defendant Hunter Mountain. This accident was the result of inherent risks in downhill skiing (*see* General Obligations Law § 18-101), and the motions should have been granted (*Lamprecht v Rhinehardt*, 8 AD3d 448 [2004]; *Kaufman v Hunter Mt. Ski Bowl*, 240 AD2d 371, 372 [1997], *lv denied* 91 NY2d 805 [1998]).

Defendants made prima facie showings of entitlement to dismissal based on the doctrine of assumption of risk, plaintiff having admitted awareness of the inherent risks and defendants having submitted proof that they did not enhance such risks (*see Whitman v Zeidman*, 16 AD3d 197 [2005]; *Bono v Hunter Mt. Ski Bowl*, 269 AD2d 482 [2000], *lv denied* 95 NY2d 754 [2000]). In opposition, plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Kaufman*, 240 AD2d at 372).

Plaintiff's allegation that posted signage failed to comply with Hunter's statutory and common-law duty is unsupported. Moreover, the accident occurred when Morris hit an ice patch during an evasive maneuver, which is one of the risks inherent in downhill skiing.

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

ENTERED: MAY 29, 2008



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Friedman, J.P., Williams, Catterson, Acosta, JJ.

3769 The People of the State of New York, Ind. 3223/04
Respondent,

-against-

Taimak Snyder,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bari Kamlet of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered May 18, 2007, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 15 years to life, unanimously affirmed.

After affording defendant sufficient opportunity to present his claims, the court properly exercised its discretion in denying, without an evidentiary hearing, defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). When defendant made his initial pro se application, the court conducted a lengthy colloquy with defendant, after which it assigned a new attorney who reiterated and supplemented defendant's claims in a written motion. In denying that motion, the court made detailed findings. The court was thoroughly familiar with the proceedings, including the plea allocution, and

properly concluded that defendant's claims were unfounded. Defendant's claim of innocence, and all of his allegations relating to his original counsel's performance, are contradicted by statements defendant made at the time of the plea. The record establishes that the plea was knowing, intelligent and voluntary, and that it was made with the effective assistance of counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]).

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

ENTERED: MAY 29, 2008

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3770N Tammy Belmore-Gaillard, Index 308986/93
Plaintiff-Appellant,

-against-

Robert R. Gaillard, Jr.,
Defendant-Respondent.

Tammy Belmore-Gaillard, appellant pro se.

Robert R. Gaillard, Jr., respondent pro se.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered April 13, 2007, which confirmed a special referee's report finding, inter alia, that plaintiff is not entitled to a reduction in her child support obligations, unanimously affirmed, without costs.

Plaintiff's child support obligations were fixed in a March 1999 order entered on default. A motion by plaintiff five years later to vacate that order was denied in a July 2005 order finding that plaintiff's claim of lack of service was demonstrably false. Plaintiff's present claim to the contrary is conclusory and otherwise unavailing. To the extent plaintiff seeks a downward modification of child support based on the

child's own receipt of monthly Social Security disability payments, we note, as did the motion court, plaintiff's failure to submit a net worth statement as required by 22 NYCRR 202.16.

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

ENTERED: MAY 29, 2008

CLERK