SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 6, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4354 The People of the State of New York, Respondent, SCI 6154/05

-against-

Miguel Alemany,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Order, Supreme Court, New York County (Michael R. Ambrecht, J.), entered on or about March 10, 2006, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to the extent of reducing the classification to that of a level one sex offender, and otherwise affirmed, without costs.

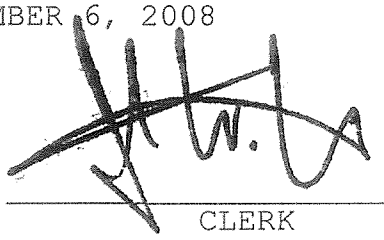
The evidence established that, at most, defendant's future living situation was uncertain in that, although he was described as homeless at the time of his arrest, upon his release from incarceration under the supervision of the Department of Probation, he was advised to go to the Bellevue men's shelter

where he would be assisted by a community organization in trying to find employment. This was insufficient as a matter of law to meet the People's burden of showing, by clear and convincing evidence, that defendant's living situation was inappropriate (*see* Correction Law § 168-n[3]; *People v Ruddy*, 31 AD3d 517 [2006], *lv denied* 7 NY3d 714 [2006]), and defendant should not have been assessed 10 points under risk factor 15 (inappropriate living or employment situation).

Since the point assessment for risk factor 15 was the only assessment at issue, there was no need for the court to make findings as to any other matters.

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

ENTERED: NOVEMBER 6, 2008



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Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4051 In Re Johnny G., Jr.,

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

MercyFirst,
Petitioner-Appellant,

Johnny G., Sr.,
Respondent-Respondent.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for appellant.

Joseph V. Moliterno, Scarsdale, for respondent.

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

Order, Family Court, Bronx County (Allen Alpert, J.), entered on or about August 16, 2007, which denied petitioner agency's application to terminate respondent father's parental rights to the subject child, and dismissed the petition, unanimously modified, on the facts and in the exercise of discretion, to the extent of reinstating the first cause of action of the petition, and otherwise affirmed, without costs, and the matter remanded to Family Court for a new fact finding hearing.

The subject child, born in September 1997, has been in foster care since October 1998. The instant petition was filed in 2005 on the grounds that respondent is presently and for the foreseeable future unable, by reason of mental illness, to

provide proper and adequate care for the child (Social Services Law § 384-b[4][c]) and that the child is permanently neglected (§ 384-b[4][d]). Following a fact-finding hearing, Family Court ordered the petition dismissed because the agency had not met its burden of proof on the permanent neglect ground. Family Court further noted that the agency presented no evidence with respect to the mental illness ground. The agency's failure to present such evidence is not explained in the record before this Court.

The record contains a report of an August 16, 2005 clinical examination of respondent by Dr. Adam Bloom, a psychologist affiliated with Family Court's Mental Health Services. Respondent was receiving outpatient psychiatric care at the time of the examination. The report recites "an Axis I DSM IV diagnosis of Schizoaffective Disorder, and Axis II Diagnoses of Borderline Intellectual Functioning/Antisocial Personality traits" reached by Dr. Raagas of the New Horizon Counseling Center in October 2003. Dr. Bloom noted a history of inpatient psychiatric care at St. Vincent's Hospital and Queens Hospital Center. He observed apparent organic difficulties and speech and language impairment marked by respondent's difficulties in retrieving words and expressing himself in a clear and logical fashion. According to the report, respondent sustained an injury in the 1980s which rendered him comatose for a year. Dr. Bloom indicated that respondent presented with labile mood patterns and

became angry at times during the interview. Indeed, respondent acknowledged that his psychiatric treatment was for "Anger issues, I can't explain it." During the examination, respondent reported that he was compliant with the prescription for only one of two prescribed medications. Dr. Bloom could not opine as to whether respondent meets the criteria for mental illness under the statute. He deferred a formal recommendation pending the receipt of treatment records from Harlem Hospital, St. Vincent's Hospital, Queens Hospital Center, New Horizon Counseling Center and EDNY Counseling Services.

According to undisputed evidence, respondent angrily shoved the then-six-year-old subject child during a June 2004 supervised visit because the child was resistant to entering the visitation room at the agency. The best interests of the child require judicial consideration of the mental illness ground in light of respondent's conduct at the time of the visit, coupled with the psychiatric history noted above. Family Court did correctly determine, however, that the agency failed to establish by clear and convincing evidence that the child had been neglected for at least one year prior to the filing of the petition (Social Services Law § 384-b[7][a]). Accordingly, the new fact-finding hearing should focus on the issue of whether respondent is presently and for the foreseeable future unable, by reason of

mental illness, to provide proper and adequate care for the child within the meaning of § 384-b[4][c].

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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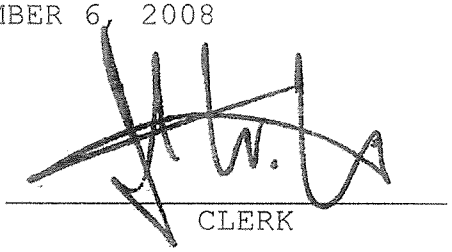

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Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4316 The People of the State of New York, Respondent, Ind. 3699/06

-against-

Elias Sandoval, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 7, 2007, convicting defendant after a jury trial, of burglary in the second degree and robbery in the third degree, and sentencing him to concurrent terms of 5 years and 2 1/3 to 7 years, respectively, unanimously modified, as a matter of discretion in the interest of justice, the conviction for burglary in the second degree reversed and the matter remanded for a new trial on that charge, and the judgment is otherwise affirmed.

As the Court of Appeals has stated:

> "Under the former Penal Law, a person entering with the owner's consent could nevertheless be guilty of burglary if the consent was obtained by 'threat or artifice' (former Penal Law §§ 402, 403, 404, 400 [3]; *see*, Denzer & McQuillan, Practice Commentary, McKinney's Cons Law of NY, Book 39, Penal Law § 140.00, at 341 [1967]). Although the current Penal Law does not include analogous language, the lower courts and commentators

> have concluded that the same rule exists today" (*People v Graves*, 76 NY2d 16, 20 [1990]).

Defendant's claim that the evidence was legally insufficient to establish that he gained entry into the apartment building by means of trick, artifice or misrepresentation is not preserved for review. At the close of the People's case, defendant argued only that the People had failed to make out a prima facie case on both the burglary and robbery charges. After defendant rested without presenting evidence, he renewed his motion to dismiss but limited his argument to the contention that his identity had not been established. Accordingly, having failed to alert the People and the court to this alleged deficiency in the proof, defendant's challenge to the sufficiency of the evidence is not preserved for review (*People v Gray*, 86 NY2d 10, 20-21 [1995]).

Nor did defendant object to the court's instructions on the elements of burglary in the second degree. The Court instructed the jury as follows:

> "There is a crime called burglary where it is - it is a crime if somebody enters a building unlawfully intending to commit a crime in the building, whether or not they ultimately commit a crime in the building.
>
> "The elements are: Entering the building, that is, a dwelling. It can be the entire apartment building as opposed to an individual apartment within the greater structure.
>
> "Enter unlawfully. *That means without permission, no lawful reason to be there.*

"To enter unlawfully a dwelling intending to commit a crime in there, whether or not once you get in there, anything strikes your fancy.

"The crime of burglary is completed if you enter a building that's a dwelling unlawfully, intending to commit a crime in there. Those are the elements. Each element has to be proven beyond a reasonable doubt.

"If the People prove each element beyond a reasonable doubt, you must convict. You have no choice.

"If the People fail in any one or all of them, you must acquit. You have no choice" (emphasis added).

The court then went on to instruct the jury concerning robbery and stealing. We quote the rest of the instructions in full because they are relevant to our decision to exercise our interest of justice jurisdiction. The court concluded its instructions as follows:

"With regard to the burglary, it can be any crime. The People don't have to prove what crime. It could be one or more crimes. It's essentially a crime of opportunity. I go in there. Anything that I'm going to do: Rape, rob, pillage, or plunder, you'll see if there's anything of interest. If not, I'll leave.

"Elements are established. The burglary charge has been established. The elements to burglary are that on or about May 21st in New York County, the defendant unlawfully entered the building at the address about which you heard testimony. The defendant did so knowingly, and that the defendant did so intending to commit a crime in the building.

"And the fourth is that the building is a dwelling."

As defendant did not object to any aspect of these instructions, the sufficiency of the evidence must be assessed in light of the elements of the crime of burglary in the second

degree as they actually were defined by the charge, regardless of any error in the charge (*see People v Sala*, 95 NY2d 254, 260 [2000]). Given the highlighted portion of the charge, the jury reasonably could have concluded that the element of unlawful entry was established simply by proof that defendant had no lawful reason to be in the apartment building. As the jury only could have concluded that defendant had "no lawful reason to be there," the evidence was legally sufficient and the verdict convicting defendant of burglary in the second degree was not against the weight of the evidence.

We nonetheless exercise our interest of justice jurisdiction and reverse the burglary conviction for several, interrelated reasons. First, the highlighted portion of the charge was manifestly incorrect as it effectively relieved the People of the obligation to prove that defendant had unlawfully entered the apartment building (*cf. People v Konikov*, 160 AD2d 146, 151 [1990], *lv denied* 76 NY2d 941 [1990] [observing in a case in which the People contended that the defendant had entered a dwelling by artifice or trick that the jury was never instructed to consider that theory of unlawful entry and, "accordingly, the People's assertion that the defendant obtained permission to enter through a deception is not supported by a jury finding . . ."] [internal quotation marks omitted]).

Second, although we need not and do not decide the issue, we

have grave doubts about whether defendant properly could have been convicted of the burglary charge if the jury had been correctly instructed. The People's evidence was that the victim unlocked and opened the outer door of the building, stepped into the vestibule after closing and locking the outer door and opened the inner door. Before she walked through the door, she heard a knock on the outer door. The man who knocked on the door - she subsequently identified defendant as that man - "[l]ook[ed] [her] in the eye, and he pointed down to the lock." The victim had been living in the building for only two months and so she looked at him "to see if I recognized him - possibly - maybe he might live in the building." According to the victim, defendant "looked like he had a look on his face like he belonged there. And so I just opened the door for him." The only other evidence bearing on the issue of whether defendant entered the building by artifice or trick is the testimony of the victim that defendant "didn't give me a look that made me feel like I had to be afraid. [He] looked, by the look on [his] face through the window, it looked kind of matter-of-fact, 'you need to open the door.' But - I obviously live there - but without saying that, of course."

The gesture defendant made in pointing to the lock is tantamount to a verbal request that she open the door. Obviously, such a request alone would not be sufficient to establish that defendant entered by means of an artifice or

trick. Nor would the absence of a threatening look be sufficient. Thus, if defendant did enter by means of an artifice or trick, it could only be on account of the victim's impression that defendant "had a look on his face like he belonged there." A "look" on his face that "looked kind of matter-of-fact" and conveyed to her that he was saying "you need to open the door." Suffice it to say, as noted above, we have grave doubts that a jury reasonably could have concluded on the basis of this unelaborated-upon testimony about the look on defendant's face that the People had proven beyond a reasonable doubt that defendant gained entry into the building by artifice or trick. We do not think it appropriate, however, to exercise our interest of justice jurisdiction and assess the sufficiency of the evidence as if the court had correctly instructed the jury on unlawful entry by artifice, trick or deception. Although it may well be improbable that the People could have elicited additional relevant evidence if defendant had made a timely and specific objection that the proof was lacking in this respect, it would not be fair to the People to assume that no such evidence could have been elicited.

Third, we can conceive of no possible strategic reason that might explain either defense counsel's failure to make such a specific objection focusing on an obvious and critical issue or counsel's failure to protest the highlighted, clearly erroneous

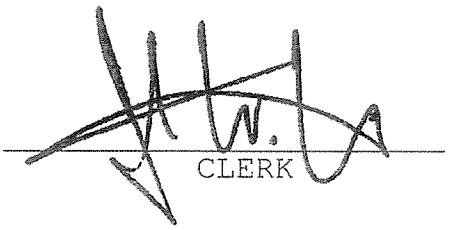
instruction. Finally, we of course are troubled by the court's additional instruction to the effect that the elements of the burglary charge "are established[;] [t]he burglary charge has been established." In fairness to the trial court, we note that on her summation defense counsel did not challenge the sufficiency of the evidence as to any of the elements of the burglary and robbery charges, and argued only that the People had failed to prove identity beyond a reasonable doubt. Nonetheless, defense counsel did not expressly concede that any of the elements had been established. Absent such a concession, the trial court should not have instructed the jury that the elements of the burglary charge had been established.

Accordingly, we exercise our interest of justice jurisdiction to review the court's instructions on the elements of the burglary charge, find that those instructions deprived defendant of a fair trial and direct a new trial on the burglary charge in the event the People believe it appropriate to retry defendant on that charge. With respect to the robbery conviction, the evidence was legally sufficient and the verdict was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning identification and credibility. The victim had ample basis to observe defendant before he robbed her, she gave the police a

generally consistent and accurate description and identified defendant just three days after the crime when she saw him walking on the street.

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

ENTERED: NOVEMBER 6, 2008



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

4324N-
4324NA Desteny Escalet, an Infant by her Mother and Natural Guardian, Melissa Quinonez,
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Index 24546/06
17054/07

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant.

Salzman & Winer, New York (Mitchell G. Shapiro of counsel), for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about January 8, 2008, which denied defendant's motion to dismiss 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. Appeal by defendant from order, same court (John A. Barone, J.), entered June 18, 2007, which granted plaintiffs' motion for leave to file a late notice of claim, unanimously dismissed, without costs, as academic.

The infant plaintiff was injured when she fell from the top of a fence that was approximately 10 to 12 feet tall. The fence surrounded a grass area that was not a designated play area. Although the fence was locked, plaintiff gained access to the area where the accident occurred by crawling through a hole in

the fence that had allegedly been in existence for more than five years. Plaintiff fell from a different section of the fence after climbing it to retrieve a ball that had become lodged there. Plaintiff does not assert that the portion of the fence from which she fell was defective. Instead, she claims that the presence of the hole facilitated the accident by failing to prevent her from accessing the grass area in the first place.

The complaint should have been dismissed because the connection between defendant's alleged neglect of the fence and plaintiff's injury is too attenuated to conclude that, even accepting the allegations in the complaint as true, defendant's malfeasance proximately caused the accident. Rather, the presence of the hole in the fence "merely furnished the condition or occasion for the occurrence of the event rather than one of its causes" (*Sheehan v City of New York*, 40 NY2d 496, 503 [1976]). The law draws a "sharp distinction" between such a facilitating condition and an act that is a proximate cause of an accident (*Lee v New York City Hous. Auth.*, 25 AD3d 214, 219 [2005]).

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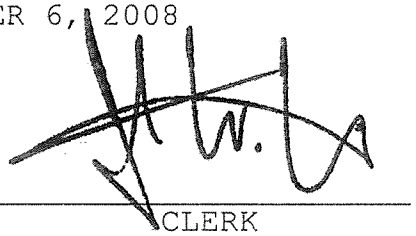

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Andrias, J.P., Saxe, Gonzalez, Catterson, Acosta, JJ.

4474 The People of the State of New York, Respondent, Ind. 3958/05

-against-

Bernard Washington, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael A. Corriero, J.), rendered August 10, 2006, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him to concurrent terms of 7 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. Although the victim did not identify defendant at trial, he made a reliable lineup identification. That identification was corroborated by defendant's possession of the victim's cell phone, a circumstance for which defendant provided an implausible explanation.

Whether to provide an expanded identification charge, and the content of such a charge, are matters within a trial court's

discretion (*see People v Knight*, 87 NY2d 873 [1995]; *People v Whalen*, 59 NY2d 273, 278-279 [1983]), and we find that the court, which delivered a thorough charge on identification, properly exercised its discretion when it declined to add language specifically directing the jury's attention to the cross-racial aspect of the victim's identification of defendant (*see People v Applewhite*, 298 AD2d 136 [2002], *lv denied* 99 NY2d 625 [2003]).

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). After the prosecution explained its reasons for the challenges at issue, defense counsel remained silent and raised no objection when the court accepted these reasons as nonpretextual. Thus, despite ample opportunity to do so, defendant failed to preserve his substantive objections to the court's ultimate ruling (*see People v Smocum*, 99 NY2d 418, 423-424 [2003]; *People v Allen*, 86 NY2d 101, 111 [1995]), and we decline to review them in the interest of justice. Defendant also failed to preserve his claim that, in arriving at its ruling, the court failed to follow the proper *Batson* procedure, and we likewise decline to review it. As an alternative holding, we also reject all of defendant's substantive and procedural claims on the merits. Viewed in context, the court's ultimate determination was a proper ruling, under step three of *Batson*, that the prosecutor's race-neutral reasons were nonpretextual, and the court implicitly made the

appropriate factual findings (*see People v Brown*, 17 AD3d 283, 284-285 [2005], *lv denied* 5 NY3d 804 [2005]). These findings are supported by the record and entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). While the court may have used the wrong nomenclature in describing its step-three ruling, that does not entitle defendant to a new trial.

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

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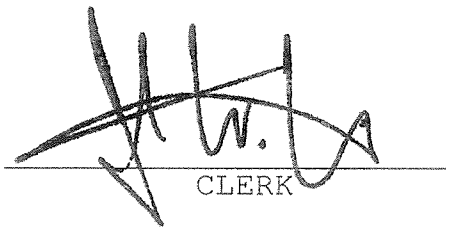

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Andrias, J.P., Saxe, Gonzalez, Catterson, Acosta, JJ.

4475 Kelly Kim, et al., Index 101406/07
Plaintiffs-Respondents,

-against-

Sydney R. Coleman, M.D.,
Defendant-Appellant.

McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of counsel), for appellant.

DeSimone, Aviles, Shorter & Oxamendi LLP, New York (Louise M. Cherkis of counsel), for respondents.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered January 16, 2008, which, in an action for medical malpractice, granted defendant's motion pursuant to CPLR 3211(a)(8) to dismiss the complaint to the extent of ordering a traverse hearing, unanimously affirmed, without costs.

A traverse hearing was properly ordered in light of the conflicting accounts provided by plaintiff's process server, and defendant and his office manager, regarding how and whether service was properly effectuated upon defendant (*see Ananda Capital Partners v Stav Elec. Sys. [1994]*, 301 AD2d 430 [2003]).

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

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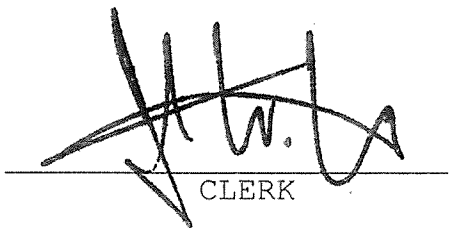

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Andrias, J.P., Saxe, Gonzalez, Catterson, Acosta, JJ.

4476 Tanja Schuster, Index 25016/02
Plaintiff-Appellant,

-against-

Five G. Associates, LLC, et al.,
Defendants-Respondents.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Edward J. O'Gorman of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 27, 2007, in an action for personal injuries sustained in an attack within defendants' building, dismissing the complaint pursuant to an order that granted defendants' motion for summary judgment, unanimously affirmed, without costs.

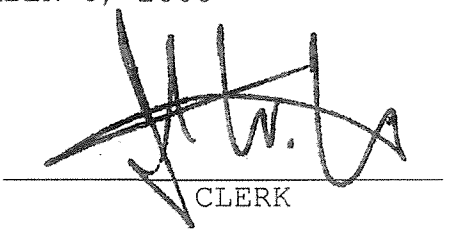
Defendants made out a prima facie case of entitlement to summary judgment by establishing that the building's door locks were functioning properly on the day of the assault (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544 [1998]), and that there was a lack of evidence that the assailant was an intruder, or that there were prior acts of criminality in the building to place defendants on notice of a potential attack (*see Buckeridge v Broadie*, 5 AD3d 298 [2004]). In response, plaintiff failed to present evidence rendering it "more likely or reasonable than not that [her] assailant was an intruder who gained access to the

premises through a negligently maintained entrance" (*Burgos*, 92 NY2d at 551).

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: NOVEMBER 6, 2008



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

4477 In re Elijah F., etc.,

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

Edgar F., etc.,
Respondent-Appellant,

Donna Denise M.,
Respondent,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for Catholic Guardian Society and Home Bureau, respondent.

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about May 30, 2006, which, insofar as appealed from, upon a fact-finding determination of permanent neglect made at inquest upon respondent father's default, terminated the father's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence demonstrated that termination of the father's parental rights was in the child's best interests. The child is doing well in his preadoptive home, where he has lived virtually his entire life and his foster

parents tend to his many special needs and wish to adopt him (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). Contrary to the father's contention, the circumstances presented do not warrant a suspended judgment. Although he has obtained employment and taken steps to address his drug problem, the record shows that the father will not be able to assume responsibility for the child in the near future, particularly where he fails to fully understand the child's special needs or possess the ability to address them (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *Matter of Jazminn O'Dell P.*, 39 AD3d 235 [2007]).

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

ENTERED: NOVEMBER 6, 2008

CLERK

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

4478-
4478A Ernest Poree, Index 17979/05
Plaintiff-Appellant,

-against-

Gregory Bynum,
Defendant-Respondent.

Adam D. White, New York, for appellant.

Gregory Bynum, Jr., respondent pro se.

Judgment, Supreme Court, Bronx County (Nelson S. Roman, J.), entered November 14, 2007, dismissing the complaint for lack of personal jurisdiction, unanimously reversed, on the law and the facts, without costs, and the complaint reinstated. Appeal from order, same court and Justice, entered on or about October 25, 2007, which, to the extent appealable, denied plaintiff's motion to renew his prior motion for default, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The traverse hearing was warranted where the parties' conflicting affidavits disputed whether service had properly been effected (*see Anello v Barry*, 149 AD2d 640, 641 [1989]). Plaintiff submitted an affidavit stating that substituted service had been made on defendant's mother at the address confirmed as defendant's through records at the Department of Motor Vehicles. Defendant denied that he lived at that address, even though it was listed as such on his driver's license, and he submitted an

affidavit from his mother denying that she received process on his behalf. Nevertheless, plaintiff did demonstrate, by a preponderance of the evidence, that proper service was made (*see Cadle Co. v Nunez*, 43 AD3d 653 [2007]). The process server testified at the hearing that he personally served defendant's mother with the summons and complaint at the officially listed address, and then mailed a copy to the same address. Defendant's statements that he did not live at that address, and that neither he nor his mother was ever served with papers, were not corroborated by any evidence. His mother's affidavit acknowledged that she spoke to the process server but denied that she accepted process on defendant's behalf; however, defendant failed to call his mother to testify at the hearing. In light of defendant's vague and uncorroborated statements about his address at the time of service, the process server's failure to produce his log book at the hearing, which was assertedly destroyed in a car accident, did not warrant a rejection of the latter's testimony. Plaintiff's motion for a default judgment was properly denied in light of defendant's affidavit raising a

potentially meritorious defense (*see e.g. Spira v New York City Tr. Auth.*, 49 AD3d 478 [2008]).

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

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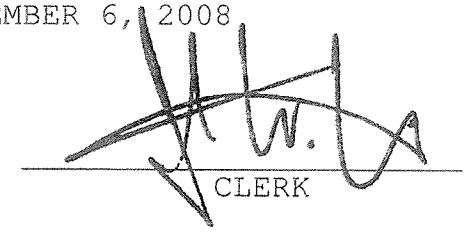

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Andrias, J.P., Saxe, Gonzalez, Catterson, Acosta, JJ.

4479-
4479A-
4479B In re Roger Guerrero B., and Others,

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

Phyllis B., etc.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Jeremiah Quinlan, Hastings on Hudson, for respondent.

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

Orders, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 10, 2007, which, after neglect and dispositional hearings, determined that respondent mother had permanently neglected the subject children, terminated her parental rights, and awarded custody and guardianship to petitioner for the purpose of adoption, unanimously affirmed, without costs.

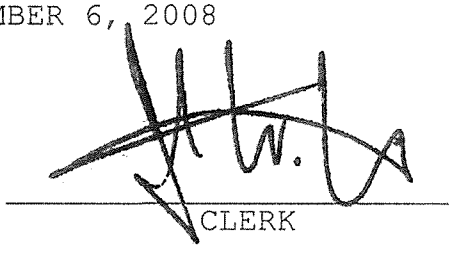
The finding of permanent neglect is supported by clear and convincing evidence that despite petitioner's diligent efforts, respondent, during the relevant statutory period, failed to maintain contact with her children and failed to address the problems leading to their placement, thus failing to plan for

their future (Social Services Law § 384-b[7][c]). The record demonstrates that respondent continued to use drugs during the relevant period, failed to avail herself of the services and therapy referred to her by petitioner, and maintained only sporadic contact with the children (*see generally Matter of Justin Lemont R.*, 45 AD3d 445 [2007]).

The record at the dispositional hearing supported, by a preponderance of the evidence, the conclusion that the children's best interests would be served by termination of respondent's parental rights (*see Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; Family Court Act § 631) so as to facilitate adoption by their maternal grandfather, with whom they have lived most of their lives and with whom they maintain a positive relationship. Despite respondent's commendable but belated efforts to comply with therapy and drug counseling (*see Matter of Saraphina Ameila S.*, 50 AD3d 378 [2008]), the record does not warrant a suspended judgment as being in the children's best interests (*Matter of Jazminn O'Dell P.*, 39 AD3d 235 [2007]).

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

ENTERED: NOVEMBER 6, 2008



CLERK

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

4480 Donald Pressley, Index 603220/06
Plaintiff-Respondent,

-against-

Paul Alexander Shneyer,
Defendant-Appellant,

Paul A. Shneyer, P.C.,
Defendant.

Arshack, Hajek & Lehrman, PLLC, New York (Kevin C. Petkos of counsel), for appellant.

Norman L. Faber, New York, for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered July 11, 2007, which, insofar as appealed from, denied defendant's motion pursuant to CPLR 3211(a)(8) to dismiss the complaint as against him in his individual capacity, unanimously affirmed, without costs.

Plaintiff satisfied the burden of establishing personal jurisdiction over defendant by service pursuant to CPLR 308(2). At the traverse hearing, the process server testified that he delivered the summons with notice to a suitable person at defendant's place of business, and that this person accepted the documents before handing them back and directing him to place them in defendant's mailbox (*see Cowan, Liebowitz & Latman v New York Turkey Corp.*, 111 AD2d 93 [1985]). The process server also stated that the following day he mailed a copy of the summons

with notice to defendant's place of business. There is no basis for disturbing the court's findings as to the credibility of the process server (*see Schorr v Persaud*, 51 AD3d 519 [2008]). Furthermore, although plaintiff failed to list the individual defendant's name on the mailing envelope, this did not render service on him invalid, since the summons gave ample notice to defendant, an attorney, that he was being sued in his individual capacity (*see Albilia v Hillcrest Gen. Hosp.*, 124 AD2d 499 [1986]).

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: NOVEMBER 6, 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 November 6, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
Luis A. Gonzalez
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 3765/03
Respondent,

-against- 4481

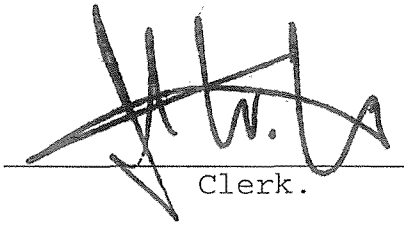
Javier Perez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Martin Marcus, J.), rendered on or about December 5, 2006,

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

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

ENTER:



Clerk.

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

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

4482 Jorge Angamarca,
Plaintiff-Respondent-Appellant,

Index 115471/04
590327/05
590842/06

Blanca A. Guguancela Encolada,
Plaintiff-Respondent,

-against-

New York City Partnership Housing Development Fund Company, Inc., et al.,
Defendants-Appellants-Respondents.

[And Other Actions]

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Timothy R. Capowski of counsel), for New York City Partnership Housing Development Fund Company, Inc., Novalex Contracting LLC and Jefferson Townhouses, LLC, appellants-respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia Raicus of counsel), for Citywide Contractors, LLC, appellant-respondent.

Michelle S. Russo, Port Washington, for Jorge Angamarca, respondent-appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Blanca A. Guguancela Encolada, respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 26, 2008, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing causes of action based on common-law negligence, Labor Law § 200 and § 241(6) except as the latter relies on Industrial Code (12 NYCRR) § 23-1.7(b)(1)(i), and denied plaintiff Angamarca's cross motion for partial summary judgment, unanimously modified, on the law, defendants' motions

granted to the extent of dismissing the claim under Labor Law § 241-a, the cross motion granted on plaintiff Angamarca's claim pursuant to § 240(1), and otherwise affirmed, without costs.

During the construction of a townhouse, Angamarca fell from the roof and was discovered lying on the second floor of the building. Although no one witnessed the fall, and the injured worker had no recollection of what happened, there was strong circumstantial evidence (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550 [1998]) that he probably fell through an improperly covered skylight hole in the roof. Just prior to the fall, Angamarca and a coworker were on the roof near the opening. There were only three pieces of plywood at the scene, two of which covered the two openings in the roof. More wood had been requested, and was being sent up by lift.

Deposition testimony indicated that the holes were generally covered by plywood sheets nailed on, but it was not unusual for the plywood to be removed from the openings. The principal of Angamarca's employer was told that the injured party had fallen through the skylight, and another individual testified that he came upon the injured worker lying on some plywood. Defendants asserted that Angamarca was likely the sole proximate cause of his injuries, and suggested that he toppled off the nearby lift, rather than falling through an opening in the roof. However, there was no evidence that Angamarca had been seen on the lift

prior to the accident, or even that the lift was on the roof at the time. Angamarca further submitted an expert affidavit stating that the nature of his injuries was consistent with having fallen through the skylight opening, rather than from the lift.

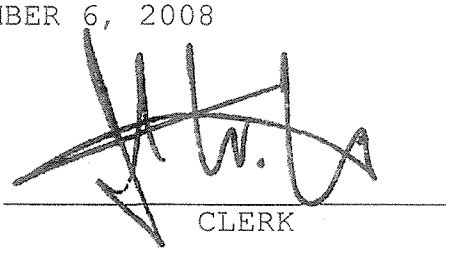
Under these circumstances, defendants have not established the existence of a triable issue of fact. Angamarca produced admissible prima facie evidence he was injured after a fall through the skylight opening and had not been provided with any safety device or equipment to afford him proper protection from such an elevation-related hazard, thereby entitling him to summary judgment as to liability on his claim under Labor Law § 240(1) (*see Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363 [2007]). In opposition, defendants offered only unsupported speculation as to an alternative explanation for the injury.

The court should have summarily dismissed Angamarca's claim pursuant to Labor Law § 241-a, which was enacted to protect those engaged in hazardous work near "elevator shaftways, hatchways and stairwells in buildings under construction or demolition." Notwithstanding its proximity to a stairwell, the skylight opening fit none of these descriptions, and § 241-a thus does not apply.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: NOVEMBER 6, 2008



CLERK

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

4483 Nazario Leon, Index 16194/05
Plaintiff-Respondent,

-against-

St. Vincent De Paul Residence,
Defendant-Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner and Judy C. Selmeci of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about January 26, 2008, which, insofar as appealed from as limited by the briefs in this action for medical malpractice, denied defendant's motion to vacate the note of issue and extend its time to move for summary judgment, unanimously affirmed, without costs.

The motion court properly exercised its discretion in denying defendant's motion, which was made seven months after the note of issue was filed and based on the assertion that the note of issue inaccurately stated that all discovery was complete when defendant had not taken plaintiff's deposition or conducted an independent medical examination of him. As the court recognized, a deposition of plaintiff would be futile considering that he suffered from advanced dementia, and the record shows that defendant deposed plaintiff's daughter, who held his power of

rney and was involved in his life and health care.

ermore, defendant waived its right to any other discovery by ing to comply with the discovery deadlines set forth in the t's compliance order, which contained a waiver clause (*see ntanna v Rogers*, 306 AD2d 167 [2003]; *Mateo v City of New rk*, 282 AD2d 313 [2001]).

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

ENTERED: NOVEMBER 6, 2008

CLERK

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

4484 G&T Terminal Packaging Co., Inc., et al., Plaintiffs-Appellants, Index 26777/03

-against-

Western Growers Association, et al., Defendants-Respondents.

Linda Strumpf, South Salem, for appellants.

Trachteberg Rodes & Friedberg, LLP, New York (Len Rodes of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered April 13, 2007, which, in this action for malicious prosecution and abuse of process, inter alia, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs purchase produce from growers to sell to wholesalers and retailers; defendants Agri-Empire (Agri) and Horwath & Co., Inc. are growers. In the fall of 1999, following a joint investigation ("Operation Forbidden Fruit") by the United States Department of Agriculture (USDA) and the FBI, nine USDA fruit and vegetable inspectors pleaded guilty to taking bribes from employees of various produce purchasers operating in the Hunts Point Market in the Bronx. In return for the money, they agreed to downgrade the quality rating of the produce received by the wholesalers, which resulted in lower prices paid to the

growers. Among the purchasers' employees implicated in the investigation was Anthony Spinale, who was charged with nine counts of making cash payments to an inspector to influence the outcome of inspections of fresh fruit and vegetables conducted at both plaintiffs' businesses. Spinale pleaded guilty to one felony count in the U.S. District Court for the Southern District of New York, and was sentenced to five years' probation, 12 months' home confinement and a $30,000 fine.

Shortly after the inspectors were arrested, the USDA notified growers and their associations that they may have been victims of the bribery scheme. By mid-2001, after filing informal complaints, Agri and Horwath each had filed a formal complaint with the USDA seeking reparations pursuant to the Perishable Agricultural Commodities Act, 1930 (PACA) (7 USC § 499a *et seq.*), and, in 2002, by order of the Secretary of Agriculture, they were awarded reparations in the sums of $8,263 and $3,880.50, against plaintiffs G&T and Tray-Wrap, respectively, plus interest and filing fees. Plaintiffs appealed the reparations awards to the federal court. Ultimately, Agri and Horwath agreed to dismiss their reparations complaints and vacatur of the reparations awards.

In June 2003, the USDA filed an administrative complaint against plaintiffs for violating PACA by Spinale's acts of bribery in 1999. Although the complaint was dismissed following

a hearing before an administrative law judge, a judicial officer reversed that decision and revoked plaintiffs' PACA licenses, and the U.S. Court of Appeals for the Second Circuit affirmed (*G&T Term. Packaging Co., Inc. v United States Dept. of Agric.*, 468 F3d 86, 88 [2d Cir 2006], *cert denied* ___ US ___, 128 S Ct 355 [2007]).

Plaintiffs commenced the instant action shortly after the federal actions based on Agri's and Horwath's reparations complaints were dismissed pursuant to stipulation.

To establish a cause of action for malicious prosecution, a plaintiff must show the elements of commencement or continuation of a judicial proceeding, malice, want of probable cause, and the successful termination of the precedent action in the plaintiff's favor (*see Martin v City of Albany*, 42 NY2d 13, 16 [1977]; *Ellman v McCarty*, 70 AD2d 150, 155 [1979]; *see also Chappelle v Gross*, 26 AD2d 340, 341 [1966]). In their opposition to defendants' motions for summary judgment, plaintiffs attempted to raise factual issues as to probable cause and malice. However, they pointed to issues, such as the quality of the produce, that were relevant to the proceedings before the USDA, but not to the instant action. Moreover, contrary to their contention, the indictment of Anthony Spinale constituted probable cause for Agri and Horwath to file their complaints with USDA (*see Jenkins v City of New York*, 2 AD3d 291 [2003]; *see also Koam Produce, Inc.*

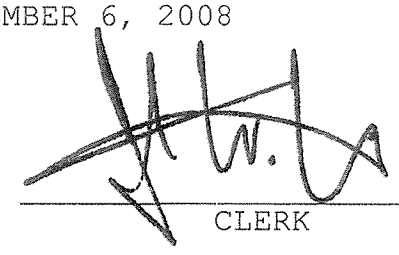
v DiMare Homestead, Inc., 329 F3d 123 [2d Cir 2003]; *G&T Terminal Packaging*, 468 F3d 86 [2d Cir 2006]). In any event, the proceedings outlined above did not end in plaintiffs' favor (*see Levy's Store, Inc. v Endicott-Johnson Corp.*, 272 NY 155, 162 [1936]).

As to their abuse of process cause of action, plaintiffs failed to raise an issue of fact as to defendants' "intent to do harm without excuse or justification" or "use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]).

Finally, in considering Spinale's affidavit, the motion court correctly subjected it to severe scrutiny in light of his conviction for an act of dishonesty and untrustworthiness (*see People v Hodge*, 141 AD2d 843, 846 [1988], *lv denied* 72 NY2d 1046 [1988]).

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

ENTERED: NOVEMBER 6, 2008



CLERK

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

4485 The People of the State of New York, Respondent, Ind. 714/06

-against-

Allen Johnson, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered October 31, 2006, convicting defendant, after a jury trial, of criminal sexual act in the first degree, attempted criminal sexual act in the first degree, attempted rape in the first degree, burglary in the first degree, criminal possession of a weapon in the second and third degrees, and three counts of sexual abuse in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 115 years to life, unanimously affirmed.

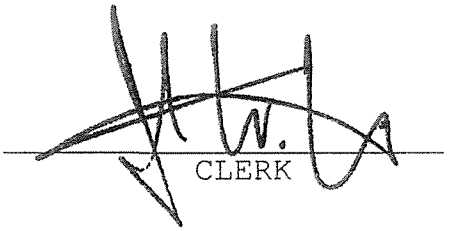
The court properly denied defendant's motion to suppress his statements to the police. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Defendant's statements were clearly spontaneous and not the

product of police interrogation (*see People v Lawrence*, 25 AD3d 498 [2006], *lv denied* 6 NY3d 835 [2006]). The detectives' words and actions relating to the recovery and securing of a loaded revolver were incidental to the arrest and were neither intended nor reasonably likely to elicit an incriminating statement (*id.*; *see also People v Arriaga*, 309 AD2d 544 [2003], *lv denied* 1 NY3d 624 [2004]; *People v Smith*, 298 AD2d 182 [2002], *lv denied* 99 NY2d 585 [2003]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court only permitted inquiry as to a limited portion of defendant's extensive record, and the convictions at issue were neither stale nor unduly prejudicial. To the extent that defendant is raising a constitutional claim relating to the *Sandoval* issue, such claim is both unpreserved and without merit.

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

ENTERED: NOVEMBER 6, 2008



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

4486 The People of the State of New York, Ind. 2268/04
Respondent,

-against-

William Taylor,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Heather L. Holloway of counsel), for appellant.

Judgment, Supreme Court, New York County (Brenda Soloff, J. at plea allocution; Charles H. Solomon, J. at sentence), rendered on or about August 2, 2007, unanimously affirmed.

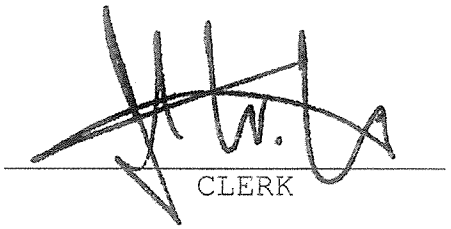
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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: NOVEMBER 6, 2008



CLERK

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

4488 Wachovia Securities, LLC, Index 104326/06
Plaintiff-Appellant,

-against-

Richard A. Joseph, etc., et al.,
Defendants-Respondents,

Delaware Charter Guarantee &
Trust Company, etc., et al.,
Defendants.

Wolff & Samson, P.C., New York (Ronald L. Israel of counsel), for appellant.

Snow Becker Krauss P.C., New York (Ronald S. Herzog of counsel), for Joseph respondents.

Ellenoff Grossman & Schole LLP, New York (Gabriel Mendelberg of counsel), for Hudson Securities, respondent.

Gibbons P.C., New York (Michael S. O'Reilly of counsel), for Koonce Securities, Inc., respondent.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered November 2, 2007, dismissing the complaint as against defendants-respondents Richard A. Joseph, Doug Joseph, Hudson Securities, Inc., and Koonce Securities, Inc., pursuant to an order, same court and Justice, entered February 7, 2007, which granted respondents' motions pursuant to CPLR 3211(a)(7) to dismiss the complaint as against them, unanimously affirmed, with costs.

The Seibels Bruce Group (Seibels), a nonparty to this action, is a holding company for property and casualty insurance

companies. On March 1, 2004, Wachovia bought Seibels securities for its account, after which those securities underwent a 1000-to-1 reverse stock split. In attempting to close its position by selling those shares, Wachovia claimed that it "mistakenly" short sold the new securities, which had a new trading symbol and a starkly different value. Wachovia commenced this action to rescind the transaction on the basis of unconscionability, unilateral mistake and unjust enrichment, and sought the imposition of a constructive trust.

The record establishes that the court applied the appropriate standards on the motions to dismiss and properly determined that the allegations in the complaint were insufficient to defeat said motions (*see e.g. Matter of Sud v Sud*, 211 AD2d 423, 424 [1995]). A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made, i.e., "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal quotation marks and citations omitted]). Even assuming that somehow a "trap" was set into which Wachovia fell, the complaint does not establish that Wachovia was coerced in any way to enter into that specific transaction. Rather, Wachovia placed an unsolicited market order

in an attempt to cover its short position in Seibels shares, and absent any aggravating factors which indicate an inequity in bargaining power, price alone will not support a finding of substantive unconscionability (*see Hertz Corp. v Attorney-General of State of N.Y.*, 136 Misc 2d 420, 425 [1987]).

Wachovia also failed to establish a right of recovery on the basis of unilateral mistake, as the complaint failed to allege facts that would sufficiently establish that its purported unilateral mistake was caused by fraudulent conduct on the part of any of respondents, and that the mistake occurred despite Wachovia's exercise of due diligence (*see Gaylords Natl. Corp. v Arlen Realty & Dev. Corp.*, 112 AD2d 93, 96 [1985]; *Bailey Ford v Bailey*, 55 AD2d 729, 730 [1976]). There is no indication in the record that Wachovia, a sophisticated investor, undertook further investigation to ascertain why the stock symbol it initially entered into its computer system was rejected prior to the subject transaction (*see G & G Invs. v Revlon Consumer Prods. Corp.*, 283 AD2d 253 [2001]).

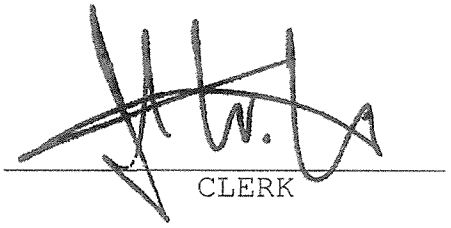
The record does not support Wachovia's allegations of injustice or unjust enrichment, but only supports a finding that Wachovia made a costly error due to its own conduct (*see Tompers v Bank of Am.*, 217 App Div 691, 694 [1926]). Furthermore, a party claiming entitlement to a constructive trust must establish: "(1) a confidential or fiduciary relation, (2) a

promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" (*Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980]), and here, the absence of a fiduciary relationship between these sophisticated entities defeats any entitlement to a constructive trust (*see SNS Bank v Citibank*, 7 AD3d 352, 354 [2004]; *Nathan W. Drage, P.C. v First Concord Sec.*, 4 Misc 2d 92, 99 [2000]).

We have considered Wachovia's remaining arguments, including that the motion court made incorrect findings of fact, and find them unavailing.

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

ENTERED: NOVEMBER 6, 2008



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

4489 Leticia Abreu, Index 6884/05
Plaintiff-Respondent,

-against-

Jose A. Quesada,
Defendant-Appellant.

Christopher E. Finger, Bronx, for appellant.

Wolf & Wolf, LLP, Bronx (Edward H. Wolf of counsel), for respondent.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered May 10, 2007, which granted plaintiff's motion for partial summary judgment on the issue of liability for legal malpractice, unanimously affirmed, without costs.

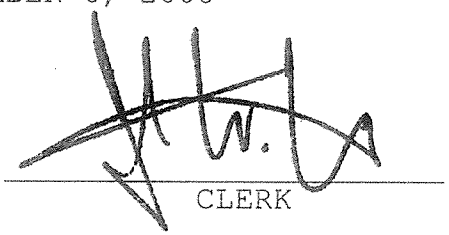
The record contains no dispute that defendant failed to file a proper request for a hearing pursuant to Education Law 3020-a(2)(c) and that this failure resulted in the loss to plaintiff of pay and benefits to which she otherwise would have been entitled, pending a hearing, before termination (*see Bishop v Maurer*, 33 AD3d 497, 498 [2006], *affd* 9 NY3d 910 [2007]; Education Law 3020-a[2][b]). Further, defendant's negligence resulted in plaintiff being obliged to retain other counsel and commence an article 78 proceeding (*see Rosenkrantz v Erdheim*, 177 AD2d 389 [1991]).

The partial grant of plaintiff's article 78 petition against the Board of Education does not collaterally estop plaintiff from

asserting defendant's legal malpractice (*see Weiss v Manfredi*, 83 NY2d 974, 976-977 [1994]; *Savattere v Subin Assoc.*, 261 AD2d 236, 236 [1999]).

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

ENTERED: NOVEMBER 6, 2008



CLERK

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

4492 The People of the State of New York, Respondent, Ind. 3284/04

-against-

Derrick Garcia, Defendant-Appellant.

Levitt & Kaizer, New York (Yvonne Shivers of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered May 31, 2007, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

Defendant opened the door to the admission of testimony about a photographic identification (*see People v Massie*, 2 NY3d 179 [2004]; *People v Cruz*, 249 AD2d 136 [1998], *lv denied* 92 NY2d 924 [1998]; *People v Mahone*, 206 AD2d 263 [1994], *lv denied* 84 NY2d 860 [1994]). Defendant's cross-examination of the identifying witness and a detective did not simply cast doubt on the reliability of the witness's in-court identification, but created the misimpression that the witness could not identify defendant at all, that the police consequently did not conduct any identification procedure involving this witness, and that the

witness identified defendant in court only because he was sitting at the defense table. We have considered and rejected defendant's remaining arguments on this issue, including his claim that he was unfairly surprised by the prosecutor's application to introduce the photo identification.

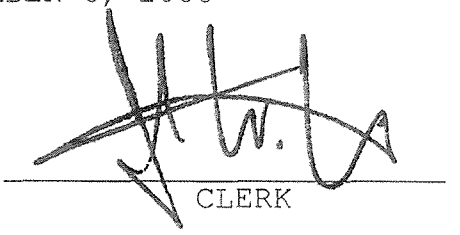
The court responded meaningfully to notes from the deliberating jury (*see People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 301-302 [1982], *cert denied* 459 US 847 [1982]). Any delay in responding to the jury's notes was occasioned by the lack of clarity of the requests and the extensive discussions between the parties and the court regarding the appropriate responses. Although the court directed readbacks of testimony that were somewhat broader than the precise information requested by the jury, this was appropriate because the additional information clarified confusing testimony and provided a complete answer to the jury's inquiries. Defendant has not established that he was prejudiced either by the delay or by the content of the readback (*see People v Agosto*, 73 NY2d 963, 966 [1989]; *People v Lourido*, 70 NY2d 428, 435 [1987]; *People v Perez*, 15 AD3d 284 [2005], *lv denied* 4 NY3d 884 [2005]).

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The evidence established a

lawful automobile stop, based on a sufficient description of the car and its occupants.

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

ENTERED: NOVEMBER 6, 2008



CLERK

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

4494 Ruth B., a Minor, by Encarnacion Maldonado, etc., Plaintiff-Respondent, Index 109144/04 590977/06

-against-

Whitehall Apartment Co., LLC, et al., Defendants-Appellants.

[And a Third Party Action]

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellants.

Madeline Lee Bryer, P.C., New York (Jonathan I. Edelstein of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered April 22, 2008, which, to the extent appealed from as limited by the briefs, denied so much of defendants' motion as sought summary judgment dismissing the third cause of action, unanimously affirmed, without costs.

Plaintiff, by her mother, commenced this action against defendant owners of the apartment building in which plaintiff and her family resided to recover damages for injuries she sustained when she was sexually assaulted by third-party defendant Avila in an elevator in the building. The complaint contained three causes of action; the first two were based on defendants' alleged negligence in failing to maintain a properly functioning self-locking door to the building, and the third was premised on defendants' alleged assumption and breach of a duty to plaintiff

to maintain and monitor security cameras in the elevator in which plaintiff was assaulted. With respect to the third cause of action, plaintiff's mother claimed that employees of the building, including the superintendent, told her prior to the assault that the elevator was equipped with a security camera that was constantly monitored on the premises and that she need not worry about plaintiff's safety when she was in the building.

Defendants moved for summary judgment dismissing the complaint, relying on plaintiff's deposition testimony. Plaintiff, among other things, opposed the motion and noted that defendants had not addressed her third cause of action. Supreme Court granted those portions of the motion seeking summary judgment dismissing the first two causes of action and denied that aspect of the motion that sought dismissal of the third. Defendants appeal from that portion of the order that denied summary judgment dismissing the third cause of action.

Defendants failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's third cause of action. In their motion papers, defendants failed to address this cause of action and submitted no evidence that demonstrated the absence of triable issues of fact with respect to it. Since defendants failed to meet their initial burden on the motion with respect to that cause of action, the portion of the motion seeking dismissal of it must be denied regardless of

the sufficiency of plaintiff's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Even in addressing the third cause of action for the first time in their reply papers -- which is generally impermissible -- defendants failed to submit any evidence supporting their contention that they were entitled to summary judgment dismissing that cause of action.

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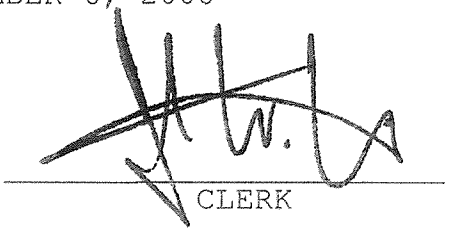

CLERK

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

4497 Brian J. Hunter, Index 602791/04
Plaintiff-Appellant,

-against-

Deutsche Bank AG, New York Branch,
Defendant-Respondent.

- - - - -

Eric L. Race, 602792/04
Plaintiff-Appellant,

-against-

Deutsche Bank AG, New York Branch,
Defendant-Respondent.

Thompson Wigdor & Gilly LLP, New York (Andrew S. Goodstadt of counsel), for appellants.

Sidley Austin LLP, New York (Cliff Fonstein of counsel), for respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered on or about November 16, 2007, which, in actions arising out of defendant's refusal to pay bonuses, granted defendant's motion for summary judgment dismissing the complaints, unanimously affirmed, with costs.

Plaintiffs' claims for breach of contract lack merit in view of the unambiguous language of their contracts and the employee handbook plainly making bonus awards solely and completely a matter of defendant's discretion (*see Kaplan v Capital Co. of Am.*, 298 AD2d 110, 111 [2002], *lv denied* 99 NY2d 510 [2003]; *cf. Caruso v Allnet Communication Servs.*, 242 AD2d 484, 484-485

[1997]). Language that bonuses would be contingent on criteria such as performance and profitability cannot be interpreted as a limitation on defendant's discretion, since doing so would render the clear language of discretion meaningless (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The claims for breach of the implied covenant of good faith and fair dealing, even assuming they can coexist in this context with a right of unfettered discretion (*but cf. Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304-305 [1983]), are not supported by any evidence of bad faith (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 303 [2003]). The claims for unjust enrichment and quantum meruit are not viable since an express contract governs the subject matter (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]). Unpaid bonuses do not constitute "wages" under Labor Law § 193 (*see Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 224 [2000]), plaintiffs' "commission" nomenclature notwithstanding.

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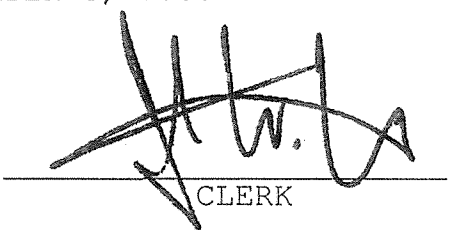

CLERK

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

4498 In re Latricia M.,

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

Edward M.,
Respondent-Appellant,

Tiffany A.,
Respondent,

Cardinal McCloskey Services,
Petitioner-Respondent.

Nancy Botwinik, New York, for appellant.

David H. Berman, Larchmont, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (William H. Roth of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about July 23, 2007, which, to the extent appealed from, determined that respondent father's consent was not required for the adoption of the subject child, and committed 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.

Respondent argues that he was entitled to a hearing on his motion to be deemed a consent father although he failed to object sufficiently to the lack of a hearing when the court made its determination based on the motion papers that were submitted

(*see Matter of Jamize G.*, 40 AD3d 543 [2007], *lv denied* 9 NY3d 808 [2007]). We need not determine whether respondent thereby waived this argument as the record shows that the court subsequently heard evidence on the issue and properly denied the motion. Although respondent formally acknowledged paternity, established paternity by means of blood testing, and maintained that he provided financial support to the child during the first four months of her life, he admittedly discontinued financial support following the child's placement in foster care. Respondent's motion to be deemed a consent father triggers application of the parental responsibility criteria set forth in Domestic Relations Law § 111(1) (*Matter of Jamize G.*, 40 AD3d at 544; *see Matter of Raquel Marie X.*, 76 NY2d 387 [1990], *cert denied sub nom. Robert C. v Miguel T.*, 498 US 984 [1990]), and while respondent maintained weekly visitation with the child, there is clear and convincing evidence that he otherwise failed to meet his obligations under the statute.

The court's determination that it would be in the child's best interests to free her for adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). There is no indication that respondent is capable of financially or emotionally caring for his daughter, and the record shows that the child has thrived in

her preadoptive home, which she shares with her sibling, and where she has developed a strong bond with her foster mother.

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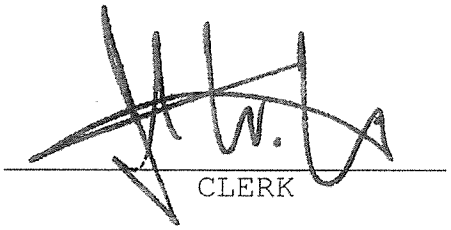

CLERK

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 November 6, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
James M. McGuire
Karla Moskowitz
Leland G. DeGrasse
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 1561/05
Respondent,

-against- 4499

Lawrence Grant,
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 (Budd G. Goodman, J.), rendered on or about November 2, 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.

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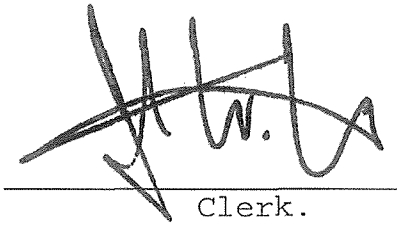

Clerk.

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

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

4502 The People of the State of New York, ex rel Arthur Artis, etc., Petitioner-Appellant, Index 250713/07

-against-

Warden, Rikers Island Correctional Facility, et al., Respondents-Respondents.

Arthur Artis, appellant pro se.

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

Order, Supreme Court, Bronx County (Barbara F. Newman, J.), entered December 18, 2007, which denied petitioner's application for a writ of habeas corpus, unanimously affirmed, without costs.

Petitioner's rights under Executive Law § 259-i(3)(c)(i) and (iii) were not violated by the fact that the written notice of his preliminary parole revocation hearing was incorrectly dated, where he was in fact given the notice on the same day that the warrant was executed and the hearing was in fact conducted within 15 days thereafter (*cf. People ex rel. Thompson v Warden of Rikers Is. Correctional Facility*, 41 AD3d 292 [2007]).

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

ENTERED: NOVEMBER 6, 2008

CLERK

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

4505 In re Jose Sanchez, etc., Index 101783/07
Petitioner,

-against-

Raymond Kelly, as Police Commissioner
of the City of New York, et al.,
Respondents.

Quinn & Mellea, LLP, White Plains (Philip J. Mellea of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

Determination of respondent Police Commissioner, dated August 9, 2006, which, after a hearing, sustained charges against petitioner, a sergeant in the New York City Police Department, and recommended that petitioner forfeit 20 vacation days, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Kibbie F. Payne, J.], entered on or about July 6, 2007), dismissed, without costs.

The findings that petitioner, in connection with an incident involving two uniformed, on-duty, intoxicated detectives, failed to prepare a Fitness for Duty Report as directed by competent authority and failed to supervise the

detectives are supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-232 [1974]), including the testimony of the lieutenant who required petitioner's assistance at the scene. No basis exists to disturb the hearing officer's findings of credibility (*see Matter of Berenhaus v Ward*, 70 NY2d 436 [1987]).

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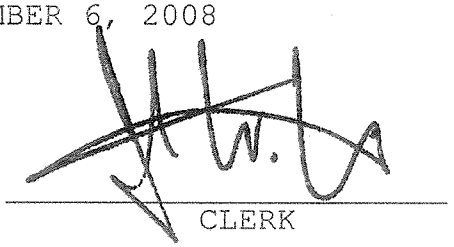

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Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4506-
4506A The People of the State of New York, SCI 6988/06
Respondent, Ind. 4754/06

-against-

Carla Washington,
Defendant-Appellant.

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

Judgments, Supreme Court, New York County (Renee A. White, J.), rendered on or about March 13, 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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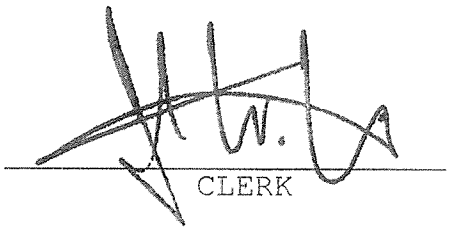

CLERK

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

4507 Robert Peck, Index 109367/05
Plaintiff-Respondent-Appellant,

-against-

2-J, LLC, et al.,
Defendants-Appellants-Respondents,

Van Brody Architect, P.C.,
Defendant-Respondent.

Billig Law, P.C., New York (Darin S. Billig of counsel), for appellants-respondents.

RAS Associates, PLLC, White Plains (Luis F. Ras of counsel), for respondent-appellant.

Milber Makris Plousadis & Seiden, Woodbury (Thomas M. Fleming II of counsel), for Van Brody Architect, P.C., respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 14, 2008, which, in an action for personal injuries sustained in a fall allegedly caused by inadequate lighting on stairs in commercial premises owned by and leased to defendants-appellants, insofar as appealed from, granted plaintiff's motion (1) to vacate a prior order dismissing the complaint because of plaintiff's failure to appear at a pre-note of issue court conference, and (2) for summary judgment on the issue of liability, to the extent of vacating the prior order, and denied defendants-appellants' cross motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to grant defendant premises owner summary

judgment dismissing the complaint as against it, and otherwise affirmed, except the owner's appeal from that portion of the order that granted vacatur as to it unanimously dismissed as academic, without costs. The Clerk is directed to enter judgment dismissing the complaint as against defendant 2-J, LLC.

Plaintiff's default was properly vacated on a showing by his attorney that a prior court order had erroneously scheduled the conference on a day of the week other than Tuesday, the one day reserved for conferences under the court's part rules, and the attorney's subsequent miscalendaring of the re-scheduled date. We note that the prior order scheduled the conference for Monday, June 25, 2005, the default was taken on June 26, plaintiff's attorney learned of the default on June 27 when he appeared in court for the conference, and plaintiff expeditiously moved to vacate the default by motion dated June 30. With respect to the merits, plaintiff's deposition testimony submitted in support of the motion to vacate was not unduly vague, and plaintiff's expert's affidavit that asserts that inadequate lighting caused plaintiff's fall was based on light measurement readings and was not speculative; thus those submissions were not contradicted by plaintiff's reply. The other possible causes of plaintiff's fall that defendants posit merely raise issues of fact. However, the out-of-possession defendant owner could not be liable for the claimed inadequate lighting, despite its right to reenter under

the lease, because the defendant tenant controlled the lighting level at its restaurant, and inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provision (*see Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 [2008]).

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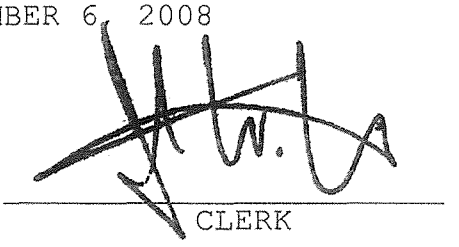

CLERK

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

4508 In re Leonard Storch, Petitioner-Appellant, Index 109353/06

-against-

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

Leonard Storch, appellant pro se.

Gary R. Connor, New York (Jason G. Parpas of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), entered February 6, 2007, dismissing petitioner tenant's article 78 proceeding to annul the determination of respondent New York State Division of Housing and Community Renewal which, inter alia, allocated a major capital improvement (MCI) rent increase between the building's commercial and residential tenants, unanimously affirmed, without costs.

Rent Stabilization Code (9 NYCRR) § 2522.4(a)(16), applicable to rent stabilized tenants, and New York City Rent and Eviction Regulations (9 NYCRR) § 2202.4(c)(5), applicable to rent controlled tenants, both of which were enacted during the pendency of the owner's PAR, set forth a method of allocating MCI costs between residential and commercial tenants based on each group's relative share of the building's total rentable square feet, supplanting DHCR's prior practice of allocating such costs

based each group's relative share of the building's total rent roll. Under Code § 2529.10, DHCR's Commissioner was required to make any allocation determination in accordance with the new provision "unless undue hardship or prejudice result[ed] therefrom" (*see also* 9 NYCRR 2527.7). Regulations § 2208.9 is to the same effect albeit without express reference to undue hardship or prejudice. Under Regulations § 2202.4(c)(4)(vi), which also went into effect during the pendency of the owner's PAR, no MCI rent increase shall be granted unless the application therefor was filed no later than two years after the completion of the installation or improvement. Assuming petitioner, a rent stabilized tenant, has standing to challenge the portion of DHCR's order that relates to rent controlled tenants, DHCR did not act arbitrarily by applying the allocation provision but not the time-bar provision. The finding that application of the allocation provision would not cause petitioner undue hardship, prejudice or deprive him of a vested interest is rationally supported by, inter alia, the circumstance that there was no prior existing enactment governing the subject but at best only a generally followed practice (*see Matter of Versailles Realty Co. v New York State Div. of Hous. & Community Renewal*, 76 NY2d 325, 330 [1990]). The finding that application of the time-bar provision would cause the owner undue hardship is rationally supported by the circumstance that there was no time bar for

recovering MCI costs when the work was done and when the owner applied for the MCI increase. We have considered petitioner's other arguments and find them unavailing.

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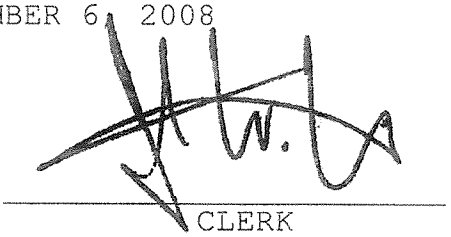

CLERK

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

4510 In re Victoria Lockett, Index 400632/07
Petitioner,

-against-

New York City Housing Authority,
Respondent.

Victoria Lockett, petitioner pro se.

Ricardo Elias Morales, New York (Menachem M. Simon of counsel), for respondent.

Determination of respondent New York City Housing Authority, dated February 21, 2007, terminating petitioner's public housing tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Louis B. York, J.], entered June 19, 2007), dismissed, without costs.

Respondent's findings that petitioner failed to comply with a stipulation in which she agreed to permanently exclude her boyfriend from her apartment, and that her boyfriend unlawfully engaged in or attempted to engage in sexual relations or contact with a female under the age of 11 years old in her apartment, are supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). Such evidence includes the boyfriend's guilty plea to attempted sexual abuse in the first degree, the transcript of the plea allocution, and the testimony of the detective who interviewed the victim of

the sexual abuse, a foster child living in petitioner's home. Petitioner's claims that she was forced by inexperienced counsel and the Housing Authority to enter into the stipulation in the prior matter, and that the prior matter was based on unfair charges, are not reviewable in this proceeding and are barred by the four-month statute of limitations for review of a final determination (CPLR 217[1]; *see Matter of Folks v New York City Hous. Auth.*, 27 AD3d 270, 271 [2006], *lv denied* 7 NY3d 709 [2006]; *Matter of Sanchez v Martinez*, 293 AD2d 292, 294 [2002], *lv denied* 99 NY 2d 502 [2002], *lv denied* 99 NY 2d 502 [2002]). The penalty of termination does not shock our conscience, particularly in view of the serious consequences of petitioner's noncompliance with the stipulation (*cf. Folks; Sanchez*).

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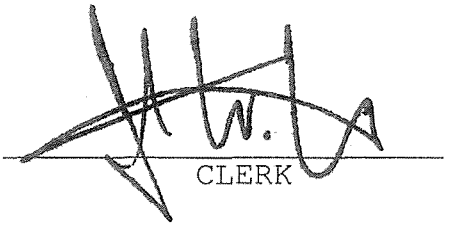

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
David Friedman
Luis A. Gonzalez
Rolando T. Acosta, JJ.

3545-
3545A
Index 102210/02

Bernadette Gotay,
Plaintiff-Respondent-Appellant,

-against-

David Breitbart,
Defendant-Respondent,

Michael Handwerker, et al.,
Defendants-Appellants-Respondents,

Handwerker, Honschke, Marchelos
& Gayner, et al.,
Defendants.

Cross appeals from the orders of the Supreme Court, New York County (Joan A. Madden, J.), entered January 25, 2007 and July 30, 2007, which insofar as appealed from, granted defendant Breitbart's motion for summary judgment, denied the motions of defendants Handwerker, Honschke, Marchelos, and the partnership Handwerker, Honschke & Marchelos for summary judgment, and denied plaintiff's cross motion for summary judgment.

Furman, Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for Michael Handwerker, appellant-respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Richard E. Lerner and Robert J. Pariser of counsel), for Steve Marchelos; Handwerker, Honschke and Marchelos; and Neil Honschke, appellants-respondents.

Gerald J. Mondora, White Plains, for respondent-appellant.

Goodman & Jacobs, LLP, New York (Thomas J. Cirone and Sue C. Jacobs of counsel), for David Breitbart, respondent.

LIPPMAN, P.J.

Plaintiff seeks to recover for the malpractice of her former attorneys in connection with the prosecution of her underlying medical malpractice action. The question presented is whether the legal malpractice action is time-barred.

The medical malpractice action arose out of injuries plaintiff allegedly sustained during her birth in August 1977. In early 1978, plaintiff's mother retained the law firm of Kaufman & Siegel, and that now defunct firm commenced the malpractice action on plaintiff's behalf in April of the same year. After a long period of apparent inactivity in the litigation, plaintiff's mother substituted defendant David Breitbart as counsel in 1993.

In 1994, former Breitbart associates Michael Handwerker, Neil Honschke and Steve Marchelos formed their own firm (HHM) and became plaintiff's attorneys of record. After HHM dissolved in November 1998, defendant Handwerker became a member of the Ross Suchoff firm, bringing plaintiff's medical malpractice action with him. Shortly thereafter, Mark Hankin, a partner at Ross Suchoff, evaluated plaintiff's case and determined that Ross Suchoff would not represent plaintiff because an index number had never been purchased in the action. Plaintiff and her father were advised of Hankin's decision on January 28, 1999. Plaintiff

commenced this action for attorney malpractice on January 31, 2002.[1]

Although Supreme Court granted defendants' motion to dismiss the action for failure to state a cause of action, this Court reversed (14 AD3d 452 [2005]), finding, inter alia, that the complaint adequately alleged that HHM had been negligent in failing to apply for an order of filing nunc pro tunc in the medical malpractice action (at 454). Defendants then moved for summary judgment, asserting that the action was time-barred and that there was no proof of damages attributable to the alleged negligence. Plaintiff cross-moved for summary judgment, arguing that the medical malpractice should be deemed admitted. Ultimately, upon reargument, Supreme Court denied the HHM defendants' motions, finding that those defendants had failed to make a prima facie showing that the attorney-client relationship had ended more than three years before plaintiff commenced this action.

Defendants' statute of limitations defense is premised upon the contention that their representation of plaintiff did not continue within the statutory period. "The continuous

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[1] Plaintiff's motion, made by new counsel, to reactivate her medical malpractice action in Bronx County Supreme Court was denied in January 2003.

representation doctrine . . . 'recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered'" (*Shumsky v Eisenstein*, 96 NY2d 164, 167 [2001], quoting *Greene v Greene*, 56 NY2d 86, 94 [1982]). The statute of limitations is tolled while the attorney continues to represent the client on a particular matter, in part to protect the professional relationship (*see Shumsky*, 96 NY2d at 167-168). However, the representation must be related to the specific area that is the subject of the malpractice claim (*id.* at 168) and "there must be 'clear indicia of an ongoing continuous, developing, and dependent relationship between the client and the attorney'" (*Aaron v Roemer, Wallens & Mineaux*, 272 AD2d 752, 754 [2000], *lv dismissed* 96 NY2d 730 [2001], quoting *Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506 [1990]).

The HHM defendants contend that the subject attorney-client relationship terminated in January 1998, or at the very latest on January 28, 1999. They urge that on the earlier occasion HHM partner Steve Marchelos met with plaintiff and her father and advised them that the medical malpractice action was dead and that they had the option to pursue a legal malpractice action

against their former attorneys, Kaufman & Siegel. The record, however, is not in accord with this characterization of what transpired at the 1998 meeting. It is clear from Marchelos's deposition testimony that, at the time of the 1998 meeting, he simply did not know the actual status of the medical malpractice action and, accordingly, could not have accurately represented that the action was certainly "dead." Indeed, Marchelos testified that, as of the date of the meeting, he was still attempting to retrieve the court file and that he fully intended "to continue in trying to follow through, maybe with a resurrection of the file." There is no indication in the record that Marchelos made any contrary representation to plaintiff; he nowhere claims to have told plaintiff that HHM's efforts on her behalf had definitively concluded. Nor is there other evidence that that impression had been conveyed. There is no indication that the firm's file on the case was either offered by Marchelos or requested by plaintiff or her father and, in fact, the file remained in the firm's possession, where it evidently continued to be viewed as active, since it was among the files that defendant Handwerker took with him to Ross Suchoff in January 1999.

As noted, the file was given, presumably by Handwerker, to Ross Suchoff partner Hankin, and after Hankin reviewed the file

and decided that Ross Suchoff would not take the matter, he met with plaintiff and her father on January 28, 1999. He told them that Ross Suchoff would not handle the case. Handwerker was not present at the meeting, and there is no proof that either plaintiff or her father was then aware that Handwerker had some weeks before become a member of Ross Suchoff. Under these circumstances, Hankin's representation to plaintiff respecting Ross Suchoff's disinterest in pursuing the matter was insufficient to signal to plaintiff that her representation by HHM had terminated. Plaintiff's attorney-client relationship had been with HHM, and never with Ross Suchoff, and her interaction with Hankin, a new attorney at a new firm, cannot reasonably be viewed as having placed her on notice that her attorney-client relationship with her own attorneys at HHM had concluded.

Although defendants claim that plaintiff's father requested the return of plaintiff's file at the January 1999 meeting, the record simply does not permit us to conclude that such a request was in fact made. Indeed, it is clear that the file was not returned at the meeting or in its immediate aftermath and that the wishes of plaintiff and her father as to the file's disposition, if they were conveyed at all, were not clear to Hankin, for Hankin, in a February 22, 1999 follow-up letter, wrote to plaintiff and her father, "your file remains in our

possession. In the event you require the whole or any portion thereof, we are available to provide you with same."

The Court of Appeals has recognized it as "essential that the terms of [attorney-client] representation . . . be set down with clarity" (*Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 179 [1986]). Although the need for such clarity has most often been remarked upon in connection with fee disputes, it is no less critical to have an explicit and accurate understanding of any other fundamental issue pertaining to the attorney-client relationship, including, obviously, the elemental issue of whether there is a relationship at all. There is no room for uncertainty on these matters, especially where, as here, attorneys deal with laypersons unversed in the nuances and intricacies of legal practice and expression; what may seem crystal clear to a lawyer may be utterly lost upon the client. If the attorney-client relationship has come to an end, that fact should be absolutely clear to all parties involved.

An attorney is required to provide reasonable notice to the client when withdrawing from representation (*see* CPLR 321[b][2]; Rules of App Div, 1st Dept [22 NYCRR] § 604.1[d][6]), and no definition of reasonable notice would require a client to infer, from ambiguous action or inaction on the part of her attorneys, much less on the part of an attorney with whom she had no

relationship, that she is no longer represented. Particularly under the circumstances obtaining here, where the entire course of the litigation had been fraught with delay and a lack of communication between client and counsel, and where there had been a series of largely inactive yet persistent attorney-client relationships, more than equivocal behavior was required to sever the representational relationship. The elaborate inferential constructs which the dissent finds so irresistible are not appropriately utilized to impute knowledge of the status of an attorney-client relation. It would have been a simple matter for HHM to advise plaintiff that in its estimation the medical malpractice action was unsalvageable and, consequently, that their relationship had run its course. Inasmuch, however, as the HHM defendants failed to meet their burden as proponents of the summary judgment motion to show prima facie that such unequivocal notice had been afforded, the motion was properly denied.

By contrast, plaintiff's action was shown to be time-barred as against defendant Breitbart because, although HHM was never formally substituted for Breitbart as counsel, it was clear to all parties involved that plaintiff had retained HHM to represent her in the underlying medical malpractice litigation (*see MacArthur v Hall, McNicol, Hamilton & Clark*, 217 AD2d 429 [1995]). The portion of this Court's prior decision (14 AD3d

452) that denied Breitbart's motion to dismiss for failure to state a cause of action is not law of the case precluding the grant of summary judgment here, as it neither addressed nor resolved the statute of limitations issue (*see Mulder v Donaldson, Lufkin & Jenrette*, 224 AD2d 125, 131 [1996]).

The parties submitted conflicting expert opinions, raising an issue of fact as to whether plaintiff would have been successful in the underlying medical malpractice action. As a result, defendants are not entitled to summary judgment based on the alleged lack of a causal link between plaintiff's damages and defendants' alleged inaction in obtaining an index number and filing the medical malpractice action nunc pro tunc. Handwerker's argument that it is speculative whether a court would have granted a motion to purchase an index number and file a summons and complaint nunc pro tunc in the underlying action is precluded by this Court's prior decision (14 AD3d at 454).

Finally, Supreme Court properly denied plaintiff's cross motion for summary judgment as untimely, since plaintiff failed to demonstrate good cause for the delay (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Accordingly, the orders of Supreme Court, New York County (Joan A. Madden, J.), entered January 25, 2007, and July 30, 2007, which, insofar as appealed from, granted defendant

Breitbart's motion for summary judgment, denied the motions of defendants Handwerker, Honschke, Marchelos, and the partnership Handwerker, Honschke & Marchelos for summary judgment, and denied plaintiff's cross motion for summary judgment, should be affirmed, without costs.

All concur except Friedman, J. who dissents in part in an Opinion.

FRIEDMAN, J. (dissenting in part)

This legal malpractice action is the culmination of a long and convoluted chain of events that began three decades ago. Ultimately, however, the lawsuit's timeliness turns on an attorney's sworn -- and entirely uncontradicted -- account of what occurred at his meeting with plaintiff and her father on January 28, 1999, more than three years before the commencement of the action. The attorney (Mark Hankin) avers in his affidavit that, at the January 1999 meeting, he advised plaintiff and her father that his firm would not undertake plaintiff's representation in a medical malpractice matter arising from her birth in 1977.[1] Hankin further states that, in response to his rejection of plaintiff's case, "plaintiff's father requested the immediate return of the file."

In opposing defendants' summary judgment motion, plaintiff submitted no evidence of any kind -- not in deposition testimony, not in an affidavit, not in a letter, not in a jotted piece of notepaper -- controverting Hankin's account of the January 28, 1999 meeting. Indeed, Hankin's account of the meeting is not even challenged in plaintiff's appellate briefs. The majority

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[1] Even the majority acknowledges that no issue of fact exists regarding the attorney's allegation that he advised plaintiff and her father at the January 1999 meeting that his firm would not undertake plaintiff's representation.

nonetheless denies summary judgment to the appealing defendants, based on two theories never suggested by plaintiff. The majority's first theory is that plaintiff and her father (although neither makes this claim) were unaware that Michael Handwerker, the attorney who had accepted plaintiff's matter several years before, had joined Hankin's firm. The other theory the majority has devised is that Hankin's claim that plaintiff's father requested the return of the file at the January 1999 meeting is somehow placed in doubt by boilerplate language in Hankin's follow-up letter, dated February 22, 1999, offering to return the file "[i]n the event you require the whole or any portion thereof."

Given that defendants moved for summary judgment based on Hankin's sworn statement asserting a simple matter of fact about his meeting with plaintiff and her father, it was up to plaintiff, if she disagreed with that statement, to present evidence straightforwardly contradicting it. Plaintiff has not done this; indeed, her counsel does not even argue that other evidence in the record gives rise to a reasonable inference that the statement may be inaccurate. Instead, counsel bases plaintiff's opposition to summary judgment on an entirely different theory, which the majority does not even bother to discuss. Further, at no point in this litigation have plaintiff

and her father denied that they were aware of the relationship between Hankin and Handwerker at the time of the January 1999 meeting. The majority's denial of summary judgment to the appealing defendants under these circumstances begs a question: Under what theory of the judicial function does a court have license, on a motion for summary judgment, to disregard an agreement on the facts evident from the submissions of the parties themselves? I submit that it is not properly within a court's role to manufacture an issue of fact that the party opposing summary judgment has not herself seen fit to raise, especially where, as here, the facts in question are within that party's knowledge.

The relevant facts begin with plaintiff's birth at Bronx Municipal Hospital Center (now known as Jacobi Hospital) on August 31, 1977. The delivery was performed by Dr. Steven Rockman, a medical resident affiliated with the Albert Einstein College of Medicine of Yeshiva University. At birth, plaintiff manifested Erb's Palsy of the upper right extremity. Erb's Palsy is a condition in which motor control of the upper arm is reduced due to nerve damage incurred during childbirth.

In April 1978, the now-defunct law firm of Kaufman & Siegel, P.C. (K&S) commenced a medical malpractice action on plaintiff's behalf against the New York City Health & Hospitals Corporation

(HHC), which operated the hospital where the delivery occurred. K&S also commenced an action based on the same facts against "Albert Einstein Hospital" and the Albert Einstein College of Medicine of Yeshiva University. Under the procedures that were applicable at the time, K&S commenced the actions by service of the summons and complaint, without purchasing an index number at the court designated as the venue of the actions (Bronx County Supreme Court).

Effective July 1, 1992, the CPLR was amended to require that actions be commenced by filing with the court and the purchase of an index number (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C304:1). At that point, although more than 14 years had passed since the commencement of plaintiff's medical malpractice actions, K&S still had not purchased an index number for the cases. K&S did not take advantage of the transitional rules under which plaintiffs in actions commenced under the previous commencement-by-service system were afforded a grace period within which to purchase an index number to comply with the new commencement-by-filing system.

In the fall of 1993 (more than 15 years after the commencement of the medical malpractice actions), plaintiff's father decided to discharge K&S and to give the matter to

defendant Michael Handwerker, an attorney whose primary area of practice was criminal defense. At that time, Handwerker worked under a contractual arrangement in the office of defendant David Breitbart. Pursuant to that contractual arrangement, in November 1993, plaintiff (through her mother) formally retained Breitbart, and a "Consent to Change Attorney" was executed substituting Breitbart for K&S as plaintiff's counsel. In January 1994, the "Law Office of David Breitbart" served a bill of particulars on plaintiff's behalf.

In June 1994, Handwerker terminated his association with Breitbart and formed defendant Handwerker, Honschke and Marchelos (HHM), a law firm that was originally a partnership among defendants Handwerker, Steve Marchelos and Neil Honschke.[2] Plaintiff's medical malpractice actions were among the matters Handwerker brought to HHM. Although plaintiff's medical malpractice case remained at HHM until the firm's dissolution in November 1998, no one at HHM took any steps to remedy the failure to purchase index numbers for the matter. As noted in this Court's decision on the prior appeal in this action, although the medical malpractice actions conceivably could have been salvaged

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[2] The record reflects that HHM's membership and name changed more than once before the firm was finally dissolved in November 1998, but the parties do not argue that any such change is relevant to the disposition of this appeal.

had index numbers been purchased in 1994 or 1995, HHM's inaction in this regard essentially doomed the lawsuits to the extent, if any, they were otherwise viable (*see* 14 AD3d 452, 454 [2005]).

Defendant Marchelos was the HHM attorney who actually worked on plaintiff's case while it was at that firm. In late 1995, Marchelos took some steps to obtain plaintiff's medical records. Thereafter, he made an unsuccessful attempt to locate a file for the matter at the office of the Bronx County Clerk. He also sought assistance from Janice Kabel, Esq., the attorney who then headed the medical malpractice division at the office of the Corporation Counsel of the City of New York, the agency responsible for HHC's defense in litigation. According to uncontradicted affidavits by Marchelos and Kabel, Kabel told Marchelos at some point in early 1998 that she had ascertained that the Corporation Counsel had referred the case to the outside firm of Bower & Gardner (B&G), which had dissolved in 1994 (*see Adams, Bower & Gardner Weighs Dissolving*, NYLJ, July 29, 1994, at 1, col 3; *Today's News: Update*, NYLJ, Aug. 1, 1994, at 1, col 1). Kabel learned that B&G had "archived" the file in 1988. Kabel found no indication in the City's records of the reason that B&G archived the file, and her efforts to retrieve the file were unsuccessful.

Marchelos states that he inferred from the fact of B&G's

archiving of the case file in 1988 that, as of that year, the medical malpractice actions had been either dismissed or abandoned. "Under either scenario," according to Marchelos's affidavit, "the file was [in his view] simply dead," given the passage of so many years. Marchelos so informed plaintiff in early 1998. His affidavit states (paragraph number omitted):

> "I telephoned plaintiff's father and asked him to come with his daughter to my prior firm [HHM] for a conference to discuss their underlying medical malpractice action. We did eventually meet in early 1998. I explained everything that I had learned from my investigation, including my discussions with Ms. Kabel, even though it was not good news. I then went on to advise the plaintiff and her father that they might have a claim for legal malpractice against [K&S] for their handling of the underlying medical malpractice action. They asked me if I would consider commencing such an action on their behalf against [K&S]. I told them that I could not render services related to commencing a legal malpractice action because I was potentially a witness, and this was not my area of expertise."

Neither plaintiff nor her father testified at their depositions to any specific recollection of the meeting with Marchelos in early 1998, and the record does not include any affidavit by either plaintiff or her father. Thus, Marchelos's account of the meeting is uncontroverted.[3]

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[3] The majority distorts the evidence when it asserts that "[t]he record . . . is not in accord with th[e] characterization [in Marchelos's affidavit] of what transpired at the 1998 meeting." To begin, the Marchelos affidavit is itself part of the record, so the majority's statement does not make sense. To

The HHM firm dissolved in November 1998. In January 1999, Handwerker became a member of a new firm known as Ross, Suchoff, Hankin, Maidenbaum, Handwerker & Mazel, P.C. (Ross Suchoff). Handwerker proposed to bring plaintiff's medical malpractice matter with him to Ross Suchoff. Mark Hankin, a member of Ross Suchoff, reviewed the matter to determine whether the firm would accept it. Hankin discovered that no index number had ever been purchased for the medical malpractice actions. As Hankin states

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the extent the majority is claiming that Marchelos's affidavit somehow contradicts his deposition testimony, that claim is simply mistaken. Contrary to the majority's claims, Marchelos never testified that "as of the date of the [1998] meeting, he was still attempting to retrieve the court file," a misapprehension on which the majority bases its assertion that Marchelos "could not have accurately represented [at the meeting] that the action was certainly 'dead.'" In fact, Marchelos's deposition testimony indicates that his effort (to which the majority refers) "to continue to try to follow through, maybe, with a resurrection of the file" occurred in "the early '90s"; he never put that effort within a more precise time frame or sequence of events at the deposition (and was never asked to do so). In his affidavit, however, Marchelos makes clear that the sequence of events was (1) his partially successful effort to retrieve medical records, (2) his unsuccessful attempt to retrieve a file for the case from the Bronx County Clerk, (3) his contact with Kabel of the Corporation Counsel in an unsuccessful attempt to obtain the B&G file, and, finally, (4) his early 1998 meeting with plaintiff and her father, at which he reported on the results of his efforts. Also, contrary to the majority's assertion that Marchelos "nowhere claims to have told plaintiff that HHM's efforts on her behalf had definitively concluded," Marchelos makes plain in his affidavit that he told plaintiff at the early 1998 meeting "everything that I had learned from my investigation," which included his conclusion that, whether the case had been dismissed or abandoned, "the file was simply dead."

in his affidavit, upon making this discovery, Ross Suchoff "decided not to undertake the representation of the plaintiff in [her] action against Jacobi Hospital [*sic*]." As described in Hankin's affidavit, Hankin communicated this decision to plaintiff and her father at a meeting held on January 28, 1999 (paragraph numbers omitted; emphasis added):

> "Although the Ross Suchoff Firm was never retained by the plaintiff and did not have an attorney-client relationship with her or her parents, I met with the plaintiff and her father on January 28, 1999 to advise of the situation, as well as, my Firm's decision not to undertake representation of the plaintiff in the underlying medical malpractice action. *At that point, the plaintiff's father requested the immediate return of the file.*
>
> "Soon thereafter, I understand that the complete file in the underlying medical malpractice action was sent directly to the plaintiff's father."

Hankin sent plaintiff and her father a follow-up letter, dated February 22, 1999:

> "As we discussed at our meeting on January 28, 1999 and on the phone [on] February 9, 1999, a review of the file indicates that your initial counsel, [K&S], never purchased an index number subsequent to their service upon the defendants of a copy of the summons and complaint in this matter. When they initially accepted this case, there was no requirement in the State of New York that an index number be purchased . . . In or about calendar year 1992, the statute in the State of New York was changed and our state became a 'file and serve' state where you were required to purchase an index number before service of the papers upon the defendants . . . Your attorneys [K&S] should have obtained an index number at that time in order to preserve your case for further action. Unfortunately,

my review of the court records relative to both actions filed in this matter indicate[s] that no index number was purchased by your former counsel. Since more than one (1) year has elapsed since the new file and serve statute was enacted, the claims previously instituted are now dismissed. Our review of the case law indicates that based upon the passage of time, any attempt to purchase an index number now would be futile.

"Accordingly, we will not be able to proceed with the claims previously instituted on behalf of [plaintiff] for claims of medical malpractice. Your file remains in our possession. In the event you require the whole or any portion thereof, we are available to provide you with same."

Plaintiff did not testify at her deposition to any specific recollection of the January 28, 1999 meeting with Hankin. While plaintiff's father, Jesus Morales, recalled the meeting, he did not contradict Hankin's account of the meeting in any way. Morales gave the following testimony about the meeting:

"Q. This line [in Hankin's February 22, 1999 letter] referencing a meeting on January 28, 1999, do you remember that meeting? Do you remember attending that meeting?

"A. A little bit. A little bit.

"Q. What do you remember about that meeting?

"A. I remember that . . . he said something that [K&S] didn't purchase a number --

"Q. Okay.

"A. -- an index number for that case.

"Q. What did he say about not purchasing the index number? What did that mean? What --

"A. I don't remember that. All I remember is that part.

. . .

"Q. What else do you remember at the meeting?

"A. All I could remember is that he said, "I can't understand why he did not purchase an index number." That was it.

"Q. Did you ask the attorney what not purchasing an index number meant or what the significance of that was?

"A. He might have explained, but I don't remember.

. . .

"Q. Do you remember having any conversation with these attorneys about not being able to continue your case for you at that January 28 meeting?

"A. I don't remember."

As previously noted, on January 31, 2002, more than three years after the January 28, 1999 meeting with Hankin (and about four years after the 1998 meeting with Marchelos), plaintiff commenced this legal malpractice action against Handwerker, Marchelos, Honschke, and the HHM firm (collectively, the HHM defendants) and Breitbart, among others.[4] After joinder of issue, discovery proceedings, and the dismissal of the other defendants from the action, the HHM defendants and Breitbart moved for summary judgment on the ground, among others, that the

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[4] Plaintiff's claims against all other named defendants (including Ross Suchoff and Hankin) were previously dismissed and are not at issue on this appeal.

legal malpractice action had been commenced after expiration of the three-year statute of limitations (CPLR 214[6]). The motions were supported by, inter alia, the aforementioned affidavits of Marchelos, Kabel and Hankin, and by transcripts of the depositions of plaintiff, plaintiff's father, and all individual movants. As previously noted, neither plaintiff nor her father submitted an opposition affidavit. Thus, to reiterate, Marchelos's and Hankin's accounts of their respective meetings with plaintiff and her father are entirely undisputed.

Supreme Court initially granted summary judgment to all the movants based on the statute of limitations. The court noted that the continuous representation doctrine could not extend the limitations period beyond January 28, 1999 as to claims against any of the HHM defendants, since "[n]either plaintiff nor Morales [her father] disputes Hankin's assertions that, at the January 28, 1999 meeting, he advised them that the Ross Suchoff Firm had decided not to undertake representation of plaintiff in the [medical malpractice actions], and Morales requested the return of the file for [those actions]." The court further observed that, in the absence of any contrary allegations by plaintiff or Morales, it could be presumed that they understood, among other things, (1) that the case file "was in Hankin's possession because Handwerker had brought it with him to the Ross Suchoff

Firm when he joined that firm as a partner," and (2) that "Morales' request [at the January 28, 1999 meeting] that the case file be returned to him meant that neither the Ross Suchoff Firm, nor [HHM], nor any of [HHM's] former partners [i.e., Handwerker, Marchelos and Honschke], would thereafter continue to represent plaintiff, or perform any additional work, in connection with plaintiff's medical malpractice claims."

Plaintiff subsequently moved for reargument. The sole argument offered in plaintiff's counsel's affirmation in support of the reargument motion was a repetition of what had been plaintiff's primary argument on the statute of limitations issue in opposing the original motions, namely, that the legal malpractice claim should not be deemed to have accrued until the medical malpractice action against HHC was finally dismissed by Bronx County Supreme Court in 2003.[5] Plaintiff's counsel did not claim that the court had overlooked any evidence giving rise to a triable issue as to what had occurred at the January 28, 1999 meeting with Hankin, or whether plaintiff and her father had understood after that meeting that the HHM defendants were no

[5] In 2002, plaintiff's present counsel purchased an index number for the medical malpractice action against HHC and moved for an order "reactivating" that lawsuit. HHC cross-moved for dismissal on the ground of laches. In 2003, Bronx County Supreme Court denied plaintiff's motion and granted HHC's cross motion.

longer representing plaintiff on her medical malpractice claims.

Supreme Court granted plaintiff's reargument motion and, upon reargument, reinstated the complaint as against the HHM defendants (but not as against Breitbart, whose involvement in the case had ended in 1994). In denying summary judgment to the HHM defendants, the court did not adopt plaintiff's theory that the legal malpractice claim did not accrue until the belated dismissal of the underlying medical malpractice action in 2003. Rather, the court relied on a rationale plaintiff had never suggested and, on appeal, still does not suggest -- that

> "the record [does not] set forth any basis for imputing to plaintiff or her father, as of the time of the meeting [with Hankin on January 28, 1999], actual or constructive knowledge of any particular relation or association between Handwerker, or [HHM], on the one hand, and Hankin, or the Ross Suchoff Firm, on the other."

On appeal, the majority affirms the denial of summary judgment to the HHM defendants on the same rationale Supreme Court created, at its own instance, on reargument. The majority relies on this theory even though, as previously indicated, plaintiff herself has not adopted it in her appellate briefs. On the undisputed facts of this case, the denial of summary judgment to the HHM defendants on the time-bar issue, on the ground that plaintiff may not have recognized the relationship between Handwerker and Hankin, flies in the face of common sense, given

that plaintiff herself does not even claim to have been unaware of the relationship. Nor is any issue of fact concerning what happened at the January 1999 meeting created by Hankin's February 1999 follow-up letter; here, again, not even plaintiff argues that such an issue of fact exists. I therefore respectfully dissent from the affirmance of the denial of summary judgment to the HHM defendants.[6]

At the outset, I note that, whenever plaintiff's legal malpractice claim against a given attorney or law firm accrued, the three-year statute of limitations governing that claim did not begin to run until the attorney's or firm's representation of plaintiff on the medical malpractice matter ended. This is the result of the continuous representation doctrine, which "tolls the running of the Statute of Limitations on [a] malpractice claim until the ongoing representation is completed" (*Glamm v Allen*, 57 NY2d 87, 94 [1982]). The Court of Appeals has explained the rationale for the continuous representation doctrine as follows:

> "[T]he rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question

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[6] I concur in the affirmance of the dismissal of the complaint as against defendant David Breitbart, substantially for the reasons stated by the majority.

> and assess the techniques employed or the manner in which the services are rendered. Neither is a person expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person." (*Id.* at 93-94 [internal quotation marks and citation omitted].)

Consistent with its purpose, "[t]he continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]). Stated otherwise, the toll for continuous representation will not be applied unless there are "'clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney'" (*Matter of Merker*, 18 AD3d 332, 332-333 [2005], quoting *Muller v Sturman*, 79 AD2d 482, 485 [1981]). Thus, "even when further representation concerning the specific matter in which the attorney allegedly committed the complained of malpractice is needed and contemplated by the client, the continuous representation toll would nonetheless end *once the client is informed or otherwise put on notice of the attorney's withdrawal from representation*" (*Shumsky v Eisenstein*, 96 NY2d 164, 170-171 [2001] [emphasis added]). The uncontroverted record evidence establishes that, here, plaintiff was "informed" and "put on notice" that the HHM defendants were withdrawing from her

representation more than three years before she commenced this lawsuit.

On this record, plaintiff reasonably should have understood from what Marchelos told her and her father at the meeting in early 1998 that HHM would no longer be able to represent her on the medical malpractice claims. However, even if I were to accept the majority's view that the early 1998 meeting with Marchelos is not sufficient to establish the termination of the attorney-client relationship between the HHM defendants and plaintiff, any remaining relationship was plainly terminated at the January 28, 1999 meeting with Hankin. At that meeting, according to Hankin's entirely uncontradicted account, Hankin advised plaintiff and her father of Ross Suchoff's "decision not to undertake representation of the plaintiff in the underlying medical malpractice action," whereupon "the plaintiff's father requested the immediate return of the file." Plaintiff's father's request for the return of the file at the January 28, 1999 meeting -- which, to reiterate, is an uncontroverted fact on this record -- completely negates any possible inference that there was, at the close of the meeting, any remaining "mutual understanding of the need for further representation" on the medical malpractice claims (*McCoy*, 99 NY2d at 306). Accordingly, with respect to all the HHM defendants, the toll of the statute

of limitations based on the continuous representation doctrine ended, at the latest, on January 28, 1999. Thus, this action was time-barred when it was commenced more than three years later, on January 31, 2002.

The majority resists this conclusion by adopting the fanciful hypothesis conceived by Supreme Court -- but never advanced by plaintiff, and without support in the record -- that plaintiff was not aware of the relationship between Handwerker and the firm that rejected her case at the January 28, 1999 meeting (Ross Suchoff). The illogic of this position is astonishing. Is the majority positing that plaintiff may have believed that Hankin called her and her father to the January 28, 1999 meeting out of the blue, without any connection to any attorney who had previously been involved in the matter? Again, plaintiff has not submitted an iota of evidence to suggest that this was the case. Thus, the majority, following Supreme Court, is essentially injecting a factual issue into the case that the parties themselves have not raised. I do not believe that this is properly within the scope of the judicial function.

In any event, the record establishes that Morales, plaintiff's father, understood full well that Hankin was connected to Handwerker at the time of the January 28, 1999 meeting. Such understanding is demonstrated by the request

Morales made at the meeting for the return of the case file. Morales had caused the file to be transmitted to Handwerker in 1993. By requesting that Hankin return the file at the January 28, 1999 meeting, Morales plainly manifested his understanding that Hankin had received the file from Handwerker when Handwerker joined the Ross Suchoff firm. Thus, in demanding the return of the file, Morales was taking the case away from Handwerker and any attorney or firm then or previously associated with Handwerker, including the HHM firm, Marchelos and Honschke. One need not fashion any "elaborate inferential constructs" from "ambiguous action or inaction on the part of [plaintiff's] attorneys" to recognize that Morales's request for the file unequivocally manifested an understanding that the attorney-client relationship with the HHM defendants -- to whom Morales had originally given the file, and from whom Hankin had received it -- was at an end.[7] At that point, if not earlier, the toll of the statute of limitations for continuous representation was lifted as to the HHM defendants.

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[7] To the extent the majority may believe that plaintiff somehow lacked the ability to understand the import of what transpired at the January 1999 meeting, I note that she ultimately graduated from college, worked as a legal assistant at Cadwalader, Wickersham & Taft, and, at the time of her deposition, was employed as an intelligence analyst by a contractor for the Drug Enforcement Administration.

The majority also argues that Hankin's uncontradicted statement that Morales requested the return of plaintiff's file at the January 1999 meeting should be disregarded because the February 22, 1999 follow-up letter Hankin sent plaintiff and her father contained the following language: "Your file remains in our possession. In the event you require the whole or any portion thereof, we are available to provide you with same." I see no contradiction between Hankin's affidavit and the two innocuous sentences from his letter highlighted by the majority. Obviously, there is often a delay between the making of a request and compliance therewith. Further, if plaintiff took the position that her father did not ask for the file at the January 28, 1999 meeting, it was her burden to come forward with competent evidence denying that such a request was made. This she failed to do. Once again, the majority uses "elaborate inferential constructs" to manufacture an issue of fact that plaintiff herself has not raised.

In sum, the inescapable conclusion is that plaintiff's attorney client relationship with defendants ended on January 28, 1999, at the latest, and any toll of the statute of limitations

ended on that day as well. Thus, the action was untimely when plaintiff commenced it on January 31, 2002, more than three years later.

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

ENTERED: NOVEMBER 6, 2008