SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 13, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Sweeny, Catterson, Acosta, JJ.

4516 The People of the State of New York, Respondent, Ind. 1538/06

-against-

Alberto Lopez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered May 22, 2007, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree and robbery in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 12 years to life, unanimously reversed, on the law and as a matter of discretion in the interest of justice, the plea vacated, and the matter remanded for further proceedings including a new suppression hearing.

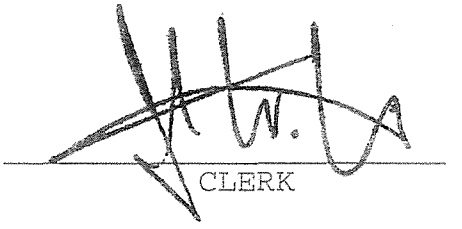
The plea was involuntary because, at the plea allocution, once again there was no mention of any of the rights defendant would be waiving by pleading guilty, including his right to a

jury trial, his right of confrontation and his right against self-incrimination (*see People v Colon*, 42 AD3d 411 [2007]). Since defendant's plea was invalid, his waiver of the right to appeal is also invalid.

At the suppression hearing, the court erred by unduly restricting defendant's opportunity to test the validity of the People's case through cross-examination of the arresting officer. The officer testified that when he interviewed the complainant, there was another person present who also provided information about the underlying incident. Although the People made a prima facie showing of probable cause for defendant's arrest based on the complainant's information, this was not a proper basis on which to cut off all questioning about the information provided by the other person. Defendant was entitled to ask the officer about the other person's account of the incident and description of the perpetrator (*see People v Misuis*, 47 NY2d 979 [1979]; *People v Sanchez*, 236 AD2d 243 [1997]).

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

ENTERED: NOVEMBER 13, 2008



CLERK

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4518 SF Holdings Group, Inc., et al., Index 604357/06
Plaintiffs-Respondents,

-against-

Kramer Levin Naftalis & Frankel LLP,
Defendant-Appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Ronald S. Greenberg of counsel), for appellant.

Storch Amini & Munves PC, New York (Bijan Amini of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered June 24, 2008, which, to the extent appealed from as limited by the briefs, denied portions of defendant's motion to dismiss the amended complaint, unanimously affirmed, without costs.

This legal malpractice action arises out of defendant's purported negligence in failing to classify SF Holdings Group's (SFH) St. Thomas plant as working capital in the merger agreement between SFH and Solo Cup Company (Solo).

Collateral estoppel does not apply because the relevant issue in this action is whether SFH would have paid for St. Thomas "but for" Kramer Levin's negligence, which was not decided in the arbitration or Delaware action (*see Weiss v Manfredi*, 83 NY2d 974 [1994]; *Schulkin v Stern*, 145 AD2d 326, 328 [1988]). Although the arbitrator determined that SFH was paid for the St.

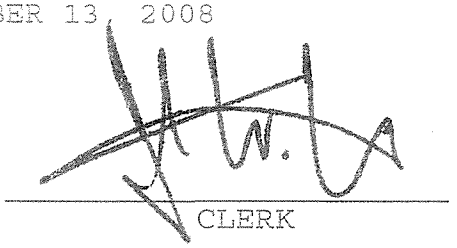
Thomas plant as part of the merger price, that determination considered the definition of working capital in the context of the allegedly negligently drafted agreement.

Given the procedural context, the motion court correctly rejected Kramer Levin's argument that plaintiffs, as a matter of law, were aware that St. Thomas was not working capital based on the merger agreement itself. Kramer Levin did not conclusively establish, for the purposes of plaintiffs' alleged awareness, that the merger agreement on its face discloses that the St. Thomas facility was not included under the definition of working capital (*see Held v Kaufman*, 91 NY2d 425, 431-432 [1998]). Further, to the extent that Mehiel, a sophisticated businessman, executed the merger agreement on behalf of plaintiffs with full knowledge of its terms, "[a]ny negligence on the part of [the client] in reviewing the agreement is merely a factor to be assessed in mitigation of damages" (*Mandel, Resnik & Kaiser, P.C. v E.I. Electronics, Inc.*, 41 AD3d 386, 388 [2007]; *see also Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 305, n2 [2001]). Nor did Kramer Levin establish, as a matter of law, that Solo would not have agreed to the terms that Kramer Levin purportedly failed to draft.

We have considered Kramer Levin's remaining arguments, including that plaintiff's damages were caused by an intervening event, and find that they do not warrant dismissal under CPLR 3211.

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

ENTERED: NOVEMBER 13, 2008



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Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4519-
4520-
4521 In re Pathjrie J., etc.,

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

Nimeh J.,
Petitioner-Appellant,

Administration for Children's Services,
Respondent-Respondent.

- - - - -

In re "Baby Girl" J., etc.,

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

Nadia J.,
Respondent-Appellant,

Lutheran Social Services, Inc.
Petitioner-Respondent.

Steven N. Feinman, White Plains, for Nimeh J., appellant.

Geoffrey P. Berman, Larchmont, for Nadia J., appellant.

Satterlee Stephens Burke & Burke LLP, New York (Zoë E. Jasper of counsel), for Lutheran Social Services, Inc., respondent.

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

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered December 13, 2006, which terminated respondent mother's parental rights to her daughter upon her admission of permanent neglect, transferred custody and

guardianship of the child to petitioner agency and the Commissioner of Social Services for the City of New York for the purpose of adoption, and denied respondent maternal grandmother's petition for custody of the child, unanimously affirmed, without costs.

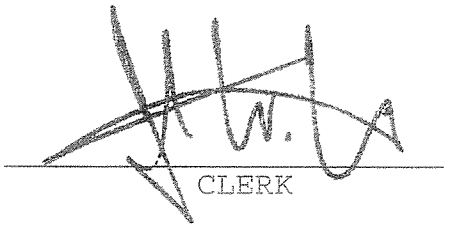
The mother failed to request a suspended judgment (*see Matter of Latoya P.*, 308 AD2d 402 [2003]). In any event, a suspended judgment would deprive the child of a "permanent, nurturing family relationship" (*Matter of Michael B.*, 80 NY2d 299, 310 [1992]), and the determination that termination of her mother's parental rights was in the child's best interests was supported by a preponderance of the evidence showing that the child has thrived in the foster home in which she has lived virtually her entire life and that the foster mother desires to adopt her (*see Matter of Violeta P.*, 45 AD3d 352 [2007]).

The determination that the child's best interests would not be served by granting the grandmother's custody petition was supported by a preponderance of the evidence indicating that the child had little, if any, relationship with the grandmother, whom she had seen only a few times in her life, that the grandmother knew little about her, failed to recognize her special needs, and did not understand the degree to which her visits caused the

child emotional harm (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-173 [1982]; *Matter of Marquis M.*, 304 AD2d 399 [2003]).

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

ENTERED: NOVEMBER 13, 2008



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Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4523 In re Lou-Ann Elias, etc., Index 109782/07
Petitioner,

-against-

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

Lou-Ann Elias, petitioner pro se.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

Determination of respondent Police Commissioner, dated March 20, 2007, finding petitioner guilty of engaging in prohibited conduct and directing that she forfeit the 40 days served in suspension, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Lewis Bart Stone, J.], entered December 10, 2007), dismissed, without costs.

Petitioner was present in the home of her estranged husband, where she had reason to believe marijuana plants were being grown, as evidenced by her admission that he was evasive about a room in the basement that was always kept locked and had told her about the idea to grow marijuana in the basement at least one or two weeks earlier. Given these facts and petitioner's use of the garage, which was in close proximity to the growing room from where the smell of marijuana and heat from the high intensity

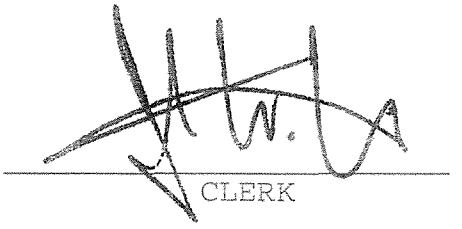
lamps were emanating, the finding that petitioner's ignorance of the criminal activity was deliberate was supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). No basis exists to disturb the credibility findings of the hearing officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Police discipline in New York City is subject to the Administrative Code of the City of New York and thus, the procedures set forth in Civil Service Law § 75 are inapplicable herein (*see Matter of Montella v Bratton*, 93 NY2d 424, 430 [1999]). Nor does the imposition of the 40-day suspension violate Administrative Code § 14-115(a) (former section 434a-14.0). Finally, we find that the penalty imposed does not shock the conscience (*see Matter of Kelly v Safir* 96 NY2d 32, 39-40 [2001]).

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

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

ENTERED: NOVEMBER 13, 2008



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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 13, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
John W. Sweeny, Jr.
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York,
Respondent,

Ind. 56865C/05

-against-

4524

Edward Melendez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered on or about October 10, 2007,

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

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

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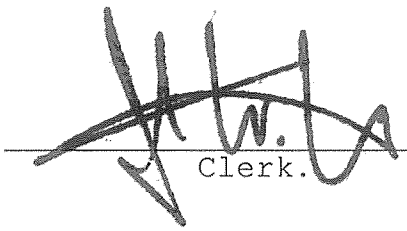


Clerk.

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

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 13, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
John W. Sweeny, Jr.
James M. Catterson
Rolando T. Acosta
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 3655/05
Respondent,

-against- 4525-
4526

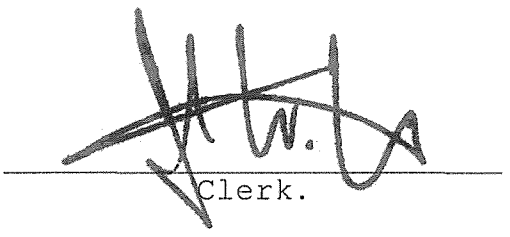
Rickey Hardy,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Charles H. Solomon, J.), entered on or about February 27, 2007, and judgment of resentence, same court and Justice, rendered on or about April 20, 2007,

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

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

ENTER:



Clerk.

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

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4527 The People of the State of New York, Ind. 798/05
Respondent,

-against-

Barret Chandler,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Arlene Goldberg, J. at jury trial and sentence), rendered July 12, 2006, convicting defendant of criminal possession of a weapon in the second degree and two counts of criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. Although neither employee spelled out defendant's role in the scheme, two store employees told the police that *both* defendant and his codefendant were jointly engaged in an effort to make purchases with stolen credit cards. According to an officer, one of the employees specifically pointed out the two men as "the individuals with the cards." This information was corroborated when an officer saw the codefendant leave a cash register, walk

over to defendant to converse with him, return to the cash register, depart with defendant, and exchange bags with defendant while they were walking in the street. Although defendant argues that the police lacked any evidence that he was a participant in the codefendant's illegal activity, we conclude that the totality of the circumstances provided probable cause for defendant's arrest. In order to establish probable cause for defendant's arrest, the People were not required to prove his accessorial liability under Penal Law § 20.00 beyond a reasonable doubt (*see Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 13, 2008

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4528 Miguel Angel Diaz Galindo, Index 20556/05
Plaintiff, 84962/06
85064/06

-against-

The Dorchester Tower Condominium, et al.,
Defendants.

- - - - -

Quality Building Construction, Inc.
Third-Party Plaintiff Respondent,

-against-

Vanlo Inc.,
Third-Party Defendant-Appellant.

- - - - -

The Dorchester Tower Condominium, et al.,
Second Third-Party
Plaintiffs-Respondents-Appellants,

-against-

Vanlo Inc.,
Second Third-Party
Defendant-Appellant-Respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Mark J. Cipolla of counsel), for appellant/appellant-respondent.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondents-appellants.

Shaub Ahmuty Citrin & Spratt LLP, Lake Success (Robert M. Ortiz of counsel), for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about October 16, 2007, which, insofar as appealed from as limited by the briefs, upon a finding that plaintiff suffered a "grave injury" pursuant to Workers' Compensation Law § 11, denied third-party/second third-party

defendant Vanlo, Inc.'s cross motion for summary judgment dismissing the third-party and second third-party causes of action seeking indemnification, and denied so much of the motion of defendants/second third-party plaintiffs The Dorchester Tower Condominium, 155 West 68th Street Associates, LLC, Rebco Properties, Inc., Ogden Capital Properties LLC and Board of Managers of the Dorchester Tower Condominium (collectively Dorchester) for summary judgment on its indemnification claims as against Vanlo, unanimously modified, on the law, to the extent of granting Dorchester summary judgment on the indemnification claims as against Vanlo, and otherwise affirmed, with costs in favor of Dorchester, payable by Vanlo, and the matter remanded for further proceedings.

The motion court properly denied plaintiff's employer Vanlo's cross motion, since the record establishes that Vanlo failed to meet its burden of showing, by competent admissible evidence, that plaintiff did not suffer a "grave injury" pursuant to Workers' Compensation Law § 11 (*see Altonen v Toyota Motor Credit Corp.*, 32 AD3d 342, 343-344 [2006]). Vanlo relies on the statements in the report of its expert that "[w]ith continued improvement" plaintiff "may eventually" be a candidate for a Traumatic Brain Injury work program. However, that same report also states that plaintiff is unemployable at this time (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]). The

additional reports relied upon by Vanlo do not offer any opinions as to plaintiff's employability nor do they suggest, in light of assertions that plaintiff exaggerated his disabilities, what plaintiff's actual abilities are or what types of jobs he could possibly perform. Furthermore, the record contains extensive medical evidence supporting the court's conclusion that plaintiff indeed suffered a traumatic brain injury that left him unemployable in any capacity (*id.*).

Dorchester's motion for summary judgment on its indemnification claims as against Vanlo should have been granted since there is no evidence of negligence on its part or that it supervised or controlled plaintiff's work (*see Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201 [2008]).

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

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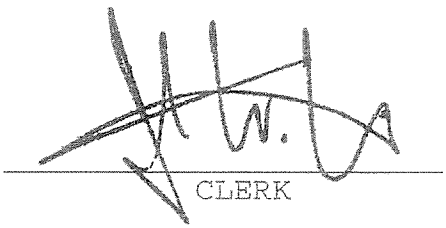

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Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4529 Bjorn Juhlin, Index 115342/05
Plaintiff-Appellant,

-against-

Ricardo E. Dominguez, et al.,
Defendants-Respondents.

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

Gallo, Vitucci, Klar, Pinter & Cogan, LLP, New York (Yolanda L. Ayala and Matthew J. Vitucci of counsel), for respondents.

Order, Supreme Court, New York County (Carol E. Huff, J.), entered June 6, 2007, which denied plaintiff's motion to set aside the verdict awarding plaintiff, among other things, $70,000 for past pain and suffering and $20,000 for future pain and suffering, unanimously affirmed, without costs.

Based on the record before us, the damage awards are not against the weight of the evidence and do not deviate materially from what would be reasonable compensation under the circumstances (*see Mejia v JMM Audubon*, 1 AD3d 261, 262 [2003]).

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 13, 2008

CLERK

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4530 Pav-Lak Industries, Inc., et al., Index 600382/06
Plaintiffs-Appellants-Respondents,

-against-

Arch Insurance Company,
Defendant-Respondent-Appellant,

B&J Welding & Iron Works, now known as
Mid Island Steel Company, et al.,
Defendants.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for appellants-respondents.

D'Amato & Lynch, LLP, New York (Neal M. Glazer of counsel), for respondent-appellant.

Order and judgment (one paper), Supreme Court, New York County (Edward H. Lehner, J.), entered January 29, 2008, which denied plaintiffs' motion for summary judgment and granted defendant Arch Insurance Company's cross motion for summary judgment to the extent of declaring that plaintiff Zurich American Insurance Company's policy is primary to Arch's insurance policy, that Arch's policy is excess to Zurich's policy, that Arch is not obligated to defend Pav-Lak in the underlying personal injury action, and that the $1 million deductible in the Arch policy applies to the underlying action, unanimously modified, on the law, to declare that the Arch policy is primary to the Zurich policy, that the Zurich policy is excess to the Arch policy, and that Arch is obligated to defend and

indemnify Pav-Lak in the underlying action, and otherwise affirmed, without costs.

The additional insured coverage endorsement of Arch's policy extends coverage to injuries sustained by the sub-subcontractor's employee, because those injuries arose out of the operations or work of the subcontractor (*see Tishman Constr. Corp. of N.Y. v CNA Ins. Co.*, 236 AD2d 211 [1997]; *Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 83-84 [1994]). Thus, Arch was required to disclaim coverage. Arch's disclaimer letter dated May 12, 2005 was effective as against Pav-Lak because Pav-Lak received a copy of it (*see Schlott v Transcontinental Ins. Co., Inc.*, 41 AD3d 339 [2007], *lv denied* 9 NY3d 817 [2008]), and, further, the grounds of disclaimer were stated with sufficient specificity (*see Realm Natl. Ins. Co. v Hermitage Ins. Co.*, 8 AD3d 110 [2004]). However, Arch's 45-day delay in disclaiming coverage was unreasonable as a matter of law. There was no need for an investigation, because the basis for the disclaimer was readily apparent from Zurich's tender letter, which Arch received on March 28, 2005 (*see West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [2002], *lv denied* 98 NY2d 605 [2002]; *McGinley v Odyssey Re (London)*, 15 AD3d 218 [2005]).

By failing to give Pav-Lak timely notice of its disclaimer, Arch waived its reliance on the Ranger Steel exclusion as a basis

for disclaiming coverage (*see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649 [2001]). In any event, however, resolving the ambiguity of the language of the exclusion against Arch, the exclusion does not apply to Pav-Lak (*see Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003]).

Arch did not waive the $1 million deductible in its policy, because the deductible endorsement does not bar coverage or implicate policy exclusions and therefore is not subject to the time requirements for disclaiming coverage under Insurance Law § 3420(d) (*see Power Auth. of State of N.Y. v National Union Fire Ins. Co. of Pittsburgh*, 306 AD2d 139 [2003]). Nor is the endorsement a warranty under Insurance Law § 3106(a), since it contains no condition precedent to coverage.

In its contract with Pav-Lak, defendant B&J Welding & Iron Works agreed to name Pav-Lak as an additional insured on a primary basis and agreed that Pav-Lak's own general liability insurance would be excess only and non-contributory to B&J's policy. In accordance with that contract, B&J obtained the Arch policy, which contained an additional insured endorsement providing coverage to any entity that B&J was contractually required to insure for liability arising out of B&J's work or operations. This additional insured endorsement unambiguously

applied to Pav-Lak (*see e.g. Tishman Constr. Corp. of N.Y. v American Mfrs. Mut. Ins. Co.*, 303 AD2d 323, 324 [2003]). Pav-Lak's commercial general liability policy, the Zurich policy, provided that its coverage would be excess over "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." Thus, the Zurich policy is excess to the Arch policy (*see id.*).

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

ENTERED: NOVEMBER 13, 2008

CLERK

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4531 Cummins, Inc.,
Plaintiff-Appellant,

Index 602392/02

-against-

Atlantic Mutual Insurance Company,
Defendant-Respondent.

Nixon Peabody LLP, Rochester (David H. Tennant of counsel), for appellant.

Post, Polak, Goodsell, MacNeill & Strauchler, New York (Frederick B. Polak of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Leland G. DeGrasse, J.), entered May 15, 2007, which, in a declaratory judgment action involving the amount of defendant insurer's compensation for providing certain insurance coverage to plaintiff manufacturer's distributors, denied plaintiff's motion for summary judgment, granted defendant's cross motion for summary judgment, and declared that the loss conversion factor in the parties' agreement applies to paid losses without regard to the deductible or self-insured retention under any policy covering plaintiff's distributors, unanimously modified, on the law, to deny defendant's cross motion, vacate the judgment, and remand the matter for a trial on the issue of whether the parties intended to have a cap on the application of the loss conversion factor, and otherwise affirmed, without costs.

With regard to defendant's compensation, the subject

insurance agreement primarily relies on a claims handling fee to be calculated by applying a multiplier, or "loss conversion factor" (LCF), and makes plaintiff responsible for a $500,000 deductible for each claim. More specifically, article III[C] provides for an LCF of ".203 of paid or incurred losses"; article III(D) defines "Loss Limitation" as "the amount of incurred losses to [be] included in [the] Paid Loss program premium," and provides for a loss limitation of $500,000 for each type of insurance covered; the term "Paid Loss program premium" is not defined in the agreement; and article IV[C], which covers plaintiff's payment obligations, states that defendant shall bill plaintiff "each month for the amount of the preceding month's Paid Losses multiplied by 1.203," without any reference to loss limitation. Plaintiff argues that the "1.203" figure only makes sense if it incorporates a $500,000 deductible cap because "it is only within the first $500,000 of claims paid that [defendant] is entitled to be reimbursed for 100% of the paid losses plus a 20.3% fee"; that the agreement would be rendered illusory were the 1.203 applied to an entire claim that exceeded the deductible; and that had defendant wanted the LCF to apply to amounts above $500,000, it needed to make such intention express and specific, and could have done so by stating that 1.203 applied to the first $500,000 and that .203 applied to all amounts above $500,000. Defendant argues that had the parties

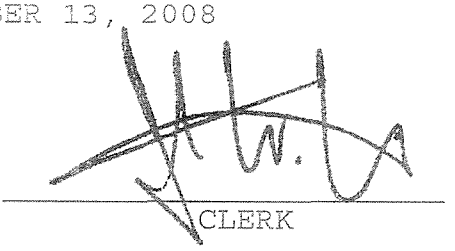
intended its claims handling fee be capped, such a cap would have been included in article IV[C]; that the "1" in the "1.203" refers only to the $500,000 deductible; and that once the deductible has been exceeded the .203 is applied to the entire amount it pays out.

We find that the agreement is ambiguous as to whether there is a limitation on the application of the LCF. The language found in an endorsement to one of the policies is not specific with regard to how the .203 multiplier is to be applied and is not conclusive as to the parties' intentions. The "rule of omission" should not be applied to conclude that the omission of a cap on the claims handling fee was intentional; such a reading would ignore the loss limitation provision and the fact that the payment section includes a "1.203" multiplier and not a ".203" multiplier. Nor does the extrinsic evidence submitted on the motions reveal the parties' intentions. The doctrine of *contra proferentem* does not apply as the evidence submitted on the motions shows that while defendant prepared the drafts of the agreement, the basic concept and terms originated with plaintiff, that plaintiff is sophisticated and was instrumental in crafting various parts of the agreement, and that plaintiff, while not an insurance company, had equal bargaining power and acted like an insurance company by maintaining a self-insured retention

(*see Coliseum Towers Assoc. v County of Nassau*, 2 AD3d 562, 565 [2003], *lv denied* 2 NY3d 707 [2004]; *Loblaw, Inc. v Employers' Liab. Assur. Corp.*, 85 AD2d 880, 881 [1981], *affd* 57 NY2d 872 [1982]).

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

ENTERED: NOVEMBER 13, 2008



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Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4532 In re Stephanie Bradford, Index 111044/05
Petitioner-Respondent,

-against-

New York City Department of Correction,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for appellant.

Communications Workers of America, New York (Christina Norum of counsel), for respondent.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered May 4, 2007, granting the petition, vacating respondent's determination to terminate petitioner's employment, and remanding the matter to respondent for a hearing, unanimously reversed, on the law, without costs, the petition denied, the determination reinstated and confirmed, and the proceeding dismissed.

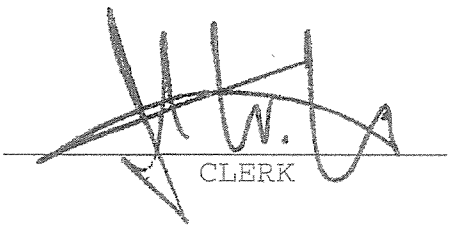
It is uncontested that petitioner's limited probationary agreement encompassed her conduct in relation to "rules, regulations, directives, operation orders, policies and institutional orders concerning: AWOLs, time and leave, sign in/out procedures, being on post and efficient performance . . ." Furthermore, petitioner was terminated, inter alia, for her repeated failure to submit statistical reports required by the rules and regulations of respondent Department of Correction, an

allegation that petitioner conceded. *Matter of Tankard v Abate* (159 Misc 2d 339 [1993] *mod on other grounds* 213 AD2d 320 [1995], *lv denied* 86 NY2d 702 [1995]), relied on by the court below, does not require a hearing in such circumstances.

Petitioner failed to put forth evidence that her termination pursuant to a limited probationary agreement was in bad faith or for illegal reasons (*Matter of Santiago v Horn*, 37 AD3d 307 [2007]). At best, petitioner merely raised factual disputes that do not entitle her to a hearing.

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

ENTERED: NOVEMBER 13, 2008



Lippman, P.J., Sweeny, Catterson, Acosta, JJ.

4533 The People of the State of New York, Ind. 556/01
Respondent,

-against-

Ernest Fields,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Joseph Fisch, J.), rendered on or about April 5, 2006, unanimously affirmed.

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

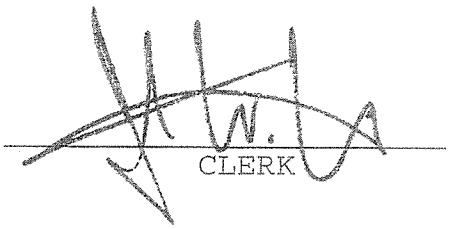
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: NOVEMBER 13, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 13, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
John W. Sweeny, Jr.
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 11051C/05
Respondent,

-against- 4534

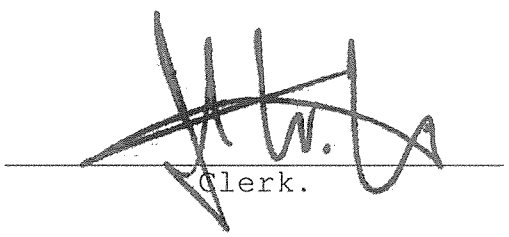
Samuel Rivera,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered on or about March 9, 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.

Lippman, P.J., Sweeny, Catterson, Acosta, JJ.

4535 Amir Tawfiyq Abdul-Aziz, Index 024683/00
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Sanford F. Young, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alan J. Saks, J.), entered on or about March 30, 2006, which, upon the prior grant of defendant's motion for a directed verdict, dismissed the complaint, unanimously affirmed, without costs.

Plaintiff did not establish a prima facie case of either false arrest or malicious prosecution. We reject plaintiff's argument that, in dismissing these claims, the trial court resolved issues of credibility or competing inferences.

On the morning of February 5, 1997, while executing a search warrant at a Bronx apartment, NYPD Captain Timothy Galvin was shot in the face by an assailant who escaped. The investigation initially focused on the occupant of the apartment. Another officer at the scene, Detective John Capobianco, gave a description of the assailant that matched the apartment's occupant, and the detective identified that person at a showup. However, the initial suspect had a well-documented alibi, and the

police turned their attention to plaintiff. Following an investigation, the police arrested plaintiff for the shooting.

Before the grand jury, Capobianco gave a description of the gunman that matched plaintiff and was different from his original description, which had matched the initial suspect. Captain Galvin, who had initially stated that he was unable to identify the person who shot him, also provided a description of his assailant before the grand jury that matched plaintiff. None of the evidence relating to the investigation of the initial suspect or of Capobianco's and Galvin's inconsistent identifications of the assailant was brought out before the grand jury. Plaintiff was indicted, but he was ultimately acquitted of all charges at trial.

With respect to the false arrest claim, even though the arrest was warrantless, defendant successfully rebutted the presumption that it lacked probable cause to arrest plaintiff (*see Smith v County of Nassau*, 34 NY2d 18, 23 [1974]). There was more than enough to establish probable cause (*see generally Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]). Prior to the arrest, the police had information from several persons that plaintiff had confessed to the shooting, as well as evidence that someone had left messages on the initial suspect's answering machine looking for plaintiff, and a photo identification of plaintiff made by a neighbor who

saw plaintiff get off the elevator, moments before the shooting, on the floor where the shooting occurred. Accordingly, the undisputed facts established probable cause as a matter of law (*see Agront v City of New York*, 294 AD2d 189, 190 [2002]).

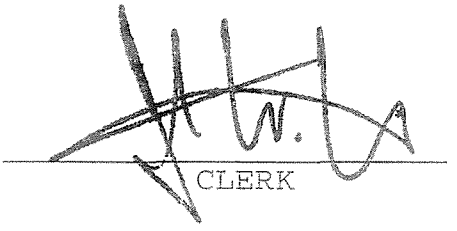
With respect to plaintiff's malicious prosecution claim, there was probable cause to continue the criminal proceeding. Plaintiff's indictment created a presumption of probable cause for his continued prosecution and pretrial detention, which plaintiff failed to overcome by evidence of misrepresentation or falsification of evidence before the grand jury (*see Jenkins v City of New York*, 2 AD3d 291, 292 [2003]). We reject plaintiff's argument that the prosecutor procured the indictment by fraud or suppression of evidence by failing to disclose to the grand jury any information about the initial pursuit of the apartment's occupant as the prime suspect of the shooting and the changed descriptions made by Capobianco and Galvin following plaintiff's arrest. Even accepting plaintiff's claims as true, the misconduct complained of does not rise to the level of an egregious deviation from statutory requirements or accepted practices applicable in criminal cases (*see Gisondi v Town of Harrison*, 72 NY2d 280, 285 [1988]). Indeed, there is no requirement that the prosecution disclose to the grand jury all the evidence in its possession that is favorable to the accused even though such information undeniably would allow the grand

jury to make a more informed determination (*see People v Lancaster*, 69 NY2d 20, 25-26 [1986], *cert denied* 480 US 922 [1987]). Moreover, even without Capobianco's and Galvin's testimony, the grand jury had sufficient evidence to indict plaintiff (*see Jenkins*, 2 AD3d at 292). By itself, the grand jury testimony of a person to whom plaintiff confessed provided sufficient evidence of plaintiff's culpability to warrant an indictment (*see* CPL 190.65[1]), even if the grand jury had also determined that Capobianco and Galvin had tailored their descriptions of the gunman to match plaintiff. Accordingly, as the undisputed facts demonstrated that the trial jury could not, by any rational process, have found in favor of plaintiff on either claim, the court was justified in taking both claims from the jury and directing a verdict in defendant's favor.

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

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

ENTERED: NOVEMBER 13, 2008



CLERK

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4536N-
4536NA Index 350829/98

Edie Weiner,
Plaintiff-Respondent,

-against-

Jay Weiner,
Defendant-Appellant.

David Portnoy, New York, for appellant.

Charles M. Mirotznik, New York (Mary Ellen O'Brien of counsel), for respondent.

Order, Supreme Court, New York County (Laura Visitacion-Lewis J.), entered on or about July 18, 2007, which insofar as appealed from as limited by the briefs, granted plaintiff's cross motion for termination of defendant's use of plaintiff's vacation home previously granted to him in a stipulation settling the parties' divorce action and incorporated but not merged into their divorce judgment, an order of protection, and attorney's fees incurred obtaining the protective order, and supplemental order, same court and Justice, entered on or about October 26, 2007, which ordered defendant to pay plaintiff $12,500 in counsel fees, unanimously affirmed, with costs.

In general, the law is well established that "a promise not to molest is an independent covenant in a separation agreement" (*Borax v Borax*, 4 NY2d 113, 115 [1958]). As a result, courts have found that even where former spouses have violated no-

molestation clauses, they must continue to receive benefits, such as maintenance, under settlement stipulations containing such clauses (*see Cygielman v Cygielman*, 111 AD2d 1057, 1058 [1985]). Under the particular circumstances of this case, however, principles of equity, rather than of law, compel us to find that defendant's egregious behavior toward plaintiff has operated to impose a forfeiture of defendant's rights under the parties' settlement stipulation. Thus, we find here that, in contrast to those cases where a party was entitled to continue receiving certain benefits under an agreement despite his or her violation of a no-molestation clause, defendant, by reason of his behavior toward plaintiff, has forfeited his right to the unusually generous and extraordinary condition allowing him to share living quarters with his former spouse.

Defendant's objection to the absence of a hearing on the award of counsel fees has been waived by his failure to request a hearing, upon submission of his papers or at any other time (*see Winter v Winter*, 50 AD3d 431, 432 [2008]; *Wasserman v Eisenberg*, 309 AD2d 709 [2003]).

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

ENTERED: NOVEMBER 13, 2008

CLERK

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

4537N Celece Laracuente, an Infant Under the Age of Fourteen Years, by Her Mother and Natural Guardian, Debbie Velez, et al., Plaintiffs-Appellants, Index 20997/04

-against-

Batia Realty Corporation, et al., Defendants-Respondents.

Manuel D. Gomez & Associates, PC, New York (Manuel D. Gomez of counsel), for appellants.

Cohen & Krassner, New York (Mark Krassner of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.) entered February 26, 2008, granting defendants' motion to vacate a default judgment and for permission to serve an answer, unanimously affirmed, without costs.

A party seeking vacatur of a default judgment pursuant to CPLR 5015 must demonstrate both a reasonable excuse for the default and a meritorious cause of action (*Crespo v A.D.A. Mgt.*, 292 AD2d 5 [2002]). In this matter, defendants attribute their inaction to the dismissal of a prior action filed by plaintiffs in New York County based on the identical facts and theory of liability. Defendants' inaction in the face of the history of litigation between the parties, while ill-advised, was not wholly unreasonable (*see Mediavilla v Gurman*, 272 AD2d 146 [2000]). We also find that defendants adequately demonstrated a meritorious

defense to the action. Accordingly, and in consideration of our preference for deciding cases on the merits (*see Wade v Village of Whitehall*, 46 AD3d 1302 [2005]; *Arias v Sanchez*, 227 AD2d 284 [1996]), we conclude that the motion court properly exercised its discretion in granting defendants' motion to vacate the default.

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

ENTERED: NOVEMBER 13, 2008

CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4539 Sandy Santana, Index 21497/96
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Francis F. Caputo of counsel), for appellant.

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

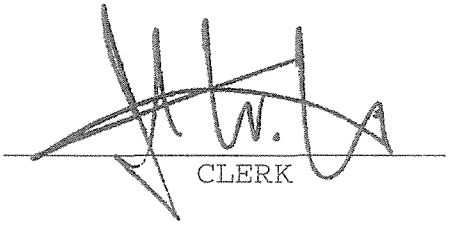
Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered on or about January 16, 2007, upon a jury verdict finding defendant 100% liable for plaintiff's injuries, unanimously affirmed, without costs.

Plaintiff was injured when his bicycle struck a 3½-inch high metal bollard sleeve protruding from a municipal park pathway without the 40-inch high bollard pole positioned in the sleeve. Contrary to defendant's contention, its motion to dismiss at trial was properly denied, because although defendant did not have prior written notice of the defective condition (see Administrative Code of the City of New York § 7-201[c][2]), the evidence established that the recognized exception to the prior written notice requirement applied, namely that defendant acted negligently when it affirmatively created the dangerous condition

(see *Yarborough v City of New* York, 10 NY3d 726, 728 [2008]; *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). Defendant had a duty to maintain the bollard pole and sleeve in a reasonably safe condition (see *Posner v New York City Tr. Auth.*, 27 AD3d 542 [2006]), and the evidence showed that the missing bollard pole was regularly removed by defendant's employees to allow for maintenance vehicles to access areas of the park normally blocked by the bollards.

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

ENTERED: NOVEMBER 13, 2008



Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4540 Sharona Cohen, Index 114857/07
Plaintiff-Respondent,

-against-

Medical Malpractice Insurance Pool
of New York State,
Defendant-Appellant,

Andrew Gardner, M.D., et al.,
Defendants.

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for appellant.

Bondi & Iovino, Garden City (Desiree Lovell Fusco of counsel), for respondent.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered April 30, 2007, which, in a declaratory judgment action involving defendant-appellant insurer's obligation to defend and indemnify plaintiff in an underlying action for personal injuries, denied the insurer's motion for summary judgment, unanimously reversed, on the law, with costs, the motion granted, and it is declared that the insurer is not obligated to defend or indemnify plaintiff in the underlying action.

Plaintiffs in the underlying action allege, inter alia, that plaintiff herein rendered negligent genetic counseling services; plaintiff herein alleges that she rendered the genetic counseling services in question as an employee of the physician named in the

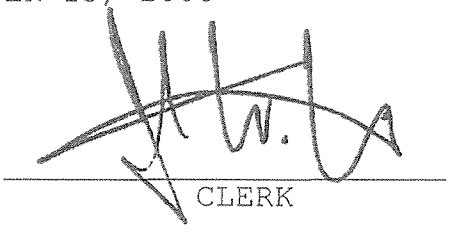
underlying action under whose medical malpractice policy she is claiming coverage. The policy in question covers the physician himself (referred to in the policy as "you") and the physician's solo professional service corporation, the physician's administrator, qualified temporary substitute physician, and estate. In addition, the policy covers "Vicarious Liability Claims," defined as "liability arising from Claims made against you because of Professional Services which were provided (or should have been provided) by other people for whose conduct you are legally responsible." The policy warns, however: "Be sure you understand that you are not covered under this policy for the acts of certain people in your employment for whose conduct you are responsible UNLESS THEY ARE INSURED UNDER A SEPARATE PROFESSIONAL LIABILITY INSURANCE POLICY," in which event the insurer would pay the excess of the vicarious liability claim over the coverage provided by the other policy. The exclusions section of the policy lists such "certain people": "Employed Physicians," physician's assistants, specialist's assistants, nurses providing anesthesia services, nurse practitioners, and midwives employed by the physician.

Plaintiff argues, and the motion court agreed, that the policy is ambiguous as to whether it covers employees of the physician other than the ones listed in the exclusions section. As the motion court saw it, to generally exclude employees would

be to render the vicarious liability provision "meaningless and superfluous" since, "in the event that it is determined that [the physician] is vicariously liable for [plaintiff's] acts, the [underlying plaintiffs'] claim made against [plaintiff] is also a claim made against [the physician], the insured under [defendant's] policy." We reject that reasoning, and find that the policy's vicarious liability coverage is not ambiguous. That the physician is covered for "[s]ervices which were provided . . . by other people for whose conduct [he is] legally responsible" does not create coverage for those "other people" (*cf. National Gen. Ins. Co. v Hartford Acc. & Indem. Co.*, 196 AD2d 414 [1993] [no evidence that employee of insured was intended to be covered where employee was neither named nor added by endorsement]).

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

ENTERED: NOVEMBER 13, 2008



CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4541-
4542 In re Robert C.,
Petitioner-Appellant,

-against-

Katherine D.,
Respondent-Respondent.

Robert C., appellant pro se.

Order, Family Court, Bronx County (Sue Levy, Referee), entered on or about April 9, 2007, which, in a proceeding pursuant to article 6 of the Family Court Act, dismissed the petition for modification of a prior order of visitation without prejudice, unanimously affirmed, without costs.

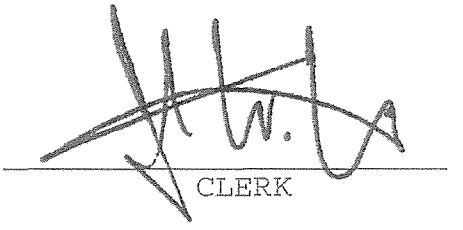
Dismissal of the petition without prejudice due to petitioner's nonappearance at the scheduled hearing was appropriate. Although the incarcerated petitioner argues that his failure to appear was due to the court's erroneous insistence that it would not issue an order to produce him unless personal service was effected upon respondent, the record indicates otherwise. The court, while initially indicating that personal service of the summons and petition upon respondent was required, subsequently acknowledged that the requirement would be relaxed if personal service was impossible (*see Matter of Cruz v Cruz*, 48 AD3d 804, 806 [2008], *lv denied* 10 NY3d 712 [2008]; Family Court Act § 651[b]). The court also set a date for the hearing and

provided petitioner with a form to complete, which would have permitted him to testify electronically. However, petitioner refused to sign the form, and on the date of the hearing, neither petitioner nor respondent appeared. Contrary to petitioner's contention, the court was not required to produce him when an alternative means for his participation was available. Furthermore, there is no indication that respondent was served with the subject petition or had notice of the hearing (*see Matter of Church v Church*, 294 AD2d 625 [2002]).

We have considered petitioner's remaining contentions, including those relating to alleged violations of his constitutional rights, and find them unavailing.

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

ENTERED: NOVEMBER 13, 2008



CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4544 Francois Rivera, Index 114858/06
Plaintiff-Appellant,

-against-

Time Warner Inc., et al.,
Defendants-Respondents,

NYP Holdings Inc., et al.,
Defendants.

Heller Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for appellant.

Cahill Gordon & Reindel LLP, New York (Landis C. Best of counsel), for respondents.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered August 10, 2007, which, to the extent appealed from, granted the motion of defendants Time Warner Inc. and Time Warner Cable Inc. (Time Warner) to dismiss the causes of action for defamation asserted against them in the seventeenth and eighteenth causes of action, unanimously affirmed, without costs.

Since plaintiff is a public official, he was required to allege that Time Warner acted with actual malice, which means with knowledge that the statements at issue were false, or with reckless disregard of whether or not they were false (*New York Times Co. v Sullivan*, 376 US 254, 279-80 (1964). Reckless

disregard means a high degree of awareness of probable falsity (*Gertz v Robert Welch, Inc.*, 418 US 323, 332 (1974). It did not suffice to plead the lower standard of gross irresponsibility applicable to private-person plaintiffs, as set forth in *Chapadeau v Utica Observer-Dispatch* (38 NY2d 196 [1975]).

Plaintiff did not plead actual malice either explicitly or through facts from which actual malice can be inferred. Actual malice cannot be inferred from factual allegations merely suggesting that Time Warner had reason to question the accuracy of the information at issue (*see Harte-Hanks Communications v Connaughton*, 491 US 657, 688 [1989]). This asserts, at most, a negligence theory that falls far short of the requisite actual malice standard (*see Masson v New Yorker Mag., Inc.*, 501 US 496, 510 [1991]; *Time, Inc. v Pape*, 401 US 279, 291 [1971]).

There is no merit to plaintiff's argument that the actual malice standard does not apply because Time Warner republished information already published in a newspaper. On the contrary, since plaintiff is a public official, he must plead actual malice in order to overcome the privilege that protects a republisher of information from a reliable source (*see Karaduman v Newsday, Inc.*, 51 NY2d 531, 551 [1980]).

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

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

ENTERED: NOVEMBER 13, 2008

CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4545 Salvador Figueroa, Index 18242/05
Plaintiff-Respondent,

-against-

West 170th Realty, Inc.,
Defendant-Respondent,

A&R Dollar LLC doing business as
Liberty Dollar, et al.,
Defendants,

Bronx 99 Cents LLC,
Defendant-Appellant.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for Salvador Figueroa, respondent.

Jeffrey Miller & Associates, P.C., New York (Jeffrey Miller of counsel), for West 170th Realty, Inc., respondent.

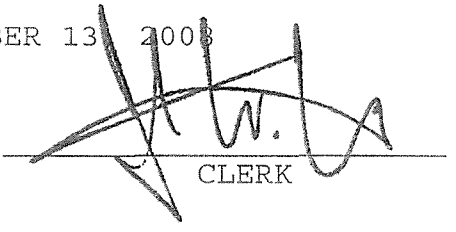
Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about March 10, 2008, which, insofar as appealed from, in an action for personal injuries allegedly sustained as a result of a slip and fall on snow and ice, denied the motion of defendant Bronx 99 Cents LLC for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

The evidence, including, inter alia, conflicting testimony from the owner of Bronx 99 Cents and the landlord, defendant West 170th Realty, Inc., presents triable issues of fact as to

whether, pursuant to its lease, Bronx 99 Cents was responsible for removing the snow and ice on the portion of the sidewalk where plaintiff slipped and fell. Furthermore, although the owner of Bronx 99 Cents could not recall the snow removal efforts taken by his employees on the date of the accident, his testimony as to his general snow removal practice, as well as plaintiff's testimony that he fell when he slipped on a patch of ice underneath the gray, slushy snow located within a shoveled pathway, and that a safe alternative route to get around the hazard he slipped on did not exist as the shoveled path abruptly ended, was sufficient to raise triable issues as to whether Bronx 99 Cents created or exacerbated a dangerous condition (*see Sanchez v City of New York*, 48 AD3d 275 [2008]; *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 337-338 [2004]). Finally, even assuming that the court improperly considered an unsworn report from plaintiff's expert (*see e.g. Charlton v Almaraz*, 278 AD2d 145 [2000]), it is clear that the court did not base its ruling exclusively on the report. Rather, it is evident that the court considered the documentary and deposition evidence in arriving at its determination.

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

ENTERED: NOVEMBER 13, 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 13, 2008.

Present - Hon. Peter Tom, Justice Presiding
Angela M. Mazzarelli
David B. Saxe
Eugene Nardelli
John T. Buckley, Justices.

The People of the State of New York, Ind. 486/07
Respondent,

-against- 4546

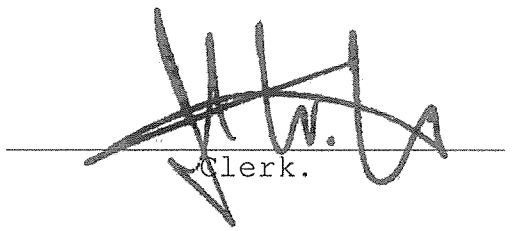
Lorenzo Deas,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about September 20, 2007,

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

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

ENTER:



Clerk.

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

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4547-
4548 In re Samantha M., and Another,

Children under the Age of
Eighteen Years, etc.,

Ana M., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

Proskauer Rose, LLP, New York (David L. Shaul of counsel), and Center For Family Representation, New York (Susan Jacobs of counsel), for Ana M., appellant.

Steven N. Feinman, White Plains, for Christopher T., appellant.

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

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

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about August 28, 2007, which, upon a fact-finding determination that respondents had abused and medically neglected Samantha M. and derivatively abused and neglected Amanda T., placed the children in the custody of the Commissioner of Social Services, unanimously affirmed, without costs.

Based on the credible testimony of the then two-year-old subject child's treating physician that her injuries, which included multiple bruises to her face and body and a severe

duodenal hematoma, were non-accidental, coupled with the admission of respondents mother and paramour that each had participated in an elaborate lie to cover up the fact that the latter was alone with Samantha for several hours prior to her hospitalization for her injuries, we find that Family Court's findings of child abuse and medical neglect were supported by a preponderance of the evidence. The court was entitled to disregard the testimony of respondents' experts that the child's injuries were a result of the undiagnosed disease Henoch-Schlein Purpura (*see People v Wells*, 53 AD3d 181, 191 [2008]), especially since neither expert actually examined her.

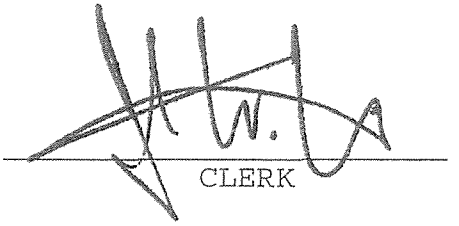
As to the finding that respondents medically neglected Samantha, while parents are not required to seek medical attention for every trifling affliction, the court must consider whether an ordinarily prudent parent would have sought medical assistance in the same situation (*see Matter of Hofbauer*, 47 NY2d 648, 654-655 [1979]; *Matter of Faridah W.*, 180 AD2d 451 [1992], *lv denied* 80 NY2d 751 [1992]). Here, the evidence established, and both respondents admitted, that the child had been ill for at least two weeks prior to her hospital admission. Even crediting respondent mother's argument that Samantha vomited "only" four or five times in the two weeks prior to her admission, among other symptoms, we find that this was enough to put an "ordinarily prudent parent" on notice that medical attention was required.

We agree that respondent Christopher T. was a person legally responsible for Samantha within the meaning of Family Court Act § 1012(g). The evidence established that respondent, who had resided in the household as respondent mother's paramour for approximately three months prior to Samantha's hospitalization, was the father of Samantha's unborn half sibling, picked Samantha up from daycare and took care of Samantha, acted as the functional equivalent of a parent in the household (*see Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]).

Finally, we find that the acts committed by respondents demonstrated an impairment of judgment sufficient to support the derivative findings of abuse and neglect [*Matter of Joshua R.*, 47 AD3d 465 [2008], *lv denied* __ NY3d __, 2008 NY Lexis 2533).

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

ENTERED: NOVEMBER 13, 2008



CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4549 The People of the State of New York, Ind. 2915N/05
Respondent,

-against-

Denzel Brown,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Ana Vuk-Pavlovic of counsel), for appellant.

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about June 6, 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.

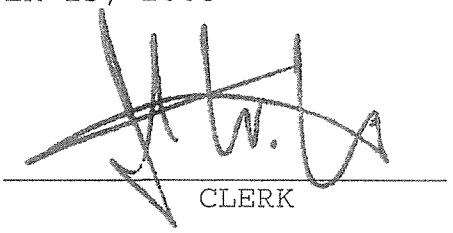
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 13, 2008



CLERK

Tom, J.P., Mazzarelli, Saxe, Buckley, JJ.

4550 Marie Sander, Index 113466/05
Plaintiff-Appellant,

-against-

J.P. Morgan Chase Home Mortgage,
Defendant-Respondent.

Marie Sander, appellant pro se.

Pittoni, Bonchonsky & Zano, LLP, Garden City (Peter R. Bonchonsky of counsel), for respondent.

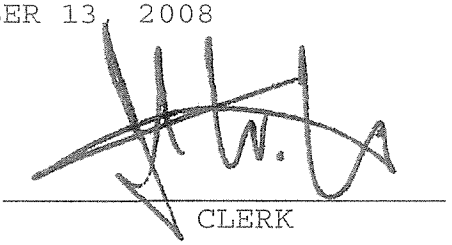
Order, Supreme Court, New York County (Walter B. Tolub, J.), entered July 25, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to raise a genuine issue of material fact with respect to fraudulent inducement or her other claims of negligence, unconscionability and duress, particularly in light of the clear and unambiguous terms of the mortgage documents (*see Matter of American Mtge. Banking v Canestro*, 201 AD2d 407 [1994]). Her initialing of the rider confirms that this was an adjustable rate mortgage. Since plaintiff had an obligation to exercise ordinary diligence in ascertaining the terms of the

document she signed (*PNC Capital Recovery v Mechanical Parking Sys.*, 283 AD2d 268, 272 [2001], *appeal dismissed* 98 NY2d 763 [2002]), she cannot reasonably claim to have believed the terms were other than as stated.

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

ENTERED: NOVEMBER 13, 2008



CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4551 East Best Food Corp., Index 100055/07
Plaintiff-Respondent,

-against-

NY 46th LLC,
Defendant-Appellant.

Cozen O'Connor, New York (Menachem J. Kastner of counsel), for appellant.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Bruce H. Wiener of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 5, 2008, which denied defendant's motion for partial summary judgment dismissing so much of the complaint as sought a stay and tolling of the expiration of the "cure period" and injunctive relief against termination of the lease and commencement of summary proceedings to evict pursuant to the first notice of default, unanimously modified, on the law, and upon a search of the record, plaintiff granted summary judgment permanently enjoining defendant from seeking to terminate the lease for alleged default under Article 12, and otherwise affirmed, with costs in favor of plaintiff.

In 2003, plaintiff and defendant's predecessor in interest entered into a lease for a store and basement premises for the purpose of running a "gourmet" food business. Article 12A prohibited plaintiff from assigning or subletting the lease

without defendant's prior consent. However, Article 12C allowed plaintiff to assign the lease to a successor, purchaser or related corporate entity, provided, among other things, that the corporate transaction was not undertaken for the "principal purpose" of acquiring plaintiff's interest in the lease and that substantially the "same business" continue to operate at the premises. Moreover, Article 12C precluded plaintiff from circumventing the non-assignment provisions of Article 12A through a stock transfer, by providing that except as permitted therein, a transfer of a "controlling interest" in plaintiff's shares "at any one time or over a period of time through a series of transfers" shall be deemed an assignment subject to all provisions of Article 12, including the consent requirement.

In June 2005, two of the three individual shareholders of plaintiff entered into an agreement involving a "swap" of their shares in plaintiff and another corporation, resulting in one of them transferring his entire 50% interest in plaintiff to the other. Thereafter, the third shareholder, who held 10% of the shares, commenced a dissolution proceeding, which was settled in May 2006, when the other remaining shareholder agreed to buy the 10% interest, thereby becoming plaintiff's sole shareholder. The sole remaining shareholder then informed defendant that he had acquired all outstanding shares, and intended to assign the lease to a newly created corporate entity through which he would

continue the business. Defendant responded by sending a notice stating that plaintiff was in default of Article 12 and giving it 30 days to cure.

Plaintiff applied for and was properly granted a *Yellowstone* injunction, having established all necessary criteria, including its willingness to cure any default by undoing the swap transaction (*see Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 228-229 [1997]; *Herzfeld & Stern v Ironwood Realty Corp.*, 102 AD2d 737, 739 [1984]). After the *Yellowstone* injunction was granted, defendant moved for summary judgment dismissing the complaint as it related to the claimed default under Article 12 on the ground that the two share transfers together constituted an assignment, which required the landlord's consent and was an incurable default as a matter of law.

Applying the longstanding rule that restrictions against assignment are disfavored as restraints on alienation and are to be construed strictly (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]), we find that even assuming the restriction on share transfers applies to transfers between and among persons who were shareholders at the time the tenant entered into the lease, the lease did not require defendant's prior consent to either of the two share transfers. The two transfers were distinct transactions, undertaken almost a year apart and for

separate purposes; they were not part of a "series of transfers" undertaken to transfer a controlling interest in plaintiff without defendant's consent or to circumvent the lease's non-assignment clause. Since the lease did not prohibit shareholders from transferring shares comprising less than a controlling interest in plaintiff, neither transfer was barred by the non-assignment clause (*see Dennis' Natural Mini-Meals v 91 Fifth Ave. Corp.*, 172 AD2d 331, 334 [1991], *lv dismissed* 78 NY2d 1124 [1991]).

Inasmuch as no factual issues remain to be resolved, plaintiff is entitled to permanent injunctive relief.

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

ENTERED: NOVEMBER 13, 2008

CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4552 Bernice Brown, Index 20763/01
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants,

New York City Transit Authority,
Defendant-Respondent.

Alexander J. Wulwick, New York, for appellant.

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered on or about January 8, 2008, which granted defendant's motion to set aside a jury verdict and ordered a new trial on the issue of liability, with plaintiff's proof to be confined to theories set forth in her notice of claim, unanimously reversed, on the law and the facts, without costs, the motion denied, the verdict reinstated, and the matter remanded for trial on the issue of damages.

Plaintiff slipped and fell in a pothole while attempting to board a bus on 149th Street in the Bronx on April 17, 2000. The notice of claim was served on or about July 14, 2000, within 90 days of the incident. In combination with plaintiff's testimony

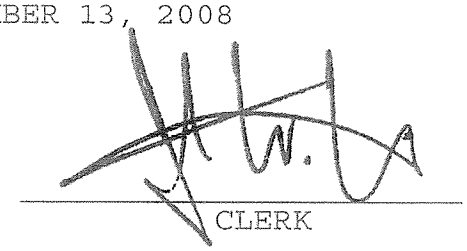
at the October 2000 hearing conducted by defendant Transit Authority (NYCTA) pursuant to General Municipal Law § 50-h, the notice of claim gave that agency sufficient notice of the nature of the claim and the manner in which it arose, as well as the fact that plaintiff might assert a claim for breach of NYCTA's duty to provide a safe place to board the bus (*see Jackson v New York City Tr. Auth.*, 30 AD3d 289, 291-292 [2006]). The evidence at trial indicated plaintiff was injured while on a direct path from the bus stop to the front door of the bus (*see Garcia v Hope Ambulette Serv. Corp.*, 307 AD2d 860 [2003]). To the extent there was any defect in plaintiff's notice of claim, NYCTA cannot claim to have been prejudiced thereby, as the record indicates it did not undertake any meaningful investigation into plaintiff's claims until July 2005, some 18 months after service of a supplemental bill of particulars, which NYCTA concedes gave express notice of the theory of liability advanced by plaintiff at trial (*see Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 68 [2007]).

We further note that the weight of the evidence adduced at

trial did not run counter to the jury's finding of liability against NYCTA (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]).

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

ENTERED: NOVEMBER 13, 2008



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Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4553 The People of the State of New York, Ind. 6368/04
Respondent,

-against-

Clarence Burwell,
Defendant-Appellant.

Richard M. Weinstein, New York, for appellant.

Clarence Burwell, appellant pro se.

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 13, 2005, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. The identifying witness led the police into a basement in search of an intruder, and the police arrested defendant in the witness's presence. Even assuming that the witness's viewing of defendant in custody moments later could be considered a showup, this prompt, on-the-scene procedure was entirely permissible (*see e.g. People v Gatling*, 38 AD3d 239 [2007], *lv denied* 9 NY3d 865 [2007]; *People v Boutte*, 304 AD2d 2d 307 [2003], *lv denied* 100 NY2d 579 [2003]).

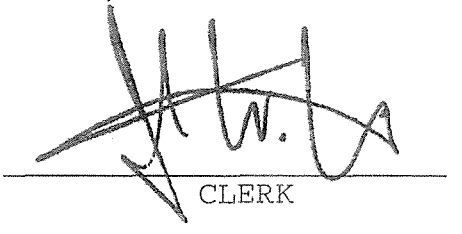
After sufficient inquiry, the court properly denied

defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes the voluntariness of the plea. Defendant's disappointment in his attorney's inability to negotiate a more favorable disposition was not a basis for withdrawing the plea; moreover, we note that defendant received the most lenient sentence available for one in his situation (*see* Penal Law § 70.08[2][c]).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: NOVEMBER 13, 2008



CLERK

Tom, J.P. Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4554 Karen Sheridan, Index 108953/04
Plaintiff-Respondent,

-against-

Very, Ltd doing business as Au Bar,
Defendant-Appellant,

625 Management Committee, et al.,
Defendants-Respondents.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellant.

Thomas M. Smith, New York, for Karen Sheridan, respondent.

Thomas D. Hughes, New York (David D. Hess of counsel), for 625 Management Committee, Sheila Daley and 625 Madison Associates, L.P., respondents.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered January 3, 2008, which granted plaintiff's motion for reargument, and, upon reargument, denied defendants' previously granted motion to dismiss the complaint for plaintiff's failure to comply with discovery, and reinstated the complaint, unanimously affirmed, without costs.

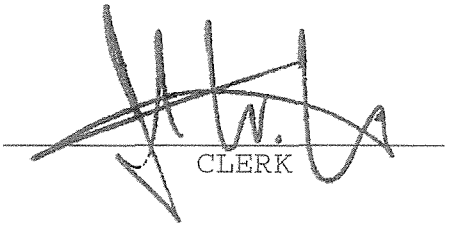
The motion court providently exercised its discretion in granting reargument and reinstating the complaint. Plaintiff's moving papers clarified certain facts relating to the extent of her compliance with discovery, including the court's directives concerning nonparty witnesses and the filing of a note of issue, that her prior submissions and opposition to defendants' motion

had obscured (*see Rodney v New York Pyrotechnic Prods. Co.*, 112 AD2d 410 [1985]). Even if plaintiff's motion cannot be said to fall precisely within the category of either renewal or reargument, the court's disposition was well within the exercise of its discretion (*see Sciascia v Nevins*, 130 AD2d 649, 650 [1987]).

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

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

ENTERED: NOVEMBER 13, 2008



Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4555 Michael Monter, et al., Index 23124/03
Plaintiffs-Respondents,

-against-

Sandra Wilson, et al.,
Defendants-Appellants,

City of New York, et al.,
Defendants.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellants.

Peter J. Koulikourdis, Bronx, for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 31, 2007, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to reinstate their previously dismissed complaint as to defendants Sandra Wilson and New York City Transit Authority, unanimously affirmed, without costs.

The court properly exercised its discretion under CPLR 5015(a)(1) in granting reinstatement. Plaintiffs presented a reasonable excuse (*see e.g. Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 [2001]) for missing a calendar call, at which they had been required to appear unless they filed a note of issue. Plaintiffs' counsel averred that prior to the scheduled conference he had made a good faith attempt to file a note of issue with the court, and that he re-sent the note of issue to

the court on the day of the calendar call. Plaintiffs' counsel then erroneously assumed that a note of issue had in fact been filed and that the case was still active, a belief that was shared by defense counsel. Plaintiffs also made a sufficient showing of merit. We do not read the motion court's choice of language in its brief decision and order as indicating that it only considered the issue of prejudice.

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

ENTERED: NOVEMBER 13, 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 13, 2008.

Present - Hon. Peter Tom, Justice Presiding
Angela M. Mazzarelli
David B. Saxe
Eugene Nardelli
John T. Buckley, Justices.

The People of the State of New York, Ind. 39431C/05
Respondent,

-against- 4556

Seth Ritchie,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about October 16, 2007,

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

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

ENTER:

Clerk.

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

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4557-
4558-
4559N CIBC Mellon Trust Co., Index 114705/03
as Trustee, et al., 602825/03
Plaintiffs-Respondents,

Hon. Burton S. Sherman, as Post-Judgment
Receiver of the Assets of Judgment
Debtors Mora Hotel Corp. N.V., et al.,
Plaintiffs,

-against-

HSBC Guyerzeller Bank AG, et al.,
Defendants-Appellants,

Samuel Montagu & Co. Limited, et al.,
Defendants.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for HSBC Guyerzeller Bank AG, appellant.

Pryor Cashman LLP, New York (Jamie M. Brickell of counsel), for Mora Hotel Corp. N.V., Chascona N.V., Chinablue Investment S.A. and Paolo Cavazza, appellants.

Proskauer Rose LLP, New York (Sarah S. Gold of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered September 19, 2007, which, inter alia, granted the motion of plaintiffs CIBC Mellon Trust Co. and Chrysler Canada, Inc. to dismiss certain affirmative defenses of defendants HSBC Guyerzeller Bank AG, Mora Hotel Corp. N.V. and Chascona N.V., unanimously modified, on the law, to reinstate Guyerzeller's sixth affirmative defense, and otherwise affirmed, without costs.

Order, same court and Justice, entered September 5, 2007,

which granted plaintiffs' motion to confirm a special referee's report and denied the motion of defendants Paolo Cavazza and Chinablue Investments, S.A. to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

In a prior proceeding before the English courts, plaintiff Chrysler alleged that it was defrauded into investing a significant portion of its pension fund assets in Castor Holdings, Inc., which was later revealed to be a Ponzi scheme. Default judgments against defendants Mora and Chascona were entered in the English proceeding and were subsequently recognized in this State (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81 [2002], *affd* 100 NY2d 215 [2003], *cert denied* 540 US 948 [2003]). Chrysler thereafter sought to enforce its judgment lien against assets held by the debtors in New York, in particular, the Hotel Gorham, which was jointly owned and operated by Mora and Chascona. However, the hotel is subject to a prior existing mortgage lien in favor of defendant Guyerzeller. Chrysler contends that the normal lien priority should be subverted because the mortgage was a device to shield Mora and Chascona from their judgment creditors in the underlying Castor Holdings case, was an unnecessary "double encumbrance," because the mortgagee had available at all times a counterbalance in its English bank securing the same loan, and was otherwise improperly procured and maintained.

The affirmative defense of unclean hands asserted by Mora and Chascona is barred by res judicata, because Mora and Chascona were parties to the English proceeding, in which they chose to default rather than to litigate the issue of Chrysler's alleged complicity in the Castor Holdings scheme (*see Robbins v Growney*, 229 AD2d 356 [1996]; *Canadian Imperial Bank of Commerce v Saxony Carpet Co., Inc.*, 899 F Supp 1248, 1254 [SD NY 1995], *affd* 104 F3d 352 [2d Cir 1996]).

Guyerzeller's affirmative defense of unclean hands should not have been dismissed. While the parties dispute whether the doctrine of unclean hands can be applied to a transfer to avoid creditors' claims where there is no allegation of injury (*compare Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316 [1956], *with Jossel v Meyers*, 212 AD2d 55, 58 [1995]), Guyerzeller adequately alleged injury insofar as it asserted that it never would have funded the mortgage transaction had it known of the alleged Castor Holdings fraud and that it will be injured to the extent it loses its secured priority. Chrysler contends that application of the unclean hands doctrine is not warranted because its conduct with respect to Castor Holdings was entirely separate from the mortgage transaction, in which it had no involvement (*see Weiss*, 1 NY2d at 316). However, Chrysler alleges that the mortgage transaction was designed to conceal the fruits of the Castor Holdings fraud and to hide Mora's and

Chascona's assets, procured through that fraud, from creditors, in light of the proceedings pending in the English court. Thus, Guyerzeller adequately alleged a relation between Chrysler's conduct with respect to Castor Holdings and the mortgage transaction.

The contention of defendants Cavazza and Chinablue that they are beyond the long-arm jurisdiction of the courts of this State is belied by the record, which demonstrates that Cavazza and Chinablue engaged in purposeful activity in New York by investing in a New York hotel business and obtaining a mortgage on New York property (*see* CPLR 302[a][1]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; CPLR 302[a][4]; *5-Star Mgt., Inc. v Rogers*, 940 F Supp 512, 516-517 [ED NY 1996]). Moreover, the amended complaint alleges that Cavazza and Chinablue participated in a fraudulent conveyance of a New York property interest, acting with and through their New York co-conspirators, to create and convey an unnecessary $10.2 million mortgage interest to Guyerzeller; that the conveyance was made with intent to hinder legitimate creditors such as Chrysler, at a time when Mora and Chascona were aware that creditors would likely seek to recover their assets; that it involved the use of dummy corporations and intermediaries; and that the consideration was inadequate because Cavazza and Chinablue received both a $10.2 million debt position

and a $10.2 million equity interest in exchange for a single $10.2 million payment. These allegations establish prima facie that Cavazza and Chinablue committed a tortious act within the state (see CPLR 302[a][2]; *Banco Nacional Ultramarino v Chan*, 169 Misc 2d 182 [1996], *affd* 240 AD2d 253 [1997]); *Neilson v Sal Martorano, Inc.*, 36 AD2d 625 [1971]; *Ed Moore Adv. Agency v I.H.R., Inc.*, 114 AD2d 484 [1985]).

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

ENTERED: NOVEMBER 13, 2008

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Eugene Nardelli, J.P.
Milton L. Williams
John W. Sweeny, Jr.
James M. Catterson, JJ.

2985-2985A
Index 402200/05

Amin Marte,
Plaintiff-Respondent,

-against-

Sandra Graber, as voluntary administrator of the estate of Herman Graber, deceased,
Defendant-Appellant.

Defendant appeals from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 3, 2007, which granted plaintiff's motion to amend the summons and substitute the voluntary administrator for the deceased defendant, and denied defendant's motion to dismiss the complaint, and from an order, same court and Justice, entered August 14, 2007, which upon reargument, adhered to the prior order.

Ronald Cohen, New York, for appellant.

David M. Goldberg, Amenia, for respondent.

CATTERSON, J.

Because there simply is no precedent nor any support in New York's Civil Practice Law and Rules for a court obtaining jurisdiction over an action "commenced" three months after the death of the individual named as the sole defendant, we find that the order appealed from is a nullity. The complaint should have been dismissed by the motion court as a nullity when the putative plaintiff, having filed a summons and complaint, discovered that the named defendant had died *before* the filing. As it is, this matter arrives before this Court as a result of a volume of errors rarely seen in this Department, and which are set forth below, seriatim.

In or around July 2005, Amin Marte, incarcerated and acting pro se, filed an unsigned, undated summons and complaint alleging legal malpractice by attorney Herman Graber. Thereafter, Marte discovered that Graber had died on April 2, 2005, approximately three months *before* the filing of the summons and complaint. Thus the action from its inception was a nullity since it is well established that the dead cannot be sued. See Jordan v. City of New York, 23 A.D.3d 436, 437, 807 N.Y.S.2d 595, 597 (2d Dept. 2005)("party may not commence a legal action or proceeding against a dead person, but must instead name the personal

representative of the decedent's estate"); see also Arbelaez v. Chun Kuei Wu, 18 A.D.3d 583, 795 N.Y.S.2d 327 (2nd Dept. 2005); Laurenti v. Teatom, 210 A.D.2d 300, 301, 619 N.Y.S.2d 754, 755 (2nd Dept. 1994)[1].

Marte, however, moved by order to show cause for what he termed a "stay" in order to ascertain the identity of Graber's personal representative. The court, apparently interpreting this as an application for an extension of the statutory 120-day period for service, issued an ex parte order extending Marte's time to serve. Subsequently, it issued a second ex parte order extending the time for service through July 2006. Thus, the court adjudicated a nullity apparently unaware that time was not the problem in a case where the only named defendant could never be served with the summons and complaint, however long the plaintiff was given to do so.

Arguably, it is not clear from the record if the court was informed in Marte's application that Herman Graber had died prior to the filing of the summons and complaint as well as prior to service. However, even if the court at that point believed that

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[1]It is important to acknowledge that at common law virtually all causes of action abated with the death of a party. See e.g. Demuth v. Griffin, 253 A.D.399, 2 N.Y.S.2d 2 (1st Dept. 1938). That was the law in New York until September 1, 1935 when the Legislature enacted a series of statutes to ameliorate the harsh effect of the common law.

the summons and complaint had been filed while Graber was alive, it, nevertheless, would have been in error issuing any order at all since all orders rendered after the death of a defendant, even in a properly commenced action, are void until an order granting substitution. See CPLR 1015(a); see also Silvagnoli v. Consolidated Edison Empls. Mut. Aid Socy., 112 A.D.2d 819, 492 N.Y.S.2d 619 (1st Dept. 1985)(the death of a party divests a court of jurisdiction to conduct proceedings in an action until a *proper* substitution has been made).

In any event, on June 7, 2006, Marte, now represented by an attorney, moved pursuant to CPLR 1021 to substitute Herman Graber's wife, Sandra, who had been appointed personal representative of the estate. He also moved for leave to amend the summons pursuant to CPLR 305(c). He attached the proposed amended summons to the motion together with a verified amended complaint as of right alleging breach of contract rather than legal malpractice, presumably to avoid any statute of limitations objections.

The motion court, compounding its errors, continued to adjudicate the nullity by granting the motion, and thus ignoring the requirement of CPLR 1015(a) that an action be *pending* for the correct application of that provision. CPLR 1015(a) provides that "[i]f a *party* dies and the claim for or against him is not

thereby extinguished the court shall order substitution of the proper parties" (emphasis added). Moreover, CPLR 1021 provides that "[a] motion for substitution may be made by the successors or representatives of a party or by any *party*" (emphasis added). The term "party" plainly indicates that an action has already been properly commenced and is pending and thus the court may effect substitution.

In this case, since the summons and complaint were filed after the death of Herman Graber, Marte had not properly commenced an action against Graber, and so Graber was never a *party* in the proceeding captioned Amin Marte v. Herman I. Graber, Index No. 402200/05. Thus, there was no party for whom substitution could be effected pursuant to CPLR 1015(a).

Likewise, Marte's attempt to amend the summons pursuant to CPLR 305(c) was made in error. That provision is generally used to correct an irregularity, for example where a plaintiff is made aware of a mistake in the defendant's name or the wrong name or wrong form is used. But it is axiomatic that a motion for leave to amend follows service of process. See Louden v. Rockefeller Ctr. N., 249 A.D.2d 25, 670 N.Y.S.2d 850 (1st Dept. 1998); Ingenito v. Grumman Corp., 192 A.D.2d 509, 596 N.Y.S.2d 83 (2d Dept. 1993); see also Stuyvesant v. Weil, 167 N.Y. 421, 60 N.E. 738 (1901). In this case, of course, process was never served on

Herman Graber (nor are we aware of any method for serving with process those who have moved beyond the vale). Thus, effectively there was no summons for amendment.

Subsequently, Sandra Graber filed a notice of appeal and a motion to reargue which the plaintiff opposed. The motion court granted the reargument but ignored Sandra Graber's contention that the proceeding was a nullity from its inception. Incomprehensibly so, since the court's decision of August 14, 2007, bearing the caption of Amin Marte against Sandra Graber, clearly reflected the fact that Herman Graber had died on April 2, 2005, and that the only summons and complaint filed in this case had been filed on July 6, 2005.

In a final disregard of the CPLR, the motion court acknowledged in its decision that while the initial summons and complaint had been filed but not served, the "filed" amended summons and complaint "appear[ed]" to have been served by substituted service. In reality, they were merely annexed to plaintiff's motion and not filed with the County Clerk. See CPLR 304; Matter of Gershel v. Porr, 89 N.Y.2d 327, 653 N.Y.S.2d 82, 675 N.E.2d 836 (1996); see also Chiacchia & Fleming v. Guerra, 309 A.D.2d 1213, 765 N.Y.S.2d 134 (4th Dept. 2003), lv. denied, 2 N.Y.3d 704, 778 N.Y.S.2d 774, 811 N.E.2d 36 (2004) (plaintiff's failure to obtain new index number could not be corrected nunc

pro tunc because there was no action pending). Perhaps, had Marte abandoned his initial action, and properly filed a summons and complaint by purchasing a new index number and naming Sandra Graber, the personal representative of Herman Graber, as defendant, the matter before us would not be the nullity it is.

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered August 14, 2007, which, upon reargument, adhered to a prior order, same court and Justice, entered April 3, 2007, granting plaintiff's motion to amend the summons and substitute the voluntary administrator for the deceased defendant, and denying defendant's motion to dismiss the complaint, should be reversed, on the law, without costs, and the plaintiff's amended summons and complaint dismissed as a nullity. The appeal from the April 3 order should be dismissed, without costs, as superseded by the appeal from the August 14 order.

All concur.

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

ENTERED: NOVEMBER 13, 2008

CLERK