SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 18, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

4212 Barnan Associates, Index 102681/06
Plaintiff-Appellant,

-against-

196 Owners Corp.,
Defendant-Respondent.

Michael B. Kramer & Associates, New York (Michael B. Kramer of counsel), for appellant.

Abrams Garfinkel Margolis Bergson, LLP, New York (Barry G. Margolis of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered May 15, 2007, which denied plaintiff's motions for summary judgment and to amend its complaint, and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of granting plaintiff's motion for summary relief and denying defendant's cross motion, and otherwise affirmed, with costs. The Clerk is directed to enter judgment in favor of plaintiff against defendant in the sum of $56,675.77 plus costs and disbursements, with interest from February 1, 2003.

The subject of this litigation is a tax escalation clause set forth at Article VI of the parties' commercial lease dated August 31, 1979. Subparagraph (a)(i) of that Article defines "base assessed valuation" as "the total fully assessed valuation *(made without regard or giving effect to any exemption or abatement)*" [emphasis added] of the parcel of land containing the demised premises for the New York City real estate tax year commencing July 1, 1979 and ending June 30, 1980, the initial tax year. Subparagraph (ii) defines "base tax rate" as the applicable real estate tax rate for the same initial tax year. Under subparagraph (iii), the "base amount of real estate taxes" is computed by applying the "base tax rate" to the "base assessed valuation."

Paragraph (b) requires the tenant to pay the landlord as additional rent during each lease year subsequent to the initial tax year 14½% of the dollar amount of any increase in "such real estate taxes" over and above the "'base amount of real estate taxes,' whether such increase in real estate taxes shall be occasioned by an increase in assessed valuation or an increase in tax rate, or both."

The crux of this litigation is whether the language italicized above is intended to refer to each year's increase in real estate taxes or only to the "base assessed valuation." Accordingly, plaintiff has brought this action to recover

overcharges resulting from defendant's refusal to give effect to applicable abatements, exemptions or refunds in the calculation of tax escalations under the lease. In view of the six-year statute of limitations set forth under CPLR 213(2), plaintiff has agreed to limit its claim to overcharges occurring after February 2000.[1] Defendant takes the position that the phrase expressly excludes abatements, exemptions and refunds from each year's calculation of taxes. In denying plaintiff's motion for summary judgment and granting defendant's cross motion, the IAS court found the tax escalation clause to be ambiguous and plaintiff's claims, in any event, precluded under the voluntary payment doctrine.

The court's finding of ambiguity is refuted by the language of the lease. The phrase "made without regard or giving effect to any exemption or abatement" is used solely to refine the "base assessed valuation," one of two components of the "base amount of real estate taxes." Paragraph (e) of Article VI sets forth the following as the lease's only description of real estate taxes: "Any reference in this Article to 'real estate taxes levied by the City of New York' shall be deemed to refer to the aggregate of all taxes levied or assessed against the land and building, of which the demised premises are a part." It is significant that

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[1]Defendant, a cooperative corporation, received abatements under the School Tax Relief (STAR) exemption (RPTL 425) and the co-op/condo abatement (RPTL 467-a).

this language contains no exclusion of abatements, exemptions or refunds from its description of real estate taxes. It has long been the rule that a contract must be read as a whole in order to determine its purpose and intent (*Bijan Designer For Men v Fireman's Fund Ins. Co.*, 264 AD2d 48, 51 [2000], *lv denied* 96 NY2d 707 [2001]). In this regard, defendant's argument that exemptions and abatements "are *expressly excluded* from the calculation of the taxes" in Article VI(a)(i) [defendant's emphasis] erroneously conflates "based assessed valuation" and the taxes assessed each year. The conclusion reached below is also at odds with well settled law that tax escalation clauses are "designed to afford relief to a landlord where an increased assessment required actual payment" (*S.B.S. Assoc. v Weissman-Heller, Inc.*, 190 AD2d 529 [1993]).

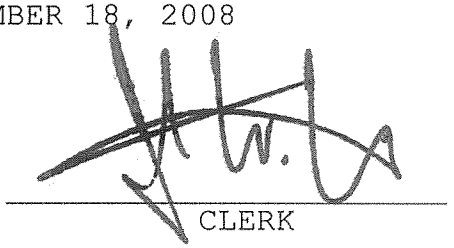
The IAS court's application of the voluntary payment doctrine is also erroneous. The doctrine bars the recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law (*Dillon v U-A Columbia Cablevision of Westchester,* 100 NY2d 525 [2003]). It is undisputed that the real estate tax statements issued by defendant to plaintiff made no mention of the abatements and/or refunds in question. Hence, the voluntary payment doctrine does not apply because full knowledge on the part of plaintiff has not been established. Defendant attempts to salvage its voluntary

payment argument by asserting that plaintiff's representative on the co-op board of directors has been privy to the co-op's financial statements over the years. The argument is unavailing on this appeal, as the record does not include the relevant portions of said financial statements or any proof of their accessibility by plaintiff's representative.

Plaintiff's motion for leave to amend the complaint was properly denied. The binding effect of this Court's order obviates the need for declaratory relief with respect to future tax escalations.

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

ENTERED: NOVEMBER 18, 2008



CLERK

Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4150 Sonia Alvia, et al., Index 105913/06
Plaintiffs-Respondents,

-against-

Mutual Redevelopment Houses, Inc.,
Defendant-Appellant.

Law Offices of Bruce A. Lawrence, Brooklyn (Mary Frances G. Marino of counsel), for appellant.

Raymond A. Raskin, Brooklyn, for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered May 21, 2008, which, in an action for personal injuries sustained when plaintiff, a newspaper deliverer, fell while descending a stairway in defendant's apartment building, denied defendant's motion for summary judgment dismissing the complaint, affirmed, without costs.

A triable issue of fact is raised by plaintiff's averment that, as she was carrying newspapers under her left arm, she slipped and tried to grab onto a handrail with her right hand, but there was no right-sided handrail, combined with plaintiffs' expert's unchallenged statement that the absence of a handrail on the stairway's right wall was a significant and dangerous departure from accepted standards and the applicable building code (*see Cruz v Lormet Hous. Dev. Fund Corp.*, 7 AD3d 660 [2004], citing, inter alia, *Courtney v Abro Hardware Corp.*, 286 App Div 261 [1955], *affd* 1 NY2d 717 [1956]). Plaintiff's affidavit in

opposition in this regard, while amplifying her previously given deposition testimony, is entirely consistent with it, and we reject defendant's argument that the handrail issue is feigned.

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

McGUIRE, J. (dissenting in part)

I agree with the majority that triable issues of fact exist as to plaintiff's claim that defendant negligently failed to have handrails on both sides of the staircase plaintiff was descending at the time her accident occurred. I disagree, however, with the majority's disposition of this appeal since it fails to grant partial summary judgment to defendant dismissing other claims of negligence asserted by plaintiff. Accordingly, I dissent in part.

Plaintiff slipped and fell while descending a staircase in a building owned by defendant. According to both her deposition testimony and affidavit, plaintiff slipped on either the third or fourth stair. Plaintiff, and her husband derivatively, commenced this negligence action against defendant, and defendant moved for summary judgment dismissing the complaint in its entirety. Supreme Court denied the motion.

While triable issues of fact exist regarding the claim based on the absence of handrails on each side of the staircase, the claims of negligence based on the condition of the stairs themselves, i.e., that there was liquid or debris on the stairs, that the stairs lacked a non-skid surface and that the pitch of certain of the stairs was too steep, are so bereft of factual

support as to be wholly speculative (*see Pluhar v Town of Southampton*, 29 AD3d 975 [2006]; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434 [2006]). Neither plaintiff nor her husband identified what caused plaintiff to slip. Although plaintiff averred that she was certain she had not "los[t] [her] footing by tripping over [her]self," she did not offer any evidence otherwise excluding the possibility that she slipped of her own accord. Rather, she expressly testified that she did not know what had caused her to slip. Nonetheless, plaintiff claims that a number of hazards caused her to slip: the presence of liquid and dust on the stairs, the absence of a non-skid surface on the stairs and the pitch of the stairs.

While plaintiff's husband took pictures of the stairs shortly after the accident and one of those pictures displayed a substance in the corner of one of the stairs, plaintiff never testified or averred that the substance caused her to slip. Furthermore, plaintiff testified that she was walking down the middle of the stairs at the time the accident occurred, yet the substance was in a corner of one of the stairs. In fact, plaintiff stated in her affidavit that she was not asserting that she slipped on the liquid shown in the picture.

Additionally, plaintiff offered no evidence that she slipped on dust, or that the absence of a non-skid surface or the pitch of the stairs caused her to slip. Plaintiff's expert's

conclusion that the stairs were dangerous because they did not have a non-skid surface is speculative because it is based on an inspection conducted three years and one month after the accident (*see Machado v Clinton Hous. Dev. Co.*, 20 AD3d 307 [2005]; *Kruimer v National Cleaning Contrs.*, 256 AD2d 1 [1998]). Similarly, the claim based on the pitch of the stairs rests on nothing more than speculation. Plaintiff offered no evidence of the pitch of the stairs on the day of the accident (*see Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 166 [2004]; *Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210 [1998]; *see also Van Skyock v Burlington N.-Santa Fe Co.*, 265 AD2d 545 [1999]), and no evidence that the pitch of the stairs did not or could not change during the three-year, one-month period between the accident and plaintiff's expert's inspection. The absence of any such evidence is especially significant because plaintiff's expert only opined that the pitches of the first and fourth stairs, respectively 1.5 and .7 degrees, were dangerous, not that the pitch of the third stair, .5 degrees, was dangerous. Thus, if the pitch of the fourth stair increased only slightly over that period of more than three years, even plaintiff's expert would have to conclude that it was not dangerous at the time of the accident. The jury therefore would have to speculate that (1) plaintiff did not slip of her own accord, (2) plaintiff slipped on the fourth stair, and (3) the pitch of the fourth

stair was dangerous on the day of the accident. In sum, this claim is based on nothing more than inferences piled on inferences.

In affirming an order that denied defendant's motion for summary judgment dismissing the complaint in its entirety, the majority, while discussing only the claim based on defendant's failure to have handrails on both sides of the staircase, leaves all of plaintiff's claims of negligence in the action. The majority's disposition is erroneous because, for the reasons stated above, defendant is entitled to summary judgment dismissing the claims based on the presence of liquid or debris on the stairs, the absence of a non-skid surface on the stairs and the pitch of certain of the stairs (*see* CPLR 3212[e] ["In any . . . action (other than a matrimonial action) summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just"]). As we have observed, "the partial summary judgment procedure affords the opportunity of promptly settling issues which can be disposed of as a matter of law, and furthermore, furnishes a means for the withdrawing from the case of sham and feigned issues of fact and of law which might have a tendency to confuse and complicate the trial" (*Janos v Peck*, 21 AD2d 529, 531 [1964], *affd* 15 NY2d 509 [1964]). For these reasons, "'the partial summary judgment procedure should be

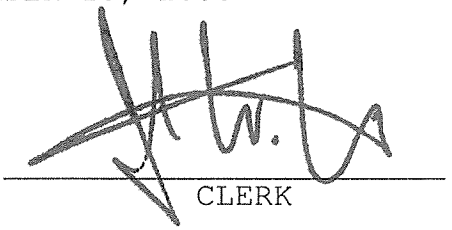
fully utilized'" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:30, at 39 [main vol] *quoting Janos*, 21 AD2d at 531). In this case, partial summary judgment should be granted to remove from the action the "sham and feigned" issues regarding the condition of the stairs and whether plaintiff slipped as a result of the condition of the stairs, and narrow the issues to be tried to the genuine issues presented -- whether defendant negligently failed to have handrails on both sides of the staircase and, if so, whether that negligence was a proximate cause of plaintiff's injuries.

If the majority believes -- it certainly does not say so -- that triable issues of fact were raised by plaintiff that preclude partial summary judgment in favor of defendant on plaintiff's claims based on the condition of the stairs, it should identify those triable issues of fact. Alternatively, if the majority believes that no triable issue of fact was raised by plaintiff that would preclude partial summary judgment on these claims, it should explain why it nonetheless refuses to grant partial summary judgment to defendant. The majority's failure to do either, i.e., identify a triable issue of fact with respect to the condition of the stairs or explain why it nonetheless refuses

to grant partial summary judgment, is bewildering and manifestly unfair to defendant.

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

ENTERED: NOVEMBER 18, 2008



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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4223 The People of the State of New York, Respondent, Ind. 14385/89

-against-

Helmer Brightley, Defendant-Appellant.

Law Offices of Roger D. Olson, New York (Roger D. Olson of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered July 11, 1991, convicting defendant, after a jury trial, of murder in the second degree, assault in the second degree (two counts) and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 29⅔ years to life, affirmed.

Defendant is not entitled to reversal based on his alleged absence from an unrecorded *Ventimiglia* hearing, since he has not established that he was absent. There is nothing in the record indicating whether defendant was present at or absent from the hearing, and no indication that defendant ever asked for the hearing to be recorded (*see People v Kinchen*, 60 NY2d 772 [1983]). Nor is a reconstruction hearing warranted, since defendant did not seek such a remedy until nearly 17 years after

the trial (*see People v Parris*, 4 NY3d 41, 47-49 [2004]; *People v Thompson*, 30 AD3d 198 [2006]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The court properly permitted the prosecutor to make a limited inquiry into the underlying facts of defendant's Florida arrest. With regard to the *Sandoval* issue, the only preserved argument is defendant's assertion that the probative value of these facts was outweighed by their prejudicial effect. However, the Florida incident was highly probative of defendant's credibility, and the court minimized its prejudicial effect by precluding questions about some of the underlying facts. The fact that the Florida incident had certain similarities to the charged crime did not require preclusion of inquiry (*see Hayes*, 97 NY2d at 208). Nor does the fact that the charges were dismissed due to the failure of the victim to come forward preclude inquiry, since the dismissal was not on the merits (*see People v Matthews*, 68 NY2d 118, 123 [1986]). Defendant's remaining *Sandoval* arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Furthermore, defendant's argument that the prosecutor gave the court misleading information about the Florida incident

is not properly before this Court since it is based on factual assertions outside the record and since defendant raised it in an unsuccessful CPL 440.10 motion but failed to obtain leave to appeal (*see People v Walker*, 283 AD2d 378 [2001]).

Defendant failed to preserve his argument that the trial court improperly failed to make any findings of fact or conclusions of law when it denied his second speedy trial motion, his challenge to the court's jury charge, and his claim that his sentence was improperly based on evidence of uncharged crimes, and we decline to review them in the interest of justice. As an alternative holding, we also find each of these arguments without merit.

We perceive no basis for reducing the sentence.

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

McGUIRE, J. (concurring)

I do not agree that the *Sandoval* ruling was proper. Nevertheless, I would not disturb the judgment of conviction.

Of course, the ruling was not improper to the extent it allowed the prosecutor to ask on cross-examination whether defendant had been "convicted of possessing marihuana" and "selling it from such and such a location," despite the fact that the charged crimes arise out of defendant's involvement in the sale of marihuana (*see People v Hayes*, 97 NY2d 203, 208 [2002]). But I believe that the trial court abused its discretion in permitting questioning about the Florida incident. As was undisputed, all charges against defendant arising out of whatever happened in Florida were dismissed. Nonetheless, Supreme Court permitted the prosecutor to ask "whether [defendant] in fact participated in torturing the person or another person who was believed to be viewed as a threat."

The question or questions about torture that thus were allowed were particularly prejudicial because the prosecutor never alleged that defendant personally had participated in the acts of torture. Yet, whether he "in fact participated" was the very question Supreme Court allowed the prosecutor to ask.

Given the similarity to the charged offenses, which also involved acts of violence arising out of defendant's alleged involvement in the business of selling marihuana, the dismissal

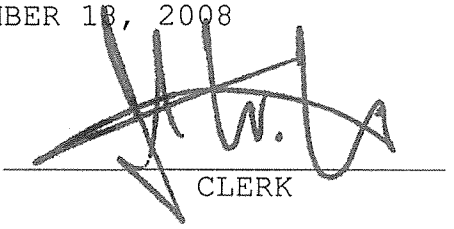
of the charges in Florida against defendant (and all the others initially charged), the absence of facts establishing defendant's personal participation in the alleged acts of torture, and the inflammatory nature of the permitted question or questions concerning torture, the prejudicial impact of the permitted questions clearly outweighed any probative value. Accordingly, I conclude that the trial court abused its discretion (*cf. People v Moore*, 156 AD2d 394, 395 [1989]).

Defendant, however, is not entitled to a new trial for two independent reasons. First, given the overwhelming evidence of guilt the *Sandoval* ruling was harmless under the standard applicable to such nonconstitutional error (*People v Grant*, 7 NY3d 421 [2006]). Second, defendant failed to perfect his appeal to this Court for more than 15 years after the judgment of conviction was rendered, and makes no effort to justify this extraordinary delay. Nonetheless, defendant maintains that he now should receive a new trial despite the inevitable prejudice to the People on account of this delay for which he is responsible. Accordingly, I conclude that defendant both has waived and forfeited any claim for a new trial on this ground. By contrast, I would not conclude that defendant has waived or

forfeited his claim that he was denied his constitutional right to a speedy trial; that claim, if it were meritorious, would require dismissal of the indictment.

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

ENTERED: NOVEMBER 18, 2008



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

4560 The People of the State of New York, Ind. 4250/74
Respondent,

-against-

Edward Hurdle,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Frank Glaser of counsel), for respondent.

Order, Supreme Court, New York County (Robert H. Straus, J.), entered on or about January 12, 2007, which denied defendant's CPL 440.30(1-a) motion for DNA testing, unanimously affirmed.

Even construing defendant's "reply" affidavit to be a supplementary motion for an order directing the People to locate additional evidence containing DNA, and, if located, to perform forensic DNA testing on that evidence, that motion was without merit. If DNA was present at all the possible crime scene locations posited by defendant, and if testing revealed that the DNA was that of the codefendant but not that of defendant, these results would not have created a reasonable probability of a different verdict (*see People v Pitts*, 4 NY3d 303, 311 [2005]),

because they would still be consistent with the trial evidence and the People's trial theory as to the roles played by each perpetrator.

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

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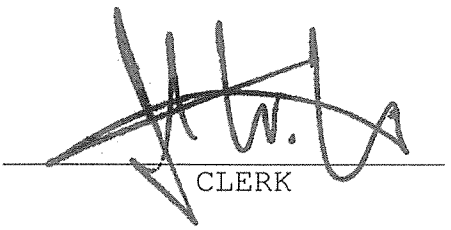

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Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

4561 Juan Diaz, Index 16996/97
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation,
Defendant-Respondent.

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

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

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered July 27, 2007, which granted defendant's motion to dismiss the complaint for failure to serve a notice of claim, unanimously affirmed, without costs.

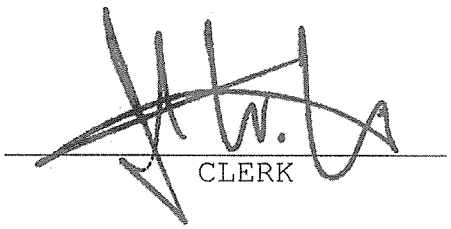
General Municipal Law § 50-e(3)(c) "does not excuse a plaintiff's failure to serve a timely notice of claim on the correct public entity, which is what happened here when plaintiff served [his] notice on the Comptroller rather than HHC" (*Scantlebury v New York City Health and Hosps. Corp.*, 4 NY3d 606, 608 [2005]).

Nor does the alleged agreement with a Corporation Counsel attorney constitute either a waiver of the notice of claim requirement (*see Badgett v New York City Health and Hosps. Corp.*, 227 AD2d 127, 128 [1996]) or a ground for application of the

doctrine of equitable estoppel against HHC (*see Hochberg v City of New York*, 99 AD2d 1028 [1984], *affd* 63 NY2d 665 [1984]).

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

ENTERED: NOVEMBER 18, 2008



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

4562 In re Imani Elizabeth W.,

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

Carla Michelle C., etc.,
Respondent,

Benny William W., etc.,
Respondent-Appellant,

McMahon Services for Children, etc.,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, for appellant.

Joseph T. Gatti, New York, for McMahon Services for Children, respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Betsy Kramer of counsel), Law Guardian.

Order, Family Court, Bronx County (Sarah P. Schechter, J.), entered on or about August 1, 2007, which, after fact-finding and dispositional hearings, terminated respondent-appellant father's parental rights to the subject child on the ground of permanent neglect and committed custody of the child to petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

Petitioner demonstrated, by clear and convincing evidence, that the child was "permanently neglected" within the meaning of Social Services Law § 384-b(7)(a). We reject appellant's

contention that petitioner failed to make diligent efforts to strengthen and encourage the parent-child relationship (*see* § 384-b[7][f]). To the contrary, petitioner worked with appellant to formulate a service plan, which included anger management and domestic violence programs, a parenting skills class, remaining drug free, submitting to psychological and psychiatric evaluations, maintaining a stable household, regular visitation with the child, and planning for her future apart from appellant's teenage girlfriend. Petitioner made the appropriate referrals for appellant, who completed portions of the service plan, as well as the anger management, domestic violence and parenting skills programs, and remained drug free to the extent that his visits with the child were improved to unsupervised and overnight at his home. Petitioner worked with appellant as to what would be required to assure the child's return to him. The fact that appellant failed to follow petitioner's advice that he obtain the required State Central Registry clearance for his girlfriend, failed to visit the child more frequently after his visitation was changed to a supervised environment at the petitioning agency, and refused to plan for the care of the child independently of his teenage girlfriend does not mean that petitioner did not meet its obligation to make diligent efforts to assist, develop and encourage a meaningful relationship between appellant and the child. An agency "is not a guarantor

of a parent's success" (*Matter of Amanda R.*, 215 AD2d 220 [1995]). The parent must assume some measure of initiative and responsibility (*see Matter of Byron Christopher Malik J.*, 309 AD2d 669 [2003]). The agency will be deemed to have fulfilled its duty if its reasonable efforts are rebuffed by an uncooperative or indifferent parent (*Matter of James X.*, 37 AD3d 1003, 1006 [2007]).

The court correctly determined that appellant did not plan for the child's future, as required by Social Services Law § 384-b(7)(c). Nor did he maintain regular contact with the child. After his visits reverted to weekly -- and eventually biweekly -- supervised visits at the petitioning agency, appellant visited his daughter only once between January and March 2006, and did not call to cancel or confirm any of the remaining scheduled visits. Even though he did partially complete the services plan established by petitioner, he did not complete or fully benefit from the evaluations and services required by petitioner, never obtaining the required mental health evaluation, and exhibiting inability to control his anger when faced with circumstances he did not like. Most significantly, appellant failed to heed petitioner's advice that he cease having inappropriate relationships with minors and plan for the future care of his child independently of his teenage girlfriend. The evidence clearly established that appellant failed to acknowledge and gain

insight from his past mistakes, fully benefit from the services provided to him, and take responsibility for the child's placement in foster care in the first place. Accordingly, the finding of permanent neglect was fully substantiated (*see Matter of Myles N.*, 49 AD3d 381 [2008]).

Appellant argues alternatively that the court should have suspended judgment. However, he has not demonstrated the initiative to ameliorate the conditions that led to the child's placement in foster care sufficient to warrant suspension of judgment (*see Matter of Juan Andres R.*, 216 AD2d 145 [1995]).

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

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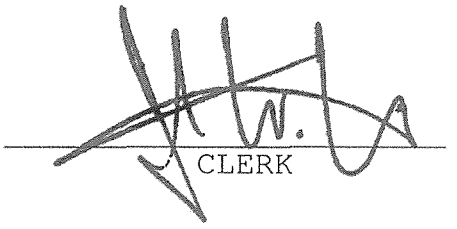


Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

4564 The People of the State of New York, Ind. 1011/03
Respondent,

-against-

Terrence Ray,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Jeffrey Atlas, J. at initial plea and sentence; James Yates, J. at re-plea and sentence), rendered on or about June 7, 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.

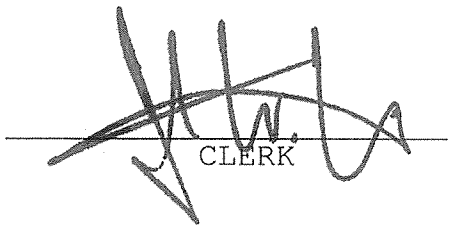
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 18, 2008



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

4566 Jon S. Kopel, Index 604331/06
Plaintiff-Appellant,

-against-

Bandwidth Technology Corp.,
Defendant-Respondent.

Laurence J. Sass, New York, for appellant.

Warner & Scheuerman, New York (Jonathon D. Warner of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 1, 2007, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

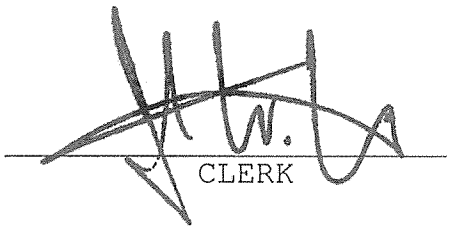
The causes of action for breach of contract, conversion and breach of fiduciary duty are barred by the applicable statutes of limitation. These claims accrued in 1998 when defendant failed to issue stock certificates "within days," as specified in the stock purchase agreement that plaintiff signed in June of that year (*see Klein v Conte*, 212 AD2d 363 [1995]), or at the latest in 1999 when the promissory note was signed.

The conversion claim also fails because such a cause of action cannot be predicated on a mere breach of contract, and no independent facts are alleged giving rise to tort liability (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [2003]). The cause of action for breach of fiduciary duty also fails because no such relationship was created by the 1998 agreement.

Rather, it was "a simple business transaction between a potential investor and a company soliciting such investors" (*Elliott v Qwest Communications Corp.*, 25 AD3d 897, 898 [2006]).

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

ENTERED: NOVEMBER 18, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 18, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 4162/05
Respondent,

-against- 4568

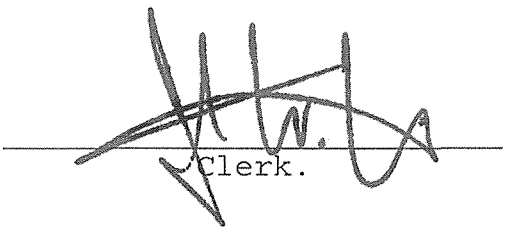
Derik Norales, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about May 25, 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.

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

4569-
4570 The People of the State of New York, Ind. 3197/05
Respondent,

-against-

Leon Beard,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

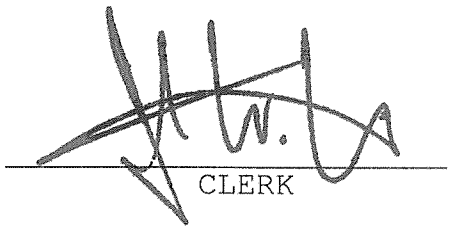
Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered March 6, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, criminal sale of a controlled substance in the fifth degree (two counts), and criminal possession of a controlled substance in the fifth degree, and sentencing him to an aggregate term of 5 to 10 years, unanimously affirmed.

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

defendant divested himself of the prerecorded buy money in a manner that escaped detection by any of the officers.

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4571 Asian American Legal Defense and Education Fund,
Petitioner-Appellant,

-against-

New York City Police Department,
Respondent-Respondent.

Index 115755/06

Asian American Legal Defense and Education Fund, New York (Tushar J. Sheth of counsel), and Weil, Gotshal & Manges, LLP, New York (W. Andrew Ryu and Jonathan Bloom of counsel), for appellant.

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

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered June 1, 2007, which denied the petition brought pursuant to CPLR article 78 challenging respondent's denial of petitioner's Freedom of Information Law (FOIL) request for documents, and granted respondent's cross motion to dismiss the petition, unanimously affirmed, without costs.

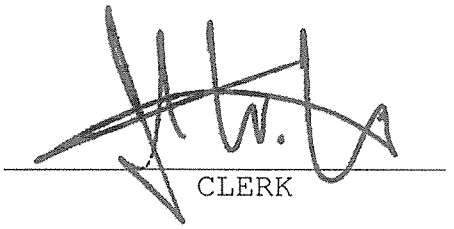
Petitioner's challenge to respondent's denial of its FOIL request was properly rejected since respondent established that it did not possess or maintain the records sought by petitioner (Public Officers Law § 89[3][a]). Respondent certified that despite its reasonable efforts, documents pertaining to immigration-related arrests and its communications with federal immigration agencies were not retrievable from its databases (*see e.g. Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464-465

[2007]). Contrary to petitioner's contention, the record demonstrates that respondent did not offer "shifting justifications" for the denial of the FOIL request.

We have considered petitioner's remaining arguments, including its request for an award of counsel fees, and find them unavailing.

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4572 In re Social Service Employees Union, Local 371 on behalf of its member Matthew Opuoru, Petitioner-Respondent,

-against-

City of New York Administration for Children's Services, Respondent-Appellant.

Index 111201/06

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

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for respondent.

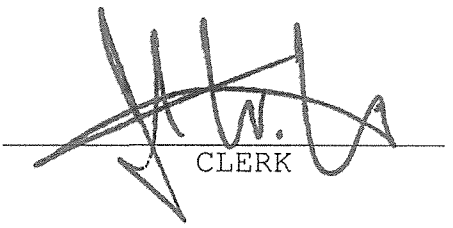
Judgment, Supreme Court, New York County (Lottie E. Wilkins, J.), entered August 20, 2007, granting petitioner's motion to confirm an arbitration award and denying respondent's cross motion to vacate the award, unanimously reversed, on the law, without costs, the motion denied and the cross motion granted to the extent of vacating grievant's reinstatement, and the matter remanded to the arbitrator for reconsideration of the appropriate penalty.

Grievant, a Child Protection Specialist Supervisor II with the New York City Administration for Children's Services (ACS), pleaded guilty to grand larceny in the fourth degree, for filing false income tax returns using confidential ACS client information to fraudulently claim entitlement to state and local tax credits. We find that the arbitrator's award, which

determined that while grievant had engaged in a censurable course of conduct that justified punishment he should be restored to his supervisory position at ACS, is irrational (*see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003]), and defies common sense. Reinstated to the position of ACS supervisor, grievant again would have access to the ACS database from which he extracted the information he used to perpetrate his crime (*see City School Dist. of City of N.Y. v Campbell*, 20 AD3d 313, 314 [2005]; *cf. City School Dist. of City of N.Y. v Lorber*, 50 AD3d 301 [2008]). In view of the foregoing, we need not reach the issue of whether the award violates public policy.

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

ENTERED: NOVEMBER 18, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 18, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 3625/05
Respondent,

-against- 4573

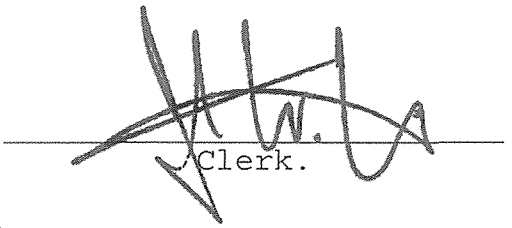
Jose Feliz,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Micki A. Scherer, J.), rendered on or about February 28, 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.

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

4574 The People of the State of New York, Respondent, Ind. 4836/06

-against-

Alfred Kettermann, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lauren S. Littman of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 22, 2007 (as amended April 26, 2007), convicting defendant, upon his plea of guilty, of grand larceny in the second degree and burglary in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 4½ to 9 years, unanimously affirmed.

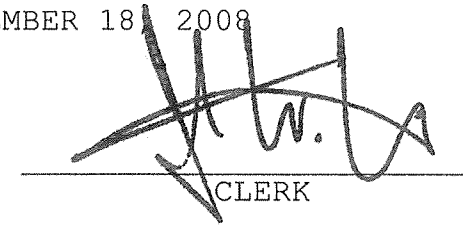
The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The circumstantial evidence in the possession of the police was sufficient to establish probable cause, which does not require proof beyond a reasonable doubt (*see Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]). In investigating the nighttime burglary of an office, the police were aware that there

was no forced entry, that the office was accessible by punching a code on a keypad, that defendant knew this code, that defendant had been recently discharged from a job that had included cleaning that particular office, that he had been seen in the building's lobby at 11 P.M. on the night of the burglary, and that he was on parole.

Since defendant did not move to withdraw his guilty plea, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), his challenge to the validity of the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record establishes that defendant's plea was knowing, intelligent and voluntary and there was nothing in the plea allocution that cast significant doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]). The requisite elements could be readily inferred from defendant's responses during the allocution (*see People v McGowen*, 42 NY2d 905 [1977]; *see also People v Seeber*, 4 NY3d 780, 781 [2005]).

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4575 Christine Moser, Index 110018/04
Plaintiff-Appellant,

-against-

BP/CG Center I, LLC,
a Delaware limited liability company, et al.,
Defendants-Respondents.

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

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondents.

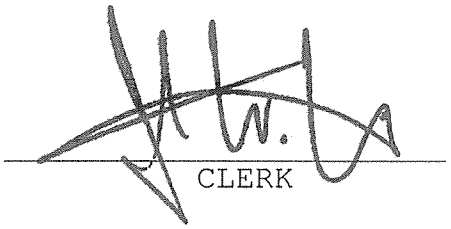
Order, Supreme Court, New York County (Edward H. Lehner, J.), entered May 30, 2007, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

The evidence submitted by defendants was insufficient to establish prima facie that they lacked constructive notice of the alleged water hazard. Defendants failed to offer specific evidence as to their activities on the day of the accident, including evidence indicating the last time the staircase was

inspected or maintained before plaintiff fell (*compare Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007], *with Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-501 [2008]).

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4576 Charles Spinner, et al., Index 104344/06
Plaintiffs-Respondents,

-against-

1725 York Owners Corp., et al.,
Defendants-Appellants.

Fabiani Cohen & Hall, LLP, New York (Lisa A. Sokoloff of counsel), for appellants.

Ginsberg & Broome, P.C., New York (Alvin H. Broome of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 22, 2008, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The evidence that rain had been falling for an hour and a half before plaintiff slipped and fell and that persons entering the building were carrying, and sometimes closing, umbrellas in view of the doormen for at least 40 minutes raises a triable issue whether defendants had actual or constructive notice of a dangerously wet and slippery condition in the lobby of their building (*see Fortgang v Chase Manhattan Bank*, 23 NY2d 895 [1969]; *Hewett v Conway Stores*, 266 AD2d 137 [1999]).

We have considered defendants' remaining contention and find it unavailing.

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

ENTERED: NOVEMBER 18, 2008

CLERK

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

4577 The People of the State of New York, Ind. 1458/06
Respondent,

-against-

Thomas Witt,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered September 20, 2006, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 7 years, unanimously affirmed.

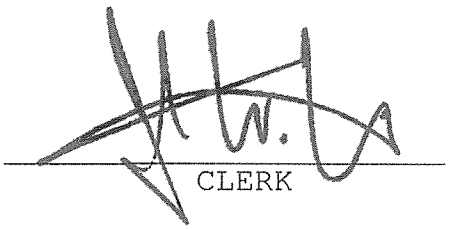
Defendant's argument that the People failed to prove the element of physical injury is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Physical injury may be established through a victim's uncorroborated testimony (*see People v Guidice*, 83 NY2d 630, 636 [1994]). The victim testified that defendant banged her head against a concrete or brick wall,

causing a lump on the back of her head which lasted about two weeks, and for which she sought medical attention (*see People v Chiddick*, 8 NY3d 445 [2007]; *People v Stapleton*, 33 AD3d 464 [2006], *lv denied* 7 NY3d 904 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4578 In re Maya Pelaez, Index 100839/07
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

Jonathan Bobrow Altschuler, P.C., New York (Jonathan B. Altschuler of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Leland G. DeGrasse, J.), entered August 24, 2007, denying the petition brought pursuant to CPLR article 78 seeking to annul respondent's determination, dated October 4, 2006, which dismissed petitioner's grievance seeking to succeed to the tenancy of the deceased tenant as a remaining family member, unanimously affirmed, without costs.

The determination that petitioner was not a remaining family member and therefore not entitled to succession rights to the subject apartment is neither arbitrary nor capricious (*see Jamison v New York City Hous. Auth.-Lincoln Houses*, 25 AD3d 501 [2006]). Petitioner had not resided in the apartment with her mother for one year prior to her death and had not applied for permission to rejoin the household (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328 [2007]). The evidence also

shows that petitioner was not listed on affidavits of income executed in 2004 and 2005, and that in 2004, her mother requested housing management to remove petitioner from the housing composition because, upon graduating from college in Florida, petitioner had decided to remain there. Furthermore, contrary to petitioner's contention, there is no indication that respondent was actually aware of her residency and implicitly approved it prior to the death of the tenant of record (*see Matter of New York City Hous. Auth. Hammel Houses v Newman*, 39 AD3d 759 [2007]).

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

ENTERED: NOVEMBER 18, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 18, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

Raymond Flores, etc.,
Plaintiff-Appellant,

Index 18224/05

-against-

4579N

Isabella Geriatric Center, Inc.,
Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about January 22, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 3, 2008,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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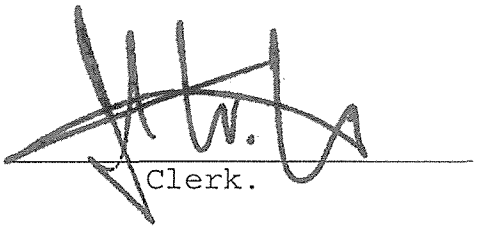


Clerk.

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

4581 In re Venisia Bland, Petitioner, Index 105696/07

-against-

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

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

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

Determination of respondent Police Commissioner, dated January 29, 2007, finding petitioner guilty of being absent from two assignments without permission or police necessity and imposing a forfeiture of 20 vacation days, 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 [Leland G. DeGrasse, J.], entered August 1, 2007), dismissed, without costs.

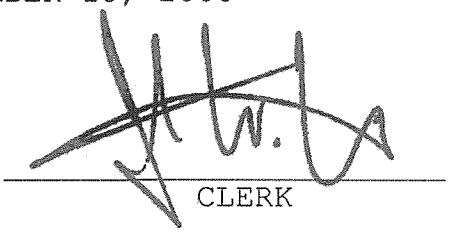
Substantial evidence, including petitioner's testimony admitting that she was absent from two overtime assignments, supports respondents' findings (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). Although petitioner claims that she had the approval of her supervisor and the desk officer to be absent from one of the assignments due to a family emergency, this claim was denied by

the desk officer, and petitioner failed to ensure that there was coverage for the high-security post.

The penalty of a forfeiture of 20 vacation days does not shock the conscience in light of petitioner's service record and her admitted absence from two overtime assignments (*see e.g. Matter of Penney v Kelly*, 16 AD3d 342 [2005]).

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4582 In re Anthony R.,

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

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

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

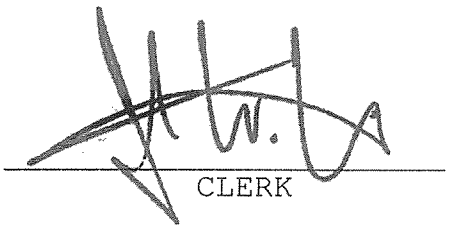
Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about January 10, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of course of sexual conduct against a child in the first degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence supported the conclusion that the course of sexual conduct extended "over a period of time not less than three months in duration," as required by Penal Law § 130.75. The victim's testimony, coupled with other evidence, circumstantially

established a time line (*see e.g. People v Paramore*, 288 AD2d 53 [2001], *lv denied* 97 NY2d 759 [2002]) that began in approximately September 2006 and extended until at least May 2007.

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4584 The People of the State of New York, Ind. 529/07
Respondent,

-against-

Andrew Chappotin,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Andrew Zakrocki of counsel), for respondent.

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered September 12, 2007, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 6 years, unanimously affirmed.

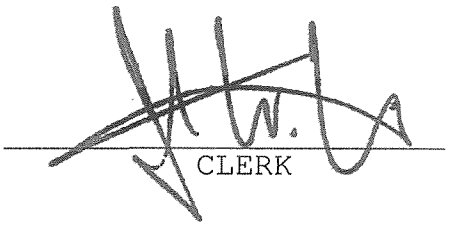
The court properly exercised its discretion when it denied defendant's attorney's request for an adjournment in order to permit him to further prepare for sentencing, and that ruling did not deprive defendant of effective assistance of counsel. Although, as part of his plea agreement, defendant faced an enhanced sentence if he failed to appear for sentencing, he was absent on the sentencing date as well as on a subsequent date after the court had stayed a bench warrant. Several months later, when defendant was involuntarily returned on the warrant for sentencing, his attorney, who had represented him throughout,

requested an adjournment in order to explore defendant's reasons for failing to appear. The court properly concluded that no such adjournment was necessary. Defendant and his counsel received suitable opportunities to confer both before and after the court denied the adjournment, they both addressed the court prior to sentencing, neither offered anything to excuse or mitigate defendant's violation of the plea conditions, and "there is no reason to believe that counsel could have persuaded the court to impose a more lenient sentence if he had received more time to prepare" (*People v Krasnovsky*, 45 AD3d 446, 447 [2007], *lv denied* 10 NY3d 767 [2008]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 18, 2008



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

4589 Szlama Witelson, etc., et al., Plaintiffs-Appellants, Index 120775/00

Burton Weiss, etc., et al., Plaintiffs,

-against-

Jamaica Estates Holding Corp. I, Defendant-Respondent,

Solomon Holding Corp., et al., Defendants.

Sheldon Farber, New York, for appellants.

Schrier, Fiscella & Sussman, LLC, Garden City (Amy R. Sussman of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 18, 2007, after a nonjury trial, dismissing the complaint, unanimously affirmed, with costs.

As plaintiffs failed to establish prima facie on their motion for summary judgment their entitlement to foreclose on the subject mortgage (*see* 40 AD3d 284 [2007]), so they failed to establish their prima facie case at trial. Those plaintiffs who testified had no personal knowledge of their investment in the subject mortgage on the property located at 133 West 136th Street in Manhattan. Neither they nor the attorney who handled all their mortgage investments ever received the subject mortgage documents, and none of the interest payments received on mortgages were identified with the subject mortgage. Indeed, the

attorney testified that he was unaware of his clients' interest in that mortgage until he investigated the cessation of payments on all the mortgages in which they had an interest and that his investigation showed that it was possible his clients had no interest at all in the subject mortgage. Plaintiffs failed to make a prima facie showing that the proceeds from the mortgage on two Brooklyn properties were used to purchase their interest in the subject mortgage.

Those plaintiffs who received their purported interest from Michael Kanoff, one of the original investors in the subject mortgage and one of the original plaintiffs in this action, are not entitled to foreclose because, crediting Kanoff's testimony, the court found that the signature on those assignments was forged and that therefore the assignments are unenforceable. However, in any event, as assignees, those plaintiffs stand in the assignor's shoes and have only the rights the assignor had (*see Citidress II v 207 Second Ave. Realty Corp.*, 21 AD3d 774, 777 [2005]).

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

ENTERED: NOVEMBER 18, 2008

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

4590 The People of the State of New York, Ind. 6042/05
Respondent,

-against-

Bobbie Snovitch,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered July 18, 2006, convicting defendant, upon her plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing her, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The officer, who was experienced with gravity knives, observed what he recognized as such a knife when he saw its clip, its curved top, and part of its blade. This provided the officer with, at least, reasonable

suspicion that defendant possessed an illegal weapon (*see e.g. People v Carter*, 49 AD3d 377 [2008], *lv denied* 10 NY3d 860 [2008]). Moreover, the officer merely approached defendant, identified himself as a police officer, and told defendant that he was stopping her because of the knife in her pocket. It was only after defendant's hand moved toward the knife that the officer, concerned for his own safety, removed the knife.

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

ENTERED: NOVEMBER 18, 2008

CLERK

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

4591 The People of the State of New York, Ind. 2999/05
Respondent,

-against-

Deon Waterman,
Defendant-Appellant.

Lawrence Schwartz, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J. at hearing; William A. Wetzel, J. at jury trial and sentence), rendered July 31, 2006, convicting defendant of murder in the second degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 22½ years to life, unanimously affirmed.

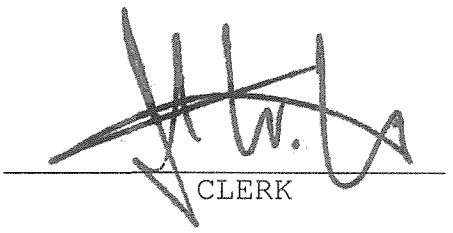
At a *Rodriguez* hearing (*People v Rodriguez*, 79 NY2d 445 [1992]), the prosecution established that a witness had sufficient familiarity with defendant so that his photographic identification was confirmatory and thus exempt from notice and hearing requirements. The prosecution had no obligation to call the identifying witness, and it properly established this prior knowledge through the testimony of a detective (*see People v Espinal*, 262 AD2d 245 [1999], *lv denied* 93 NY2d 1017 [1999]). There is no basis for disturbing the court's determinations concerning credibility. The detective testified that the witness

knew defendant's first name and his address, accurately described defendant's girlfriend, had seen defendant on nearly a daily basis in the neighborhood for approximately one year, and had several prior conversations with defendant.

Defendant's arguments concerning trial evidence, including his constitutional claims, are unpreserved, or affirmatively waived, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4592 Yvonne Pagan, Index 116905/06
Plaintiff-Appellant,

-against-

Board of Education of the
City School District of the
City of New York, et al.,
Defendants-Respondents.

James R. Sandner, New York (Yvonne M. Mariette of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 5, 2007, which granted defendants' motion pursuant to CPLR 103(c) to convert the action to a CPLR article 78 proceeding, and to dismiss the petition for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiff's complaint, although asserting breach of contract claims, sought a declaration that the termination of her employment as a New York City public school teacher was null and void and requested reinstatement with back pay. Such claims are fundamentally premised upon the contention that the administrative determination terminating her employment was wrongful, and accordingly, should have been brought in a

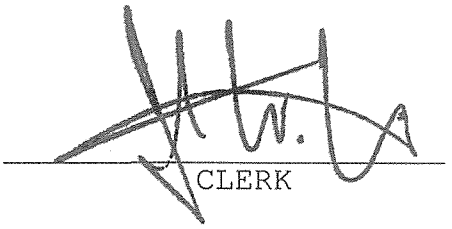
proceeding pursuant to CPLR article 78 (*see Todras v City of New York*, 11 AD3d 383, 384 [2004]; *compare Mitchell v Board of Educ. of City School Dist. of City of N.Y.*, 15 AD3d 279, 281 [2005]).

The court also properly found that, based upon the terms of a signed stipulation in which plaintiff agreed to a three-year probationary period during which she was subject to automatic termination if she exceeded 10 days per school year in unexcused absences and in which she validly waived her tenure right to a hearing under Education Law § 3020-a (*see Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455 [1979], *cert denied* 444 US 845 [1979]), plaintiff was a probationary employee with regard to absenteeism and was required to show bad faith in order to challenge her dismissal (*see Matter of Weir v Bratton*, 4 AD3d 160 [2004], *lv denied* 3 NY3d 611 [2004], *cert denied* 545 US 1140 [2005]). Here, the evidence did not demonstrate that the termination of petitioner's employment was in bad faith. Rather, it established that during the 2005-2006 school year, plaintiff

had 11 unexcused absences, and plaintiff's contention that three of the absences were in connection with court appearances did not satisfy the terms of the stipulation for excused absences.

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4593 In re Wajeeh B.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elizaeth I. Freedman of counsel), for presentment agency.

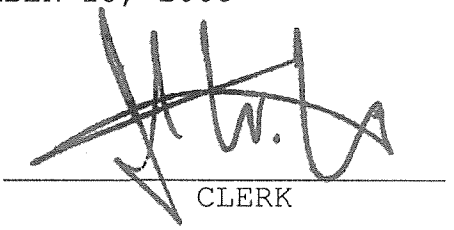
Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about November 7, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed him on probation for a period of 9 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. When appellant's teacher ordered him not to enter a classroom, he announced his intent to injure her and shoved her with such force that it caused a significant, long-lasting injury to her forearm, which she had raised to protect herself. This conduct

established the elements of third-degree assault and third-degree menacing. The victim's testimony provided ample proof of the extent of her injury (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4594 In re 97 Wooster Corp., Index 103914/07
Petitioner,

-against-

New York City Loft Board,
Respondent,

Janan Tomko,
Intervenor-Respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz and Amanda L. Nelson of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for New York City Loft Board, respondent.

Jan Ira Gellis, P.C., New York (Jan Ira Gellis of counsel), for Janan Tomko, respondent.

Determination of respondent New York City Loft Board, dated November 16, 2006, finding that the fourth-floor loft at 97 Wooster Street in Manhattan is subject to rent regulation despite the sale of improvements by a former tenant of the loft to a former owner of the building, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Emily Jane Goodman, J.], entered June 25, 2007), dismissed, without costs.

Substantial evidence supports the finding that the former tenant sold the former owner only the improvements, and not the

rights, to the loft (*see generally Herlihy v New York City Loft Bd.*, 26 AD3d 184, 185 [2006]). Moreover, while petitioner contends that there was a sale of the rights to the loft and that that sale satisfied the criteria of 29 RCNY 2-10 and thus served to deregulate the loft, the evidence indicates that petitioner never filed a record of any such sale with the Loft Board, as required by 29 RCNY 2-10.

While the Loft Board incorrectly found that a 1997 stipulation between intervenor-respondent Tomko, the current tenant of the loft, and the former owner of the building confers rent regulated status on the loft (*see 546 W. 156th St. HDFC v Smalls*, 43 AD3d 7, 12 [2007]), it correctly found that Tomko is entitled to rent regulated status pursuant to 29 RCNY 2-09(b)(3)(i).

Contrary to its contention, petitioner had adequate time to prepare for the hearing and an adequate opportunity to be heard. There is no indication that petitioner was prejudiced by the expedited hearing schedule (*compare Green v New York City Police Dept.*, 34 AD3d 262 [2006], *with Matter of Feliz v Wing*, 285 AD2d 426, 426-427 [2001], *lv dismissed* 97 NY2d 693 [2002]).

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

ENTERED: NOVEMBER 18, 2008

CLERK

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

4595 In re General Assurance Company, Index 103786/05
Petitioner-Appellant,

-against-

Siomik Rahmanov,
Respondent,

Sadiki McKain, et al.,
Additional Respondents,

State Farm Mutual Automobile
Insurance Company,
Additional Respondent-Respondent.

The Law Offices of David J. Tetlak, Huntington Station (Albert J. Galatan of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for State Farm Mutual Automobile Insurance Company, respondent.

Judgment, Supreme Court, New York County (Leland G. DeGrasse, J.), entered July 5, 2007, insofar as appealed from as limited by the briefs, which, upon granting the petition pursuant to CPLR article 75 to permanently stay arbitration of a claim for uninsured motorist benefits, declared that additional respondent State Farm Mutual Automobile Insurance Company's disclaimer of coverage was valid, unanimously reversed, on the law, without costs, and the disclaimer of coverage declared invalid.

Respondent Rahmanov was involved in a motor vehicle accident with a vehicle registered to additional respondent McKain and operated by additional respondent McDaniels. Rahmanov's vehicle was insured by petitoner, while the car registered to McKain was

allegedly insured by State Farm. Rahmanov subsequently notified petitioner of a potential uninsured motorist claim, while McDaniels and the two passengers in his vehicle at the time of the accident filed claims with State Farm.

Petitioner advised Rahmanov that it was unable to honor his claim because the vehicle operated by McDaniels was insured by State Farm. However, State Farm disclaimed liability to McDaniels and the passengers on the grounds of failure to cooperate and fraud. State Farm had determined that McKain was the victim of identity theft and had not procured the applicable insurance policy.

Following its receipt of a demand for arbitration from Rahmanov to resolve his claim, petitioner sought to permanently stay the arbitration. A framed-issue hearing was held to determine whether the vehicle operated by McDaniels was insured at the time of the accident and whether State Farm's disclaimer of coverage was valid. At the conclusion of the hearing, the court granted the petition and determined that the vehicle operated by McDaniels was uninsured and that State Farm's disclaimer of coverage was valid.

Dismissal of the appeal on the grounds that petitioner is not an aggrieved party would not be appropriate. Although the application for a permanent stay was granted, petitioner also sought relief in the form of having State Farm's disclaimer of

coverage deemed invalid. Accordingly, since petitioner did not obtain the full relief sought, it is an aggrieved party within the meaning of CPLR 5511 (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545 [1983]).

The court improperly determined that State Farm's disclaimer of coverage was valid. The evidence establishes that State Farm did not cancel the subject policy before the date of the accident, and there was no indication that Rahmanov participated in the fraud in obtaining the State Farm policy in McKain's name. Under these circumstances, State Farm was precluded from denying coverage on the ground that the policy was fraudulently obtained (*see Matter of Metlife Auto & Home v Agudelo*, 8 AD3d 571 [2004]; *Taradena v Nationwide Mut. Ins. Co.*, 239 AD2d 876 [1997]). Furthermore, the disclaimer of coverage, issued approximately three months after State Farm had sufficient knowledge of the reasons why it was disclaiming coverage, was untimely as a matter of law (*see e.g. Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028 [1979]; *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88-89 [2005]; *Campos v Sarro*, 309 AD2d 888 [2003]).

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

ENTERED: NOVEMBER 18, 2008

CLERK

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

4596 The People of the State of New York, Ind. 2064/06
Respondent,

-against-

Rafael Fabian,
Defendant-Appellant.

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

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

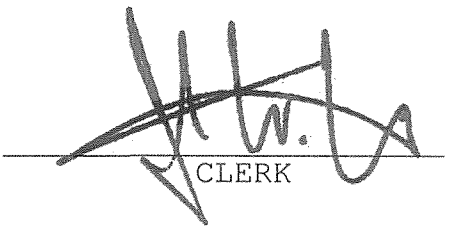
Judgment, Supreme Court, New York County (Renee A. White, J. at hearing; Ronald A. Zweibel, J. at plea and sentence), rendered November 22, 2006, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion. In the late evening, in a drug-prone location, a detective in civilian clothes in an unmarked car observed activity that he recognized as a possible drug transaction, in which defendant made hand-to-hand contact with another person. When the detective and his partner approached, defendant behaved in a nervous manner warranting a reasonable inference that he realized he was in the presence of the police and was trying to change direction to avoid them. Defendant refused to respond to the detective's repeated inquiries and walked away, and then raised

to his mouth the same hand he used in the apparent hand-to-hand transaction, thus suggesting a possible attempt to destroy evidence by swallowing it. While each of these events, viewed separately, might be susceptible of innocent interpretation, when viewed collectively they at least provided sufficient reasonable suspicion to warrant physical restraint of defendant (*see People v Oeller*, 191 AD2d 355 [1993], *affd* 82 NY2d 774 [1993]), which resulted in the officers' observation of an apparent drug package in defendant's mouth.

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

ENTERED: NOVEMBER 18, 2008



CLERK

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

4597 Weil, Gotshal & Manges LLP, Index 100630/03
Plaintiff,

-against-

Fashion Boutique of Short Hills, et al.,
Defendants-Appellants.
- - - - - - - - -
McCallion & Associates, et al.,
Nonparty Respondents.
- - - - - - - - -
[And a Counterclaim Action]

Michael H. Zhu, New York, for appellants.

McCallion & Associates LLP, New York (Kenneth F. McCallion of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 18, 2006, which granted the motion of nonparty respondents McCallion & Associates and Grobman for an order directing defendants to consummate a settlement agreement embodied in a July 25, 2006 order of the court by executing general releases in favor of those nonparty respondents, unanimously affirmed, with costs. Defendants are directed to execute and deliver the releases in the form provided by nonparty respondents within 10 days of entry of the order of this Court.

Defendants' contention that the portion of the settlement agreement requiring them to sign general releases is unenforceable is without merit. Upon application by defendants, then represented by able counsel, the trial court signed an order

embodying the terms of a settlement agreement negotiated among all parties, including the McCallion firm and Grobman, defendants' former attorneys in this action. Notwithstanding defendants' unsworn protestations that they never agreed to execute general releases in favor of McCallion and Grobman, they are bound by the terms of the settlement agreement because their counsel had actual and apparent authority both to negotiate the settlement on their behalf and to apply to the court for an order embodying the terms of the settlement agreement (*see Hallock v State of New York*, 64 NY2d 224 [1984]; *Davidson v Metropolitan Tr. Auth.*, 44 AD3d 819 [2007]). The term requiring defendants to release their former attorneys was negotiated in accordance with Code of Professional Responsibility DR 6-102 (22 NYCRR 1200.31). Moreover, with actual knowledge of the terms of the settlement order, defendants accepted and made use of the substantial benefits accruing to them under the settlement agreement, thereby implicitly ratifying the terms of the agreement (*see Friedman v Garey*, 8 AD3d 129 [2004]) and barring any subsequent claim of duress (*Benjamin Goldstein Prods. v Fish*, 198 AD2d 137, 138 [1993]).

Under these circumstances, the court providently exercised its discretion in denying defendants' request for an adjournment (*see Matter of Steven B.*, 6 NY3d 888 [2006]).

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

ENTERED: NOVEMBER 18, 2008

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 18, 2008.

Present - Hon. Peter Tom, Justice Presiding
Richard T. Andrias
David Friedman
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 3274/06
Respondent,

-against- 4598

Zaida Sanchez,
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 October 26, 2007,

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

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

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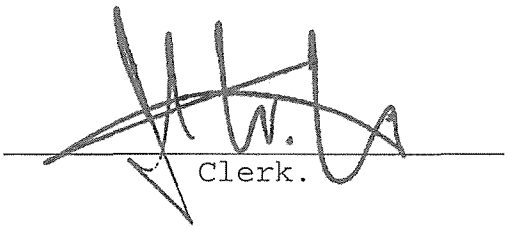


Clerk.

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 18, 2008.

Present - Hon. Peter Tom, Justice Presiding
Richard T. Andrias
David Friedman
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 546/07
Respondent,

-against- 4599

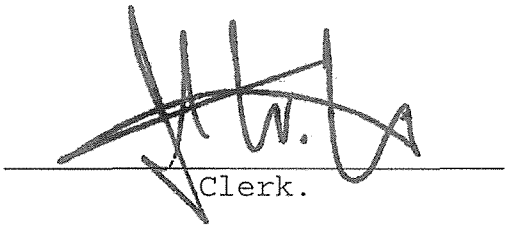
Zaida Sanchez, also known as
Bertha Yanes,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about September 24, 2007,

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

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

ENTER:



Clerk.

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

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

4600N Francina A. Price, Index 24873/05
Plaintiff-Appellant,

-against-

Boston Road Development Corp.,
Defendant-Respondent.

Elliot Ifraimoff & Associates, P.C., Forest Hills (David E. Waterbury of counsel), for appellant.

Werner, Zaroff, Slotnick, Stern & Ashkenazy, LLP, Lynbrook (Howard J. Stern of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 6, 2007, which granted defendant's motion to vacate a default judgment, unanimously affirmed, without costs.

Defendant established the requisite lack of actual notice of the summons in time to defend and meritorious defense to the action (CPLR 317; *see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138 [1986]; *Arabesque Recs. LLC v Capacity LLC*, 45 AD3d 404 [2007]). Although there was evidence that the summons and complaint were served on the Secretary of State, defendant demonstrated by affidavits in support of its motion that it did not receive notice of the action until its former managing agent was personally served with plaintiff's motion for a default judgment. Further, the prompt action defendant took after receiving notice of plaintiff's motion suggests that it lacked

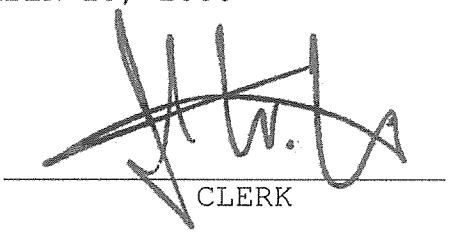
actual notice of the summons and complaint. Defendant made a prima facie showing of a meritorious defense by submitting evidence that it had no notice of any alleged defective condition and that plaintiff admitted she was intoxicated at the time she fell (*see Batra v Office Furniture Serv.*, 275 AD2d 229, 231 [2000]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [2008]).

With respect to defendant's failure to oppose plaintiff's motion, its insurance carrier's failure to act timely does not preclude defendant from vacating an unintentional default (*see Price v Polisner*, 172 AD2d 422 [1990]).

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

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

ENTERED: NOVEMBER 18, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
David B. Saxe
David Friedman
Rolando T. Acosta, JJ.

4083-
4083A
Index 8083/05
8014/06

2386 Creston Avenue Realty, LLC,
Plaintiff-Appellant,

-against-

M-P-M Management Corp., et al.,
Defendants,

Pioneer Parking, LLC,
Defendant-Respondent.

[And Another Action]

Plaintiff appeals from an order of the Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered on or about February 21, 2008, which granted defendant Pioneer Parking's motion for summary judgment dismissing the complaint against it and cancelled plaintiff's notice of pendency; the court's underlying memorandum decision; and an order, same court and Justice, entered on or about April 3, 2008, which denied reargument.

Palmeri & Gaven, New York (John J. Palmeri of counsel), for appellant.

Pollock & MaGuire, LLP, White Plains (Lee A. Pollock of counsel), for respondent.

ACOSTA, J.

On or about August 16, 2004, plaintiff entered into a contract with defendant M-P-M Management whereby the latter agreed to sell to plaintiff the property at 2386 Creston Avenue in the Bronx. The closing, scheduled for November 1, 2004, did not go through because of outstanding violations. The contract called for M-P-M to clear those violations, subject to a cap, or to place money in escrow for that purpose. According to plaintiff's counsel, M-P-M refused to put any money in escrow, but agreed to adjourn the closing and clear the violations. Counsel for both sides then communicated over a period of several months regarding the violations. However, on February 14, 2005, M-P-M cancelled the contract.

Meanwhile, unbeknownst to plaintiff or its counsel, in January 2005, defendant Pioneer Parking, which was not aware of M-P-M's prior unrecorded contract with plaintiff, contracted to purchase the property from M-P-M. Pioneer and M-P-M closed on February 14, 2005. The following week, Pioneer's title agent allegedly delivered the deed to the City Registrar, where it was recorded on March 1, 2005.

On February 22, 2005, the same day that Pioneer's deed was allegedly delivered to the City Registrar, plaintiff filed a notice of pendency against the property and commenced an action

against M-P-M and its counsel for specific performance. In April 2005, the complaint was amended to add Pioneer as an additional defendant, alleging that it intentionally interfered with the prior contract and conspired with M-P-M to defraud plaintiff by causing a breach of that contract.

Plaintiff moved, in August 2007, for summary judgment dismissing the complaint against it and vacating the notice of pendency. Supreme Court granted the motion, citing, among other things, the absence of any evidence in admissible form to suggest Pioneer had been aware of M-P-M's contract with plaintiff. Citing CPLR 6501[1] and *Goldstein v Gold* (106 AD2d 100[1984], *affd in part* 66 NY2d 624 [1985]), plaintiff now argues on appeal that

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[1] "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party."

as a contract vendee seeking specific performance to purchase real property, its filing of a notice of pendency was the proper vehicle to protect its rights pending the outcome of the litigation, even if the filing did not, in an of itself, create an interest in the property. We disagree.

Real Property Law § 294(3) provides that "[e]very executory contract for the sale . . . of real property not recorded . . . shall be void as against any person who subsequently purchases or . . . contracts to purchase . . . the same real property." A good faith purchaser whose deed is recorded, as was Pioneer's, thus takes precedence over a purchaser with an unrecorded contract of sale and no deed, such as plaintiff *(see LaMarche v Rosenblum,* 50 AD2d 636 [1975]*)*. "Where two or more prospective buyers contract for a certain property, pursuant to Real Property Law §§ 291 and 294, priority is given to the buyer whose conveyance or contract is first duly recorded" (*Avila v Arsada Corp.*, 34 AD3d 609, 610 [2006]). "The filing of a notice of pendency does not substitute for the recording of the contract of sale or the conveyance" (11 Warren's Weed, New York Real Property § 115.04 [5th ed]). Although New York is a "race-notice" state (*Avila*, 34 AD3d at 610), plaintiff's failure to avail itself of the protection of either § 291 or § 294 deprives it of the right to substitute a notice of pendency for the recording of a

conveyance or a contract (*Finkelman v Wood*, 203 AD2d 236, 238 [1994]).

The purpose of the notice of pendency is "to afford constructive notice from the time of the filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action" (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Solow Bldg. Corp.*, 52 AD2d 533, 534 [1976]). It does not create rights that did not already exist (*Varon v Annino*, 170 AD2d 445 [1991]). Accordingly, as Supreme Court noted, CPLR 6501 is not in conflict with the recording statutes.

Furthermore, *Goldstein v Gold* (106 AD2d 100, *supra*) and its progeny do not support plaintiff's contention that its filing of the notice of pendency pursuant to CPLR 6501 was proper in allowing it to prove its right to the real estate in question. Plaintiff's argument is flawed for several reasons. First, since a notice of pendency does not serve to create rights, plaintiff could not obtain a superior right under the recording statutes over Pioneer, a good faith purchaser for value from the same vendor who recorded a conveyance. It is only if plaintiff had an enforceable interest in the property superior to Pioneer's interest that Pioneer would be bound by the outcome of the litigation (*Varon v Annino*, 170 AD2d 445, *supra*). The filing of

a notice of pendency does not substitute for the recording of the contract of sale or conveyance.

Second, *Goldstein* does not support plaintiff's claim. In that case, the plaintiff who filed the notice of pendency already had a recorded interest in the property, having recorded his mortgage, and the notice simply preserved an existing property right.

Other cases cited by plaintiff are similarly distinguishable because, like *Goldstein*, they involved a plaintiff who already had an established interest in the property, or a defendant who was not a good faith purchaser for value (*Novastar Mtge., Inc. v Mendoza*, 26 AD3d 479 [2006]; *Roth v Porush*, 281 AD2d 612 [2001]; *Green Point Sav. Bank v St. Hilaire*, 267 AD2d 203 [1999], *lv denied* 95 NY2d 778 [2000]; *Morrocoy Marina v Altengarten*, 120 AD2d 500 [1986] [specific performance available because defendant was not a good faith purchaser for value]; *Stephens v Snitow*, 95 AD2d 806 [1983], *lv denied* 60 NY2d 557 [1983]; *United States v McCombs*, 30 F3d 310 [2d Cir 1994]; *19 Court St. Assoc. v Resolution Trust Corp.*, 190 BR 983 [SD NY 1996]; *Nitchie Barrett Realty Corp. v Biderman*, 704 F Supp 369 [SD NY 1988]).

In the case at bar, specific performance was an impossible remedy since M-P-M did not have title to the subject property at the time the action was commenced, and, under New York law as

stated above, a contract vendee such as plaintiff does not, by virtue of the filing of a notice of pendency, create an interest in real property superior to a subsequent good faith purchaser from the same vendor who records a contract or conveyance.

Plaintiff's argument that summary judgment was improper because discovery was incomplete is unavailing. CPLR 3212 provides that a party is entitled to summary judgment when there are no material issues of fact to be tried. Knowledge of a prior contract is an essential element of intentional interference with contract (*Bogoni v Friedlander*, 197 AD2d 281 [1994], *lv denied* 84 NY2d 803 [1994]). Supreme Court properly found that there was no evidence that Pioneer had any knowledge of M-P-M's prior contract with plaintiff, and correctly dismissed plaintiff's intentional-interference-with-contract claim and its fraudulent-conspiracy claim against Pioneer. In fact, plaintiff's own principal testified at deposition that his basis for contending Pioneer had knowledge of plaintiff's prior contract was "just a guess" and he had no facts upon which to base his conclusion. He further testified that he also did not think Pioneer's principal was aware of the contract between plaintiff and M-P-M.

Plaintiff merely asserts that with more discovery - namely, the depositions of an officer of M-P-M, the real estate brokers and the title closer for both transactions - it will be able to

overcome Pioneer's summary judgment motion. Plaintiff's bald assertion alone is insufficient to warrant reversal. A motion for summary judgment may not be defeated based on surmise or conjecture (*Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 64 [1959]). A plaintiff's claimed need for discovery unsupported by facts suggesting it might lead to relevant evidence, which amounts to "mere hope," is insufficient to forestall summary judgment (*see Moran v Regency Sav. Bank*, 20 AD3d 305 [2005]). Plaintiff has indeed offered no facts from which it could be inferred that the examinations sought will produce evidence that Pioneer had knowledge of the prior contract. Perhaps more telling, had plaintiff really expected valuable evidence from these examinations, it would not have unilaterally adjourned them over Pioneer's objection and never rescheduled them.

In sum, New York's "race-notice" statute protects good faith purchasers who record first. Pioneer took advantage of the statute and recorded, but plaintiff did not. While "the status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such" (*Yen-Te Hsueh Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709

[1997], *lv dismissed* 91 NY2d 921 [1998]), plaintiff has failed to demonstrate that Pioneer had knowledge of plaintiff's contract with M-P-M and thus was not a good faith purchaser.

Accordingly, the order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered on or about February 21, 2008, which granted defendant Pioneer's motion for summary judgment dismissing the complaint against it and cancelled plaintiff's notice of pendency, should be affirmed, with costs. Appeals from the court's underlying memorandum decision and an order, same court and Justice, entered on or about April 3, 2008, which denied reargument, should be dismissed, without costs, as taken from nonappealable papers.

All concur.

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

ENTERED: NOVEMBER 18, 2008