SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 2, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, Moskowitz, Renwick, JJ.

72 Randy Shifrel, Index 26092/04
Plaintiff-Appellant,

-against-

Sarbjit Singh,
Defendant-Respondent.

Goldstein & McGowan, LLP, New York (Steven Goldstein of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered February 4, 2008, which, after a jury trial, denied plaintiff's motion to set aside the verdict awarding plaintiff $5,000 for past pain and suffering and $0 for future pain and suffering, unanimously modified, on the facts, to grant the motion to the extent of vacating the award for past pain and suffering, and to direct a new trial on the issues of such damages only, and otherwise affirmed, without costs, unless defendant, within 30 days of service of a copy of this order with notice of entry, stipulates to increase the award for past pain and suffering to $50,000.

Plaintiff's automobile was hit in the rear as he was stopped

in traffic on the Cross Bronx Expressway. He complained of left shoulder pain at the Palisades Medical Center, and was advised to seek an evaluation by an orthopedic surgeon. That doctor, who testified at trial, ordered an MRI of plaintiff's left shoulder, which revealed a torn rotator cuff. The orthopedic surgeon related that the tear was acute and was not the result of a degenerative condition. He opined that it was caused by the automobile accident. Plaintiff underwent surgery to repair the tear, followed by seven weeks of physical therapy.

The defense did not produce a medical expert. However, it produced a biomechanical engineer. It was this expert's opinion, based upon the weight of the two automobiles and defendant's speed prior to the accident, that it was unlikely that plaintiff's left shoulder made impact with his steering wheel.

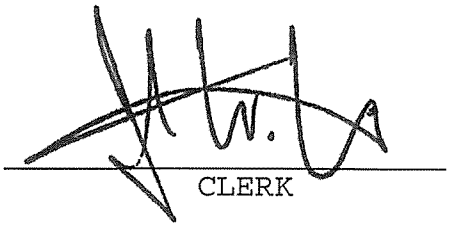
The jury assessed all of this evidence, and appropriately concluded that the accident caused plaintiff to suffer only a non-permanent injury which prevented him from performing his usual and customary activities for at least 90 of 180 days immediately following the accident rather than a permanent consequential limitation or significant limitation of a body function or system (*see Mejia v JMM Audubon*, 1 AD3d 261, 262 [2003]).

However, we have determined to increase the jury's award for past pain and suffering to $50,000 upon a conclusion that a

$5,000 award materially deviated from reasonable compensation under the circumstances (CPLR 5501(c); *Miller v Tacopina*, 34 AD3d 254 [2006]). Given the lack of permanency of plaintiff's injuries, we affirm the jury's determination that plaintiff is not entitled to an award for future pain and suffering.

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

ENTERED: APRIL 2, 2009



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 April 2, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
Peter Tom
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick, Justices.

In re Phyllis Reaves,
Petitioner,

Index 406855/07

-against-

203

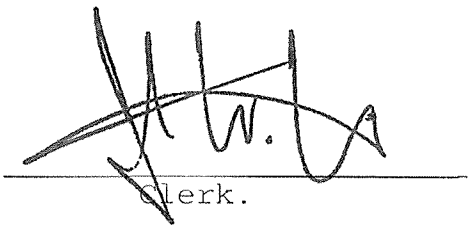
Shaun Donovan, as Commissioner of the Department of Housing Preservation and Development of the City of New York, et al.,
Respondents.

A proceeding having been brought by the above-named petitioner from a determination of the Department of Housing Preservation and Development, dated August 13, 2007, and said proceeding having been transferred to this Court by order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about June 30, 2008,

And upon the stipulation of the parties hereto dated March 12, 2009,

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

ENTER:



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 April 2, 2009.

Present - Hon. Peter Tom, Justice Presiding
John M. McGuire
Leland G. DeGrasse
Helen E. Freedman, Justices.

National Academy of Television Arts & Sciences,
Petitioner-Appellant,

Index 116906/07

-against-

4101

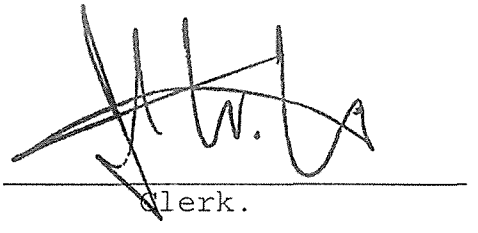
Academy of Television Arts & Sciences,
Respondent-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered on or about March 3, 2008,

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 March 26, 2009,

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

ENTER:



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 April 2, 2009.

Present - Hon. David Friedman, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick, Justices.

x

In re New York City Asbestos Litigation.

- - - - - - - - -

Alfred D'Ulisse, et al., Index 113838/04
Plaintiffs-Respondents,

-against-

4892
4892A
Amchem Products, Inc., et al., 4892B
Defendants, 4892C

DaimlerChrylser Corporation,
Defendant-Appellant.

x

Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Louis B. York, J.), entered on or about May 13, 2008, and from orders, same court and Justice, entered May 22, 2006, July 10, 2007, and May 12, 2008,

And said appeals 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 March 13, 2009,

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

ENTER:

Clerk.

Mazzarelli, J.P., Moskowitz, Renwick, Freedman, JJ.

5170 Maria S. Burgos, Index 15760/06
Plaintiff-Respondent,

-against-

205 E.D. Food Corporation,
doing business as C-Town, et al.,
Defendants-Appellants.

MacKay, Wrynn & Brady, LLP, Douglaston (Christine Brennan of counsel), for appellants.

Ronemus & Vilensky, New York (Erica P. Anderson of counsel), for respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered April 29, 2008, which, in an action for personal injuries sustained in a supermarket operated by defendant tenant on premises owned by defendant landlord, denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of granting the motion of defendant Terrinaz Enterprises, LLC for summary judgment, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendant Terrinaz Enterprises, LLC dismissing the complaint as against it.

Plaintiff allegedly tripped and fell over a box of tangerines the size of a supermarket shopping basket. Such a box can constitute a dangerous condition (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 75 [2004]). An issue of fact as to whether defendant supermarket created or had notice of

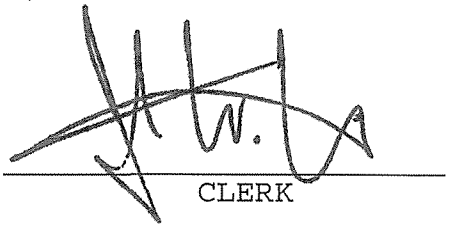
this condition was raised by the testimony of plaintiff and a nonparty witness that there were always boxes in the aisles (*see Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294 [1994]). However, plaintiff failed to raise an issue of fact as to whether defendant Terrinaz Enterprises, LLC, an out-of-possession landlord, had a contractual obligation to make repairs or maintain the premises (*see Vasquez v The Rector*, 40 AD3d 265 [2007]). Accordingly, summary judgment should have been entered in its favor.

M-1066 ***Burgos v 205 E.D. Food Corp., etc., et al.***

Motion seeking stay dismissed as moot.

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

ENTERED: APRIL 2, 2009



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Mazzarelli, J.P., Moskowitz, Renwick, Freedman, JJ.

5171 In re Shanae F.,

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

Renita M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Neal D. Futerfas, White Plains, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Colella of counsel), Law Guardian.

Order, Family Court, Bronx County (Lori Sattler, J.), entered on or about June 22, 2007, which, after a fact-finding hearing, found that respondent educationally neglected the subject child, unanimously reversed, on the law, without costs, the finding of neglect vacated, and the petition dismissed.

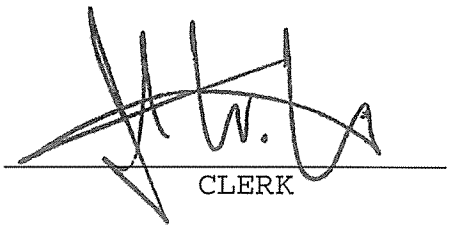
Petitioner failed to establish that respondent did not exercise a minimum degree of care in supplying her 14-year-old child with adequate education (Family Ct Act § 1012[f][i][A]). The record shows that respondent sought to address the reason for the child's absences from school, which was the child's concern about a member of the school's administration, by having the child transferred to a different school (*see Matter of Giancarlo P.*, 306 AD2d 28 [2003]; *Matter of Iesha J.*, 183 AD2d 573 [1992]).

Moreover, petitioner did not rebut respondent's testimony that her efforts to have the child transferred were frustrated by the school's failure to assist her in that regard (*see Matter of Jessica Y.*, 161 AD2d 368 [1990]).

Because we find that petitioner failed to prove by a preponderance of the evidence that respondent neglected the child, we need not reach the issue of whether the child's absences from school resulted in an impairment of her physical, mental or emotional condition (Family Ct Act § 1012[f][i]).

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

ENTERED: APRIL 2, 2009



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

129 In re Edward Coffina, Index 119191/07
Petitioner-Appellant,

-against-

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

- - - - - -

Champion Properties, LLC,
Intervenor-Respondent.

John D. Gorman, New York, for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for DHCR, respondent.

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for Champion Properties, LLC, respondent.

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered December 26, 2007, which denied the petition challenging the determination of the Division of Housing and Community Renewal (DHCR) that rejected the tenant's rent overcharge complaint, reversed, on the law, without costs, and the petition granted to the extent of remanding to DHCR for calculation of the legal regulated rent for the subject apartment beginning in 2002, consistent with the terms of the parties' 1994 lease and the actual legal regulated rent paid by petitioner in 2000 and 2001, plus any applicable rent increases approved the rent guidelines board and DHCR.

Petitioner's argument that the parties intended the legal

rent for the subject apartment to be the rent stated in the original lease, plus any statutory guideline increases, for the duration of the tenancy, is supported by the language in that lease (*see e.g. Matter of Pastreich v New York State Div. of Hous. & Community Renewal*, 50 AD3d 384 [2008]). The rent paid by petitioner in 2000 and 2001 was the legal regulated rent for apartment 1R and not a "preferential" rate (as per the terms of the 1994 lease and its riders). As such, the owner could not rely upon the 2003 rent law amendments authorizing an owner to change a prior-noticed "preferential" rate to a legal regulated rate upon a lease renewal (*see* Rent Stabilization Law (Administrative Code of City of NY] § 26-511[c][14]; Rent Stabilization Code [9 NYCRR] § 2521.2). On this record, DHCR's determination that the owner demonstrated his claimed right to a higher legal regulated rent was irrational since it was refuted by the terms of the 1994 lease and by the apparent intent of the parties to increase the legal regulated rent in the 2002 and 2004 lease renewals by the allowable percentages authorized by the rent guidelines board and DHCR.

All concur except Nardelli and Catterson, JJ. who concurs in part and dissents in part in a separate memorandum by Nardelli, J. as follows:

NARDELLI, J. (concurring in part, dissenting in part)

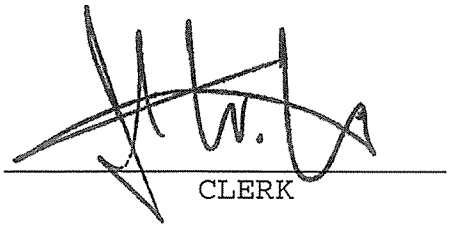
I agree with the majority that the petition should be granted to the extent of directing a new hearing as to what constitutes the legal rent, as well as whether petitioner was granted a preferential rent. The apparent inconsistencies between the filed registration statements and the original lease provisions present a question as to whether fraud was perpetrated, so as to warrant looking further back in the rental history than the four years authorized by Rent Stabilization Code [9 NYCRR] § 2521.2 (*see Thornton v Baron*, 5 NY3d 175, 180-181 [2005]).

Nevertheless, inasmuch as a hearing will be conducted, I find no reason, at this juncture, for the majority to conclude, inter alia, that the rent paid in 2000 and 2001 was the legal regulated rent for the apartment, or that the owner could not change the claimed "preferential" rate to the legal rate upon renewal. The purpose of the hearing is to ascertain what the

legal rent should be. As written, the language of our decision will constrict the hearing examiner's search.

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

ENTERED: APRIL 2, 2009



CLERK

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

142-
142A Cesare Gaspari, DPM, et al., Index 114960/05
Plaintiffs-Respondents,

-against-

Amnon Eric Sadeh, M.D., et al.,
Defendants,

Marlene Finkelstein, P.A.,
Defendant-Appellant.

Fiedelman & McGaw, Jericho (Andrew Zajac and James K. O'Sullivan of counsel), for appellant.

Joseph Lanni, P.C., Larchmont (Joseph Lanni of counsel), for respondents.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered September 24, 2007, which denied defendant Marlene Finkelstein's motion to dismiss the action against her as time-barred and order, same court and Justice, entered on or about May 28, 2008, which denied Finkelstein's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly found, for purposes of the relation-back doctrine, that Finkelstein was united in interest with the timely sued defendant Amnon Eric Sadeh, M.D. (*see Cuello v Patel*, 257 AD2d 499, 500 [1999]). At all relevant times, Finkelstein, a physician's assistant, was employed by defendant A. Eric Sadeh, M.D., P.C. When the court ruled on her statute of limitations motion, her contention that she and Sadeh were not

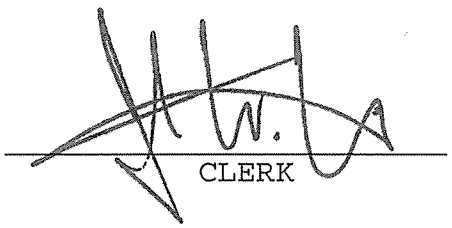
united in interest rested on the allegation that Sadeh sought to shift liability to her for treating plaintiff Cesare Gaspari on August 26, 2003, not following up after August 12, 2003, and writing illegible notes on February 12, 2004. However, those are all acts and omissions for which Sadeh would be vicariously liable (*see* Business Corporation Law § 1505[a]; Education Law § 6542[1]; 10 NYCRR 94.2[a], [b], [f]; *Marchisotto v Williams*, 11 Misc 2d 1089[A], 2006 NY Slip Op 50774[U], *6-7 [2006]). Further, since Finkelstein personally examined plaintiff on two occasions, was still employed by Sadeh's P.C. when Sadeh was timely sued, and does not deny having been aware of this action from its inception, she "should have known that, but for a[] . . . mistake by plaintiff as to the identity of the proper parties, the action would have been brought against h[er] as well" (*Buran v Coupal*, 87 NY2d 173, 178 [1995]). Accordingly, "the linchpin of the relation back doctrine - notice to the defendant within the applicable limitations period" (*id.* at 180 [internal quotation marks and citation omitted]) - is satisfied here.

The court correctly found that issues of fact necessitating credibility determinations preclude summary judgment (*see Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [2007]). While Finkelstein testified that she asked Sadeh to examine plaintiff on August 26, 2003, and Sadeh refused, Sadeh testified that it was unlikely that he was in the office that day and that he would

have made a notation if he had spoken with Finkelstein about plaintiff. Plaintiff's expert stated under oath that if Finkelstein did not tell Sadeh about plaintiff's condition on August 26, that omission would constitute a deviation from proper medical practice, and it would be a proximate cause of plaintiff's injury because it would have delayed a diagnosis of reflex sympathetic dystrophy (RSD). Another issue of fact is presented by the conflict between Finkelstein's testimony that it was beyond her expertise to diagnose RSD and plaintiff's expert's opinion that Finkelstein should have diagnosed RSD on August 26 and that her failure to do so constituted a deviation from proper medical practice.

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

ENTERED: APRIL 2, 2009



Saxe, J.P., Buckley, McGuire, Freedman, JJ.

177 In re Scott A. Weill, Index 108951/07
Petitioner-Appellant,

-against-

New York City Department
of Education, et al.,
Respondents-Respondents.

Charles D. Maurer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for respondents.

Judgment, Supreme Court, New York County (Leland G. DeGrasse, J.), entered May 1, 2008, which denied a petition seeking to annul respondents' determination terminating petitioner's employment as a New York City school teacher and dismissed this proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded to respondent Department of Education for it to provide its rationale, if any, for rejecting petitioner's excuse for his failure to request timely a hearing.

Petitioner was a tenured New York City school teacher whose employment was terminated by the Department of Education. Petitioner was accused of, among other things, showing an inappropriate movie to a class and making despicable comments to students. Shortly after he was served with notice of the charges, petitioner met with representatives of the United

Federation of Teachers (UFT). At this meeting, petitioner filled out a form requesting a hearing on the charges; the UFT representatives told petitioner that they would ensure that the form was timely filed. That form was not, however, received by the Department within the required time frame (see Education Law § 3020-a[2][c]).

After he received a letter informing him that he had failed to request a hearing and therefore had waived his right to a hearing, petitioner contacted the UFT. In an effort to secure a hearing, petitioner's UFT-assigned counsel sent to the Department attorney handling the matter an affidavit from petitioner offering an explanation of his failure to file a timely request (see Education Law § 3020-a[2][d]). The Department attorney, however, refused to submit the affidavit to the panel assigned to hear petitioner's case because it contained not only petitioner's excuse for his failure to file a timely request for a hearing, but also averments challenging the disciplinary charges. According to the Department attorney, she would only submit to the panel an affidavit addressed solely to petitioner's excuse. Petitioner's counsel then submitted to the Department attorney a "memorandum" in which he offered an excuse for petitioner's failure to file a timely request for a hearing; the Department attorney apparently provided this memorandum to the panel.

The panel acted on the charges against petitioner without

affording him a hearing, and, following an inquest hearing at which the Department attorney presented a summary of "the evidence that DOE would have presented if the case proceeded to trial," the panel concluded that petitioner had engaged in the conduct alleged in the charges. The chairperson of the panel issued a determination listing the findings of fact made by the panel, specifying the misconduct committed by petitioner and terminating petitioner's employment.

Petitioner commenced this CPLR article 78 proceeding to annul that determination. Petitioner claimed that the panel's rejection of his excuse for his failure to request timely a hearing and concomitant failure to afford him a hearing was arbitrary and capricious. Petitioner also claimed that the penalty imposed by the panel was excessive. Supreme Court denied the petition and dismissed the proceeding, and this appeal ensued.

In reviewing an administrative determination that was made without a hearing, we are limited to determining whether the determination was arbitrary and capricious (CPLR 7803[3]), i.e., lacks a rational basis (see e.g. Siegel v Board of Educ. of City School Dist. of City of N.Y., 58 AD3d 474 [2009]). Critically, we may only consider evidence that was before the administrative agency (see Matter of Kelly v Safir, 96 NY2d 32, 39 [2001]; Matter of HLV Assoc. v Aponte, 223 AD2d 362 [1996]) and we can

only review the grounds presented by the agency at the time of its determination (see Matter of Scanlan v Buffalo Pub. School Sys., 90 NY2d 662, 678 [1997]; Blum v D'Angelo, 15 AD2d 909, 909 [1962]; see also Montauk Imp., Inc. v Proccacino, 41 NY2d 913, 914 [1977]).

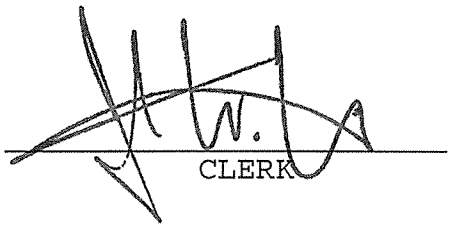
Here, in its determination, the panel did not address petitioner's excuse for his failure to file a timely request for a hearing. Rather, the panel simply noted that petitioner had failed to file a timely request and that he had therefore waived his right to a hearing. Given the absence of any ground in the determination for the panel's rejection of petitioner's excuse, we must remand the matter to the panel for a statement of its rationale for rejecting the excuse. Then, and only then, can we perform the limited function that we are charged with in reviewing the determination of an administrative body -- ascertaining whether that determination is arbitrary and capricious.

Although the Department attorney submitted an affidavit in opposition to petitioner's CPLR article 78 proceeding -- in which she attempts to provide the panel's grounds for rejecting petitioner's excuse -- we cannot consider it because it was not before the panel (see Kelly, supra; HLV Assoc., supra). More importantly, the attorney prosecuting the disciplinary proceeding

cannot supply the panel's rationale for its determination; only the panel can supply its reasoning for the determination.

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

ENTERED: APRIL 2, 2009



Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

212 The People of the State of New York, Respondent, Ind. 4936/06

-against-

Marcos Nunez, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mark Dwyer of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered March 13, 2007, convicting defendant, after a jury trial, of robbery in the first degree (two counts), robbery in the second degree (two counts) and burglary in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 30 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There was probable cause for defendant's arrest based on evidence that he had pawned property taken in a robbery (see People v Radoncic, 239 AD2d 176, 179 [1997], lv denied 90 NY2d 987 [1997]). Defendant's recent, exclusive possession of the property warranted the inference that he was guilty of either robbery or criminal possession of stolen property (see People v Galbo, 218 NY 283, 290 [1916]), and the possibility that he might have innocently acquired the property did not negate probable

cause, which does not require proof beyond a reasonable doubt (see People v Tinort, 272 AD2d 206, 207 [2000], lv denied 95 NY2d 872 [2000]). The record also supports the court's finding that the lineup was not unduly suggestive (see People v Chipp, 75 NY2d 327, 336 [1990], cert denied 498 US 833 [1990]).

The evidence was sufficient to establish the physical injury element of the second-degree robbery convictions. The jury was entitled to credit the victims' descriptions of their injuries (see People v Guidice, 83 NY2d 630, 636 [1994]), and to draw the conclusion that these injuries were more than mere "petty slaps, shoves, kicks and the like" (Matter of Philip A., 49 NY2d 198, 200 [1980]; see also People v Chiddick, 8 NY3d 445, 447 [2007]).

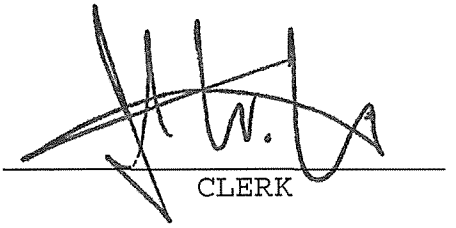
The People's rebuttal evidence clearly tended to disprove defendant's case (see e.g. People v Payne, 235 AD2d 235 [1997], lv denied 89 NY2d 1039 [1997]), and defendant's arguments to the contrary are without merit. We are aware of no rule requiring the People to anticipate evidence a defendant might introduce and "rebut" it in advance on their direct case. In any event, the

testimony presented on rebuttal was admissible as a matter of discretion (see CPL 260.30[7]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 2, 2009



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Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

213 American Guarantee and Liability Insurance Company, Plaintiff-Respondent, Index 602207/07

-against-

Edmund J. Hoffmann, Jr., et al., Defendants-Appellants.

Hancock & Estabrook, LLP, Syracuse (Timothy P. Crisafulli of counsel), for appellants.

Steinberg & Cavaliere, LLP, White Plains (Ronald W. Weiner of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered February 27, 2008, which, to the extent appealed from as limited by the briefs, granted plaintiff's cross motion for summary judgment declaring no duty to defend or indemnify defendants, unanimously affirmed, with costs.

The policy at issue excludes from coverage any claims based "in whole or in part" on acts "in connection with" a trust of which defendants are beneficiaries. This is an enforceable exclusion (*see American Guar. & Liab. Ins. Co. v Lerner*, 58 AD3d 523 [2009]). Here, each claim in the underlying proceeding centered on the transfer of stock held by a trust for the petitioners therein to a trust created by defendants of which they were the sole trustees and beneficiaries. Because no claim

fell outside the exclusion, there was no duty to defend or indemnify (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22 [2003]).

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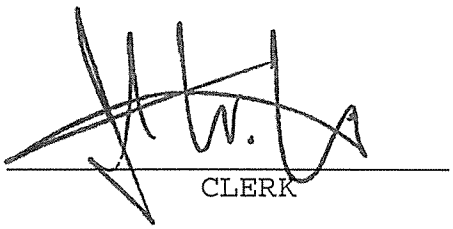

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Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

215-
216 Concord Village Owners, Inc., Index 106917/04
Plaintiff-Respondent, 590684/04

-against-

Trinity Communications Corp., et al.,
Defendants-Appellants,

Keyspan Corporation,
Defendant.

- - - - -

Trinity Communications Corp.,
Third-Party Plaintiff-Appellant,

-against-

Central Locating Service, Ltd.,
Third-Party Defendant-Appellant.

Ahmuty, Demers & McManus, Albertson (Deborah Del Sordo of counsel), for Trinity Communications Corp., appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Charles W. Kreines of counsel), for Time Warner Cable of New York, appellant.

Lavin, O'Neil, Ricci, Cedrone & DiSipio, New York (Susan E. Satkowski of counsel), for Central Locating Service, Ltd., appellant.

Dunnington, Bartholow & Miller LLP, New York (Carol A. Sigmond of counsel), for Concord Village Owners, Inc., respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered May 13, 2008, which, to the extent appealed from, denied the motions of defendants Time Warner Cable of New York City, a division of Time Warner Entertainment Co., L.P., and Time Warner, Inc. (collectively Time Warner), and Trinity

Communications Corporation (Trinity), and third-party defendant Central Locating Service (CLS) for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of granting Time Warner's motion and dismissing the complaint as against it, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Time Warner retained Trinity to excavate and replace its underground cables near plaintiff's building and CLS was hired by involved utilities operators to mark out the various utilities at the site so as to minimize the risk of striking underground pipes or cables. During the excavation, a gas main was ruptured, causing natural gas to escape from the cracked main into the air. Gas service to plaintiff's building was shut off, and plaintiff alleges that the leaks subsequently found in its internal gas system were caused by the negligence involved in rupturing the gas main.

Generally, a party that hires an independent contractor cannot be held liable for the negligence of that independent contractor (*see Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370 [1995]), and summary judgment is appropriate where the evidence on the issue of control of the method and means of the work presents no conflict (*Goodwin v Comcast Corp.*, 42 AD3d 322 [2007]). Here, the record establishes that Time Warner had no authority to direct or control Trinity's work, and accordingly,

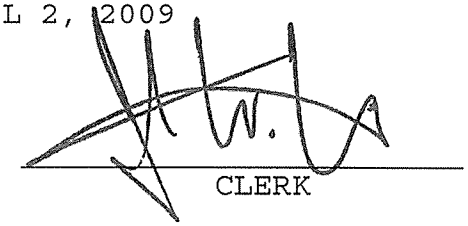
Time Warner is entitled to summary judgment (*see Steel v City of New York*, 271 AD2d 435 [2000]).

Regarding Trinity and CLS, the record presents triable issues of fact as to whether the rupture of the gas main caused the gas leaks in plaintiff's building. In an affidavit, plaintiff's expert refuted the opinion of the expert relied upon by, inter alia, Trinity and CLS, that the leaks in the pipes had been caused by the deterioration of the pipes, and he opined that the leaks were caused by the rupture of the gas main and the resulting loss in pressure in the gas system. Plaintiff's expert also refuted the claim that the lubricating material used on the gas pipes was relevant to the leaks and concluded that the loss of pressure and the introduction of air and humidity into a previously closed system caused the damage. Furthermore, the affidavit of plaintiff's expert was based on the evidence in this case, as well as his knowledge and experience as a professional engineer. Although he never examined the pipes removed from plaintiff's building and only inspected the gas system two years after the incident, he reviewed all of the deposition testimony

and other evidence and set forth in detail the facts supporting his conclusions (*see Cuevas v City of New York*, 32 AD3d 372 [2006]).

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

ENTERED: APRIL 2, 2009



CLERK

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

217 The People of the State of New York, Ind. 5584/05
Respondent,

-against-

Kenny Smith,
Defendant-Appellant.

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

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

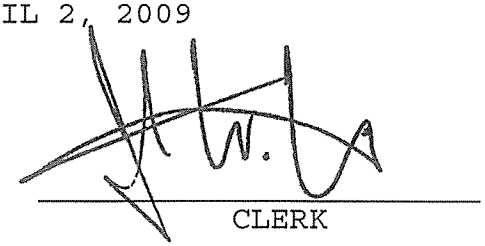
Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered August 7, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of 5½ years, unanimously affirmed.

Defendant signed a detailed and valid written waiver of his right to appeal, and he orally acknowledged that he understood it and had discussed it with counsel. This established defendant's understanding that, separately from the rights already waived by pleading guilty, he was waiving his right to raise suppression

issues on appeal. As an alternative holding, we reject defendant's suppression claims on the merits.

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

ENTERED: APRIL 2, 2009



CLERK

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

218 In re Monique R.,

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 (Elizabeth I. Freedman of counsel), for presentment agency.

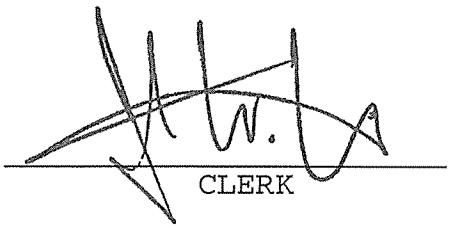
Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about June 23, 2008, which adjudicated appellant a juvenile delinquent, upon her admission that she committed an act which, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing her on probation for a period of 12 months. This was the least restrictive alternative consistent with her needs in light of, among other things, the violent nature of the offense, her significant truancy, her involvement with drugs and the recommendation contained in the probation report. The court properly concluded that appellant was in need of supervision and treatment for a

longer period than six months, which would have been the maximum period available under an adjournment in contemplation of dismissal (*see e.g. Matter of Antonio C.*, 294 AD2d 123 [2002]).

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

ENTERED: APRIL 2, 2009



CLERK

Friedman, J.P., Moskowitz, Acosta, Freedman, JJ.

219 Kiss Construction NY, Inc., Index 602373/05
Plaintiff-Respondent,

-against-

Rutgers Casualty Insurance Company,
Defendant-Appellant,

Buckingham Badler Associates, Inc., et al.,
Defendants.

Bivona & Cohen, P.C., New York (Elio M. Di Berardino of counsel), for appellant.

Apuzzo & Chase, New York (William Apuzzo of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered April 16, 2008, which, to the extent appealed from, denied defendant Rutgers' motion for summary judgment and granted plaintiff's motion for partial summary judgment declaring that Rutgers is obligated to defend and/or pay plaintiff's defense costs in an underlying action until the question of rescission of the policy is decided, unanimously reversed, on the law, with costs, Rutgers' motion granted, plaintiff's motion denied, the policy declared void ab initio, and defendant Rutgers is directed to refund the premiums to plaintiff.

In its application for commercial general liability insurance with Rutgers, plaintiff listed the nature of its business as "PAINTING-100%-100% INTERIOR." The Declaration page of the policy described plaintiff's business as a painting

contractor, and the Extension of Declarations included the further description "PAINTING INTERIOR BUILDINGS-NO TANKS." Plaintiff further acknowledged that by accepting the policy, it agreed that the statements in the Declarations were accurate, complete and based on representations it had made in its application, and that Rutgers was issuing the policy in reliance on those representations.

In 2004, plaintiff lodged a claim under the policy for injuries that allegedly occurred during the construction of a three-family building, where plaintiff was the general contractor in work involving excavation and paving. Rutgers disclaimed coverage based on an alleged material misrepresentation in the application for insurance. Plaintiff brought the instant action, seeking a declaration that Rutgers was obligated under the policy to defend and indemnify plaintiff in that underlying claim. In its fifth affirmative defense, Rutgers sought to void the policy ab initio, based on the alleged material misrepresentation in the application.

For an insurer to be entitled to rescind a policy ab initio, it must show that the applicant made a material misrepresentation with an intent to defraud (*see Dwyer v First Unum Life Ins. Co.*, 41 AD3d 115 [2007]). "No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make

such a contract" (Insurance Law § 3105[b]). While the materiality of a misrepresentation is ordinarily a jury question, it becomes a matter of law for the court's determination when the evidence concerning materiality is clear and substantially uncontradicted (*Process Plants Corp. v Beneficial Natl. Life Ins. Co.*, 53 AD2d 214, 216-217 [1976], *affd* 42 NY2d 928 [1977]).

Here, although defendants have not established that the policy itself limited coverage to painting and neither the guidelines nor the classification of the nature of plaintiff's business would alter the coverage provided, the court should have granted Rutgers' motion for summary judgment declaring the policy void ab initio. Rutgers offered the affidavits of two of its vice presidents (one of whom was the Vice President of Commercial Underwriting) who each averred that the company does not write policies for such construction work, or for general contractors. This argument was also supported by the company's underwriting guidelines, by copies of e-mails declining coverage to similarly situated applicants, and by copies of disclaimer letters sent to similarly situated insureds making similar claims (*see* Insurance Law § 3105[c]; *cf. Di Pippo v Prudential Ins. Co. of Am.*, 88 AD2d 631 [1982]). This satisfied Rutgers' burden of demonstrating the materiality of the misrepresentation (*see Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co.*, 38 AD3d 231 [2007]; *Mehta v New York Life Ins. Co*, 203 AD2d 8 [1994]), and plaintiff

does not argue to the contrary on appeal.

One of plaintiff's managers, who was the father of plaintiff's principal, testified at deposition that based on his own knowledge, plaintiff had been performing such construction work throughout and since 2002. The subsequent affidavits of plaintiff's principal and this manager, to the effect that the father was never employed by plaintiff and that he had no knowledge of any such construction work during 2002, were insufficient to defeat Rutgers' motion for summary judgment, as those self-serving affidavits created no more than a feigned issued of fact tailored to avoid the consequences of the earlier contrary testimony (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). The later affidavits asserting that the father was not employed by plaintiff are also belied by a prior affidavit submitted by him in this action, on plaintiff's behalf, in which he averred that he was indeed one of plaintiff's managers. Again, plaintiff does not argue otherwise on appeal.

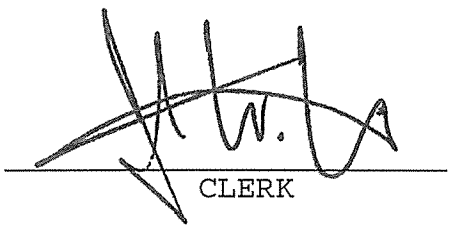
In *Federal Ins. Co. v Kozlowski* (18 AD3d 33 [2005]), we held that once a policy goes into effect and a claim has been made, the status quo is changed and a defense of rescission must await a judicial determination. This does not mean, as plaintiff argues, that once a claim is made under such a policy, the rescission would only be effective as to new claims. We clearly held that once a claim is lodged under the policy, a rescission

by notice (i.e., without a judicial determination) can only be prospective, but "[n]eedless to say, if [the insurer] prevails in its claim of right to rescind on the basis of fraud in the inducement, its obligation to defend [the insured] is vitiated and the policy will be rendered void from its inception irrespective of the point in the life of the policy that a liability claim may have arisen" (*id.* at 40).

None of plaintiff's other arguments alters Rutgers' right to summary judgment on its affirmative defense for a declaration that the policy was void ab initio based on the material misrepresentations in the insurance application. Since we now declare the policy void ab initio, Rutgers is obligated to refund plaintiff's premium payments (*LaRocca v John Hancock Mut. Life Ins. Co.*, 286 NY 233, 238 [1941], cited in *Curiale v AIG Multi-Line Syndicate*, 204 AD2d 237, 238 [1994], *lv dismissed* 84 NY2d 1026 [1995]).

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

ENTERED: APRIL 2, 2009



CLERK

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

221 Silverite Construction Company, Inc., et al., Index 603379/06
Plaintiffs-Appellants,

-against-

One Beacon Insurance Company, as Successor to American Specialty Insurance Company,
Defendant-Respondent,

United Aluminum Door, Inc.,
Defendant.

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

Goldberg Segalla LLP, Mineola (Joanna M. Roberto of counsel), for respondent.

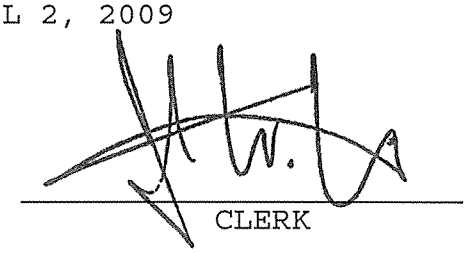
Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 31, 2008, which denied plaintiffs Silverite Construction Company, Inc. ("Silverite") and the New York City Department of Environmental Protection's ("the DEP") motion for summary judgment and granted defendant One Beacon Insurance Company's ("One Beacon") motion for summary judgment unanimously affirmed, with costs.

Plaintiffs excuse for their 2½ month-plus late notice of a worker's injury at a city construction site was that they did not believe the worker either had a claim, or would bring one, was properly rejected given evidence that the worker was removed from the worksite by ambulance, an accident report was prepared the same date but not followed up, the worker missed a week of work,

he returned on limited duties and filed a notice of claim against the City the same day (*see generally Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742 [2005]). One Beacon's disclaimer was timely following a brief investigation into whether the plaintiffs qualified as additional insureds under the One Beacon policy.

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

ENTERED: APRIL 2, 2009



CLERK

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

222 The People of the State of New York, Ind. 1200/06
Respondent,

-against-

Chiki McClain,
Defendant-Appellant.
- - - - - - - - - -

223-
224 The People of the State of New York,
Respondent,

-against-

Joseph Owens,
Defendant-Appellant.

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

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for Joseph Owens, appellant.

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered June 22, 2007, convicting defendant Chiki McClain, upon his plea of guilty, of criminal possession of a controlled substance in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 8 years and 3½ to 7 years, and judgment, same court (Rena K. Uviller, J. at suppression hearing; Daniel FitzGerald, J. at plea and sentence), rendered November 28, 2007, as amended January 23, 2008,

convicting defendant Joseph Owens of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 10 years, unanimously affirmed.

The hearing court properly denied both defendants' motions to suppress. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

The People established, by clear and convincing evidence, that the police entered the apartment where defendants were arrested only after obtaining the voluntary consent of the apartment's tenant (*see People v Gonzalez*, 39 NY2d 122, 128-131 [1976]). The atmosphere was not unduly coercive, and the tenant was cooperative with the police. Moreover, the tenant later gave written consent to a further search in a document that also confirmed the voluntariness of his initial consent (*see People v Williams*, 278 AD2d 150 [2000], *lv denied* 96 NY2d 764 [2001]). The police acted within what reasonably appeared to be the scope of the tenant's consent (*see People v Gomez*, 5 NY3d 416, 419 [2005]) when they entered the living room where defendants and two other persons were sitting, and observed cocaine and marijuana in plain view. Upon agreeing to show the officers where the other occupants were located, the tenant effectively directed the officers to the rest of the apartment including the

living room.

The police reasonably relied on the apparent authority of the person who granted them entry to consent to a search of the entire apartment (*see People v Adams*, 53 NY2d 1, 9-11 [1981], *cert denied* 454 US 854 [1981]). It was not until after the police entered the living room and saw the drugs in plain view that they learned any facts giving them reason to believe that the part of the living room where the drugs were located was a partitioned-off separate living space rented by the tenant to defendant Owens. We reject defendants' argument that an upturned item of furniture positioned part of the way across the room should have put the police on notice that part of the room might be the separate living quarters of someone other than the person who admitted them into the apartment. At the time of the police went past this item and made their plain view observation, all they reasonably knew was that they were in the living room of the apartment's tenant, that an object resembling neither a wall nor a partition was in an odd position, and that other persons of unknown connection to the apartment were present. In any event, even if it reasonably appeared to an outsider that someone's separate space had been carved out of the living room, the means by which the demarcation was accomplished were so limited that Owens should have reasonably expected that the tenant of record might have permitted others to be in a position to view Owens's

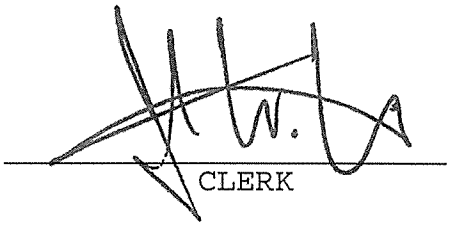
portion of the room (*see Georgia v Randolph*, 547 US 109, 110-111 [2006]).

Furthermore, the police did not conduct a search "over the express refusal of consent by a physically present resident" (*id.* at 120). After the police found drugs in open view, Owens began asking questions about the basis for the officers' presence. Even assuming this was a refusal of consent, it came too late, because the police had already found the drugs. "[T]here is no evidence that the police [had] removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection" (*id.* at 121).

We have considered and rejected defendants' remaining suppression arguments, as well as McClain's challenge to the manner in which fees and surcharges were imposed (*see People v Guerrero*, __ NY3d __ 2009 NY Slip Op 01242).

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

ENTERED: APRIL 2, 2009



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 April 2, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
Karla Moskowitz
Rolando T. Acosta, Justices.

The People of the State of New York,
Respondent,

-against-

Terry Pearson,
Defendant-Appellant.

Ind. 4340/06
4464/06
4478/06

225-
225A-
225B

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Charles Solomon, J. at plea, Micki A. Scherer, J. at sentence), rendered on or about May 22, 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 judgments so appealed from be and the same are hereby affirmed.

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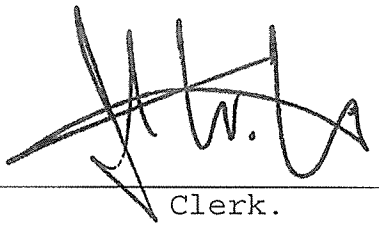


Clerk.

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

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

228-
229 Duane Morris LLP, Index 109609/05
Plaintiff-Respondent-Appellant, 590785/06

-against-

Astor Holdings Inc., et al.,
Defendants-Appellants-Respondents.

[And a Third-Party Action]

Berger & Webb, LLP, New York (Jonathan Rogin of counsel), for appellants-respondents.

Foley and Lardner LLP, New York (Todd C. Norbitz of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about October 25, 2007, which, to the extent appealed from as limited by the briefs, in this action to recover legal fees, granted plaintiff's motion for summary judgment on its account stated cause of action against defendant Astor Holdings Inc. (Astor) and dismissing part of defendants' legal malpractice counterclaim, and denied plaintiff's motion for summary judgment dismissing defendant Robot Wars LLC's malpractice counterclaim, unanimously modified, on the law, to grant plaintiff's motion for summary judgment dismissing Robot Wars' malpractice counterclaim, and otherwise affirmed, with costs in favor of plaintiff. Order, same court and Justice, entered August 19, 2008, which, inter alia, granted plaintiff's motion for reargument and, upon reargument, granted plaintiff

summary judgment on its account stated claim against Robot Wars, unanimously affirmed, with costs in favor of plaintiff.

The lack of discovery in this action does not require denial of plaintiff's summary judgment motion as premature (*see e.g. Voluto Ventures, LLC v Jenkens & Gilchrist Chapin LLP*, 44 AD3d 557 [2007]). Defendants failed to show that facts essential to justify opposition to the motion were within plaintiff's exclusive knowledge or that discovery might lead to facts relevant to the issues (*see id.; Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [2000]).

The record shows that in December 2003, each defendant signed an agreement with plaintiff, acknowledging that it owed plaintiff a certain sum of money for their legal representation and agreeing to pay it within a certain amount of time. Although defendants contend that there is a triable issue of fact as to whether these agreements were signed under duress, "[r]epudiation of an agreement on the ground that it was procured by duress requires a showing of *both* (1) a wrongful threat, and (2) the preclusion of the exercise of free will" (*Fred Ehrlich, P.C. v Tullo*, 274 AD2d 303, 304 [2000]). Here, defendants have admitted that the December 2003 agreements resulted from significant negotiations with plaintiff during which they were represented by separate counsel, and even if plaintiff threatened to cease representing defendants unless it were paid, that is not a

wrongful threat (*id.*). There is no need for discovery as to whether the December 2003 agreements are enforceable, as the existence of a wrongful threat and the overbearing of defendants' free will are both matters within defendants' knowledge.

The affidavit of defendants' principal, which claimed that he orally protested plaintiff's services, does not serve to defeat plaintiff's motion. A client's "self-serving, bald allegations of oral protests [a]re insufficient to raise a triable issue of fact as to the existence of an account stated" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]), and defendants do not need discovery as to whether they ever protested plaintiff's bills, since that is also a matter within their own knowledge.

Defendants' contention that the December 2003 agreements cannot form the basis of an account stated because they are not itemized billing statements, is raised for the first time in their reply brief and is not entitled to consideration (*see e.g. Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 159 [2003]). In any event, plaintiff's account stated claims are not based solely on the December 2003 agreements, but also on the detailed billing statements dated from January 2004 through August 2004.

The part of defendants' malpractice counterclaim that dealt with the action against Edward Roski III was properly dismissed. "A legal malpractice action is unlikely to succeed when the

attorney erred because an issue of law was unsettled or debatable" (*Darby*, 95 NY2d at 315 [internal quotation marks and citation omitted]). When the Southern District of New York found that some of Astor's claims in the Roski Action were barred, it noted that "there appears to be no federal authority directly on point" (*Astor Holdings, Inc. v Roski*, 325 F Supp 2d 251, 262 [SD NY 2003]), and relied on a California state case that was decided in 2002 (*see id.*), which was after the Roski action was filed. The e-mails of defendants' principal, summarizing the results of his consultations with lawyers from firms other than plaintiff, show that the issue of whether Astor had to bring certain claims in Bankruptcy Court (as opposed to the Southern District of New York) was unsettled, and defendants' attempt to distinguish good/bad faith from preemption, is not availing. The basis for the Southern District's finding of preemption was that the Bankruptcy Court had exclusive jurisdiction to determine whether a debtor had filed for bankruptcy in bad faith (*id.* at 262-263).

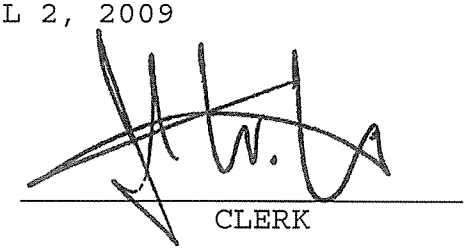
Regarding defendants' argument that plaintiff was not forthright about the damages that could be recovered in the Roski action, this claim was not pleaded in either the original or amended counterclaims and should not be considered as a basis for defeating summary judgment (*see e.g. People v Grasso*, 54 AD3d 180, 212-213 [2008]). In any event, the documentary evidence contradicts the claim.

Robot Wars' malpractice counterclaim should have been dismissed as time-barred. "An action to recover damages arising from an attorney's malpractice must be commenced within three years from accrual (*see* CPLR 214[6])" (*McCoy v Feinman*, 99 NY2d 295, 301 [2002]). The amended counterclaims allege that plaintiff's malpractice in the action that Robot Wars filed against Marc Thorpe in April 2001 occurred between February and May 2001. However, Robot Wars did not assert its malpractice counterclaim until July 2006. The continuous representation doctrine does not save Robot Wars' counterclaim about the Thorpe action on the basis that plaintiff represented Astor in the Roski action until July 2004. "[I]n the context of a legal malpractice action, the continuous representation doctrine tolls the statute of limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice" (*Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). Plaintiff's representation of Robot Wars in the Thorpe

action ceased in February 2002, more than three years before Robot Wars asserted its malpractice counterclaim.

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

ENTERED: APRIL 2, 2009



CLERK

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

230 Ysabel Abreu, Index 116342/05
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Alpert & Kaufman, LLP, New York (Morton Alpert of counsel), for respondent.

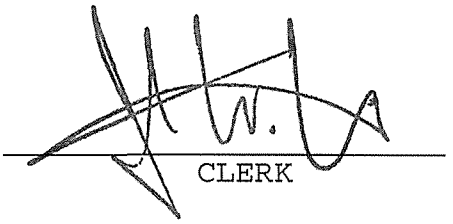
Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 25, 2008, which, in an action for personal injuries sustained in a trip and fall allegedly caused by a crack in a cement ramp sloping down from a rear exit of a residential building owned and operated by defendant, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant's argument that the crack was trivial as a matter of law was properly rejected by the motion court on the basis of the photographs submitted by defendant depicting a lengthy irregularity in the cement that might have been capable of catching plaintiff's sandal (*see Jacobsen v Krumholz*, 41 AD2d 128, 128-129 [2007], citing *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [2000]; *see also Nin v Bernard*, 257 AD2d 417, 418 [1999] [defendant's expert's statement that "'it was

impossible for all but the sharpest heel or toe to fall within the depression' hardly constitutes a conclusive refutation of plaintiff's case"]). "[E]ven a trivial defect can sometimes have the characteristics of a snare or a trap" (*Herrera v City of New York*, 262 AD2d 120 [1999]).

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

ENTERED: APRIL 2, 2009



Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

231N Ivelisse Eusebio, Index 107265/00
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

William J. Rita, New York, for appellant.

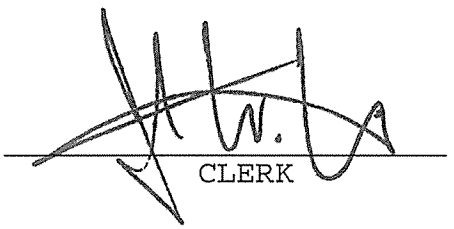
Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 8, 2008, which, in an action for personal injuries allegedly sustained when plaintiff slipped and fell on a wet area in defendant's subway station, denied plaintiff's motion to vacate a default judgment dismissing her complaint, unanimously affirmed, without costs.

We agree with Supreme Court's exercise of its discretion under the circumstances of this case.

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

ENTERED: APRIL 2, 2009



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Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

232N In re The New York State Urban Development Corporation, etc.,

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Movieplex 42, Inc., Claimant-Appellant, Index 403585/95 403587/95

-against-

New York State Urban Development Corporation, doing business as Empire State Development Corporation, Respondent-Respondent.

Fahringer & Dubno, New York (Herald Price Fahringer of counsel), for appellant.

Carter Ledyard & Milburn LLP, New York (Susan B. Kalib of counsel), for respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered August 13, 2007, which granted respondent's motion to strike the claim for fixture compensation, unanimously affirmed, without costs.

The court properly determined that the claim for the value of the fixtures was encompassed in the award for the value of the theater building (*see Matter of City of New York (Lincoln Sq. Slum Clearance Project)*, 24 Misc 2d 206, 208 [1960] ["to give owner an additional award for fixtures would be to duplicate the award which was heretofore made for the theatre building based on a rental which included the use of these same fixtures and equipment"], *mod on other grounds* 15 AD2d 153 [1961], *affd* 16 NY2d 497 [1965]). Contrary to claimant's contention, it was in

privity with the building owner and had a full and fair opportunity to participate in the prior valuation proceeding (*see generally Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]).

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

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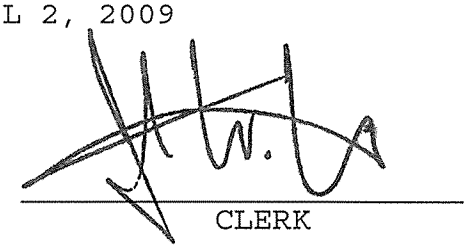

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