SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 7, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

191 Adam Grant, Index 104457/06
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

David Horowitz, P.C., New York (Steven J. Horowitz of counsel), for appellant.

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

Order, Supreme Court, New York County (Donna M. Mills, J.), entered March 14, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the complaint reinstated.

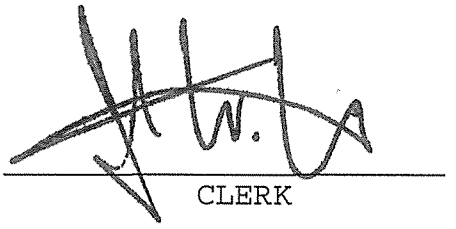
Plaintiff was injured when the bus he was riding as a standee stopped suddenly, causing him to lose his footing. "To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a halt, the plaintiff must establish that the stop

caused a jerk or lurch that was 'unusual and violent'" (*Urquhart v City of New York City Tr. Auth.*, 85 NY2d 828, 829-830 [1995] [citation omitted]). "Proof that the stop was unusual or violent must consist of more than a mere characterization of the stop in those terms by the plaintiff" (*id.* at 829-830). Measured by this standard, plaintiff's proof was sufficient to raise a triable issue of fact as to whether defendant was negligent. Plaintiff, who was 29 years old at the time of the accident, testified that buildings within his view seemed to be "moving" by very quickly as the bus engine made a high-pitched sound. Plaintiff estimated the bus's speed to be at least 35 to 40 miles per hour immediately before deceleration. Plaintiff added that when the bus stopped, he was launched into the air even though he was holding the overhead grip. It was also plaintiff's testimony that the bus's sudden stop caused another standee to fall to his knee. Such testimony constitutes "objective evidence that the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of

defendant" (*id.* at 830; *see also Fonseca v Manhattan & Bronx Surface Tr. Operating Auth.*, 14 AD3d 397 [2005]). An issue of fact was thus raised, warranting denial of the motion.

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

ENTERED: APRIL 7, 2009



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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

233 The People of the State of New York, Respondent, Ind. 2581/95

-against-

Darryl Whitley, Defendant-Appellant.

Simpson Thacher & Bartlett LLP, New York (Barry R. Ostrager of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about April 16, 2007, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court (Laura E. Drager, J.), rendered April 18, 2002, convicting him, after a jury trial, of murder in the second degree and sentencing him to a term of 22 years to life, unanimously affirmed.

The court properly denied, on the merits, defendant's CPL 440.10 motion asserting ineffective assistance of counsel. We conclude that defendant received effective assistance under both the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant's principal claim is that when the testimony a prosecution witness gave at defendant's first trial was admitted on retrial due to the witness's assertion of his Fifth Amendment

privilege, defendant's counsel should have sought to introduce evidence that the witness had recanted his prior testimony between the two trials. "Had trial counsel attempted to get the statements before the jury, he would undoubtedly have been rebuffed, and we cannot fault him for not trying" (*People v Stulz*, 2 NY3d 277, 287 [2004]). Counsel's failure to seek admission of the recantation statements was objectively reasonable.

As we stated in an alternative holding on defendant's direct appeal (14 AD3d 403, 405 [2005], *lv denied* 4 NY3d 892 [2005]), the recantation evidence was inadmissible (*Mattox v United States*, 156 US 237, 244-250 [1895]). *Mattox* remains part of this State's evidentiary law and it is applicable to the present fact pattern (*see* Prince, Richardson on Evidence § 8-111 [Farrell 11th ed]). Since the witness had become unavailable, defendant was unable to lay a foundation for the admission of the recantations by asking the witness about them. The fact that the recantations were made in open court on the record did not satisfy the foundational requirement; in this case, as discussed below, the need to explore with the witness the precise nature of the purported recantation was particularly acute since the recantation statements were unclear and inconsistent.

Furthermore, the recantations were not admissible because of

defendant's right to confront witnesses or his right to present a defense, and counsel's failure to present such theories was also not objectively unreasonable. *Mattox* does not support defendant's Confrontation Clause argument. Moreover, the recantations not only lacked "sufficient indicia of reliability" (*People v Stulz*, 2 NY3d at 286), but "there is overwhelming reason to question the statements' genuineness" (*Bagby v Kuhlman*, 932 F2d 131, 136 [2d Cir 1991], *cert denied* 502 US 926 [1991]). In addition to the principle that "[t]here is no form of proof so unreliable as recanting testimony" (*People v Shilitano*, 218 NY 161, 170 [1916]), we note that the witness's first attempt at recantation was cast in terms of a lack of recollection, and the witness contradicted himself about whether he lacked recollection of *making* a statement to a detective, of the *contents* of that statement, or of the facts *underlying* the statement. Then, in a second attempt at recantation made through his attorney, he no longer claimed a lack of recollection, but instead claimed he had been uncertain all along about the matters to which he had testified at the first trial.

We also find that, regardless of whether defendant's counsel should have sought to introduce the recantation evidence, or whether it should have been admitted, its absence did not deprive defendant of a fair trial or cause him any prejudice. As we

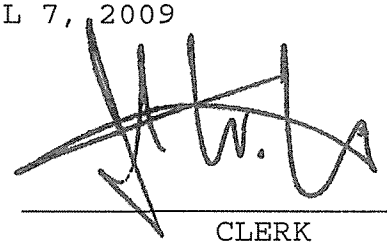
stated in an alternative holding on the direct appeal, "there is no reasonable possibility that its introduction would have affected the verdict" (14 AD3d at 405). The recantations lacked probative value, and, as we observed in discussing the weight of the evidence supporting the conviction, even though the witnesses' credibility was challenged, "defendant admitted his guilt to four persons on separate occasions. The accounts of the four men generally harmonized with each other, as well as with other evidence, and there was no evidence of collusion" (*id.* at 403).

Defendant's other ineffective assistance claims are without merit. The record establishes that a third-party culpability defense would have been unavailing because of documentary evidence that the alternate suspect was hospitalized at the time of the crime, and that further investigation of such a defense was not warranted. The motion court properly relied, among other things, on counsel's assertions regarding his general practice (*see Carrion v Smith*, 549 F3d 583, 585, 590 [2d Cir 2008]) in

correctly determining that defense counsel provided appropriate advice to his client regarding the possibility of pleading guilty (*see Purdy v United States*, 208 F3d 41 [2d Cir 2000]).

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

ENTERED: APRIL 7, 2009



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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

235 In re Elias A.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about June 20, 2008, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and placed him 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 him on probation for a period of 12 months. This was the least restrictive alternative, given the violent nature of the offense, in which appellant deliberately cut another child's neck, along with appellant's history of aggressive conduct leading to treatment beginning two years earlier and his continued need to control his

anger. The court was not required to grant his request for an adjournment in contemplation of dismissal or a conditional discharge merely because this was his first arrest (*see Matter of Nikita P.*, 3 AD3d 499, 501 [2004]). Appellant's argument that he could have received the same therapy with an ACD as with probation is unpersuasive; 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 ACD (*see e.g. Matter of Antonio C.*, 294 AD2d 123 [2002]).

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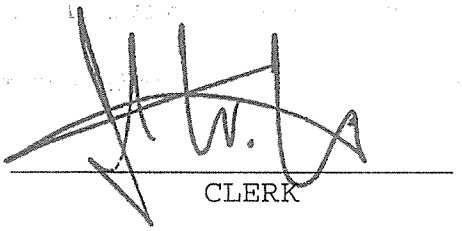

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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

236 Zoila Barrerra, Index 110260/03
Plaintiff-Appellant,

-against-

The New York City Transit Authority,
Defendant-Respondent.

Alexander J. Wulwick, New York, for appellant.

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

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered March 14, 2008, dismissing the complaint upon the grant of defendant's motion for judgment notwithstanding the verdict, unanimously affirmed, without costs.

Plaintiff testified at trial that she was walking in the middle of the staircase leading to the subway at 168th Street and St. Nicholas Avenue when she put her right foot on the step and something detached from the stair. After she fell, a person who helped her stand up identified the place where she fell. Plaintiff testified that four days later the unnamed third person went with her to the location, told her where she had fallen and took photographs. On one of the photographs, which was admitted into evidence, plaintiff marked the step where she allegedly fell.

The trial court set aside the verdict in favor of plaintiff on the ground that nothing was presented which showed that the condition existed for a period of time sufficient for defendant to have had a chance to repair it.

To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it *(see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Plaintiff failed to establish that defendant had constructive notice of the alleged defect. Constructive notice will not be imputed where the defect is latent *(see Bean v Rupert Towers Housing Co., Inc.*, 274 AD2d 305, 308 [2000]). Finally, plaintiff failed to establish the location of the accident through admissible evidence and instead relied on hearsay statements of an unidentified third party. Accordingly, plaintiff failed to prove a prima facie case of defendant's negligence.

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

ENTERED: APRIL 7, 2009

Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

237 Barbara LaFurge, Index 113990/03
Plaintiff-Appellant,

-against-

Richard Cohen, et al.,
Defendants-Respondents.

Joshua Annenberg, New York, for appellant.

Tarshis, Catania, Liberth, Mahon & Milligram, LLC, Newburgh (Richard F. Liberth of counsel), for Richard Cohen, respondent.

Steinberg, Symer & Platt, LLP, Poughkeepsie (Ellen Fischer-Bopp of counsel), for George Varsos, respondent.

Judgment, Supreme Court, New York County (Lottie E. Wilkins, J.), entered May 14, 2007, upon a jury verdict in defendants' favor, unanimously affirmed, without costs.

The trial court providently exercised its discretion in precluding testimony from plaintiff's expert oncologist regarding a new theory of liability that plaintiff failed to timely disclose and which was not apparent from her prior expert disclosures. Although CPLR 3101(d)(1) does not establish a specific time frame for expert witness disclosure, a trial court has discretion to preclude expert testimony for failure to comply with the statute. Here, plaintiff failed to timely serve her supplemental expert disclosure or provide an adequate explanation

for the delay (*see Lucian v Schwartz*, 55 AD3d 687, 688 [2008], *lv denied* NY3d , 2009 NY Slip Op 63827 [2009]; *Durant v Shuren*, 33 AD3d 843 [2006]).

Nor did the trial court improvidently exercise its discretion in precluding plaintiff's expert medical physicist from testifying regarding the biological equivalent dose (BED) of the high dose rate radiation brachytherapy administered to plaintiff. The expert is not a medical doctor and had no experience calculating the BED under the specific and unique circumstances involved in treating plaintiff's rare illness. The calculation involved required specialized medical knowledge in order to impute certain values to the type of tissue and the tumor being treated (*see de Hernandez v Lutheran Med. Ctr.*, 46 AD3d 517, 518 [2007]; *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d 892, 895-896 [2004]; *Jordan v Glens Falls Hosp.*, 261 AD2d 666, 667 [1999]).

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.

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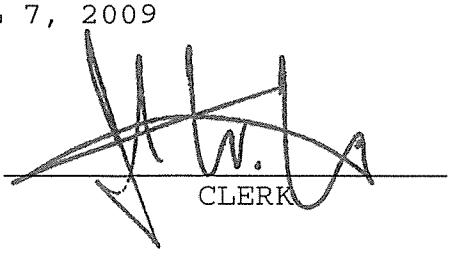

Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

238 The People of the State of New York, Ind. 908/04
Respondent,

-against-

Jose Vega,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Peter Rienzi of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered September 28, 2004, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to a term of 4 to 8 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, including its acceptance of the officer's testimony as to the transaction he observed, and its rejection of

defendant's testimony (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

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

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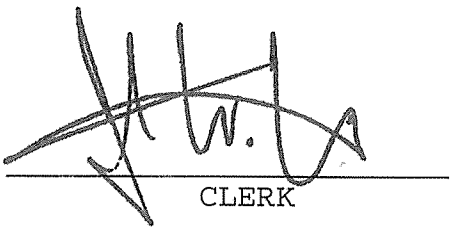

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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

240 The People of the State of New York, Ind. 4758N/06
Respondent,

-against-

Lenard Jones,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered on or about March 7, 2008, 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.

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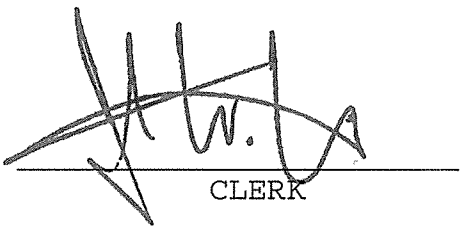

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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

242 The People of the State of New York, Respondent, Ind. 3613/04

-against-

Angel Aviles, Defendant-Appellant.

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

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

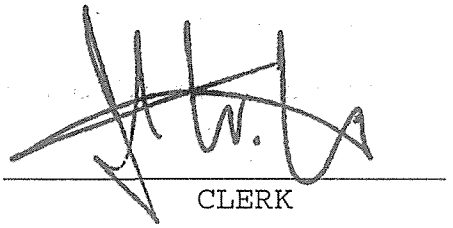
Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered May 5, 2005, as amended July 9, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 4½ to 9 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence warrants the inference that defendant took part in the transaction as part of a team of drug dealers (*see People v Eduardo*, 11 NY3d 484, 493 [2008]). Defendant accompanied the person who actually made the exchange of drugs for money from the beginning of the incident until they

were arrested together, a short distance away. During the incident, defendant repositioned himself and his bicycle in order to hide the transaction from view, responding to directions from the seller as to how to optimally position himself and then telling the seller to "Go ahead man, I got you. Go ahead and do her [i.e., the undercover buyer] now." This pattern of conduct established defendant's connection with the seller and was inconsistent with that of a bystander who simply sought to help the buyer make a purchase.

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

ENTERED: APRIL 7, 2009



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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

243 The People of the State of New York, Respondent, Ind. 4713/04

-against-

Rashad Dunkley, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered July 13, 2005, as amended August 30, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him to an aggregate term of 1 to 3 years, unanimously affirmed.

The court properly denied defendant's challenge for cause, since the prospective juror's responses, viewed as a whole, did not cast doubt on his ability to reach a fair and impartial verdict (*see People v Chambers*, 97 NY2d 417 [2002]; *People v Arnold*, 96 NY2d 358 [2001]). The panelist unequivocally agreed that, notwithstanding his positive feelings toward the police, he would follow the court's instruction to evaluate police testimony like any other testimony. During subsequent questioning by

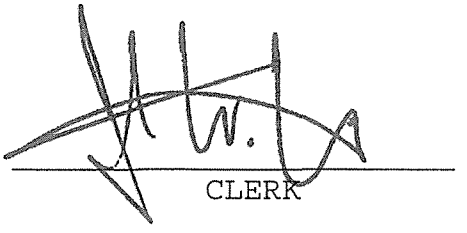
defense counsel, the panelist never retracted, qualified, or wavered from that assurance.

The court properly modified its original *Sandoval* ruling after defendant testified that he was "not a seller." In context, this was a global denial of drug dealing not limited to the case on trial, and it opened the door to questioning about his prior marijuana sale conviction (*see People v Fardan*, 82 NY2d 638, 646 [1993]). We have considered and rejected defendant's remaining arguments on this issue.

The prosecutor's cross-examination of defendant regarding his failure to call his girlfriend and a close friend as witnesses did not shift the burden of proof (*see People v Overlee*, 236 AD2d 133, 143 [1997], *lv denied* 91 NY2d 976 [1998]. Defendant referred to both persons in his account of his allegedly innocent presence in the vicinity of the drug transaction, and they were in a position to provide material testimony substantiating portions of his account.

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

ENTERED: APRIL 7, 2009



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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

244 Michelle Nguyen, Index 100227/06
Plaintiff-Respondent,

-against-

Yasser Abdel-Hamed, et al.,
Defendants,

Lei Chang, et al.,
Defendants-Appellants.

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

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered June 25, 2008, which, to the extent appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted, and, upon a search of the record, the remaining defendants' motion for summary judgment granted as well. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint in its entirety.

Defendants made a prima facie showing that plaintiff suffered no permanent or significant limitation of use of her

cervical, thoracic and lumbar spine, by submitting the affirmed medical report of a neurologist describing the tests he performed and setting forth the results supporting his finding that plaintiff had full range of motion in the spine and his conclusion that plaintiff was not disabled at the time of the examination and that there was no permanency or residual effect (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *see Taylor v Terrigno*, 27 AD3d 316 [2006]). Plaintiff's chiropractor, while concluding, to the contrary, that plaintiff's injuries were permanent and significant, failed to set forth any objective basis for his findings, such as the tests he performed to measure plaintiff's range of motion (*see Toure, supra; Harris v Ariel Transp. Corp.*, 55 AD3d 323 [2008]; *Cartha v Quinn*, 50 AD3d 530 [2008], *lv to denied* 11 NY3d 704 [2008]; *Rodriguez v Abdallah*, 51 AD3d 590, 591 [2008]).

Defendants also demonstrated that plaintiff suffered no "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102[d]), by submitting plaintiff's deposition testimony that she was confined to home for two weeks and missed only two or three days of work following the accident (*see Prestol v McKissock*, 50 AD3d 600 [2008]). To the extent plaintiff's opposition affidavit differs with her testimony regarding her alleged impairment during the 90/180-day period,

the affidavit appears to have been tailored to avoid the consequences of her earlier testimony and is insufficient to defeat summary judgment (*see Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327 [2006]).

Upon a search of the record, the nonappealing defendants' motion is also granted (*see Lopez v Simpson*, 39 AD3d 420 [2007]).

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

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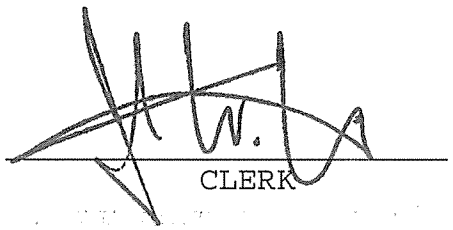


Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

245-
246 Jennifer Cangro, Index 109694/07
Plaintiff-Appellant,

-against-

John Z. Marangos,
Defendant-Respondent.

Jennifer Cangro, appellant pro se.

John Z. Marangos, Staten Island, respondent pro se.

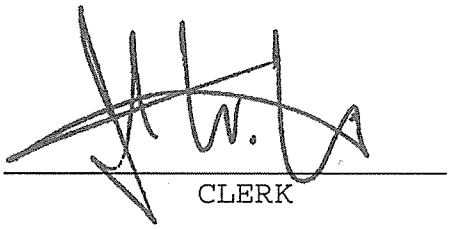
Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered January 22, 2008, which denied plaintiff's motion for an order "granting compensatory and punitive damages" and setting a trial date, and granted defendant's cross motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

The allegations in the complaint and in plaintiff's affidavit constitute "bare legal conclusions" (*see Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1994]). Plaintiff's fraud claims are not pleaded with the requisite particularity (CPLR 3016[b]). Her defamation claims fail because the alleged offending statements were made in the context of a judicial proceeding to which they were directly

related (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 174-176 [2007]).

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

ENTERED: APRIL 7, 2009



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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

247 The People of the State of New York, Respondent, SCI 8667/83

-against-

Albert Muniz, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

Order, Supreme Court, New York County (Charles J. Tejada, J.), entered on or about December 4, 2006, which denied defendant's motion to be resentenced pursuant to the Drug Law Reform Act of 2005 (L 2005, ch 643), unanimously affirmed.

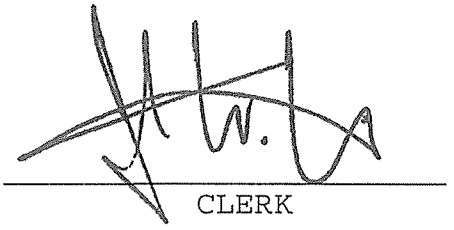
The court properly found that defendant was ineligible for resentencing in that he was not more than three years from being eligible for parole (*see People v Bautista*, 26 AD3d 230 [2006], *app dismissed* 7 NY3d 838 [2006]). Defendant was sentenced to six years to life in 1984. He first became eligible for parole on September 28, 1989, long before the DRLA was enacted. Rather than being paroled, he was transferred to a federal prison on January 3, 1990 to serve a lengthy federal sentence. At the time of his resentencing motion, his next New York parole eligibility date was November 28, 2008. Although as a practical matter

defendant will not be considered for parole until 2020, when he is due to complete his federal sentence, that fact does not expand his right to be resentenced. It is undisputed that without the federal incarceration defendant would have been ineligible for resentencing because he would not have been more than three years from parole eligibility. The Legislature did not intend the "illogical, if not perverse" (*People v Then*, 11 NY3d 527, 537 [2008]) result of granting defendant the benefit of resentencing consideration for which he would otherwise be ineligible, merely because he committed additional crimes.

Defendant is also ineligible for resentencing for the separate reason that he is not in the custody of the Department of Correctional Services (*see* L 2005, ch 643, § 1). Contrary to defendant's contention, jurisdiction and custody are not equivalent.

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

ENTERED: APRIL 7, 2009



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Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

248 Brook Peters, etc., et al., Plaintiffs-Appellants, Index 112866/05

-against-

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

Weitz & Luxenberg, P.C., New York (Lawrence Goldhirsch of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

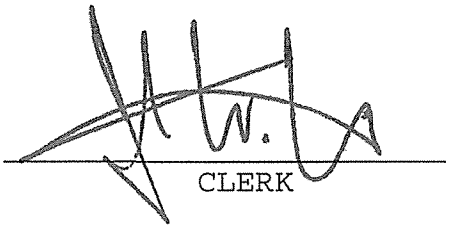
Order, Supreme Court, New York County (Karen S. Smith, J.), entered November 15, 2007, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The infant plaintiff allegedly was injured while climbing an eight-foot fence around a public playground when he slipped and got caught on one of the six-inch spikes at the top. Through plaintiffs' testimony and photographs of the fence, defendants established prima facie that the fence was in a reasonably safe condition and that the spikes were open and obvious (*see Koppel v Hebrew Academy of Five Towns*, 191 AD2d 415 [1993], *lv denied* 82 NY2d 652 [1993]). In opposition, plaintiffs failed to raise an issue of fact as to these issues or the negligent design or construction of the fence (*see id.*).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: APRIL 7, 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 7, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
David Friedman
James M. McGuire
Karla Moskowitz, Justices.

In re Tishman Construction Corp. of New York, et al.,
Petitioners,

-against-

252
[M-687 & 1136]

Hon. Jane Solomon, etc., et al.,

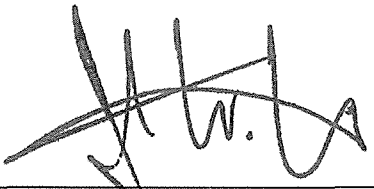
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

And respondent Schiavone Construction Company having cross-moved to dismiss the article 78 proceeding,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied, the cross motion to dismiss granted and the proceeding dismissed, with costs and disbursements.

ENTER:



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

253 The People of the State of New York, Ind. 4363/06
Respondent,

-against-

George Hayes,
Defendant-Appellant.

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

George Hayes, appellant pro se.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 10, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, criminal possession of a controlled substance in the fourth degree, and criminally using drug paraphernalia in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 15 years to life, unanimously affirmed.

Defendant's motion for a trial order of dismissal was insufficiently specific to preserve his present challenge to the legal insufficiency of the evidence supporting his weapon possession conviction (*see People v Hawkins*, 11 NY3d 484, 492 [2008]), 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. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Evidence including, among other things, an incriminating photograph supported the conclusion that defendant was a member of a drug-selling operation conducted out of an apartment, and that he and the other participants jointly possessed a pistol in connection with their drug enterprise (*see People v Tirado*, 38 NY2d 955 [1976]).

Defendant's claim that his trial counsel rendered ineffective assistance by failing to request certain limiting instructions regarding the jury's use of the photograph depicting defendant holding a pistol is unreviewable on direct appeal because it involves matters outside the record concerning counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). In particular, counsel may have had a strategic reason for accepting the limiting instruction the court actually delivered, which was arguably quite favorable to defendant, and refraining from asking for a different instruction. On the existing record, to the extent it permits review, we find that defendant received effective

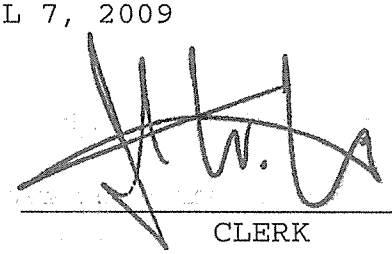
assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that his counsel's acceptance of the court's instruction was unreasonable, or that it caused him any prejudice or deprived him of a fair trial.

We have considered and rejected defendant's pro se claims.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

254 Glenn Herman, et al., Index 100684/01
Petitioners-Respondents,

-against-

Ronald W. Gill,
Respondent-Appellant.

Ronald W. Gill, Washington, D.C., appellant pro se.

Altier & Vogt, LLC, New York (Philip P. Vogt of counsel), for respondents.

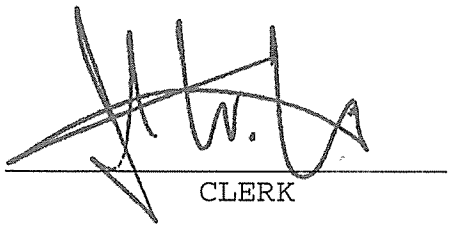
Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 8, 2008, which granted petitioners' motion to confirm the report of the Special Referee and directed respondent to pay petitioners $154,509.24, unanimously affirmed, without costs.

It is well settled that "where questions of fact are submitted to a referee, it is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility" (*Kardanis v Velis*, 90 AD2d 727 [1982]). The record does not demonstrate that the Special Referee exhibited partiality toward petitioners. Nor does it otherwise disclose any ground upon which the Referee's

credibility determinations should be disturbed. The amount awarded is supported by the record.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

255-
256 In re Jonathan R.,

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

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

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for presentment agency.

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about September 28, 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 robbery in the second degree, attempted robbery in the second degree, attempted assault in the second degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 18 months, unanimously modified, on the law, to the extent of vacating the finding as to attempted robbery in the second degree and dismissing that count of the petition, and otherwise affirmed, without costs.

The court's finding 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 and identification. The victim was certain that appellant actively participated in the attack, particularly by pulling the victim's leg and causing him to fall. The minor inconsistencies cited by appellant do not warrant a different result. In particular, the discrepancy between the complaint and the victim's testimony was readily explained by evidence that the 14-year-old victim did not draft the complaint and did not fully understand what he was signing.

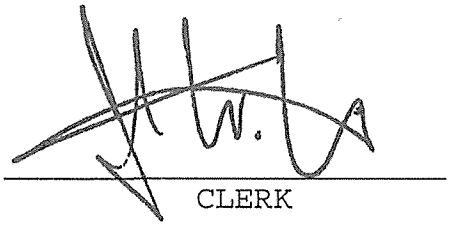
The court properly declined to strike the victim's testimony as a sanction for the prosecution's belated disclosure of material governed by *Brady v Maryland* (373 US 83 [1963]). Appellant was able to make effective use of this information by placing it before the trier of fact (*see People v Cortijo*, 70 NY2d 868 [1987]), and his claim that earlier disclosure or prompt memorialization of the information might have had an impact on the outcome of the case is speculative.

Appellant was charged with an attempt to commit robbery in the second degree as defined by Penal Law § 160.10(2)(a). The statute provides that a person commits the crime when he forcibly steals property and, during the commission of the crime or immediate flight therefrom, he or another participant "[c]auses

physical injury to any person who is not a participant in the crime." This count should be dismissed in light of the court's specific finding that the victim was not injured. We have considered and rejected appellant's remaining claims.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

257 Goddess Morris, etc., et al., Index 119137/06
Plaintiffs-Respondents,

-against-

Ilya Cab Corp. et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Steven N. Feinman of counsel), for appellants.

Weiser & Associates, LLP, New York (Edward Spark of counsel), for respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 17, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss plaintiff Keith Morris's 90/180 day claim of serious injury, and otherwise affirmed, without costs.

Defendants established a prima facie case that plaintiffs did not suffer serious injuries within the meaning of Insurance Law § 5102(d). However, plaintiffs raised issues of fact (except as to the 90/180 day category) by submitting (a) the reports of their treating physicians providing objective test results to substantiate their subjective complaints of pain and explaining why plaintiffs' injuries were permanent and (b) MRI reports indicating disc herniation (Keith Morris) and bulging (Goddess Morris) and tears of the glenoid labrum (both plaintiffs) (*see*

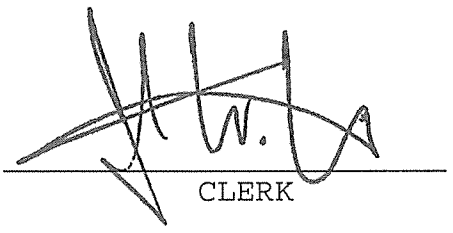
Newcomb v Leslie, 300 AD2d 92 [2002]; *DaSilva v Storz*, 290 AD2d 288 [2002]). One of the doctors' reports for Keith also explained his pre-existing condition.

The only evidence in the record that Keith had to quit his job as a result of the accident is his own testimony. This is insufficient (*see e.g. Uddin v Cooper*, 32 AD3d 270, 272 [2006], *lv denied* 8 NY3d 808 [2007]; *Arrowood v Lowinger*, 294 AD2d 315, 316-317 [2002]). The statement in the September 2006 report of Keith's treating physician that "[h]e is totally disabled and I have advised him to restrict his activities" is too general to support a 90/180 day claim (*see Gorden v Tibulcio*, 50 AD3d 460, 463 [2008]).

We note that Supreme Court has precluded Goddess from relying on the 90/180 day category of serious injury and that plaintiffs have not cross-appealed.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

258 Milca Esdaille, individually and as Mother and Natural Guardian of Alanna Vaughns, etc., Plaintiffs-Appellants, Index 16238/03 15508/04

-against-

Whitehall Realty Company, et al., Defendants-Respondents.

[And Another Action]

Godosky & Gentile, P.C., New York (Brian J. Isaac of counsel), for appellants.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered November 30, 2007, which in an action for personal injuries resulting from an apartment fire, granted the motion of defendants Whitehall Realty Company and Hampton Management Company (sponsor defendants) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

The court properly found that the motion for summary judgment was timely, as it was served within the time dictated by the court (*see* CPLR 2211; *Gazes v Bennett*, 38 AD3d 287 [2007]). The 10-day delay in re-noticing the motion was due to the Clerk's office rejection of the original motion papers because the case

had been transferred to another part that required motions to be brought by order to show cause (*see Rivera v Glen Oaks Vil. Owners, Inc.*, 29 AD3d 560 [2006]).

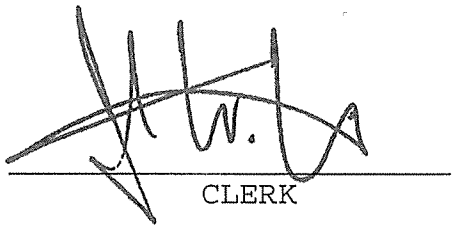
Sponsor defendants established their prima facie entitlement to summary judgment. In opposition, plaintiffs failed to raise a triable issue of fact.

Sponsor defendants cannot be held liable for injuries allegedly sustained as a result of the installation of window guards on the window to the terrace, as such was the responsibility of the building owner. In any event, the window guards were properly installed in accordance with the New York City Health Code (24 RCNY 131.15[a]), and contrary to plaintiffs' contention, the terrace did not constitute a fire escape (*see* Administrative Code of City of NY § 27-2004[a][43]; Multiple Dwelling Law § 4[42][c]]). Furthermore, plaintiffs' theory based on an allegedly malfunctioning smoke detector is equally unavailing because even if, as claimed by plaintiffs, their duty to maintain the smoke detector in proper working order (*see Tucker v 64 W. 108th St. Corp.*, 2 AD3d 193 [2003], *lv dismissed* 2 NY3d 759 [2004], *lv denied* 5 NY3d 710 [2005]) was shifted through

a course of conduct by the building owner (*see Ritto v Goldberg*, 27 NY2d 887, 889 [1970]; *Cherubini v Testa*, 130 AD2d 380, 382 [1987]), such burden shifting impacts owner defendants, not sponsor defendants.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

259 Kory Kleinberg, et al.,
Plaintiffs-Appellants,

-against-

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

Triboro Bridge and Tunnel Authority, et al.,
Defendants-Respondents.

- - - - -

Ronald Villa, et al.,
Plaintiffs-Appellants,

-against-

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

Triboro Bridge and Tunnel Authority, et al.,
Defendants-Respondents.

- - - - -

Triboro Bridge and Tunnel Authority, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Kleinberg Electric, Inc.,
Third-Party Defendant-Respondent.

- - - - -

Start Elevator, Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

Washington Infrastructure Services, Inc.,
Second Third-party Defendant-Respondent.

- - - - -

Index 125310/99
18214/00
590041/01
590226/03
591012/03

Triborough Bridge and Tunnel Authority, etc.,
Third Third-Party Plaintiff-Respondent,

Schiavone Construction Co., Inc.,
Third Third-Party Plaintiff-Respondent,

-against-

Washington Group International, Inc., etc.,
Third Third-Party
Defendant-Respondent-Appellant.

Robert I. Elan, New York (Richard C. Bell of counsel), for Kory and Rose Kleinberg, appellants.

Pollack Pollack Isaac & DeCicco, New York (Brian J. Isaac of counsel), for Ronald Villa and Clarence White, appellants.

Strongin Rothman & Abrams, LLP, New York (David Abrams of counsel), for Washington Group International, Inc., respondent-appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Sean P. Dwyer of counsel), for Triboro Bridge and Tunnel Authority and Metropolitan Transportation Authority, respondents.

Harrington Ocko & Monk, LLP, White Plains (I. Paul Howansky of counsel), for Schiavone Construction Co., Inc., respondent.

Keller, O'Reilly & Watson, P.C., Woodbury (Nicholas R. Capece, Jr. of counsel), for Start Elevator, Inc., respondent.

MacKay, Wrynn & Brady, LLP, Douglaston (Austin P. Murphy, Jr. of counsel), for Kleinberg Electric, Inc., respondent.

Order, Supreme Court, New York County (Donna Mills, J.), entered October 9, 2007, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing their claims under Labor Law § 240(1) and

§ 200 and common law negligence, and dismissed as moot all counterclaims and cross claims for contractual indemnification, unanimously modified, on the law, the motions denied with respect to the § 200 and common law negligence claims, those claims reinstated against defendants Triboro Bridge and Tunnel Authority (TBTA), Metropolitan Transportation Authority (MTA) and Schiavone Construction, the negligence claim reinstated against Start Elevator and the claims for contractual indemnification by TBTA, MTA, Schiavone and third third-party defendant Washington Group International reinstated, as indicated herein, and otherwise affirmed, without costs.

This action arises out of injuries allegedly sustained by plaintiffs Kory Kleinberg, Villa and White while working on a construction project in July 1999 at the Harlem River Lift Bridge connecting Manhattan to Randall's Island. The project called for changing the lifting ropes and cables for the movable bridge, along with replacement of the elevators on either side of the bridge. Plaintiff workers, electricians employed by subcontractor Kleinberg Electric, were injured when the Tower C service elevator in which they were riding allegedly went into a free fall or over-speed and crashed at the bottom of the shaft from a height of 80 to 100 feet.

The Labor Law § 240(1) claims were properly dismissed. The

facts show that these injuries were not attributable to the elevation risks contemplated by that section. The elevator was not designed as a safety device within the meaning of the statute (*see DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191, 192 [2005]).

As to the § 200 and negligence claims, TBTA was the bridge owner, so its control of the elevator was nondelegable (*see Wagner v Grinnell Hous. Dev. Fund Corp.*, 260 AD2d 265, 266 [1999], *lv denied* 99 NY2d 502 [2002]). Schiavone, as general contractor, was responsible for calling B&G Elevator or Start in the event of a shutdown, and at times may have attempted its own repairs. TBTA and Schiavone thus had the authority to control the injury-producing activity (*see Sweeney-Kamouh v City of New York*, 180 AD2d 487 [1992]). Moreover, TBTA made the decision to hold off replacing this more-than-60-year-old elevator until this construction project was finished, even though testimony established awareness of weight capacity restrictions and potentially heavy usage, and TBTA's consultant having told Schiavone about weight overloading on many occasions prior to this accident. This created factual issues as to Schiavone's notice of said violations (*see id.*).

The negligence claim against Start should be reinstated because it has not sustained the burden of establishing that it

was free from negligence. Start's maintenance contract required it to inspect the safety devices and the condition of the cables and the brakes, to conduct a "no load and full load . . . test of the safety mechanism, [and] overhead speed governors," and to recalibrate and scale the governors for proper tripping speed, if necessary. New York City Elevator Rules in effect when the bridge was constructed also required a governor and safety device to control in over-speed situations. Testimony established that despite these requirements, the elevator did not have an over-speed governor, and the maintenance reports provided by Start do not indicate what testing was done, if any. Under these circumstances, even discounting the affidavits of plaintiffs' experts, as the motion court did, the documentary evidence and testimony establish triable issues with respect to whether Start "should have known of the defective condition that allegedly caused" plaintiffs' injuries (*Solowij v Otis El. Co.*, 295 AD2d 145 [2002]).

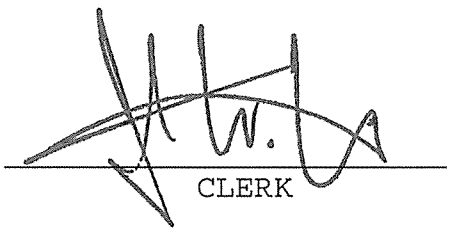
The doctrine of res ipsa loquitur may apply to this case, inasmuch as a free-falling elevator does not ordinarily occur in the absence of negligence (*see e.g. Hodges v Royal Realty Corp.*, 42 AD3d 350, 351-352 [2007]). Moreover, it is yet to be determined whether plaintiffs contributed to the accident. This Court has applied the doctrine to cases involving an elevator

malfunction (*see Dickman v Stewart Tenants Corp.*, 221 AD2d 158 [1995]; *Burgess v Otis El. Co.*, 114 AD2d 784 [1985], *affd* 69 NY2d 623 [1986]), and contrary to the motion court's reasoning, the fact that more than one entity may have been in control of the elevator does not preclude the application of the doctrine (*see Felder v Host Marriott Corp.*, 276 AD2d 276 [2000]).

The claims for contractual indemnification were incorrectly dismissed as moot and should be reinstated. Third third-party defendant Washington Group International's claims for contractual indemnification should be conditionally granted. Inasmuch as the Kleinberg Electric contract appears to run afoul of the General Obligations Law with respect to TBTA, MTA and Schiavone, their request for contractual indemnification should be denied without prejudice as premature, subject to a determination on negligence.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

260 The People of the State of New York, Ind. 6326/04
Respondent,

-against-

Onnie Parker,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Amyjane Rettew of counsel), for respondent.

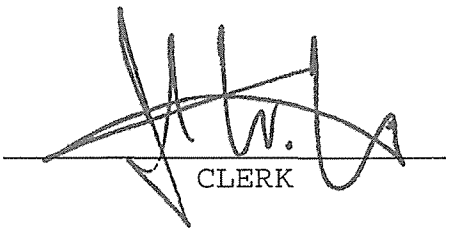
Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at mistrial; Maxwell Wiley, J. at second jury trial and sentence), rendered February 15, 2006, convicting defendant of burglary in the second degree and attempted rape in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 12 years, unanimously affirmed.

Defendant's retrial was not barred by double jeopardy, because the court's sua sponte declaration of a mistrial was based on manifest necessity (*see Matter of Enright v Siedlecki*, 59 NY2d 195, 200 [1983]). The court observed that defense counsel had fallen asleep during the prosecutor's cross-examination of defendant. In addition to the court's own observations, the record reveals, among other things, counsel's failure to react to events during the cross-examination,

counsel's complete failure to respond to the court's inquiry as to whether he wished to ask any questions on redirect, defendant's spontaneous expression of dismay at his lawyer's condition, and counsel's implied admission that he had been asleep. The conclusion is inescapable that counsel slept through a significant portion of the prosecutor's questioning and did not merely doze off or close his eyes. Furthermore, the court concluded that counsel was having "a particularly terrible trial," considering "what occurred by way of topics, questions, not understanding what the witnesses had said." and thus had not met the standard of effective representation. Accordingly, the court concluded that the attorney not only failed to function as counsel at a critical time (*see Tippins v Walker*, 77 F3d 682, 687 [2d Cir 1996]), but was generally ineffective. In these circumstances, a mistrial was necessary to protect defendant's right to effective assistance of counsel, and we conclude that there was no reasonable alternative.

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

ENTERED: APRIL 7, 2009



Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

261 Barbara A. Lazore, et al., Index 102674/08
Plaintiffs-Respondents,

-against-

NYP Holdings, Inc., doing business as
The New York Post,
Defendant-Appellant.

Hogan & Hartson LLP, New York (Slade R. Metcalf of counsel), for appellant.

Barr & Associates, P.C., New York (Daniel A. Seff of counsel), for respondents.

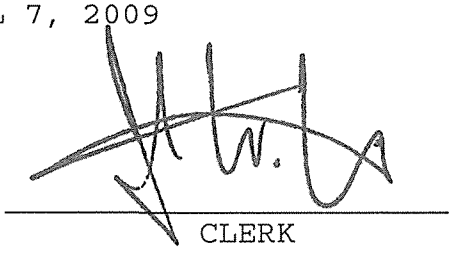
Order, Supreme Court, New York County (Carol Edmead, J.), entered October 17, 2008, which, in an action for defamation by the lone three voting members of the Tribal Council of the St. Regis Mohawk Tribe, an Upstate New York tribe that numbers approximately 2,700 individuals, denied defendant New York Post's motion to dismiss the complaint for failure to state a cause of action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

The offending editorials essentially asserted that the St. Regis Mohawk Tribe should not be permitted to run a proposed casino because it "amounts to a criminal enterprise," having regularly engaged in many criminal activities, including drug,

alcohol, cigarette and alien smuggling, as well as shoot-outs with law enforcement both in the United States and Canada. The editorials frequently referred to "the tribe" and "the Mohawks" but did not mention the Tribal Council or plaintiffs individually. Plaintiffs allege that it can be reasonably inferred that the editorials were "of and concerning" the governing body of the St. Regis Mohawk Tribe, i.e., the Tribal Council, i.e., the three plaintiffs. We dismiss the complaint because, even accepting such inference, the offending statements were directed against a governing body and how it governed, rather than against its individual members; there were no statements that the Tribal Council members were individually corrupt or individually promoting a criminal enterprise (*see New York Times Co. v Sullivan*, 376 US 254, 292 [1964]; *Rosenblatt v Baer*, 383 US 75, 82-83 [1966]). In this respect, disclosure cannot avail plaintiffs (*see Ravenna v Christe's Inc.*, 289 AD2d 15, 16 [2001]).

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

262 The People of the State of New York, Ind. 2655/05
Respondent,

-against-

Ernest Robinson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Edward A. Jayetileke of counsel), for respondent.

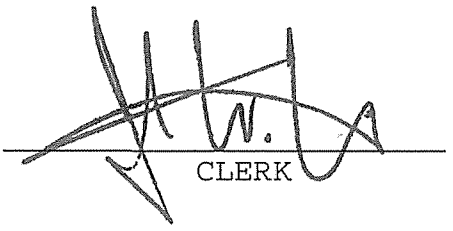
Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered April 18, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, assault in the third degree and menacing in the second degree, and sentencing him to an aggregate term of 2 to 6 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence supports the conclusion that defendant struck the victim with an object, and that the object was the handgun he had just displayed. Defendant's acquittal of other charges does not

warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

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

ENTERED: APRIL 7, 2009



Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

263 Steven Tuberman, Index 8196/05
Plaintiff-Appellant,

Rosalba Lopez,
Plaintiff,

-against-

Andrea A. Hall, et al.,
Defendants-Respondents.

Taubman Kimelman & Soroka, LLP, New York (Antonette M. Milcetic of counsel), for appellant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa Corchia of counsel), for Andrea A. and Trevor A. Hall, respondents.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for Gregory Blackwell, respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 10, 2007, which, to the extent appealed from, dismissed plaintiff-appellant Steven Tuberman's complaint, alleging "serious injury" under Insurance Law § 5102(d), unanimously affirmed, without costs.

The motion court properly dismissed plaintiff's complaint as against the Hall defendants. The Hall defendants satisfied their prima facie burden of establishing that plaintiff did not sustain a statutorily-defined serious injury under Insurance Law § 5102(d) (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [2003]). The

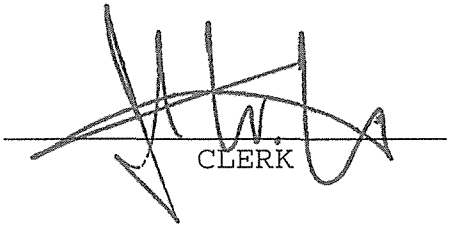
reports of the Hall defendants' expert orthopedist, Dr. Freeman, and expert neurologist, Dr. Schwartz, which showed that plaintiff had only minor limitations in the range of motion of his right knee, lumbar spine, and shoulders, established that plaintiff's injuries did not amount to a "significant" or "permanent" limitation of use of those body parts as a matter of law (*see Licari v Elliott*, 57 NY2d 230, 236 [1982]; *see e.g. Santos v Taveras*, 55 AD3d 405, 405 [2008]). Moreover, the reports of the Hall defendants' expert radiologist, Dr. Tantleff, stated that any abnormalities revealed by the MRIs of plaintiff's cervical spine, lumbar spine, and right knee were degenerative in nature and not caused by the subject accident.

In opposition to the motion, plaintiff failed to proffer quantitative or qualitative evidence in admissible form raising an issue of fact that he did sustain a "serious" injury (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]).

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

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

ENTERED: APRIL 7, 2009



Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

264 The People of the State of New York, Ind. 4857/06
Respondent,

-against-

Raymond Harris,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered June 13, 2007, convicting defendant, after a jury trial, of robbery in the second degree, grand larceny in the second degree, and four counts of larceny in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 12 years, 7 to 14 years and 2 to 4 years (four terms), unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion made after the prosecutor's summation. To the extent that the prosecutor's comments may be viewed as commenting on defendant's exercise of his right to a trial, the court's prompt curative actions were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). Defendant's remaining challenges to the summation do

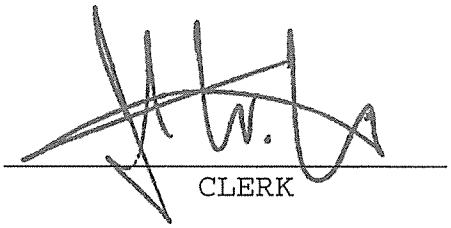
not warrant reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's Confrontation Clause claim is unpreserved (*see e.g. People v Lopez*, 25 AD3d 385 [2006], *lv denied* 7 NY3d 758 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we find that the document at issue was not testimonial (*see People v Freycinet*, 11 NY3d 38 [2008]; *People v Rawlings*, 10 NY3d 136 [2008]).

We perceive no basis for reducing the sentence. Defendant's argument concerning the mandatory surcharge and fees is unavailing (*see People v Guerrero*, __NY3d__, NY Slip Op 02142).

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

265 Ames Ray, Index 604381/98
Plaintiff-Appellant,

-against-

Christina Ray,
Defendant-Respondent.

McLaughlin & Stern, LLP, New York (Peter C. Alkalay of counsel), for appellant.

Dechert, LLP, New York (Eric C. Kirsch of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 11, 2008, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

The court improperly dismissed the claim for $532,288.10, which was the core of the first cause of action, on the ground that it was contained in a confession of judgment that was not filed within the three years required by CPLR 3218. While failure to file this document would render it void as a confession of judgment, it did not extinguish the underlying debt (*see Reliance Ins. Co. v Brown*, 59 AD2d 968, 969 [1977]).

The court also improperly dismissed so much of the first

cause of action as sought recovery of some $99,860 in credit card debt for which defendant had expressly agreed, in writing, to reimburse plaintiff. At oral argument, the court specifically found defendant's arguments against this debt unavailing and denied this aspect of her motion. However, without reference to this debt in its written decision, the court nonetheless summarily dismissed the entire cause of action. Defendant's argument that plaintiff offered no evidence that he paid these debts is unavailing, as the agreement defendant signed expressly states that she alone accumulated these debts on specific credit cards in plaintiff's name. Defendant, who has the burden of demonstrating prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]), offered no evidence of a default by plaintiff on these debts, or that he does not remain liable for them. Therefore, she has failed to carry her burden of demonstrating entitlement to summary judgment on this issue.

The court also improperly dismissed so much of plaintiff's first cause of action as claimed nearly $19,000 from a liquidated damages clause in an agreement signed by defendant, by which she agreed to provide plaintiff with timely financial statements as a result of her default on some $500,000 of apparent debt, and to pay "at least an additional $50" for each day that such

statements were late. The statement in the agreement that this $50 per day "shall not be indicative of the actual damage" is not an admission that it bears no reasonable relationship to the actual damages, but appears to be no more than a recognition of the fact that such liquidated damages may only be enforced when the actual damages are difficult or impossible to ascertain (*see Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425 [1977]). Defendant correctly notes that there is no evidence that this liquidated damages amount bears a reasonable relationship to the actual damages plaintiff suffered. However, there is also no evidence that it does not. "The burden is on the party seeking to avoid liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty," and to "demonstrate either that damages flowing from [the breach] were readily ascertainable at the time [the parties] entered into their . . . agreement or that the [liquidated damages] fee is conspicuously disproportionate to these foreseeable losses" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]). It is defendant, not plaintiff, who has failed to carry her burden.

The court also improperly dismissed so much of the first cause of action as sought to recover amounts allegedly owed for defendant's purchase of plaintiff's half interest in the parties' Sagaponack property. It is uncontested that the parties both

signed a document in which defendant agreed to this purchase. This agreement included the names of the parties, the price of the purchase, the terms of financing, a description of property, and plaintiff's relinquishment of all rights, title and interest in the property. As such, it was, on its face, a binding obligation (*see Wacks v King*, 260 AD2d 985 [1999]), and defendant does not argue that the written agreement lacked any material term. She does argue that there was no performance because legal title was never put in her name and the agreement was never filed; but upon execution of a valid contract, the equitable tile passed to her, despite legal title remaining in plaintiff, and defendant's interest in the real property thus came into existence by operation of law (*see Dubbs v Stribing & Assoc.*, 274 AD2d 32, 38 [2000], *affd* 96 NY2d 337 [2001]; *Bean v Walker*, 95 AD2d 70, 72 [1983]; *Occidental Realty Co. v Palmer*, 117 App Div 505, 5067], *affd* 192 NY 588 [1908]). Moreover, upon the passing of such interest, defendant assumed the risk of loss and the right to all appreciation (*see Bean*, 95 AD2d at 73). Defendant's written assumption of the debt to plaintiff for the purchase constituted sufficient consideration, and was also evinced in the ledger entries kept by the parties. While issues of fact clearly exist with regard to the parties' intentions relating to all of these documents and the ledger, as well as to defendant's claim

of duress, they are not raised on appeal and would not, in any event, entitle defendant to summary judgment.

Defendant has also failed to demonstrate plaintiff's abandonment of this agreement, which would have to be knowing, voluntary and intentional (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). That the property was refinanced in plaintiff's name does not prove, as a matter of law, that any abandonment occurred. Plaintiff offered evidence that defendant signed an agreement assuming full responsibility for the refinancing, and took plaintiff's power of attorney for that purpose, while agreeing to indemnify plaintiff against any claims arising from the refinancing. Plaintiff's involvement in the new financing was required because he retained legal title while equitable title passed to defendant. Moreover, that plaintiff's name appeared on an action against a contractor after the agreement was signed does not prove, as a matter of law, that plaintiff abandoned the agreement; plaintiff testified he was unaware of that action until six years later, and he produced the verification page of the complaint therein, containing only defendant's name. Therefore, at the very least, issues of fact exist as to any claim of abandonment.

Similarly, the court improperly dismissed so much of the

first cause of action as sought to recover amounts allegedly owed from defendant's purported sale of a half interest in her Manhattan cooperative apartment, and plaintiff's subsequent re-sale of that interest back to defendant. It is again uncontested that plaintiff executed express agreements for these transfers. That the shares or proprietary lease were never put into plaintiff's name does not invalidate the agreements, because plaintiff obtained a beneficial ownership in such shares upon execution of the contract (*see generally Broderick v Alexander*, 268 NY 306, 309 [1935]), which he then transferred back to defendant. He also offered documents, signed by defendant, in which she acknowledged receipt of interest payments on the loan she extended to plaintiff for the initial purchase, as well as documents, again signed by defendant, indicating that plaintiff paid half the maintenance and special assessments for the apartment. Therefore, at the very least, issues of fact exist as to the validity of these transfers, and the claim should not have been dismissed on summary judgment.

The court also improperly dismissed the second cause of action that was based on an agreement, again signed by defendant, whereby plaintiff allowed defendant to continue trading on his stock account, and defendant agreed to pay plaintiff any amount by which his account "falls" below $350,000. Ultimately,

defendant lost plaintiff's entire investment. The court found that the account was already below $350,000, and never again exceeded this amount. It also found that the agreement was prospective only, and not meant to cover losses that had already occurred, or any losses until the account again exceeded $350,000, which it never did. The court thus found that the agreement did not warrant recovery of this amount. However, the words used in the agreement are in the present tense, not necessarily indicative of an exclusively prospective application. At best, the agreement is ambiguous on this point, warranting denial of the motion for summary judgment on this ground (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 58 [2008]). Moreover, defendant testified at her deposition that it was her understanding the agreement was applicable to "not just further losses, but $350,000 worth of losses." This apparent conflict in her testimonies raises an issue of fact.

Defendant also argued that she did not sign this agreement until September 1994, at which time only $1,285 remained in the account, which was an insufficient amount with which to continue trading. However, the agreement they signed was dated June 14, 1994, and at least an issue of fact exists as to when the parties agreed to such an arrangement. If defendant agreed to it in June 1994, when there was more money in the account, and plaintiff

permitted her to continue trading in this account based on this understanding, her signing in September would merely be a recognition on her part that she had so agreed, and that she had lost the remaining amount of money for which she was now liable. As of June 1994, when defendant claims only $44,000 of "net liquidating value" remained in the account, the statement still showed hundreds of thousands of dollars in long and short options, which might well have given defendant the incentive to continue trading, rather than liquidating at a loss, especially in light of her testimony that part of the reason she wanted this account was to create a track record for her trading strategy. Even the remaining $44,000 would be sufficient to support an inference that defendant had such incentive. If a contract is not against public policy and is not ambiguous, the courts should not relieve one of the parties of disadvantageous terms by the process of interpretation (*see Seifert, Hirshorn & Packman v Insurance Co. of N. Am.*, 36 AD2d 506, 508 [1971]; *see also Aloi v Board of Educ. of W. Babylon Union Free School Dist.*, 81 AD2d 874, 876 [1981]).

Defendant later signed a statement confirming that she owed plaintiff $384,715.08 plus interest for the losses on his funds management account, thus contradicting her present position that she owes nothing because the original agreement to indemnify

plaintiff for losses was prospective only, and would only have been operative had the account exceeded $350,000 after the agreement was entered. A party, by her own acts or words, may ratify what would otherwise be a questionable contract or provision of a contract (*Surlack v Surlack*, 95 AD2d 371, 381 [1983], *appeal dismissed* 61 NY2d 906 [1984]).

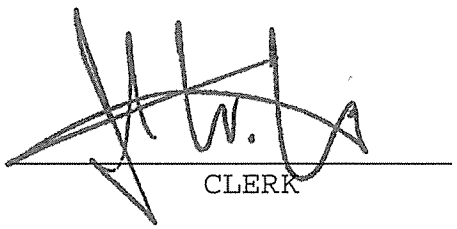
The court's conclusion that the contract, if interpreted as retroactive, lacked consideration, is incorrect, because the consideration was plaintiff's agreement to forebear liquidating the account in June (*see Holt v Feigenbaum*, 52 NY2d 291, 299-300 [1981]).

Defendant's estoppel argument, based on an allegedly contrary position taken by plaintiff in his tax returns, would have to await the court's receipt of those returns. However, to the extent that plaintiff simply sought to take these losses as business expenses because he did not believe defendant would be able to repay the debt, this would not be contrary to his position in this action. In other words, his tax position would

not be a repudiation of the fact that such debt existed. In any event, the court was unable to make the determination without reviewing plaintiff's tax returns.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

266 The People of the State of New York, Ind. 5166/05
Respondent,

-against-

Diana Sabouni,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered October 12, 2006, convicting defendant, after a nonjury trial, of grand larceny in the second degree and identity theft in the first degree, and sentencing her to an aggregate term of 6 months, with 5 years' probation and restitution in the sum of $40,000, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. There was a chain of circumstantial evidence supporting the conclusion that defendant used a check routing number and bank account number of her former union to steal money from the union and use that money to pay her bills, and undermining the defense theory that

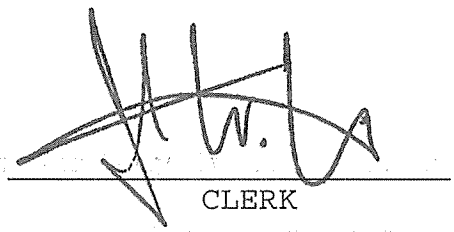
defendant's teenaged son was solely responsible. Among other things, there was evidence of a pattern of conduct by defendant with no rational explanation except that she was a participant in the scheme.

We perceive no basis to disturb the amount of restitution ordered by the court.

We have considered and rejected defendant's remaining claim.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

267 In re Aaron P. and Another,

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

Juan C.P.,
Respondent-Appellant,

Graham-Windham,
Petitioner-Respondent.

Robin Steinberg, The Bronx Defenders, Bronx (Gertrude Strassburger of counsel), for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

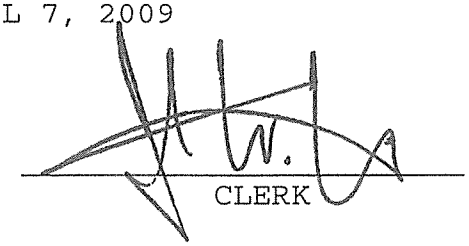
Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about November 21, 2007, which, to the extent appealed from as limited by the briefs, determined that respondent father's consent was not required for the adoption of the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Because respondent did not maintain "substantial and continuous or repeated contact" with the children, his consent to their adoption was not required (Domestic Relations Law § 111[1]

[d]). Respondent's admission that he made no child support payments during his incarceration from 1997 to 2002 is fatal to his claim of being a "consent father," as his incarceration did not "absolve him of his responsibility to support and maintain regular communication with the children" (*Matter of Sharissa G.*, 51 AD3d 1019, 1020 [2008]; *see Matter of Jonathan Logan P.*, 309 AD2d 576 [2003]). Moreover, the record shows significant periods during which respondent failed to contribute support payments "of a fair and reasonable sum" when not incarcerated (Domestic Relations Law § 111[1][d][I]). Additionally, respondent failed to make any objective showing of regular communication while incarcerated (*Jonathan Logan*, 309 AD2d at 576). Respondent's testimony of regular contact with the children prior to July 1997 was muddled and largely contradictory. Even crediting that testimony, under these circumstances, such windows of regular contact did not make up for years of absence and failures to communicate (*see Matter of Jason Brian S.*, 303 AD2d 759, 760 [2003]).

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

268 The People of the State of New York, Ind. 209/06
Respondent,

-against-

Jamie Frierson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at hearing; Arlene R. Silverman, J. at nonjury trial and sentence), rendered January 31, 2007, convicting defendant of robbery in the third degree (three counts), attempted robbery in the third degree and criminal possession of stolen property in the fourth degree (three counts), and sentencing him, as a second felony offender, to an aggregate term of 5½ to 11 years, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. From an observation post in a drug-prone location, a police officer trained and experienced in the detection of narcotics transactions observed defendant converse briefly with another man, and then transfer currency to him in exchange for an unidentified object, in a manner the officer believed was

indicative of a drug transaction. These circumstances provided probable cause for defendant's arrest (*see People v Jones*, 90 NY2d 835, 837 [1997]; *People v Wilson*, 46 AD3d 254 [2007], *lv denied* 10 NY3d 818 [2008]; *People v Jack*, 22 AD3d 238 [2005], *lv denied* 5 NY3d 883 [2005]). 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]).

At the hearing, the People met their initial burden of demonstrating the fairness of the lineup at issue by offering testimony that fillers were selected on the basis of their generally similar appearance to defendant. Defendant did not meet his ultimate burden of establishing that this lineup was unduly suggestive (*see People v Jackson*, 98 NY2d 555, 558-559 [2002]; *People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]).

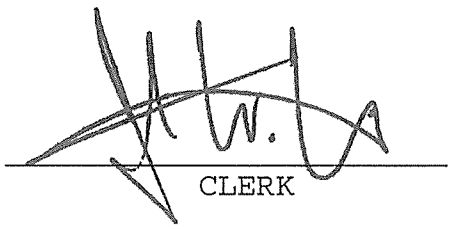
We reject defendant's arguments concerning the sufficiency and weight of the evidence supporting one of the robbery convictions (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determination that defendant is the person depicted in a surveillance photograph taken at the scene of this robbery.

Defendant's remaining argument is unpreserved and we decline

to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

269 Sports Legends Inc., Index 110262/07
Plaintiff-Appellant-Respondent,

-against-

Paul B. Carberry,
Defendant-Respondent-Appellant.

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

Leffler, Marcus & McCaffrey LLC, New York (Seth L. Marcus of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered March 13, 2008, which, in an action for conversion of property, granted defendant's motion to dismiss the complaint and denied his motion for sanctions against plaintiff, plaintiff's counsel and Joseph Cusenza, unanimously affirmed, without costs.

The motion court properly found that plaintiff's claim was barred pursuant to the three-year limitation of CPLR 214 [3]. Plaintiff sent a "demand" letter to defendant on July 19, 1999 and the demand letter was deemed rejected by the letter's own terms when not complied with in two weeks. Contrary to plaintiff's assertions, this 2007 complaint solely alleges one cause of action in conversion and the complained-of conduct is

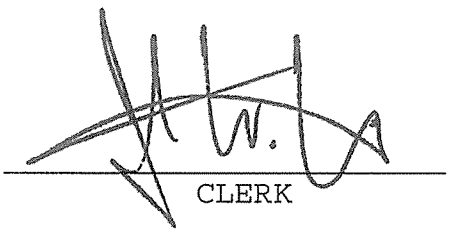
not a continuing tort (*see Sporn v MCA Records, Inc.*, 58 NY2d 482, 488 [1983]; *see also Elghanayan v Elghanayan*, 265 AD2d 262, 263 [1999]). Moreover, in an action where defendant was a 50% shareholder of plaintiff and Cusenza the holder of the remaining 50%, Cusenza had no authority to commence this action against defendant (*see Exec. Leasing Co., Inc v Leder*, 191 AD2d 199, 200 [1993]).

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

The motion court's admonition to plaintiff and Cusenza "that further attempts to pursue similar claims may result in the imposition of sanctions" was well within its discretionary authority to dispose of defendant's motion for sanctions.

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

ENTERED: APRIL 7, 2009



CLERK

Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

270 TMB Communications, et al., Index 108715/06
Plaintiffs-Respondents,

-against-

John J. Preefer,
Defendant-Appellant.

[And a Third-Party Action]

The McDonough Law Firm, L.L.P., New Rochelle (Eli S. Cohn of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Brian W. Keatts of counsel), for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered October 31, 2008, which denied defendant's motion for summary judgment dismissing the complaint in this legal malpractice action, unanimously affirmed, without costs.

The motion court correctly found the retainer agreement ambiguous (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]) with respect to the scope of defendant's obligations (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). Plaintiffs' explanation for the late submission of their pre-merger claim was neither a conclusive bar to their assertion that defendant's advice or failure to respond to their inquiry was the "but for" cause of their loss, since an informal judicial admission may be

explained at trial (*see Ficus Inv., Inc. v Private Capital Mgt., Inc.*, _AD3d_, 872 NYS2d 93, 100 [2009]), nor a basis for judicial estoppel, since their prior position was unsuccessful (*see Factory Mut. Ins. Co. v Mut. Marine Off., Inc.*, 57 AD3d 304 [2008]; *Kalikow 78/79 Co. v State of New York*, 174 AD2d 7, 11 [1992], *appeal dismissed* 79 NY2d 1040 [1992]).

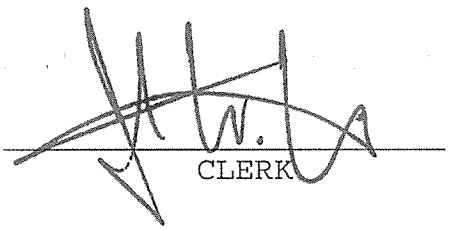
We have considered appellant's remaining contentions and find them unavailing.

M-1134 - TMB Communications et al. V Preefer

Motion seeking leave to enlarge the record denied.

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

ENTERED: APRIL 7, 2009



Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

271N The State of New York, Index 401535/06
Plaintiff-Respondent,

-against-

Shari Kessler, et al.,
Defendants-Appellants.

John W. Russell, New York, for appellants.

Andrew M. Cuomo, Attorney General, New York (Richard Dearing of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered December 4, 2007, which denied defendants' motion to vacate a default judgment, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings.

This is an action to recoup alleged overpayments for transportation services claimed to have been provided to Medicaid recipients. The corporate defendant and its principal and owner served their answer four days after the deadline unilaterally imposed by plaintiff, and served an amended answer six days later than the agreed-upon deadline. Their counsel, a solo practitioner, did not appear on the return date of plaintiff's default motion, supposedly because of a conflict in his schedule, but he did serve opposition papers one date later, asserting that

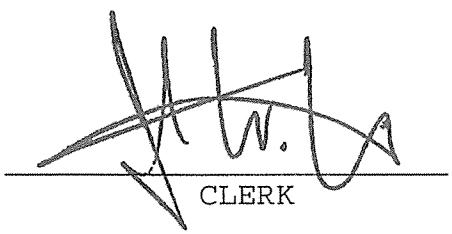
the clerical service he utilized failed to request an adjournment as he had instructed. Counsel also failed to appear at the inquest, assertedly because he did not receive notice of the date until after it had passed. The record does not reflect an affidavit of service of the inquest notice.

In support of the motion to vacate the default, defendants submitted an affidavit of the individual defendant denying any fraudulent conduct and asserting that defendants had complied with all regulations imposed on the company. She further stated that plaintiff's seizure of the company records several years ago, and denying defendants access to them, prevented her from addressing the specific billings alleged in the complaint in greater detail.

Defendants provided a reasonable excuse for the default and an arguably meritorious defense. The motion to vacate was made within the statutory period (CPLR 5015[a][1]).

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

ENTERED: APRIL 7, 2009



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Mazzarelli, J.P., Nardelli, Buckley, Acosta, DeGrasse, JJ.

272N-
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In re Edith M. Kallas, et al.,
Petitioners-Appellants,

Whatley Drake & Kallas, LLC,
Petitioner,

-against-

Milberg Weiss LLP, formerly known as Milberg Weiss,
Respondent-Respondent.

- - - - -

In re David J. Bershad,
Petitioner-Respondent,

-against-

Edith M. Kallas, et al.,
Respondents-Appellants,

Whatley Drake & Kallas, LLC,
Respondent.

- - - - -

In re Steven G. Schulman,
Petitioner-Respondent,

-against-

Edith M. Kallas, et al.,
Respondents-Appellants,

Whatley Drake & Kallas, LLC,
Respondent.

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Index 603458/07
603293/07
113481/07
113416/07

In re Milberg LLP, et al.,
Petitioners-Respondents,

-against-

Edith M. Kallas, et al.,
Respondents-Appellants,

Whatley Drake & Kallas, LLC,
Respondent.

Gibson, Dunn & Crutcher LLP, New York (Miguel A. Estrada of counsel), for appellants.

Gregory P. Joseph Law Offices LLC, New York (Gregory P. Joseph of counsel), for Milberg LLP and Melvyn I. Weiss, respondents.

Patton Boggs LLP, New York (Todd R. Harrison of counsel), for David J. Bershad, respondent.

Davidoff Malito & Hutcher LLP, New York (Peter M. Ripin of counsel), for Steven G. Schulman, respondent.

Orders, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 2, May 6 and August 26, 2008, which denied the motions by appellants Kallas, Clark-Weintraub and Guglielmo for consolidation of these related arbitration proceedings, and granted in part the motions by the Milberg parties for stay of arbitration, unanimously reversed, on the law, without costs, consolidation granted, stay of arbitration denied and the question of timeliness of the fraudulent inducement claims by Kallas and Clark-Weintraub referred to the arbitrators for determination.

The Milberg law firm and some of its former partners are engaged in a dispute concerning, in part, appellants' entitlement to a share in the counsel fees awarded by a federal court in connection with certain litigation. Appellants and the firm have demanded arbitration under Milberg's partnership agreement, but the court declined appellants' petition to consolidate the proceedings. It is well settled that "there is judicial power to order consolidation of arbitration proceedings" (*County of Sullivan v Edward L. Nezelek, Inc.*, 42 NY2d 123, 127 [1977]; *see also Matter of Cowper Co. [Hires-Turner Glass Co.]*, 51 NY2d 937 [1980]; *Yaffe v Mintz & Fraade*, 270 AD2d 43 [2000]). Although arbitrations arising under separate agreements are not generally consolidated, the proceedings before us not only arise from the same partnership agreement and involve common issues of law and fact (*see* CPLR 602[a]), but there is a possibility that separate arbitrations could result in inconsistent rulings. Under these circumstances, the court improvidently denied consolidation.

The fraudulent inducement claims by Kallas and Clark-Weintraub are clearly subject to arbitration under the firm's partnership agreement; but that agreement makes no mention of timeliness, nor does it expressly incorporate New York law. Questions relating to time limits are generally within the

province of the arbitrators (*see Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]). Since they will need to resolve the fraudulent inducement claim by Guglielmo, which Milberg has conceded is arbitrable, and it cannot be said that the claims by Kallas and Clark-Weintraub are not intertwined with the other substantive questions raised by appellants, the court should have left to the arbitrators the issue of timeliness of the fraudulent inducement claims by the remaining appellants.

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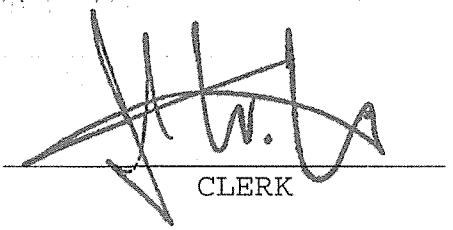

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