SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 9, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, McGuire, DeGrasse, JJ.

5392N Janet Addo, Index 23462/06
Plaintiff-Respondent,

-against-

Neil Melnick, M.D., et al.,
Defendants-Appellants.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellants.

McMahon, McCarthy & Verrelli, Bronx (Patrick J. Rooney of counsel), for respondent.

Order, Supreme Court, Bronx County (Alan J. Saks, J.), entered February 20, 2008, which upon granting plaintiff's motion for reargument, denied defendants' motion for a change of venue from Bronx County to Westchester County, reversed, on the law, without costs, defendants' motion granted, and venue changed to Westchester County.

On reargument, the court denied defendants' motion because the alleged malpractice occurred in the Bronx. However, venue is based on the parties' residence (CPLR 503[a]), not where the cause of action arose (*Hitchoff v Air Brook Limousine, Inc.*, 26 AD3d 310 [2006]). The "residence" of a natural person is his or

her abode, not office (*see Friedman v Law*, 60 AD2d 832 [1978]), and the individual defendant here resides in Westchester County. The corporate defendant also "resides" in Westchester. "The designation of a county as the location of a corporation's principal office in a certificate of incorporation is controlling in determining corporate residence for the purposes of venue" (*Conway v Gateway Assoc.*, 166 AD2d 388, 389 [1990]), even if the corporation maintains an office or facility in another county (*Altidort v Louis*, 287 AD2d 669, 670 [2001]), and even if it is a professional corporation (*see Della Vecchia v Daniello*, 192 AD2d 415 [1993]).

In its original decision, the motion court properly found plaintiff's affidavit insufficient as proof of her residence because it contradicted her prior deposition testimony that she had moved from the Bronx to New Jersey prior to November 22, 2006, the date on which she commenced this action (*see Nemeroff v Coby Group*, 54 AD3d 649, 650-651 [2008]). In this regard, plaintiff had testified that she thought she moved to New Jersey on a Friday during the third week of November 2006 on what she thought was the 18th day of the month.[1] While the dissent construes this testimony as an expression of uncertainty, we find it an admission. We look to Federal Rules of Evidence rule

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[1]We take judicial notice of the fact that November 17, 2006 fell on a Friday.

801(d)(2)(B), which defines a party's admission as "a statement of which the party has manifested an adoption or *belief* in its truth [emphasis added]." Inasmuch as the phrase "I think" is an expression of belief, we conclude that such an expression can be an admission. The binding effect of such an admission is illustrated by this Court's recent decision in *McNeill v LaSalle Partners* (52 AD3d 407 [2008]), which reads, in part, as follows:

> "The trial court also erred in precluding appellants from questioning plaintiff on cross-examination about his deposition testimony that the liquid on which he slipped might have been 'encapsulate' (a milky liquid used in the abatement of asbestos). . . . At his deposition, plaintiff testified that he *thought* the liquid on which he slipped 'could be some kind of encapsulate, but I wasn't sure.' At trial, however, plaintiff testified that he had no idea what kind of liquid had caused his accident. Under these circumstances, appellants were entitled to question plaintiff about the deposition testimony in question, both for purposes of impeachment and to use the prior inconsistent testimony as *evidence-in-chief that the liquid was encapsulate*" (*id.* at 410 [emphasis added]).

Unquestionably an affidavit tailored to avoid the consequences of a deposition lacks evidentiary value (*see Blackmon v Dinstuhl*, 27 AD3d 241, 242 [2006]). For example, in *Concepcion v Walsh* (38 AD3d 317, 318 [2007]) we stated that: "[w]hile plaintiff's mother's affidavit asserts that there was peeling or chipping paint, her deposition testimony was that she did not know; accordingly, her affidavit lacks evidentiary value." Since plaintiff failed to submit documentary evidence (other than her

own self-serving statement) supporting her claim that she resided in the Bronx when she commenced this action, and since this case does not involve conflicting affidavits, there is no need to hold a hearing as suggested by plaintiff and the dissent (*see Martinez v Semicevic*, 178 AD2d 228 [1991]; *cf. Rivera v Jensen*, 307 AD2d 229 [2003]). In this instance, the distinction the dissent draws between formal and informal admissions is of no moment. This is because plaintiff's deposition constituted the *only* evidence of plaintiff's place of residence albeit "some evidence" of same.

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

McGUIRE, J., (dissenting)

Plaintiff commenced this medical malpractice action in the Bronx on November 22, 2006, predicating the Bronx venue on the assertion in the summons that she resided in the Bronx. Thereafter, defendants moved to change venue to Westchester. In relevant part, plaintiff's affidavit in opposition to the motion asserted as follows: "I now clearly recollect that I moved to New Jersey on November 24, 2006. I know that I moved the Friday after Thanksgiving which would be November 24, 2006." It is undisputed that the Friday after Thanksgiving that year fell on November 24th.

The majority concludes that "[i]n its original decision [granting defendants' motion to change venue], the motion court properly rejected plaintiff's affidavit, which *contradicted* her prior deposition testimony" (emphasis added). This conclusion is not only erroneous, its implications are profoundly important.

In her deposition, taken on June 28, 2007, plaintiff testified as follows:

> Q. How long have you been living at 38 Carnation Street in Bergenfield, New Jersey?
>
> A. I *think* from November.
>
> Q. November of 2006?
>
> A. 2006, yes.
>
> Q. What date in November did you move to Carnation

Street?

A. I *think* that was Friday.

Q. Do you know the day of the week, the day in November, the 1st, 2nd[,] 3rd?

A. I *think* middle week.

Q. I'm talking about the day?

A. The day. Oh, I *think* the third week.

Q. Do you know the specific day?

A. Friday.

[Plaintiff's counsel]: Do you know if it was the 25th, 26th, 20th?

A. I *think* that was the 18th or so?

Q. You *believe* it was on a Friday?

A. I *think* so.

(Emphasis added).

As is evident from these excerpts -- no other portions of her testimony bears on the subject -- plaintiff expressly stated her uncertainty concerning the date she moved to New Jersey. Only with regard to the month and day of the week did plaintiff make unqualified statements, testifying that she moved in November of 2006 and that she moved on a Friday, albeit after first indicating uncertainty that it was November and a Friday (but even as to the day of the week she went on to again express uncertainty). Consistent with that testimony, plaintiff averred

in her affidavit that it was indeed a Friday in November 2006, namely, the Friday after Thanksgiving.

On the decisive question on this appeal, the date in November 2006 on which plaintiff moved out of the Bronx, the deposition excerpts quoted above expressly denote plaintiff's uncertainty. If plaintiff had unqualifiedly asserted in her deposition that she moved on November 18, her affidavit would be inconsistent with her testimony. Whether we properly could conclude that such an inconsistency justifies disregarding her affidavit entirely, presumably on the theory that it is inconceivable that she could have erred in her deposition, is a matter I need not address. The majority, however, should address an aspect of her deposition that is more significant than the fact that the affidavit is consistent with her testimony that she moved on a Friday in November. That is, plaintiff testified that she "th[ought]" she moved on a Friday in the "third week" of November. Although Friday November 24, 2006 was the fourth Friday in November of that year, it fell during the third, full week in November.

The crucial point is that a prior factual assertion that is tentative is not contradicted by a later statement that is definite; rather, the uncertain statement is clarified. We should not deprive plaintiff of her statutory right to designate the Bronx as the place of trial by imputing to her a

contradiction where only a clarification can be found. Doing so is not only illogical, it is inconsistent with the principle that the function of the motion court is to identify and not resolve disputed issues of material fact (*see generally Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). On the basis of an illogical characterization of her affidavit, the majority deprives plaintiff of her statutory right without even giving her an opportunity to testify at a hearing and possibly impress the trier of fact with her demeanor and her explanation for her subsequent certainty concerning the date she moved. That is all the more unfortunate for two reasons: it is a matter of common human experience that some people are not particularly good at recalling dates, and it hardly is implausible that upon reflection plaintiff could have recalled that she still resided in the Bronx on Thanksgiving Day in 2006.

The majority is unpersuasive in also disparaging as "self-serving" plaintiff's sworn statement that she moved on November 24, 2006. All that fairly can be said is that this statement supports plaintiff's position. Of course, there would be no dispute about venue if plaintiff did not support her position in her affidavit. Moreover, a sworn assertion of fact by a party, unless conclusively refuted by documentary evidence, is sufficient to require a hearing (*see Collins v Glenwood Mgt. Corp.*, 25 AD3d 447 [2006]). Despite the absence of any such

documentary evidence from defendants, the majority puts the burden on plaintiff to come forward with documentary evidence supporting her sworn factual assertion of a residency in the Bronx through Thanksgiving 2006.

I agree with the majority that plaintiff's statement at her deposition that she thought she moved to New Jersey on a Friday during the third week of November 2006, on what she thought was November 18th, is an admission. I disagree, however, with the majority's conclusion that this admission conclusively established that plaintiff moved to New Jersey before she commenced this action on November 22, 2006.

Judicial admissions take one of two forms, formal or informal. Formal judicial admissions take the place of evidence and are conclusive evidence of the facts admitted (*People v Brown*, 98 NY2d 226, 232, n 2 [2002], citing Prince, Richardson On Evidence § 8-215, at 523 [Farrell 11th ed]). However, an admission will only be characterized as "formal" where the party who made the admission *conceded* the truth of a fact alleged by the other party (Prince, Richardson On Evidence, § 8-215, at 523). Examples of formal judicial admissions include: (1) admissions of fact made pursuant to CPLR 3123, (2) facts admitted pursuant to a stipulation, (3) facts admitted in open court, such as a plea in a criminal proceeding, and (4) facts admitted in a formal pleading (*id.* at 523-524).

On the other hand, informal judicial admissions are facts incidentally admitted during the course of a judicial proceeding (*id.* § 8-219, at 529). An informal judicial admission is not conclusive of the fact "admitted," but rather is merely some evidence of that fact (*People v Brown*, 98 NY2d at 232; *People v Rivera*, 45 NY2d 989 [1978]; Prince, Richardson On Evidence § 8-219, at 530). A classic example of an informal judicial admission is a statement made by a party at a deposition (Prince, Richardson On Evidence, § 8-219, at 530; *see also Matter of Union Idemn. Ins. Co. of N.Y. v American Centennial Ins. Co.*, 89 NY2d 94, 103 [1996] [statement made in affidavit]; *People v Rivera, supra* [statement made in affidavit]; *Baje Realty Corp. v Cutler*, 32 AD3d 307 [2006] [statement made in affidavit]).

Here, plaintiff did not *concede* that she moved to New Jersey on a Friday during the third week of November 2006, on what she thought was November 18th. Rather, she testified that she "thought" and "believe[d]" that she moved to New Jersey at that time, an incidental admission. Given the absence of a concession by plaintiff -- the sine qua non of a formal judicial admission -- the majority errs in according plaintiff's informal judicial admission conclusive effect.

The principal case on which the majority relies, *McNeill v LaSalle Partners* (52 AD3d 407 [2008]), supports my position. In *McNeill*, the plaintiff slipped and fell on a liquid substance on

a floor of the construction site at which he was working. The plaintiff commenced a Labor Law action against the owner of the premises and the construction manager; those defendants commenced a third-party action against the asbestos abatement subcontractor for contribution or indemnification. At trial, the plaintiff testified that he had no idea what kind of liquid he slipped on. At his deposition, however, the plaintiff testified that he thought the liquid on which he slipped "could be some kind of encapsulate [i.e., a liquid used in asbestos abatement projects], but I wasn't sure." Supreme Court precluded the owner and construction manager from questioning the plaintiff about his deposition testimony, which was clearly inconsistent with his trial testimony, and dismissed the owner and construction manager's third-party claims against the subcontractor.

We reversed and ordered a new trial, finding that the owner and construction manager were entitled to question the plaintiff about his deposition testimony, and that the owner and construction manager could use the deposition testimony both to impeach the plaintiff and as evidence-in-chief. Consistent with the well-established principle that an incidental admission made by a party during the course of a judicial proceeding is an informal judicial admission that is only *some* evidence of the fact admitted, we remanded for a new trial.

The majority's reliance on *Martinez v Semicevic* (178 AD2d 228 [1991]) is misplaced. There, the plaintiff did not claim that he resided both in the Bronx and in Manhattan until after defendant moved to change venue and then advanced that claim through counsel. The plaintiff did not submit an affidavit until after the motion to change venue was granted, and when he moved for reargument and renewal. Under these very different circumstances, this Court relied in part on the plaintiff's failure to submit documentary evidence supporting his assertion that he in fact maintained a residence in the Bronx. The understandable cynicism about the "belated affidavit" in *Martinez v Semicevic* (*id.* at 229) is not warranted here.

Relatedly, the majority errs in completely disregarding plaintiff's affidavit on the ground that it was "tailored to avoid the consequences of [her] deposition [and] lacks evidentiary value." As we have stated, "courts have occasionally disregarded affidavits or other evidence submitted in opposition to such a motion [for summary judgment] where they *directly contradict* the plaintiff's own version of the accident and are plainly tailored to avoid dismissal of the action" (*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 324 [2006] [emphasis added]). The affidavit at issue in *Branham* presented "one of those rare occasions where such evidence must be disregarded by this Court" (*id.*). Here, the affidavit does not contradict, let

alone "directly contradict," plaintiff's deposition.

To repeat the decisive point, one the majority does not come to grips with: a prior factual assertion that is tentative is not contradicted by a later statement that is definite. Accordingly, this is not one of those "rare occasions" where an affidavit must be disregarded as "plainly tailored" to avoid an adverse result. As noted above, the majority deprives plaintiff of a statutory right by exercising a power it does not have (*Sillman*, 3 NY2d 395) when it finds, despite the absence of the requisite direct contradiction, that plaintiff's affidavit was "[plainly] tailored."

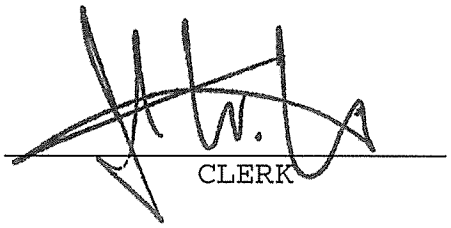
Far more is at stake on this appeal than the erroneous deprivation of plaintiff's statutory right. I am confident the bar will appreciate what the majority does not: its position that a party can be conclusively bound by a factual statement made in a deposition cannot rationally be confined to factual statements bearing on the question of venue. Indeed, the bar surely will appreciate as well that if a party's tentative statement of a fact is conclusive whenever it is adverse to the party's position, it necessarily follows that a factual statement that is not expressly qualified by some indication of uncertainty also is conclusive whenever it is adverse to the party's position. Mistakes occur and are not without significant consequences as they sometimes provide the opposing party with powerful

impeachment material. The authorities cited above sensibly recognize that informal judicial admissions are not conclusive. The implications of the majority's position for both the manner in which depositions are conducted and the just resolution of litigation are profound and I am loathe to explore them.

For these reasons, I would direct a hearing on the issue of when plaintiff moved from the Bronx.

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

ENTERED: APRIL 9, 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 9, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
Angela M. Mazzarelli
David Friedman
James M. Catterson
Dianne T. Renwick, Justices.

Houston Management Corp.,
Plaintiff-Respondent-Appellant, Index 112884/04

-against-

5269

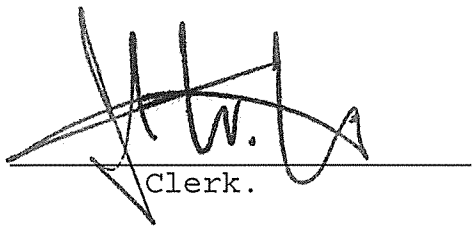
Houston Essex Realty Corp., et al.,
Defendants-Appellants-Respondents.

Cross appeals having been taken to this Court from an order of the Supreme Court, New York County (Louis B. York, J.), entered on or about January 22, 2008,

And said cross appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 13, 2009,

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

ENTER:



Clerk.

Gonzalez, P.J., Tom, Sweeny, Catterson, JJ.

273 The People of the State of New York, Respondent,

-against-

Hector Rodriguez, Defendant-Appellant. Ind. 416/06

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered September 26, 2007, as amended January 8, 2008, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 7 years, unanimously affirmed.

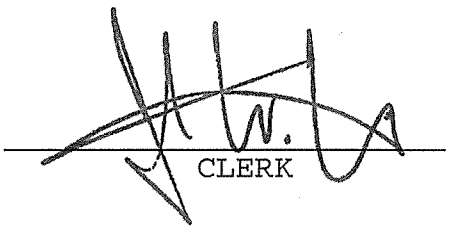
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its acceptance of the victim's version of the incident. The victim's testimony clearly negated defendant's justification defense, particularly with respect to the final shot, which was fired at the fleeing victim.

Defendant did not preserve his claim that the court based

his sentence on any improper criteria, and we decline to review it in the interest of justice. As an alternative holding, we find it unsupported by the record. We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 9, 2009



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 9, 2009.

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

NBC Universal, Inc., et al.,
Plaintiffs-Respondents,

Index 601011/08

-against-

275

The Weinstein Company, LLC,
Defendant-Appellant,

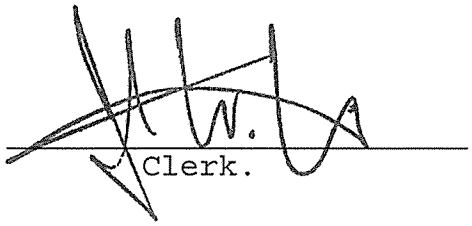
Lifetime Entertainment Services,
Defendant-Intervenor.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered on or about September 26, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 1, 2009,

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

ENTER:



Clerk.

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

276 Debra H., Index 106569/08
Petitioner-Respondent,

-against-

Janice R.,
Respondent-Appellant.
- - - - - - - -
National Association of Social Workers, The National Association of Social Workers' New York State Chapter, The National Association of Social Workers' New York City Chapter, The New York Civil Liberties Union and American Civil Liberties Union,
Amici Curiae.

Reiss Eisenpress LLP, New York (Sherri L. Eisenpress of counsel), for appellant.

Lambda Legal Defense and Education Fund, Inc., New York (Susan L. Sommer of counsel), for respondent.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Jennifer L. Colyer of counsel), for the child.

Kramer Levin Naftalis & Frankel LLP, New York (Eve Preminger of counsel) for The National Association of Social Workers, The National Association of Social Workers' New York State Chapter and The National Association of Social Workers' New York City Chapter, amici curiae.

Matthew Faiella, New York, for New York Civil Liberties Union, amicus curiae.

Rose Saxe, New York, for American Civil Liberties Union, amicus curiae.

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered October 9, 2008, which granted a hearing on whether petitioner stands in loco parentis to respondent's biological

child and whether respondent should be equitably estopped from denying that parental relationship, and appointed a law guardian to represent the child's best interest, unanimously reversed, on the law, without costs, the order vacated, the petition denied and this proceeding dismissed.

Petitioner seeks joint legal and physical custody of respondent's biological child, born approximately one month after the parties entered into a civil union in the State of Vermont, and more than two months after they registered as domestic partners in New York City. Although the record indicates that petitioner served as a loving and caring parental figure during the first 2½ years of the child's life, she never legally adopted the child.

This matter is governed by the Court of Appeals decision in *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]), which provides that a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law § 70, even though that party may have developed a longstanding, loving and nurturing relationship with the child and was involved in a prior relationship with the biological parent.

Supreme Court concluded that denial of petitioner's right to invoke equitable estoppel herein would be inconsistent with the

application of that doctrine in similar proceedings (*see e.g. Matter of Shondel J. v Mark D.*, 7 NY3d 320 [2006]; *Jean Maby H. v Joseph H.*, 246 AD2d 282, 285 [1998]). However, to the extent such inconsistencies exist, our reading of precedent is such that the doctrine of equitable estoppel may not be invoked where a party lacks standing to assert at least a right to visitation (*see Anonymous v Anonymous*, 20 AD3d 333 [2005]; *Matter of Multari v Sorrell*, 287 AD2d 764 [2001]).

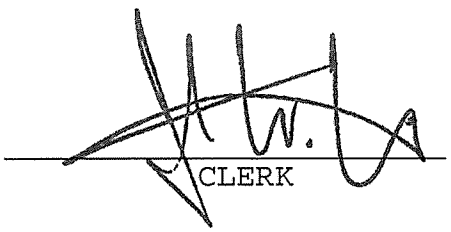
Our conclusion that petitioner lacks standing renders academic respondent's claim that Supreme Court improvidently exercised its discretion by appointing a law guardian in this matter.

M-785 - *Debra H. v Janice R.*

Motion seeking leave to strike brief denied.

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

ENTERED: APRIL 9, 2009



Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

277 The People of the State of New York, Respondent, Ind. 6919/06

-against-

Carlos Gagot, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered October 31, 2007, convicting defendant, after a jury trial, of assault in the second degree (three counts) and attempted assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 7 years, unanimously affirmed.

Defendant failed to preserve his arguments that the court improperly interfered with defense counsel's examination of witnesses and improperly denigrated defense counsel *(see People v Charleston*, 56 NY2d 886, 887-888 [1982]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Most of the conduct challenged by defendant on appeal was permissible clarification, and even if some of the court's interventions and comments were inappropriate, they were not so egregious as to deprive defendant

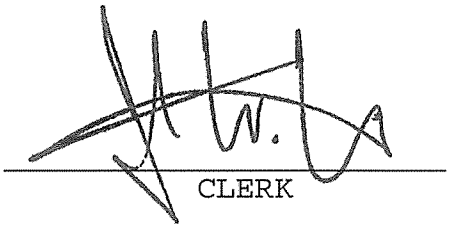
of a fair trial (*see People v Arnold*, 98 NY2d 63, 67 [2002]; *People v Moulton*, 43 NY2d 944 [1978]; *compare People v Retamozzo*, 25 AD3d 73 [2005]).

Defendant's testimony on direct examination that he had been a victim of a crime and that he therefore carried a weapon for his own protection clearly opened the door to cross-examination about his gang affiliation (*see People v Melendez*, 55 NY2d 445, 451-452 [1982]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 9, 2009



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Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

278 Ricardo Cardona, Index 104760/05
Plaintiff-Respondent,

-against-

Olga M. Martinez,
Defendant-Respondent,

"John Doe," etc.,
Defendant,

The Motor Vehicle Accident
Indemnification Corporation,
Defendant-Appellant.

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for appellant.

William Pager, Brooklyn, for Ricardo Cardona, respondent.

Picciano & Scahill, P.C., Westbury (Thomas R. Craven, Jr. of counsel), for Olga M. Martinez, respondent.

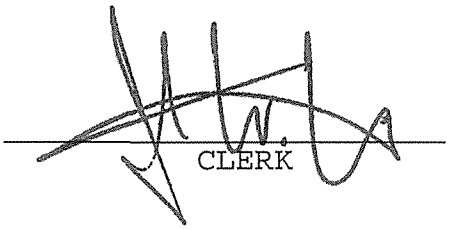
Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered December 17, 2007, which, in an action for personal injuries sustained when plaintiff pedestrian was struck by a motor vehicle that left the scene, denied the motion of defendant Motor Vehicle Accident Indemnification Corporation (MVAIC) to dismiss the complaint as against it, unanimously affirmed, without costs.

Despite the procedural irregularities cited by MVAIC, the court properly found that plaintiff was a "qualified person" under the Insurance Law. Insurance Law § 5218(b) provides that the court may permit an action against MVAIC upon satisfaction of

certain enumerated conditions. Here, those conditions have effectively been demonstrated and there was no need for a hearing (*see e.g. Milstein v Clark*, 32 AD2d 935 [1969]). Plaintiff established that he cannot ascertain the identity of the owner or operator of the offending vehicle. MVAIC's argument that there has been no judicial determination that defendant Martinez was not involved in the accident does not warrant a different finding (*see Steele v Motor Veh. Acc. Indem. Corp.*, 39 AD3d 78, 83 [2007], *appeal dismissed* 9 NY3d 989 [2007]).

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

ENTERED: APRIL 9, 2009



Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

279 Amanda Ferreira, etc., et al., Index 18669/05
Plaintiffs, 85263/06

-against-

Mereda Realty Corp., et al.,
Defendants.

- - - - -

Mereda Realty Corp., et al.,
Third-Party Plaintiffs-Appellants,

-against-

RLI Insurance Company,
Third-Party Defendant-Respondent.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Monte E. Sokol of counsel), for appellants.

Quirk and Bakalor, P.C., New York (Richard H. Bakalor of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered June 9, 2008, which denied appellants' motion for summary judgment declaring that respondent had an obligation to defend and indemnify them in the personal injury action and granted respondent's cross motion for summary judgment dismissing the third-party complaint and directed entry of judgment, unanimously affirmed, without costs.

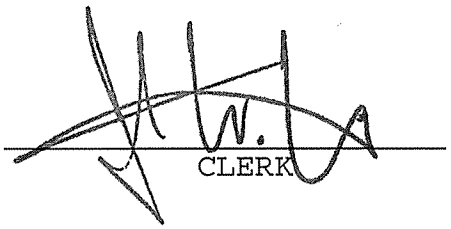
Appellant insureds were required by the policy to notify the insurer "as soon as practicable of an 'occurrence' or offense which may result in a claim." Here, where they did not give notice for more than two months after first learning of the

infant plaintiff's accident, it was their burden (*see Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743-44 [2005]) to establish that a reasonably prudent person, upon learning of the accident, would have a good faith, objective basis for believing that litigation would not be commenced (*see Kambousi Rest. v Burlington Ins. Co.*, 58 AD3d 513 [2009]; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239 [2002]). It is not disputed that, on meeting with plaintiff mother no later than April 11, 2005, the insureds' property manager had seen burn scars on the infant plaintiff and been told that the infant had been in the hospital. At that point, the insureds could not have reasonably believed that there would be no litigation arising out of the accident (*see e.g. Tower Ins. Co. of New York v Dyker Contr.*, 47 AD3d 522 [2008]; *Rondale Bldg. Corp. v Nationwide Prop. and Cas. Ins. Co.*, 1 AD3d 584, 585-86 [2003]), and therefore have not shown any extenuating circumstances to justify their having delayed reporting the occurrence until late June 2005 (*see Paramount Ins. Co.*, 293 AD2d at 242). We reject appellants' alternate argument that the policy was ambiguous, since appellants fail to show how the term "claim," as used in this policy, could be parsed in two different, equally

logical ways (*see Schechter Assoc. v Major League Baseball Players Assn.*, 256 AD2d 97 [1998]; *cf. Matter of Ancillary Receivership of Reliance Ins. Co.*, 55 AD3d 43 [2008], *affd* __ NY3d __ , 2009 NY Slip Op 1019).

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

ENTERED: APRIL 9, 2009



Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

280 The People of the State of New York, SCI. 122/06
Respondent,

-against-

Rafael Toscano,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

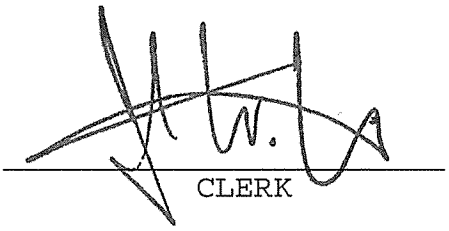
Judgment, Supreme Court, New York County (Laura Ward, J.), rendered April 27, 2006, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to concurrent terms of 2 years, unanimously modified, on the law, to the extent of remanding for resentencing that will include the pronouncement of the applicable term of postrelease supervision, and otherwise affirmed.

In its oral pronouncement of sentence, the court imposed a one-year period of postrelease supervision for the attempted possession conviction. That term was illegally low, and, as both sides agree, the replacement of that period with a lawful period of 1½ years by way of the commitment sheet was ineffective under *People v Sparber* (10 NY3d 457 [2008]). The proper remedy is a

remand for resentencing, and defendant's argument that the illegally low term should be allowed to stand is similar to arguments rejected by the *Sparber* court (*id.* at 471-472).

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

ENTERED: APRIL 9, 2009



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Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

281 The Scotts Company, LLC, Index 602712/05
Plaintiff,

-against-

Pacific Employers Insurance Company, et al.,
Defendants.

- - - -

Pacific Employers Insurance Company,
Third-Party Plaintiff-Appellant,

-against-

Employers Insurance of Wausau, etc.,
et al.,
Third-Party Defendants-Respondents.

Siegal & Park, Mt. Laurel, NJ (Brian G. Fox of counsel), for appellant.

Dorsey & Whitney, LLP, New York (Patrick J. Feeley of counsel), for Employers Insurance of Wausau, respondent.

Kantor, Davidoff, Wolfe, Mandelker, Twomey & Gallanty, P.C., New York (Michael E. Twomey of counsel), for Liberty Mutual Insurance Company, respondent.

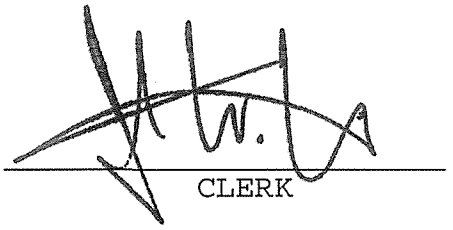
Howrey LLP, Los Angeles, CA (Keith A. Meyer of the California Bar, admitted pro hac vice, of counsel), for The Scotts Company, LLC, respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 27, 2008, which, to the extent appealed from as limited by the briefs, denied third-party plaintiff's motion to amend its third-party complaint to seek relief enjoining its co-insurers from seeking contribution in this matter as to any claims in any proceeding in any jurisdiction, unanimously affirmed, with costs.

The court properly denied appellant's motion to amend the third-party complaint since the proposed amendment did not state a viable claim for relief. The amendment sought to enjoin appellant's co-insurers from proceeding against appellant for contribution based upon appellant's settlement agreement with the insured and upon General Obligations Law § 15-108. The court correctly found that the settlement agreement's express contemplation of contribution claims by the co-insurers was a waiver of § 15-108's protections (*see Mitchell v New York Hosp.*, 61 NY2d 208, 213 [1984]). Moreover, § 15-108 applies only to joint tortfeasors, not to co-insurers (*HRH Constr. Corp. v Commerical Underwriters Ins. Co.*, 11 AD3d 321, 323 [2004]).

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

ENTERED: APRIL 9, 2009



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Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

282 The People of the State of New York, Respondent, Ind. 30082/07

-against-

Salvador Diaz, Defendant-Appellant.

Salvador Diaz, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about February 8, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

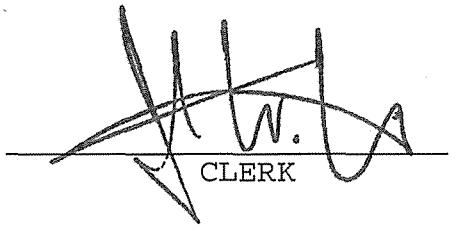
The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level two sex offender adjudication. The court properly assessed points under the factor for lack of supervised release, even though this was a matter beyond defendant's control (*see People v Lewis*, 37 AD3d 689, 690 [2007], *lv denied* 8 NY3d 814 [2007]). The court properly exercised its discretion in denying defendant a downward departure from his

presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]).

Defendant's remaining contentions are unpreserved and meritless.

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

ENTERED: APRIL 9, 2009



Gonzalez, P.J., Tom, Sweeny, Catterson, JJ.

283 The People of the State of New York, Respondent, Ind. 4354/03

-against-

Matthew Williams, Defendant-Appellant.

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Matthew Williams, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Alexis Pimentel of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered September 15, 2004, convicting defendant, after a jury trial, of promoting prostitution in the second degree (seven counts) and rape in the third degree, and sentencing him to an aggregate term of 5⅓ to 16 years, unanimously affirmed.

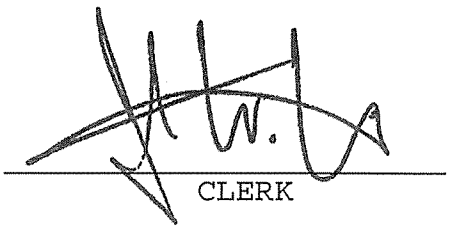
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence established that defendant threatened the victims with violence if they did not comply with his demand that they engage in prostitution, and that defendant forced one of the victims to have sexual intercourse with him.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters

outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: APRIL 9, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

284-
285 Travelers Indemnity Company, Index 115827/07
Petitioner-Appellant,

-against-

Rapid Scan Radiology, P.C.,
Respondent-Respondent.

Law Office of John P. Humphreys, Melville (Dominic P. Zafonte of counsel), for appellant.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 17, 2008, which denied the petition to vacate the award of the master arbitrator in the underlying no-fault arbitration, and order, same court and Justice, entered May 1, 2008, which, upon petitioner's motion for reargument, adhered to the original determination, unanimously affirmed, with costs.

Petitioner failed to demonstrate a ground pursuant to CPLR 7511 to vacate the master arbitrator's decision. There was a rational basis, based on *Fair Price Med. Supply Corp. v Travelers Indem. Co.* (42 AD3d 277 [2007], *affd* 10 NY3d 556 [2008]), for the master arbitrator's finding that the arbitrator erred, as a matter of law, in finding, in essence, that Rapid Scan committed fraud, given that the denial was not issued on that basis and the defense was subject to a 30-day preclusion rule.

The master arbitrator did not exceed his authority and his determination was not arbitrary or capricious. As to

petitioner's claim that respondent did not comply with the filing requirements of 11 NYCRR 65-4.10(d)(2) because it failed to state the nature of the claim and grounds for review and failed to include a copy of the lower arbitrator's award, this was not the basis of their challenge before the master arbitrator. Further, no prejudice has been shown since the parties submitted memoranda fully apprising the master arbitrator of the issues at hand and of the lower arbitrator's decision (*see Travelers Ins. Co. v Job*, 239 AD2d 289, 289-90 [1997]; *New Hampshire Ins. Co. v Util. Mut. Ins. Co.*, 134 AD2d 670, 671 [1987]; *compare Meisels v Uhr*, 79 NY2d 526 [1992]).

While it is conceded that Rapid Scan served its request by regular mail, not certified mail as required by 11 NYCRR 65-4.10(d)(3), as the Supreme Court found, petitioner participated in the master arbitrator's review and recognized in its own submission that the defect could be viewed as "de minimus and/or harmless."

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

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

ENTERED: APRIL 9, 2009

CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

286 The People of the State of New York, Respondent, Ind. 5376/06

-against-

Steven Myers, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

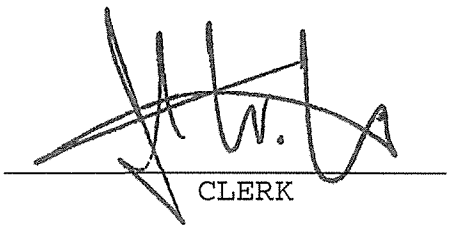
Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered February 25, 2008, convicting defendant, after a jury trial, of burglary in the first degree (two counts), attempted robbery in the first degree (two counts) and criminal possession of a weapon in the second and third degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request for assignment of new counsel, made at the commencement of jury selection, since defendant failed to establish good cause. Initially, we note that defense counsel was retained, and defendant neither sought to hire different counsel nor explained why he considered himself eligible for assigned counsel (*see People v Wall*, 56 AD3d 361 [2008]; *People v Wilburn*, 40 AD3d 508, 509 [2007], *lv denied* 9 NY3d 883 [2007]).

In any event, defendant never elaborated upon his conclusory complaints about his attorney. Contrary to defendant's argument, the court accorded defendant ample opportunity to be heard, including an opportunity to establish good cause in a manner that would not prejudice his defense. Defendant's refusal to communicate with his attorney was not a proper basis for substitution (*see People v Linares*, 2 NY3d 507 [2004]).

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

ENTERED: APRIL 9, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

287 Northgate Electric Corp., Index 603772/07
Plaintiff-Respondent,

-against-

Barr & Barr, Inc.,
Defendant-Appellant,

Smith-Palmer & Famulari, Ltd.,
et al.,
Defendants.

Duane Morris LLP, New York (Mark Canizio of counsel), for appellant.

Steven G. Rubin & Associates, P.C., Melville (Steven G. Rubin of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 29, 2008, which, insofar as appealed from, denied the motion of defendant-appellant construction manager (defendant) to dismiss plaintiff subcontractor's complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter a judgment dismissing the complaint as against defendant Barr & Barr, Inc.

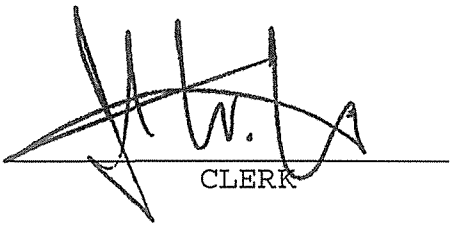
The action is barred by the release clause contained in the parties' April 2006 settlement agreement, which provides that "[i]n consideration for the issuance of this global change order, [plaintiff] waives and releases [defendant] from any and all claims and change order requests which were submitted or could have been submitted prior to 11/01/05." The claim made herein,

which is one for delay that admittedly existed as of the August 2004 date by which plaintiff's work was originally scheduled to be completed, but was not made until June 2007, is covered by the word "claims" in the release. We reject plaintiff's argument that under the rule of ejusdem generis, the general word "claims" is limited by the specific words "change order requests," such that, as plaintiff's principal asserts was his intention, the release covers only the change order requests considered in the mediation that resulted in the settlement agreement. To read the release as plaintiff urges would be render the word "claims" a nullity. If plaintiff had wished to except its delay claim from the release, it should have included plain language to that effect in the release. It does not avail plaintiff that it did add such language to its June 2006 partial waiver of lien and November 2006 final waiver of lien, as it could not thus unilaterally change the previously executed settlement agreement. Given the clarity of the release, the motion court should not have considered the affidavit of plaintiff's principal asserting his intention to release only the change order requests submitted to the mediator (*see Kass v Kass*, 91 NY2d 554, 566 [1998]; *E. Lee Martin, Inc. v Saks & Co.*, 30 AD3d 1139 [2006]), and that he signed the release without reading it or fully comprehending its significance (*Collins v E-Magine, LLC*, 291 AD2d 350, 351 [2002], *lv denied* 98 NY2d 605 [2002]), and without representation of

counsel (*Booth v 3669 Delaware, Inc.*, 92 NY2d 934 [1998], *affg* 242 AD2d 921 [1997]). We would add that the motion court incorrectly relied on *Barsotti's, Inc. v Consolidated Edison Co. of N.Y.* (254 AD2d 211 [1998]) in finding an issue of fact as to whether defendant had waived the subcontract's requirement that plaintiff give it written notice of "a claim of any nature whatsoever against [it]" within 15 days "of the occurrence of the event or documentation upon which such claim is based." *Barsotti's* did not involve a condition precedent-type notice provision setting forth the consequences of a failure to strictly comply (*see Promo-Pro Ltd. v Lehrer McGovern Bovis*, 306 AD2d 221, 222 [2003], *lv denied* 100 NY2d 628 [2003], distinguishing *Barsotti's* and citing, inter alia, *A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20 [1998]). Here, the 15-day notice clause provides that "[i]n default of such notice the claim is waived."

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

ENTERED: APRIL 9, 2009



Gonzalez, P.J., Tom, Catterson, Renwick, JJ.

288N Maria Diakrousis, Index 118232/03
Plaintiff,

-against-

Peter Maganga, et al.,
Defendants.

- - - - -

Finkelstein & Partners, L.L.P.,
Non-Party Appellant-Respondent,

-against-

Trief & Olk,
Non-Party Respondent-Appellant.

Finkelstein & Partners, LLP, Newburgh (Terry D. Horner of counsel), appellant-respondent pro se.

Trief & Olk, New York (Barbara E. Olk of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered July 27, 2007, which, in a dispute between plaintiff's outgoing and incoming counsel as to the division of a $1,000,000 contingency fee earned in a personal injury action, apportioned 70% of the contingency fee to plaintiff's incoming attorneys Finkelstein & Partners, L.L.P. (Finkelstein) and 30% to the outgoing attorneys Trief & Olk (T & O), unanimously affirmed, without costs.

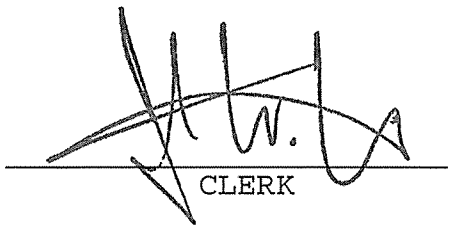
The motion court's apportionment of the contingency fee was a provident exercise of discretion (*see Ebrahimian v Long Is. R.R.*, 269 AD2d 488 [2000]). The court analyzed the relevant

factors including the amount of time spent by the attorneys on the case, the nature and quality of the work performed and the relative contributions of counsel toward achieving the outcome (*see Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]). The record shows that T & O laid the foundation for the case in the eight months that they represented plaintiff, and obtained a $900,000 settlement offer, which plaintiff rejected. Finkelstein then handled the case for three more years, adding additional defendants, and obtained a settlement of $3,000,000 prior to the jury publishing its verdict following a 10-day trial. The motion court appropriately recognized the relative contributions of the attorneys in awarding 30% of the contingency fee to T & O (*see e.g. Martin v Feltingoff*, 7 AD3d 467 [2004], *lv denied* 3 NY3d 608 [2004]; *Pearl v Metropolitan Transp. Auth.*, 156 AD2d 281, 283 [1989]).

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

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

ENTERED: APRIL 9, 2009



Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

289N Cutie Parker, Index 106683/07
Plaintiff-Appellant,

-against-

Christian Ferraro, et al.,
Defendants-Respondents.

Michael A. Ruiz, PLLC, New York (Michael A. Ruiz of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 3, 2008, which, insofar as appealed from, granted defendants' motion to transfer venue to Nassau County, unanimously reversed, on the law, without costs, and the motion denied.

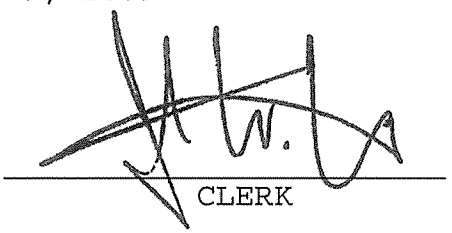
Plaintiff's designation of New York County as the venue for this action was proper, since corporate defendant's principal place of business is located within that county (CPLR 503[c]; *see Margolis v United Parcel Serv., Inc.*, 57 AD3d 371 [2008]). In order to obtain a discretionary change of venue under CPLR 510(3), "the moving party must provide detailed justification for such relief in the form of the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be

inconvenienced by the initial venue" (*Rodriguez v Port Auth. of N.Y. & N.J.*, 293 AD2d 325, 326 [2002]).

Defendants failed to meet this burden. In support of the motion, defendants submitted, inter alia, an affidavit from defendant driver Ferraro, "whose convenience [is] not a factor for consideration on the motion" (*Gissen v Boy Scouts of Am.*, 26 AD3d 289, 291 [2006]), and who failed to particularize his anticipated testimony. It is further noted that in opposition to defendants' motion, plaintiff submitted an affidavit from an eyewitness to the motor vehicle accident, who stated that she was available to testify and would not be inconvenienced by traveling to New York County.

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

ENTERED: APRIL 9, 2009



CLERK