SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 14, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

182 The People of the State of New York, Ind. 5331/03
Respondent,

-against-

Rahjeem Williams,
Defendant-Appellant.

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

Rahjeem Williams, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Raymond L. Bruce, J.), rendered September 26, 2005, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

The totality of the record (*see People v Montez*, 269 AD2d 154 [2000], *lv denied* 95 NY2d 800 [2000]; *People v Leonor*, 245 AD2d 22, 23 [1997], *lv denied* 92 NY2d 855 [1998]) demonstrates that defendant knowingly, intelligently and voluntarily waived

his right to be present at discussions with potential jurors regarding possible bias (*see People v Antommarchi*, 80 NY2d 247 [1992]). After defendant's counsel had already told the court that he advised defendant of his *Antommarchi* rights, the court explained to defendant that he had an absolute right to be present at any sidebars, or any time the court and both counsel had a discussion. When the court and both counsel retired to the deliberation room to hear from potential jurors about possible problems they had with serving, defendant did not join them, and the Court Clerk informed the court that defendant "elected" not to do so. Later the court reiterated to defendant that he had a right to be present during any sidebar discussions or any discussions with the court and both counsel, and defendant confirmed that he had been advised about these rights by his own counsel. Counsel also later confirmed in the deliberation room that defendant was again waiving his rights to be present. Given the flexible standard for finding such a waiver (*see People v Vargas*, 88 NY2d 363, 375-376 [1996]), this record supports the conclusion that defendant waived this right. While the court articulated a right to be present that was broader than the law requires, its statement necessarily included the rights

guaranteed by *Antommarchi*, and the surrounding circumstances support the inference that defendant understood and waived those rights.

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 element of intent to sell was established by evidence of defendant's contemporaneous drug sale to an undercover officer. Defendant was not acquitted of the sale count; instead, that count was dismissed on the People's application after defendant's conviction on the possession count. Moreover, even if he had been acquitted of the sale count, we would reach the same result (*see People v Rayam*, 94 NY2d 557 [2000]; *People v Freeman*, 298 AD2d 311 [2002], *lv denied* 99 NY2d 582 [2003]).

Defendant's pro se claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: APRIL 14, 2009

CLERK

Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

290 The People of the State of New York, Ind. 5600/04
Respondent,

-against-

Kevin Weems,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Kevin Weems, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J. at dismissal motion; Arlene Goldberg, J. at suppression hearing, plea and sentence), rendered November 7, 2005, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, including its resolution of minor discrepancies in the officers' testimony (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

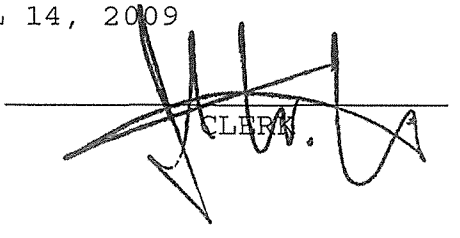
Since defendant pleaded guilty with the assistance of new counsel, he forfeited the right to argue that he was denied the

opportunity to testify before the grand jury as a result of his prior attorney's conduct (*see People v Petgen*, 55 NY2d 529, 534-535 [1982]; *People v Bostick*, 235 AD2d 287 [1997], *lv denied* 89 NY2d 1089 [1997]). In any event, even assuming the prior attorney withdrew defendant's request to testify without consulting her client, this did not constitute ineffective assistance (*see People v Wiggins*, 89 NY2d 872 [1996]; *People v Nobles*, 29 AD3d 429 [2006], *lv denied* 7 NY3d 792 [2006]). There is no reason to believe that testimony from defendant would have affected the result of the grand jury proceeding. Defendant's arguments that he was "effectively unrepresented" or represented by "conflicted" counsel as the result of his attorney's failure to carry out his wish to testify before the grand jury are without merit (*see People v Simmons*, 10 NY3d 946, 948 [2008]; *see also People v Ferguson*, 67 NY2d 383, 390 [1986]; *People v Cox*, 19 Misc 3d 1129[A] [Sup Ct, NY County 2007]).

We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

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

ENTERED: APRIL 14, 2009



Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

291 Advanced Fertility Services, P.C., Index 107564/03
Plaintiff-Respondent,

-against-

Yorkville Towers Associates, et al.,
Defendants-Appellants.

Margaret G. Klein & Associates, New York (Eugene Guarneri of counsel), for appellants.

Law Offices of Steve Newman, New York (Steve Newman of counsel), for respondent.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered October 16, 2008, which, in an action by a tenant against its landlord and managing agent for property damages and business interruption caused by water infiltration, granted defendants' motion pursuant to CPLR 3126 to dismiss plaintiff's complaint for noncompliance with disclosure orders unless plaintiff provided certain discovery, mostly related to its business interruption claim, by October 28, 2008, unanimously modified, on the facts, to grant the motion unless, within 30 days after service of a copy of this order, plaintiff pays defendants' attorney $5,000, and otherwise affirmed, with costs in favor of defendants, payable by plaintiff.

Defendants acknowledge that plaintiff provided the discovery responses by October 28, 2008, and do not assert prejudice as a

result of general delay, but argue that the action should have been dismissed outright because of plaintiff's failure to explain its noncompliance with prior court orders directing discovery. While the drastic relief that defendants seek was properly denied for lack of a clear showing that the noncompliance was willful or contumacious (*see Delgado v City of New York*, 47 AD3d 550 [2008]), plaintiff's inexcusable laxness "should not escape adverse consequences" (*Figdor v City of New York*, 33 AD3d 560, 561 [2006]; *see Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1999]), and we modify accordingly.

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

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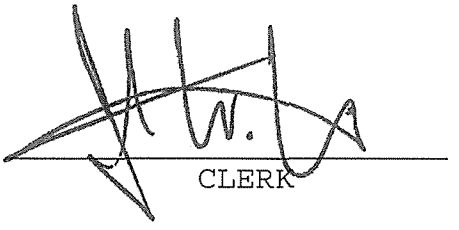

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Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

292 In re Edward H.,

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

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

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

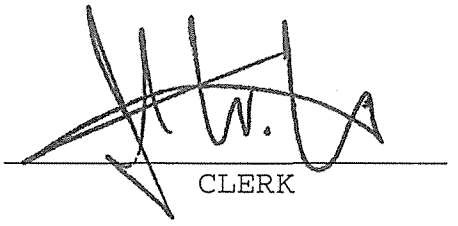
Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about February 7, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and placed him with the Office of Children and Family Services for a period of up to 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its rejection of appellant's version of the events. Appellant's intent to cause physical injury could be readily inferred from

his act of punching the victim in the face hard enough to knock him unconscious (*see generally People v Getch*, 50 NY2d 456, 465 [1980]).

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

ENTERED: APRIL 14, 2009



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Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

293 Leonard Eidlisz, Index 600105/05
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

Orans, Elsen, Lupert & Brown LLP, New York (Robert L. Plotz of counnsel), for appellant.

Nancy Kilson, New York, for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered July 31, 2008, which, in an action for specific performance, denied plaintiff's motion for summary judgment and granted defendants' cross motion for summary judgment dismissing the complaint as barred by the four-month statute of limitations, unanimously reversed, on the law, without costs, defendants' cross motion denied, plaintiff's motion granted, and defendants directed to award plaintiff a degree and diploma and any authorizations he may need to take the dental boards.

Plaintiff, who began his studies with defendant dental school in 1993, was granted readmission to the school as a part-time student for the academic year 2002-2003 in a letter, dated July 18, 2002, stating that he would receive the school's degree

upon successful completion of three specified courses for which he would be assessed tuition based on the number of credits per course.

Plaintiff was initially overcharged tuition due to an admitted billing error by the school. Plaintiff attempted to have the bill corrected, and was told by school personnel in the Bursar's and Financial Aid offices that it would be corrected. Because of the billing error, the school mailed delinquency notices to plaintiff, and, in January 2003, mailed him a letter "de-enrolling" him "because you have not displayed the ability to meet your financial obligations." Plaintiff asserts he never received any of those letters.

In any event, notwithstanding the de-enrollment, plaintiff continued to attend courses and take final exams, which he passed, and, in the spring of 2003, he had further conversations with school personnel in the Financial Aid and Bursar's offices concerning the incorrect tuition bill in which his de-enrollment was not mentioned. Plaintiff asserts that he received a corrected bill in July 2003; that in September 2003, when he asked a professor for his final grade, she told him that she had received instructions not to release it because of his finances; that in November 2003, after his applications for financial aid were denied, he obtained a loan from his father and paid the

corrected bill in full; and that in January 2004, he met with the school's academic advisor and learned for the first time of his de-enrollment for nonpayment of tuition. By letter dated February 12, 2004, the school's associate dean rejected plaintiff's request for re-enrollment, and plaintiff instituted the instant action for breach of contract 11 months later.

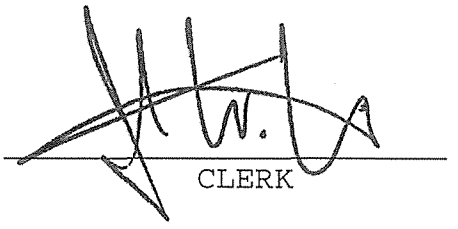
Contrary to Supreme Court's conclusion that this case "relates to the sort of academic and administrative decisions that . . . are properly the subject of an article 78 proceeding, rather than an action for breach of contract," "there exists an implied contract between the institution and its students such that if the student complies with the terms prescribed by the institution, he will obtain the degree which he sought" (*Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 414 [1980] [internal quotation marks and brackets omitted]).

Plaintiff properly brought this action for breach of contract, rather than an article 78 proceeding, because, in the school's July 18, 2002 letter, he was promised that he would be billed per credit and would obtain a degree upon completion of the three courses; however, the school failed to bill plaintiff as promised, failed to correct the tuition bill in a timely manner, failed to notify plaintiff of his de-enrollment by e-mail

in accordance with its handbook's announced preference for e-mail, and failed to grant plaintiff a degree when he paid the correct amount of tuition in full.

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

ENTERED: APRIL 14, 2009



Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

294 The People of the State of New York, Ind. 1942/04
Respondent,

-against-

Donald Mackay,
Defendant-Appellant.

Jamel Oeser-Sweat, New York, for appellant.

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

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered February 7, 2005, convicting defendant, after a jury trial, of leaving the scene of an incident without reporting and aggravated unlicensed operation of a motor vehicle in the second degree, and sentencing him to an aggregate term of 1⅓ to 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations.

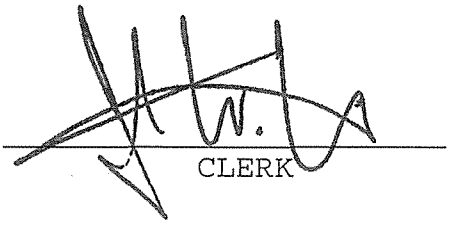
Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters outside the record concerning counsel's strategy and preparation (*see People v Rivera*, 71 NY2d 705, 709 [1988]). On the existing record, to the extent it permits review, we 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]).

We perceive no basis for reducing the sentence. We have considered and rejected defendant's arguments relating to the sentencing proceeding.

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

ENTERED: APRIL 14, 2009



Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

295 The People of the State of New York, Ind. 1050/07
Respondent,

-against-

Raymundo Garcia,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

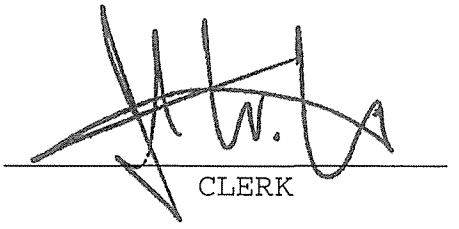
Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 26, 2007, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously reversed, on the law, the plea vacated and the matter remanded for further proceedings.

The court's failure to inform defendant at his plea allocution that he would be subject to a period of postrelease supervision requires reversal of the conviction (*People v Catu*, 4 NY3d 242 [2005]). In pleading guilty, defendant was entitled to rely on the *court's* sentence promise, which, as applicable here, was a prison term of 3½ years with no mention of anything else. Accordingly, the fact that the prosecutor mentioned postrelease supervision earlier in the plea proceeding does not warrant a

different result. A court's failure to warn a defendant prior to pleading guilty of the sentencing consequences of the plea is not subject to harmless error analysis (*People v Hill*, 9 NY3d 189, 192 [2007], *cert denied* __ US __, 128 S Ct 2430 [2008]; *see also People v Van Deusen*, 7 NY3d 744, 745-746 [2006]). Similarly, there is no reason to depart from the rule that a defendant may raise a *Catu* issue for the first time on appeal (*see People v Louree*, 8 NY3d 541 [2007]). We have considered and rejected the People's remaining arguments.

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

ENTERED: APRIL 14, 2009



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Tom, J.P., Andrias, Buckley, Moskowitz, JJ.

296 Jeffrey Roth, et al., Index 116729/06
Plaintiffs-Appellants,

-against-

State University of New York, et al.,
Defendants-Respondents.

Pryor Cashman LLP, New York (Joshua Zuckerberg of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (Richard O. Jackson of counsel), for State University of New York, SUNY State College of Optometry, Steven H. Schwartz, Mitchell Dul and Richard Weber, respondents.

Manatt Phelps & Phillips, LLP, New York (Gregory A. Clarick of counsel), for Alden N. Haffner, respondent.

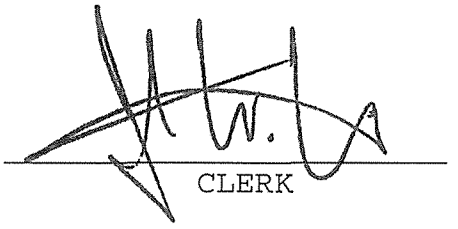
Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered November 30, 2007, which granted defendants' motions to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

The summons described the nature of this action as "violations of federal, New York State, and New York City human rights laws, including but not limited to" various named statutes. Since numerous potential causes of action may be brought under these statutes, the summons left defendants to guess the precise claims against them (*see Scaringi v Broome Realty Corp.*, 191 AD2d 223 [1993]). In thus failing to comply

with the notice requirements of CPLR 305(b), the summons was jurisdictionally defective (*Wells v Mount Sinai Hosp. & Med. Ctr.*, 196 AD2d 749 [1993]), and as such could not be amended (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C305:4).

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

ENTERED: APRIL 14, 2009



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Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

298 The People of the State of New York, Ind. 48564C/05
Respondent,

-against-

Jose Gonzalez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

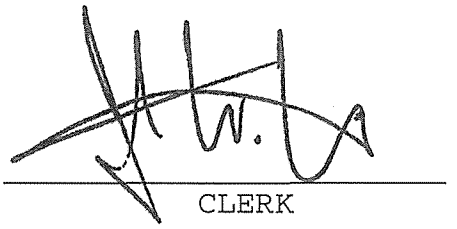
Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered January 26, 2007, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

After the court denied defendant's challenge for cause to a prospective juror, and defendant used all of his peremptory challenges, the court "gave him an additional peremptory challenge which he declined to use. Since the defendant did not exhaust all of his peremptory challenges when jury selection was completed, the asserted impropriety of the denial of the challenge for cause does not constitute a ground for reversal"

(*People v Libardi*, 12 AD3d 534, 534-535 [2004], *lv denied* 4 NY3d 765 [2005] [citations omitted]; *see also People v Miles*, 55 AD3d 955 [2008], *lv denied* 11 NY3d 928 [2009]).

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

ENTERED: APRIL 14, 2009



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Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

299 Mister Gemini, et al., Index 112153/05
Plaintiffs-Respondents,

-against-

Nmi P. Christ, et al.,
Defendants-Appellants.

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

Moshe D. Fuld, P.C., New York (Michael W. Reich of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered July 15, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, the 90/180-day portion of his "serious injury" claim dismissed, and otherwise affirmed, without costs.

Defendants' medical expert evaluations of plaintiffs set forth the objective tests performed in support of their conclusions that plaintiffs did not suffer serious injury. Partial denial of their motion was nonetheless appropriate, inasmuch as plaintiffs, through the affidavits of their experts and treating physicians, sufficiently demonstrated an issue of fact as to whether they had suffered serious injury on a theory of significant and permanent consequential limitation of their

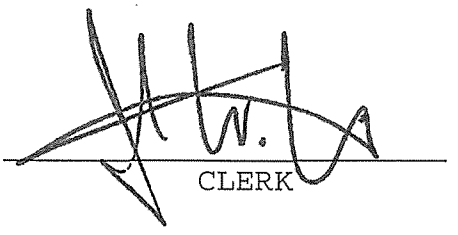
cervical and lumbar spines (*see Brown v Dunlap*, 4 NY3d 566, 577-578 [2008]).

Plaintiffs failed, however, to raise an issue of fact concerning their inability to perform daily activities for at least 90 of the 180 days immediately following the accident (*see Ayala v Douglas*, 57 AD3d 266 [2008]). Plaintiff Gemini's affidavit contradicted his deposition testimony in this respect and appears to have been tailored to avoid the consequences of that testimony, and thus was insufficient to raise a triable issue of fact (*see Blackmon v Dinstuhl*, 27 AD3d 241 [2006]).

We have considered the appellants' remaining arguments and find them unavailing.

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

ENTERED: APRIL 14, 2009



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Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

300 Patricia Furman-Rawlings, Index 115239/04
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

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

Stephen Bilkis & Associates, Bohemia (Myra P. Lapidus of counsel), for respondent.

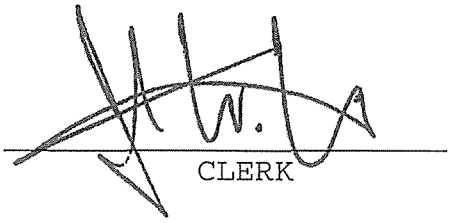
Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 21, 2008, which, in an action for personal injuries sustained when plaintiff stepped on an extension cord, denied defendant's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiff sustained an electric shock when she stepped on an electric cord where it was plugged into a surge protector at office space owned by defendant. This negligence action is based on the premise that defendant's failure to provide adequate lighting required plaintiff and her co-workers to resort to lamps which they plugged into outlets and surge protectors throughout the office. Plaintiff has failed to raise a triable

issue of fact as to the existence of a causal connection between her injury and the inadequacy of the office's lighting conditions (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Indeed, plaintiff testified that she had stepped backwards when her foot came into contact with the cord. We also note that plaintiff's notice of claim cites "a broken and/or defective electrical wire or power strip that constituted a nuisance or trap" as the cause of her injury.

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

ENTERED: APRIL 14, 2009



Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

301-
301A Gemstar-TV Guide International, Inc., Index 602094/07
Petitioner-Respondent,

-against-

Henry C. Yuen,
Respondent-Appellant.

Dershowitz, Eiger & Adelson, P.C., New York (Alan M. Dershowitz, of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), for appellant.

Hogan & Hartson, LLP, New York (Paul D. Sarkozi of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Helen E. Freedman, J.), entered February 8, 2008, granting the petition to confirm two arbitration awards determining that petitioner was obligated to pay respondent nothing on his claim for a termination payment and awarding petitioner the principal amount of $88,712,904.95 plus interest, and denying respondent's motion to dismiss the petition and to vacate adverse portions of the awards, unanimously affirmed, with costs. Appeal from order, same court and Justice, also entered February 8, 2008, which directed settlement of the above order and judgment, unanimously dismissed, without costs, as subsumed in the appeal from the order and judgment.

The arbitration awards were properly confirmed where there was no showing that the arbitration panel manifestly disregarded the law or exceeded its authority (*see* 9 USC § 10[a]; *Wien & Malkin LLP v Helmsely-Spear, Inc.*, 6 NY3d 471, 480-483 [2006], *cert dismissed* 548 US 940 [2006]). The panel's interpretation of the Termination Agreement, particularly that petitioner's requirement to make the termination payment was conditioned upon respondent's compliance with his representations and warranties, was supported by the agreement's plain language and the uncontroverted testimony of petitioner's witness. The panel also appropriately recognized the collateral estoppel effect of the Findings of Fact in the federal action (*S.E.C. v Yuen*, 2006 WL 1390837, 2006 US Dist LEXIS 34759 [CD Cal 2006], *affd* 272 Fed Appx 615 [9th Cir 2008]).

We have considered respondent'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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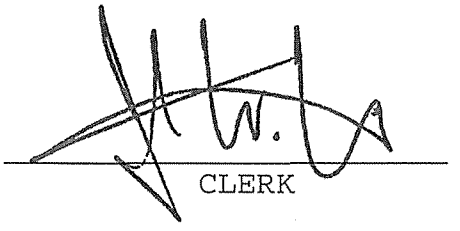

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Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

302 Susan Sutherland, et al., Index 114415/07
Petitioners-Appellants,

-against-

New York City Housing
Development Corporation, et al.,
Respondents-Respondents.

Patton, Eakins, Lipsett, Martin & Savage, New York (John G. Lipsett of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for New York City Housing Development Corporation, respondent.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Richard G. Leland of counsel), for AMP Apartments, Inc., respondent.

Order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 17, 2008, which, in a CPLR article 78 proceeding seeking to annul respondent New York City Housing Development Corporation's (HDC) determinations (1) that respondent AMP Apartments' (AMP) housing construction project would have no significant environmental impact, and (2) to provide funds for affordable housing to the AMP project, denied the petition and dismissed the proceeding, unanimously affirmed, without costs.

To the extent petitioners challenge construction of AMP's residential building as obstructing the views from their

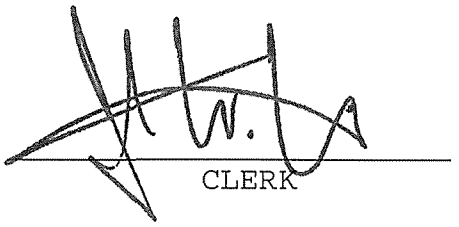
apartments, Supreme Court correctly concluded that the challenge was moot. By the time this proceeding was commenced, the building project was substantially complete, petitioners had failed to seek preliminary injunctive relief, there was no evidence that construction work was performed in bad faith, and such work could not be readily undone without undue hardship (*see Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 729 [2004]; *Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172-173 [2002]).

To the extent petitioners challenge HDC's decision to provide tax-exempt funds allowing 20% of the apartment units in the building to be designated as affordable housing for low income tenants, Supreme Court correctly concluded that petitioners lack standing. The unrefuted evidence shows that the building's structure would have been the same without HDC's funding, the only difference being that without such funding, all of the apartment units would rent at market rates. Accordingly, petitioners fail to establish any nexus between the view obstruction injury they allege and HDC's funding of the project (*see Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433 [1990]). In addition, petitioners fail to show that such funding caused them to suffer hardships, namely, view

obstruction, not also experienced by the public at large (*see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774-775 [1991]).

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

ENTERED: APRIL 14, 2009



CLERK

Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

303 Trump Plaza Owners, Inc., Index 110351/03
Plaintiff-Respondent,

-against-

Dorothea M. Weitzner,
Defendant-Appellant.

Kenneth J. Glassman, New York, for appellant.

Frederick Mehl, New York, for respondent.

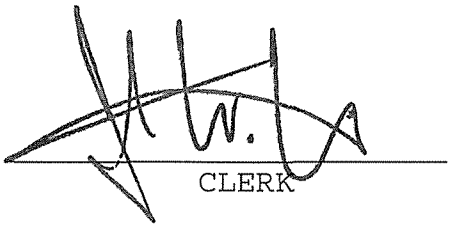
Order and judgment (one paper), Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 16, 2008, which granted plaintiff's motion for summary judgment, declared the lease terminated and ejected defendant, unanimously affirmed, without costs.

The minutes of the special meeting of the cooperative's Board of Directors, duly called for the purpose of determining whether, because of her objectionable conduct, defendant's tenancy as a tenant shareholder of the cooperative was undesirable and the proprietary lease should expire, establish that the Board followed the requisite procedures in terminating defendant's tenancy. There is no issue of fact on this point that would preclude summary judgment. Nor has defendant raised a factual issue as to whether in voting to terminate her lease, the cooperative board did not act for the purposes of the

cooperative, within the scope of its authority, and in good faith (*see Matter of Levandusky v One Fifth Ave Apt Corp*, 75 NY2d 530 537-538 [1990]; *see also 40 West 67th St v Pullman*, 100 NY2d 147, 154-155 [2003]).

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

ENTERED: APRIL 14, 2009



CLERK

Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

304 The People of the State of New York, Ind. 2530/06
Respondent,

-against-

Dashaun Hinton,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered March 6, 2007, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

Defendant failed to make a record sufficient to permit review of his claim (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]) that the court did not provide defense counsel with notice of two jury notes and an opportunity to be heard regarding the court's responses (*see People v O'Rama*, 78 NY2d 270 [1991]). Viewed in light of the presumption of regularity that attaches to judicial proceedings (*see People v Velasquez*, 1 NY3d 44, 48 [2003]), the existing record, to the extent it permits review, demonstrates that the court satisfied its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]) to disclose jury

notes and permit comment by counsel. Accordingly, there was no mode of proceedings error exempt from preservation requirements (*see People v Starling*, 85 NY2d 509, 516 [1995]). There is no evidence that the court prevented counsel from knowing the specific contents of the notes, or from suggesting different responses from those the court provided. On the contrary, the court, at least, revealed the full contents of each note in the presence of counsel and the jury immediately prior to responding.

We decline to review defendant's unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal. The record supports the conclusion that counsel received a suitable opportunity for input into the court's responses. The first of the inquiries at issue required essentially ministerial responses that were not likely to require significant input from counsel (*see People v Snider*, 49 AD3d 459, 460 [2008], *lv denied* 11 NY3d 795 [2008]). The other inquiry at issue announced that the jury had reached a verdict on two of the three counts submitted, and the court responded by simply accepting the partial verdict without objection from defense counsel.

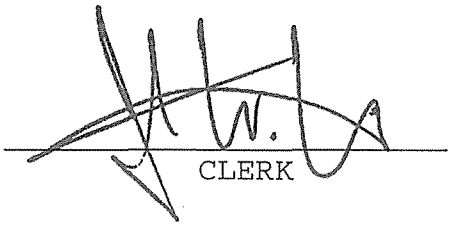
While we do not find that the court's handling of any of the jury inquiries in this case requires reversal, nevertheless, as the Court of Appeals stated in *Kisoon*, "we underscore the

desirability of adherence to the procedures outlined in *O'Rama*" (8 NY3d at 135).

Defendant's challenge to the content of the *Allen* charge (*Allen v United States*, 164 US 492 [1896]) that the court delivered in response to another jury note is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Alvarez*, 86 NY2d 761, 763 [1995]).

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

ENTERED: APRIL 14, 2009



Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

305 Liberty Insurance Underwriters, Inc., Plaintiff-Appellant, Index 104396/08

-against-

Arch Insurance Company, et al., Defendants-Respondents.

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for appellant.

Gallo Vitucci Klar LLP, New York (Yolanda L. Ayala of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Walter B. Tolub, J.), entered December 30, 2008, which, in a declaratory judgment action between insurers involving their respective obligations to defend and indemnify in an underlying action for personal injuries, upon the parties' respective motions for summary judgment, declared that plaintiff is obligated to defend and indemnify in the underlying action and is also obligated to reimburse defendants for the costs they incurred in defending the underlying action, unanimously modified, on the law, to declare that plaintiff is obligated to reimburse defendants for the costs defendants incurred in defending the underlying action after tendering the defense of the underlying action to plaintiff, and otherwise affirmed,

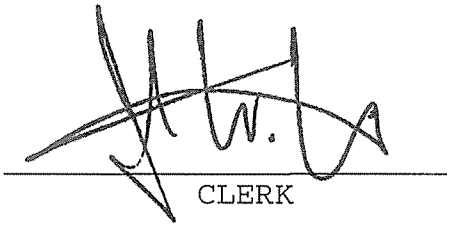
without costs.

"The doctrine of estoppel precludes an insurance company from denying or disclaiming coverage where the proper defending party relied to its detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on the loss of the right to control its own defense" (*Merchants Mut. Ins. Group v Travelers Ins. Co.*, 24 AD3d 1179, 1182 [2005] [internal quotation marks and brackets omitted]). We reject plaintiff's argument that this doctrine should be limited to coverage disputes between insurers and insureds, and not applied to coverage allocation disputes between insurers (*see e.g. Fireman's Fund Ins. Co. v Zurich Am. Ins. Co.*, 37 AD3d 521 [2d Dept 2007]; *Donato v City of New York*, 156 AD2d 505, 507-508 [2d Dept 1989]). *Lumbermens Mut. Ins. Co. v Lumber Mut. Ins. Co.* (148 AD2d 328 [1st Dept 1989]), cited by plaintiff, is not to the contrary. *Lumbermens* merely held that failure by an insurer to reserve its rights under the circumstances of that case did not constitute an intentional relinquishment, or waiver, of the right to seek contribution from another insurer (*id.* at 330). It did not address the issue of whether an insurer may be estopped, by its unqualified assumption of the defense of an action, from seeking contribution from another insurer. No issues of fact exist as to whether defendants, in tendering the

defense to plaintiff, lacked knowledge that plaintiff would ultimately claim to be only an excess insurer, or whether defendants lost control of the underlying defense and were otherwise prejudiced by plaintiff's assumption thereof for two years without reserving a right to disclaim coverage (*see Federated Dept. Stores v Twin City Fire Ins. Co.*, 28 AD3d 32, 39 [2006]). Defendants, however, are not entitled to reimbursement of defense costs incurred before tendering the defense to plaintiff (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD2d 84, 94 [2005]), and we modify the declaration accordingly. We have considered plaintiffs' other arguments and find them unavailing.

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

ENTERED: APRIL 14, 2009



CLERK

Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

306N Alexander Kobernik, Index 105263/07
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for appellant.

James M. Lane, New York, for respondent.

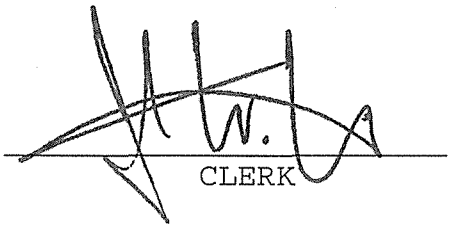
Order, Supreme Court, New York County (Paul G. Feinman, J.), entered July 16, 2007, which, in an action against defendant City of New York for personal injuries sustained when a tree on the side of a road located the Town of Carmel, Putnam County, uprooted and fell on the van in which plaintiff was a passenger, granted plaintiff's motion for leave to serve a late notice of claim, unanimously affirmed, without costs.

Plaintiff's original error in serving notices of claim on the Town of Carmel and Putnam County is excusable, based as it was on a reasonable belief that one or the other owned this roadway within the territorial jurisdiction of both, and plaintiff's subsequent delay in serving the true owner, the City of New York, is also excusable where he promptly moved to serve a late notice of claim against the City once advised by Putnam

County that the site is owned by the City (*see Matter of Harris v Dormitory Auth. of State of N.Y.*, 168 AD2d 560 [1990]). The transient nature of the condition refutes the City's claim of prejudice (*see id.*).

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

ENTERED: APRIL 14, 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 14, 2009.

Present - Hon. Peter Tom, Justice Presiding
Richard T. Andrias
John T. Buckley
Leland G. DeGrasse, Justices.

In re William Miranda,
Petitioner,

Dkt. 12208
12209

-against-

[M-1060]
307

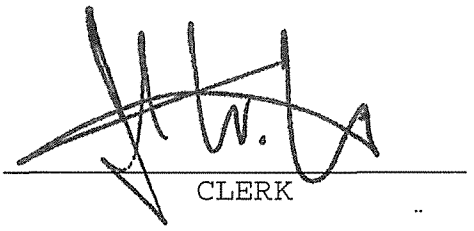
Hon. Ralph Fabrizio, etc., et al.,
Respondents.

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,

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 and the petition dismissed, without costs or disbursements.

ENTER:



CLERK

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

308 The People of the State of New York, Ind. 2736/06
Respondent,

-against-

Ceasar Hassell,
Defendant-Appellant.

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

Ceasar Hassell, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 21, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 6 years, unanimously affirmed.

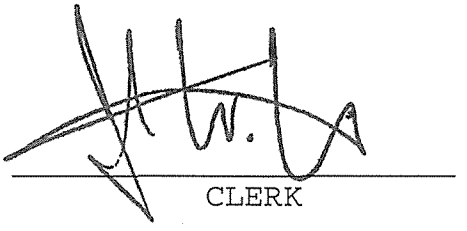
Defendant was not prejudiced when the arresting officer, in testifying about a statement made by defendant, mistakenly used wording that made reference to a possible uncharged crime, since the officer immediately corrected his mistake and made it clear to the jury that the offending reference was never made. On cross-examination, defense counsel repeated this clarification of

the officer's testimony, and did not request any remedy. The statement, as corrected, was clearly admissible in the context of the case. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's pro se claims are without merit.

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

ENTERED: APRIL 14, 2009



CLERK

Saxe, J.P., Sweeny, Moskowitz, Acosta, JJ.

309-
309A Citibank, N.A., Index 600148/98
Plaintiff-Respondent,

-against-

Angst, Inc., et al.,
Defendants,

John M. McNamara,
Defendant-Appellant.

Charles G. Mills, Glen Cove, for appellant.

Otterbourg, Steindler, Houston & Rosen, P.C., New York (Bernard Beitel of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 8, 2008, inter alia, directing defendant-appellant judgment debtor's arrest upon a finding that he failed to purge his contempt of judgment creditor's subpoena in accordance with a prior order, same court and Justice, dated June 21, 2006 (the 2006 contempt order), and order, same court and Justice, entered April 23, 2008, again directing judgment debtor's arrest upon a finding that the automatic bankruptcy stay in 11 USC § 362 does not apply to the February 8, 2008 order, unanimously affirmed, with one bill of costs.

The 2006 contempt order adjudged judgment debtor in contempt for failing to appear and produce documents in accordance with

judgment creditor's nonjudicial subpoena, and provided that judgment debtor could purge himself of the contempt by producing the documents and appearing for examination on specified dates. Judgment debtor challenges the validity of this order, arguing that under CPLR 2308(b) the remedy for noncompliance with a nonjudicial subpoena, in the first instance, is not contempt but an order compelling compliance. We reject that challenge because the purging provision in the 2006 contempt order was, in effect, an order compelling compliance with the subpoena.

As it happened, before judgment debtor's arrest was ordered in the February 8, 2008 order, he had been given a second opportunity, in an order entered February 28, 2007, to purge his contempt of the subpoena by showing, as he claimed for the first time in his opposition to judgment creditor's motion for a commitment order made after the purge examination, that a neurological condition impaired his memory and prevented him from answering the questions put to him at the purge examination. The February 28, 2007 order, which directed a Special Referee to report on whether judgment debtor "has a neurological condition so affecting his memory that it excuses his otherwise contemptuous conduct in failing to answer the questions asked him by [judgment creditor] at the examination, in particular those [516] questions set forth in [judgment creditor's counsel's]

August 17, 2006 affidavit," was a clear and unequivocal mandate that gave judgment debtor clear notice what he needed to do to purge his contempt.

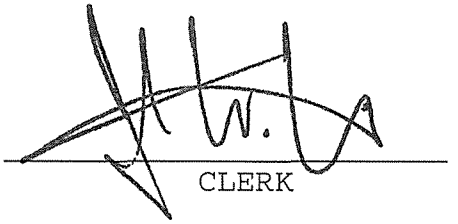
Since judgment debtor's opposition to the second contempt motion did not claim that his answers to the questions set forth in judgment creditor's affidavit were responsive, only that a neurological memory disorder prevented him from giving responsive answers, the factual issue referred to the Special Referee was not whether any particular answer was contemptuous, but whether judgment debtor's "otherwise contemptuous" answers were due to the claimed neurological disorder. Such fact-finding was subject to the preponderance-of-the-evidence standard applied by the Special Referee, and no basis exists to disturb the Special Referee's finding, turning largely on the credibility of expert witnesses, that judgment debtor's failure to answer the questions was not the result of a neurological disorder (*see Clean Rental Servs. v Karten*, 146 AD2d 462, 464 [1989]).

Judgment debtor's remaining arguments are unavailing. CPLR 5221(a)(4) did not require that judgment creditor seek enforcement of its subpoena by way of a special proceeding returnable in the county of judgment debtor's residence, regular employment or place of business. A contempt motion under CPLR 5210 to enforce a CPLR 5224 subpoena served on a judgment debtor

is not an enforcement device that requires institution of a special proceeding, and judgment creditor properly made its contempt motions returnable in Supreme Court, New York County, which issued the judgment sought to be enforced (*see* CPLR 5221[b]; Judiciary Law § 756; *Coutts Bank [Switzerland] v Anatian*, 275 AD2d 609, 611 [2000] [Sullivan, J., concurring]). Since the February 8, 2008 commitment order was entered to uphold the dignity of the court, not collect on a judgment, the automatic stay provisions of 11 USC § 362 do not apply (*see In re Altchek*, 124 BR 944, 959 [SD NY 1991]). We note that judgment debtor's opening brief contains factual assertions without supporting references to the record or appendix, contrary to the rules governing appeals (CPLR 5528[b], 5528[a][3]; 22 NYCRR 600.10[d][2][iii]).

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

ENTERED: APRIL 14, 2009



CLERK

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

310 In re Jayden R.,

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

Luis R., etc.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

Elisa Barnes, New York, for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for respondent.

Tamara A. Stecker, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about May 18, 2007, which, to the extent appealable, found, after a hearing, that the mother permanently neglected the child, terminated her parental rights and awarded custody of the child to petitioner agency and the Commissioner of Social Services for purposes of adoption by his foster mother, unanimously affirmed, without costs.

The father defaulted in appearing at the hearing which considered whether his consent was required for the child's adoption. No appeal lies from this default *(see Matter of Myles N.*, 49 AD3d 381, 382 [2008], *lv denied* 11 NY3d 709 [2008]).

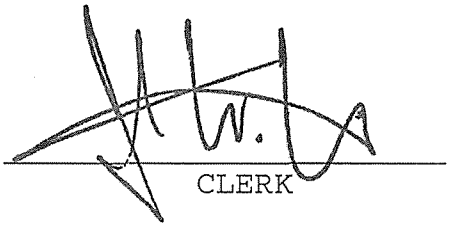
Even if the court were to consider the issue on the merits, the father cannot establish that he satisfied the criteria set forth in Domestic Relations Law § 111(1)(d). He testified that although he was working on a regular basis for the last 1½ years, he failed to provide support for the child and he admitted that he did not visit the child or communicate with the foster mother for at least 10 months. Accordingly, the court properly found that the father's consent was not required for the child's adoption.

A preponderance of the evidence demonstrated that it was in the child's best interests to be freed for adoption by the foster mother, with whom he had lived for four years. Agency records indicated that all of his physical, medical and emotional needs were being met by the foster mother. The father contends that the foster mother is too old to properly care for the child and he was improperly denied an adjournment of the dispositional hearing which would have enabled him to present two additional witnesses. While age is a factor to be considered, it is not the only or, necessarily, a dispositive factor in determining whether a child's best interests would be served by the adoption *(see Matter of Jennifer A.*, 225 AD2d 204, 207 [1996], *lv denied* 91 NY2d 809 [1998]). The foster mother has demonstrated her ability and willingness to care for the child and adequate backup

resources are available. In contrast, the father showed limited interest in the child since his placement in foster care, and returned him to the mother after an incident where she placed him in a dangerous situation. Furthermore, based on the father's offer of proof, the testimony of the witnesses he sought to present would have been cumulative or irrelevant.

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

ENTERED: APRIL 14, 2009



CLERK

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

311 John Mattesich, Index 102512/07
Plaintiff-Respondent,

-against-

Hayground Cove Asset Management, LLC, et al.,
Defendants-Appellants.

Proskauer Rose LLP, New York (Steven D. Hurd of counsel), for Hayground Cove Asset Management, LLC, Hayground Cove Associates, L.P. and Jason Ader, appellants.

Bressler, Amery & Ross, P.C., New York (Andrew W. Sidman of counsel), for David Schrader, appellant.

Liddle & Robinson, L.L.P., New York (Christine A. Palmieri of counsel), for respondent.

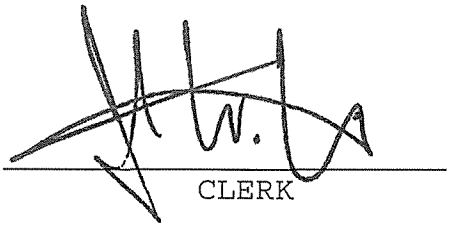
Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 15, 2008, which, to the extent appealed from as limited by the briefs, denied defendants' motions to dismiss the first cause of action for breach of contract as against defendant Hayground Cove Asset Management, LLC (HCAM), and the fourth cause of action as against all defendants for tortious interference with prospective economic advantage, unanimously reversed, on the law, with costs, and the motions granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint in its entirety.

Plaintiff alleges that HCAM, his former employer, breached a non-disparagement agreement, and that, as a result, he was denied

a position that he would have otherwise been offered. Defendants however submitted deposition testimony from members of the prospective employer who stated, inter alia, that although plaintiff was under consideration for employment, it was by no means certain that he would have been offered the position. Plaintiff would be unable to prove damages, and thus has no viable claim under a theory of either breach of contract (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 108 [2004]; *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]), or tortious interference with prospective economic advantage (*see Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421 [2006]; *American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 418-419 [1998]).

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

ENTERED: APRIL 14, 2009



CLERK

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

312-
312A In re New York City School Construction Authority,
Petitioner,

Index 737/07

Greentree Properties, LLC,
Respondent-Respondent,

-against-

The Slane Company, Ltd.,
Claimant-Appellant.

Gilbert Law Group, Melville (Cameron Gilbert of counsel), for appellant.

Brandt, Steinberg & Lewis, LLP, New York (Kathryn Weg Brandt of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered October 31, 2007, which granted respondent Greentree's motion to dismiss claimant Slane's leasehold claim, and order, same court and Justice, entered February 11, 2008, which, to the extent appealable, adhered upon renewal, to the prior decision, unanimously affirmed, without costs.

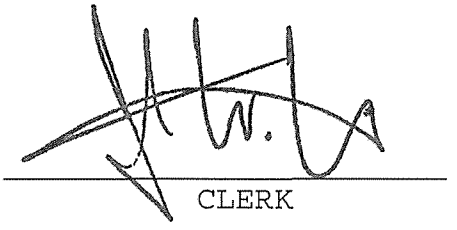
The clause in claimant's lease waiving its right to compensation in condemnation awards precludes it from asserting leasehold claims and from participating in any fee simple award payable to the landlord (*see Matter of New York State Urban Dev. Corp. v Nawam Entertainment, Inc.*, 57 AD3d 249, 250 [2008]). No

compensable tenant improvements, as defined under the lease, existed on the property at the time of the condemnation.

Claimant offered no new facts on renewal that would have altered the prior determination (*see Yerushalmi v Abed Realty Corp.*, 58 AD3d 491 [2009]).

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

ENTERED: APRIL 14, 2009



CLERK

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

314 Michael Katz, et al., Index 112747/05
Plaintiffs-Respondents, 109870/06
590131/07
-against- 590686/07

Jae Moon Kim, et al.,
Defendants,

The City of New York,
Defendant-Respondent.

- - - - -

Michael Katz, et al.,
Plaintiffs-Respondents,

-against-

Adellco Development, LLC, et al.,
Defendants,

One Hand Realty, LLC,
Defendant-Appellant.

[And Other Actions]

Ellen Rothstein, New York, for appellant.

Weiser & Associates, P.C., New York (Martin J. Weiser of counsel), for Katz respondents.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for The City of New York, respondent.

Order, Supreme Court, New York County (Karen Smith, J.), entered March 17, 2008, which, to the extent appealed from, granted plaintiffs leave to amend the verified complaint and the verified bill of particulars and denied defendant One Hand Realty's ("One Hand") cross motion for summary judgment

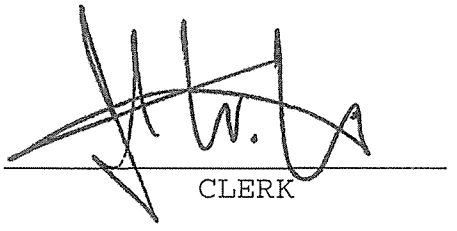
dismissing the complaint, unanimously affirmed, without costs.

Defendant One Hand failed to establish as a matter of law that it did not create or have notice of the alleged defective condition (*Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294, 295 [1994]). Plaintiff's testimony as well as the photographs and affidavit from plaintiff's expert were properly relied upon by the motion court in determining that One Hand was not entitled to summary judgment.

Plaintiff was properly granted leave to amend his complaint and bill of particulars (CPLR 3025[b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]).

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

ENTERED: APRIL 14, 2009



CLERK

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

315 In re Everett C.,
Petitioner-Appellant,

-against-

Oneida P.,
Respondent-Respondent.

Howard M. Simms, New York, for appellant.

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about March 18, 2008, which, after a fact-finding hearing in a proceeding brought pursuant to article 8 of the Family Court Act, dismissed the petition for an order of protection, unanimously affirmed, without costs.

To support a finding that a respondent has committed a family offense, a petitioner must prove his allegations by a fair preponderance of the evidence (Family Court Act § 832; *Melissa Marie G. v John Christopher W.*, 57 AD3d 314 [2008]). A hearing court's determination is entitled to great deference because it has the best vantage point for evaluating the credibility of the witnesses, and its determination should not be set aside unless it lacks a sound and substantial evidentiary basis (*see Peter G. v Karleen K.*, 51 AD3d 541, 542 [2008]; *In re Brittni K.*, 297 AD2d 236, 237-238 [2002]).

Here, the Family Court properly dismissed the petition.

Petitioner failed to establish by a preponderance of the evidence that respondent had committed acts warranting an order of protection in petitioner's favor, particularly in light of the court's finding that none of the testimony was especially credible (*see Peter G.*, 51 AD3d at 542; *Barnes v Barnes*, 54 AD3d 755 [2008]). Contrary to petitioner's contention, there is no indication that the court failed to apply the proper standard in making its determination.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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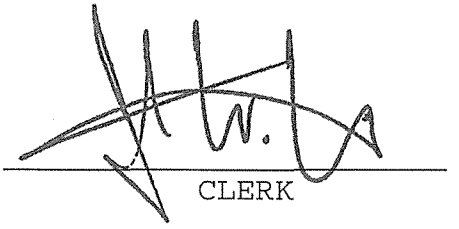

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Saxe, J.P., Friedman, Sweeny, Acosta, Freedman, JJ.

316 The People of the State of New York, Ind. 723/06
Respondent,

-against-

Jason Torres,
Defendant-Appellant.

- - - - - -

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

-against-

Luis Vives,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for Jason Torres, appellant.

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

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

Judgments, Supreme Court, New York County (Maxwell Wiley, J.), rendered December 21, 2006, convicting defendants, after a joint jury trial, of criminal possession of a controlled substance in the second degree, robbery in the first and second degrees and burglary in the first degree, and sentencing defendant Torres, as a second felony offender, to an aggregate term of 12 years, and sentencing defendant Vives, as a second violent felony offender, to an aggregate term of 17 years,

unanimously affirmed.

Since defendants did not exhaust their peremptory challenges, their claim that the court should have granted certain challenges for cause is foreclosed (CPL 270.20[2]; *People v Lynch*, 95 NY2d 243, 248 [2000]). There is no reason to depart from the express terms of the statute, and we reject defendants' argument to the contrary.

Defendants' absence from an off-the-record discussion and initial colloquy concerning the People's request to introduce evidence that Vives threatened a witness did not deprive defendants of their constitutional and statutory rights to be present at all material stages of a trial (*see People v Velasco*, 77 NY2d 469, 473 [1991]). The discussion and colloquy were merely preliminary to a subsequent proceeding in open court in defendants' presence, at which they had a full opportunity to provide meaningful input. Any violation of defendants' right to be present at those preliminary proceedings was de minimis, and the suggestion that defendants could have altered the outcome if present is entirely speculative (*see People v Roman*, 88 NY2d 18, 26-27 [1996]).

We reject Vives's argument that his threat to kill a witness should not have been admitted; that evidence was highly probative

of his consciousness of guilt (*see e.g. People v Rosario*, 309 AD2d 537, 538 [2003], *lv denied* 1 NY3d 579 [2003]). Vives expressly waived any limiting instruction regarding this evidence (*see People v Miller*, 232 AD2d 247 [1996], *lv denied* 89 NY2d 1038 [1997]), and his argument to the contrary is without merit. In any event, the absence of a limiting instruction was harmless.

Torres's argument that he was entitled to introduce an unavailable witness's statement as a remedy for the prosecutor's alleged untimely disclosure of *Brady* material (*Brady v Maryland*, 373 US 83 [1963]) is unavailing. Initially, we conclude that the witness's statement tended to corroborate the prosecution's case rather than providing exculpatory evidence. Furthermore, there is no reason to believe that earlier disclosure of the information would have resulted in the witness being available to testify (*see e.g. People v Buie*, 289 AD2d 140 [2001], *lv denied* 98 NY2d 695 [2002]). The court properly exercised its discretion in declining to admit the witness's hearsay statement, and Torres has not established that he was constitutionally entitled to introduce it.

We reject Torres's claim that the verdict was 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.

We perceive no basis for reducing either defendant's sentence.

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

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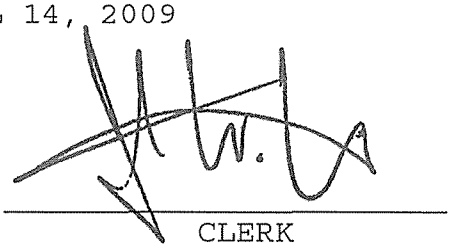

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Saxe, J.P., Friedman, Sweeny, Acosta, Freedman, JJ.

318 Joseph Romeo, Index 106470/06
Plaintiff-Appellant,

-against-

Property Owner (USA) LLC, et al.,
Defendants-Respondents.

Arnold E. DiJoseph, III, New York, for appellant.

Murphy & Higgins, LLP, New Rochelle (Richard S. Kaye of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered December 14, 2007, which granted defendants property owner and general contractor's motion to dismiss the complaint, and denied plaintiff's cross motion for summary judgment on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff electrician's injury occurred when, while walking on a raised computer floor, he stepped on a floor tile that suddenly and unexpectedly dislodged, causing his right foot to fall through the 2' x 2' opening created by the missing tile and strike the concrete sub-floor 18 inches below.

Plaintiff's claims pursuant to Labor Law §§ 200, 240(1) and 241(6) were properly dismissed. As to the § 240(1) claim, plaintiff's injury while walking on the permanent floor did not involve an elevation-related hazard of the type contemplated by

the statute, and did not necessitate the provision of the type of safety devices set forth in the statute (*see Geonie v OD&P NY Ltd.*, 50 AD3d 444, 445 [2008]; *Piccuillo v Bank of New York Co.*, 277 AD2d 93, 94 [2000]; *D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 765 [2000], *lv denied* 95 NY2d 765 [2000]). Plaintiff's § 200 claim and common law negligence claim were unsupported by evidence to indicate that the owner and general contractor either had notice of the alleged hazardous tile condition or that they directly controlled and supervised the electrical work in question (*see Geonie*, 50 AD3d at 445; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505-506 [1993]). Plaintiff testified that the tile floor had appeared defect-free during the five days he worked at the job site, and at all times prior to his accident. Further, plaintiff testified that his work instructions came only from a sub-foreman who, like plaintiff, was employed by the electrical subcontractor.

Plaintiff's § 241(6) claim was also properly dismissed for the reasons set forth in *Geonie* and *D'Egidio*. The "hazardous opening" provision (*see* Industrial Code [12 NYCRR] § 23-1.7[b][1]), relied upon for the alleged § 241(6) violation, was inapplicable, inasmuch as the "opening" in question and the 18-

inch depth to the sub-floor did not present significant depth and size to warrant the protection of the provision (*see e.g. Messina v. City of New York*, 300 AD2d 121, 123-124 [2002]).

To the extent plaintiff also relied upon Industrial Code (12 NYCRR) § 23-1.7(e)(2) (work area debris and tripping hazards) as a predicate for a § 241(6) violation, such provision is inapplicable to the circumstances alleged here. Plaintiff was not injured as a result of tripping over, or even slipping on, "accumulat[ed]" debris, dirt, tools or materials.

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

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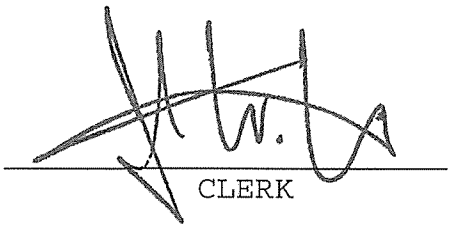

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Saxe, J.P., Friedman, Sweeny, Acosta, Freedman, JJ.

319 Sapphire Simmons, etc., et al., Index 6880/06
Plaintiffs-Appellants,

-against-

Vito Sacchetti, et al.,
Defendants-Respondents,

Ambassador Fuel and Oil Burner Corp., et al.,
Defendants.

Arnold E. DiJoseph, III, New York, for appellants.

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

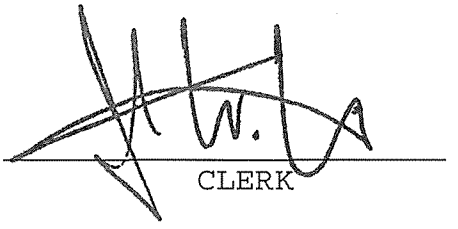
Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered on or about October 15, 2008, which denied plaintiffs' motion to dismiss the counterclaims of defendants Vito Sacchetti and TMS Management Company for failure to state a cause of action or for summary judgment dismissing the counterclaims, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of plaintiffs dismissing the counterclaims.

Plaintiffs seek damages for injuries sustained by the infant plaintiff after she wandered into the bathroom and entered the tub, which was filling with scalding water. As the counterclaims brought by the building owner and management company are based on the mother's negligent supervision of the infant, they do not

state a cause of action (*see Munoz v Mael Equities*, 286 AD2d 213, 213-214 [2001]; *Deshler v East W. Renovators*, 275 AD2d 252 [2000]; *Zikely v Zikely*, 98 AD2d 815 [1983], *affd* 62 NY2d 907 [1984]).

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

ENTERED: APRIL 14, 2009



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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 14, 2009.

Present - Hon. David B. Saxe, Justice Presiding
David Friedman
John W. Sweeny, Jr.
Rolando T. Acosta
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 2047/06
Respondent,

-against- 320

Ricardo Ferguson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Seth L. Marvin, J.), rendered on or about January 16, 2008,

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

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

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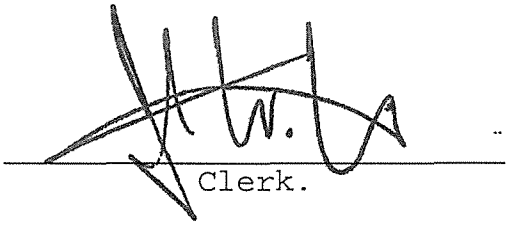

Clerk.

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

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

321 The People of the State of New York, Ind. 1735/07
Respondent,

-against-

Philip Sarubbi,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at suppression hearing; John Cataldo, J. at jury trial and sentence), rendered November 15, 2007, convicting defendant of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court improperly denied defendant's challenges for cause to two prospective jurors. When defense counsel asked a panelist a specific question as to whether her experience as a crime victim might prevent her from being an impartial juror, she replied that "it might, it might." Another panelist stated that her two grandsons had been murdered, and that serving on a criminal case made her "a little" uncomfortable. This panelist then volunteered that her watch was missing, that she believed it

had just been stolen while she was in the courthouse, and that "I'm afraid I would be a little impartial," presumably intending to mean she could not be completely impartial.

As to each panelist, defense counsel elicited a sufficient basis to require the court to either grant the challenge for cause or make its own inquiry of the panelist. Accordingly, we reject the People's argument that defense counsel was obligated to ask additional clarifying questions. Where "potential jurors themselves openly state that they doubt their own ability to be impartial in the case at hand, there is far more than a *likelihood* of bias, and an unequivocal assurance of impartiality must be elicited if they are to serve" (*People v Johnson*, 94 NY2d 600, 614 [2000]). Where there is any doubt, the court should err on the side of disqualification because "the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror" (*People v Culhane*, 33 NY2d 90, 108 n 3 [1973]). Here, the court simply denied each of these challenges for cause without comment or further inquiry, leaving in doubt each panelist's ability to serve.

The hearing court properly denied defendant's suppression motion. The police action constituted an investigatory detention

requiring only reasonable suspicion, which was present (*see People v Allen*, 73 NY2d 378 [1989]; *People v Hicks*, 68 NY2d 234 [1986]).

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

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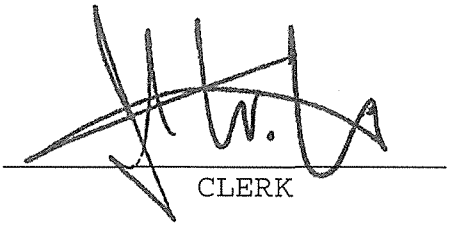

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Saxe, J.P., Friedman, Sweeny, Acosta, Freedman, JJ.

322 The People of the State of New York, ex rel. Jose Rodriguez,
Petitioner-Appellant,

-against-

Warden, Rikers Island Correctional Facility, et al.,
Respondents-Respondents.

Index 250548/07

Zoe Dolan, New York, for appellant.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for respondents.

Order, Supreme Court, Bronx County (David Stadtmauer, J.), entered on or about January 2, 2008, which denied the petition for a writ of habeas corpus and dismissed the proceeding, unanimously affirmed, without costs.

As petitioner has been released on parole, the remedy of habeas corpus is unavailable. However, the matter is converted to a CPLR article 78 proceeding, since it affects the period of petitioner's post-release supervision (*see People ex rel. Goldberg v Warden of Rikers Is. Correctional Facility*, 45 AD3d 356 [2007], *lv denied* 10 NY3d 704 [2008]; CPLR 103[c]).

Petitioner alleges that he was denied due process because he was not served with the determination on his final revocation

hearing until service of the Division of Parole's opposition to his petition. However, the printout of the Division's Status Inquiry Summary established that petitioner and his attorney at the final revocation hearing were mailed an "Affirmation" on June 29, 2007, one day after the recommendation of the hearing officer had been affirmed, and petitioner failed to rebut the information contained in the summary (*see People ex rel. Harrison v Warden, Rikers Is. Correctional Facility*, 48 AD3d 375 [2008], *lv denied* 11 NY3d 712 [2008]; *People ex rel. Jefferson v Kelly*, 178 AD2d 973 [1991]). Even if petitioner's denial of personal receipt of the Division's decision is credited, the Division's notice requirement was satisfied by service on counsel alone (*see People ex rel. Knowles v Smith*, 54 NY2d 259, 266 [1981]).

Furthermore, even assuming that petitioner was not served with the determination on his final revocation hearing until receiving the Division's opposition to the subject petition, the delay did not result in a denial of due process under the circumstances (*see People ex rel. Freeman v Warden, Rikers Is. Correctional Facility*, 30 AD3d 192 [2006]).

Petitioner's challenge to the Division's determination on

the grounds that it was arbitrary and capricious is not preserved since it was not raised in the petition.

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

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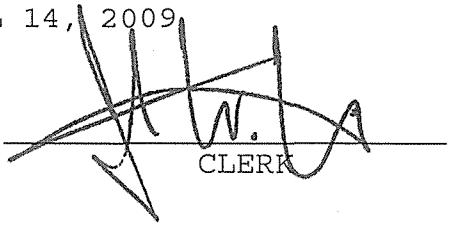

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Saxe, J.P., Friedman, Sweeny, Acosta, Freedman, JJ.

323 The People of the State of New York, Ind. 3726/06
Respondent,

-against-

Kenneth Moore, also known as
James Jackson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered November 15, 2006, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4½ years, unanimously affirmed.

The record taken as a whole (*see People v Providence*, *affd* 2 NY3d 579, 583 [2004]) demonstrates that defendant made a knowing and intelligent waiver of his right to counsel, and that the court's inquiry into defendant's request to proceed pro se was sufficient in light of all the surrounding circumstances (*see People v Reifsteck*, 134 AD2d 876 [1987], *lv denied* 70 NY2d 1010 [1988]; *People v Whitted*, 113 AD2d 454, 458 [1985], *lv denied* 67 NY2d 952 [1986]). Defendant had a lengthy criminal history and

had just completed representing himself at trial on very similar charges, and with the use of the same advisor who advised him in this case. Moreover, defendant told the court he wished to proceed pro se "for the time being." This equivocal statement, coupled with the apparent lead role his legal advisor took during subsequent plea negotiations, is akin to a situation where a defendant merely participates in his or her defense, rather than completely waiving the right to counsel (*see People v Cabassa*, 79 NY2d 722, 730-731 [1992], *cert denied sub nom. Lind v New York*, 506 US 1011 [1992]). The record supports the conclusion that when defendant pleaded guilty, his legal advisor played essentially the same role he would have played had defendant not requested to represent himself. Furthermore, the disposition, in which defendant's sentence ran concurrently with a longer sentence he was already serving, was very favorable, and there is no reason to doubt the attorney rendered sound advice to accept the plea.

Since defendant pleaded guilty with the assistance of new counsel, he forfeited the right to argue that he was denied the opportunity to testify before the grand jury as a result of his prior attorney's conduct (*see People v Petgen*, 55 NY2d 529, 534-535 [1982]; *People v Profitt*, 23 AD3d 238 [2005]; *People v Bostick*, 235 AD2d 287 [1997], *lv denied* 89 NY2d 1089 [1997]). In

any event, even assuming the prior attorney withdrew defendant's request to testify without consulting her client, this did not constitute ineffective assistance (*see People v Simmons*, 10 NY3d 946, 949 [2008]; *People v Wiggins*, 89 NY2d 872 [1996]; *People v Nobles*, 29 AD3d 429 [2006], *lv denied* 7 NY3d 792 [2006]; *see also People v Cox*, 19 Misc 3d 1129[A] [Sup Ct, NY County 2007]; *compare People v Mason*, 263 AD2d 73, 76-77 [2000] [represented defendant retains personal right to testify at *trial*]). Since defendant has not made any showing of what testimony he would have given or how it might have affected the outcome of the grand jury proceeding, he has not established any prejudice.

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

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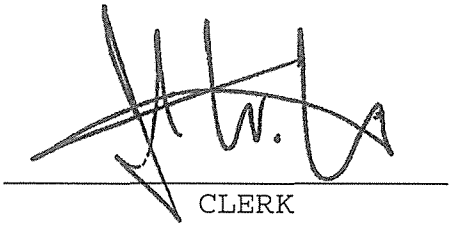

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Saxe, J.P., Friedman, Sweeny, Acosta, Freedman, JJ.

324N-
324NA Bridge Capital Corp., et al., Index 105020/06
Plaintiffs-Respondents,

-against-

Todd E. Ernst, et al.,
Defendants,

Sigurd A. Sorenson,
Defendant-Appellant.

- - - - -

Sigurd A. Sorenson,
Third-Party Plaintiff-Appellant,

-against-

257/117 Realty LLC,
Third-Party Defendant-Respondent.

Sigurd A. Sorenson, New York, appellant pro se.

Balber Pickard Maldonado & Van Der Tuin, PC, New York (Roger Juan Maldonado of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 8, 2007, which denied defendant Sorenson's motion for a default judgment on his counterclaim, for partial summary judgment as to liability on the counterclaim, or the striking of plaintiffs' pleadings and awarding of sanctions against plaintiffs, and order, same court and Justice, entered February 5, 2008, which granted plaintiffs' motion to dismiss the counterclaim, unanimously affirmed, with one bill of costs.

Sorenson's counterclaim and third-party claim, which alleged that the libel complaint was a retaliatory "strategic lawsuit against public participation" (SLAPP), actionable under Civil Rights Law §§ 70-a and 76-a, was correctly dismissed for failure to state a cause of action. The anti-SLAPP statute is intended for the "protection of citizens facing litigation arising from their public petitioning and participation" (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 137 n 1 [1992], *cert denied* 508 US 910 [1993]; *see Guerrero v Carva*, 10 AD3d 105, 116 [2004]; Civil Rights Law § 76-a[1][a]). In order to state an anti-SLAPP counterclaim, a defendant must "identify . . . the application or permit being challenged or commented on," and his communications must have been "substantially related to such application or permit" (*Guerrero*, 10 AD3d at 117).

Here, although Sorenson alleged in a prior lawsuit that plaintiffs made false statements in an offering plan filed with the Attorney General's Office, the thrust of that complaint was that Sorenson had been fraudulently induced to enter into contracts as a result of those misstatements, and was entitled either to damages or to specific enforcement of the contracts (*Sorenson v Bridge Capital*, 52 AD3d 265 [2008]). Sorenson did not engage in the type of public advocacy or participation protected under the anti-SLAPP statute, and thus the instant

action did not offend §§ 70-a and 76-a.

We have considered defendant's remaining arguments and find them without merit.

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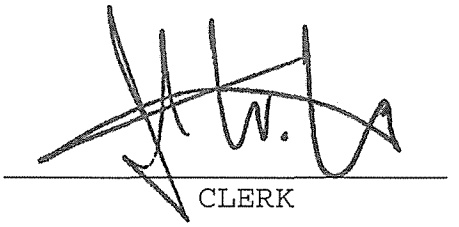

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Saxe, J.P., Friedman, Sweeny, Acosta, Freedman, JJ.

325N Donovan Morgan, etc., et al., Index 8083/01
Plaintiffs,

-against-

Eloisa B. Talusan, M.D., et al.,
Defendants.

- - - - -

Spencer, Maston & McCarthy, LLP,
Petitioner-Appellant,

-against-

Silberstein, Awad & Miklos, P.C.,
Respondent-Respondent.

Spencer, Maston & McCarthy, LLP, Albany (Bruce Maston of counsel), appellant pro se.

Silberstein, Awad & Miklos, P.C., Garden City (Joseph P. Awad of counsel), for respondent pro se.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about August 4, 2008, which denied petitioner's motion to resettle and affirm an order, same court (Bertram Katz, J.), entered on or about September 23, 2003, denying respondent's motion for a hearing to determine its fees, unanimously affirmed, without costs.

Supreme Court correctly understood the prior order as merely

referring the matter to Supreme Court, Nassau County, and not as denying the fee application on the merits.

Under the circumstances, we find sanctions unwarranted.

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

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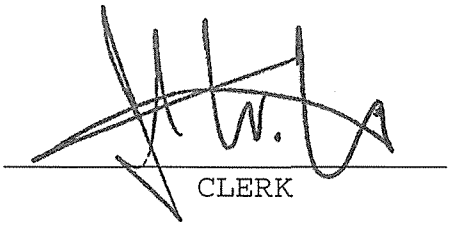

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