SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 11, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Sweeny, McGuire, JJ.

5 Maribel Cuadrado, Index 400912/04
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellant.

Jeffrey Samel & Partners, New York (David Samel of counsel), for respondents.

Order, Supreme Court, New York County (Nicholas Figueroa, J.), entered January 22, 2008, which granted defendants' motion to set aside a jury verdict rendered in favor of plaintiffs, reversed, on the law, without costs, the motion denied, and the verdict reinstated.

Through her own testimony and that of a disinterested witness, plaintiff produced sufficient objective evidence to establish that the bus from which she fell made a movement that was "unusual and violent," that is, something more than the jolting and jerking incidental to the operation of a city bus (*see Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 829-830 [1995]). Moreover, upon our independent review, we do not find

that the verdict was against the weight of the evidence.

In addition, the trial court properly declined to give the jury an instruction on comparative negligence because the evidence did not support it. Although comparative negligence is usually a jury question, it is "inappropriate where there are no specific factual allegations to support it and no valid line of reasoning which could lead the jury to find plaintiff comparatively negligent" (*Perales v City of New York*, 274 AD2d 349, 350 [2000] [internal citation omitted]; *see also Rountree v Manhattan & Bronx Surface Tr. Operating Auth.*, 261 AD2d 324, 327 [1999], *lv denied* 94 NY2d 754 [1999]). To have been entitled to the charge, defendants were required to come forward with evidence that plaintiff's stepping into the exit and/or pushing on the partially opened rear doors was negligent. As there was no trial evidence that these actions were unreasonable, there was no basis for defendants' requested charge.

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

McGUIRE, J. (concurring)

I agree with the majority's conclusion that the order granting defendants' motion to set aside the verdict should be reversed, the motion denied and the verdict reinstated, but I disagree with its analysis.

It is by no means clear that the holding of *Urquhart v New York City Tr. Auth.* (85 NY2d 828 [1995]) applies when a bus is stopped and the doors are open. Under *Urquhart*, the plaintiff must provide "objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel" (*id.* at 830). Moreover, "[p]roof that the stop was unusual or violent must consist of more than a mere characterization of the stop in those terms by the plaintiff" (*id.*). In this case, however, there was evidence from which the jury could have found that the movement of the bus causing plaintiff to fall occurred after the doors had opened. At the very least, the jury could have found that the movement occurred as the doors were opening. Why require passengers to guard themselves against even ordinary jerks and lurches attendant to moving buses when the bus is stopped and the doors are either open or opening to let passengers out?

In any event, neither side objected to or made requests to charge with respect to the relevant portions of the court's

instructions to the jury (*see* CPLR 4110-b). The court did not charge that plaintiff was required to come forward with "objective evidence" of any kind. Rather, the court charged that "in the absence of an emergency, the carrier must avoid sudden, unusual and violent stops, jerks or lurches," and that if the jury found that after the door was opened "the movement of the bus was unnecessarily sudden, unusual, and violent, then you will find that the carrier was negligent." Although NYCTA moved to dismiss the complaint at the close of plaintiff's case on the ground that plaintiff's evidence was legally insufficient because her evidence established only that the bus "jerked," which was insufficient to impose liability on NYCTA, it did not object to or make requests to charge regarding the relevant portion of the court's instructions to the jury (*see Peguero v 601 Realty Corp.*, 58 AD3d 556 [2009]). Thus, "the law as stated in th[e] charge became the law applicable to the determination of the rights of the parties in this litigation and thus established the legal standard by which the sufficiency of the evidence to support the verdict must be judged" (*Harris v Armstrong*, 64 NY2d 700, 702 [1984] [internal citation omitted]).

As the jury could have found that NYCTA was liable solely on the basis of a finding that an "unnecessarily sudden" movement of the bus occurred while the door was opening or open, I have no trouble concluding that the verdict should be upheld. For this

reason, we need not and should not reach either the issue of whether the holding of *Urquhart* applies or the issue of whether plaintiff produced sufficient "objective evidence" establishing an "unusual and violent" movement of the bus.

I agree with the majority's conclusion that the evidence did not support an instruction on comparative negligence.

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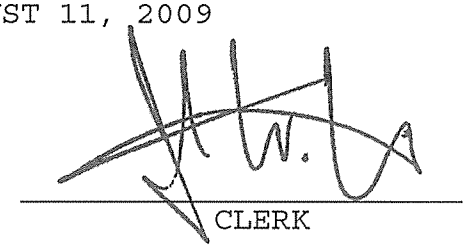
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 11, 2009



CLERK

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1013N Angus King, as Executor of the Estate of Roger Kline,
Plaintiff-Respondent,

-against-

Susan Ferris Kline,
Defendant-Appellant.

Index 350760/05

Stein Riso Mantel, LLP, New York (Allan D. Mantel of counsel), for appellant.

Sheresky Aronson Mayefsky & Sloan, LLP, New York (David Aronson of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Saralee Evans, J.), entered December 26, 2008, which denied defendant wife's request for additional discovery, sanctions and interim counsel fees of $200,000, and instead awarded her interim counsel fees of $25,000, unanimously dismissed, without costs.

This appeal calls on us to determine whether a spouse seeking pendente lite counsel fees may continue to press such a claim in a divorce action after the spouse from whom such relief was sought dies. For the reasons stated below, we hold that the surviving spouse may not continue to pursue the claim.

The parties were married in 1977. The husband commenced this action in November 2005. In February 2008, the wife moved for omnibus pendente lite relief. The resulting order directed the husband, among other things, to pay accrued professional fees to the wife's outgoing attorneys, her incoming attorneys, and her

accountants. Thereafter, the wife served extensive discovery demands on the husband and a subpoena on his employer (the nonparty respondent), most of which sought information related to the post-commencement appreciation of the husband's financial interest in his employer. Rather than comply, the wife contends that the husband and his employer deliberately engaged in obstructionist discovery tactics, all as part of what she alleges was a "war of attrition" strategy.

In September 2008, the wife moved by order to show cause to compel the husband and his employer to comply with outstanding discovery or, in the alternative, for various sanctions. In addition to that relief, the wife sought $200,000 in additional interim counsel fees, "virtually all of [which]" she argued "were made necessary by plaintiff's dilatory behavior and litigation strategy."

The motion court resolved the discovery aspect of the motion by directing the husband and his employer to produce certain documents and requiring the wife to refine her demands against the employer by serving certain interrogatories. With respect to the request for counsel fees, the court reminded the parties of the reason for its rule against permitting discovery motions without prior authorization, "having found them to be unduly time consuming and expensive." It then awarded the wife $25,000 in counsel fees, "subject to reallocation at trial."

The wife perfected an appeal of the order to this Court on February 23, 2009. Her principal brief argued that the motion court erred in not granting all of the discovery relief she sought, and in only awarding her a small percentage of the interim counsel fees she had requested. On March 18, 2009, before his brief was due, the husband died. An estate representative was quickly appointed and substituted as plaintiff. Further, the parties stipulated that all of the discovery issues addressed in the wife's brief were moot. The wife, however, disagreed with the estate that the issue of counsel fees was also academic. The estate moved to dismiss the appeal, arguing that, upon the husband's death, the divorce action ended.

It is well settled that "a suit for divorce abates at the death of either party, because the marriage relation sought to be dissolved no longer exists" (*Cornell v Cornell*, 7 NY2d 164, 169 [1959]). As the wife's claim for interim counsel fees was necessarily dependent on the existence of a divorce action in which to make the claim, it was extinguished along with the litigation. The death of the husband necessarily precludes the wife from seeking counsel fees because "it is only where the parties to the action stand in the relation of husband and wife that the latter is entitled to" such fees (*Farnham v Farnham*, 227 NY 155, 158 [1919]).

The estate correctly argues that the appeal must be dismissed as a practical matter. First, if this Court were to consider the appeal and find that the wife was entitled to a larger counsel fee award, we would likely remand for further proceedings to determine the precise amount. However, since the action abated, there would be no forum in which such a determination could be made. In addition, as the motion court correctly noted in its order, any interim fee award would be subject to reallocation at trial. As there will be no trial, the estate would have no opportunity to establish any entitlement to recoup counsel fees paid on a pendente lite basis.

The wife argues, relying on the holding in *Peterson v Goldberg* (180 AD2d 260 [1992], *lv dismissed* 81 NY2d 835 [1993]), that her claim may proceed because her right to an award of interim counsel fees is "vested." However, that case is distinguishable. In *Peterson*, the husband moved to Florida and the wife commenced a divorce action in New York, where they had resided. Subsequent to the commencement of the New York action, the husband obtained an ex parte judgment of divorce in Florida. He moved for summary judgment in the New York action, stating that the parties were already divorced pursuant to the Florida proceeding. The New York court dismissed the claim for a divorce, but converted the action into one for equitable distribution following a foreign judgment of divorce, pursuant to

Domestic Relations Law section 236(B)(2). Then, the wife died. The husband claimed that the action abated upon her death, but the Second Department disagreed. It noted that a cause of action for equitable distribution following a foreign judgment of divorce vests upon the entry of the foreign judgment. It stated that "[c]onsequently, if a party dies in possession of a vested right to equitable distribution, and that right has been asserted during the party's lifetime in an action in a court of this State, that right survives the party's death and may be asserted by the estate" (180 AD2d at 263). Significantly, the court distinguished the claim for equitable distribution from "a cause of action for a divorce, which is personal to a party and which thus abates on that party's death, because death terminates the marital relationship." (*id.*, citing *Cornell v Cornell*, 7 NY2d 164 [1959], *supra*).

Similarly unavailing to the wife is her citation to *Dembitzer v Rindenow* (35 AD3d 791 [2006]). There, too, the wife died after entry of a judgment of divorce, but while her motion to enforce the husband's child support obligation, and the husband's cross motion for a reduction of support arrears, were pending. The Court, again the Second Department, rejected the husband's argument that his ex-wife's death impacted his obligation to pay the arrears, stating that "the obligation to pay child support survives the death of the custodial parent."

(35 AD3d at 793).

While there are strong public policy reasons for that rule, there is no reason for a rule providing that the right to seek pendente lite counsel fees survives the death of a party to a divorce action. The purpose of pendente lite relief counsel fees is to level the playing field, to sustain the nonmonied spouse pending resolution of a divorce action so a fair result can be reached (*see O'Shea v O'Shea*, 93 NY2d 187, 193 [1999]). Once, as here, the action abates, any concerns about the nonmonied spouse's ability to litigate on a level playing field no longer exist. Accordingly, there is no reason for the court to retain jurisdiction over the application for interim counsel fees, notwithstanding the abatement of the action.

M-2004 - ***King v Kline, et al.***

Motion seeking to strike
brief denied.

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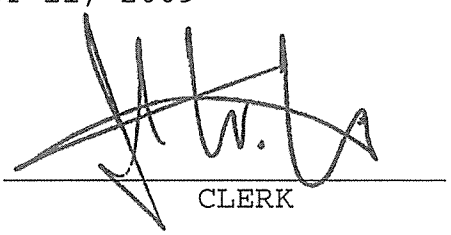

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Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

743 Hector Lebron, Index 7796/06
Plaintiff-Respondent,

-against-

Napa Realty Corp.,
Defendant-Appellant.

Marin Goodman, LLP, New York (Margaret J. Leszkiewicz of counsel), for appellant.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about September 15, 2008, which, to the extent appealed from, in this action for personal injuries allegedly sustained as the result of a slip and fall on a patch of ice on the sidewalk abutting defendant's service station, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to make a prima facie showing of entitlement to judgment as a matter of law. Since it did not offer any evidence to refute plaintiff's contention that a dangerous condition, namely ice, existed on the sidewalk outside the convenience store and gas station operated by defendant, defendant was required to establish that it did not create the condition or have actual or constructive notice of it (*see Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323 [2008]). It did not meet that

burden. The deposition of its general manager was not probative, because he had no personal knowledge of the condition of the sidewalk at the time of the accident or in the hours immediately preceding it. Nor did his testimony establish that any of the employees who worked in the convenience store operated by defendant could not have noticed the ice in time to clear it.

Indeed, the general manager's testimony suggests just the opposite. It established that the store was open 24 hours a day and that defendant's employees were charged with the responsibility of keeping the sidewalks clear of snow and ice. Defendant claims that 7 hours elapsed between the time that its climatological records show the temperature dropped below 32 degrees Fahrenheit and the time of the accident. Indeed, the time which elapsed between formation of the ice and the accident may even have been longer. Defendant failed to accurately establish the length of time that the ice existed, because the climatological records it submitted were not from the Bronx, where the accident occurred (*see Duffy-Duncan v Berns & Castro*, 45 AD3d 489, 490 [2007]; *Ralat v New York City Hous. Auth.*, 265 AD2d 185 [1999]).

Even if the climatological records were accurate, given the facts that defendant always had employees on site and that those employees' duties included ensuring that the sidewalks were safe, it can be presumed that seven hours were sufficient for those

employees to notice and address the dangerous condition before the accident. Since it did not submit evidence establishing why its employees were not able to notice and address the condition in that time period, defendant failed to establish its prima facie entitlement to summary judgment (*see Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007]).

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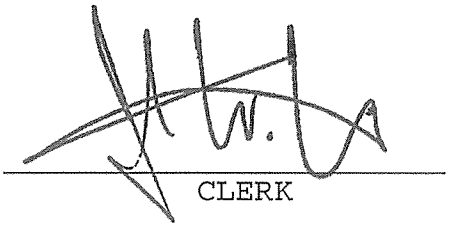

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Saxe, J.P., McGuire, Moskowitz, Acosta, JJ.

756-
756A Seth Fielding, Index 113572/07
Plaintiff-Appellant,

-against-

Stephanie Kupferman, et al.,
Defendants-Respondents.

Gregory Antollino, New York for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Brett A. Scher of counsel), for respondents.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered January 9, 2009, dismissing the complaint, and bringing up for review an order, same court and Justice, entered January 29, 2009, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously reversed, on the law, without costs, and the complaint reinstated. Appeal from the order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this legal malpractice action, defendant law firm represented plaintiff in connection with a divorce action commenced by plaintiff's wife; defendant Stephanie Kupferman handled the matter. Based on Kupferman's advice, plaintiff entered into a stipulation of settlement dated April 30, 2007 that was subsequently incorporated into the judgment of divorce. The stipulation provided, among other things, that in exchange

for the marital residence, a cooperative apartment, plaintiff would pay his wife the sum of $1,597,013 by relinquishing any claim to the funds in accounts in her name, making a payment of $1,200,000, and paying the balance in monthly installments; the $1.2 million payment was to be made "within 30 days after the execution [of the stipulation of settlement] . . . in *immediately available* funds" (emphasis added).

Plaintiff, having discussed the stipulation and its contents with Kupferman, planned to obtain a mortgage or home equity line of credit on the cooperative apartment prior to the divorce becoming final. The complaint alleges that "although there was substantial equity in the apartment, this was an unrealistic contemplation because without a finalized divorce, no lender would give plaintiff the money that he needed to effectuate the settlement." Plaintiff did not become aware that he would be unable to obtain a mortgage or home equity line of credit until after he signed the settlement stipulation. The complaint further alleges that plaintiff signed the document "[a]s a result of defendants' failure to give [him] proper advice under the circumstances - or to advise him to get advice elsewhere."

According to the complaint, upon being unable to obtain a mortgage or home equity line of credit, plaintiff informed defendants "that the settlement was unrealistic and should have been better explained to him" but "they refused to attempt to

renegotiate the settlement, or to apply to the court for relief therefrom." Defendants advised him to "stop wasting time and get a mortgage" and his wife's counsel threatened to obtain a judgment against him.

In order to comply with the stipulation, plaintiff ultimately withdrew the money from a retirement account resulting in a "huge tax burden." The complaint asserts that defendants failed to advise plaintiff that withdrawing assets from that account, even for the purpose of giving them to his wife to satisfy the divorce judgment, would result in a significant tax burden. Additionally, it asserts that not only did defendants fail to provide the proper advice, they were apparently unaware of the tax consequences. Thus, the complaint states: "[w]hen plaintiff attempted to withdraw half of his retirement account to comply with the terms of the settlement agreement, and was unable to withdraw the entire amount because of the tax burden, Ms. Kupferman was so surprised she called plaintiff's broker to ask why." It further states that by that point, "time was running out" so "plaintiff had to swallow the tax burden, beg and borrow to cover the deficit, obtain an interest-only mortgage after the divorce . . . became final, and then bring this lawsuit."

After plaintiff commenced this action and filed an amended complaint, defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), arguing that the stipulation that was

incorporated into the divorce judgment constituted documentary evidence refuting conclusively plaintiff's claim because he represented therein that the funds were "immediately available." Defendants maintained that plaintiff's "attorney should [not] be held responsible for [his] inability to adequately finance the divorce settlement." They further maintained that plaintiff failed to plead that Kupferman's purported negligence was the proximate cause of his damages or that he suffered actual and ascertainable damages.

"[A]n action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the injury, and evidence of actual damages. In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some ascertainable damages" (*Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 67 [2002]). Here, plaintiff alleges that, but for defendants' malpractice in advising him to sign the stipulation of settlement without advising him properly of the tax consequences arising out of his withdrawal of money from retirement accounts, he would have avoided actual ascertainable damage, i.e., the tax liability resulting from the withdrawal of the money. He further alleges that defendants were not knowledgeable with regard to the tax consequences and failed to advise him to obtain tax advice from

another source.

"[A]n attorney is obligated to know the law relating to the matter for which he/she is representing a client and it is the attorney's duty, 'if he has not knowledge of the statutes, to inform himself, for, like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner'" (*Reibman v Senie*, 302 AD2d 290, 291 [2003], quoting *Degen v Steinbrink*, 202 App Div 477, 481 [1922], *affd* 236 NY 669 [1923]). Defendants assert that they should not be held liable for plaintiff's representation that the money was immediately available when it was not. Indeed, they argue that plaintiff should be "judicially estopped from now alleging that he suffered damages" because he signed the stipulation stating that the funds were available immediately and now claims "a contrary position, to wit, that he incurred damages by not having funds immediately available." Thus, defendants submitted the stipulation of settlement and divorce judgment in support of their motion to dismiss, arguing that it is documentary evidence which refutes conclusively plaintiff's claim.

Defendants' documentary evidence not only fails to refute plaintiff's allegations conclusively, it *supports* plaintiff's claim of malpractice in a key respect. The stipulation identifies four accounts in plaintiff's name representing his financial assets and states that $894,530 of the total

($1,258,854) is in a "Profit Sharing Keogh Account," a retirement account that has specific rules regarding the withdrawal of funds and requires that significant taxes be paid upon preretirement withdrawal. Thus, the stipulation makes clear that the sum of money that plaintiff needed to comply with its requirements was not "immediately available," yet defendants advised plaintiff to sign it. Given that the ground for plaintiff's claim of malpractice is apparent from the face of the stipulation, the allegations contained in the complaint are not conclusory and plaintiff properly has pleaded a cause of action for legal malpractice.

The Court of Appeals recently stated that "the conclusiveness of [an] underlying agreement does not absolutely preclude an action for professional malpractice against an attorney for negligently giving to a client an incorrect explanation of the contents of a legal document" (*Bishop v Maurer*, 9 NY3d 910 [2007]). Although the Court found that the complaint in *Bishop* was devoid of any nonconclusory allegations that incorrect legal advice was given to the plaintiff, the facts of that case are distinguishable.

The documents at issue in *Bishop* were estate planning instruments executed by the plaintiff who believed that he was giving his wife a life estate and was not limiting his access to

his life savings (*Bishop*, 33 AD3d 497, 501 [2006], *affd* 9 NY3d 910 [2007]). He alleged that the defendant attorneys wrongly advised him of the meaning of the estate planning documents, that he "'was not advised that those documents limited his right to alter his dispositions of'" his property, and that he "'was not informed, and was not aware' when he executed the trust and the agreement that his wife could do as she pleased with his assets, to the detriment of his own issue, if he predeceased her" (*id.*). The documents signed by the plaintiff and his wife each contained an acknowledgment that both parties read and understood the documents and waived any conflict of interest due to their joint reliance on the same attorneys in executing the estate documents (*id.* at 498-499). On their face, the documents were proper and did not establish that the defendants had provided improper advice or engaged in any act of malpractice. This Court found that the "plaintiff's allegations that defendants attorneys failed to perceive that they had a conflict of interest, and failed to inform him as to the provisions of the estate planning instruments he executed, do not state a cognizable claim for legal malpractice in view of the clear and unambiguous documentary evidence" (*id.* at 498). The Court of Appeals affirmed, finding that the plaintiff's allegations that incorrect advice was given were conclusory (9 NY3d at 911).

Here, not only are the allegations of the giving of

incorrect advice sufficient and nonconclusory, as noted above, the documentary evidence provides significant support for plaintiff's claim. It clearly establishes that the overwhelming majority of plaintiff's funds, including the amount necessary to satisfy the obligation to his wife, were not, as characterized by the stipulation, "immediately available." Plaintiff alleges that he did not know that under the applicable tax laws the necessary funds were not "immediately available" -- we must accept that allegation as true (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]) -- and that a reasonably competent matrimonial attorney who read the stipulation would not have advised him to sign it. Given these allegations, the stipulation may constitute evidence of defendants' negligence and does not constitute a defense to the malpractice claim (*see Mandel, Resnik & Kaiser, P.C. v E.I. Elecs., Inc.*, 41 AD3d 386 [2007]; *IMO Industries Inc. v Anderson Kill & Olick*, 267 AD2d 10 [1999]).

Furthermore, defendants' assertion that plaintiff's alleged damages are too speculative lacks merit. To survive a preanswer motion to dismiss pursuant to CPLR 3211(a)(7), "a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be inferred" (*Lappin v Greenberg*, 34 AD3d 277, 279 [2006]). At this early stage of the proceedings, plaintiff "'is not obliged to show . . . that [he] actually sustained damages,'" but only that "damages attributable

to [defendants' conduct] might be reasonably inferred" (*InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [2003], quoting *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45, 45 [1993]).

The complaint sufficiently asserts that "but for" defendants' faulty advice that plaintiff sign the stipulation, he would not have incurred the tax liability that resulted from the withdrawal of funds from his retirement account (*see Lappin*, 34 AD3d at 279-280; *Tenzer, Greenblatt Fallon*, 199 AD2d at 45). We do not regard as pure speculation plaintiff's contention that in no event would he have incurred that liability if the settlement had not been reached.

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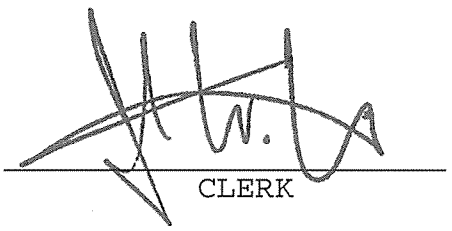

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Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

859-
859A In re Elsie Detres, Index 406500/07
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

Sonya M. Kaloyandies, New York (Corina L. Leske of counsel), for appellant.

Bryer & David, New York (Marvin M. David of counsel), for respondent.

Orders, Supreme Court, New York County (Alice Schlesinger, J.), entered October 31, 2008, which, in an article 78 proceeding to annul respondent Housing Authority's determination denying, after a hearing, petitioner remaining-family-member status to succeed to the apartment formerly leased to her deceased mother, stayed execution of a Civil Court warrant of eviction, permitted petitioner to submit evidence of her co-residency of the apartment with her mother that had not been submitted at the hearing, and, after consideration of such new evidence, directed a hearing, before the court, on the issues of whether petitioner had taken up residence in the apartment at least one year before her mother's death and whether respondent had knowledge of and acquiesced in such co-residency, unanimously modified, on the law, to reduce the stay of execution of the warrant to 30 days after the date of issuance of this order, vacate the direction of

a hearing before Supreme Court, and otherwise affirmed, without costs, and the matter remitted to the Housing Authority for further proceedings in accordance with the following.

Civil Court issued the warrant of eviction after the parties executed a so-ordered stipulation settling a holdover proceeding that respondent had brought after denying petitioner's remaining-family-member grievance. Instead of seeking a stay of execution of the warrant of eviction in Civil Court, the then pro se petitioner commenced this proceeding. Under the facts presented below, execution of the warrant should only have been stayed temporarily to give petitioner time to seek relief from the warrant from Civil Court (*see Matter of Bobian v New York City Hous. Auth.*, 55 AD3d 396, 396 [2008]).

An evidentiary hearing before the court to supplement the record should not have been directed, and instead the matter should have been remitted to the Housing Authority for further proceedings (*see Matter of Ansonia Assoc. v State Div. of Hous. & Community Renewal*, 147 AD2d 420, 421 [1989]; *Matter of Board of Educ. of Pleasantville Union Free School Dist. v Ambach*, 132 AD2d 257, 261 [1987]). Further consideration by the agency is warranted because petitioner underwent major brain surgery some five months before the administrative hearing and exhibited some confusion at the hearing. As a result of the Hearing Officer's failure to question petitioner, who represented herself pro se,

about her medical issues and their ramifications, petitioner was not afforded a full opportunity to be heard, particularly with respect to when her tenancy commenced (*see Matter of Hall v Municipal Hous. Auth. for City of Yonkers*, 57 AD2d 894, 894-895 [1977], *appeal dismissed* 42 NY2d 973 [1977], *lv denied* 42 NY2d 805 [1977] [due process affords public housing tenants the right of opportunity to be heard]. Pursuant to Supreme Court's directive, petitioner submitted evidence that she had co-resided in the apartment with her mother for more than the requisite year and that respondent implicitly approved of the co-residency (*see Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [2004]).

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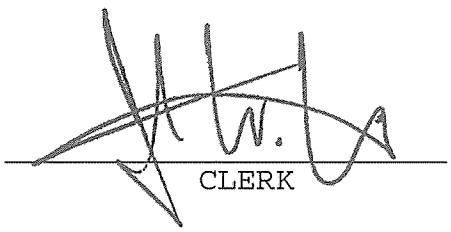


CLERK

Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

862 Lisa Nutley, Index 108665/06
Plaintiff-Respondent,

-against-

SkyDive the Ranch,
Defendant-Appellant.

The Law Offices of David M. Schreier, New York (Steven E. Kurtz of counsel), for appellant.

McMahon, Martine & Gallagher, LLP Brooklyn (Patrick W. Brody of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered January 28, 2009, which denied defendant's motion for summary judgment dismissing the complaint and for a default judgment on its counterclaim for attorney's fees and costs, unanimously modified, on the law, the motion granted to the extent of awarding defendant summary judgment, the complaint dismissed, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly. Plaintiff is directed to respond to defendant's counterclaims within 60 days of the date of this order.

Defendant demonstrated prima facie entitlement to summary judgment on the doctrine of assumption of risk. Plaintiff was engaged in a sport or recreational activity, the commonly appreciated risks of which are inherent in, and arise out of, the nature of the sport generally and are consequent upon such

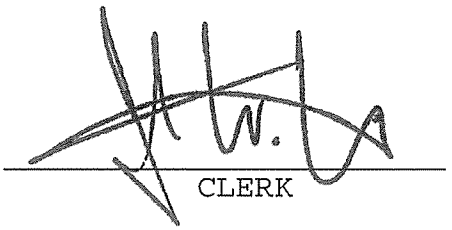
participation (*see e.g. Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Here, the risk of the main parachute failing to open during a tandem sky dive was perfectly obvious. Indeed, plaintiff was given a reserve parachute. Plaintiff failed to raise a triable issue of fact as to whether the injury-causing event resulted from defendant's negligence, creating unique and dangerous conditions beyond those inherent in the sport (*id.* at 485).

So much of the waiver and release signed by plaintiff as purports to exempt defendant from its own negligence is void under General Obligations Law § 5-326. Severance of that provision leaves the rest of the contract intact (*see Caruso v Allnet Communication Servs.*, 242 AD2d 484, 485 [1997]). As to defendant's counterclaims, however, we note that whether agreements not to sue a defendant and to pay its attorney's fees and litigation costs might transgress the public policy of promoting recreational activities advanced by § 5-326 does not appear to have been considered by the courts (*cf. Ciofalo v Vic Tanney Gyms*, 10 NY2d 294, 297 [1961] [exculpatory clause not barred by "overriding public interest"]), the parties have not briefed the issue, and we do not reach it (*see Brown v Christopher St. Owners Corp.*, 87 NY2d 938, 939 [1996]; *Bacchiocchi v Ranch Parachute Club*, 273 AD2d 173, 176 [2000]). Defendant's motion to enter judgment by default (CPLR 3215[c])

was appropriately denied in the exercise of discretion (*cf. Charles F. Winsom Gems v D. Gumbiner, Inc.*, 85 AD2d 69, 71 [1982], *affd* 57 NY2d 813 [1982]), and plaintiff should be afforded the opportunity to assert any defenses she might have to defendant's counterclaims.

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

ENTERED: AUGUST 11, 2009



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Mazzarelli, J.P., Andrias, Nardelli, DeGrasse, Abdus-Salaam, JJ.

914 Madison-68 Corp., Index 112820/04
Plaintiff-Appellant,

-against-

David Malpass, et al.,
Defendants-Respondents.

Belkin Burden Wenig & Goldman, LLP, New York (Edward Baer of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Debra Bodian Bernstein of counsel), for respondents.

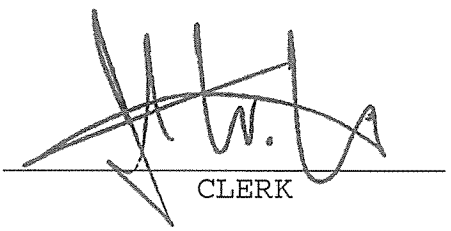
Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 11, 2008, after a nonjury trial, awarding plaintiff the sum of $15,500 with interest from July 1, 2004, costs and disbursements, and which brings up for review an order of the same court and J.H.O., entered March 17, 2008, which, inter alia, denied plaintiff's motion to set aside the trial and restore the case to the trail calendar, and granted defendants' counterclaim for attorneys' fees, unanimously modified, on the law, to the extent that the award of attorneys' fees to defendants is vacated, and otherwise affirmed, without costs.

Plaintiff's objection, made under the best evidence rule, to the admission of the lease rider was properly overruled because it had offered into evidence a copy of the same document. The J.H.O. at times cut off questioning, but did so in an evenhanded manner to expedite the trial, never amounting to prejudicial

error (*see Lewis v Port Auth. of N.Y. & N.J.*, 8 AD3d 205, 206 [2004]). Nor was the judgment against the weight of the evidence, since the case essentially turned on the parties' competing oral testimony. The issue of the prevailing party notwithstanding, it was error for the J.H.O. to determine that defendants were entitled to an award of attorneys' fees. In *Oxford Towers Co., LLC v Wagner* (58 AD3d 422 [2009]), this Court held that an identical lease provision was not covered by Real Property Law § 234.

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

ENTERED: AUGUST 11, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
John T. Buckley
James M. Catterson
James M. McGuire
Rolando Acosta, JJ.

5161
Ind. 787/06

The People of the State of New York,
Respondent,

-against-

Jose Calderon,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, Bronx County (Denis J. Boyle, J.), rendered November 1, 2007, convicting him, after a jury trial, of manslaughter in the second degree, and imposing sentence.

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

Robert T. Johnson, District Attorney, Bronx (Bryan C. Hughes and Peter D. Coddington of counsel), for respondent.

ACOSTA, J.

The issue in this case is whether defendant's counsel was ineffective as a result of his failure to request that the court charge the jury on criminally negligent homicide as a lesser included offense of manslaughter in the second degree, the offense of which he was convicted. We find that the record before us is insufficient to deem trial counsel ineffective.

Background

Defendant was indicted for the crimes of murder in the second degree (two counts), manslaughter in the first degree and endangering the welfare of a child, for causing four-year-old Quachaun B.'s death on January 30, 2006. Quachaun lived with his 26-year-old mother, Aleshia Smith, defendant, who was his mother's 18-year-old boyfriend, and his 4 sisters, ages 12, 11, 6 and 1.

Quachaun's 11-year-old sister Nyeshia testified that on January 27, 2006, as Quachaun climbed on furniture in the bedroom, he fell and landed on his back and a television fell on him. Defendant, who was babysitting, began pushing on the child's chest and blowing air through his mouth. When Quachaun woke up, defendant placed him on a bunk bed, sat down behind him and wrapped both hands around the child's neck. He then started banging both sides of the child's head against the wall.

Quachaun started to cry and then stopped moving. When Smith came home, Nyeshia told her what happened, but Smith did not take Quachaun to the hospital.

The following day, Quachaun vomited in the family car on the way to an outing. Although Nyeshia pleaded with her mother to take him to the hospital, Smith left him with a babysitter while the rest of the family continued on their outing. Defendant was away that day but returned that evening and repeatedly struck Quachaun with his hands and a plastic bat. That evening, Nyeshia saw long black and blue lines on Quachaun's body. He had stopped talking and was moaning repeatedly.

Quachaun's condition worsened the following day, but Smith went to a party in the evening and left the children with defendant. Once again, according to Nyeshia, defendant beat Quachaun with his hands and a bat and banged Quachaun's head against the wall because Quachaun did not eat his food.

Later that night, Nyeshia saw defendant "holding [Quachaun's] waist and . . . throwing him up and catching him." She testified that defendant was trying to revive him but Quachaun did not respond. Defendant then began hitting Quachaun in the back with the plastic bat until Nyeshia carried the child to bed.

At 2:35 A.M. on January 30, Smith called 911 and reported

that a television had fallen on her son. Defendant took the phone and said that it looked like the child was not breathing and that he was dead. Defendant also told the operator that a television had fallen on the child, but that the child "came out of it ok," that he was sleeping very well, was calm, but that "today" he was lying in bed and that defendant was checking on him all the time because he "looks a little beaten up." Defendant added that the child had had a seizure that day and that he had bitten his tongue, twisted his hands and feet and stopped breathing.

A paramedic who responded to the apartment testified that defendant told him in broken English that Quachaun was playing with the other children so he went out for a while and returned to find Quachaun unconscious. When the paramedic asked if Quachaun had been ill, defendant told him that a television had fallen on Quachaun the day before, but that he had taken him to the hospital and that the hospital had released him. Defendant, however, told the EMS supervisor that Quachaun seemed fine after the television accident so he was not taken to the hospital.

On January 31, defendant gave several statements at the precinct. First, he stated that a television set had fallen on Quachaun that Saturday (January 28), but since he looked fine afterwards, he was not taken to the hospital. Four hours later,

when Quachaun broke defendant's stereo defendant struck him four times with a belt and seven times with his hand. On Sunday (the 29th), defendant noticed that Quachaun was "drooling a lot" during his bath. After the bath, Quachaun "hit himself in the back of the head" so defendant told Smith to call for an ambulance. Defendant added that he took medication for epilepsy, which made him "aggressive," and that he had a bad temper.

Defendant also made a videotaped statement with the aid of a Spanish interpreter, where he repeated much of what he had stated earlier, and elaborated on what happened when Quachaun allegedly broke his stereo. After he hit Quachaun four times on the leg with a belt, Quachaun "talk[ed] bad" to him, which caused defendant to go "blind" and to strike "seven blows like crazy" with his open hand. Defendant maintained that he then put Quachaun on a bed and noticed small bruises on Quachaun's cheek and excrement with blood on the bed, which caused defendant to "get scared."

The medical examiner testified that Quachaun had extensive blunt force trauma on his scalp, his face and at least 50 more bruises on the rest of his body. There was massive bleeding around the brain and abdominal cavity, and his liver and pancreas had been completely torn apart. He "died from multiple blunt impacts to his trunk and head with lacerations . . . of the

pancreas and the liver and subdural hemorrhage." She stated that the large bruises on the child's face were consistent with a person standing behind the child and grabbing him by the face, wrapping fingers around each cheek and applying force, and that the injuries to his scalp and subdural bleeding were consistent with the child's head being slammed against a wall. She also testified that the wounds indicated that they had been delivered at different times, over a period of days, shortly before his death.

Defendant testified that he had moved into Smith's apartment on December 25, 2005, and that she regularly hit her children with a belt and her hands.[1] He maintained that she became angry with him when he tried to intervene.

On Friday, January 27, 2006, at approximately 7 P.M., he heard Smith arguing with Quachaun and saw her hit him with a belt. He then went to a bar, and when he returned to the apartment, Smith told him that a television had fallen on Quachaun. He asked Smith to take the child to the hospital, but she refused, saying the child was fine.

At about noon the following day, he saw Smith hitting Quachaun with her hands. He threatened to end his relationship

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[1]An examination at the hospital of the other children revealed that they all had bruises and scars on their bodies.

with Smith and left the apartment. When he returned at 9 P.M., he saw that Quachaun was lethargic and noncommunicative, with no appetite. Since he was not the child's father, defendant did not believe he could take him to the hospital, and Smith would not let him call 911.

Although Quachaun was not moving on Sunday morning, at 9 P.M. he told defendant that he wanted pizza and candy. As defendant was about to leave the apartment, he heard Smith arguing with Quachaun and again saw her hit him. Defendant asked her to stop, then grabbed his coat and left the apartment. When he returned at 1 A.M., he thought that Quachaun was having an epileptic seizure so told Smith to call an ambulance.

Defendant maintained that he never struck Quachaun and that Nyeshia's testimony was not true. He stated that the written statement he provided for the police was the product of coercion by the detectives who told him what to write, as was the case with the videotaped statement, which he only made because the police told him that if he wanted to see his daughter again, he had to say the same thing in front of the camera that he had written for the police.

At the close of the evidence, defense counsel requested that the court charge second-degree (reckless) manslaughter as a lesser included offense of counts one, which charged

second-degree depraved-indifference murder under PL § 125.25(2), and three, which charged first-degree manslaughter under PL § 125.20(4) (involving a child victim). Counsel argued that the jury could find that defendant had just meant to discipline the boy. The People voiced no opposition to counsel's request on evidentiary grounds, contending only that second-degree manslaughter should be charged exclusively under count one. Counsel did not request submission of criminally negligent homicide.

Ultimately, the court submitted the following offenses, in the alternative: second-degree depraved-indifference murder of a child under PL § 125.25(4), as charged in count two of the indictment; first-degree manslaughter (of a child), as charged in count three; second-degree manslaughter "as a lesser included offense"; and endangering the welfare of a child, as charged in count four.

In his summation, counsel argued primarily that Smith had beaten her son and caused his death. He concluded his argument by observing that the jurors could disagree with him, and also disagree with the prosecutor's claim that defendant was a murderer, and so he asked them to consider the various charges — which he identified - in order to "weigh the entire situation" and "come in with the right verdict." "It's for [the jury] to

consider, is this murder, is this not guilty, or is it something in between?"

After approximately three hours of deliberations, the jury acquitted defendant of second-degree murder and first-degree manslaughter, and convicted him of second-degree manslaughter. In accordance with the court's charge, the jury rendered no verdict on the child-endangering count. Defendant was sentenced to five to fifteen years' imprisonment.[2]

On appeal, defendant argues that his trial counsel was ineffective for not requesting criminally negligent homicide as a lesser included offense of second-degree manslaughter. According to defendant, his trial counsel's strategy was to place before the jury all the possible charges in order to have the jury pick the one that best fit the facts of the case. Defendant argues that with this strategy in mind, there was no reason for not requesting a charge of criminally negligent homicide.

New York's standard for the effective assistance of counsel is whether the defendant was afforded "meaningful representation," which requires assessing the representation in light of the law and the facts of the case, ordinarily viewed in

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[2]Smith pleaded guilty to manslaughter in the second degree on July 18, 2007, and was sentenced to a term of 2½ to 7½ years.

their totality at the time of trial (*People v Baldi*, 54 NY2d 137, 147 [1981]). Moreover, counsel's failure must seriously compromise the defendant's right to a fair trial (*see People v Benevento*, 91 NY2d 708, 713 [1998]). The federal standard requires demonstration that the attorney's performance failed to meet an objective standard of reasonableness (*Strickland v Washington*, 466 US 668, 687-688 [1984]) and that, but for counsel's deficiency, a reasonable probability exists that the result of the proceeding would have been different (*id.* at 694). New York's cases agree with the federal standard on its "reasonableness" prong, but depart on the "but for" prong, by "adopting a rule somewhat more favorable to defendants" (*Turner*, 5 NY3d at 480).

Both the United States Supreme Court and this State's Court of Appeals have recognized that "a single failing in an otherwise competent performance [may be] 'so egregious and prejudicial' as to deprive a defendant of his constitutional right" (*id.*). However, "[s]uch cases are rare" and "counsel's efforts should not be second-guessed with the clarity of hindsight" (*id.; see also People v Borrell*, 12 NY3d 365 [2009] ["we have often tolerated errors by counsel where the overall representation was nonetheless capable of characterization as 'meaningful'"]). For a single error to constitute ineffective assistance of counsel,

the failing would have to be "clear-cut and completely dispositive" (*Turner*, 5 NY3d at 481), and not one based on a complex analysis (*id*). Our Constitution "guarantees the accused a fair trial, not necessarily a perfect one" (*People v Benevento*, 91 NY2d at 712).

Based on the record before us, however, we cannot state that counsel was ineffective. Counsel is not ordinarily deemed ineffective for failing to request a lesser included offense. Indeed, a court's failure to submit a statutorily and factually appropriate lesser included offense "does not constitute error" absent a party's request for such a charge (CPL 300.50[2]). This waiver provision recognizes that the lack of such a request typically reflects trial strategy (*see Turner*, 5 NY3d at 483). We cannot determine and need not speculate as to counsel's strategy in failing to request the lesser included offense of criminally negligent homicide, or whether defendant participated in making that decision. However, it bears noting that there is no appellate contention that defendant's second-degree manslaughter conviction was against the weight of the evidence, or that defendant did not have the requisite mens rea for

conviction of that crime. While we recognize that a single egregious failing by counsel may deprive a defendant of his or her constitutional right to effective assistance, (*Turner*, 5 NY3d at 480), we cannot conclude that failing to seek the lesser included offense of criminally negligent homicide was either a clear cut, or a dispositive error (*see People v Borrell*, 12 NY3d 365).[3]

As noted above, defendant need not show a reasonable probability that but for counsel's failure to request submission of criminally negligent homicide as a lesser included offense he would have been convicted of that crime and not second-degree manslaughter (*People v Caban*, 5 NY3d 143, 155 [2005]).

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[3]Although the record does not support defendant's claim, we reject the People's position that defendant waived his ineffective assistance of counsel claim based on *People v Parilla* (8 NY3d 654 [2007]), where the court held that the defendant had waived a statute of limitations defense by pleading guilty and that he could not sidestep the consequences of his plea by claiming that his counsel was ineffective for failing to file a motion to dismiss the indictment on statute of limitations grounds. Here, the People argue that based on *Parilla*, this Court should find that defendant's contention that counsel was ineffective for failing to request the charge on criminally negligent homicide was waived. *Parilla*, however, pertained to the rights waived by a guilty plea and the inability of a defendant to revive issues so waived by arguing ineffective assistance of counsel. Here, defendant proceeded to trial and may raise on direct appeal the issues that would have otherwise been waived by a guilty plea.

Nonetheless, there is a prejudice component to an ineffective assistance of counsel claim under the State Constitution (*id.* at 155-156). In this regard, defendant's reliance on the speed with which the jury acquitted him of second-degree murder and first-degree manslaughter is misplaced. The speed with which the jury acquitted him of these crimes does not undermine the verdict finding that guilt of second-degree manslaughter had been proven beyond a reasonable doubt or provide anything other than speculative support for the notion that the jury might have convicted him of criminally negligent homicide. Moreover, particularly given that defendant does not otherwise fault his attorney in any respect, that he was acquitted of the more serious crimes is relevant to the "fairness of the process as a whole" (*id.* at 156).

Contrary to defendant's argument, *Turner* is inapposite as counsel's trial strategy in that case was evident from the record on appeal. In *Turner*, the defendant, who had been charged with second-degree murder (for a crime committed 16 years earlier), decided to gamble on acquittal and thus, trial counsel unsuccessfully objected to the submission of a lesser included manslaughter charge. Since manslaughter (unlike murder) was

subject to a statute of limitations defense, counsel could have kept that charge out by raising that defense. In finding counsel ineffective, the Court noted that given counsel's strategy, "it could not have been rational for trial counsel to abandon a statute of limitations defense that would have prevented the charge from being submitted" (5 NY3d at 484). Here by contrast, counsel's failure to request criminally negligent homicide was not outcome determinative, and it cannot be said that counsel's strategies fell short of the objective standard of reasonableness (*Turner*, 5 NY3d at 485), required by both the Federal and State Constitutions. In short, the record before us does not support a claim of ineffective assistance of counsel.[4]

With respect to defendant's sentence, the record does not establish that it was based on the crimes of which he was acquitted or any other improper criteria, and we perceive no basis for reducing it.

Accordingly, the judgment of the Supreme Court, Bronx County (Denis J. Boyle, J.), rendered November 1, 2007, convicting defendant, after a jury trial, of manslaughter in the second

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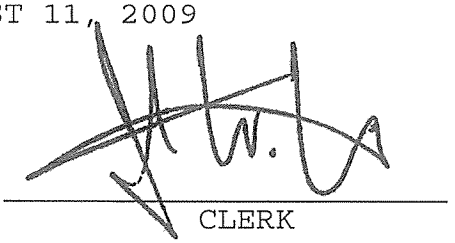
[4]Appellant's recourse should have been to pursue his claim by way of a CPL 440.10 motion.

degree, and sentencing him to a term of 5 to 15 years, should be affirmed.

All concur.

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

ENTERED: AUGUST 11, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, J.P.
Eugene Nardelli
James M. Catterson
Karla Moskowitz
Dianne T. Renwick, JJ.

327
Index 116768/06

x

Julius H. Schoeps,
Plaintiff-Appellant,

-against-

The Andrew Lloyd Webber Art Foundation,
Defendant-Respondent.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Rolando T. Acosta, J.), entered November 26, 2007, which granted defendant's motion to dismiss the complaint and denied his motion for leave to file a third amended complaint.

Byrne Goldenberg & Hamilton, PLLC, Washington, DC (John J. Byrne, Jr. of counsel) and Bressler, Amery & Ross, P.C., New York (David H. Pikus and David Smitham of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Carey R. Ramos, Darren W. Johnson and Robert C. Schuwerk of counsel), for respondent.

NARDELLI, J.

The genesis of this litigation occurred in 1935 in pre-war Germany, when Paul von Mendelssohn-Bartholdy, a German-Jewish banker, was allegedly forced to sell a valuable Picasso painting to a German art dealer. The issue before this Court is whether plaintiff Julius Schoeps, a German national, may pursue his claim against defendant, which acquired the painting in 1995, without first being appointed a representative of Bartholdy's estate. We hold that plaintiff lacks standing, and thus affirm the Supreme Court's dismissal of the action.

In his proposed third amended complaint, which is unverified, plaintiff Julius Schoeps states that he is a great-nephew of Bartholdy, and an heir to 12.5% of the estate. He further alleges that all of the living heirs have assigned their claims to him in this matter, but has not provided any proof of such assignments. Bartholdy was a member of a prominent Jewish family in Germany, and included among his forebears the composer Felix Mendelssohn. Prior to his death in 1935 he owned an extensive art collection, including a painting by Pablo Picasso entitled "The Absinthe Drinker (Angel Ferdinand de Soto)." According to Schoeps, Bartholdy had sold the painting to a German art dealer in 1935 under duress resulting from Nazi persecution.

Defendant, The Andrew Lloyd Webber Art Foundation, is an

express charitable trust established under the laws of England and Wales, and is the current owner of the painting. It acquired the artwork in 1995 in an open auction by Sotheby's in New York.

The Foundation sought to sell the painting at a November 8, 2006 auction at Christie's in New York. Plaintiff filed a complaint against defendant in the United States District Court for the Southern District of New York, and sought temporary restraining orders to stop the sale of the painting and to prevent defendant from taking it out of the United States. That complaint was dismissed for lack of federal jurisdiction on November 7, 2006, and the restraining orders were lifted. Nonetheless, due to the controversy, the Foundation withdrew the painting from auction. It was returned to London on November 8, 2006.

On November 8, 2006, plaintiff commenced this action in Supreme Court, New York County with the filing of a summons and complaint. On November 9, 2006, he filed a first amended complaint. The complaints asserted causes of action for restitution, constructive trust, declaratory relief, replevin and conversion. The Foundation claims that it was never served with either complaint.

On March 5, 2007, plaintiff filed a second amended complaint without seeking or being granted leave to do so. Counsel for

defendant returned the second amended complaint.

On or about April 5, 2007, defendant moved to dismiss the first amended complaint upon the ground, inter alia, that plaintiff lacked standing to bring the action because he had neither been appointed a representative of decedent's estate, nor did he have any other personal capacity for bringing such an action.

In opposition, Schoeps maintained that, under German law, ownership rights vested immediately in the heirs, and the appointment of a personal representative of the estate was thus unnecessary. He further contended that Bartholdy did not have a cause of action in Nazi Germany during his lifetime, and, therefore, his individual heirs had the right to file suit on their own behalf.

On May 2, 2007, plaintiff moved for leave to file a third amended complaint. The Foundation responded that the amended pleadings did not cure plaintiff's lack of standing and capacity to bring the action.

After consolidating the motions, the court granted the motion to dismiss, and denied as moot the motion for leave to file an amended pleading. The motion court found that plaintiff lacked standing since he had not been appointed a personal representative of the estate pursuant to Estates, Powers and

Trusts Law §§ 11-3.2(b) and 13-3.5. Although the court agreed with plaintiff's contention that any cause of action asserted by decedent during his own lifetime in Nazi Germany would have been futile, it observed that the wrong itself nevertheless occurred during his lifetime, and any rights to the painting necessarily passed to his estate at the time of his death. The court also rejected plaintiff's argument that he possessed standing because title to the painting had vested immediately in the decedent's distributees.

Section 11-3.2(b) of the Estates, Powers and Trusts Law provides, in pertinent part, that an action for injury to person or property belonging to a decedent may be maintained by a personal representative of the decedent. EPTL 13-3.5(a)(1) provides that a personal representative of a foreign decedent who seeks to maintain a cause of action in New York must, within 10 days after commencing the action, file a copy of the letters issued to the representative, duly authenticated as prescribed by CPLR 4542. If the action is not brought by a personal representative, the individual is required to submit an affidavit setting forth the facts which authorize him to act for the decedent, along with such other proof as the court may require.

In this case, as noted previously, the complaint is not verified by plaintiff, and there is no affidavit from Schoeps in

the record that would otherwise comply with EPTL 13-3.5(a)(1). As an exhibit to the complaint, however, plaintiff offered a 12-page document entitled "Research Summary," which he avers, without contradiction by defendant, was prepared as a provenance in conjunction with the anticipated auction of the painting. Although the provenance is not verified, or the author even identified, in the absence of objection by defendant we accept the information in the document to be true for purposes of addressing the issue of plaintiff's standing.

Initially, we note that the law in New York is that, absent extraordinary circumstances, even a party who is the sole beneficiary of the estate "cannot act on behalf of the estate or exercise . . . fiduciary's rights with respect to estate property" (*Jackson v Kessner*, 206 AD2d 123, 127 [1994], *lv dismissed* 85 NY2d 967 [1995] citing *McQuaide v Perot*, 223 NY 75 [1918]). The appropriate avenue is to be appointed a representative pursuant to the requirements of the EPTL (*see e.g. Matter of Peters v Sotheby's Inc.*, 34 AD3d 29, 34 [2006], *lv denied* 8 NY3d 809 [2007]).

In seeking to escape the strictures of the EPTL, Schoeps argues first that when, under relevant foreign law, the property of the decedent passes directly to the heirs, letters of appointment need not be obtained. As authority, he cites a one

paragraph decision in *Roques v Grosjean* (66 NYS2d 348, [Sup Ct, NY County 1946]). This case involved a claim by a plaintiff who was the heir of a French decedent. The court made no analysis of French law in its decision, nor did it apply a conflict of law analysis. It concluded that the plaintiff was suing on her own behalf as owner of the property, and found that French law vested title in her to all of the decedent's assets immediately upon the death of the decedent because she was the sole legatee.

The obvious initial difference between *Roques* and this case is that Schoeps is not a sole legatee. Indeed, he claims that his interest is limited to 12.5% of the estate. Although he alleges in his proposed third-party complaint, which is unverified, and which he has not received permission to file, that he has received assignments from all the remaining heirs, the purported assignments are not part of the record.

It is significant that although Schoeps now argues that German law applies, he initially took the contrary position. When defendant raised conflicts of law concerns about the appropriateness of New York as a venue, Schoeps argued that German law did not apply. The following is excerpted from his memorandum in opposition:

> "The Foundation suggests that German or British law would apply to this case. This is patently incorrect. German law will have

> no application, since the place of theft - in this case Nazi Germany - is irrelevant to any choice of law analysis regarding stolen property."

He eventually reversed himself. At oral argument on the motion, the court directed the parties to submit supplemental memoranda after Schoeps argued that he had discovered additional authority in support of his claim to standing. The authority was a decision of the United States District Court for the Eastern District of New York, *Bodner v Banque Paribas* (114 F Supp 2d 117 [2000]), which will be addressed *infra*. Relying on *Bodner*, Schoeps claimed that the Bartholdy estate had long been closed, and that the property rights of the heirs vested immediately upon Bartholdy's death under German law. He did not offer any affidavit from an expert in German law, or even cite the applicable provision of German law which would support this contention. He also did not explain why this position, such as it was, could be reconciled with his prior position that German law did not apply.

On appeal, again without retracting his prior position that German law did not apply, Schoeps refers this Court to various websites, including that of the German Ministry of Justice. Obviously, a question of law can be addressed for the first time

on appeal under certain circumstances (*see Baker v Bronx Lebanon Hosp.*, 53 AD3d 21, 27 [2008]). In order to do so, however, the record must be sufficient to make a determination. At a minimum, the absence of the affirmation of an expert in German law, opining as to the applicability of German law to plaintiff's standing to bring this lawsuit without being appointed as a personal representative, renders the record insufficient.

In any event, we are not persuaded by the authority cited by plaintiff. *Roques* is the only New York decision which holds that letters are not needed by a nonresident to maintain a cause of action in New York, when the law of the plaintiff's domicile vests title to personal property in the heirs at the time of death. Moreover, in making its determination, the *Roques* court cited a Ninth Circuit decision which held that a public administrator in California was not a necessary party to an action for fraud by the heirs of a French resident who had owned property in California (*see Anglo California Natl. Bank of San Francisco v Lazard*, 106 F2d 693 [1939], *cert denied* 308 US 624 [1939]). In *Anglo California*, however, the court pointed out in a footnote that the appropriate method by which an heir to a French estate establishes his standing is by filing all testamentary instruments with a Notary, and then having the Notary execute a written instrument known as an "acte de

notariete" (*id.* at 699 n 2). Presumptively, that instrument was part of the record in the litigation. In any event, it is evident that even if under French law title were vested at the time of death, a proceeding before a French Notary was still necessary to document standing.

Whether an "acte de notariete" was submitted in *Roques* is not recorded in the decision, but, as discussed above, there is nothing in competent form in this case to indicate that Schoeps has offered any proof of his own standing. He has not submitted any affidavit, his complaint is not verified, the research document contains neither an author nor a notarization, there are no written assignments, and the record is bereft of an affidavit from an expert in German law. Such deficiencies give us no reason to depart from the guiding principle that letters of appointment should first be obtained before standing is recognized.

As noted above, Schoeps also relied on *Bodner v Banque Paribas* (114 F Supp 2d 117 [2000]), which permitted a class of heirs of Jewish customers to sue French banks in New York to pursue claims to recover assets expropriated during the Nazi occupation, without first obtaining letters pursuant to EPTL 11-3.2. The only authority upon which the *Bodner* court relied was the *Roques* case. There was no discussion in the decision about

whether the plaintiffs had obtained an acte de notariete, and the court merely concluded that the plaintiffs had standing because their ownership interests vested upon their forebears' deaths. Likewise, in *Pressman v Estate of Steinvorth* (860 F Supp 171 [1994]), the court allowed an individual who was the universal heir of a Venezuelan decedent to pursue claims in New York, without obtaining letters. The *Roques* case was again the sole authority cited.

We cannot state that these cases were wrongly decided, because the decisions do not reflect what type of evidence was provided by the heirs to establish their standing. Nevertheless, we reject any contention that these cases provide precedent for allowing individuals who assert rights obtained through inheritance from a foreign decedent to pursue claims in New York without first obtaining letters pursuant to the EPTL, or at least following the alternate procedure under section 13-3.5(a)[1] of submitting an affidavit, as well as whatever other proof may be required by the court. Even this additional proof may not guarantee the recognition of standing, but it will allow for a more complete record to be made before a determination is made.

Schoeps also relies on the recent decision in *Schoeps v The Museum of Modern Art* (594 F Supp 2d 461 [2009]), in which he, along with other Bartholdy heirs, sued the Museum of Modern Art

and the Guggenheim Foundation to recover possession of paintings in those institutions' possession that allegedly formerly belonged to Bartholdy, and were sold under similar economic and political duress. In denying defendants' motion for summary judgment on the ground that plaintiffs lacked standing, the Southern District relied upon *Roques* and its federal progeny, *Bodner* and *Pressman*. Indeed, the court specifically stated, that it was "constrained to disagree" with the motion court's decision in this case "[i]n light of *Roques*" (*id.* at 467).

It is thus clear that all authority for the proposition that claims such as the one at issue here may be pursued without the appointment of plaintiff as a personal representative flows from a one paragraph decision of the New York County Supreme Court written 60 years ago, which was never appealed. We conclude that the precedential value of *Roques* must be limited to the recognition that foreign law may provide for a different method of establishing the right to title in heirs. It cannot support the proposition that common law claims in New York may be pursued in New York without first complying with the procedural requirements of the EPTL. One method, although not necessarily the exclusive one, would be to provide an affidavit from an expert in the law of the foreign jurisdiction concerning

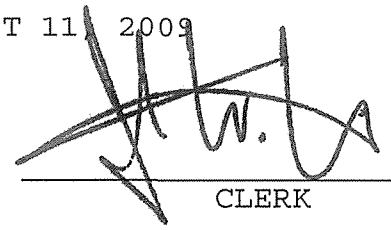
inheritance rights,[1] as well as the foreign jurisdiction's equivalent of an "acte de notariete" formally certifying the party's right to pursue claims on behalf of the estate. Clearly, we do not seek to limit the manner by which a foreign legal representative can establish standing; our decision is limited to the holding that merely being vested with title at the time of the decedent's death is insufficient grounds for permitting a party to pursue a claim in this jurisdiction.

Accordingly, the order of the Supreme Court, New York County (Rolando T. Acosta, J.), entered November 26, 2007, which granted defendant's motion to dismiss the complaint and denied plaintiff's motion for leave to file a third amended complaint, should be affirmed, without costs.

All concur.

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

ENTERED: AUGUST 11, 2009



CLERK

[1]We note that in the federal action Schoeps apparently provided expert authority on German law indicating that title passes by operation of law at the time of death. Nothing in the decision indicates, however, what proof, if any, was submitted to the court as to the bona fides of plaintiff's claim to standing.