SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 5, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5135 The People of the State of New York, Respondent, Ind. 1242/04

-against-

Darrell Williams,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Bruce Allen, J.), rendered June 20, 2008, resentencing defendant to a term of 3 years with 5 years' post-release supervision, unanimously affirmed.

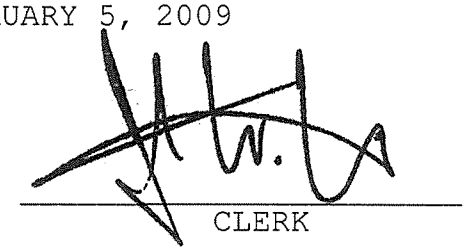
After defendant completed his prison sentence and began serving a term of PRS that was improperly imposed by the Department of Correctional Services, the court conducted a resentencing proceeding (*see* Correction Law § 601-d) and properly imposed PRS. We reject defendant's double jeopardy argument, as well as his other challenges to the resentencing (*see People v Hernandez*, __ AD3d __, decided simultaneously herewith).

Defendant also challenges the original sentencing court's

failure to pronounce the DNA databank fee orally. Since this appeal is from the resentencing, which was limited to the imposition of PRS, defendant may not raise any issue regarding imposition of fees (*see People v Williams*, 6 NY2d 193, 195-96 [1959]). Furthermore, defendant's original appeal from the underlying judgment (26 AD3d 903 [2006], *lv denied* 6 NY3d 899 [2006]) failed to raise any such issue. In any event, the imposition of the databank fee by way of court documents was lawful (*see People v Harris*, 51 AD3d 523 [2008], *lv denied* 10 NY3d 935 [2008]).

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

ENTERED: FEBRUARY 5, 2009



CLERK

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

5169 The People of the State of New York, Respondent, Ind. 6854/04

-against-

Rafael Rodriguez, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael A. Corriero, J.), rendered November 20, 2007, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree, and sentencing him to a term of 3 to 9 years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved (*see People v Lopez*, 71 NY2d 662 [1988]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The plea was knowing, intelligent and voluntary, and there was nothing in the allocution that cast doubt on defendant's guilt. While defendant was initially reluctant to admit his guilt, he ultimately did so. The record also establishes that the court sufficiently explained to defendant that the plea was conditioned

on his satisfactory completion of a treatment program, and that the consequence for noncompliance with this requirement would be a sentence of three to nine years. The record of the plea and subsequent hearing further supports the conclusion that defendant fully understood that the misconduct in which he engaged at the program constituted a violation of the plea conditions.

Defendant claims that his attorney rendered ineffective assistance by failing to move to withdraw the plea. However, that claim is unreviewable on direct appeal because it involves matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Even in a case where a defendant has a legal basis upon which to withdraw his or her plea, the defendant may still wish to let the plea stand in order to avoid the risks of going to trial on the original charges, and a competent attorney may provide sound advice to let a plea stand notwithstanding an issue as to its validity. In this case, defendant faced the danger of severe consecutive sentences had he withdrawn his plea and been convicted after trial on multiple counts. 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 Ford*, 86 NY2d 397, 404 [1995]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 5, 2009

CLERK

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

5172 In re Lolita Santiago, Index 118732/06
Petitioner,

-against-

East Midtown Plaza Housing Co., Inc., et al.,
Respondents.

Jack L. Lester, New York, for petitioner.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for East Midtown Plaza Housing Co., Inc., respondent.

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

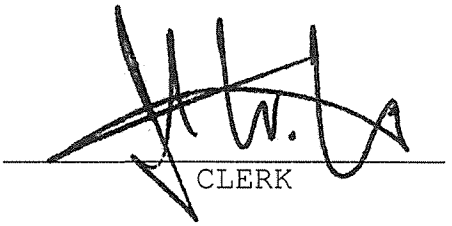
Determination of respondent Department of Housing Preservation and Development (HPD), dated September 7, 2006, which, after a hearing, granted respondent East Midtown Plaza Housing Co., Inc.'s request for a certificate of eviction, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Judith J. Gische, J.], entered July 12, 2007) dismissed, without costs.

Substantial evidence supports HPD's determination that petitioner failed to maintain the subject apartment as her primary residence, as required by the rules applicable to tenancies in Mitchell-Lama apartments (*see* 28 RCNY 3-02[n][4]). Petitioner provided a Colorado address as her residence on a voting registration card completed in Colorado in 2004 and spent

less than an aggregate of 183 days in the subject apartment in the calendar year preceding commencement of the eviction proceeding in November 2005 (*see* 28 RCNY 3-02[n][4][ii], [iv]). She admitted that she had not spent a night in the apartment since January 2002 and that in 2004 she had acquired a condominium in Colorado. Moreover, petitioner failed to provide a certified New York City Resident Income Tax return for the year immediately preceding the commencement of the eviction proceeding or to show that she was not legally obligated to file such return (*see* 28 RCNY 3-02[n][4][iv]). Petitioner's claim that her prolonged physical absence from the apartment should be excused as medically required is unavailing.

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

ENTERED: FEBRUARY 5, 2009



CLERK

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

5175 The People of the State of New York, Respondent, Ind. 5361/05

-against-

Ricky Omar Dunlop, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

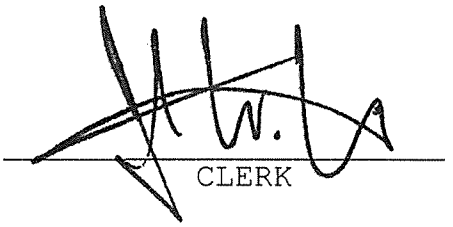
Judgment, Supreme Court, New York County (James A. Yates, J.), rendered November 14, 2006, convicting defendant, after a jury trial, of attempted assault in the first degree, assault in the second degree and criminal possession of a weapon in the second and third degrees, and sentencing him to concurrent terms of 15 years, 7 years, 15 years and 7 years, respectively, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The challenged remarks were fair comment on the evidence, and were permissible responses to the defense summation (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 5, 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 February 5, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 5524/05
Respondent,

-against- 5176

Jorge Ucho,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about June 6, 2006,

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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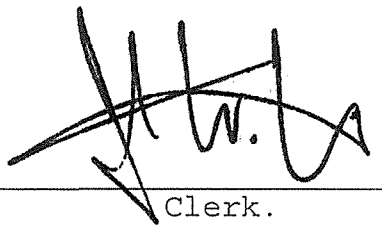


Clerk.

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

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

5178 The People of the State of New York, Ind. 1693/06
Respondent,

-against-

Frank Tolentino,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

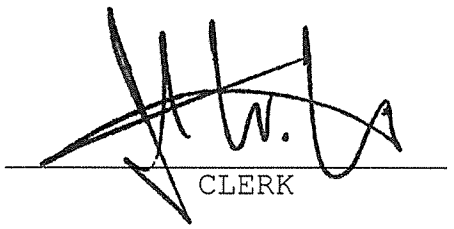
Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered June 7, 2006, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

Defendant did not preserve his claim that when the court ordered his sentence to be served consecutively to another sentence it misapprehended its discretion under Penal Law § 70.25(2-b) to impose a concurrent sentence upon a finding of

mitigating circumstances (*see People v Hamlet*, 227 AD2d 203, 204 [1996], *lv denied* 88 NY2d 1021 [1996]), and we decline to review it in the interest of justice.

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

ENTERED: FEBRUARY 5, 2009



CLERK

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

5179-
5180 In re Wyleed M., and Others

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

Said M.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

Charles Zolot, Jackson Heights, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

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

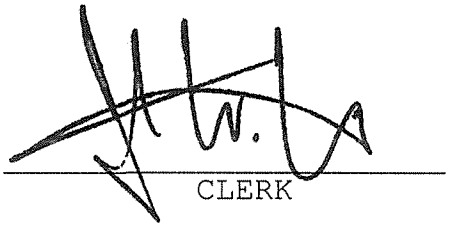
Order, Family Court, New York County (Jody Adams, J.), entered on or about October 24, 2007, which denied respondent father's motion to vacate, inter alia, an order of disposition, same court and Judge, entered on or about April 23, 2007, which, upon respondent's default, inter alia, transferred the custody and guardianship of the subject children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs. Order, same court and Judge, entered on or about November 14, 2007, which denied respondent's motion to restore the action to the calender, unanimously affirmed, without costs.

Respondent's initial motion to set aside the default was

properly denied since respondent failed to offer a reasonable excuse for his failure to appear at the dispositional hearing (*see e.g. Matter of Jones,* 128 AD2d 403, 404 [1987]). The record belies respondent's claim that he never received notice of the proceeding. Respondent's subsequent motion to restore the matter to the calendar was also properly denied as respondent's proffered excuse for his nonattendance at the hearing on the initial motion, that he went to the wrong floor of the courthouse on the day the motion was heard, was also not reasonable, particularly in light of respondent's history of failing to appear at previously scheduled proceedings.

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

ENTERED: FEBRUARY 5, 2009



CLERK

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

5181 Lori Keating, et al., Index 122264/03
Plaintiffs-Respondents,

-against-

SS&R Management Co., et al.,
Defendants,

Robert Borgella,
Defendant-Respondent,

High Thor Taxi Corp.,
Defendant-Appellant.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for appellant.

Arnold E. DiJoseph, III, New York, for Lori and Kevin Keating, respondents.

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

Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered April 10, 2007, which, in an action for personal injuries sustained when plaintiff pedestrian was hit by a taxi registered and leased by defendant-appellant High Thor Taxi Corp., insofar as appealed from as limited by High Thor's brief, denied High Thor's posttrial motion insofar as it sought judgment dismissing the complaint as a matter of law, and granted the motion insofar as it sought a new trial to the extent of directing a new trial on the issues of past and future pain and suffering only, unless plaintiffs stipulated to reduce the jury's award for past pain and suffering from $5 million to $500,000 and

the award for future pain and suffering from $7 million (over 31 years) to $600,000, unanimously modified, on the facts, to direct that the new trial also include the issue of future medical expenses unless, within 30 days after service of a copy of this order, plaintiffs also stipulate to reduce the award for future medical expenses from $800,000 (over 10 years) to $150,000, and otherwise affirmed, without costs.

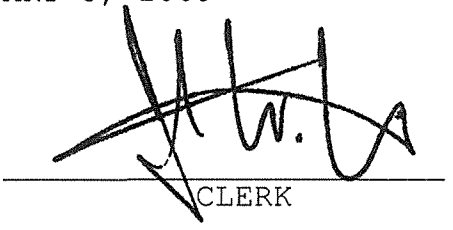
The parties stipulated that defendant SS&R Management Co. is the "titled owner" and that defendant-appellant High Thor is the "registered owner" of the taxi involved in the accident, and that the individual defendant had permission to operate the taxi. There also appears to be no dispute that, as the trial court found, High Thor was in the business of registering vehicles owned by SS&R Management and then leasing them to taxi drivers as SS&R's agent. Such an arrangement makes High Thor vicariously liable for the taxi driver's negligence (*see Taughrin v Rodriguez*, 254 AD2d 735 [1998]) in an action commenced prior to the effective date of the Graves Amendment (49 USC § 30106), barring vicarious liability against professional lessors and renters of vehicles (*cf. Graham v Dunkley*, 50 AD3d 55 [2008], *appeal dismissed* 10 NY3d 835 [2008]).

The awards for past and future pain and suffering do not deviate materially from what would be reasonable compensation, where plaintiff, 45 years old at the time of the July 2003

accident, suffered an open fracture of the tibia and a fracture of the fibula requiring six surgical procedures performed over the course of almost three years, including external fixation and internal fixation, as well as skin, muscle and nerve grafts; the fracture has not achieved union, will likely require additional surgery, and continues to cause plaintiff significant pain; and plaintiff has severe scarring, has undergone extensive physical therapy, and does not have full mobility of her right ankle (*cf. Bello v New York City Tr. Auth.*, 50 AD3d 511 [2008]; *Brown v Elliston*, 42 AD3d 417 [2007]; *Orellano v 29 E. 37th St. Realty Corp.*, 4 AD3d 247-248 [2004], *lv denied* 4 NY3d 702 [2004]). The award for future medical expenses, however, is excessive to the extent above indicated, given that the only evidence of such costs was the testimony of plaintiff's treating orthopedic surgeon that plaintiff will likely require future surgery at a cost of $40,000 to $50,000, exclusive of hospital costs, and future physical therapy at a cost of "tens of thousands of dollars." We find the award for future lost earnings supported by the evidence.

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

ENTERED: FEBRUARY 5, 2009



CLERK

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

5182 Antonia Tavaras, et al., Index 117049/03
Plaintiffs-Appellants,

-against-

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

Dobbs-Friedman, Inc.,
Defendant-Respondent.

Buden, Reisman, Kupferberg & Bernstein, LLP, New York (Ralph Gavin Bell of counsel), for appellants.

White, Quinlan & Staley, L.L.P., Garden City (Erin M. O'Hanlon of counsel), for respondent.

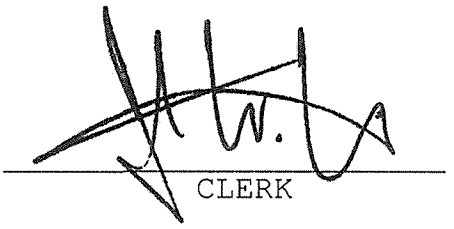
Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 24, 2007, which, insofar as appealed from as limited by the briefs, in an action for personal injuries, granted defendant-respondent's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff was injured when she tripped over construction fencing maintained by defendant New York City Transit Authority, causing her foot to hit a raised padlock affixed to cellar doors on adjacent premises owned by respondent. Following respondent's prima facie showing of entitlement to summary judgment, plaintiff failed to raise a triable issue of fact as to whether the padlock, rather than the Transit Authority's fencing, caused the accident. Regardless of any special use respondent may have had

in connection with the padlocked cellar doors, plaintiff failed to present any evidence that this use was a proximate cause of the accident, since she admitted that she tripped when she became entangled in the fence and that her foot landed on the padlock (*see Fine v City of New York*, 303 AD2d 306 [2003], *lv dismissed* 1 NY3d 607 [2004]; *McGee v City of New York*, 252 AD2d 483, 484 [1998]). Furthermore, there is no evidence that the padlock constituted a trap, nuisance, or that it otherwise created a dangerous condition (*see Riley v City of New York*, 50 AD3d 344 [2008]).

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

ENTERED: FEBRUARY 5, 2009



CLERK

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

5183 The People of the State of New York, Respondent, Ind. 414/06

-against-

Anthony Smith, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

Judgment, Supreme Court, New York County (Renee Allyn White, J.), rendered on or about February 27, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

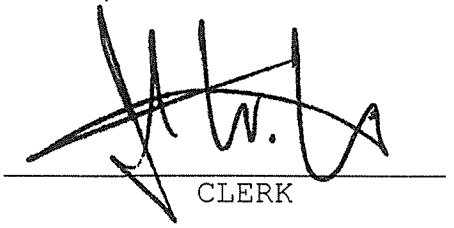
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 5, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 5, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 4030/02
Respondent,

-against- 5184

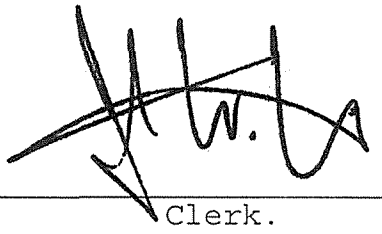
Mark Moore,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel FitzGerald, J.), rendered on or about May 24, 2007,

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

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

ENTER:



Clerk.

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

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

5185 Troy Smiley, Index 109268/04
Plaintiff-Respondent,

-against-

North General Hospital, et al.,
Defendants-Appellants.

Windels, Marx, Lane & Mittendorf, LLP, New York (John D. Holden of counsel), for North General Hospital, appellant.

Marin Goodman, LLP, New York (Margaret J. Leszkiewicz of counsel), for Burns International Security Services Corporation, appellant.

Friedman, Levy, Goldfarb & Weiner, P.C., New York (Ira H. Goldfarb of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 13, 2007, which denied defendant North General Hospital's motion for summary judgment dismissing the complaint and defendant Burns International Security Services Corp.'s cross motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion and cross motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

The evidence shows that in April 2003, plaintiff, a psychiatric patient, was allegedly injured by one of defendant Burns' security guards as he was attempting to leave the

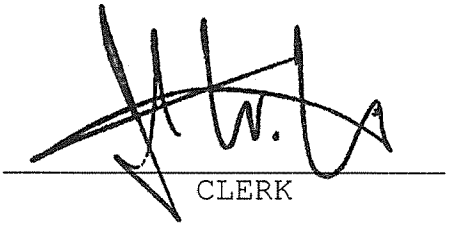
psychiatric holding area of defendant hospital. A determination had been made that plaintiff, who suffers from a number of disorders including major depression and explosive mood disorder, posed a danger to himself and others and had to be admitted to the psychiatric ward. Plaintiff tried to leave the hospital several times, became agitated and abusive towards staff when he was not permitted to do so, and, during one struggle with security guards, allegedly fell or was pushed to the floor, sustaining the knee injury for which he now seeks damages.

This action, commenced in June 2004, is one for assault, and accordingly, is barred by the applicable one-year statute of limitations (*see* CPLR 215[3]). It is well settled that once intentional offensive contact has been established, the actor is liable for assault and not negligence inasmuch as there is "no such thing as a negligent assault" (*see Trott v Merit Dept. Store*, 106 AD2d 158, 159 [1985] [internal quotation marks and citation omitted]; *see Wrase v Bosco*, 271 AD2d 440 [2000]). It is undisputed that plaintiff objected to the contact with the security personnel, and plaintiff's argument that the security

personnel used excessive force does not transform this action into one for negligence (*see Mazzaferro v Albany Motel Enters.*, 127 AD2d 374, 376 [1987]).

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

ENTERED: FEBRUARY 5, 2009



CLERK

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

5186 The People of the State of New York, Ind. 9476/99
Respondent,

-against-

Efrain Hernandez,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered October 17, 2008, resentencing defendant to a term of 7 years with 5 years' post-release supervision, unanimously affirmed.

In December, 2005, having served six years of the seven-year determinate term imposed upon his conviction of burglary in the second degree, defendant was granted conditional release and began to serve an administratively-imposed mandatory five-year term of post-release supervision. Thereafter, in *People v Sparber* (10 NY3d 457 [2008]) and *Matter of Garner v New York State Dept. of Correctional Servs.* (10 NY3d 358 [2008]) the Court of Appeals held that a PRS term is only valid if judicially imposed at the time of sentencing, but emphasized that a sentencing court retains the authority to correct a procedural sentencing error, even beyond the one year following conviction

afforded the People to seek resentencing under CPL 440.40 (*Sparber*, 10 NY3d at 469, 471-72; *Garner*, 10 NY3d at 363 n 4). In response, the Legislature enacted Correction Law § 601-d, providing a procedural framework for the identification and resentencing of those defendants whose convictions required a mandatory PRS component that had not been imposed by the sentencing court. In accordance with the new statute, the court resentenced defendant, imposing a five-year term of PRS.

The court clearly acted under the authority granted to it by the Legislature when it enacted Correction Law § 601-d. Accordingly, we reject defendant's arguments that the resentencing exceeded the sentencing court's authority to correct an illegal sentence (*see People v DeValle*, 94 NY2d 870 [2000]), and that the court lost jurisdiction to resentence defendant.

We further reject defendant's claim that double jeopardy and due process protections rendered his resentencing unconstitutional. Defendant concedes that his resentencing would have been constitutional had it occurred while he was still serving his prison sentence, but argues that the resentencing violated his legitimate expectation of finality since the PRS term imposed by the Department of Correctional Services was a nullity, since he had completed the only lawfully-imposed portion of his sentence, and since the People's time to seek corrective action by way of an appeal or CPL 440.40 motion had expired. We

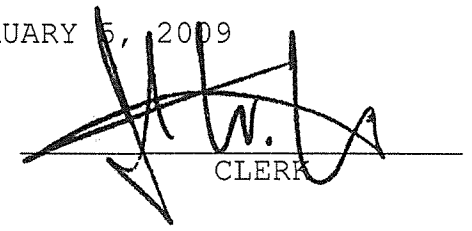
conclude that defendant had no legitimate expectation of finality with respect to a determinate seven-year sentence with no attending PRS component (*see United States v DiFrancesco*, 449 US 117, 138-39 [1980]; *United States v Rosario*, 386 F3d 166, 171 [2nd Cir 2004]; *United States v Lundien*, 769 F2d 981 [4th Cir 1985], *cert denied* 474 US 1064 [1986]).

Clearly, defendant understood that PRS was a component of his sentence, as he had actually served three years of PRS at the time of resentencing. The fact that DOCS-imposed PRS is a nullity does not render it irrelevant to a defendant's expectation of finality. Here, defendant did not merely "expect" to be subject to PRS; he was actually serving such a term, albeit one that was improperly imposed by DOCS instead of the sentencing court. Furthermore, defendant could not have had a legitimate expectation in the finality of a sentence that is manifestly contrary to law. As noted, both the Court of Appeals and the Legislature have determined that failure to impose PRS is a defect that is correctable, notwithstanding the expiration of the People's time to appeal or move for resentencing. Finally, defendant's resentencing did not offend notions of fundamental

fairness, as he was resentenced only to the originally promised determinate term of seven years, along with the required five-year term of PRS.

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

ENTERED: FEBRUARY 5, 2009



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

5187 Edith Harari, Index 350623/06
Petitioner-Respondent,

-against-

Donald Davis,
Respondent-Appellant.

Donald E. Davis, appellant pro se.

Andrea Ziegelman, P.C., New York, for respondent.

Order, Supreme Court, New York County (Laura E. Drager, J.), entered March 13, 2007, which denied respondent's motion to dismiss the petition for a determination on the issues of custody and child support, unanimously affirmed, without costs.

Contrary to respondent's argument, where there has been a showing that an award is necessary to maintain the reasonable needs of the children during the litigation, the court has jurisdiction to prospectively adjudicate child custody and child support issues despite the fact that the unmarried parties continue to live together with their children (*see Koerner v Koerner*, 170 AD2d 297, 297-298 [1991]).

M-6066 - Harari v Davis

Motion seeking stay pending appeal denied.

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

ENTERED: FEBRUARY 5, 2009

CLERK

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

5188 The People of the State of New York, Respondent, Ind. 3398/06

-against-

Anthony Mendoza, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), entered June 27, 2007, convicting defendant, after a jury trial, of robbery in the first and second degrees, and also convicting him, upon his plea of guilty, of two counts of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

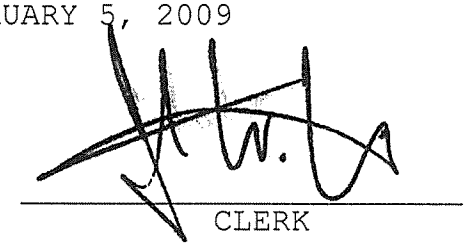
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. There was ample evidence establishing that defendant took the victim's property at knifepoint and also caused physical injury.

Defendant's constitutional challenge to his sentencing as a

persistent violent felony offender is without merit (*see* *Almendarez-Torres v United States*, 523 US 224 [1998]).

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

ENTERED: FEBRUARY 5, 2009



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

5189 The People of the State of New York, Respondent, Ind. 5997/06

-against-

Kevin Keys, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered June 28, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

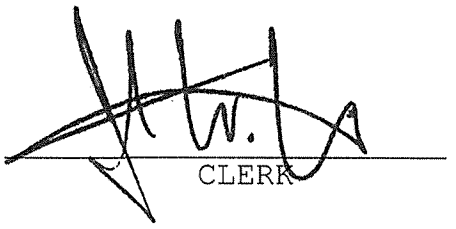
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its evaluation of minor inconsistencies in testimony.

The court properly exercised its discretion in denying defendant's mistrial motion based on a summation remark by the prosecutor that allegedly shifted the burden of proof, because the curative action taken by the court during the summation was sufficient to prevent any prejudice. Defendant's remaining

contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that none of the actions by the prosecutor of which defendant complains on appeal deprived him of a fair trial.

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

ENTERED: FEBRUARY 5, 2009



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

5190N Jessica Garcia, Index 14768/06
Plaintiff-Appellant,

-against-

Juan Carlos Defex, D.D.S.,
Defendant-Respondent.

Burns & Harris, New York (Jean M. Prabhu of counsel), for appellant.

Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge (Scott G. Christesen of counsel), for respondent.

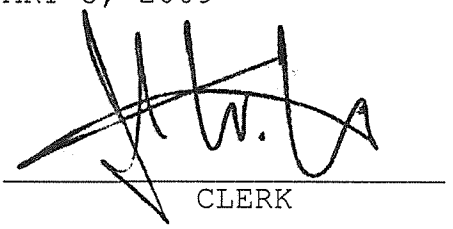
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 2, 2007, which, in an action for dental malpractice, granted defendant's motion pursuant to CPLR 3126 for sanctions for failure to provide disclosure to the extent of conditionally precluding plaintiff from offering evidence at trial unless she provides certain authorizations and produces medical records for in camera inspection, and directing plaintiff's counsel to pay defendant's counsel $2,000 for failure to comply fully with three discovery orders, unanimously affirmed, without costs.

The conditional order of preclusion was not an improvident exercise of discretion in view of plaintiff's insufficiently explained delay in providing authorizations, her unexplained delay in providing proof and itemization of special damages, her failure to object to or seek a protective order with respect to

other items sought but not produced, and the warning in the last compliance conference order that the imposed sanction would be imminent if plaintiff failed to comply (*see Arts4All, Ltd. v Hancock*, 54 AD3d 286 [2008]; *Langer v Miller*, 281 AD2d 338 [2001]). Contrary to plaintiff's contention, the court sufficiently set forth the conduct resulting in the sanctions, which were imposed pursuant to CPLR 3126, and not part 130 of the Rules of the Chief Administrator of the Courts (22 NYCRR part 130) (*see Arts4All, Ltd.*, 54 AD3d at 290). Furthermore, the monetary sanction was appropriate to compensate the defense for the time plaintiff wasted (*see Agron v Response Veh.*, 251 AD2d 234, 235 [1998]).

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

ENTERED: FEBRUARY 5, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Eugene Nardelli
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, JJ.

4713
Index 119226/99

Octavio Ramos,
Plaintiff-Respondent,

-against-

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

Jake Realty LLC, et al.,
Defendants-Appellants.

Defendants appeal from an order of the Supreme Court, New York County (Paul G. Feinman, J.), entered August 16, 2007, which, insofar as appealed from, granted plaintiff's motion to renew a prior order, same court (Michael D. Stallman, J.), entered October 31, 2003, granting their motion for summary judgment dismissing the complaint as against them, and, upon renewal, denied their motion for summary judgment.

London Fischer LLP, New York (Michael J. Carro, James Walsh and Miriam B. Schneider of counsel), for appellants.

Beekman & Kaufman, LLP, Roslyn Heights (Jonathan D. Beekman and Stephanie J. Kaufman of counsel), for respondent.

ACOSTA, J.

This action arises out of an altercation between plaintiff Octavio Ramos, the president of the tenants' association of an apartment building in Manhattan, and defendant Victor Casanova, the superintendent of the building. Specifically, according to plaintiff, Casanova and defendant Neil Gewirtz, the managing agent for the building, contacted the police and falsely accused plaintiff of having threatened and physically struck Casanova. As a result, plaintiff was arrested and subsequently convicted on January 21, 2000 of second-degree harassment and resisting arrest. In 1999, prior to his conviction, plaintiff commenced this action against, among others, Casanova, Gewirtz, the building, the building's management company (the building defendants), the arresting police officers, and the City of New York, asserting claims for false arrest, malicious prosecution, assault and battery, and violation of 42 USC § 1983. In September 2003, the building defendants moved for summary judgment dismissing the complaint, arguing, in part, that plaintiff's criminal conviction established probable cause for his arrest, thus rendering his civil claims unviable as a matter of law. Plaintiff's counsel did not submit any opposition to the building defendants' motion, did not inform the court that plaintiff had appealed his criminal conviction, and did not even

advise plaintiff of defendants' motion.

By order dated October 28, 2003, Justice Michael D. Stallman granted defendants' motion in full, stating that plaintiff's "criminal conviction both establishes probable cause to arrest and collaterally estops [him] from litigat[ing] . . . the occurrence," and that he failed to "come forward with any evidence that would create a triable question of fact." Thus, although plaintiff did not oppose the motion, the court dismissed the complaint on the merits and did not render a default judgment against plaintiff. On February 17, 2004 a judgment dismissing the complaint as against all defendants was entered.

Shortly after, by order dated April 12, 2004, Appellate Term reversed the conviction and dismissed the accusatory instrument against plaintiff (*People v Ramos*, 3 Misc 3d 127[A], 2004 NY Slip Op 50324[U] [2004]). Appellate Term found that the harassment conviction was "against the weight of the evidence," which showed, at most, "incidental physical contact" in the midst of a "rapidly escalating, housing-related dispute," and that the resisting arrest conviction was "infirm" because there was no reasonable cause to arrest "on a violation harassment charge involving events which took place outside the presence of the arresting officer."

Plaintiff, more than ever convinced that he was entitled to

be compensated for the injuries inflicted upon him by defendants' false accusations, retained new counsel, who in or about March 2005 instituted a new action in all presently pertinent respects identical to the first action dismissed by Justice Stallman. The defendants in this second action moved to consolidate it with a third action that plaintiff, acting pro se, had commenced against Casanova. By order dated August 30, 2006, Justice Louis B. York denied consolidation and dismissed the second action on the basis of Justice Stallman's prior order dismissing the first action. In the opinion of Justice York, "[w]hen the criminal conviction was reversed, there should have been a motion to vacate" Justice Stallman's decision, which had "res judicata" effect.

Consequently, plaintiff moved for leave to renew Justice Stallman's order and, upon renewal, to reinstate the complaint. By order dated August 13, 2007, Justice Paul G. Feinman granted plaintiff's request for renewal, and, upon renewal, denied the building defendants' motion for summary judgment without prejudice to again so move upon the completion of discovery. The court pointed out that the motion for summary judgment was predicated upon a criminal conviction that was vacated after the motion was made, and ruled that "[t]he extant record, therefore, is inadequate to exclude issues of fact regarding the existence of probable cause and the recitation of 'undisputed facts' in the

moving affirmation [on the prior summary judgment motion] is no longer accurate."

On appeal, the building defendants contend that inasmuch as plaintiff did not move to vacate his default within one year, as required by CPLR 5015 (a)(1), he could not seek to revisit their unopposed motion for summary judgment. They also argue that plaintiff has not, and cannot, demonstrate a meritorious cause of action against them, also required by CPLR 5015(a)(1).

Since plaintiff came forward with new evidence that would change the prior determination (*see* CPLR 2221[e][2]; CPLR 5015[a][2]), the motion court properly granted renewal and, upon renewal, denied summary judgment. That the prior determination was made on a motion for summary judgment that plaintiff did not oppose, did not require that plaintiff seek vacatur of the prior order pursuant to CPLR 5015(a)(1) (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; see also Siegel, Practice Commentaries, McKinney's Cons Law of NY, book 7B, CPLR C5015:6, at 213-214 [2007]).

Moreover, a motion for leave to renew is not subject to any particular time constraints (*see* CPLR 2221[e][1]; 5015[a][2]; *Luna v Port Auth. of N.Y. & N.J.*, 21 AD3d 324, 326 [2005]). A motion to renew simply requires a showing of "new facts not offered on the prior motion that would change the prior

determination" or "a change in the law that would change the prior determination," and a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e].

Here, there can be no doubt that the reversal of plaintiff's conviction constitutes such "new facts not offered on the prior motion" or "newly discovered evidence" that would have, if known to the motion court, produced a different result, not least because it called into question whether the building defendants' complaint to the police had been made in good faith and/or whether the officers had possessed the necessary probable cause to arrest plaintiff in the first place.

As for plaintiff's "reasonable justification for the failure to present such facts on the prior motion," it is self-evident that he could not have done so until the Appellate Term reversed his conviction, on April 12, 2004, at which time he began to revive his effort to recover civil damages from defendants. When his initial effort was rejected by Justice York, plaintiff promptly followed the latter's suggestion to seek vacatur of Justice Stallman's order.

Contrary to the dissent, plaintiff should not be faulted for his former attorney's failure to oppose the motion for summary judgment or to inform the court that the appeal of the criminal conviction was pending. Indeed, plaintiff was not even aware

that a motion for summary judgment had been made. Thus, unlike *Rubinstein v Goldman* (225 AD2d 328, 328-329 [1996]), where counsel answered the original motion and then attempted "to raise entirely new issues on reargument and to submit, without sufficient excuse, new facts on renewal," here, in granting the renewal motion, the court was not "freely giv[ing]" plaintiff a "second chance" to raise issues that should have been raised initially.

Furthermore, Justice Stallman's order dismissing the complaint was entered on October 31, 2003, and a judgment dismissing the complaint as against all defendants was entered on February 17, 2004. Two months later, on April 13, 2004, the Appellate Term reversed plaintiff's conviction. Within one year of the reversal, plaintiff retained new counsel who commenced a new action; plaintiff also commenced a pro se action against Casanova at about the same time.

Although the better practice would have been to move for renewal prior to commencing these new actions, the new actions show that plaintiff had not fallen asleep at the wheel. Upon receiving guidance by Justice York, plaintiff immediately moved for renewal. Under these circumstances it cannot be said that plaintiff unreasonably delayed seeking relief after learning of

the new evidence (*cf Levy New York City Health & Hosp. Corp.*, 40 AD3d 359 [2007] [renewal motion properly denied in malpractice action, which was dismissed because of attorney's "'prodigious' but unsuccessful efforts to find an expert who would support the claim of malpractice," where five years after complaint dismissed attorney finally found a physician who purportedly supported a malpractice claim, but attorney failed to show, inter alia, a reasonable justification for the five-year delay]).

Accordingly, the order of the Supreme Court, New York County (Paul G. Feinman, J.), entered August 16, 2007, which, insofar as appealed from, granted plaintiff's motion to renew a prior order, same court (Michael D. Stallman, J.), entered October 31, 2003, granting defendants-appellants' motion for summary judgment dismissing the complaint as against them, and, upon renewal, denied defendants-appellants' motion for summary judgment, should be affirmed, without costs.

All concur except Nardelli and McGuire, JJ.
who dissent in an Opinion by McGuire, J.

McGUIRE, J. (dissenting)

I disagree with the majority that Supreme Court properly granted plaintiff's motion to renew appellants' prior motion for summary judgment dismissing the complaint.

On December 7, 1998, plaintiff was involved in an altercation with defendant-appellant Casanova, the superintendent of a building owned by defendant-appellant Jake Realty, LLC, and managed by defendant-appellant Pine Management. The altercation occurred in the building of which Casanova was the superintendent; plaintiff was a tenant in the building. As a result of the altercation, plaintiff was placed under arrest by New York City police officers and was later convicted, following a jury trial, in New York City Criminal Court of harassment in the second degree and resisting arrest. Following his arrest but prior to his conviction, plaintiff commenced this action in September 1999 against appellants and the City of New York and the police officers who arrested him to recover damages for false arrest, malicious prosecution, assault and battery, and violations of 42 USC § 1983.

Appellants moved for summary judgment dismissing the complaint against them and the City of New York and the police officers cross-moved for the same relief. Plaintiff failed to submit opposition to these motions and also failed to appear at

oral argument. By an order dated October 28, 2003, Supreme Court granted the motions on the ground that plaintiff's conviction established that the police had probable cause to arrest plaintiff and that a finding that probable cause existed for the arrest was fatal to plaintiff's claims. Supreme Court noted that plaintiff did not submit any evidence in opposition to the motions, but the court did not grant the motions based on plaintiff's failure to oppose them or appear for oral argument.

By an order dated April 12, 2004, the Appellate Term, First Department, reversed plaintiff's judgment of conviction, finding that plaintiff's conviction for harassment in the second degree was against the weight of the evidence, and that his conviction for resisting arrest had to be dismissed because the police lacked probable cause to arrest him.

More than three years later, by motion papers dated May 18, 2007, plaintiff moved to renew the motions for summary judgment. Plaintiff argued that Supreme Court's order granting summary judgment dismissing the complaint was predicated on his conviction and that the conviction was reversed after the order had been issued. By an order dated August 13, 2007, Supreme Court granted plaintiff's motion to renew and, upon renewal, denied appellants' motion for summary judgment. The court did not disturb that aspect of the prior order that granted the cross

motion of the City and the individual police officers for summary judgment dismissing the complaint against them. This appeal ensued.

Despite plaintiff's failure to oppose the motions for summary judgment or appear at oral argument on those motions, plaintiff correctly sought relief by moving to renew those motions. "A summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion" (*Liberty Taxi Mgt. v Gincherman*, 32 AD3d 276, 277 n 1 [2006]). Rather, where a party fails to submit opposition to a motion for summary judgment, the court is required to "assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law" (*id.*, quoting *Vermont Teddy Bear Co. v 1-800 Beargram Co.*, 373 F3d 241, 244 [2d Cir 2004]). In other words, a summary judgment motion should not be granted based solely on a party's failure to submit opposition, i.e., on "default" (*see Vermont Teddy Bear Co.*, 373 F3d at 245-247). Of course, however, a court may dismiss an action based upon a party's failure to appear before the court for a scheduled appearance (22 NYCRR 202.27), but here the court did not do that. Instead, the court reviewed the motions for summary judgment to ascertain whether

the movants met their respective burdens, and, based on its assessment of those motions, granted the movants summary judgment. Because the order deciding the motions was not a default order or judgment, plaintiff could not seek relief under CPLR 5015(a)(1). Rather, plaintiff correctly sought relief under CPLR 2221.

Leave to renew is not freely given to a party who did not exercise due diligence in opposing the initial motion (*see Rubinstein v Goldman*, 225 AD2d 328 [1996], *lv denied* 88 NY2d 815 [1996]; *see also Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 [2001]), and plaintiff did not exercise due diligence in opposing the motions for summary judgment. Indeed, plaintiff offered no explanation at all for his failure to oppose the motions. He did not claim that he was not given notice of the motions; he did not offer any explanation or excuse for his failure to oppose the motions; and he offered no excuse for his failure to alert Supreme Court that his appeal from his criminal conviction was sub judice (*see Beyl v Franchini*, 37 AD3d 505, 506 [2007] [renewal properly denied where plaintiff failed to offer an explanation for his failure to seek an adjournment of defendants' prior motion to permit plaintiff's expert to perform an examination of plaintiff]; *cf. Luna v Port Auth. of N.Y. & N.J.*, 21 AD3d 324 [2005] [plaintiff informed motion court of the

circumstances surrounding plaintiff's inability to present certain evidence in opposition to defendants' motion before the motion court ruled on defendants' motion]). Rather, in his affirmation in support of plaintiff's motion to renew, plaintiff's counsel merely stated that he was "puzzled by the fact that [the motions] were unopposed by [plaintiff's] former counsel at the time" those motions were made. Counsel's puzzlement is *not* an excuse. To the contrary, it is insufficient as a matter of law to explain plaintiff's failure to oppose the motions (*see Okun v Tanners*, 11 NY3d 762 [2008], *revg* 47 AD3d 475 [2008]).

Under these circumstances, Supreme Court should have denied the motion to renew as a matter of law. Had plaintiff exercised due diligence and notified the court hearing the motions for summary judgment that his appeal from his criminal conviction was pending at the time the motions for summary judgment were made, the court could have adjourned the motions or held them in abeyance pending the resolution of the criminal appeal and avoided deciding the motions on the basis of the criminal conviction (*see Beyl, supra*). Plaintiff's appeal to the Appellate Term had already been heard and was sub judice at the time the motions for summary judgment were made.

Moreover, plaintiff's failings go beyond failing to exercise

any diligence in opposing the motions and failing to offer any excuse for his failure to do so. Plaintiff failed to seek renewal *for more than three years* after the Appellate Term reversed his conviction, and even then did so only at the urging of Supreme Court (or, as the majority charitably puts it, after "receiving guidance" from Supreme Court). Although a motion to renew is not subject to any particular limitation of time in which it must be made, I think it evident that plaintiff's protracted and unexplained delay is utterly inexcusable (*see e.g. Levy v New York City Health & Hosps. Corp.*, 40 AD3d 359 [2007], *lv dismissed* 9 NY3d 1001 [2007] [renewal denied where plaintiff, in seeking renewal of prior motion, failed to offer reasonable justification for her five-year delay in seeking renewal]; *Cole-Hatchard v Grand Union*, 270 AD2d 447 [2000] [renewal improperly granted where party seeking renewal failed to offer excuse for seven-month delay in seeking renewal]; *Dankner v Szurzan and Dorf*, 226 AD2d 669 [1996] [renewal properly denied where party seeking renewal failed to offer an explanation for her 17-month delay in seeking renewal]; *Ramsco, Inc. v Riozzi*, 210 AD2d 592 [1994] [renewal properly denied where party seeking renewal failed to offer excuse for its seven-month delay in seeking renewal]; *Elgem, Inc. v National Gypsum*, 192 AD2d 636 [1993] [renewal properly denied where party seeking renewal failed to

offer explanation for its 13-month delay in seeking renewal]). By nonetheless granting renewal and denying appellants' motion for summary judgment, Supreme Court failed to heed legal standards and unjustifiably vitiated appellants' legitimate finality interests and expectations. In affirming, the majority does the same.

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

ENTERED: FEBRUARY 5, 2009