SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 10, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4351 Milton Valentin, Index 13831/06
Plaintiff-Respondent,

-against-

Francesco Pomilla, et al.,
Defendants,

Marcos Alonzo,
Defendant-Appellant.

Marjorie E. Bornes, New York, for appellant.

Shapiro Law Offices, Bronx (Jason S. Shapiro of counsel), for respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about November 26, 2007, which denied defendants' motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants established prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) by submitting a radiologist's affirmed report that plaintiff's MRI films revealed evidence of degenerative disc disease predating the accident and no evidence of post-traumatic

injury to the disc structures (*see Perez v Hilarion*, 36 AD3d 536, 537 [2007]). In opposition, plaintiff failed to raise an inference that his injury was caused by the accident (*see Diaz v Anasco*, 38 AD3d 295 [2007]) by not refuting defendants' evidence of a preexisting degenerative condition of the spine. Missing from all of plaintiff's submissions is any mention of the congenital defect at the S1 vertebral level and degenerative condition of plaintiff's lumbar spine reported by Dr. Eisenstadt or the preexisting degenerative changes in his right knee and degenerative meniscal tears in both posterior horns of both menisci reported by plaintiff's own experts, Drs. Lubin and Rose, in their initial evaluation of plaintiff's right knee shortly after the accident (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]).

With regard to his claim that the evidence submitted by him was sufficient to raise an inference that he suffered injuries that were caused by the accident, plaintiff asserts that his MRIs of the cervical and lumbar spine revealed disc herniation at L4-5 and L5-S1 and disc bulging at C4-C5, and that EMGs revealed L5-S1 radiculopathy. However, "[a] herniated disc, by itself, is insufficient to constitute a 'serious injury'; rather, to constitute such an injury, a herniated disc must be accompanied by objective evidence of the extent of alleged physical

limitations resulting from the herniated disc" (*Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]). Plaintiff also contends that the MRI of his right knee revealed a medial meniscal tear, for which he ultimately underwent arthroscopy. Again, he makes no mention of the degenerative nature of that condition.

In addition, plaintiff argues that his chiropractor Dr. Zeren's affidavit set forth objective quantified evidence of the degree of limitation and permanency of the injuries sustained by him. Notably, he contends Dr. Zeren found positive straight-leg testing during plaintiff's May 30, 2007 examination (*see Brown v Achy*, 9 AD3d 30, 31-32 [2004]), and that plaintiff was also noted to have decreased limitation of motion of the lumbar and cervical spine (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]).

However, plaintiff's reliance on Dr. Zeren's affidavit is misplaced. Although he presumably saw plaintiff just days after the accident, Dr. Zeren failed to provide documentation regarding *that* visit or any contemporaneous evidence of limitations. In this regard, there were no contemporaneous limitations shown regarding the accident -- at most, some limitations were purportedly measured by Dr. Hausknecht two months after the accident (*see Thompson v Abbasi*, 15 AD3d 95, 98 [2005] ["despite the positive MRI findings as to plaintiff's cervical spine two months after the accident, there are no objective findings

contemporaneous with the accident showing any initial range-of-motion restrictions on plaintiff's cervical spine"] [emphasis added]). Even if Dr. Hausknecht's report were considered contemporaneous, the limitations concerned only lateral flexion of the cervical spine and forward flexion of the lumbar spine, and were minor. In addition, Dr. Hausknecht failed to address whether plaintiff's condition was causally related to the motor vehicle accident at issue.

The most significant flaw in plaintiff's arguments is his failure to address causation. "To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is 'serious' within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident. Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation, insufficient to support a finding that such a causal link exists" (*Diaz v Anasco,* 38 AD2d at 295-296 [internal quotation marks and citations omitted]).

Here, not only did plaintiff's experts fail to refute defendants' evidence of a preexisting congenital and degenerative

condition of the spine, his own doctors reported a degenerative condition of the right knee. Dr. Rose's failure even to mention, let alone explain, why he ruled out degenerative changes as the cause of plaintiff's knee and spinal injuries rendered his opinion that they were caused by the accident speculative (*see Gorden v Tibulcio*, 50 AD3d 460, 464 [2008]). Consequently, there is no objective basis for concluding that the present physical limitations and continuing pain are attributable to the subject accident rather than to the degenerative condition (*see Jimenez v Rojas*, 26 AD3d 256, 257 [2006]). In *Pommells v Perez* (4 NY3d 566 [2005], *supra*), where, as here, there was persuasive evidence that the plaintiff's alleged pain and injuries were related to preexisting degenerative conditions, the Court held that plaintiff had the burden of coming forward with evidence addressing the defendants' claimed lack of causation. In the absence of such evidence, the defendants are entitled to summary dismissal of the complaint (*id.* at 580; *see also Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Licari v Elliott*, 57 NY2d 230, 237 [1982]).

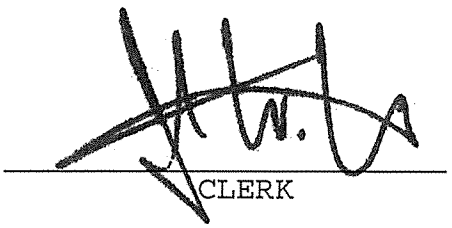
Moreover, absent any objective medical evidence that his injuries were caused by the accident, plaintiff's statements that he was limited in his ability to exercise or perform personal maintenance were insufficient to establish his 90/180-day claim. Despite plaintiff's claim that he was confined to bed and home

from the date of the accident to the present date and the conclusion of Dr. Hausknecht, who examined him during the statutory time period, that plaintiff was "totally disabled" and "I . . . advised him to restrict his activities," plaintiff still fails to offer competent medical proof that he could not perform substantially all his daily activities for 90 of the first 180 days following the accident "because of an injury or impairment caused by the accident" (*Rossi v Alhassan*, 48 AD3d 270, 271 [2008]). Such statements are too general in nature to raise an issue of fact that plaintiff was unable to perform his usual and customary activities during the statutorily required time period and do not support any claim that plaintiff's confinement to bed and home was medically required (*see Gorden v Tibulcio*, 50 AD3d at 463).

Finally, although defendants Francesco Pomilla and Yvonne M. Pomilla did not appeal from the denial of their cross motion for summary judgment, upon a search of the record, we grant summary judgment to them pursuant to CPLR 3212(b) (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-112 [1984]).

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

ENTERED: FEBRUARY 10, 2009



CLERK

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4606 The City of New York, et al., Index 400207/04
Plaintiffs-Appellants,

-against-

Thomas A. Maul, etc.,
Defendant.

- - - -

L.J., et al.,
Plaintiffs-Intervenors-Respondents,

-against-

John B. Mattingly, in his official capacity as Commissioner, New York City Administration for Childrens' Services,
Defendant-Appellant,

Thomas A. Maul, etc.,
Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for appellants.

Patterson Belknap Webb & Tyler LLP, New York (Christopher M. Strong of counsel), for respondents.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered May 1, 2008, which granted plaintiffs-intervenors' motion for class certification, and denied the motion of defendant-appellant New York City Administration for Childrens' Services for partial summary judgment, affirmed, without costs.

Plaintiffs-intervenors are mentally retarded and developmentally disabled individuals. All of them are, or were, in the foster care system under the aegis of defendant Administration for Childrens' Services (ACS). Defendant New York

State Office of Mental Retardation and Developmental Disabilities (OMRDD) has the responsibility, pursuant to the Mental Hygiene Law, to "assure the development of comprehensive plans, programs, and services in the areas of research, prevention, and care, treatment, habilitation, rehabilitation, vocational and other education, and training of persons with mental retardation and developmental disabilities" (Mental Hygiene Law § 13.07[a]). Plaintiffs claim that both ACS and OMRDD jointly failed to properly provide for their care.

ACS, plaintiffs contend, has no uniform policy for identifying individuals who are in need of OMRDD services, does not train its staff to recognize such individuals, and rarely coordinates with OMRDD in this regard, despite OMRDD's expertise in the area. Even when individuals are identified by ACS as needing services, plaintiffs claim that ACS often fails to refer them to OMRDD for further evaluation. When ACS does make a referral, plaintiffs assert that the referral information is often incomplete, resulting in OMRDD's rejection of the information packet and further delay in delivery of the services to which the applicant has already been found entitled. Plaintiffs claim that ACS' lackadaisical, ineffective methods are especially harmful to those persons close to aging out of the foster care system, since it significantly limits the time OMRDD has to develop an individual's placement plan.

Plaintiffs contend that OMRDD shares responsibility for the breakdown in providing appropriate care for mentally retarded and developmentally disabled individuals and independently fails to fulfill its statutory duties. For example, they claim that OMRDD categorically refuses to provide services, other than residential placement, to foster children, even though residential placement is just one of several services offered to similarly disabled children who are not in foster care. In addition, they claim that OMRDD will only accept placement referrals from ACS for those for whom the permanency planning goal is residential placement. Even then, plaintiffs assert that the waiting list for placement is unreasonably long and that people for whom immediate placement is particularly crucial are given no special consideration.

Some individuals, plaintiffs claim, have languished on OMRDD's wait list for as long as nine years without finding temporary placement. In those cases, ACS has placed mentally retarded and developmentally disabled people in facilities pending placement by OMRDD that are often unduly restrictive and highly inappropriate. Plaintiffs assert this is because ACS performs only cursory investigations into the quality of facilities. ACS also fails to communicate each person's specific needs to the facility's staff before the placement.

Plaintiffs allege that, other than themselves, there are at

least 150 individuals who are adversely affected by these systemic failures. Accordingly, they sought class certification. Most of the people proposed for the class were those who have been found eligible for OMRDD services but who have been on a waiting list for an inordinate period of time. Plaintiffs also claim that relief is necessary for eligible individuals whom ACS has not yet referred to OMRDD and those whose referral was rejected by OMRDD because of a procedural defect in the referral packet prepared by ACS. Further, they wish to represent those who had aged out of the ACS system prior to placement and those who need services other than adult residential care but are not receiving such services from ACS or OMRDD.

The motion court certified the class and defined it as plaintiffs had proposed:

> "Individuals with developmental disabilities who are in or have been in New York City Administration for Child[ren's] Services' (ACS's) care or custody and who, during their time in ACS's care or custody, have not received or did not receive services from ACS and the New York Office of Mental Retardation and Developmental Disabilities to which they were or are entitled."

CPLR 901(a) requires that to maintain an action on behalf of a class, it must be established that

> "1. the class is so numerous that joinder of all members...is impracticable;

> "2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> "3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> "4. the representative parties will fairly and adequately protect the interests of the class; and
>
> "5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

This section has been interpreted to require that "[t]hese criteria...be broadly construed not only because of the general command for liberal construction of all CPLR sections (*see* CPLR 104), but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [1980]).

Guided by this notion of liberality, we find that plaintiffs satisfied all of these factors. First, there are at least 150 class members. ACS does not dispute that the numerosity requirement is satisfied. Second, all members of the class are similarly situated because they allege the same deprivation of specific governmental services to which they are entitled by law. Indeed, all of the class members trace their predicament to the identical violations of law alleged to have been committed by ACS

and OMRDD. While ACS argues that the class lacks commonality because to determine the appropriateness of a particular facility requires an individualized inquiry into that individual's needs, it ignores all of the other alleged harmful results of its conduct which do not require specific factual inquiry. These include unreasonably long wait lists for placement, failures to refer individuals for necessary care and failures to submit complete referral packages. These harms predominate and it is "predominance, not identity or unanimity," that is the linchpin of commonality (*Friar,* 78 AD2d at 98; *see also Brad H. v City of New York*, 185 Misc 2d 420, 424 [Sup Ct, NY County 2000], *affd* 276 AD2d 449 [2000] ["(e)ven though there may be some questions of law or fact which affect some individual members of the class but not others...that is not a reason to deny class certification"]).

Moreover, the existence of commonality:

> "should not be determined by any mechanical test, but rather, 'whether the use of a class action would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated.'"

(*Friar*, 78 AD2d at 97, quoting *Lamar v H&B Novelty & Loan Co.*, 55 FRD 22, 25 [D Or 1972]).

The remaining prerequisites for class certification under CPLR 901(a) were also fulfilled. Plaintiffs' claims meet the typicality requirement for the same reasons they satisfy the commonality test. That is, plaintiffs' claims and the claims of

the class generally flow from the same alleged conduct. The class's interests will be adequately protected because it is represented by experienced counsel. Also, no conflict exists between the interests of plaintiffs and the class as a whole. To the extent that ACS identifies litigation in the Family Court as an alternative method for adjudicating the claims herein, that forum is inadequate. The limited jurisdiction of the Family Court would prevent it from granting most of the relief sought by the class. Finally, ACS is incorrect that the claims are nonjusticiable, as the action seeks neither to impose policy determinations upon a governmental agency nor to direct an agency as to the manner in which it exercises discretionary functions. Rather, the action attempts to obtain only those rights conferred on the individuals by the legislative branch (*see Klostermann v Cuomo*, 61 NY2d 525 [1984]).

We reject ACS' argument that the action should have been dismissed for mootness because each of the plaintiffs has now received the services to which each of them claims to be entitled. This case fits precisely within the exception to the mootness doctrine for cases involving issues important to the public that are likely to evade review (*see e.g. Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). If the case is dismissed the significant issue of whether ACS is complying with law will remain unresolved. Moreover, because an individual's

time in the foster system is necessarily temporary, there is no guarantee that future cases will not likewise become moot.

The cases on which the dissent relies regarding commonality are inapposite. In *Solomon v Bell Atl. Corp.* (9 AD3d 49 [2004]), this Court decertified a class of people who alleged that they had purchased internet access service from the defendant based on deceptive advertising. This Court held that the commonality test was not met because the plaintiffs could not establish that all of the proposed class members had been exposed to the same advertisement or to any advertisement at all. This case is dramatically different. Here, all of the class members trace their predicament to the identical violations of law allegedly committed by ACS and OMRDD. Furthermore, purchase of advertised internet access can hardly be compared to care critical for the well-being of mentally retarded and developmentally disabled children.

In *Mitchell v Barrios-Paoli* (253 AD2d 281 [1999]), the proposed class members were public assistance recipients assigned to New York City's Work Experience Program as a condition for receiving benefits. They challenged the particular work assignments they were given, which they claimed were inappropriate to their particular disabilities. This Court decertified the class, holding that:

> "Assuming there is a class of persons whom the City routinely assigns to medically inappropriate jobs...and to whom the State fails to afford relief...the fact that wrongs were committed pursuant to a common plan or pattern does not permit invocation of the class action mechanism where the wrongs done were individual in nature or subject to individual defenses."

(253 AD2d at 291). Because each class member's disability and work assignment were potentially unique, the economies which class actions are intended to provide did not exist in that case. Again, this case is factually and legally distinguishable.

Here, there is a "common plan or pattern" and the wrongs done were, largely, not "individual in nature." Certainly, an individualized assessment is not required to determine whether a foster child who was found eligible for OMRDD services but allowed to languish on a wait list for years, rather than receive necessary services, qualifies for the class. Nor, need a detailed inquiry be had to ensure that a foster child eligible for OMRDD services but rejected by OMRDD because her referral papers were not completed properly by ACS belongs in the class.

We also reject the dissent's application of the United States Supreme Court's constrained exception to the mootness doctrine. That exception applies only where the very same individual plaintiff whose claim has been rendered moot is likely to become embroiled in the same controversy again. As even the dissent concedes, that exception is grounded in the United States

Constitution's case and controversy clause, which has no analog in the New York State Constitution. Instead, the dissent relies on an observation by the Court of Appeals in *Matter of Hearst Corp.* that the principle that a court is limited to determining rights of persons which are actually controverted before it "is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary" (50 NY2d at 713-14). Thus, the dissent suggests that there is no reason not to apply the more limited exception. However, the Court of Appeals itself did not believe that to be the case. In the very same case the Court reiterated that the exception to the mootness doctrine can apply even where "other members of the public" would benefit from judicial review (*id.* at 715).

We see no reason to wait for "an express ruling from the Court of Appeals," as the dissent would require. The Court of Appeals has ruled on the issue repeatedly since *Matter of Hearst Corp.* (*see e.g. Matter of M.B.*, 6 NY3d 437, 447 [2006]; *Matter of Mental Hygiene Legal Servs. v Ford,* 92 NY2d 500, 505-506 [1998]; *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154 [1994]; *Matter of Chenier v Richard W.*, 82 NY2d 830, 832 [1993]), and has consistently restated the exception to the mootness doctrine applied by the motion court here.

Indeed, we can hardly perceive of a case better suited to

application of the exception than this one. The people who have the most interest in the immediate adjudication of the claims herein are among the most disadvantaged found in society. Not only were they born with significant obstacles to success, they were neglected, abandoned, or otherwise deprived of care by their parents. Now, it is alleged that the safety net designed by the Legislature for them has failed them as well. Judicial review of these claims should be had now, so that, if it is determined that the system for care of mentally retarded and developmentally disabled persons needs to be corrected, it can be corrected without any unnecessary delay.

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

McGUIRE, J.(dissenting)

The class certified by Supreme Court is the one proposed by plaintiffs-intervenors:

> "Individuals with developmental disabilities who are in or have been in New York City Administration for Child[ren's] Services' (ACS's) care or custody and who, during their time in ACS's care or custody, have not received or did not receive services from ACS and the New York State Office of Mental Retardation and Developmental Disabilities to which they were or are entitled."

As Supreme Court observed in the course of granting the class certification motion, "intervenors do not point to affirmative policies which they claim violate the law ..."

In my view, the class certification motion is controlled by well-settled law and, in particular, Justice Rosenberger's decision in *Mitchell v Barrios-Paoli* (253 AD3d 281 [1999]). In that case, the proposed class consisted of all individuals who allegedly were assigned by the New York City Human Resources Administration to work experience program jobs that exceeded their medical limitations. The panel in *Mitchell* unanimously found this definition of the class to be "unworkable" because:

> "determining who is a member of that class would require individualized examination of each person's medical history and the physical demands of her assigned task, which would defeat the class action's goal of saving judicial time and resources (*Small v Lorillard Tobacco Co.*, 252 AD2d 1, 6 [decertifying class of nicotine-addicted smokers as requiring burdensome individualized proof of class membership])" (*Mitchell*, 253 AD2d at 291).

Whether a putative class member was denied services to which he or she was entitled is not a question that can be resolved in the abstract. Rather, as in *Mitchell*, individualized determinations would be necessary to determine whether any putative member of the class is a member of the class. Indeed, whether any individual is a member of the class necessarily entails a fact-bound determination that he or she has a valid claim on the merits. Thus, to determine whether any individual is a member of the class, not only must the particular services he or she did not receive be identified, it also must be established that the individual was entitled to those services under state or federal law. The necessity for these individual and fact-specific determinations makes it pointless at best to certify a class (*id.*) For these reasons, as in *Mitchell*, we should reverse and deny the motion for class certification.

Justice Ellerin's opinion in *Solomon v Bell Atl. Corp.* (9 AD3d 49 [2004]) also is directly on point. In *Solomon*, a class was certified by Supreme Court in an action alleging deceptive advertising about high-speed internet service. The named plaintiffs, however, did "not demonstrate[] that all members of the class saw the same advertisements" (9 AD3d at 53). To the contrary, the named plaintiffs "did not all see the same advertisements; some saw no advertisements at all before deciding to become subscribers" (*id.*). In addition, the content of the

advertising "varied widely and not all the advertisements contained the alleged misrepresentations" (*id.*). Accordingly we concluded that "questions of individual members' exposure to the allegedly deceptive advertising predominate" (*id.*).

This Court decertified the class for another reason, after assuming arguendo that all members of the class had seen the same advertisements: "questions as to whether each individual was reasonably misled by them predominate, given the alternative sources of information about the [internet] service that each may have had" (*id.* at 54). Thus, "individual trials would be required to determine whether a reasonable consumer would have been misled by defendants' representations" (*id.*; *see also Hazelhurst v Brita Prods. Co.*, 295 AD2d 240, 242 [2002] [decertifying class where, "(l)ike reliance, injury will require individual determinations which are not common to the class"]).

That the intervenors allege systemic failures by ACS does not support the certification of the class. As Justice Rosenberger observed in *Mitchell*, "the fact that wrongs were committed pursuant to a common plan or pattern does not permit invocation of the class action mechanism where the wrongs done were individual in nature or subject to individual defenses" (*Mitchell*, 253 AD2d at 291; *see also J.B. ex rel. Hart v Valdez*, 186 F3d 1280, 1289 [10th Cir 1999] ["We refuse to read an allegation of systemic failures as a moniker for meeting the

class action requirements .... For a common question of law to exist, the putative class must share a discrete legal question of some kind .... Here, ... plaintiffs merely attempt to broadly conflate a variety of claims to establish commonality via an allegation of systemic failures"] [internal quotation marks and citations omitted]).

The majority cites a litany of alleged failures by ACS and OMRDD to support a claim of "systemic failure." The first point to be made, however, is that the majority's reliance on claimed "systemic failures" is misplaced. The statements quoted above from our opinion in *Mitchell* and from the Tenth Circuit's opinion in *J.B. ex rel. Hart* are squarely at odds with the majority's position. Notably, the majority simply ignores these statements of the law and makes no effort to distinguish *Mitchell* and *J.B. ex rel. Hart* in this regard.

Second, the highly fact-bound nature of the alleged failures is apparent. The majority writes, for example, that

> "[m]ost of the people proposed for the class were those who have been found *eligible* for OMRDD services but who have been on a waiting list for an *inordinate* period of time. Plaintiffs also claim that relief is necessary for *eligible individuals* whom ACS has not yet referred to OMRDD and those whose referral was rejected by OMRDD because of a *procedural defect* in the referral packet prepared by ACS" (emphasis added).

Under the first sentence quoted above, membership in the class will depend, among other things, on identifying those who were found "eligible" (but presumably not any persons who may

incorrectly have been found eligible) *and* who have been waiting for a period of time that can be characterized, by some unknown standard, as "inordinate." Under the second sentence, membership in the class will depend, among other things, on identifying other "eligible" individuals -- which certainly is a highly fact-bound process -- *and* whose referral was rejected because of a "procedural defect," which surely must be determined on a case-by-case basis.

Similarly, the majority relies on allegations that "the waiting list for placement is *unreasonably long* and that people for whom immediate placement is *particularly crucial* are given no special consideration" (emphasis added). Obviously enough, case-by-case determinations must be made to determine whether any particular putative class member was on a waiting list for an "unreasonably" long period and whether the immediate placement of any individual is "particularly crucial." So, too, with the majority's reliance on allegations of placements by OMRDD "that are often *unduly restrictive*" and "*highly inappropriate*" (emphasis added).

My point is the one made in *Mitchell*, *Solomon* and *Hazelhurst*. In all three cases we held that class certification was inappropriate because "determining who is a member of the class would require individualized examination of each person's medical history and the physical demands of her assigned task,"

(*Mitchell*, 253 AD2d at 291), "individual trials ... to determine whether a reasonable consumer acting reasonably in each plaintiff's circumstances would have been misled" (*Solomon*, 9 AD3d at 54), and "individual determinations which are not common to the class" (*Hazelhurst*, 295 AD2d at 242). The majority has nothing to say with respect to the above-quoted grounds for our decisions in these three cases. Rather, it refers to or quotes from portions of the opinions in *Mitchell* and *Solomon* discussing some of the particular facts supporting the ground for the holdings that class certification was inappropriate because of the necessity for mini-trials to determine the threshold issue of membership in the class.

I also disagree with the majority's conclusion that Supreme Court properly denied the City's motion for partial summary judgment dismissing as moot the intervenors' claims for prospective relief. Of the 11 intervenors, 8 now are in OMRDD's care and thus neither need nor are entitled to any services from ACS. The remaining 3 intervenors were referred to and accepted by OMRDD and are awaiting placement; accordingly, they have only historical and not current objections to planning, placements and services provided by ACS. For these reasons, the claims for

prospective relief should have been dismissed as moot (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801 [2003], *cert denied sub nom Pataki v Saratoga County Chamber of Commerce*, 540 US 1017 [2003]).

The intervenors essentially concede that the claims for prospective relief otherwise are moot but, relying on *Matter of Jones v Berman* (37 NY2d 42 [1975]), argue that the questions printed in the amended interview complaint "being of importance and interest and because of the likeliness that they will recur, are properly entertainable ... irrespective of any allegation of mootness" (37 NY2d at 57).[1] In my view, however, the exception to the mootness doctrine for disputes that are likely to recur, typically evade review and raise important questions (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]) does not apply here.

In the first place, this exception requires, among other

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[1]The intervenors are not persuasive to the extent they argue that the claims for prospective relief are not moot because appropriate placements for certain of them occurred "not due to ACS fulfilling its statutory requirements, but rather through the efforts of [their] counsel and the State." The Supreme Court rejected a similar claim that a case should not be considered moot because, among other things, of "the dilatory tactics of the state attorney general's office" (*Spencer v Kemna*, 523 US 1, 18 [1998]). As the Court stated, "mootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong" (*id.*).

things, "a reasonable expectation that the same complaining party will be subject to the same action again" (*Davis v Federal Election Comm.*, _ US _, 128 S Ct 2759, 2769 [2008] [internal quotation marks and citation omitted]; *see also Spencer v Kemna*, 523 US at 17-18 [same and citing other decisions so holding]; *East Meadow Community Concerts Assn. v Board of Educ. of Union Free School Dist. No. 3*, 18 NY2d 129, 135 [1966] ["It is settled doctrine that an appeal will ... be entertained where, as here, the controversy is of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well"]). This requirement is a corollary of "the core requirement that a court can act only when the rights of the party requesting relief are affected" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]). After all, if the party requesting relief will not be subject to the same action again, the rights of that party will not be affected, let alone "directly affected" (*Matter of Hearst Corp.*, 50 NY2d at 714), by a determination on the merits. Here, there is no contention that any of the intervenors will be subject again to the same allegedly unlawful action. For this reason alone, the claims for prospective relief do not fall within this exception to the prohibition against deciding moot disputes.

In *Matter of Hearst Corp.*, the Court of Appeals stated that one element of this exception is "a likelihood of repetition,

either between the parties *or among other members of the public"* (50 NY2d at 714-715 [emphasis added]). The highlighted language, which was not necessary to the Court's resolution of the appeal, is not inconsistent with the requirement that the party seeking relief show a reasonable expectation that it will be subject to the same action again. The Court may have had in mind a case in which the party seeking relief would be subject again to the same action, but as a result of the conduct of someone other than a party to the action. To the extent the highlighted language can be read otherwise, I would not regard it as authoritative. Although New York's Constitution does not contain an analogue to the requirement of the federal constitution of a case or controversy (*Society of Plastics Indus.*, 77 NY2d at 772), the "fundamental principle" of New York law that "forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common law judiciary" (*Matter of Hearst Corp.*, 50 NY2d at 713-714). Given that New York's prohibition against deciding moot disputes also is of constitutional dimension, I would follow the unequivocal precedents of the United States Supreme Court in the absence of an express ruling from the Court of Appeals that the party seeking relief need not show that it will be subject to the same action again.

The majority dismisses the holdings of the United States Supreme Court in *Davis*, *Spencer* and the long line of cases they cite, breezily disparaging these holdings as a "*constrained* exception to the mootness doctrine" (emphasis added). As the decisions make plain, however, these holdings inhere in fundamental, constitutional precepts of separation of powers. To be sure, the majority is correct that there are decisions of the Court of Appeals in which the Court had held that a dispute was not moot even though it appears that the plaintiff would not be subject again to the same allegedly unlawful action. But none of those decisions provide any reason to think that the issue of whether the plaintiff must be subject again to the same allegedly unlawful action was raised, let alone decided. Accordingly, these decisions cannot be regarded as having decided the issue (*see Matter of Seelig v Koehler*, 76 NY2d 87, 92 [1990] [distinguishing prior decisions and observing that "the identification and weighing of all the unique and particular facts of each case governs"], *cert denied* 498 US 847 [1990]; *Roosa v Harrington*, 171 NY 341, 350 [1902] ["each case, as it arises, must be viewed and decided according to its own particular facts and circumstances, and will become a controlling precedent, only, where the facts are the same"]). The Court of Appeals may decide not to follow the holdings of the United States Supreme Court. If so, however, it surely will be for some

substantive reason grounded in the structure of New York's Constitution -- the majority offers none -- and will not, for the reasons stated above, be premised on the absence of the phrase "case or controversy" in the New York Constitution.[2]

Nor does the claimed importance of the intervenors' claims for prospective relief save them from dismissal on mootness grounds. On the one hand, if only the particular, fact-bound claims of each intervenor were litigated, resolving any of them favorably to an intervenor would establish nothing more than that the intervenor did not receive some service or services from ACS to which he or she was entitled under the specific facts of the case. As ACS argues, a declaration that ACS should have acted differently with respect to an intervenor would not alter the scope of discretion that ACS may exercise in another case. Thus, the resolution of the intervenors' claims for prospective relief would have "no appreciable public significance beyond the

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[2]Permitting a party to maintain an action because another party, i.e., not the plaintiff, is or may be subject to the same allegedly unlawful action, legitimize what Professor Monaghan describes as "a genuine third party claim - one not susceptible of a first party formulation" (Monaghan, *Third Party Standing*, 84 Colum L Rev 277, 282 [1984]). As Professor Monaghan observes, to the extent that a litigant presents "a genuine third party claim ... the litigant is essentially a judicially licensed private attorney general. Talk of third party standing in these cases obscures the doubtful basis of federal judicial authority to create such private attorneys general" (*id.*; *see also id.* at 310-316 [questioning the authority of the judiciary to license such third-party claims]).

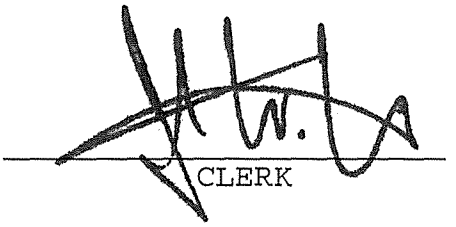
immediately affected parties" (*Matter of Collela v Board of Assessors of County of Nassau*, 95 NY2d 401, 411 [2000]). On the other hand, permitting the intervenors to prescind from the particular facts of each intervenor's claim and litigate generalized grievances against ACS is incompatible with basic, separation-of-powers precepts (*see Lujan v Defenders of Wildlife*, 504 US 555, 576 [1992] ["Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive"] [emphasis deleted]; *id.* at 577 ["to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit [the] transfer from the President to the courts [of] the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"]).

Because the exception to the prohibition against deciding moot disputes does not apply for the foregoing reasons, I need not determine whether ACS is correct in arguing that claims that foster children with developmental disabilities are denied services to which they are entitled do not typically evade review given the broad and ongoing jurisdiction of Family Court over foster children. I note, however, that although decertification would be required if ACS' argument based on Family Court's

jurisdiction is correct, the majority disposes of that argument with the conclusory assertion that Family Court would be an "inadequate" forum because "[t]he limited jurisdiction of the Family Court would prevent it from granting most of the relief sought by the class." The majority, however, does not identify either the respects in which that jurisdiction is limited or the particular forms of relief Family Court is incapable of granting to individual class members. Finally, because I believe that the class should be decertified in any event, I also need not address the question of whether dismissal of the intervenors' claims for prospective relief provides an independent ground for decertifying a class seeking that relief (*cf. Simon v Eastern Kentucky Welfare Rights Org.*, 426 US 26, 40 n 20 [1976] ["That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class ... which they purport to represent"] [internal quotation marks and citation omitted]).

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

ENTERED: FEBRUARY 10, 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 10, 2009.

Present - Hon. David Friedman, Justice Presiding
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse
Helen E. Freedman, Justices.

Markel International Insurance Co., Ltd.,
Plaintiff-Appellant, Index 102438/06

-against-

Jason Lash, et al., 4806
Defendants-Respondents,

City of New York, et al.,
Defendants.

An appeal having been taken to this Court by the above-named appellant from an order and judgment of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about July 18, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 20, 2009,

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

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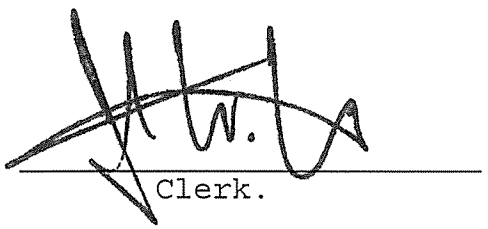


Clerk.

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5192 The People of the State of New York, Ind. 4163/02
Respondent,

-against-

Harvey Dudley,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert G. Seewald, J.), rendered December 14, 2006, convicting defendant, after a jury trial, of manslaughter in the second degree, and sentencing him, as a persistent felony offender, to a term of 15 years to life, unanimously affirmed.

Following this Court's modification of defendant's original judgment convicting him of murder (31 AD3d 264 [2006], *lv denied* 7 NY3d 866 [2006]), Supreme Court adjudicated him a persistent felony offender. This adjudication was a proper exercise of the court's discretion, and was neither unconstitutional nor defective under state law.

The adjudication procedure did not violate *Apprendi v New Jersey* (530 US 466 [2000]) and its progeny. The Court of Appeals has interpreted the statutory scheme so as not to require "additional factfinding beyond the fact of two prior felony

convictions. . ." (*People v Rivera*, 5 NY3d 61, 70 [2005], *cert denied* 546 US 984 [2005]). Defendant's adjudication was constitutional because the court based it solely on prior convictions (*see Almendarez-Torres v United States*, 523 US 224 [1998]), facts found by the jury in the instant case, and the court's discretionary evaluation of the seriousness of defendant's criminal history. The court did not make additional findings of fact, and, under the *Rivera* interpretation of the statute, no such findings were required.

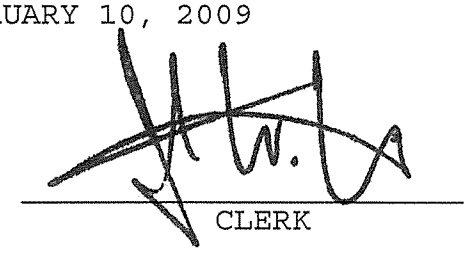
Similarly, we conclude that the court's order directing a persistent felony offender hearing was proper. The factors which the court found relevant in directing the hearing, as set forth in the information filed by the People and relied upon by the court, were sufficient to satisfy CPL 400.20 (3), even though they essentially constituted a recitation of defendant's lengthy and serious criminal record. As noted, under *Rivera*, a court may properly exercise its discretion and sentence a defendant as a persistent felony offender without making any findings of fact beyond the defendant's criminal history.

Defendant's argument that in making its adjudication the court improperly considered factors that had not been brought out at the hearing is unpreserved (*see People v Proctor*, 79 NY2d 992, 994 [1992]), and we decline to review the issue in the interest of justice. As an alternative holding, we also reject it on the

merits. The factors at issue were appropriate components of a sentencing court's proper exercise of its discretion (*see People v Rivera*, 5 NY3d at 70).

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

ENTERED: FEBRUARY 10, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5193 In re Shanell K.M., etc.,

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

Elizabeth V., etc.,
Respondent-Appellant,

Family Support Systems Unlimited, Inc.,
Petitioner-Respondent,

Eduardo M.,
Respondent.

Florian Miedell, New York, for appellant.

John R. Eyerman, New York, for Family Support Systems Unlimited, Inc., respondent.

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

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about October 15, 2007, which terminated respondent-appellant's parental rights to her daughter on the ground of permanent neglect, and committed custody of the child to petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

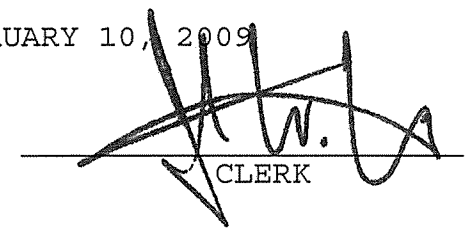
The court's finding on permanent neglect was correct within the meaning of Social Services Law § 384-b. Petitioner scheduled regular visitation, made appropriate referrals to programs designed to address appellant's substance abuse problems and to

improve her parenting skills, and repeatedly reminded her of the necessity of complying with the terms of her service plan and the consequences of failing to do so. This demonstrated, by clear and convincing evidence, petitioner's diligent efforts, tailored to appellant's individual situation, to remedy the obstacles barring family reunification and thereby strengthen the relationship between appellant and her daughter (*see* § 384-b[7][a], [f]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]; *Matter of Star A.*, 55 NY2d 560, 564 [1982]).

The preponderance of the evidence also established that despite such diligent efforts, appellant failed, during the relevant statutory period, to sufficiently maintain contact with and plan for the return of the child (*see* § 384-b[7][a]). Appellant never completed parenting skills classes or a drug treatment program on an inpatient or outpatient basis, nor did she undergo counseling, and she actually visited with the child while under the influence of drugs. This constituted failure to comply with the terms of the service plan petitioner had prepared for her (*see Matter of Sean LaMonte Vonta M.*, 54 AD3d 635 [2008]; *Matter of Angel P.*, 44 AD3d 448 [2007]).

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

ENTERED: FEBRUARY 10, 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 10, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
Eugene Nardelli
James M. Catterson
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York,
Respondent,

Ind. 5680/06
5116/06

-against-

5194

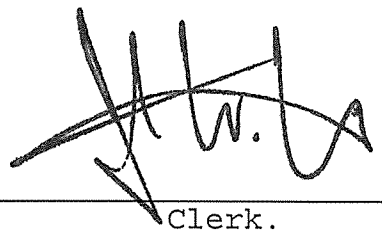
Bryant White,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J. at hearing; Bruce Allen, J. at plea and sentence), rendered on or about September 14, 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.

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5195 Robert Lettieri, Index 105699/05
Plaintiff-Appellant,

-against-

Answorth Allen, M.D., et al.,
Defendants-Respondents.

Burstein & Blum LLP, New York (David M. Blum of counsel), for appellant.

Peltz & Walker, New York (Bhalinder L. Rikhye of counsel), for respondents.

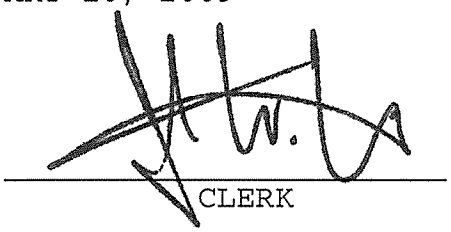
Judgment, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered April 30, 2008, in an action for injuries allegedly sustained during surgery, dismissing the complaint pursuant to an order that granted defendants' motion for leave to amend their answers to assert the affirmative defense of statute of limitations, and, upon amendment, to dismiss the complaint pursuant to CPLR 3211(a)(5), unanimously affirmed, without costs.

The motion court properly granted defendants leave to amend their answer to raise the affirmative defense of the statute of limitations (*see* CPLR 3025[b]). Although the motion was made on the eve of trial and more than two years after defendants answered the complaint, given plaintiff's assertion that his intent from the inception of the action was to pursue a claim for battery, which is governed by a one-year statute of limitations (CPLR 215[3]), he cannot reasonably claim to have been prejudiced

or surprised by defendants' request to amend their answers (*see Solomon Holding Corp. v Golia*, 55 AD3d 507 [2008]; *Seda v New York City Hous. Auth.*, 181 AD2d 469 [1992], *lv denied* 80 NY2d 80 NY2d 759 [1992]). Furthermore, contrary to plaintiff's argument that defendants waived the defense since they had notice of his intention to pursue a battery claim, the record shows that plaintiff consistently described his action as one for medical malpractice, not battery, and his allegations that defendants' decision to perform a tenotomy resulted from their misdiagnosis of a torn biceps tendon as a superior labrum anterior-posterior tear, coupled with his consistent assertions that defendants treated him without his informed consent, are the essence of a claim for lack of informed consent (*see Messina v Alan Matarasso, M.D., F.A.C.S., P.C.*, 284 AD2d 32 [2001]).

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

ENTERED: FEBRUARY 10, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5196 The People of the State of New York, Ind. 5342/04
Respondent,

-against-

Alton G. Lamont, etc.,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Frank Glaser of counsel), for respondent.

Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered May 20, 2005, convicting defendant, upon his plea of guilty, of assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 9 years, unanimously affirmed.

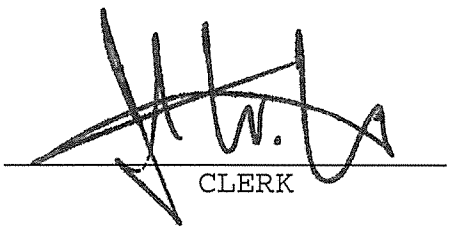
The motion court properly denied defendant's suppression motion without a hearing. The allegations in defendant's moving papers, when considered in the context of the detailed information provided by the People, were insufficient to create a factual dispute requiring a hearing (*see e.g. People v Reddick*, 56 AD3d 344 [2008]; *People v Roldan*, 37 AD3d 300 [2007], *lv denied* 9 NY3d 850 [2007]). The extensive discovery information clearly disclosed, among other things, that one of the victims identified defendant's photograph prior to defendant's arrest, thereby providing probable cause for that arrest. There was

nothing in defendant's sparse moving papers that was sufficient to support his present claim that this photo identification may have occurred after defendant was already in custody. Defendant failed to "either controvert the specific information that was provided by the People . . . or to provide any other basis for suppression" (*People v Arokium*, 33 AD3d 458, 459 [2006], *lv denied* 8 NY3d 878 [2007]). Moreover, defendant did not even make a general denial of having committed the crime (*compare People v Hightower*, 85 NY2d 988 [1995]), and his claim he was doing nothing unlawful at the time of his arrest, two days later, did not address the disclosed factual predicate for his arrest.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 10, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5197-
5198 Winopa International, Ltd., etc., et al.,
Plaintiffs-Appellants,

-against-

Woori America Bank,
Defendant-Respondent.

Index 602150/04

Allen M. Schwartz, New York, for appellants.

Koven & Krausz, New York (Murray T. Koven of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 26, 2007, which granted defendant's motion to confirm the report of the Special Referee recommending dismissal of plaintiffs' claims, and denied plaintiffs' cross motion to set the report aside, deemed an appeal from judgment, same court and Justice, entered March 10, 2008 (CPLR 5501[c]), inter alia, dismissing the complaint, and, so considered, said judgment unanimously affirmed, with costs.

Plaintiffs' contention that the court improperly referred the matter to a referee to hear and report on contested questions of fact was waived by their failure to object to the reference as well as by their willing participation in the resulting hearing (*see Law Offs. of Sanford A. Rubenstein v Shapiro Baines & Saasto*, 269 AD2d 224, 225 [2000], *lv denied* 95 NY2d 757 [2000]). Furthermore, the court, in confirming the report, properly

deferred to the findings of the Special Referee, "who was in the best position to weigh the evidence and make credibility determinations" (*Andersen v Weinroth*, 48 AD3d 121, 133 [2007]).

We have considered plaintiffs' remaining contentions, including that the court, in confirming the report, failed to consider all of their claims, and find them unavailing.

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

ENTERED: FEBRUARY 10, 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 10, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
Eugene Nardelli
James M. Catterson
Rolando T. Acosta
Leland G. DeGrasse, Justices.

Teresa Moore, et al.,
Plaintiffs-Respondents, Index 112732/04

-against-

The City of New York, 5199
Defendant-Respondent,

New York College of Podiatric Medicine, et al.,
Defendants-Appellants,

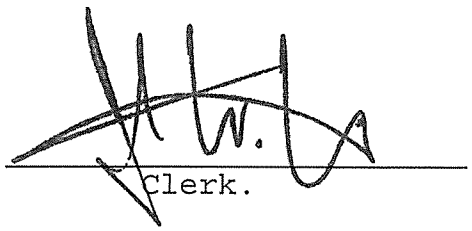
Marriott International, Inc.,
Defendant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about January 17, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 19, 2008,

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

ENTER:



Clerk.

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5200 The People of the State of New York, Ind. 5911/05
Respondent,

-against-

Itury McCroskey,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered May 25, 2007, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 15 years, unanimously affirmed.

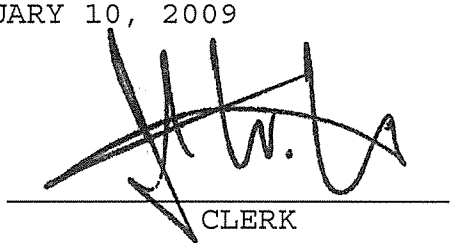
The court properly exercised its discretion in receiving photographs of the victim's injuries, since this evidence was relevant to establish the element of serious physical injury, and was not gruesome or inflammatory (*see People v Wood*, 79 NY2d 958 [1992]; *People v Stevens*, 76 NY2d 833 [1990]; *People v Pobliner*, 32 NY2d 356, 370 [1973], *cert denied* 416 US 905 [1974]).

Defendant's claim regarding bolstering testimony is unpreserved and we decline to review it in the interest of

justice. As an alternative holding, we find any error in this regard to be harmless.

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

ENTERED: FEBRUARY 10, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5201-
5201A Vertical Computer Systems, Inc., etc., Plaintiff-Respondent,

-against-

Ross Systems, Inc., Defendant-Appellant,

J. Patrick Tinley, et al., Defendants.

- - - - -

Ross Systems, Inc., Plaintiff-Appellant,

-against-

NOW Solutions, LLC, Defendant-Respondent.

Index 600644/03
600679/04

Wollmuth Maher & Deutsch LLP, New York (Randall R. Rainer of counsel), for appellant.

Davidoff Malito & Hutcher LLP, New York (Derek Wolman of counsel), for respondent.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered October 11, 2007, after a jury trial, awarding NOW Solutions, LLC in the *Ross* action $1,943,483 on its first counterclaim, as reduced by a credit for the amount owed on a note, and for attorneys' fees, unanimously affirmed, with costs. Judgment, same court and Justice, entered July 23, 2008, dismissing the *Vertical* action as moot, unanimously affirmed, with costs.

The trial court properly directed a verdict in favor of NOW

Solutions based on the unambiguous provision in the asset purchase agreement entitling NOW to a post-closing purchase price adjustment for payments with respect to contracts entered into before the closing date whose periods of maintenance payments go beyond the closing date; the contrary interpretation proffered by Ross Systems would render the phrase "renewals extending" beyond such date meaningless (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). This Court is not bound by the law of the case as represented by the motion court ruling (*see Liddle, Robinson & Shoemaker v Shoemaker*, 309 AD2d 688, 691 [2003]). We agree with the trial court that, despite the parties' different interpretations (*see Riverside S. Planning Corp. v CRP/Extell Riverside*, __ AD3d __, 869 NYS2d 511 [2008]), the provision was unambiguous as reasonably susceptible of only one meaning (*see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 [2002]), and was therefore not subject to interpretation with the aid of extrinsic evidence (*see Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 [2008]). In view of the foregoing, even if, arguendo, appellant were correct that the trial court improperly excluded evidence of a business record reflecting the intent of the parties, any such error would be harmless.

The court properly directed a verdict in favor of NOW regarding liability under a transitional services agreement, aptly recognizing such liability as a set-off to NOW's obligation

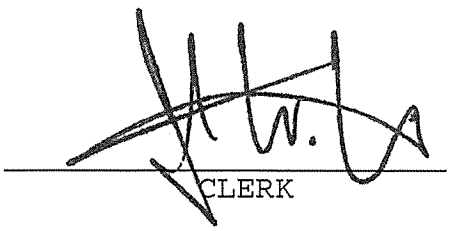
to make an installment payment on a note, and not subject to the condition that the note be paid first. Based on all of the governing factors, NOW was the prevailing party entitled, under the asset purchase agreement, to its attorneys' fees in the *Ross* action (*see Solow v Wellner*, 205 AD2d 339, 341 [1994], *affd* 86 NY2d 582 [1995]). Its dismissed counterclaims did not entail central issues, despite the large recovery sought in one of them, and the result was not "mixed" (*cf. Berman v Dominion Mgt. Co.*, 50 AD3d 605 [2008]).

The *Vertical* action was properly dismissed as moot; appellant's claim for attorney fees, set forth only in its wherefore clause and not in any counterclaims to which it could be deemed an integral part (*cf. Burke v Crosson*, 85 NY2d 10 [1995]; *Marotta v Blau*, 241 AD2d 664 [1997]), was not adequately pleaded.

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

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

ENTERED: FEBRUARY 10, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5203-
5203A The People of the State of New York, Ind. 4217/04
Respondent, 5350/05

-against-

Ruben Ramirez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Richard Joselson of counsel), and Cahill Gordon & Reindel LLP, New York (Katherine Marie Vogele of counsel), for appellant.

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

Judgments, Supreme Court, New York County (James A. Yates, J.), rendered March 16, 2006, convicting defendant, after a nonjury trial, of manslaughter in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

The hearing court properly denied suppression of defendant's statements to a police receptionist. Defendant, who appeared to be bleeding slightly from minor scratches, walked up to the receptionist while she was taking a break outside the police station and told her in Spanish that he "wanted" and "needed" a lawyer. Assuming that he was a crime victim, the Spanish-speaking receptionist told defendant he was at a police station, not a law office, and asked if she could help him in any way. In response, defendant confessed to the crime, stating that he had

just shot the victim in the eye. The receptionist, concerned that defendant was armed, asked him where the weapon was, and he told her where he had discarded it.

Defendant's statement admitting the homicide was admissible regardless of whether the receptionist could be deemed an agent of the Police Department. When he made this statement, he had not made an unequivocal request for counsel. When he said he wanted a lawyer, he was not being questioned about anything, and he provided no context for his reference to a lawyer; it was not until after he admitted the homicide that the context became clear. For all the receptionist knew, he could have been looking for help in locating a personal injury lawyer. We note that the receptionist was neither trained nor authorized to investigate crimes, and that one of her duties was to help people who mistakenly came to the police station for assistance in civil matters. In any event, even if defendant had invoked his right to counsel, his confession was spontaneous under the standard applicable where the right to counsel has attached (*see People v Campney*, 94 NY2d 307 [1999]; *People v Harris*, 57 NY2d 335, 342 [1982], *cert denied* 460 US 1047 [1983]). The simple question "Can I help you in any way?" and its surrounding circumstances cannot even remotely be considered an interrogation environment.

Even assuming that defendant's right to counsel had attached by the time the receptionist asked him whether he had the weapon

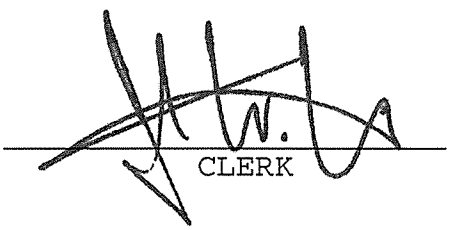
on his person, that inquiry was proper under the public safety exception (*see New York v Quarles*, 467 US 649, 655-656 [1984]; *People v Palmer*, 263 AD2d 361 [1999], *lv denied* 93 NY2d 1024 [1999], *cert denied* 528 US 1051 [1999]).

After defendant was arrested, a lieutenant asked another officer, "Has this guy been tossed for a gun," and defendant made a statement in English about his having discarded the weapon. This statement was not introduced at trial, and we reject defendant's contention that the recovery of a revolver was the fruit of this statement. In any event, we find that this statement was also spontaneous within the right-to-counsel context.

Defendant's complaint about an incriminating statement he subsequently made to a detective is unavailing because the People did not introduce that statement. We have considered and rejected defendant's remaining claims, including those concerning the physical evidence.

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

ENTERED: FEBRUARY 10, 2009



Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5207 The People of the State of New York, Ind. 34063C/04
Respondent,

-against-

Sal Merante,
Defendant-Appellant.

Donald Yannella, New York for appellant.

Robert T. Johnson, District Attorney, Bronx (Nikki D. Woods of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Thomas Farber, J.), rendered February 9, 2006, convicting defendant, after a jury trial, of grand larceny in the third degree, and sentencing him to an unconditional discharge, unanimously affirmed.

The verdict was based upon legally sufficient evidence. The evidence established that defendant agreed to permit a car to be stored on his property, and that he also agreed that he would have no authority to move the car; instead, the owner's sister would be contacted to move the car if necessary. The evidence also established that defendant (in his own words to the investigating officer) "got rid of the car" by giving it to an accomplice. This evidence supported the inference of larcenous

intent (*see* Penal Law § 155.05[1]; § 155.00[3],[4]; *People v Kirnon*, 39 AD2d 666, 667 [1972], *affd* 31 NY2d 877 [1972]; *cf. People v Tse*, 261 AD2d 309 [1999], *lv denied* 93 NY2d 1006 [1999]), and satisfied all the elements of larceny. Defendant's present assertion that he had the car moved off his property for legitimate purposes is unsupported by any evidence, as well as being undermined by his own trial testimony.

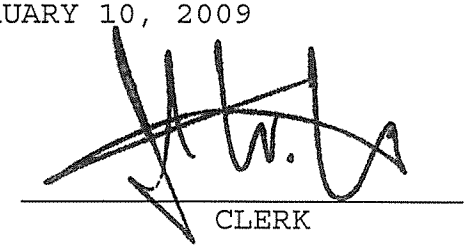
The testimony of the People's expert clearly supported the conclusion that the value of the car at the time it was taken exceeded the $3,000 threshold for third-degree grand larceny. Defendant's other arguments relating to legal sufficiency are both unpreserved and without merit.

The court properly admitted evidence that defendant's accomplice demanded that the owner's sister pay him money to obtain the return of the car. This was not offered for its truth, but as a verbal act that was part of the criminal transaction (*see e.g. People v Ayala*, 273 AD2d 40 [2000], *lv denied* 95 NY2d 863 [2000]). Accordingly, it was neither hearsay nor evidence of an uncharged crime. In its final charge, the court thoroughly instructed the jury on accomplice liability, and

the absence of such a charge at the time this evidence was introduced did not cause defendant any prejudice.

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

ENTERED: FEBRUARY 10, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5210 The People of the State of New York, Ind. 3414/04
Respondent,

-against-

Jason Mercado,
Defendant-Appellant.

Steven Banks, Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about May 10, 2005, 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.

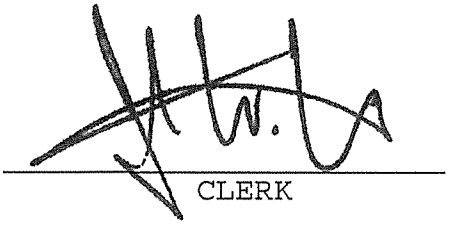
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 10, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5211N Citidress II, etc., Index 121848/99
Plaintiff-Appellant-Respondent,

-against-

207 Second Avenue Realty Corp., et al.,
Defendants.

- - - -

Hinshaw & Culbertson LLP,
Non-Party Respondent-Appellant,

Bleakley Platt & Schmidt, LLP,
Non-Party Respondent.

[And Another Action]

Ira Daniel Tokayer, New York, for appellant-respondent.

Hinshaw & Culbertson LLP, New York (Richard Supple of counsel), for respondent-appellant.

Bleakley Platt & Schmidt, LLP, White Plains (Vincent W. Crowe of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about October 25, 2007, which granted the motions of nonparties Hinshaw & Culbertson LLP (H&C) and Bleakley Platt & Schmidt, LLP (BP&S) to fix charging liens in the amounts of $199,805.53 on behalf of H&C, $19,878 on behalf of Harvey Krasner, Esq., and $64,885.26 on behalf of BP&S, and denied that branch of H&C's motion that sought sanctions against Citidress, unanimously affirmed, with costs.

The special referee's determination of the legal fees owed to plaintiff mortgagee Citidress II by defendant mortgagor 207

Second Avenue Realty Corp. in connection with the foreclosure sale of the mortgaged premises, which determination was expressly based on the terms of the mortgage agreement, did not have a preclusive effect on the claims for unpaid legal fees asserted against Citidress by its various counsel, pursuant to their respective retainer agreements, who were neither parties to the proceedings before the special referee nor privies to the mortgage agreement.

The proof submitted by the various counsel in support of fixing their charging liens included letters of engagement or retainer agreements, copies of their regular monthly invoices, and affirmations stating that monthly invoices were forwarded to Citidress and that no objections were received from Citidress as to the accuracy and the quality of the work set forth in the invoices (*see generally Bartning v Bartning*, 16 AD3d 249 [2005]). Further, in its post-hearing memorandum to the special referee (prepared by new counsel), Citidress confirmed its position that the invoiced attorney fees were reasonable and accurate and that Citidress had no objection to them. The self-serving claim of Citidress's principal, Oleg Kobylevsky, that he had asserted regular objections to the bills was unsupported (*see generally Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]; *Milistar [NY] Inc. v Natasha Diamond Jewelry Mfrs., LLC*, 18 AD3d 402 [2005]). Indeed, while Kobylevsky claimed that he and H&C had agreed to a

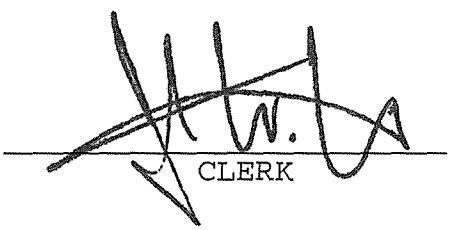
flat fee of $35,000 for perfecting the appeal from a decision denying Citidress's motion for summary judgment, there was no writing memorializing this alleged significant change in fee terms, and H&C continued to bill Citidress hourly for its appellate work without objection from Citidress. To the extent the referee found some of the challenged legal work to have been unnecessary or duplicative, that finding was based in part on Citidress's frequent changes of counsel, and, in any event, Citidress failed to timely challenge the bills in writing as required by the retainer agreements.

The court properly denied H&C's motion for sanctions against Citidress for submitting an allegedly fraudulent memorandum by Kobylevsky. On this record, it cannot be determined that the memorandum was fraudulent.

As it is a moot point, we do not reach H&C's contention that Citidress should be judicially estopped from challenging the legal fees based on its aforementioned post-hearing memorandum attesting to the reasonableness of those fees.

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

ENTERED: FEBRUARY 10, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5212N Citidress II Corp., Index 112522/07
Plaintiff-Respondent,

-against-

Hinshaw & Culbertson LLP,
Defendant-Appellant,

Bleakley Platt & Schmidt, LLP,
Defendant.

Hinshaw & Culbertson LLP, New York (Richard Supple of counsel), for appellant.

Ira Daniel Tokayer, New York, for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered June 30, 2008, which, to the extent appealed from, denied defendant Hinshaw & Culbertson LLP's (H&C) motion to dismiss the complaint with prejudice and for the imposition of sanctions, unanimously modified, on the law, to grant the motion to dismiss the complaint with prejudice, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against H&C.

Res judicata applies because plaintiff's causes of action for declaratory relief as to its various counsels' claims for unpaid legal fees were litigated to a final conclusion in a prior proceeding culminating in an order of the Supreme Court, New York

County (Alice Schlesinger, J.), entered on or about October 25, 2007 (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Grezinsky v Mount Hebron Cemetery*, 52 AD3d 202 [2008], *lv denied* 11 NY3d 709 [2008]).

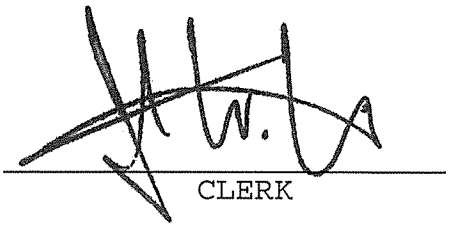
Following the entry of Justice Schlesinger's order, defendants wrote to Citidress requesting that it withdraw the instant action on the ground that the action was barred by the doctrine of res judicata. Defendants then brought the instant motion to dismiss. Citidress cross-moved for a stay. Just before defendants were to submit their reply papers, counsel for Citidress informed the court that Citidress was voluntarily withdrawing the action. The court denied defendants' motion as moot in light of the claimed voluntary discontinuance. On appeal, H&C correctly notes that Citidress has never contested the application of the doctrine of res judicata to the facts of this case. Under the circumstances, Citidress's purported voluntary discontinuance of this action was ineffective because its notice of same was not served within the time period prescribed by CPLR 3217(a)(1). Therefore, it was error to deny H&C's motion as moot.

The court properly denied H&C's motion for sanctions against

Citidress for commencing and prosecuting this action based on certain factual findings made by the special referee in the prior proceeding.

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

ENTERED: FEBRUARY 10, 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 10, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
Eugene Nardelli
James M. Catterson
Rolando T. Acosta
Leland G. DeGrasse, Justices.

In re William Johnson Belliard,
Petitioner,

5213
-against- [M-5983]

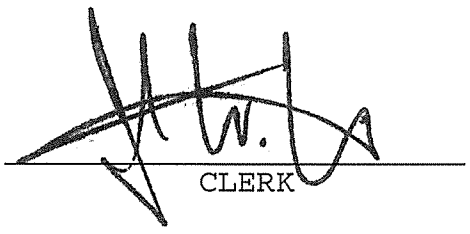
Hon. John S. Moore, etc., et al.,
Respondents.

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

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

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTER:



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5214 The People of the State of New York, Ind. 4501/06
Respondent,

-against-

Cesar Garcia,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered June 18, 2008, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

The court properly denied defendant's request for a justification charge, since there was no reasonable view of the evidence, when viewed in the light most favorable to defendant, that would support that charge (*see People v Watts*, 57 NY2d 299, 301-302 [1982]). It was undisputed that after defendant's stepson, who was unarmed, struck defendant a single blow with his hand, defendant struck his stepson on the head and shoulder with the claw side of a claw hammer, causing significant injuries.

Defendant's conduct constituted deadly physical force within the meaning of Penal Law § 10.00(11). There was no factual issue for resolution by the jury with respect to whether defendant used

deadly or ordinary physical force, and no reason to instruct the jury on the justifiable use of ordinary force (*see People v Mickens*, 219 AD2d 543 [1995], *lv denied* 87 NY2d 904 [1995]). Moreover, in order to convict defendant of second-degree assault by means of a dangerous instrument (Penal Law § 120.05[2]), the jury essentially had to find that he used deadly force (*see* Penal Law § 10.00[13]).

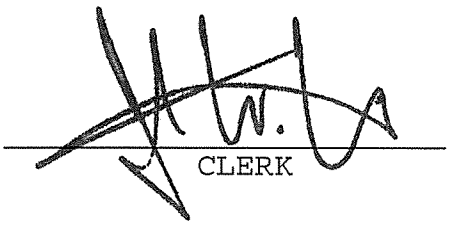
As for defendant's use of deadly force, there was no evidence presented by either the People or defendant that defendant reasonably believed such force to have been necessary to defend himself from deadly force. Defendant argues that the evidence supports inferences that he believed that his stepson was armed, and also believed that his wife was about to join the attack. However, there is nothing but speculation to support either the objective or subjective aspects (*see People v Goetz*, 68 NY2d 96 [1986]) of the justification defense (*see People v Hubrecht*, 2 AD3d 289, 290 [2003], *lv denied* 2 NY3d 741 [2004]).

To the extent that defendant is raising a constitutional claim, such claim is unpreserved and we decline to review it in

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

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

ENTERED: FEBRUARY 10, 2009



Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5216 In re Taylor G.,

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

William C.,
Petitioner-Respondent,

Juelle G.,
Respondent-Appellant.

Elisa Barnes, New York, for appellant.

Anne Reiniger, New York, for respondent.

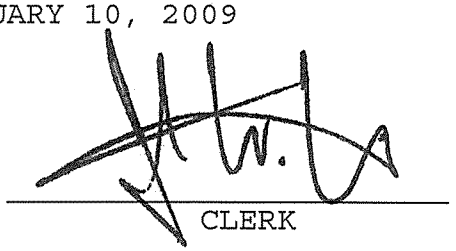
Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about May 15, 2007, which granted full custody of the subject child to petitioner father, unanimously affirmed, without costs.

The totality of the circumstances establish that the award of custody to petitioner was in the best in interests of the child and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). Although awarding custody to petitioner is contrary to the expressed wishes of the child, the desire of the child is one of many factors to be considered and is not determinative, particularly where, as here,

all of the additional factors weigh heavily in favor of granting custody to petitioner (*id.* at 172-173).

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

ENTERED: FEBRUARY 10, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5219 Mary Elizabeth Kelly also known as Mary Beth Kelly, individually and as Executrix of the Estate of Carl Henry Nacht, deceased, Plaintiff-Appellant, Index 111047/06

-against-

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

Gair, Gair, Conason, Steigman & Mackauf, New York (Howard S. Hershenhorn of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

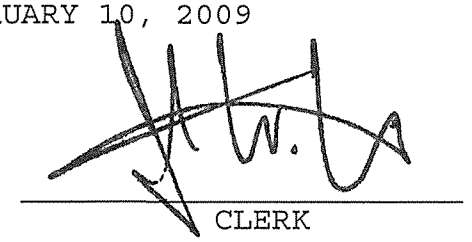
Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 28, 2008, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that, despite defendant tow-truck driver's unobstructed view, he failed to obey the yield sign and failed to observe either plaintiff or her decedent prior to making a right turn across the bike path and striking the decedent (*see* Vehicle and Traffic Law § 1142[b]; § 1172[b]; *Kirchgaessner v Hernandez*, 40 AD3d 437 [2007]). In opposition, defendants' speculation as to the decedent's alleged comparative negligence was insufficient to raise a triable issue

of fact. The record establishes that the decedent's failure to have his bicycle equipped with either a light on the front of the bicycle or a bell (*see* Vehicle and Traffic Law § 1236[a], [b]), was not a proximate cause of the accident, especially given the uncontradicted testimony that plaintiff, who was riding side-by-side with decedent and was close to the oncoming traffic, did have a working lamp attached to her bicycle (*see e.g. Cranston v Oxford Resources Corp.*, 173 AD2d 757, 758-759 [1991], *lv denied* 78 NY2d 860 [1991]). Nor was the decedent's reaction in veering to get out of the way of the path of the truck an unreasonable reaction to the emergency circumstances confronting him (*see Garcia v Verizon N.Y., Inc.*, 10 AD3d 339 [2004]).

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

ENTERED: FEBRUARY 10, 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 10, 2009.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
James M. McGuire
Karla Moskowitz
Helen E. Freedman, Justices.

The People of the State of New York,
Respondent,

Ind. 6729/06

-against-

5220

Brian Barone,
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 (Carol Berkman, J.), rendered on or about May 30, 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.

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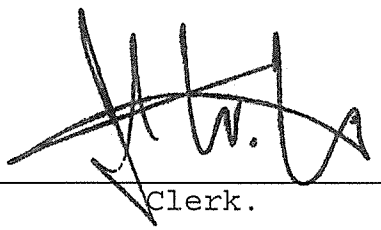


Clerk.

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

Tom, J.P., Saxe, McGuire, Moskowitz, Friedman, JJ.

5221-
5222-
5222A Natixis North America, Inc., Index 102058/07
Plaintiff-Respondent, 102059/07

-against-

Solow Building Company II, L.L.C.,
Defendant-Appellant.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellant.

Davis & Gilbert, LLP, New York (Paul F. Corcoran of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered April 29, 2008, that granted plaintiff's motion for summary judgment declaring that it was not in default of the parties' lease, and order, same court and Justice, entered May 1, 2008, to the extent it granted plaintiff's motion for summary judgment dismissing defendant's counterclaims, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 20, 2007, to the extent it granted plaintiff's motion for preliminary injunctive relief, unanimously dismissed, without costs, as academic.

Unrefuted evidence showed that, contrary to defendant landlord's claim in the notice to cure, plaintiff tenant did not violate the lease agreement by permitting unaffiliated entities to occupy the premises. Plaintiff also established it had not

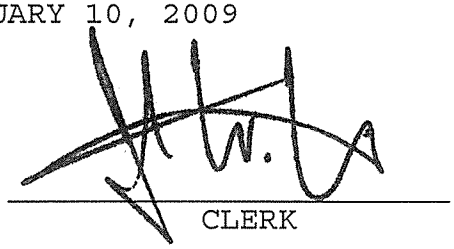
violated the lease in failing to remove refrigerant, as the federal Clean Air Act and its implementing regulations purportedly mandate. The notice to cure fails to assert this breach and an "event of default does not occur under the lease until the tenant has failed to effect a cure of the nonperformance of the obligation within the appropriate cure period after notice" (*Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assoc.*, 85 NY2d 600, 606 [1995]).

Plaintiff's second action, that sought to restrain the landlord from interfering with plaintiff's right to perform certain previously approved alterations, became moot when, after issuance of the court's preliminary injunction, plaintiff completed the construction project in question. While defendant challenges the propriety of the preliminary relief afforded to plaintiff, urging that the tenant did not make the required showing, defendant would not be entitled to relief now even if defendant were correct. Because the construction is complete, whether the court properly restrained defendant from interfering with the work is academic.

We have considered defendant's other arguments and find them unavailing.

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

ENTERED: FEBRUARY 10, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5223 The People of the State of New York, Respondent, Ind. 3306/05

-against-

Kevin Coles, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Charles Tejada, J. at hearing; Micki A. Scherer, J., at plea and sentence), rendered on or about February 7, 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.

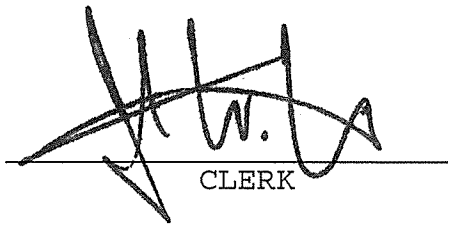
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 10, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5224 The People of the State of New York, Ind. 5721/04
Respondent,

-against-

Anonymous,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 12, 2007, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing her, as a second felony drug offender, to a term of 4½ to 9 years, unanimously affirmed.

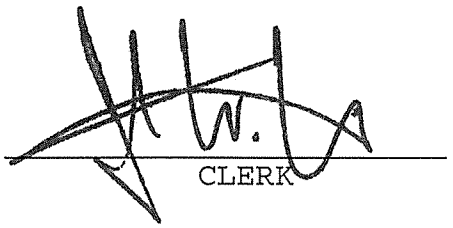
Regardless of whether defendant's waiver of the right to appeal forecloses review of the issues she now raises, we find no basis for reversal. Defendant's claim that she did not receive the hearing to which she was entitled is not preserved for our review and we decline to review it in the interest of justice. As an alternate ground, we reject it as meritless. After a suitable inquiry into whether defendant violated the conditions of her plea, and after according her a full opportunity to be heard, the court lawfully sentenced defendant in accordance with

her plea agreement without holding an evidentiary hearing (*see People v Valencia*, 3 NY3d 714 [2004]; *People v Outley*, 80 NY2d 702, 712 [1993]). After entering into a plea agreement, defendant was released to a drug treatment facility on her own recognizance. She thereafter left the facility and the State, and was involuntarily returned a year later on a bench warrant. This conduct, which, she admitted, violated the express terms of her plea agreement, disqualified her from receiving the lenient alternative disposition she had been promised if she satisfied all the relevant conditions (*see e.g. People v Jackson*, 44 AD3d 301 [2007], *lv denied* 9 NY3d 1006 [2007]). Defendant received a reasonable opportunity to present her explanation that she absconded as a result of being threatened. Since she admitted that she acted unilaterally, without contacting the court, her attorney or law enforcement authorities about the alleged threats, she did not establish any justification for violating her plea agreement (*cf. People v Smith*, 309 AD2d 599 [2003], *lv denied* 1 NY3d 601 [2004] [unreported "safety concerns" did not justify unilateral withdrawal from drug program]).

Accordingly, there was no factual issue warranting the taking of testimony.

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

ENTERED: FEBRUARY 10, 2009



Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5225-
5226 The People of the State of New York, Ind. 25254C/05
Respondent, 3412/04

-against-

Joel Evans,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

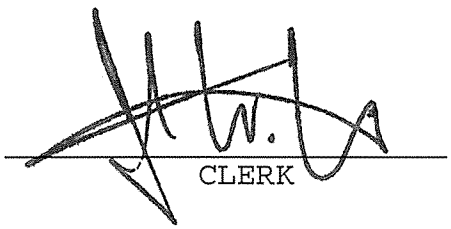
Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered December 1, 2005, convicting defendant, after a jury trial, of two counts of robbery in the first degree, and sentencing him to concurrent terms of 8 years, and also convicting him, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a consecutive term of 2 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, including his right to appeal from his conviction after trial (*see People v Seaberg*, 74 NY2d 1, 10-11 [1989]; *People v Thacker*, 47 AD3d 423 [2008], *lv denied* 10 NY3d 817 [2008]). During the colloquy, the court explained in detail the appellate rights that defendant was waiving, including his right to raise issues relating to his trial. The court was not required to enumerate

all possible trial issues (*cf. People v Roulette*, 55 AD3d 394 [2008]). Before making the waiver, defendant extensively consulted with counsel, who, on the present record, is presumed to have discussed potential appellate claims with his client. No coercion or concealment of trial issues can be found on this record (*see People v Holman*, 89 NY2d 876 [1996]). Plainly, defendant received a substantial benefit in return for his waiver, since he significantly limited his sentencing exposure. Accordingly, defendant has effectively waived his right to have this Court consider his claim of trial error. As an alternative holding, we also reject that claim on the merits.

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

ENTERED: FEBRUARY 10, 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 10, 2009.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
James M. McGuire
Karla Moskowitz
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 4306/06
Respondent,

-against- 5227

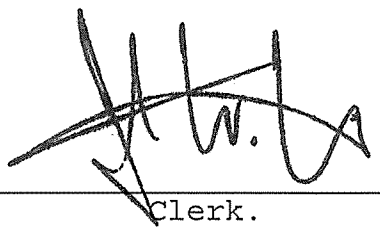
Julio Santana,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J.), rendered on or about June 22, 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.

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5228 Barbara Witt, et al., Index 115232/05
Plaintiffs-Appellants,

-against-

Hill St. Commercial, LLC,
Defendant/Third Party
Plaintiff-Respondent,

-against-

Dan's Papers, Inc.,
Third Party Defendant-Respondent.

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

Bruce A. Lawrence, Brooklyn (Eric A. Schnittman of counsel), for Hill St. Commercial, LLC, respondent.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for Dan's Papers, Inc., respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered October 16, 2007, which granted the motions of defendant and third-party defendant for summary judgment dismissing the complaint, unanimously affirmed, without costs.

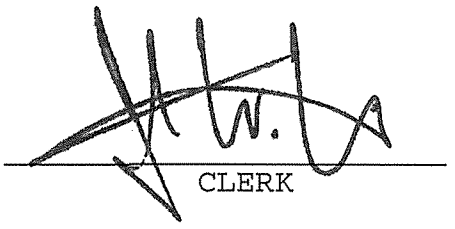
Dismissal of the complaint was appropriate in this action where plaintiff Barbara Witt, while at her husband plaintiff Phillip Witt's office, which was closed for business that day, was looking for a bathroom when she opened a door marked "Employees Only," and fell down a flight of stairs as she attempted to turn on a light. Following a prima facie showing of entitlement to judgment as a matter of law by defendant building

owner and third-party defendant commercial tenant (Phillip's employer), plaintiffs failed to raise a triable issue of fact regarding whether there were structural defects on the premises, or whether any act or omission by the owner or tenant proximately caused the injuries that resulted from Barbara's fall (*see e.g. Kane v Estia Greek Rest.*, 4 AD3d 189, 190-191 [2004]). Contrary to plaintiffs' contention, the closed door marked "Employees Only," in an office that was closed for business, did not constitute a trap or hazardous condition, particularly since plaintiffs failed to provide a nexus between the conditions existing in the premises and Barbara's fall.

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

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

ENTERED: FEBRUARY 10, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5229 The People of the State of New York, Ind. 6659/05
Respondent,

-against-

Micah James,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (James Roberts of counsel), for respondent.

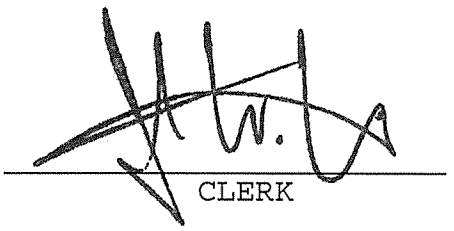
Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered September 5, 2006, convicting defendant, after a jury trial, of burglary in the second degree and attempted burglary in the second degree, and sentencing him to an aggregate term of 3½ years, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Immediately after the court mentioned the location of the crime, the panelist at issue spontaneously volunteered that she lived in that area. Although the panelist then assured the court that this would not be a problem, the prosecutor later explained that he challenged this panelist because she had initially volunteered her concern about her proximity to the crime and had been particularly vocal on the subject. The record supports the court's finding that the nondiscriminatory reason provided by the prosecutor was not

pretextual. This finding, which essentially involved an assessment of the prosecutor's credibility, is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

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

ENTERED: FEBRUARY 10, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5230 Connaught Tower Corp., Index 104669/06
Plaintiff-Respondent,

-against-

Shimon Nagar, et al.,
Defendants-Appellants.

Donald Eng, New York, for appellants.

Axelrod & Fingerhut, New York (Lance Luckow of counsel), for respondent.

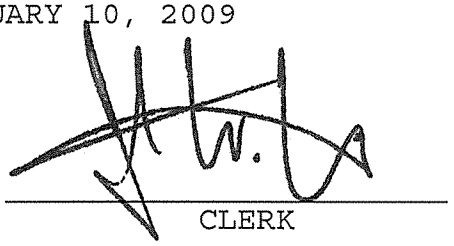
Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 12, 2007, which, in an action for breach of a commercial lease, granted plaintiff landlord's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Defendants tenants' vacating of the premises by delivery of the keys to one "David," and David's purported written acceptance of the keys on behalf of plaintiff landlord, could not operate as a surrender of the premises, where the lease specified that the delivery of keys to any agent or employee of plaintiff could not operate as a termination of the lease or surrender of the premises. Upon review of the record, including the parties' correspondence, we find that there was no meeting of the minds on the terms of surrender. No clear and unambiguous promises by

plaintiff warrant equitable intervention (*see American Bartenders School v 105 Madison Co.*, 59 NY2d 716 [1983]; *99 Realty Co. v Eikenberry*, 242 AD2d 215, 216 [1997]). No acts by plaintiff warrant a finding of surrender by operation of law (*see Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 690-691 [1986]).

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

ENTERED: FEBRUARY 10, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5232-
5233 The People of the State of New York, Ind. 2736/05
Respondent,

-against-

Kevin Davis,
Defendant-Appellant.

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

Amended; Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered on or about December 5, 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.

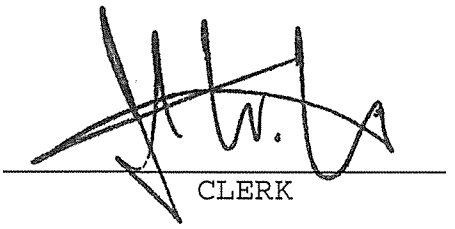
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 10, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5234N Naomi Reyes, etc., Index 21492/04
Plaintiff-Respondent,

-against-

Riverside Park Community (Stage I), Inc., et al.,
Defendants-Appellants,

Riverside Maintenance Corp., et al.,
Defendants.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Alfred L. D'Isernia, III of counsel), for appellants.

Madeline Lee Bryer, New York, for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered June 23, 2008, which denied defendants-appellants' motion for an order directing the issuance of a commission pursuant to CPLR 3108 to examine a nonparty witness in California, unanimously affirmed, with costs.

The motion court properly denied the motion since "absent allegations that the proposed out-of-State deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that 'the judicial imprimatur accompanying a commission will be necessary or helpful when the [designee] seeks the assistance of the foreign court in compelling the witness to attend the examination', the [appellants have] failed to demonstrate that a commission is

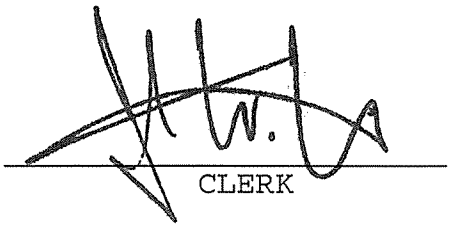
"'necessary or convenient'" (*Susan A. v Steven J. A.*, 141 AD2d 790, 791 [1988] [*quoting Wiseman v American Motors Sales Corp.*, 103 AD2d 230, 235 (1984)]; *see also Lewis v Baker*, 279 AD2d 380, 380-381 [2001]).

M-6107 - *Naomi Reyes, etc., v Riverside Park Community (Stage I), Inc., et al.*

Motion seeking leave to strike portions of the reply brief denied.

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

ENTERED: FEBRUARY 10, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5235N The Bank of New York as Collateral Agent & Custodian for the benefit of NYCTL 1988-2 Trust, Plaintiff-Respondent, Index 101549/04

-against-

125-127 Allen Street Associates, et al., Defendants-Appellants,

The Federal Deposit Insurance Corporation, etc., et al., Defendants.

Benjamin R. Kaplan, New York, for appellants.

Crowell & Moring, LLP, New York (Jamie C. Krapf of counsel), for respondent.

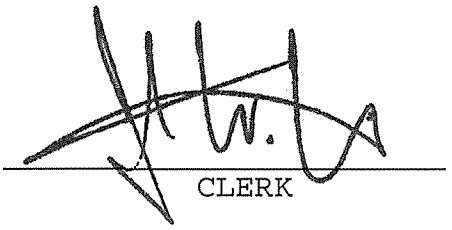
Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about March 14, 2008, which, insofar as appealed from, in this action to foreclose on a real estate tax lien, granted plaintiff's motion for summary judgment, unanimously affirmed, with costs.

Plaintiff established its entitlement to summary judgment by submitting affidavits, including that of the New York City Tax Lien ombudsman, and exhibits showing that defendants-appellants failed to pay the subject real estate taxes in a timely manner. In opposition, appellants failed to raise triable issues of fact regarding whether the subject real estate taxes had been timely paid. The affidavit of appellants' managing agent was contradicted by documentary evidence showing that the interest on

the late payments had not been paid and that the payments were not timely, and thus the allegations with respect to said issues were "not genuine, but feigned" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Furthermore, appellants' reliance on statements purportedly made by a supervisor in the City's Department of Finance, is misplaced as such statements constituted inadmissible hearsay.

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

ENTERED: FEBRUARY 10, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Luis A. Gonzalez
James M. Catterson
Rolando T. Acosta, JJ.

4491
Index 601977/07

x

Peter Kowalchuk, et al.,
Plaintiffs-Respondents,

-against-

Matthew Stroup,
Defendant-Appellant.

x

Defendant appeals from a judgment of the Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 26, 2007, awarding plaintiffs damages, and bringing up for review an order, same court and J.H.O., entered October 17, 2007, which, inter alia, granted plaintiffs summary judgment and directed a reference as to attorneys' fees.

Burkhart Wexler & Hirschberg, LLP, Garden City (Norman B. Arnoff of counsel), for appellant.

McCormick & O'Brien, LLP, New York (Liam O'Brien of counsel), for respondents.

SAXE, J.

This appeal, concerning a dispute regarding the time at which a negotiated settlement becomes an enforceable contract, requires consideration of some of the most fundamental aspects of the law of contracts: offers, acceptance, and consideration.

Facts

Plaintiff Evelyn Kowalchuk, an 88 year old widow, and her son, plaintiff Peter Kowalchuk, had invested in brokerage accounts managed by defendant Matthew Stroup. In December 2005, they commenced an arbitration proceeding before the NASD asserting that Stroup had fraudulently or negligently handled their accounts, and seeking judgment for losses of $832,000. After the arbitration hearing was completed, but before a decision was rendered, the parties agreed on a settlement. On February 6, 2007, plaintiffs' counsel e-mailed defendant's counsel:

> "As discussed, my clients have agreed to accept Mr. Stroup's settlement offer. The terms of the offer are as follows:
>
> "Total settlement amount of $285,000 with $125,000 payable upon execution of the settlement paperwork but no later than 20 days. The remainder to be paid in nine equal monthly installments on the 15th of each month beginning on March 15, 2007. Confession of judgment and security interest sufficient to cover the outstanding amounts.
>
> "We have also agreed to provide you with a letter that you may use in negotiations with Mr. Stroup's insurance carrier.

> "ps. Let me know if you would like me to contact the NASD and inform them that we have reached a settlement and will advise them as soon as the settlement is finalized."

Plaintiffs' counsel then sent defendant's counsel a draft settlement agreement. Defendant's counsel responded on February 12 with his own draft, and later that day advised plaintiffs' counsel:

> "The insurance company is considering making a dollar contribution to the settlement agreed upon... However they want to know the dollar amount of your settlement...and I have advised that you have agreed on confidentiality. I would appreciate your waiving this confidentiality... I would appreciate your consideration in order to facilitate the settlement..."

Plaintiffs' counsel declined to waive confidentiality, but indicated that he had reviewed his adversary's changes, and would respond the next morning with his own. On February 14, defendant's counsel advised:

> "My client has executed the settlement agreement, which I will forward to you tomorrow for your clients to execute. If you are agreeable, I would like to advise the NASD tomorrow we have a settlement and/or an agreement in principle that will be documented and formalized shortly."

On February 16, plaintiffs' counsel responded:

> "Please fax your client's executed agreement to me...and notify the NASD. I will forward my clients' executed copies as soon as they are received."

That same day, defendant's counsel faxed plaintiff's counsel a

"signed and approved settlement agreement," and stated that he would be forwarding to plaintiff's counsel and to the NASD a "confirmation of settlement." He asked that plaintiffs' counsel send him "your signed counterpart." Also that day, defendant's counsel faxed the NASD advising that the arbitration "has been settled," asking that the arbitrators be so advised so that no award be entered.

Meanwhile, on February 15, the NASD had issued its award and sent it by regular mail to respective counsel. It is apparent that both sides' counsel received it after the foregoing faxed exchange. The award was in favor of plaintiffs in the amount of $88,787.50, far less than the settlement amount of $285,000.

On February 20, defendant's counsel, having received a copy of the award, advised plaintiffs' counsel that defendant had instructed him to "withdraw the offer of settlement," and advised the NASD that defendant intended to honor the award and had withdrawn the "offer of settlement" because it "did not receive the settlement and release documents executed by [plaintiffs] accepting the settlement."

On February 21, by fax and Fed Ex overnight mail, plaintiffs' counsel sent defendant's counsel a copy of the settlement agreement signed by plaintiffs. The cover letter acknowledged having been advised that defendant did not intend to

honor the settlement agreement, and asserted that defendant had clearly approved its terms, and reserved plaintiffs' rights to "enforce the agreement as written."

On March 23, plaintiffs' counsel advised defendant's counsel that defendant was in default of the first payment of $125,000 due under the terms of the settlement agreement, and offered an opportunity to cure the default. When defendant did not pay, plaintiffs commenced this action for breach of contract.

Defendant moved to dismiss pursuant to CPLR 3211(a)(1), (2) and (5) and for summary judgment dismissing the complaint, arguing, essentially, that there was no binding settlement agreement. The motion court, upon converting the dismissal motion to one for summary judgment, searched the record and granted summary judgment to plaintiffs.

Discussion

The motion court correctly awarded summary judgment to plaintiffs, properly holding that, based upon the submissions, it was established as a matter of law that the parties had entered into a binding and enforceable settlement agreement prior to defendant's purported revocation, and properly rejecting defendant's contention that it had withdrawn its offer before the offer was accepted. That the written formulation of the

agreement had not yet been signed by plaintiffs at the time defendant sought to repudiate it did not in any way refute its existence or terms.

To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 NY Jur 2d, Contracts § 9). That meeting of the minds must include agreement on all essential terms (*id.* at § 31).

The February 6 e-mail sent by plaintiffs' counsel establishes that defendant made an offer, including all the essential material terms of that offer, and that plaintiffs accepted the offer. If any confirmation were needed that plaintiffs' counsel had accurately framed and characterized defendant's offer, the subsequent e-mails satisfy any such concerns.

Nevertheless, defendant contends that the offer was revoked before it was accepted, relying on the fact that plaintiffs had not yet signed the formal writing by the time they heard of the NASD award, after which defendant quickly communicated an intent to revoke his offer. This contention raises the issue of how an offer is effectively accepted.

While an offer normally may be revoked at any time prior to acceptance, the moment of acceptance is the moment the contract

is created. "As a general rule, in order for an acceptance to be effective, it must comply with the terms of the offer and be clear, unambiguous and unequivocal" (*King v King*, 208 AD2d 1143, 1143-1144 [1994], citing 21 NY Jur 2d, Contracts, § 53, at 470; 2 Lord, Williston on Contracts § 6:10, at 68 [4th ed]). Inasmuch as there was nothing unclear, ambiguous, or equivocal about plaintiffs' February 6 e-mail responding to defendant's offer, it constituted an effective acceptance.

In order to treat the contract formation process employed here as ineffective to bind him, as well as to contend that his offer was revoked prior to any proper acceptance, defendant relies on the rule that "if the parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed" (*ABC Trading Co. v Westinghouse Elec. Supply Co.*, 382 F Supp 600, 601 [ED NY 1974], quoting Williston on Contracts § 28 at 66-67 [3d ed]; *see generally* 1 Lord, Williston on Contracts § 4:11 [4th ed]). Defendant contends that because the formal writing prepared for both parties' signature contained language making reference to it being "complete and binding" upon signature of all the parties, that writing indicates the parties' intent not to be bound until the point that all parties have signed the document.

"'It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed'" (*Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 166 [2007], quoting *Scheck v Francis*, 26 NY2d 466, 469-470 [1970]). Under New York law, "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement," that intent is honored (*see Jordan Panel Sys. Corp.*, 45 AD3d at 169, quoting *R.G. Group, Inc. v Horn & Hardart Co.*, 751 F2d 69, 75 [2d Cir 1984] [applying New York law]).

This rule has been explained as distinguishing between a "preliminary agreement contingent on and not intended to be binding absent formal documentation," which is not enforceable, and a "binding agreement that is nevertheless to be further documented," which is enforceable with or without the formal documentation (*Hostcentric Techns. Inc. v Republic Thunderbolt, LLC*, 2005 WL 1377853, *5, 2005 US Dist LEXIS 11130, *17 [SD NY 2005]). The former is established by a showing that a party made an explicit reservation that there would be no contract until the full formal document is completed and executed. But, the mere fact that the parties intended to draft formal settlement papers is *not alone* enough to imply an intent not to be bound except by

a fully executed document (*id.*).

The federal courts applying this rule have set out factors to consider in determining whether the parties intended not to be bound without an executed writing:

> "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing"

(*Winston v Mediafare Entertainment Corp.*, 777 F2d 78, 80 [2d Cir 1985]). In *Winston*, the parties had reached an agreement in principle, and the plaintiff's counsel wrote to the district judge handling the litigation, asking that a scheduled conference be postponed "subject to consummation of the proposed settlement" (*id.* at 81). While four draft agreements were prepared, the defendant had signed the third; the plaintiff claimed the fourth was binding. The Court held that there was no binding agreement, pointing out that the language used in drafts of the agreements and counsel's correspondence, as well as the acts of the parties, all tended to reflect an intent to not be bound until a written agreement was fully executed (*id.*). It was particularly significant that counsel's correspondence repeatedly used the terms "proposed settlement" and "proposed agreement" (*id.*).

In contrast, in *Delyanis v Dyna-Empire, Inc.* (465 F Supp 2d 170 [ED NY 2006]), the court found that the parties had entered into an enforceable agreement. The parties had agreed to the terms of a settlement while before a mediator, but the mediator's handwritten recording of their agreement affirmatively stated that the handwritten document was not meant to be binding. Nevertheless, when, a few days later, the mediator asked whether he could notify the court that the matter had been settled, the plaintiff's counsel answered affirmatively. When the plaintiff thereafter realized that the settlement amount was taxable and declined to settle the matter on the agreed terms, the defendants sought to enforce the settlement. The *Delyanis* court, while observing that the mediator's handwritten draft was not binding because of the included language that the parties did not intend to be bound by it, held that the subsequent actions of the plaintiff's counsel rendered the agreement binding on the plaintiff (*id.* at 174).

Here, none of defendant's correspondence indicated an intent not to be bound until an agreement was executed by both parties. Indeed, defendant's counsel affirmatively notified the NASD that a settlement was reached, without any assurances that plaintiffs had executed the agreement; his letter to the NASD stated "Please be advised the above captioned arbitration has been settled."

The inclusion, in the formal document intended to encompass the terms of an agreement, of the language that "[t]he Agreement is complete and binding upon its execution by all signatories" is simply insufficient to be treated as an explicit reservation that the parties should not be bound by the terms of their agreement until the written agreement is fully executed. Notably, there is no indication that at any time in the course of arriving at the terms of the agreement was it proposed that the parties not be bound until a written agreement was fully executed.

Defendant also relies on the rule that in the absence of consideration, an offer to enter into a contract may be revoked prior to acceptance (*see Friedman v Sommer*, 63 NY2d 788, 789 [1984]; *Evans v 2168 Broadway Corp.*, 281 NY 34 [1939]), reasoning that because his offer was made without consideration, he was entitled to revoke it. However, this rule is simply inapplicable to the present circumstances. According to the Restatement, the rule arose because under the common law, offers may be revoked prior to acceptance, but in certain situations an offeree should be provided with a "dependable basis for decision" during which the offeror's power to revoke is limited or eliminated (*see* Restatement [Second] of Contracts § 25, Comment 5). This rule therefore developed to cover option contracts, through which an offer, accompanied by some form of consideration, may protect an

offeree, by entitling the offeree to treat the offer as irrevocable within specific time constraints.

This rule is particularly irrelevant here, in view of our conclusion that defendant's offer was accepted prior to the purported revocation, so as to create a binding agreement between the parties. In fact, the consideration for a bilateral contract such as this one, in which promises are exchanged, consists of the acts mutually promised (*see Moers v Moers*, 229 NY 294, 301 [1920], citing 1 Williston on Contracts, § 103f). Plaintiffs' agreement to withdraw the claim they made to the NASD, and defendant's agreement to pay the money, constituted fair consideration.

Even if the e-mails had failed to evidence the existence of a contract, the formal written document signed just by defendant would have sufficed to establish the existence of the parties' agreement, since "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]), unless, of course, the parties have agreed that their contract will not be binding until executed by both sides. As the motion court observed, the provision in the Settlement Agreement that "[t]he Agreement is complete and binding upon its execution by all signatories" is

not the equivalent of a provision that it is *not* binding *until* it has been so executed. In any event, the parties' conduct establishes without any question that both sides understood and intended that the dispute had been settled.

Plaintiffs were properly awarded attorneys' fees. The costs provision of the settlement agreement, which is enforceable as the formal documentation of the already binding oral agreement, specifically provides for attorney's fees "[i]n the event that any party is required to bring any action against any other party to enforce the terms of this Agreement."

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

Accordingly, the judgment of the Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 26, 2007, awarding plaintiffs the principal sum of $285,000, and bringing up for review an order, same court and J.H.O., entered October 17, 2007, which, inter alia, granted plaintiffs summary judgment

and directed a reference as to attorneys' fees, should be affirmed, with costs.

All concur.

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

ENTERED: FEBRUARY 10, 2009

CLERK

Lippman, P.J., Tom, McGuire, Freedman, JJ.

4091 Joseph Brunetti, Index 601769/01
Plaintiff-Appellant,

-against-

Rami Musallam, et al.,
Defendants-Respondents,

Stephen Zimmerman, et al.,
Defendants.

Labaton Sucharow LLP, New York (Mark S. Arisohn of counsel), for appellants.

Katten Muchin Rosenman LLP, New York (Robert W. Gottlieb of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 1, 2008, which granted the motion by defendants Musallam, Klener and ThruPoint to amend their answer and by ThruPoint for summary judgment, and denied plaintiff's cross motion to amend his complaint, modified, on the law, to the extent of vacating the credit allocated to the nonsettling defendants under General Obligations Law § 15-108, and otherwise affirmed, without costs.

Plaintiff asserts that he was induced to transfer shares of ThruPoint stock to defendants Musallam, Zimmerman, Nachtigal and Klener and nonparty Rich as a result of their breach of fiduciary duty and fraud. The complaint further alleges that plaintiff's employment with ThruPoint was wrongfully terminated. Rich settled with plaintiff by returning the shares that he had

received, and Zimmerman and Nachtigal settled with plaintiff for $25,000 each. Musallam, Klener and ThruPoint were permitted to amend their answer to include an affirmative defense under General Obligations Law § 15-108, which "reduces a nonsettling tortfeasor's liability to the injured party by the greater of the amount of consideration the settling tortfeasor paid for its release or, alternatively, the amount of the settling tortfeasor's equitable share of the damages under CPLR article 14" (*Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld*, 309 AD2d 173, 174 [2003]).

Supreme Court held that the nonsettling defendants are entitled to a credit equal to 61.5% of any damages that plaintiff might be awarded at trial, representing the percentage of the shares of ThruPoint stock that plaintiff transferred to the settling transferees. Because their culpability cannot be assessed in the absence of a verdict, and because additional findings are needed before the credit to be assigned to the nonsettling defendants under General Obligations Law § 15-108 can be calculated, the award of a credit equal to 61.5% of the transferred shares was erroneous.

The equitable share of damages attributable to released tortfeasors under General Obligations Law § 15-108 is "determined in accordance with the relative culpability of each person liable for contribution" (CPLR 1402) and is calculated using one of two

methods. Where appropriate evidence is presented at trial, it is preferable to assess the fault of both settling and nonsettling defendants (*see Williams v Niske*, 81 NY2d 437, 440, n 1 [1993]). This approach simplifies the allocation of liability in that "the question of what constitutes the 'equitable share' attributable to a defendant does not arise. In this instance, the equitable share is simply the percentage fault allocated to each defendant" (*Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 188 AD2d 214, 221 [1993], *affd for reasons stated below* 82 NY2d 821 [1993]). Essentially, the nonsettling defendants receive a credit equal to the greater of the amount of the consideration paid by the settling tortfeasors, in the aggregate, or, if greater, that portion of the verdict determined by the percentage fault allocated to the settlers. Likewise, if the culpability of all settling tortfeasors cannot be assessed, "the aggregate method of computing offsets under General Obligations Law § 15-108(a) should be used" (*Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 82 NY2d 342, 353 [1993]). In this instance, a nonsettling defendant's equitable share of damages is calculated by reducing the verdict by the total consideration received by way of settlement and applying the percentage share of the defendant's fault to the result (*see Vazquez v City of New York*, 211 AD2d 475, 476 [1995]).

Without an allocation of fault as to those transferees of

plaintiff's shares who settled his claims against them, the credit to be assigned to the nonsettling defendants cannot be calculated as a percentage of the verdict. Significantly, plaintiff places most of the responsibility for inducing the transfer of his shares on one defendant, Musallam. Furthermore, the complaint seeks additional damages (for financial benefits accruing from plaintiff's ownership of the transferred stock and lost wages resulting from the improper termination of his employment with ThruPoint), and the extent to which each of the settling transferees bears responsibility for inducing the transfer of his stock or his termination, if any, is unclear. In any event, any damages consequent to plaintiff's lost employment are not amenable to apportionment according to the distribution of his shares of stock among the various transferees.

Our decision merely holds that no determination of the credit to which the nonsettling defendants are entitled can be made at this juncture. To sustain the motion court's summary allocation of fault, each transferee of plaintiff's ThruPoint shares would have to be held culpable for damages, including loss of earned income, in proportion to that tortfeasor's ownership of transferred stock, which further presumes that the equitable share of each settling tortfeasor can be determined. At this early stage of the proceedings, such assumptions are speculative, prematurely resolving issues within the exclusive province of the

trier of fact. In sum, we make no findings with respect to the computation or allocation of damages, which must be made at trial on the basis of the guidance afforded by the cited authority.

Plaintiff failed to raise a triable issue of fact to defeat ThruPoint's motion for summary judgment. Indeed, plaintiff did not allege that ThruPoint committed fraud or breached any duty owed to him, nor does the record support such claims. Furthermore, plaintiff did not contend that the shareholder defendants' alleged fraudulent scheme was carried out in furtherance of ThruPoint's interests (*see Solow v New N. Brokerage Facilities*, 255 AD2d 198 [1998]). Finally, none of plaintiff's stock was transferred to ThruPoint.

The court properly exercised its discretion in denying plaintiff's motion to amend the complaint to add a new theory of recovery, since such an amendment may not be "based on facts that would contradict [the] original theory" (*Peso v American Leisure Facilities Mgt. Corp.*, 277 AD2d 48, 49 [2000]). Notably, while plaintiff's original theory was that defendant Musallam acted on his own behalf and in concert with the other shareholders to defraud plaintiff, the proposed amended complaint completely contradicts that theory, alleging that Musallam's statements and actions were made in his capacity as ThruPoint's president and on behalf of the company.

With regard to the new damage claims sought to be added,

plaintiff failed to show that the proposed amendments had merit (*see Citarelli v American Ins. Co.*, 282 AD2d 494 [2001]), and he provided no valid reason for waiting until the eve of trial to propose the amendments (*see Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290 [2004]).

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

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

McGUIRE, J. (concurring)

I agree with the majority that Supreme Court correctly granted the moving defendants' motion for summary judgment dismissing the complaint against defendant ThruPoint and for leave to amend the answer of defendants Musallam and Klener to assert an affirmative defense under General Obligations Law § 15-108. I also agree that the court correctly denied plaintiff's cross motion to amend his pleadings. I agree as well that Supreme Court incorrectly determined the amount of the setoff under section 15-108 to which Musallam and Klener are entitled, but I disagree with the majority's reasoning.

In 1993 plaintiff founded Total Network Solutions, which later changed its name to ThruPoint, Inc. Plaintiff subsequently sought to expand the company's operations and invited defendants Musallam, Zimmerman, Nachtigal and Klener and nonparty Rich to join as shareholders; with the exception of Klener, who owned 14.583% of the shares, each of the remaining shareholders owned 17.083% of the shares. The shareholders entered into an agreement in January 1996 that provided, among other things, that each shareholder held a seat on ThruPoint's board of directors; each (except for Klener) was an employee of ThruPoint and entitled to a specified salary and annual bonus; and a shareholder-employee could be terminated only under limited, narrowly defined circumstances.

According to plaintiff, in April 1998 Musallam told plaintiff that ThruPoint needed financing and that Morgan Stanley, Musallam's former employer, agreed to provide it on the following conditions: (1) that plaintiff reduce his holdings in ThruPoint from 17% of the shares to 5%; (2) that plaintiff resign from the board; and (3) that plaintiff surrender his employment rights under the shareholders' agreement and become an at-will employee. Plaintiff claims that Musallam told him that, if plaintiff did not agree to those conditions, the financing could not be secured and ThruPoint would be unable to operate. Because he did not want to see ThruPoint cease operations, plaintiff agreed to the conditions and signed an agreement on April 22, 1998 amending the shareholders' agreement to reflect the conditions. Plaintiff was subsequently terminated effective January 31, 2001.

In April 2001, plaintiff commenced this action against Musallam, Klener, Zimmerman, Nachtigal and ThruPoint, asserting causes of action for breach of fiduciary duty and fraud. Plaintiff claimed, among other things, that Musallam's statement to him in April 1998 that Morgan Stanley would not provide financing unless plaintiff agreed to the conditions was false, that Musallam knew it was false, and that plaintiff relied on it in determining to agree to the conditions. Plaintiff also claimed that, as a result of the tortious conduct, he surrendered

70% of his shares, and lost both his seat on the board and his protected employment status. Plaintiff sought damages for the fair market value of the shares he parted with, the loss of the financial benefits of ownership of those shares under the original shareholders' agreement, and salary and bonuses he would have received had he not signed the April 1998 agreement, as well as punitive damages. A cause of action for rescission of the April 1998 agreement also was asserted.[1]

In October 2007, Musallam, Klener and ThruPoint moved for summary judgment dismissing plaintiff's cause of action for rescission and the complaint against ThruPoint. Musallam and Klener also sought to amend their answer to include as an affirmative defense the setoff afforded by General Obligations Law § 15-108. With respect to that portion of the motion seeking to amend their answer to include an affirmative defense under the statute, Musallam and Klener noted that, prior to commencing this action, plaintiff settled with nonparty Rich, who returned the shares plaintiff had transferred to him in exchange for plaintiff's promise not to sue him. Additionally, after the action was commenced, plaintiff settled with Zimmerman and Nachtigal, each of whom gave plaintiff $25,000.

Plaintiff cross-moved to amend his complaint to "clarify

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[1]Supreme Court granted defendants' motion for summary judgment dismissing the complaint in its entirety, but this Court reversed and reinstated the complaint (11 AD3d 280 [2004]).

[his] damage claims," and partially opposed Musallam, Klener and ThruPoint's motion. While plaintiff did not oppose that portion of the motion seeking summary judgment dismissing the cause of action for rescission, he did oppose that portion of the motion seeking to amend Musallam and Klener's answer to include an affirmative defense under General Obligations Law § 15-108 to the extent they sought any offset other than $50,000, the amount plaintiff received in settling with Zimmerman and Nachtigal.

Supreme Court granted Musallam, Klener and ThruPoint's motion in its entirety, dismissing the cause of action for rescission, dismissing the complaint against ThruPoint and allowing Musallam and Klener to amend their answer to include an affirmative defense under General Obligations Law § 15-108. Regarding the amendment to the answer, Supreme Court determined that:

> "It is the amount of the transferred stock received by each settling wrongdoer that provides the measure of the injury caused by each one with respect to [plaintiff's] claims for damages for breach of fiduciary duty and fraud. The only equitable way to apply the statute in this type of commercial tort case, where the alleged tortfeasors each benefitted from their alleged wrongdoing in a distinct and easily calculable manner, is to reduce any award of damages for the loss of [plaintiff's] ThruPoint stock by 61.5%[,the percentage of stock that plaintiff surrendered under the April 1998 agreement that was distributed to Rich, Zimmerman and Nachtigal, the settling tortfeasors]" (19 Misc 3d 1115[A], *3).

Plaintiff asserts that Supreme Court erred in permitting Musallam and Klener to amend their answer to include an

affirmative defense under General Obligations Law § 15-108 for any offset other than $50,000, because they waited too long to seek that relief. Plaintiff also asserts that the court misapplied the statute in granting Musallam and Klener a setoff of 61.5% of any damages award based on the percentage of stock plaintiff surrendered that was distributed to the settling tortfeasors; plaintiff claims that the statute requires an offset based on the greater of the amount of consideration paid by the settling tortfeasors or the amount of the settling tortfeasors' equitable shares of plaintiff's damages as determined by the finder of fact.

With respect to plaintiff's first contention, because "a party may amend its pleadings to raise General Obligations Law § 15-108 as a defense at any time . . . provided that the late amendment does not prejudice the other party" (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998]), and plaintiff was not prejudiced by the amendment, Supreme Court providently exercised its discretion in allowing Musallam and Klener to amend their answer. Although plaintiff complains that Musallam and Klener knew about the settlements long before October 2007 and concomitantly should have moved to amend their answer much sooner, plaintiff incurred no change in position or hindrance in the preparation of his case as a result of the amendment. The gravamen of plaintiff's action is that his fellow shareholders,

particularly Musallam, engaged in fraudulent conduct and breached fiduciary duties owed to plaintiff, which caused him to part with shares in ThruPoint and lose both financial benefits of ownership in that entity and salary and bonuses; the amendment to Musallam and Klener's answer does not require plaintiff to steer a new course. As Supreme Court correctly observed, "th[e] affirmative defense's addition will not affect [plaintiff's] prosecution of this case, as it does not raise new issues [that] may require him to re-tune his legal strategy."

With respect to plaintiff's argument that Supreme Court erred in applying General Obligations Law § 15-108, subdivision (a) of that statute states that

> "When a release or a covenant not to sue . . . is given to one of two or more persons liable or claimed to be liable in tort for the same injury . . . it does not discharge any of the other tortfeasors from liability for the injury ... unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest."

In turn, CPLR article 14 provides that "equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution" (CPLR 1402).

"CPLR 1402 uses the term 'culpability,' rather than 'fault,' because the right of contribution may be based on no-fault torts, such as strict products liability" (Alexander, Practice

Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1402, at 543). The rule, however, is typically described in terms of fault (*id.*, citing *Garrett v Holiday Inns*, 58 NY2d 253, 258 [1983] ["Principles allowing apportionment among tortfeasors reflect the important policy that responsibility for damages to an injured person should be borne by those parties responsible for the injury, in proportion to their respective degrees of fault"]; *see Williams v Niske*, 81 NY2d 437, 440 n 1 [1993] ["Even though a defendant in a multi-defendant suit settles, proof as to the settler's fault may still be presented at trial and the settler's equitable share determined"]; 1B PJI3d 2:275C; *see also Whalen*, 92 NY2d at 292; *Hill v St. Clare's Hosp.*, 67 NY2d 72, 85 [1986] [the equitable share of the released tortfeasor under General Obligation Law § 15-108 is determined by assessing the damage inflicted by each tortfeasor]). "[C]ulpability . . . is expressed in terms of percentages, and the allocation is a task for the jury" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1402, at 543; *see Schipani v William S. McLeod, D.P.*, 541 F3d 158, 163 [2d Cir 2008, Wesley, J.]; 1B PJI3d 2:275C).

As discussed above, section 15-108 allows for a setoff of the greater of (1) the amount stated in the settlement, (2) the amount of consideration given by the settling party to the plaintiff for the settlement and (3) the amount of the settling

party's equitable share of the damages. Supreme Court concluded that, under the third category, Musallam and Klener were entitled to a setoff of 61.5% of any damages award because that was the percentage of the total number of shares plaintiff transferred under the April 1998 agreement to the settling tortfeasors, Rich, Zimmerman and Nachtigal.

Supreme Court erred in affording Musallam and Klener that setoff because the percentage of shares received by the settling parties does not represent the relative culpability, i.e., fault, of those parties. In fact, plaintiff claims that Musallam was principally (if not exclusively) at fault for defendants' tortious conduct because he made the false representations to plaintiff that led plaintiff to surrender the majority of his shares in ThruPoint and agree to terms of employment that were far less favorable to him than the terms of the original shareholders' agreement. Moreover, plaintiff does not claim that his damages were limited to the amount of shares he lost as a result of the April 1998 agreement. Rather, plaintiff seeks damages for the fair market value of the shares he parted with, the loss of the financial benefits of ownership of those shares under the original shareholders' agreement, and salary and bonuses he would have received had he not signed the April 1998 agreement. Merely because the settling parties possessed a certain percentage of the shares plaintiff surrendered does not

necessarily mean that they caused that percentage of the damages plaintiff sustained. At bottom, there is no correlation between the amount or the value of the shares received by each of the settling parties and the amount of damages, i.e., the equitable share of the damages, for which each of those parties is responsible. Rather, a jury must weigh the relative culpability of the various parties that participated in the tortious conduct and apportion fault among them. That jury determination is critical in determining the amount of the setoff to which Musallam and Klener are entitled under the relative culpability setoff. Accordingly, Supreme Court should have simply allowed Musallam and Klener to amend their answer to assert an affirmative defense under General Obligations Law § 15-108 without specifying the amount of the setoff.[2]

The majority writes that "[*i*]*f the culpability of all settling tortfeasors cannot be assessed*, 'the aggregate method of computing offsets under General Obligation Law § 15-108(a) should be used' (*Matter of New York City Asbestos Litig.* [*Brooklyn Nav.*

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[2]Obviously, it is of course conceivable that at trial proof may not be offered with respect to a particular settling individual (Rich or defendants Zimmerman and Nachtigal) or even with respect to all of them. Under such circumstances, "the statute cannot be applied literally" (*Williams*, 81 NY2d 437, 440 [1993]) to determine the amount of the setoff. However, any verdict against the nonsettling defendants first would be reduced by the amount of the consideration plaintiff received from Rich, Zimmerman and Nachtigal, and Musallam and Klener each would be responsible only for his equitable share of the balance (*id.* at 445).

Shipyard Cases], 82 NY2d 342, 353 [1993])" (emphasis added)]. Contrary to the assertion of the majority, the application of the aggregate method does not depend on the absence of, or the inability to assess, the culpability of settling tortfeasors. In the very case the majority cites, the jury apportioned fault among the nonsettling and the settling parties (*id.* at 347) and the Court of Appeals applied the aggregate rather than the "case-by-case" or individual method (*id.* at 351; *see also Matter of New York City Asbestos Litig.* [*Brooklyn Nav. Shipyard Cases*], 188 AD2d 214, 221 [1993] [applying aggregate method where "the jury apportion[ed] fault among all tortfeasors"], *affd for reasons stated below* 82 NY2d 821 [1993]; *id.* at 222 [applying aggregate method to hypothetical in which fault was apportioned by a jury among all settling and nonsettling tortfeasors]).

Finally, the majority states that "[t]o sustain the motion court's summary allocation of fault, each transferee of plaintiff's ThruPoint shares would have to be held culpable for damages, including loss of earned income, in proportion to that tortfeasor's ownership of transferred shares, which further presumes that the equitable share of all settling tortfeasors can be determined." This, too, is erroneous, as the motion court's allocation of fault could not be sustained even if the stated conditions could be determined and were satisfied. Suppose, for example, that all the settling individuals were responsible for

61.5%, the percentage of the shares plaintiff transferred to the settling individuals, of all the damages, and that the percentage of responsibility for each of them and for each of the nonsettling defendants matched the percentage that each received of the shares plaintiff transferred. If the total amount that plaintiff received from the settling individuals in exchange for the releases they obtained (the sum of the $25,000 paid by Zimmerman, the $25,000 paid by Nachtigal and the value of the shares Rich transferred back to plaintiff, valued at the time they were transferred back) exceeded 61.5% of the damages awarded, the nonsettling defendants would be entitled to a credit that would exceed 38.5% of the total damages (*Matter of New York City Asbestos Litig.* [*Brooklyn Nav. Shipyard Cases*], 188 AD2d at 222). Because of this additional possibility, others readily can be hypothesized, the motion court's setoff could not be sustained in any event.

As for ThruPoint's motion for summary judgment dismissing

the complaint against it, I agree that it was properly granted for the reasons stated by the majority.

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

ENTERED: FEBRUARY 10, 2009

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