SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 19, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., McGuire, Acosta, DeGrasse, Freedman, JJ.

4818 The People of the State of New York, Ind. 6876/06
Appellant,

-against-

Raheem Mayo,
Defendant-Respondent.

Robert M. Morgenthau, District Attorney, New York (Justin Wechsler of counsel), for appellant.

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

Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about April 19, 2007, which granted defendant's motion to dismiss counts two and three of the indictment charging, respectively, criminal possession of a controlled substance in the third degree (Penal Law § 220.16[1]) and criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09[1]), reversed, on the law, the motion denied, and the counts reinstated.

The evidence before the grand jury was essentially as follows. At about 12:30 A.M. on December 28, 2006, Detective Payne and other police officers "closely followed" in "hot pursuit" a suspect in a crime, a man who had run into apartment 6

of a building in Brooklyn. After entering the apartment, a railroad flat with two adjoining bedrooms, Detective Payne moved past the living room and saw Leola Nimmons emerging from the back bedroom. Entering that bedroom, a "small" room that was approximately 8 feet by 10 feet, Detective Payne saw defendant putting on his pants; John Bosmond, defendant's father, was sitting on the bed. On a dresser in the bedroom, in plain view, was a clear bag holding 47 small lime green ziploc bags containing a white, rocky substance. Another adult, a woman, and three children were in the living room. One of the children, an 18-month-old, was defendant's child; the other two children were the children of a neighbor. The apartment was "filthy"; empty ziploc bags were in the kitchen and bathroom and "all over the place" in the living room. The empty ziploc bags differed from the lime green ones only with respect to their color; they were "brand new" and "ready for packaging."

In their brief, the People inexplicably state that the man who ran into the apartment was Clarence Saunders. However, the only witness who testified before the grand jury, Detective Payne, stated that two men were in the apartment, defendant and John Bosmond. Thus, from the evidence before the grand jury it is clear that the man who ran into the apartment was either defendant or Bosmond. Accordingly, the dissent errs in stating that "[t]here is no indication in the record whether this man was

arrested or even found in the apartment." As Detective Payne testified that defendant was putting his pants on when he entered the bedroom, it is reasonable to infer that Bosmond was the man who ran into the apartment. Our analysis, however, does not depend on that inference.

After defendant and Bosmond were taken out of the apartment, the police officers were talking about the Administration for Children's Services taking the children from the apartment on account of the drug parapernalia, i.e., the empty glassine envelopes, in the living room. With that, Nimmons whispered to Detective Payne that she wanted to talk to him. She went on to say, "I know what you're here for" and, pointing to a spot on the floor of the bedroom, she stated, "It's on the floor right here." Under a pair of men's jeans were two plastic bags, each of which contained small ziploc bags. One of the bags contained 37 and the other contained 59 ziploc bags; each bag also contained a white rocky substance. The jeans completely covered the two plastic bags. In addition to the jeans, there were clothes all over the floor.[1]

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[1]The dissent's position on the question of who ran into the apartment relies on the inexplicable statement in the People's brief identifying that man as Clarence Saunders. First, the sufficiency of the evidence before the grand jury must be appraised solely on the basis of that evidence; the statement in the People's brief is not part of and conflicts with that evidence. For that reason, the statement is irrelevant albeit confounding, and it is equally irrelevant whether it in fact represents a mistake by the author of the People's brief.

The small ziploc bags inside the two plastic bags also were lime green in color. These 96 ziploc bags in the two plastic bags "matched" the 47 ziploc bags on the dresser in the same room. Subsequent field and laboratory testing revealed that the 143 ziploc bags contained cocaine with a net weight of at least 1/8th ounce and 11.7 grains. Nimmons was the legal tenant of the apartment and the girlfriend of defendant's father. When asked if he knew whether defendant or his father lived in the apartment, Detective Payne answered, "They do not." When she pointed to where the two plastic bags were on the floor, Nimmons did not say whose drugs they were.

The first count of the indictment charged defendant and his father with criminal possession of a controlled substance in the third degree (Penal Law § 220.16[1]) for possessing the 47 ziploc bags of cocaine in plain view on the dresser. This count was premised on the statutory room presumption, which provides that the presence of narcotics "in open view in a room, other than a public place, under circumstances evincing an intent to . . . package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and

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Surely, if the People's brief contained an extra-record statement clearly inculpating defendant, the dissent correctly would protest that it was irrelevant. Second, the dissent makes a mountain out of a proverbial molehill. As we expressly state, our analysis does not depend on the inference -- reasonable though it is -- the Grand Jury could have drawn that Bosmond was the man who ran into the apartment.

every person in close proximity to such controlled substance" (Penal Law § 220.25[2]). On the basis of this presumption, "the jury is authorized . . . to draw from presence of the defendants . . . the logical inference that they were guilty of criminal possession of narcotics (*People v Daniels*, 37 NY2d 624, 631 [1975]). As the cocaine that is the subject of the second count, contained in the 96 ziploc bags in the two plastic bags, was not in open view but were under the jeans, the room presumption does not apply to that count. The grand jury nonetheless charged defendant and his father with possessing the 96 ziploc bags of cocaine. The question on this appeal is whether the People presented legally sufficient evidence that defendant was in constructive possession of the 96 ziploc bags. If so, the third count of the indictment -- which alleges that defendant and his father possessed one eighth of an ounce or more of cocaine on account of the combined weight of all 143 ziploc bags -- also is supported by legally sufficient evidence.

The controlling legal standards are clear. To establish constructive possession, "the People must show that the defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573 [1992] [internal quotation marks omitted]). Legally sufficient evidence "means simply a prima

facie case, not proof beyond a reasonable doubt" (*People v Swamp*, 84 NY2d 725, 730 [1995]). In determining the legal sufficiency of the evidence before the grand jury, "[t]he reviewing court must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted -- and deferring all questions as to the weight or quality of the evidence -- would warrant conviction" (*id.*). "That other, innocent inferences could possibly be drawn from the facts [presented] is irrelevant on this pleading stage inquiry, as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Deegan*, 69 NY2d 976, 979 [1987]).

Pursuant to the room presumption, it unquestionably was reasonable for the grand jury to conclude that defendant possessed the 47 ziploc bags of cocaine in plain view on the dresser. On the evidence before it, the grand jury could rationally have drawn the guilty inference that defendant also possessed the contents of the two plastic bags under the jeans. That inference is rational for numerous reasons. In the first place, the 96 ziploc bags of cocaine in the plastic bags under the jeans were the same green color as the 47 ziploc bags and defendant was in close proximity to the bags of cocaine under the jeans as well as the bags of cocaine on the dresser. The room, moreover, was a small one in the rear of the apartment and only defendant, his father and Nimmons were in the room. Thus, the

universe of persons who might have dominion and control over the 96 ziploc bags under the jeans is quite small, as it comprised at most only four persons -- the three adults in the bedroom and the woman in the living room. On these facts, we think it entirely rational to infer that the persons who possessed the 47 green ziploc bags of cocaine also possessed the 97 green ziploc bags of cocaine.

In addition, to the extent a reasonable inference can be drawn that Nimmons did not exercise dominion and control over the 96 ziploc bags, that would strengthen the inference that the other two persons in close proximity to the 96 ziploc bags did so. We think the grand jury rationally could infer that the person who alerted the police to the presence of the 96 ziploc bags of cocaine did not exercise dominion and control over them. That another inference could be drawn from the fact that Nimmons alerted the police to the additional cocaine is of no consequence (*see Deegan, supra*).

To be sure, Nimmons was the lessee of the apartment and Detective Payne testified that defendant and his father did not live in the apartment. Defendant's connection to the apartment, however, was far from tenuous. When the police entered the bedroom after midnight, defendant was putting on his pants, which is hardly typical conduct of a casual visitor. And, as noted, Nimmons was the girlfriend of defendant's father, and defendant's

own young child was in the living room. Finally, the guilty inference is supported as well by the presence in the apartment of so many other "brand new" ziploc bags "ready for packaging."

The dissent untenably asserts that "the evidence before the grand jury showed no more than defendant's mere presence in an apartment where drugs were found." Defendant was in a small room in the apartment in close proximity not only to the 47 small ziploc bags containing cocaine that were in plain view, but to the 96 ziploc bags containing cocaine that were under a pair of men's jeans (not, contrary to the dissent, under other clothing as well). All 96 of the ziploc bags were of the same, lime green color. The dissent essentially glosses over this important fact, stressing instead that the other ziploc bags, which it acknowledges were "strewn throughout the apartment," were of a different color. To the extent the dissent is of the view that the different color of the empty ziploc bags supports its position, we respectfully disagree and maintain that just the opposite is true.

Moreover, only defendant, his father and Nimmons were in the small bedroom. That defendant was not someone who had the misfortune to be passing through the apartment at the wrong time is an entirely reasonable inference that can be drawn from the evidence that the police entered the apartment at 12:30 A.M. and, as noted, the evidence that defendant was putting his pants on

when the police entered into the bedroom. According to the dissent, however, the evidence "show[s] only that defendant's father was Nimmons's boyfriend -- evidencing a legitimate explanation for his presence in the apartment -- and that defendant happened to be present when the police entered." For the reasons stated, we think it clear the grand jury could have inferred much more.

The dissent does not take issue with our position that from the fact that Nimmons alerted the police to the additional 96 ziploc bags of cocaine, a reasonable inference can be drawn that she did not exercise dominion and control over that cocaine.[2] For this additional reason, we submit that the grand jury reasonably could have inferred that the persons who possessed the 47 ziploc bags of cocaine in the bedroom also possessed the 96 ziploc bags containing cocaine that were but a few feet away in the same bedroom.

The dissent stresses the absence of "scales, chemicals, razors with which to cut the cocaine, cash, or even surfaces or

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[2]Rather, the dissent wrongly asserts that the inference "could be used to ensnare even the young children in the apartment." Of course, however, defendant, Bosmond and Nimmons were the ones who were in close proximity to all 96 ziploc bags in the small, back bedroom, not the other adult and the three young children, who were elsewhere in the apartment. On this score, finally, we note that even if the young children were in that same bedroom, we hardly are committed to the proposition that it would be equally reasonable to infer that they constructively possessed all 143 green ziploc bags of cocaine.

equipment covered with residue." But the absence of such evidence demonstrates only that the evidence before the grand jury was not so overwhelming as to preclude any dispute about its sufficiency. It hardly negates the reasonableness of the inference from all the evidence that was adduced before the grand jury that defendant also possessed the 96 ziploc bags. Regardless of whether "a drug operation [was] being run out of the apartment," the dissent is not persuasive in brushing aside the evidence of empty ziploc bags -- bags that were "brand new" and "ready for packaging" -- in the kitchen and bathroom and "all over the place" in the living room. The fact remains that the apartment did contain paraphernalia and its presence throughout the apartment cannot reasonably be seen as helpful to defendant's position.

The dissent asserts that under our analysis "everyone within open view is also presumed to be a 'trusted member of the operation,' and, automatically, charged with knowing possession of hidden drugs as well as visible drugs." Our position does not depend on any such presumption, however plausible or implausible it may be, and our analysis dictates no such sweeping or automatic consequences. Rather, our position, like our analysis,

is, as it must be, limited to the particular facts before the grand jury and the reasonable inferences that can be drawn from those facts, viewed in the light most favorable to the People (*People v Swamp*, 84 NY2d at 730).

All concur except Acosta and Freedman, JJ., who dissent in a memorandum by Acosta, J. as follows:

ACOSTA, J. (dissenting)

I respectfully dissent because the majority extends the room presumption to drugs not in plain view. Given the absence of evidence that respondent exercised dominion and control over the apartment, this extension dangerously casts too wide a net of criminality.

On December 28, 2006, at 12:30 A.M., defendant was arrested in a Brooklyn apartment with John Bosmond and Leola Nimmons for allegedly possessing various quantities of drugs in Nimmons's apartment. Neither Bosmond or defendant lived there, although Bosmond was Nimmons's boyfriend and defendant's father. Several children, aged 18 months to 11 years old (including defendant's son), and another woman were in the living room when the police entered the apartment.

The arresting officer testified before the grand jury that he and other officers followed a man, who was a suspect in a crime, running into Nimmons's apartment. There is no indication in the record whether this man was arrested or even found in the apartment. The majority makes light of these facts by speculating that defendant or his father must have been the man who entered the apartment, although there is absolutely no evidence in the record to support this conclusion. Indeed, the People state in their brief that the man who was being pursued was a Clarence Saunders.

In the bedroom of the apartment the officers observed a clear plastic bag containing 47 green ziploc bags of a rocky substance, later identified as crack cocaine, in plain view on the dresser. When the arresting officer went into the bedroom, Nimmons was coming out of the bedroom, Bosmond was sitting on the bed, and defendant was putting his pants on. The bedroom was a small room, about 8 feet by 10 feet and had clothes all over the floor.

The apartment was filthy, with empty ziploc bags (of a different color than those found on the dresser) in the kitchen and living room, and clothes and garbage strewn all over. There were no other packaging and no scales in the apartment.

After defendant and Bosmond had been taken out and the police were discussing taking the children to the Administration for Children's Services, Nimmons said "I want to talk to you" and then said "I know what you're here for. It's on the floor right there." At the spot she indicated, the bedroom floor, there were two more large ziploc bags completely covered with a pair of men's jeans; one bag contained 37 ziploc bags and the other contained 59 bags. The 96 ziploc bags were of the same color as the ziploc bags on the dresser, but different from the ones strewn throughout the apartment. The bags contained cocaine and the total weight of all three bags was 1/8 ounce and 11.7 grains. Based on the arresting officer's experience, the quantity of

cocaine was consistent with sale, not personal use.

There was no evidence that the jeans under which the drugs were found -- or any of the other clothes that were strewn all over the floor -- belonged to defendant. Nor was there any evidence that defendant exercised, or had any right to exercise, any control over the premises. Notably, the apartment was leased to Nimmons, who was Bosmond's girlfriend, and there was no evidence before the grand jury as to how long they had been together or how often he spent the night there. Defendant, in turn, was Bosmond's son, and the testifying officer stated unequivocally that defendant did not live there.

The statutory "room" presumption does not apply to the hidden bags in this case because, by its terms, the presumption is limited to drugs in "open view." The majority nonetheless posits that since the drugs in plain view were packaged similarly to those hidden under the jeans and respondent was in close proximity to both, the grand jury could have inferred that respondent possessed the hidden drugs as well. The majority buttresses this inference by speculating that defendant or his father was the man running into the apartment although the evidence shows otherwise. To account for the lack of evidence, the majority speculates that the People simply made a mistake in their brief in "inexplicably" stating that the man who was being pursued was Clarence Saunders. There are several problems with

these assumptions. First, in the absence of evidence that defendant exercised dominion and control over the apartment, it criminalizes mere presence in an apartment with drugs. The Court of Appeals, however, has held that proof of the defendant's "mere presence" in an apartment that the defendant did not own, rent or occupy is insufficient to establish his dominion and control over drugs, guns or paraphernalia that were found in the apartment but were not in open view and therefore were not subject to the room presumption (*People v Headley*, 74 NY2d 858 [1989], *affg* 143 AD2d 937 [1988] ["Proof that the premises were used for drug dealing was not sufficient to establish that defendant himself was guilty of unlawful drug and weapons possession"]; *see People v Pearson*, 75 NY2d 1001 [1990] [evidence legally insufficient to sustain conviction absent proof that defendant had any control or possessory interest in store or backroom where drugs were found, or "was involved in any drug selling or other operation being conducted there"]; *People v Gil*, 220 AD2d 328[1995] [affirming dismissal of indictment where People presented nothing more than proof of defendant's presence]; *People v Dawkins*, 136 AD2d 726 [1988] [defendant could be charged with constructive possession of cocaine found in a bag under his feet, but not of 41 bags of marijuana found in another room]). These cases are consistent with the Legislature's policy choice to limit the room presumption -- even in a drug factory -- to drugs in close

proximity *and* in open view.

Moreover, by relying on sheer speculation that defendant or his father was the person being pursued, and then layering that speculation on an inference that defendant possessed the drugs that were not in plain view because it can be presumed that he also possessed the drugs in plain view by virtue of the room presumption, the majority unfairly extends the room presumption beyond its intended limits. Notwithstanding the majority's insistence that its analysis does not depend on the inference that appellant may have been the man running into the apartment, its unsupported view of the facts clearly and unfairly support its conclusion.

The majority also states that the grand jury could have reasonably inferred that Nimmons, the lessee of the apartment, did not exercise dominion and control over the hidden drugs because she alerted the police to their presence. And, this inference, according to the majority, serves to strengthen the inference that defendant and his father constructively possessed the hidden drugs, heightened by their proximity to the drugs by virtue of the small size of the bedroom. This logic, which could be used to ensnare even the young children in the apartment, actually highlights the dangers inherent in extending the room presumption and settled principles of law simply to add two more counts to the indictment. Of course, if Nimmons could have

afforded a larger apartment, the inference against defendant would not be as strong under the majority's reasoning.

Rather, as the motion court correctly found, the evidence before the grand jury showed no more than defendant's mere presence in an apartment where drugs were found, and was plainly insufficient to establish his constructive possession of any of the hidden drugs found in Nimmons's bedroom. Nimmons was the lessee and there was nothing to show that defendant lived with her, or had free use of the premises, or had the key to the apartment giving him access. The grand jury minutes show only that defendant's father was Nimmons's boyfriend -- evidencing a legitimate explanation for his presence in the apartment -- and that defendant happened to be present when the police entered. This evidence does not support the theory that defendant constructively possessed the hidden drugs through the exercise of "dominion and control over the place where contraband was seized" (*People v Manini*, 79 NY2d 561, 572-573 [1992]).

Nor was there any evidence that defendant was involved in any drug packaging or selling operation conducted in the apartment that could be used to support his constructive possession of drugs that were not in plain view (*see Pearson*, 75 NY2d at 1002). In fact, the record contains no support for the People's assertion on appeal that the evidence established that the apartment served as a drug packaging facility.

Rather, there were drugs already packaged in the bedroom, some in plain view, some concealed by clothing on the floor, in quantities large enough to infer they were to be sold. But nothing indicative of a drug operation being run out of the apartment was discovered, such as scales, chemicals, razors with which to cut the cocaine, cash, or even surfaces or equipment covered with residue (*cf. e.g. People v Robinson*, 41 AD3d 317 [2007], *lv denied* 9 NY3d 925 [2007] [evidence showed that apartment being used as a drug factory, where it contained large quantities of narcotics, drug paraphernalia and cash, and permeated by a noxious chemical smell]; *People v Miranda*, 220 AD2d 218 [1995], *lv denied* 87 NY2d 849 [1995] [cocaine found near scale, wrapping materials and a calculator]).

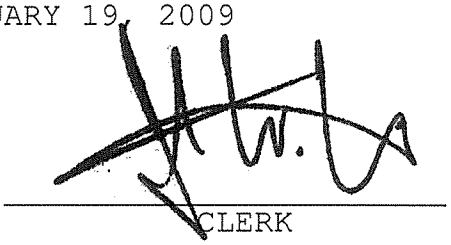
Moreover, the apartment, although unkempt, was clearly being used as Nimmons's residence. Her bedroom had a bed and a dresser, there were clothes there and in the living room, and there were an adult and several children on the premises who were obviously not involved in any illegal activity. This was clearly not a place where "only trusted members of the [narcotics] operation would be permitted to enter" (*People v Bundy*, 90 NY2d 918, 920 [1997]). Under these circumstances, the unspecified number of ziploc bags, all of a different color than those containing cocaine in the bedroom, was insufficient evidence of a drug factory given the absence of any other paraphernalia

associated with drug packaging.

Under the majority's interpretation everyone within open view is also presumed to be a "trusted member of the operation," and, automatically, charged with knowing possession of hidden drugs as well as visible drugs. This is not only inconsistent with the Legislature's policy choice to limit the presumption to drugs in plain view, but it also may be a dangerous proposition to cast such a wide net capable of catching persons unconnected to the drug operation in question. Accordingly, I respectfully dissent.

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

ENTERED: FEBRUARY 19, 2009



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Gonzalez, J.P., Buckley, Catterson, McGuire, Acosta, JJ.

5163 Maria Gutierrez, Index 401282/06
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

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

Taub & Marder, New York (Frank N. Eskesen of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 9, 2008, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when she tripped and fell while descending a subway stairway and placing her foot in the area of a step where a substantial piece of screwed-in metal nosing was missing. Defendant failed to meet the burden of showing not only that it did not create the defective condition, but also that it had no constructive notice of the defective condition because it was not "visible and apparent" and did not exist for a "sufficient length

of time prior to the accident" to permit defendant to remedy the defect (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Franco v D'Agostino Supermarkets, Inc.*, 34 AD3d 328 [2006]). At a bare minimum, the record presents triable issues of fact including, inter alia, whether defendant, in the event it did not create the defective condition of the stairway, had constructive notice of it (*see e.g. Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). We note that the obvious and otherwise inexplicable absence of the metal nosing after plaintiff fell supports the reasonable inference that defendant removed it on an earlier occasion. That another inference could be drawn is not relevant as all reasonable inferences must be drawn in favor of the non-moving party (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 555-556 [2008]).

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

ENTERED: FEBRUARY 19, 2009

CLERK

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

5205 Pascuala Vargas, Index 101927/04
Plaintiff-Appellant,

-against-

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

UHAB Housing Development Fund Corporation, et al.,
Defendants-Respondents.

Mkrtchian & Broderick, Forest Hills (Kenneth R. Berman of counsel), for appellant.

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for UHAB Housing Development Fund Corporation and JF Contracting Corp., respondents.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for Prisma Construction, Inc., respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 5, 2007, which, insofar as appealed from, granted the motions of defendants UHAB Housing Development Fund Corporation (UHAB), JF Contracting Corp. (JF) and Prisma Construction, Inc. for summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action, and denied plaintiff's cross motion for summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously modified, on the law, defendants' motions denied, and otherwise affirmed, without costs, and the matter remanded for further proceedings.

Plaintiff claims that, while performing debris removal work

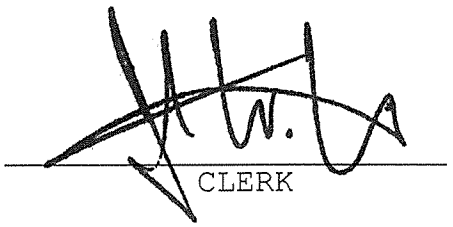
on a building's basement level, she was injured when she was struck by a nine-inch long pipe that fell several floors from above, where other workers were performing demolition work, including the cutting and removal of pipes. The evidence suggests that insufficient safety devices were provided. It is well established that falling-object liability is not limited to cases in which the object is being hoisted or secured at the precise time that it falls (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-59 [2008]; *Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404, 406-407 [2007]). In other circumstances, we would direct that summary judgment be directed to the plaintiff. In this case, however, purportedly because she feared losing her job, plaintiff did not seek medical attention until a week after the accident, after her employment had been terminated. Since there is no other competent evidence supporting her version of the purported incident, a credibility question as to even whether the accident occurred is presented, and requires resolution at trial.

We have not considered the request by UHAB and JF for dismissal of plaintiff's Labor Law § 241(6) claim, since they did

not file a notice of appeal from the motion court's denial of that part of their summary judgment motion (*see* CPLR 5515).

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

ENTERED: FEBRUARY 19, 2009



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Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5261 In re Arceny H.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about January 17, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and imposed a conditional discharge for a period of 12 months with restitution in the amount of $200, unanimously affirmed, without costs.

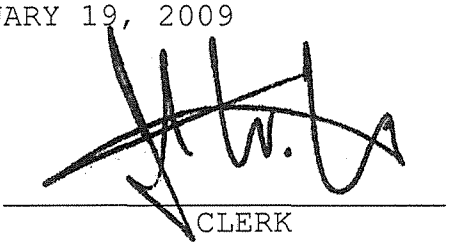
The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating her a juvenile delinquent and imposing a conditional discharge (*see Matter of Jonaivy Q.*, 286 AD2d 645 [2001]), which, given the fact that the incident resulted in physical injury and loss of property, was the least

restrictive alternative (*see Matter of Katherine W.*, 62 NY2d 947, 948 [1984]).

Appellant's general objection to restitution, and her suggestion that the court impose community service instead, failed to preserve her present challenges to the procedures by which the court arrived at the restitution component of the disposition, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: FEBRUARY 19, 2009



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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 19, 2009.

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

The People of the State of New York,
Respondent,

Ind. 4629/06

-against-

5262-
5263

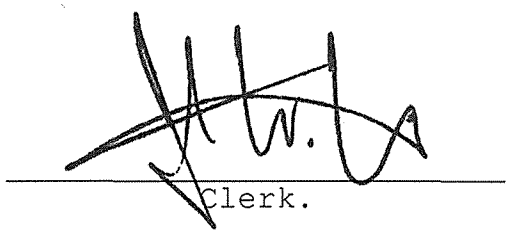
Theodore Smith,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles J. Tejada, J.), rendered March 5, 2007,

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

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

ENTER:



Clerk.

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

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5264 Debra A. Lewis, Index 24206/06
Plaintiff-Respondent,

-against-

Nicolas Tejada,
Defendant-Appellant,

Prince Afum, et al.,
Defendants.

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

Louis Atilano, Bronx, for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 8, 2008, which denied defendant Nicolas Tejada's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

While defendant satisfied his initial burden of presenting a prima facie case that plaintiff did not suffer serious injury, the submissions of plaintiff's expert were sufficient to raise a triable issue of fact on that question. Plaintiff also raised issues of fact as to her 90/180-day claim.

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

ENTERED: FEBRUARY 19, 2009

CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5265 Abra Construction Corp., Index 117966/98
Plaintiff-Appellant,

-against-

112 Duane Associates, LLC,
Defendant-Respondent,

Service Sign Erectors Co., Inc.,
Defendant.

Robert Jan Miletsky, White Plains, for appellant.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Lee S. Wiederkehr of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered March 9, 2007, after a nonjury trial, awarding plaintiff $48,905.04, inclusive of interest, for the value of work performed and $294,519.05, inclusive of interest, costs and disbursements, for lost profit, less $243,808.20 for willful exaggeration of the mechanic's lien, for a total net award of $50,710.85, unanimously affirmed, with costs.

In this action to foreclose on a mechanic's lien and for breach of a construction contract, the trial court properly rejected plaintiff's completion-percentage method for calculating the value of work plaintiff performed under the contract until it was wrongfully terminated. The percentage-of-completion was not an accurate indicator of plaintiff's alleged damages, since plaintiff failed to establish substantial completion of the

contract as a whole (*see Beaumont Birch Co. v Najjar Industries, Inc.*, 477 F Supp 970 [SD NY 1979]; *Tibbetts Contr. Corp. v O & E Contr. Co.*, 15 NY2d 324 [1965]). The contract was terminated in the early stages and plaintiff had only been on the job for approximately two months. The completion-percentage method was inaccurate for the additional reason that plaintiff sought to obtain the benefit of the percentage of completion of work performed by other subcontractors, for which plaintiff did not pay. Therefore, the trial court properly calculated the value of the work performed by using plaintiff's payroll records, adding reasonable percentages for labor burden, overhead and profit, and adding to that figure the amount of proven cost of plaintiff's materials that had been stipulated by the parties, to reach a total of $120,000. This calculation was supported by a fair interpretation of the trial evidence (*see Watts v State of New York*, 25 AD3d 324 [2006]).

The trial court correctly calculated the amount of lost profit damages by applying the 8% profit percentage that testimony indicated was the industry standard. The court properly rejected the testimony of plaintiff's president that his estimate of lost profit was between 45% and 60% of the contract price, since he was never qualified as an expert and his offer of proof was purely speculative (*see Designer Homes v Got-A-Flo, Inc.*, 43 AD2d 716 [1973]).

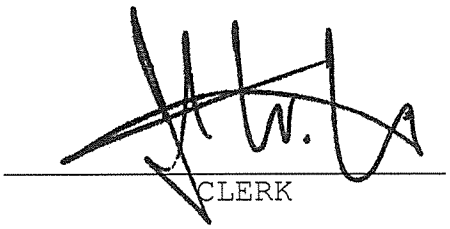
The trial evidence amply supports the trial court's finding that plaintiff willfully and intentionally exaggerated its mechanic's lien, warranting the voiding of the lien and the assessment against plaintiff of a civil penalty, pursuant to Lien Law § 39-a. Based on the facts that the amount of the lien was almost seven times the amount that the court found to be due and owing to plaintiff, and that, in employing the percentage-of-completion method, plaintiff included the value of work performed by subcontractors that it did not pay, and based on plaintiff's own documentation of the work it performed until November 29, 1997 and the amount it had been paid therefor, the conclusion is inescapable that at the time plaintiff set the amount due in the mechanic's lien it knew the amount was untrue (*see New Jersey Steel & Iron Co. v Robinson*, 85 App Div 512 [1903], *affd* 178 NY 632 [1904]).

It is clear from the trial court's decision that the court valued plaintiff's exaggeration of the lien by measuring the entire discrepancy between the lien as filed and the amount due plaintiff. Thus, there is no need to remand for findings of fact as to the items and amount of willful exaggeration (*see Goodman v Del-Sa-Co Foods*, 15 NY2d 191 [1965]).

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

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

ENTERED: FEBRUARY 19, 2009



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5266 The People of the State of New York, Respondent, Ind. 7631/84

-against-

Jose Martin Taveras, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

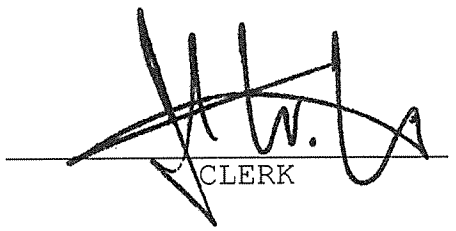
Judgment of resentence, Supreme Court, New York County (William A. Wetzel, J.), rendered June 23, 2008, resentencing defendant on his conviction of bribery in the second degree to a term of 1 to 3 years, consecutive to an aggregate term of 25 years to life upon his conviction of murder in the second degree and other crimes, unanimously affirmed.

Defendant was convicted in 1988, after a jury trial, of multiple crimes including murder and bribery. The resentencing court granted defendant's CPL 440.20 motion to set aside the original sentence on his bribery conviction, upon the People's concession that this sentence exceeded statutory limits. The court properly exercised its discretion when it then imposed a lawful sentence for the bribery conviction, the minimum permitted by law, but directed that it still be served consecutively to the other sentences.

Defendant's claim that the procedure by which the court determined that he was eligible for consecutive sentences violated the principles of *Apprendi v New Jersey* (530 US 466 [2000]) is without merit. The resentencing court did not engage in any fact-finding, but instead made, implicitly, a legal determination based upon facts already found by the jury (*see People v Lloyd*, 23 AD3d 296 [2005], *lv denied* 6 NY3d 755 [2005]; *United States v White*, 240 F3d 127, 135 [2d Cir 2001], *cert denied* 540 US 857 [2003]). Under Penal Law § 70.25, a jury's finding that a defendant committed more than one offense is sufficient to permit the court to impose consecutive sentences, unless the court either makes (where permitted) a discretionary determination to impose concurrent sentences or a legal determination that concurrent sentences are required.

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

ENTERED: FEBRUARY 19, 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 19, 2009.

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

The People of the State of New York, Ind. 6714/05
Respondent,

-against- 5267

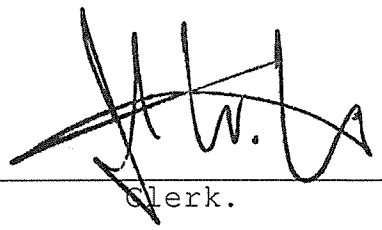
David Gabriel,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about September 27, 2006,

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

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

ENTER:



Clerk.

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

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5268 In re Robert Calvin R., Jr.,

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

Robert R.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

Florian Miedel, New York, for appellant.

Jeremiah Quinlan, Hastings on Hudson, for respondent.

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

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about September 7, 2007, which, revoking a suspended judgment, terminated respondent's parental rights and committed the child's custody to petitioner and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The court's finding of permanent neglect was supported by clear and convincing evidence of respondent's failure to plan for the child's future, notwithstanding the petitioning agency's diligent efforts (Social Services Law § 384-b[7][f]; *see Matter of Lady Justice I.*, 50 AD3d 425 [2008]; *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). Those efforts included arranging for counseling while respondent was in prison, communicating with his

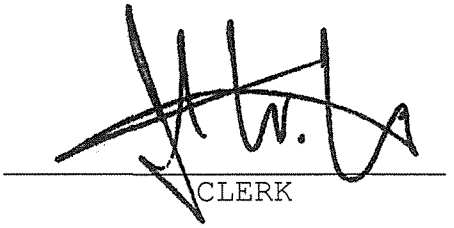
parole officer to ascertain the programs and services offered through parole and requesting additional services consistent with the Family Court's directives, communicating with respondent's drug program, obtaining drug testing results, scheduling biweekly visitation, meeting and communicating with respondent, and discussing his service plan with him. Petitioner was not required to duplicate the parole officer's efforts in addressing respondent's drug and alcohol problem (*see Matter of Mentora Monique B.*, 44 AD3d 445, 446 [2007]).

Respondent's failure to complete a drug program and attend required meetings supported a finding of permanent neglect (*Matter of Dade Wynn F.*, 291 AD2d 218 [2002], *lv denied* 98 NY2d 604 [2002]). The suspended judgment, having already been extended six months, was properly revoked where respondent admittedly failed to comply with its terms (*see Matter of Eric Jule C.*, 39 AD3d 346 [2007]; *Matter of Bykya Minnie E.*, 212 AD2d 365 [1995], *lv denied* 85 NY2d 964 [1995]). Respondent had neither seen nor contacted the child for seven months prior to the dispositional hearing, had not contacted the agency during that period, and failed to obtain appropriate housing. Under these circumstances, it was in the child's best interests (Family Ct Act § 631) to transfer his custody and guardianship to the agency and free him for adoption by his foster parents, with whom

he had been living for years (*see Matter of Star Leslie*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: FEBRUARY 19, 2009



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5270 The People of the State of New York, Ind. 4249/06
Respondent,

-against-

Harrison Burch,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Bryan Cave LLP, New York (Scott H. Kaiser of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at summary denial of *Dunaway* hearing; Michael A. Corriero, J. at jury trial and sentence), rendered October 10, 2007, convicting defendant of attempted assault in the second degree, criminal possession of a weapon in the third degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

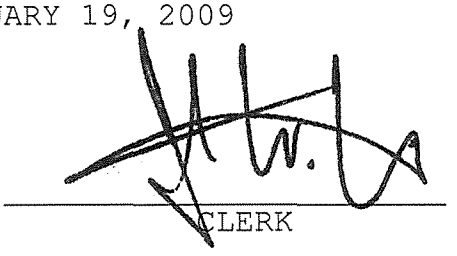
Summary denial of defendant's motion for a *Dunaway* hearing was proper since defendant's allegations failed to raise a legal basis for suppression (*see People v Lopez*, 5 NY3d 753 [2005]; *People v Mendoza*, 82 NY2d 415 [1993]). Defendant was fully aware that his arrest was based on the complaint of a citizen victim regarding an incident that occurred prior to his arrest, and his denials of any wrongdoing at the time of his arrest did not identify any Fourth Amendment issue to be resolved at a hearing

(*see People v Roldan*, 37 AD3d 300 [2007], *lv denied* 9 NY3d 850 [2007]). This was not a case where "[b]ased upon . . . meager information, defendant could do little but deny participation in the [crime]" (*People v Hightower*, 85 NY2d 988, 990 [1995]). In any event, defendant did not even explicitly deny committing the crime.

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

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

ENTERED: FEBRUARY 19, 2009



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5271 Christopher Spierer, et al., Index 8024/87
Plaintiffs-Appellants,

-against-

Bloomingdale's, etc., et al.,
Defendants,

Simmons, USA,
Defendant-Respondent.

Ian Anderson, New York, for appellants.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about January 3, 2008, which, upon renewal, granted the motion of defendant Simmons to dismiss the complaint as against it, unanimously affirmed, with costs.

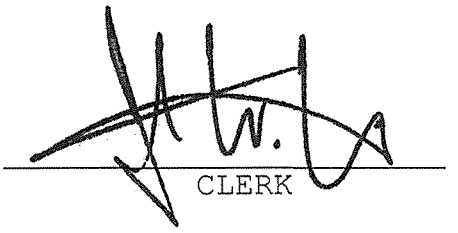
This is a personal injury/product liability action alleging injury from exposure to toxic chemicals in bedding manufactured by defendant Simmons and purchased from defendant Bloomingdale's. The court properly applied the law of the case doctrine (*People v Evans*, 94 NY2d 499, 504 [2000]; *Matrin v City of Cohoes*, 37 NY2d 162, 165 [1975]) in dismissing the claims against Simmons based on this Court's earlier dismissal of the claims against Bloomingdale's for lack of a defect and proximate cause (43 AD3d 664, *lv denied* 10 NY3d 705).

Renewal was warranted because dismissal of the action

against Bloomingdale's constituted a change in the law (CPLR 2221[e][2]) -- i.e., a new pronouncement of the law governing this case (*see Avalon, LLC v Coronet Props. Co.*, 16 AD3d 209, 210 [2005]); *Engel v Eichler*, 300 AD2d 622 [2002]).

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

ENTERED: FEBRUARY 19, 2009



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5272 The People of the State of New York, Ind. 2369/06
Respondent,

-against-

Dorita Jackson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne Gantt of counsel), and Cahill Gordón & Reindel LLP, New York (Mary McCann of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered November 17, 2006, convicting defendant, after a jury trial, of criminal possession of stolen property in the fourth degree (five counts) and attempted petit larceny, and sentencing her to an aggregate term of 1 to 3 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its rejection of defendant's testimony, in which she claimed the victim gave her his credit cards in return for her services as a prostitute. There was extensive evidence to support the knowledge element of possession of stolen property, including

circumstantial evidence that warranted the conclusion that defendant personally stole the credit cards from the victim.

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

ENTERED: FEBRUARY 19, 2009

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5274 The People of the State of New York, Respondent, Ind. 1832/06

-against-

Gerald Gordon, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 21, 2006, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him to an aggregate term of 25 years, unanimously reversed, on the law, and the matter remanded for a new trial.

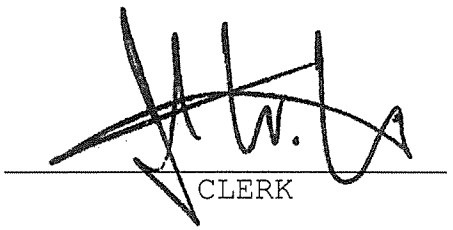
During voir dire of prospective jurors, after defense counsel had exercised his peremptory challenges, the court permitted the prosecutor to exercise a peremptory challenge to a panelist who had already been accepted by the defense and seated as a juror. However, CPL 270.15(2) precludes the People from challenging a prospective juror remaining in the jury box after a defendant has exercised his or her peremptory challenges. Because defendant was thereby deprived of a juror he wished to have seated, and because the court did not provide him with a

remedy, such as allowing him to re-exercise his peremptory challenges, we find that he was significantly prejudiced, such that a new trial is required (*see People v McQuade*, 110 NY 284 [1888]; *compare e.g. People v Levy*, 194 AD2d 319, 320-321 [1993], *appeal dismissed* 82 NY2d 890 [1993] [court's remedy prevented any prejudice]).

We reject defendant's challenge to his first-degree robbery conviction.

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

ENTERED: FEBRUARY 19, 2009



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5275 In re Teresa Perez-Frangie, Index 100876/08
Petitioner,

-against-

Shaun Donovan, as Commissioner of
the New York City Department of Housing
Preservation and Development,
Respondent.

- - - - -

Glenn Gardens Associates, L.P.,
Non-Party Landlord.

Moss & Moss LLP, New York (Donald C. Moss of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Gutman, Mintz, Baker & Sonnenfeldt, P.C., New Hyde Park (Olga Someras of counsel), for non-party landlord.

Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated September 19, 2007, terminating petitioner's Section 8 housing subsidy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to article 78 (transferred to this Court by order of the Supreme Court, New York County [Michael D. Stallman, J.], entered May 13, 2008), dismissed, without costs.

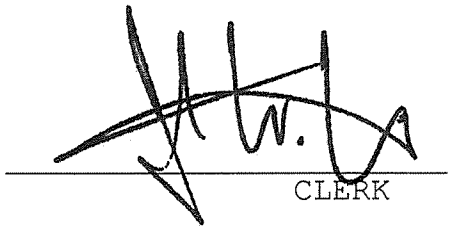
HPD's determination was supported by substantial evidence (*Berenhaus v Ward*, 70 NY2d 436, 443 [1987]) establishing that petitioner violated HPD's policy requiring truthful and complete reporting of her income.

The penalty assessed - termination of her subsidy - was not shocking to one's sense of fairness (*see Kelly v Safir*, 96 NY2d 32, 39 [2001]).

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

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

ENTERED: FEBRUARY 19, 2009



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5276 The People of the State of New York, Ind. 2962/06
Respondent,

-against-

Damien Ramos,
Defendant-Appellant.

Campos & Wojszwilo, New York (Richard Wojszwilo of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered August 30, 2007, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the fourth degree, and sentencing him to concurrent terms of 6 months, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

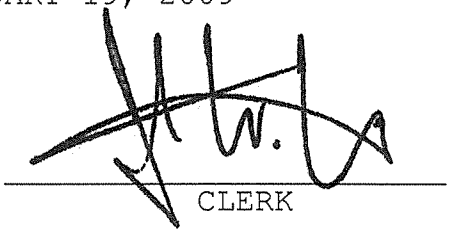
The verdict was based on legally sufficient evidence. The evidence, which included, among other things, the presence in a van of an assortment of weapons, a ski mask (in June) and sets of disposable gloves, warranted the inference that each of the occupants, including defendant, was part of a group engaged in a joint criminal enterprise, and that the occupants were in joint possession of the weapons (*see Matter of Kadeem W.*, 5 NY3d 864 [2005]; *People v Tirado*, 38 NY2d 955 [1976]), regardless of the

proximity of any occupant to any particular weapon. The same evidence also supported the conclusion that defendant possessed the knives at issue with intent to use them unlawfully.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 19, 2009



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5278 Eduardo Caraballo, Index 24919/04
Plaintiff-Appellant,

-against-

Kingsbridge Apt. Corp.,
Defendant-Respondent.

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

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondent.

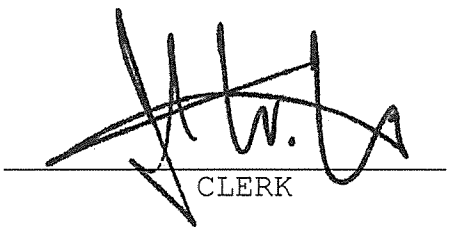
Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered November 15, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured when he allegedly slipped on an interior stairway step in defendant's apartment building, causing him to fall and land on a platform several steps below. Following defendant's prima facie showing of entitlement to summary judgment, plaintiff failed to raise a triable issue of fact as to whether defendant's negligence caused plaintiff's injury. During his 2005 deposition, plaintiff was unable to identify any dangerous condition that caused him to slip, stating that he did not see any water on the step where he slipped and only saw a "puddle" on the platform where he finally landed. While plaintiff introduced two tenants' affidavits that alleged general wetness on the staircase following rainfall, these

affidavits not only directly contradicted plaintiff's sworn testimony two years earlier, but failed to mention any complaints made by the affiants to defendant concerning such alleged conditions. Such self-serving affidavits denote an effort to avoid the consequences of plaintiff's earlier testimony and are insufficient to defeat defendant's motion for summary judgment. (*See Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327, 327-328 [2006]; *Harty v Lenci*, 294 AD2d 296, 298 [2002]; *Philips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000].) Further, mere speculation and conjecture, rather than admissible evidence, is insufficient to sustain the action (*see Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302, 303 [2006]; *Kane v Estia Greek Restaurant*, 4 AD3d 189, 190 [2004]; *Segretti v Shorenstein Co., E.*, 256 AD2d 234, 235 [1998]).

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

ENTERED: FEBRUARY 19, 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 19, 2009.

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

The People of the State of New York, SCI 2204/07
Respondent,

-against- 5279

Allen Proctor,
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 A. Ward, J.), rendered on or about July 11, 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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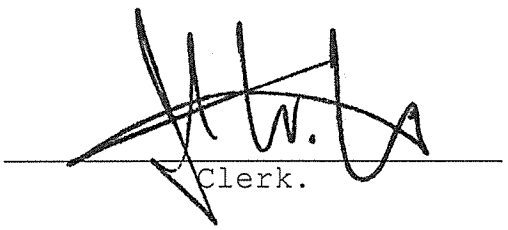


Clerk.

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

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Renwick, JJ.

5280N Donald P. Fewer, Index 601099/08
Plaintiff-Respondent,

-against-

GFI Group Inc., et al.,
Defendants-Appellants.

Carter, Ledyard & Milburn LLP, New York (Lawrence F. Carnevale of counsel), for appellants.

Troutman Sanders LLP, New York (Stephen F. Harmon of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered July 29, 2008, which, insofar as appealed from, granted plaintiff's motion pursuant to CPLR 2201 for a stay of the action pending resolution of a related arbitration proceeding, unanimously reversed, on the law and the facts, with costs, the motion denied, and the stay vacated.

Plaintiff former employee executive commenced this action for constructive discharge based on an employment agreement, and defendants asserted counterclaims for, inter alia, damages arising from alleged conversion of confidential information and the "raiding" of defendants' personnel. In granting that branch of plaintiff's motion to stay the instant action (*Fewer* Action) pending the outcome of an arbitration proceeding commenced by his former employer (Employer Arbitration), the motion court exercised its discretion in an improvident manner.

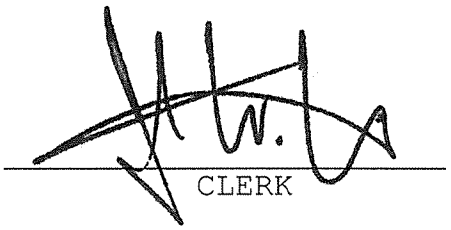
Although certain of the parties in the *Fewer* Action and the Employer Arbitration are closely related, the issues and claims that underlay the two matters are not inextricably interwoven such that the arbitration determination could resolve the issues in the *Fewer* Action (*see Somoza v Pechnik*, 3 AD3d 394 [2004]; *compare Belopolsky v Renew Data Corp.*, 41 AD3d 322 [2007]). An award in the Employer Arbitration finding there to be a conspiracy to take the employer's assets (i.e., confidential information, clients and employees) would not necessarily be made as to plaintiff, who is not a party to that proceeding and may not have a full and fair opportunity to contest such issues. Furthermore, the counterclaims in the *Fewer* Action, unlike the employer's claims in the Employer Arbitration, do not assert a formal conspiracy claim and, as such, plaintiff's alleged liability under the counterclaims does not rely upon evidence of conspiracy potentially to be determined in the Employer Arbitration.

Even with the rendering of an award in the Employer Arbitration that would resolve the issues raised therein, the material issues raised in the *Fewer* Action would still remain unresolved, namely, whether plaintiff had been constructively discharged and whether he breached his employment agreement. Under these circumstances, continuing the stay of the *Fewer* Action would neither serve to aid judicial efficiency nor avert

inconsistent holdings (*see e.g. Mt. McKinley Ins. Co. v Corning Inc.*, 33 AD3d 51, 58-59 [2006]; *Corbetta Constr. Co. v Driscoll Co.*, 17 AD2d 176, 179 [1962]).

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

ENTERED:



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5285 Erika Casado, Index 28535/02
Plaintiff-Appellant,

-against-

OUB Houses Housing Co. Inc., et al.,
Defendants-Respondents.

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

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Gregory A. Cascino of counsel), for respondents.

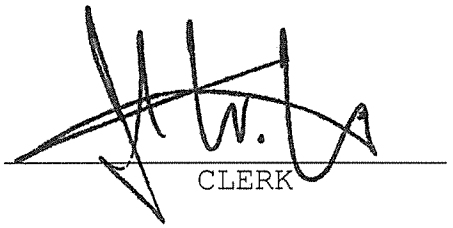
Judgment, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered March 22, 2007, dismissing the complaint, and bringing up for review an order, same court and Justice, entered June 16, 2006, which granted defendants' motion for summary judgment, unanimously affirmed, without costs.

Defendants established their entitlement to summary judgment in this negligence action by submitting evidence that they had no notice of the condition in the building's elevator alleged to have caused plaintiff's fall, and her opposition failed to create any material issue of fact (*see Dennis v Bartow Stationery*, 28 AD3d 238 [2006]; *Tejeda v Six Ten Mgt. Corp.*, 15 AD3d 265 [2005]). Although plaintiff's bill of particulars alleged that water accumulated in the elevator cab "constantly on weekends," she neither informed defendants of the alleged hazardous condition nor produced evidence to raise a factual question as to

whether they had received notice from any other source (*compare Siciliano v Garden of Eden, Inc.*, 12 AD3d 319 [2004], *with Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403 [2001]). Nor did plaintiff provide evidence as to the cause of the condition or how long it had existed prior to her accident to demonstrate constructive notice, and thus she has failed to make out a prima facie case of negligence (*see Segretti v Shorenstein Co., E.*, 256 AD2d 234, 235 [1998]).

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

ENTERED: FEBRUARY 19, 2009



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5286 The People of the State of New York, Ind. 2815/04
Respondent,

-against-

Todd Branham,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered June 8, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly exercised its discretion in precluding defendant from introducing a prosecution witness's testimony about an alleged declaration against penal interest made by a codefendant (*see People v Settles*, 46 NY2d 154, 167-170 [1978]). In this felony murder case, the People's evidence established that defendant personally committed the homicidal act while aided by two codefendants, each of whom pleaded guilty. Defendant sought to introduce a vague statement made by one of the codefendants that contained an indirect suggestion that this codefendant, rather than defendant, may have been the person who shot the victim.

Unavailability of the declarant is a prerequisite for admissibility of a declaration against penal interest (*id.* at 167). Under the circumstances of the case, it cannot be assumed that the codefendant's testimony was unavailable to defendant by virtue of the codefendant's Fifth Amendment privilege. When he pleaded guilty shortly before defendant's trial, the codefendant agreed to testify for the prosecution. However, the codefendant was not called as a witness by either side at defendant's trial, and he never invoked his right against self-incrimination. There is no indication in the record that the codefendant either personally, or through his attorney, ever expressed an intent to invoke his privilege; instead, the codefendant's attorney told defendant's attorney that the codefendant would deny making the statement at issue and would "absolutely" testify that it was defendant who fired the fatal shot. The prospect that a witness's testimony would be damaging does not satisfy the requirement of unavailability. The statement also fell far short of satisfying the reliability requirement for introduction of a declaration against penal interest (*see People v Shortridge*, 65 NY2d 309 [1985]).

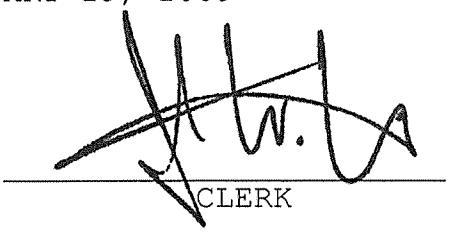
The court properly rejected defendant's argument that his constitutional right to present a defense required admission of

the declaration (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]). This evidence was neither reliable nor critical to establish any defense. To establish the affirmative defense to felony murder set forth in Penal Law § 125.25(3), defendant would have had to prove by a preponderance of the evidence that he did not commit the homicidal act, as well as proving a series of other elements. There is no reason to believe that the cryptic declaration at issue would have had any likelihood of establishing the affirmative defense, or undermining, in any other manner, the evidence establishing that defendant committed felony murder. In any event, in view of the overwhelming evidence of defendant's guilt, any error in excluding the declaration was harmless under the standards for both constitutional and nonconstitutional error (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenges to the People's introduction of an excited utterance are without merit (*see People v Buie*, 86 NY2d 501, 506 [1995]; *People v Caviness*, 38 NY2d 227, 232 [1975]).

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

ENTERED: FEBRUARY 19, 2009



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5287 Lee Rosenbloom, et al., Index 600535/01
Plaintiffs-Appellants,

-against-

Nathan Gurary, et al.,
Defendants-Respondents.

Allan H. Carlin, New York, for appellants.

Jaroslawicz & Jaros, LLC, New York (David Jaroslawicz of counsel), for respondents.

Judgment, Supreme Court, New York County (Herman Cahn, J.), entered December 14, 2006, to the extent appealed from, finding, after a special referee's hearing to determine the validity of an accounting in a shareholders derivative action brought on behalf of The Luba Organization, Inc. (Luba), Nathan Gurary, Mordechai Gurary and Joseph Gurary (the Gurary defendants) jointly and severally liable to defendant Luba in the sum of $529,068.31, and bringing up for review the order, same court and Justice, entered on or about July 12, 2006, which denied plaintiffs' motion to reject, in part, and granted defendants' motion to reject, in part, the special referee's report and recommendations, unanimously affirmed, with costs.

The motion court, having found that the referee had clearly defined the issues, resolved matters of credibility, and made

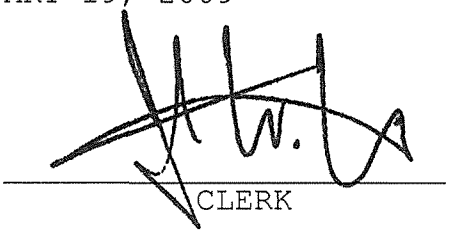
findings substantially supported by the record (*see Poster v Poster*, 4 AD3d 145, 145 [2004], *lv denied* 3 NY3d 605 [2004]; *Kaplan v Einy*, 209 AD2d 248, 251 [1994]), acted appropriately in adopting the conclusion of the referee's report as derived from the hearing, since the parties waived the filing of the transcript (*see Halperin v Halperin*, 282 AD2d 340, 341 [2001]).

Based on the evidence before it, the motion court properly confirmed the referee's findings awarding surcharges for management fees, the payment to Tema Ltd., and the loan repayment to Eichenstein. The court also properly determined that the imposition of surcharges upon the corporate defendants was unwarranted, since there was insufficient evidentiary basis to join the Gurary defendants, who managed the Luba Corporation, a separate entity, with the corporate defendants in which the Gurary defendants also had an interest and from which they had borrowed money in order to prevent foreclosure of Luba's building. Finally, the motion court properly confirmed the special referee's findings disallowing additional surcharges in the amount of $1,048,000 for alleged rental expenses, repair and maintenance expenses, or decreases in rental income (*see* Business Corporation Law §§ 624, 714), and properly exercised its

discretion in not awarding plaintiffs attorneys' fees (*see* Business Corporation Law § 626(e); *First Westchester Bank Natl. Bank v Olsen*, 25 AD2d 661 [1966], *affd* 19 NY2d 342 [1967]).

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

ENTERED: FEBRUARY 19, 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 19, 2009.

Present - Hon. Peter Tom, Justice Presiding
Karla Moskowitz
Rolando T. Acosta
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 6506/05
Respondent,

-against- 5288

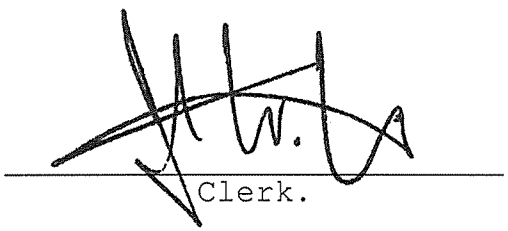
Roberto Bermudez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael A. Corriero, J.), rendered on or about November 29, 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., Moskowitz, Acosta, Freedman, JJ.

5289 The People of the State of New York, Ind. 2507/03
Respondent,

-against-

Angelo Grace,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered November 4, 2004, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to withdraw his plea, without granting the requests made by defendant and his attorney for substitution of counsel, and defendant was not deprived of his right to conflict-free representation (*see Cuyler v Sullivan*, 446 US 335, 348-350 [1980]). Defendant's claims of coercion and ineffective assistance were unsubstantiated, and were refuted by the record of the plea and the proceedings leading up to it, which establishes that there were extensive discussions leading up to the plea, that defendant declined the court's offer of more time to confer with counsel or family members, and that defendant expressed satisfaction with counsel's

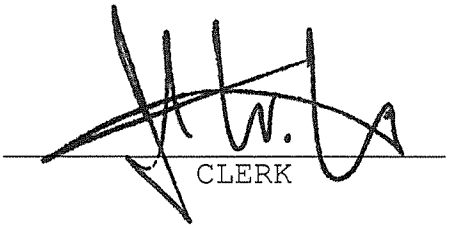
representation. Accordingly, defendant's allegations did not require substitution of counsel (*see e.g. People v Senghor*, 248 AD2d 299 [1998], *lv denied* 92 NY2d 892 [1998], *lv denied* 92 NY2d 905 [1998]). Counsel's comments about his own actions did not provide any damaging factual information (*compare People v Rozzell*, 20 NY2d 712 [1967]), and there is no reasonable possibility that they contributed to the court's denial of the motion (*see e.g. People v Burgos*, 298 AD2d 190 [2002], *lv denied* 99 NY2d 580 [2003]; *People v Otero*, 282 AD2d 344, 345 [2001], *lv denied* 96 NY2d 905 [2001]). Counsel essentially provided information that the court already knew, such as that, prior to the plea, counsel possessed a transcript of a codefendant's trial. The record also establishes that counsel provided effective assistance (*see People v Ford*, 86 NY2d 397, 404 [1995]). In this heinous murder case, counsel negotiated a disposition that was as favorable as possible under the circumstances, whereby the sentence would be concurrent with a lengthy existing sentence.

Defendant is not entitled to vacatur of his plea on the ground that the court did not inform him of the mandatory fees and surcharges. In view of the significant differences between these assessments and postrelease supervision, as explained by this Court in *People v Harris* (51 AD3d 523 [2008], *lv denied* 10 NY3d 935 [2008]), we conclude that the principles set forth in

People v Catu (4 NY3d 242 [2005]) do not apply here. Information about fees and surcharges is not the type of information that is essential for a pleading defendant to have "in order to knowingly, voluntarily intelligently choose among alternative courses of action" (*Catu* at 245).

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

ENTERED: FEBRUARY 19, 2009



Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5291-
5292 The People of the State of New York, Ind. 1693/03
Respondent,

-against-

Avery Pettigrew,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about April 12, 2007, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supported the court's point assessments under the risk factors of being armed with a dangerous instrument (*see People v Walker*, 15 AD3d 692 [2005]), history of drug or alcohol abuse (*see People v Gonzalez*, 48 AD3d 284 [2008], *lv denied* 10 NY3d 711 [2008]) and failure to accept responsibility (*see People v Lewis*, 37 AD3d 689 [2007], *lv denied* 8 NY3d 814 [2007]).

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

ENTERED: FEBRUARY 19, 2009

CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5293 Anthony Pepe, et al., Index 106495/04
Plaintiffs,

-against-

The Center for Jewish History, Inc., et al.,
Defendants.

- - - - -

The Center for Jewish History, Inc., 590148/06
Third-Party Plaintiff-Respondent,

-against-

D'Aprile Inc.,
Third-Party Defendant-Appellant,

Orion Mechanical Systems, Inc., et al.,
Third-Party Defendants.

Gorton & Gorton LLP, Mineola (John T. Gorton of counsel), for appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaron and Ian F. Harris of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered April 28, 2008, which, in an action under the Labor Law for personal injuries, after granting plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action against the building owner (CJH), insofar as appealed from, denied the motion of third-party defendant-appellant masonry subcontractor (D'Aprile) for summary judgment dismissing CJH's third-party claim against it for contractual indemnification, unanimously reversed, on the law, without costs, D'Aprile's motion granted, and CJH's third-party claim against D'Aprile for

contractual indemnification dismissed.

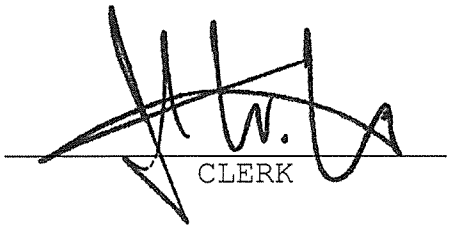
Plaintiff, an employee of the general contractor, was assigned on the day of the accident to clear debris from the roof. It appears that a ramp connecting the roof to the exterior elevator had been removed, and that in order to access the roof, plaintiff hopped over the parapet wall that D'Aprile was then in the process of constructing, landing on unsecured plywood planking covering a hole in the roof, and falling through with resulting injury. D'Aprile's subcontract, which required it to construct the parapet wall on the building's facade and was performed entirely by use of scaffolds, did not require access to or work on the roof, and did not impose a duty to provide plaintiff with a safe means of accessing the roof. The motion court found that no issues of fact exist as to either D'Aprile's nonnegligent performance of its contract or its lack of any involvement in the creation of the hole on the roof or the installation or maintenance of the plywood covering the hole. It did find, however, that an issue of fact exists as to whether the removal of the ramp was a necessary step in D'Aprile's erection of the parapet wall, and, as a consequence, that an issue of fact exists as whether the accident "arose out of" or "in connection with" D'Aprile's work within the meaning of the broad indemnification clause in D'Aprile's subcontract on which CJH relies. We disagree. The connection between plaintiff's

accident and the mere existence of the partially constructed wall where the ramp formerly had been is too tenuous to trigger the indemnification clause (*see Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415-416 [2008]). A contrary conclusion is not required by the clause in D'Aprile's subcontract authorizing it to disturb any existing structures if necessary to do its masonry work. Even if D'Aprile did remove the ramp in order to perform its work -- and there is no evidence that it did -- and even if removal of the ramp and location of the commencement of the erection of the wall forced plaintiff to climb over the wall in a place that put him close to the hole, plaintiff was not performing work that was even remotely related to D'Aprile's masonry work, and the ramp was neither an instrumentality for which D'Aprile was responsible nor a tool or material supplied by or needed by D'Aprile to perform its work (*cf. Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376 [2008]; *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 271-273 [2007], citing, inter alia, *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401 [2005]). In short, plaintiff was injured not because the ramp had been removed, but because someone had removed the secure covering over the hole that everyone, including plaintiff, thought was still in place, and replaced it with a flimsy, unsecured piece of plywood.

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

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

ENTERED: FEBRUARY 19, 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 19, 2009.

Present - Hon. Peter Tom, Justice Presiding
Karla Moskowitz
Rolando T. Acosta
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 14959/90
Respondent,

-against- 5294

Terrance Mims,
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 July 6, 2005,

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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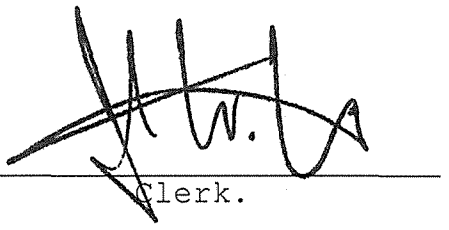


Clerk.

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

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5295 Enid Griffiths, Index 113789/07
Plaintiff-Respondent,

-against-

Triangle Services, Inc.,
Defendant-Appellant,

GCI Corp.,
Defendant.

Bond, Schoeneck & King, PLLC, Garden City (Mark N. Reinharz of counsel), for appellant.

The Rosenthal Law Firm, P.C., New York (Douglas Rosenthal of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 28, 2008, which denied the motion of defendant Triangle Services, Inc. (Triangle) to dismiss the complaint and/or for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Triangle dismissing the complaint as against it.

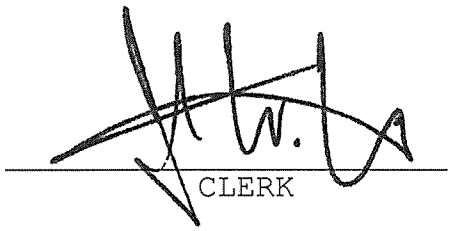
Plaintiff's defamation action is preempted by section 301 of the Labor Management Relations Act of 1947 (29 USC § 185), since the claim requires interpretation of a collective-bargaining agreement (CBA). Plaintiff asserts that Triangle (her employer) defamed her when it sent a copy of a letter terminating her employment to the union which represents her, while Triangle maintains that, although not explicitly stated in the CBA, a copy

of the letter was required to be sent to the union as it has both the right and obligation to represent employees concerning a termination.

A finding that this defamation claim is independently resolvable would be tantamount to a conclusion that Triangle had no duty to notify the union, and would necessarily be making an interpretation of the CBA (*see Barbe v Great Atl. & Pac. Tea Co., Inc.*, 722 F Supp 1257, 1261 [D MD 1989], *affd* 940 F2d 651 [1991], *cert denied* 502 US 1059 [1992]). Similarly, resolution of the privilege defense advanced by Triangle would require a determination regarding the interests of the parties relative to the union, thereby implicating the area of preemption which the federal statute was intended to cover (*id.* at 1261-62).

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

ENTERED: FEBRUARY 19, 2009



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5296 The People of the State of New York, Ind. 929/82
Respondent,

-against-

Luis Mangual,
Defendant-Appellant.

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

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

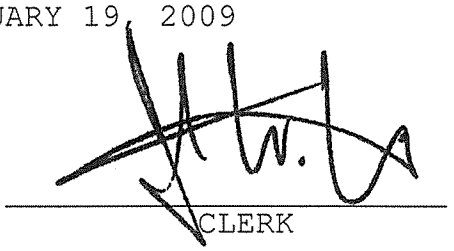
Order, Supreme Court, New York County (Arlene R. Silverman, J.), entered on or about January 9, 2007, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although the court did not use the expression "upward departure," it made clear that, in view of the extreme brutality of the underlying sex crime, it intended to depart upwardly to level three even if defendant's point score, standing alone, would support only a level two adjudication. This upward departure was based upon clear and convincing evidence of aggravating factors of a degree not taken into account by the

risk assessment instrument and guidelines (*see e.g. People v Miller*, 48 AD3d 774 [2008], *lv denied* 10 NY3d 711 [2008]; *People v Sanford*, 47 AD3d 454 [2008], *lv denied* 10 NY3d 707 [2008]).

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

ENTERED: FEBRUARY 19, 2009



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5297 The People of the State of New York, Respondent, Ind. 232/06

-against-

Alvin Reid, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered September 12, 2006, convicting defendant, after a guilty plea, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

The record establishes that defendant made a valid waiver of his right to appeal, that the waiver encompassed his suppression claims (*see People v Kemp*, 94 NY2d 831 [1999]), and that it was otherwise enforceable (*see People v Holman*, 89 NY2d 876 [1996]). As an alternative holding, we also reject defendant's suppression claims on the merits.

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

ENTERED: FEBRUARY 19, 2009

CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5298 Kirk Dillon, Index 22482/05
Plaintiff-Respondent,

-against-

Motorcycle Safety School, Inc., et al.,
Defendants-Appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Gregory J. Dell of counsel), for appellants.

Ateshoglou & Aiello, P.C., New York (Steven D. Ateshoglou of counsel), for respondent.

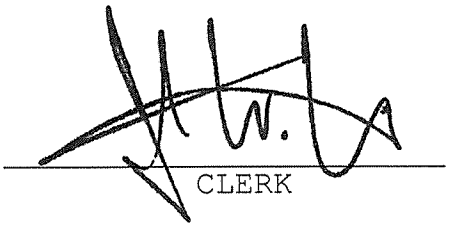
Order, Supreme Court, Bronx County (Lucy Billings, J.), entered October 3, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Although New York law generally enforces contractual provisions absolving a party from its own negligence, public policy prohibits contractual avoidance of liability for damages occasioned by grossly negligent conduct (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]; *Federal Ins. Co. v Honeywell, Inc.*, 243 AD2d 605 [1997]). The court correctly determined that there were issues of fact as to whether defendants' activity rose

to the level of gross negligence (*see Food Pageant v Consolidated Edison Co.*, 54 NY2d 167, 172-173 [1981]).

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

ENTERED: FEBRUARY 19, 2009



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5299 The People of the State of New York, Respondent, Ind. 1868/06

-against-

Jian McLaren, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered September 18, 2006 convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fourth degrees and criminally using drug paraphernalia in the second degree, and sentencing him to an aggregate term of 1 year, unanimously affirmed.

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

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

ENTERED: FEBRUARY 19, 2009

CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5300 Timothy Lee, Index 13958/04
Plaintiff-Respondent,

-against-

Burger King, et al.,
Defendants-Respondents-Appellants,

101 East 161st Street Restaurant Corp., et al.,
Defendants-Appellants-Respondents,

Stadium Grocery, et al.,
Defendants.

Gannon, Rosenfarb & Moskowitz, New York (James A. Aldag of counsel), for appellants-respondents.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondents-appellants.

Shaevitz & Shaevitz, Jamaica (Jonathan R. Vitarelli of counsel), for respondent.

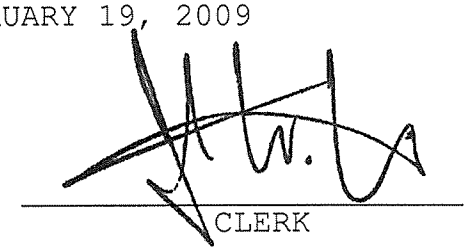
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 10, 2008, which denied the motion of defendants 101 East 161st Street Restaurant Corp. and 101 Restaurant Corp. and the cross motion of Burger King, Burger King Corp. and Walton Foods Enterprises, L.L.C. for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants did not demonstrate their entitlement to summary judgment, since their conflicting evidence failed to establish their lack of responsibility for the alleged hazardous grease condition on the public sidewalk and since their argument that other possible sources for the condition existed was properly

rejected (*see Bowry v Uptown Gift Shop*, 292 AD2d 240 [2002]). In any event, plaintiff raised triable issues of fact with evidence from which a jury could infer that one, or more, of defendants created the alleged hazardous condition (*see Vazquez v Santana*, 291 AD2d 230 [2002]).

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

ENTERED: FEBRUARY 19, 2009



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5301 Gloria Gaston, Index 8027/03
Plaintiff-Appellant,

-against-

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

Klose & Associates, Nyack (Peter Klose of counsel), for appellant.

White Quinlan & Staley, L.L.P., Garden City (Eugene P. Devany of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), entered May 31, 2007, upon a jury verdict finding plaintiff 80% and defendant 20% liable for plaintiff's injuries and awarding plaintiff, prior to apportionment, $5,000 and $0 for past and future pain and suffering, respectively, and $3,000 and $0 for past and future medical expenses, respectively, unanimously modified, on the facts, the awards for past and future pain and suffering vacated and the matter remanded for a new trial solely on the issue of those damages, and otherwise affirmed, without costs, unless defendants stipulate, within 30 days after service of a copy of this order, to an award, prior to apportionment, of $200,000 for past pain and suffering, and $50,000 for future pain and suffering and to entry of an amended judgment in accordance therewith.

The jury's award of an aggregate sum of $8,000 for past pain

and suffering and past medical expenses is not inconsistent with its finding of liability on defendants' part and therefore reflects no impermissible compromise (*see Galaz v Sobel & Kraus*, 280 AD2d 427 [2001]). The trial evidence supports the jury's apparent finding that defendants' negligence was not a contributing cause of the injuries revealed during plaintiff's second surgery. The evidence also supports the jury's awards for past and future medical expenses.

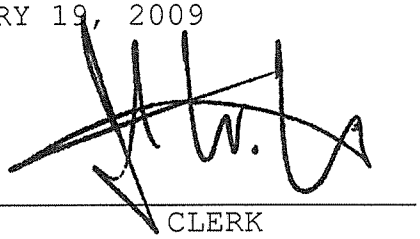
However, in view of the evidence that plaintiff suffered a torn meniscus that necessitated surgical repair and would be attended by arthritic consequences, the jury's award for past and future pain and suffering deviated from what would be reasonable compensation to the extent indicated (*see e.g. Juliano v Prudential Sec.*, 287 AD2d 260, 261 [2001]).

Defendants' expert was properly permitted to comment on surgical photographs offered into evidence by plaintiff. Plaintiff failed to show that defense counsel's summation remarks "substantially influenced or affected the fairness of the trial" (*Smith v Au*, 8 AD3d 1, 1-2 [2004]). The court's charge on liability was clear and unambiguous as to defendant's duty to maintain the construction area and sidewalk in a reasonably safe condition so as to permit pedestrian access to plaintiff's

workplace and contained nothing that could have influenced the jury in its apportionment of fault.

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

ENTERED: FEBRUARY 19, 2009



CLERK

Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5302N-
5302NA BCRE 230 Riverside LLC, Index 109809/06
Plaintiff-Respondent,

-against-

Erich Fuchs,
Defendant-Appellant.

Sandra D. Parker, New York, for appellant.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Aimee D. Drexler of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 9, 2007, which granted plaintiff's motion to vacate a prior order that had permitted defendant on default to amend its counterclaims, and upon reconsideration dismissed those counterclaims, and order, same court and Justice, entered January 18, 2008, which denied defendant's motion to renew the November 9, 2007 order with respect to the defamation counterclaim, unanimously affirmed, without costs.

Defendant's proposed amplified counterclaim for defamation and new counterclaims for injurious falsehood and malicious prosecution were "palpably insufficient as a matter of law" (*Davis & Davis v Morson*, 286 AD2d 584, 585 [2001]). The court thus properly denied defendant's motion for leave to amend.

The counterclaim for defamation, in both its original and amplified form, was deficient on its face because it failed to

meet the pleading requirements of CPLR 3016(a). In now alleging that "plaintiff and/or their agents or attorneys" stated to New York Post reporters false and defamatory "words to the effect" that defendant had been tossing urine and other fluids and objects from the terrace of his apartment onto construction workers below, and that as a result, plaintiff caused an article to be written repeating the false and defamatory words, the proposed amended counterclaim failed to state with particularity what the allegedly false statements were and who made them. Defendant's use of the qualifying "words to the effect," as well as his reliance on the text of a third party's paraphrasing of plaintiff's allegedly false statements, made these allegations insufficient to satisfy the particularity requirement of CPLR 3016(a) and rendered the proposed amended counterclaim defective (*Ramos v Madison Sq. Garden Corp.*, 257 AD2d 492, 493 [1999]); *Murganti v Weber*, 248 AD2d 208 [1998]). Defendant's contention that he is entitled to discovery to ascertain the particulars that are lacking is unavailing. Dismissal of a claim need not await disclosure where it is "otherwise deficient in failing to allege in haec verba the particular defamatory words" (*Cerick v MTB Bank*, 240 AD2d 274 [1997]), and is based instead on a paraphrased version (*see Le Sannom Bldg. Corp. v Dudek*, 177 AD2d 390, 391 [1991]).

We also find no merit to defendant's proposed counterclaim

for injurious falsehood. As with the defamation counterclaim, the proposed injurious falsehood counterclaim fails to specify with particularity the alleged falsehood uttered by plaintiff (*see Alexander & Alexander of N.Y. v Fritzen*, 114 AD2d 814, 816-817 [1985]). Moreover, the court's findings of fact in the earlier preliminary injunction hearing make clear that plaintiff's representatives had good reason to believe it was defendant who was dumping fluids and throwing debris on the construction workers. Accordingly, the circumstances under which the allegedly false statements were made to the New York Post reporters, if in fact made by plaintiff's representatives, flatly contradict defendant's contention that any such statements were made with intentional malice or with reckless disregard for the consequences flowing therefrom (*see Gilliam v Richard M. Greenspan, P.C.*, 17 AD3d 634, 635 [2005]). Defendant's allegation of special damages, a necessary element of an action for injurious falsehood that must be pleaded with particularity (*see Wasserman v Maimonides Med. Ctr.*, 268 AD2d 425, 426 [2000]), is wholly inadequate because it fails to allege specific injury to legally protected property interests (*see Cunningham v Hagedorn*, 72 AD2d 702, 704 [1979]). The allegation that defendant has incurred legal fees does not satisfy this requirement (*see Rall v Hellman*, 284 AD2d 113, 114 [2001]).

We similarly reject defendant's argument that the court

erred in denying him leave to add a counterclaim for malicious prosecution. In addition to failing on the elements of actual malice and special damages for the reasons set forth above, defendant's proposed counterclaim fails sufficiently to allege facts tending to show that plaintiff instituted the prior civil proceedings against him without probable cause (*see Burt v Smith*, 181 NY 1 [1905], *writ dismissed* 203 US 129 [1906]; *Rossi v Attanasio*, 48 AD3d 1025, 1028-1029 [2008]). As the testimony from plaintiff's witnesses at the preliminary injunction hearing made clear, plaintiff had reasonable cause to believe that defendant had committed the acts complained of against the construction workers, causing it to seek an injunction and to evict defendant. Plaintiff thus clearly had knowledge of facts, actual or apparent, strong enough to justify a reasonable person in believing he had lawful grounds for prosecuting defendant in the manner complained of (*see Burt*, 181 NY at 5).

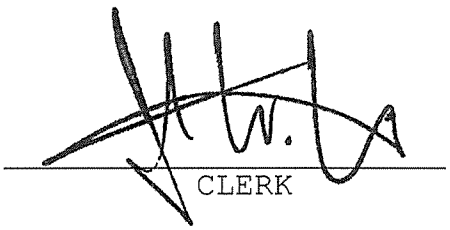
Finally, the court properly denied defendant's motion to renew with respect to the proposed amended counterclaim for defamation. Contrary to defendant's contention, the fact he had failed to apprise the court of having served the Post reporters with subpoenas was not "new" because the court had previously been aware of this through defendant's submissions in connection with his original motion for leave to amend and in opposition to plaintiff's motion to vacate. To the extent defendant argues

that the court overlooked this fact in considering plaintiff's motion to vacate, such an argument is consistent with a motion for reargument, the denial of which is not appealable (*see Siegel v Monsey New Sq. Trails Corp.*, 40 AD3d 960, 962 [2007]). In any event, even if the facts relied on were "new facts" properly considered on a motion to renew, they would not have changed the prior determination because the failure of defendant to avail himself of the discovery devices to ascertain the necessary facts to support his defamation counterclaim was but one of several infirmities that invalidated his defamation counterclaim (*see Peycke v Newport Media Acquisition II, Inc.*, 40 AD3d 722 [2007]).

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

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

ENTERED: FEBRUARY 19, 2009



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Tom, J.P., Moskowitz, Acosta, Freedman, JJ.

5303N-
5303NA-
5303NB-
5303NC Clarendon National Insurance Co., Index 106324/06
Plaintiff-Respondent,

-against-

Atlantic Risk Management, Inc.,
Defendant-Appellant.

Babchik & Young, LLP, White Plains (Jordan M. Sklar of counsel), for appellant.

Herrick, Feinstein LLP, New York (David L. Fox of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered December 19, 2007, which, insofar as appealed from as limited by the brief, declined to compel plaintiff to produce certain documents sought by defendant, unanimously modified, on the law and the facts, to direct plaintiff to make available for inspection or produce copies of all its claims files in which defendant acted as its third-party claims administrator (TPA) from 1997 to 2005, with each party bearing its own expenses, and otherwise affirmed, without costs.

Order, same court and Justice, entered December 19, 2007, which, insofar as appealed from as limited by the brief, denied defendant's motion to compel plaintiff to comply with certain of its discovery demands, including documents requested in defendant's First and Second Sets of discovery demands,

unanimously modified, on the law and the facts, to direct plaintiff to make available for inspection or produce copies of all its claims files in which defendant acted as its TPA from 1997 to 2005, with each party bearing its own expenses, and otherwise affirmed, without costs.

Order, same court and Justice, entered July 17, 2008, which, insofar as appealable, declined to consider defendant's motion to compel compliance with its Third and Fourth Sets of discovery demands, unanimously modified, on the law and the facts, the motion granted to the extent of directing plaintiff to make available for inspection or produce copies of all its claims files in which defendant acted as its TPA from 1997 to 2005, with each party bearing its own expenses, and otherwise affirmed, without costs.

Order, same court and Justice, entered August 7, 2008, which, insofar as appealed from as limited by the brief, denied without prejudice defendant's motion to compel plaintiff to comply with its Fifth Set of discovery demands, unanimously modified, on the law and the facts, to direct plaintiff to produce copies of any applicable reinsurance policies, and otherwise affirmed, without costs.

Many of defendant's requests for production, including its requests for all plaintiff's claims files in which plaintiff either agreed or disagreed with any of its TPAs' coverage

recommendations and all plaintiff's claims files containing key words such as "coverage," were overbroad and unduly burdensome (*see e.g. Belco Petroleum Corp. v AIG Oil Rig*, 179 AD2d 516, 517 [1992]). Nonetheless, to the extent plaintiff's action is premised on contentions that it consistently relied on and approved defendant's coverage recommendations, its claims handling practices are relevant to defendant's defense (*see Dias v Consolidated Edison Co. of N.Y.*, 116 AD2d 453 [1986]; *Austin v Calhoon*, 51 AD2d 958 [1976]). We find that directing plaintiff to produce all claims files in which defendant acted as TPA strikes an appropriate balance between defendant's legitimate interests in discovery of plaintiff's claims handling practices and coverage denial patterns and the burdensomeness and intrusiveness of its demands (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 747 [2000]). We see no reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests (*see Waltzer v Tradescape & Co., L.L.C.*, 31 AD3d 302, 304 [2006]).

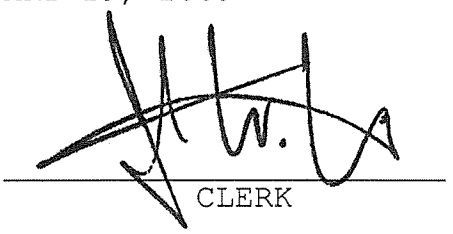
As to defendant's request for information relating to reinsurance policies available to Clarendon with respect to the claims at issue in this litigation, CPLR 3101(f) entitles defendant to copies of the applicable reinsurance policies

themselves (*see Anderson v House of Good Samaritan Hosp.*, 1 AD3d 970 [2003]).

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

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

ENTERED: FEBRUARY 19, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
David Friedman
Luis A. Gonzalez
James M. McGuire, JJ.

2859
Index 602379/05

Estee Lauder Inc.,
Plaintiff-Appellant,

-against-

OneBeacon Insurance Group, LLC, etc., et al.,
Defendants-Respondents.

Plaintiff appeals from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered December 12, 2006, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's motion for summary judgment on its third and fourth causes of action and its cross motion to dismiss defendants' defense of untimely notice.

Patton Boggs LLP, Washington, D.C. (John W. Schryber of counsel); Patton Boggs LLP, New York (Shannon W. Conway of counsel), and Morrison Cohen LLP, New York (Mary E. Flynn and Alvin C. Lin of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Michael A. Kotula, Gary D. Centola and Janice M. Greenberg of counsel), for respondents.

McGUIRE, J.

This breach of contract and declaratory judgment action commenced by plaintiff Estee Lauder Inc. against its insurer, defendant OneBeacon Insurance Group, LLC and its affiliates, arises from OneBeacon's refusal to defend and indemnify certain environmental claims asserted against plaintiff. The resolution of this appeal turns on whether OneBeacon waived its right to disclaim coverage on the ground that plaintiff failed to give it timely notice of certain claims against plaintiff.

By a letter to counsel for Lauder dated July 24, 2002, OneBeacon rejected Lauder's claim for defense and indemnity with respect to claims against Lauder relating to the Huntington and Blydenburgh landfills. Specifically, OneBeacon advised that it was "terminating its investigation of this matter and closing its file." The sole ground stated for this decision was that OneBeacon "cannot locate any further evidence" of the policy under which Lauder sought coverage, a policy that Lauder could not locate, although it identified the policy, which assertedly ran from September 19, 1968 to September 19, 1971, by its policy number. Thereafter, by a letter dated November 1, 2002, OneBeacon denied Lauder a defense to another action, the Hickey's Carting claim, relating to the Blydenburgh landfill. The stated ground for this decision was the same ground stated in the July 24 letter, i.e., that "OneBeacon has been unable to find any

other evidence to confirm the existence and terms of th[e] . . . policy" that Lauder contended OneBeacon's predecessor had issued. Referencing its July 24 letter and other correspondence, OneBeacon stated that it "stands by its prior disclaimers of coverage." Neither in the July 24 nor the November 1 letter did OneBeacon ever assert that Lauder had failed to give timely notice of a claim or occurrence, let alone disclaim coverage on the ground of such a failure by Lauder.

An insurer's "notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" (*General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]). Of course, an insurer may reserve the right to disclaim on such different or alternative grounds as it may later find to be applicable (*National Rests. Mgt. v Executive Risk Indem.*, 304 AD2d 387, 388 [2003]). However, "[a]n insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it learns of the accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer" (*Matter of Firemen's Fund Ins. Co. of New York v Hopkins*, 88 NY2d 836, 837 [1996] [internal quotation marks omitted]). Because of the insurer's duties to disclaim promptly and with specificity, "New York law establishes that an insurer is deemed, as a matter of law, to have intended to waive a

defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted defense" (*State of New York v Amro Realty Corp.*, 936 F2d 1420, 1431 [1991]).[1]

As the duties to disclaim promptly and specifically are imposed by law (*see Hotel Des Artistes, Inc. v General Acc. Ins. Co. of Am.*, 9 AD3d 181, 193 [2004], *lv dismissed* 4 NY3d 739 [2004]), an insurer cannot unilaterally absolve itself of these duties. Thus, an insurer cannot avoid a waiver of a defense of which it has actual or constructive knowledge (i.e., avoid its duties to disclaim promptly and with specificity on the basis of that defense), by a unilateral assertion in a disclaimer notice that it is reserving or not waiving a right to disclaim on other, unstated grounds (*id.* at 185, 193 [despite statement by insurer in its disclaimer letter that it was not waiving any rights or defenses under the policy not mentioned in the letter, insurer waived defense of late notice both because it failed to disclaim on this ground in the letter and because it failed to raise a

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[1]However, "where the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions), the doctrine of waiver is simply inapplicable" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]).

defense of late notice in its answer]; *see also Allstate Ins. Co. v Moon*, 89 AD2d 804, 806 [1982]).[2]

On the basis of, among other things, a tolling agreement between Lauder and the Attorney General relating to the Blydenburgh landfill claim that Lauder produced to OneBeacon in April 2000 (familiarity with which OneBeacon acknowledged on July 6, 2000), a notice of potential claim relating to the Huntington landfill that Lauder provided to OneBeacon in 1987 and a notification made by Lauder to OneBeacon and other carriers in May 1999 that the Attorney General had identified it as a "potentially responsible party" in connection with the Huntington landfill, it is clear that long before its July 2002 and November 2002 letters OneBeacon had sufficient knowledge of the circumstances relating to its defense of untimely notice. Indeed, OneBeacon does not argue otherwise in its brief.

Nor did Supreme Court conclude otherwise. Rather, Supreme Court reasoned that in light of the sweeping reservation of all of its rights, "that OneBeacon possessed sufficient knowledge to

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[2]We came to the same conclusion in *Benjamin Shapiro Realty Co. v Agricultural Ins. Co.* (287 AD2d 389 [2001]). There, we held that an insurer had waived the defense of untimely notice of occurrence when its disclaimer letter asserted a different lack of notice ground. Although it is not mentioned in our memorandum decision, Lauder correctly points out that the disclaimer letter in *Benjamin Shapiro* asserted that nothing in the letter should be construed "as a waiver of any of the terms and conditions of the policy, or of any rights or defenses provided by law, all of which are expressly reserved."

assert a late-notice defense by virtue of its receipt of the [tolling agreement] . . . is inconsequential." Thus, an erroneous conclusion of law -- namely, that as long as an insurer claims or reserves the right to do so, it may disclaim coverage on one ground and thereafter disclaim coverage on another ground even though it had actual or constructive knowledge of the latter ground at the time of the initial disclaimer -- was the basis for Supreme Court's conclusion that OneBeacon had not waived its right to assert a defense of late notice.[3]

OneBeacon is not persuasive in contending that it did not disclaim coverage in its July 2002 and November 2002 letters. As noted, in the July 2002 letter OneBeacon informed Lauder that it was "terminating its investigation of this matter and closing its file" with respect to Lauder's tender under the disputed pre-1971 policy (Policy No. E-16-40036-27) with regard to the Huntington and Blydenburg landfills. With respect to the Hickey's Carting claim, OneBeacon expressly referenced in its November 2002 letter the earlier decision to close its file and went on to state, "[p]lease be advised that OneBeacon had determined, at this time, it will not revisit its prior determination." Even assuming that OneBeacon did not state in either letter that it was

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[3]For this reason, Supreme Court denied Lauder's cross motion to dismiss OneBeacon's defense of untimely notice. For this same reason, and because Supreme Court concluded that Lauder had failed to give timely notice, Supreme Court granted OneBeacon's cross-motion for summary judgment dismissing the complaint.

"disclaiming" coverage, both letters made clear that OneBeacon was denying coverage.[4]

No case cited by OneBeacon supports the proposition that an insurer disclaims coverage only if it uses a form of the word "disclaim" in the course of denying coverage. The cases that are on point are to the contrary (*see e.g. Commercial Union Ins. Co. v International Flavors & Fragrances, Inc.*, 822 F2d 267, 270, 274 [2d Cir 1987] [construing New York law]). Moreover, to accept OneBeacon's position would exalt form over substance and invite gamesmanship. Because we conclude that OneBeacon did disclaim coverage in the July 2002 and November 2002 letters, we need not address Lauder's independent contentions that OneBeacon

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[4]As noted above, the November 2002 letter also stated that OneBeacon "stands by its prior *disclaimers* of coverage with regard to the *pre*-1971 policies issued by [its predecessor]" (emphasis added). OneBeacon plausibly argues that put in context the reference to "*pre*-1971" policies reflects a typographical error and that the letter intended and could only have been understood to refer to other, *post*-1971 policies. Given our view that the substance of both letters should be controlling, we think it irrelevant that in its November 2002 letter OneBeacon may not have expressly characterized the July 2002 letter as a "disclaimer[]" of coverage. We note, however, that a header to the November 2002 letter denominates the letter as a "SUPPLEMENTAL DISCLAIMER OF COVERAGE/RESERVATION OF RIGHTS" (capitalization in original). We note, too, that in separate letters dated November 11, 1999 relating to the claims arising out of the Blydenburgh and Huntington landfills, OneBeacon informed Lauder that "[a]s soon as we have completed our investigation, we will notify you of our coverage determination." Because OneBeacon stated that it was "terminating its investigation" in its July 2002 letter, Lauder argues that the November 11, 1999 letters afford an additional reason to conclude that the July 2002 and November 2002 letters constitute disclaimers, i.e., the promised "coverage determination."

constructively waived its untimely notice defenses by failing to assert them within a reasonable time (*see e.g. 151 E. 26th St. Assoc. v QBE Ins. Co.*, 33 AD3d 452 [2006]), and by failing to assert them with specificity in its answer to Lauder's complaint (*see e.g. Hotel des Artistes*, 9 AD3d at 193).

With respect to constructive waiver, one final contention by OneBeacon should be addressed. It argues that "where, as here, the existence of coverage has not been established because the insurance policy is missing, . . . an insurer cannot waive its right to disclaim coverage." To be sure, as noted above, "where the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions), the doctrine of waiver is simply inapplicable" (*Albert J. Schiff*, 51 NY2d at 698). Thus, where the putative insured fails to establish coverage, it is not created by the insurer's failure timely to disclaim coverage (*id.*). It does not follow, however, that when an insurer asserts that no policy was in effect during the relevant period, an untimely-notice *defense* to coverage need not be timely asserted.

OneBeacon's argument would be more compelling if the duties of an insurer to disclaim coverage in a timely, specific and nonselective manner were imposed solely by the terms of the contract of insurance. As noted above, however, those duties are imposed by law. So, too, at least where the policy is silent on

the subject, the conditions of reasonable-notice-of-occurrence and reasonable-notice-of-claim are implied into every insurance contract (*see Olin Corp. v Insurance Co. of N. Am.*, 743 F Supp 1044, 1051 [SD NY 1990] [construing New York law], *affd* 927 F2d 62 [2d Cir 1991]). Thus, as Lauder argues, knowledge of the policy's actual terms is not necessary to assert such defenses to coverage.[5]

Although there appears to be a paucity of precedent on the issue, OneBeacon's position is inconsistent with *Burt Rigid Box, Inc. v Travelers Prop. Cas. Corp.* (302 F3d 83 [2d Cir 2002]). In that case, the insurer defended in a coverage action brought by the insured on the ground, among others, that the insured had failed to prove the existence and terms of the alleged policies and thus that it was an insured (*id.* at 88-90). Nonetheless, construing New York law, a panel of the Second Circuit concluded that the insurer had waived its right to assert untimely notice

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[5]OneBeacon does not argue that policies it issued during the period in question relieved its insureds of these duties. To the contrary, OneBeacon's expert asserted that if the alleged policy existed, it "would have required Estee Lauder to notify the insurer in writing of the particulars of an 'occurrence' 'as soon as practicable' and to 'immediately' forward any claims made or suits brought against the insured to the insurer." Moreover, as Lauder observes, even as OneBeacon asserted in the seventh affirmative defense of its answer that Lauder had not proven the existence and terms of the disputed policy, OneBeacon's fourth affirmative defense asserted that it was not liable to the extent Lauder had failed to perform conditions that may be contained in the alleged policy "including, but not limited to, the notice . . . requirements."

when, in its answer, it disclaimed coverage on a number of specific grounds without specifically listing untimely notice (*id.* at 95-96). Although the panel did not expressly discuss the argument pressed by the insurer in the District Court that "a dispute over whether an insurance policy was ever issued negates the putative insurer's obligation to disclaim based on untimely notice of an occurrence" (126 F Supp 2d 596, 632 [WD NY 2001]), it implicitly rejected that argument.

We agree, moreover, with the reasoning of Magistrate Judge Foschio that "[i]mposing the duty on the insurer to provide an early disclaimer based on late notice of an occurrence or claim, even where the insurer claims there is no policy, enables the insured to make a prompt and fully informed decision as to whether to pursue efforts to establish the existence of the policy or to better invest its resources on investigating the potential claim, and preparing a defense" (*id.* at 633). Acceptance of OneBeacon's argument that an insurer is absolved of any duty to make timely, specific and nonselective disclaimers on the basis of defenses to coverage when the insurer denies that a policy was issued would entail an extraordinary proposition: that if the insurer ultimately is found to have issued the policy -- even after litigation over a period of years -- the insurer nonetheless still can disclaim on the basis of defenses to coverage it could have asserted prior to or at the outset of the

litigation.

Finally, although Supreme Court denied Lauder's motion for partial summary judgment on its third and fourth causes of action, it did not discuss that motion in its decision and apparently denied it as moot given its determination that OneBeacon was entitled to summary judgment dismissing the complaint. We grant Lauder's motion. Lauder came forward with sufficient secondary evidence of the disputed pre-1971 policy -- including, specifically, a renewal policy issued to it by OneBeacon's predecessor stating in the declaration page that the policy being renewed is the disputed policy, No. E16-40036-27, and two certificates of insurance signed by the predecessor in 1969 and 1970, both certifying, among other things, that the policy, No. E16-40036-27, was issued to Lauder effective September 18, 1968 with an expiration date of September 18, 1971 -- to establish the existence of the policy and to invoke the presumptions that the terms of the renewal policy are identical to the terms of the policy being renewed and that the policy being renewed, like the renewal policy, was a three-year policy ending on September 18, 1971 (*see Century Indem. Co. v Aero-Motive Co.*, 254 F Supp 2d 670, 692 [WD Mich 2003] [upholding insured's reliance "on the rule that unless an agreement to the contrary is shown, a renewal policy is presumed to be on the same terms, conditions, and amounts as provided in the original

policy"]; *Lewitt & Co. v Jewelers' Safety Fund Socy.*, 249 NY 217, 222 [1928] ["Clearly, a policy which renews an old policy must renew the terms of that policy as they stood at the moment of expiration. An agreement to *renew* a policy, implies that the terms of the existing policy are to be continued . . . in the absence of evidence, that a change was intended"] [emphasis in original; internal quotation marks omitted]). As Lauder would be entitled to a defense under the duty-to-defend clause in the renewal policy, it adduced sufficient evidence on its motion to establish that it is entitled to a defense in the underlying actions that are the subject of its third and fourth causes of action.[6]

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[6]The third cause of action alleges that OneBeacon breached its duty to defend Lauder in the Hickey's Carting action and claims that Lauder is entitled to recover all post-tender reasonable fees and expenses necessarily incurred in defense of that action, plus pre-judgment interest accruing from the date of OneBeacon's repudiation of its duty to defend. Although the third cause of action identifies that date as "October 2002," that date appears to reflect a typographical error as Lauder contends only that OneBeacon disclaimed coverage in its November 1, 2002 letter. We do not understand Lauder to be claiming that it is entitled to fees and expenses in excess of the applicable policy limits. The fourth cause of action claims that with respect to any future defense costs Lauder may incur in defense of the Blydenburgh landfill claim and the Hickey's Carting action, it is entitled to a declaration that such defense costs must be paid promptly by OneBeacon to the extent that they are reasonable and necessary. Again, we do not understand Lauder to be seeking the recovery of defense costs in excess of the applicable policy limits. The fourth cause of action also claims that Lauder is entitled to a declaration that any reasonable settlement of the Blydenburgh landfill claim and the Hickey's Carting action must be timely indemnified by OneBeason up to the applicable loss limits. However, Lauder does not mention this

In its opposition, OneBeacon failed to meet its burden of coming forward with evidentiary facts sufficient to raise any material issues of fact that would require denial of Lauder's motion (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 343 [1974]). As the affidavit of Lauder's expert submitted in its reply convincingly demonstrates, OneBeacon's expert offered only unsupported assumptions and speculation (*see Aero-Motive*, 254 F Supp 2d at 692-693; *Batista v Rivera*, 5 AD3d 308, 309 [2004]; *Warden v Orlandi*, 4 AD3d 239, 242 [2004]; *Leggio v Gearhart*, 294 AD2d 543, 545 [2002]). For this same reason, OneBeacon failed to raise a material issue of fact supporting its position -- on which it bears the burden of proof (*see Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002]) -- that the disputed policy would have contained a pollution exclusion during the entire policy period.

Accordingly, the order of Supreme Court, New York County (Carol R. Edmead, J.), entered December 12, 2006, which granted defendants' motion for summary judgment dismissing the complaint,

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claim for indemnification in its briefs and thus we limit the declaration to the claim for defense costs. Finally, for reasons that are not explained by Lauder in its briefs, it did not move for summary judgment on its first and second causes of action, asserting breach of contract on account of OneBeacon's failure to provide a defense to and repudiation of its obligation to indemnify with respect to, respectively, the Huntington landfill and Blydenburgh landfill cases.

and denied plaintiff's motion for summary judgment on its third and fourth causes of action and plaintiff's cross motion to dismiss defendants' defense of untimely notice, should be reversed, on the law, with costs, defendants' motion for summary judgment should be denied, plaintiff's motion for summary judgment on its third and fourth causes of action granted, plaintiff's cross motion for summary judgment dismissing defendants' untimely notice defense with respect to plaintiff's first and second causes of action granted, and the matter remanded to Supreme Court for further proceedings.

All concur.

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

ENTERED: FEBRUARY 19, 2009

CLERK