SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 24, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Gonzalez, Buckley, Acosta, JJ.

3082 The People of the State of New York, Ind. 3681/04
Respondent,

-against-

Patrick Watson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell, New York (Michel Beshara of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

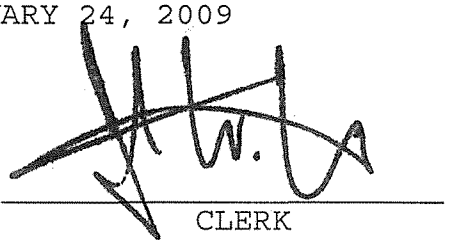
Judgment, Supreme Court, New York County (Robert Straus, J. at hearing; Robert M. Stolz, J. at jury trial and sentence), rendered March 29, 2005, as amended March 5, 2007, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees, and resentencing him, as a second felony offender, to concurrent prison terms of 4½ to 9 years and 3 to 6 years, respectively, unanimously affirmed.

Previously, we held this matter in abeyance and remanded for a *Mapp* hearing (49 AD3d 385 [2008]). We find no basis to disturb the hearing court's credibility determinations (*see People v Muhammed*, 300 AD2d 54 [2002], *lv denied* 99 NY2d 657 [2003]), or

to conclude that the denial of the suppression motion was error (*see People v Butler*, 292 AD2d 151 [2002], *lv denied* 98 NY2d 673 [2002]). Defendant's challenge to the adequacy of the trial court's response to a jury note is unpreserved (*see People v O'Hara*, 96 NY2d 378, 383 [2001]), and we decline to reach the issue in the interest of justice. As an alternative holding, we find that the court's response was meaningful (*see People v Santi*, 3 NY3d 234, 248-249 [2004]).

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

ENTERED: FEBRUARY 24, 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 24, 2009.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
Luis A. Gonzalez
James M. McGuire
Rolando T. Acosta, Justices.

Keith Fernandez,
Plaintiff-Respondent,

Index 112474/06

-against-

4930

One Bryant Park LLC, et al.,
Defendants-Appellants,

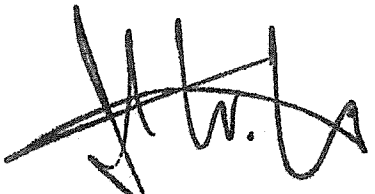
Tishman Construction Corporation
of Manhattan,
Defendant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on or about June 11, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the correspondence of the parties dated February 5, 2009,

It is unanimously ordered that said appeal be and the same is hereby dismissed as moot, without costs, in view of the order, same court and Justice, entered January 30, 2009.

ENTER:



Clerk.

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5019 Michael D. Brockman, Index 350491/00
Plaintiff-Appellant,

-against-

Ellen Brockman,
Defendant-Respondent.

Bondi & Iovino, Garden City (Desirée Lovell Fusco of counsel), for appellant.

Iris M. Darvin, New York (Mona R. Millstein of counsel), for respondent.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered October 19, 2007, which denied plaintiff's motion for an accounting, for permission to serve discovery demands, and to terminate his obligation to pay maintenance to defendant, and granted defendant's cross motion for, inter alia, a money judgment for basic child support and maintenance from June 2005 through June 2007, additional accrued arrears, and counsel fees, unanimously affirmed, without costs.

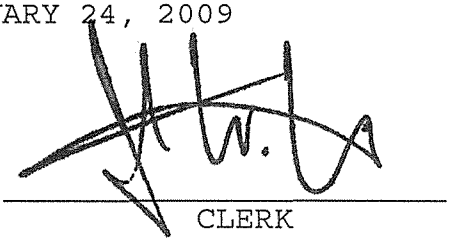
Plaintiff's submissions failed to raise genuine issues of fact as to his maintenance and child support obligations or the propriety of the money judgment for basic child support and maintenance from June 2005 through June 2007. Nor has plaintiff shown entitlement to an accounting as to defendant's sale of certain photographs pursuant to a May 2004 stipulation between

the parties (*see Silber v Rainess & Co.*, 34 AD2d 188, 191-192 [1970], *affd* 28 NY2d 612 [1971]). Accordingly, the court also properly denied him discovery as to the sale of the photographs.

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

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

ENTERED: FEBRUARY 24, 2009



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Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5103 184 West 10th Street Corp., Index 570228/06
Petitioner-Appellant,

-against-

Siiri Marvits,
Respondent-Respondent.

Borah, Goldstein, Altschuler, P.C., New York (Paul N. Gruber of counsel), for appellant.

De Castro Law Firm, New York (Steven De Castro of counsel), for respondent.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered November 21, 2007, which reversed an order of the Civil Court, New York County (Ernest J. Cavallo, J.), entered on or about April 13, 2006, awarding possession to petitioner, and instead dismissed the petition, unanimously affirmed, without costs.

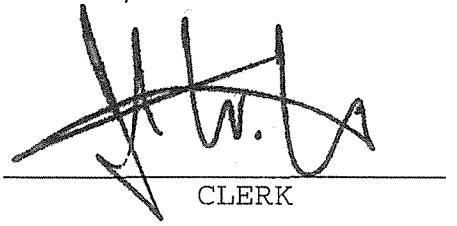
Respondent met her burden of demonstrating that she harbored her two cats "openly and notoriously" by showing that she kept the cats and their effects in an open manner, as any cat owner ordinarily would do, without hiding them from the landlord or his agents. In particular, the presence of the cats' litter box in the bathroom was an unmistakable indicium of cat ownership. The cats' shy nature and tendency to hide from strangers notwithstanding, respondent was not required to display the cats

in public (*see* Administrative Code of the City of New York § 27-2009.1; *Matter of Robinson v City of New York*, 152 Misc 2d 1007, 1010-1011 [Sup Ct, NY County, 1991]).

The building contractor retained by petitioner to perform scheduled minor repairs was the type of long-term independent contractor who serves as an agent for purposes of imputing knowledge to the landlord under the Pet Law *(Seward Park Hous. Corp. v Cohen*, 287 AD2d 157, 166 [2001]).

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

ENTERED: FEBRUARY 24, 2009



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Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5306 Sherin Saffore, Index 16588/05
Plaintiff-Appellant,

-against-

Abdulakeem Fasinro,
Defendant-Respondent.

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

Gannon, Rosenfarb & Moskowitz, New York (Jennifer B. Ettenger of counsel), for respondent.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered January 14, 2008, which, in an action for personal injuries sustained when plaintiff slipped on water in the kitchen of an apartment leased by her daughter and owned by defendant, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

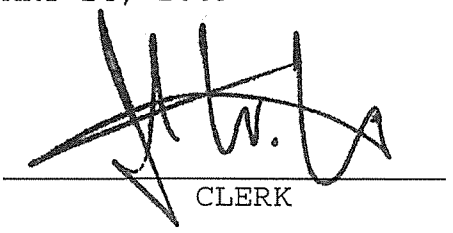
Defendant testified at deposition that about three months before the accident, he received a complaint from plaintiff's daughter about a leak, which he discovered was caused by an upstairs toilet that clogged and overflowed, and which he immediately fixed by shutting off the water to the toilet and, the next morning, having his relatives clear the clog. Defendant further testified that neither plaintiff nor her daughter again complained about water problems before the accident; that about a

week before the accident, he performed a yearly inspection of the apartment and did not observe any leaks; and that when informed about the accident about a week after it occurred, he again entered the apartment and observed no water on the floor or wetness in areas to which he was directed by the daughter. This testimony satisfied defendant's initial burden of showing that he did not have notice of the alleged water condition that caused plaintiff's slip and fall (*see Lopez v Crotona Ave. Assoc., LP*, 39 AD2d 388, [2007]; *McFadden v 530 Fifth Ave., RPS III Assoc., LP.*, 28 AD3d 202 [2006]). Affidavits from defendant's relatives were not necessary given his testimony from personal knowledge that neither plaintiff nor her daughter again complained about water problems after the incident involving the upstairs toilet. In opposition, plaintiff offered only hearsay to the effect that her daughter continued to complain to defendant about leaks after the incident involving the upstairs toilet. As noted by the motion court, plaintiff did not submit an affidavit from her daughter and the daughter did not appear for a noticed deposition. Under the circumstances, these hearsay statements are insufficient to raise an issue of fact (*see Iurato v City of New York*, 9 AD3d 301, 303 [2004]) as to whether a recurring water problem in the area of the accident was routinely left

unaddressed by defendant (*see O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106, 106-107 [1996]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: FEBRUARY 24, 2009



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Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5307-
5307A In re Ana Luisa B.,
Petitioner-Respondent,

-against-

Paul H. A.,
Respondent-Appellant.

Paul H. A., appellant pro se.

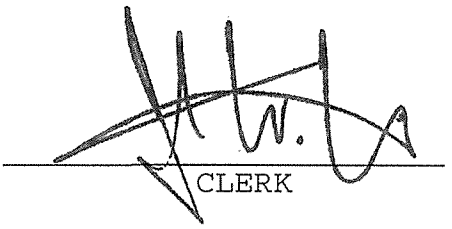
Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about July 18, 2007, which denied respondent father's objections to the Support Magistrate's order granting petitioner mother's application for counsel fees to the extent of directing respondent to pay petitioner $6,682.63, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about December 20, 2007, which denied respondent's motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

The record supports the court's finding that the proceedings were complicated and discovery prolonged by respondent's unwillingness or inability to disclose in full his financial circumstances, and that the income disclosed in respondent's tax returns is insufficient to cover his basic living expenses, child support obligation, and other expenditures, including attorneys' fees. Thus, although petitioner failed to substantiate her suspicions that respondent has undisclosed income or assets,

under all of the circumstances, including respondent's substantially greater assets, it was a provident exercise of discretion to direct him to pay half of the attorneys' fees incurred by petitioner in proceedings seeking modification and enforcement of a child support order (Family Ct Act § 438[a]; *see Anna-Sophia L. v Paul H.*, 52 AD3d 313 [2008]; *see also Kahn v Oshin-Kahn*, 43 AD3d 253 [2007] [mother entitled to an award of attorneys' fees notwithstanding that father entitled to a reduction of his maintenance and child support obligations]; *see generally O'Shea v O'Shea*, 93 NY2d 187, 193 [1999]). We have considered and rejected respondent's other arguments.

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

ENTERED: FEBRUARY 24, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5308 Evelyn Nieves, Index 13450/05
Plaintiff-Respondent,

-against-

Burnside Associates, LLC,
Defendant-Appellant,

The City of New York,
Defendant.

Morrison Mahoney LLP, New York (Demi Sophocleous of counsel), for appellant.

Robin Mary Heaney, Rockville Centre, for respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered June 26, 2008, which denied defendant Burnside's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Burnside Associates, LLC dismissing the complaint as against it.

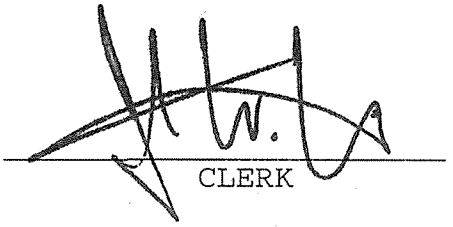
Out-of-possession owner Burnside, which had no contractual obligation to repair, cannot be liable for plaintiff's alleged injury absent an allegation that the defective condition resulting in the accident constituted a specific statutory safety violation (*see Vasquez v The Rector*, 40 AD3d 265, 266 [2007]); plaintiff failed to establish any such violation. Moreover, Burnside's managing agent averred, without contradiction, that Burnside had never been given actual notice of the defect. With

respect to constructive notice, plaintiff testified that despite numerous visits to the workplace parking lot where she fell, she had never before seen the defect in the pavement. There was no evidence that Burnside had created the defect when it constructed the parking lot several years earlier.

In view of the foregoing, it is unnecessary to address plaintiff's remaining contentions.

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

ENTERED: FEBRUARY 24, 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 24, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 3562/07
Respondent,

-against- 5310

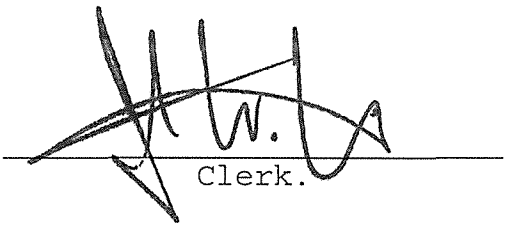
Dennis Watson,
Defendant-Appellant.

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 October 24, 2007,

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

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

ENTER:



Clerk.

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

Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5313-
5314 The People of the State of New York,
Respondent,

Ind. 1490/05

-against-

Jamar Lott,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Arent Fox LLP, New York (Stergios P. Kosmidis 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 J. Tejada, J.), rendered August 10, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of 5 years, unanimously affirmed.

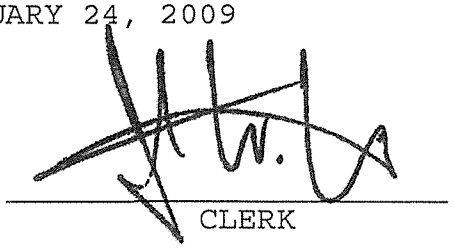
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The jury could have reasonably concluded that defendant or another participant in the sale secreted most of the

prerecorded buy money by means that went undetected by the police.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 24, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5315 Richard A. Williamson, Esq., etc., Index 100828/04
Plaintiff-Appellant,

-against-

Ron Delsener,
Defendant-Respondent,

Judith Holston, et al.,
Defendants.

Labaton Sucharow LLP, New York (Jonathan Gardner of counsel), for appellant.

Mitchell Silberberg & Knupp LLP, New York (Jane G. Stevens of counsel), for respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered November 13, 2007, to the extent it denied plaintiff's motion for judgment on a negotiated settlement, unanimously reversed, on the law, with costs, and plaintiff awarded against defendant Delsener the principal amount of $84,868.20, plus statutory interest from December 12, 2006. The Clerk is directed to enter judgment accordingly.

The e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds (*see Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [2008], *lv dismissed* 10 NY3d 930 [2008]), and entitle plaintiff to judgment (CPLR 5003-a[e]). The agreement to settle at 60% of the amount demanded was sufficiently clear and concrete to constitute an enforceable

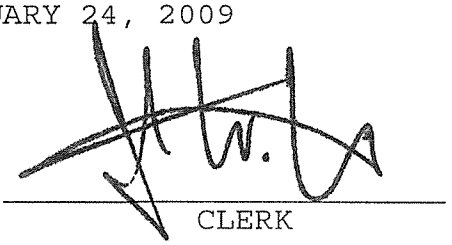
contract (*see Hostcentric Tech. v Republic Thunderbolt*, 2005 US Dist LEXIS 11130, 2005 WL 1377853 [SD NY]). Delsener's subsequent refusal to execute form releases and a stipulation of discontinuance did not invalidate the agreement (*see Wronka v GEM Community Mgt.*, 49 AD3d 869 [2008]; *Cole v Macklowe*, 40 AD3d 396 [2007]).

The e-mail communications indicate that Delsener was aware of and consented to the settlement; the record contains no indication to the contrary, or that counsel was without authority to enter into the settlement (*see Hallock v State of New York*, 64 NY2d 224 [1984]; *cf. Katzen v Twin Pines Fuel Corp.*, 16 AD3d 133 [2005]). To the contrary, the record supports only the conclusion that counsel at least had apparent authority.

We find no merit to Delsener's argument that this Court lacks jurisdiction to hear this appeal.

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

ENTERED: FEBRUARY 24, 2009



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Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5318 The People of the State of New York, Dkt. 040976C/06
Respondent,

-against-

Terrence Dunmeyer,
Defendant-Appellant.

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

Judgment, Criminal Division of the Supreme Court, Bronx County (Judith Lieb, J.), rendered on or about August 9, 2006, unanimously affirmed.

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

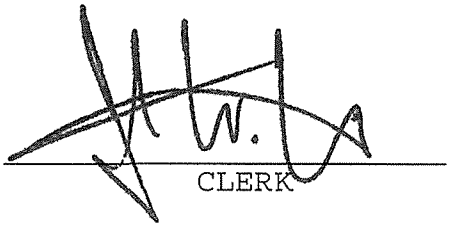
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: FEBRUARY 24, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5319 A. Louis Shure, Index 114275/03
Plaintiff-Appellant,

-against-

New York Cruise Lines, Inc., et al.,
Defendants-Respondents,

Arcorp Properties, Inc., etc.,
Defendant.

Litman & Litman, P.C., East Williston (Jeffrey E. Litman of counsel), for appellant.

Freehill Hogan & Mahar LLP, New York (Justin T. Nastro of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered September 26, 2007, which, upon reargument, granted defendants' motion to vacate a prior order restoring this action to the calendar and reinstate an earlier order dismissing the complaint, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion denied, the complaint reinstated, and the parties are directed to complete discovery within 60 days of service of a copy of this order.

Plaintiff was allegedly injured in 2001 when he fell on a defective gangplank ramp while boarding a cruise ship owned and operated by defendants. After initially participating in discovery, including providing authorizations to obtain medical records, plaintiff failed to provide medical authorizations concerning subsequent illnesses or to appear at a deposition or

independent medical examination. He allegedly suffered strokes in October 2004 and January 2005, and had various other medical problems that required hospitalization or inpatient rehabilitation for extended periods of time from October 2004 until approximately September 2005.

The complaint was dismissed on default in November 2005 for plaintiff's failure to comply with discovery. In seeking to vacate that dismissal order and have the action reinstated, plaintiff detailed the medical conditions and hospitalization that purportedly prevented his compliance with discovery, and indicated that he had now sufficiently recovered to resume discovery.

Plaintiff's motion was granted on default in April 2007, and the action was reinstated on condition that he file proof of appearance for deposition within 60 days of entry of the court's reinstatement order. The following month, defendants moved to reargue, seeking reinstatement of the November 2005 dismissal of the complaint. The court granted that motion, citing periods of time between plaintiff's strokes in which some discovery could have been completed.

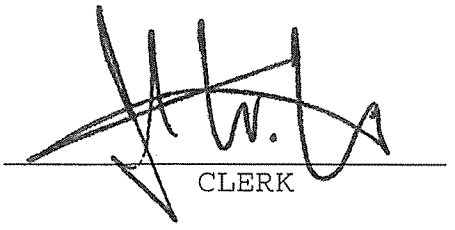
An action may be dismissed where a party refuses to obey an order for disclosure or willfully fails to disclose information the court finds ought to have been disclosed (CPLR 3126). Wherever possible, however, actions should be resolved on the

merits. Litigants who have not replied expeditiously to notices for discovery and inspection should be afforded reasonable latitude before imposition of the ultimate sanction (*see Bassett v Bando Sangsa Co.*, 103 AD2d 728 [1984]), and a complaint should not be dismissed under these circumstances unless the failure to comply was willful, contumacious or due to bad faith (*Weissman v 20 E. 9th St. Corp.*, 48 AD3d 242 [2008]). The court made no express findings in that regard.

Based on plaintiff's affidavit, it is likely that his medical problems interfered with his ability to complete the outstanding discovery. Prior to his first stroke, he actively participated in discovery. The periods of time when he was not hospitalized or in a rehabilitation facility between October 15, 2004 and September 1, 2005 were very brief. Defendants did not demonstrate that plaintiff had willfully failed to comply with the scheduling orders of the court. Dismissal of the complaint was too harsh a penalty under these circumstances.

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

ENTERED: FEBRUARY 24, 2009



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Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5320 The People of the State of New York, Ind. 5995C/05
Respondent,

-against-

Khaliyq Sellers,
Defendant-Appellant.

The Legal Aid Society, New York (Steven Banks of counsel), and Dewey & LeBoeuf, LLP, New York (Amelia Lister of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered January 30, 2007, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 8 years, unanimously affirmed.

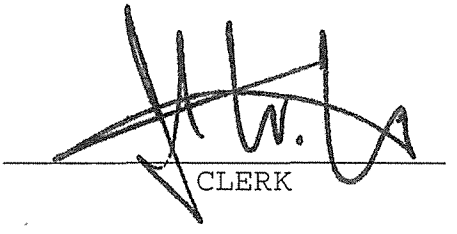
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's intent to cause, at the very least, serious physical injury could be readily inferred from his act of firing a shotgun at the victim from a distance of four feet (*see People v Getch*, 50 NY2d 456, 465 [1980]). The evidence also disproved defendant's justification defense beyond a reasonable doubt.

Defendant did not preserve his argument that the court should have placed annotations on the verdict sheet

differentiating between the two counts of first-degree assault, or his challenges to the court's main and supplemental jury instructions, and we decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal. Defendant also claims that by failing to raise these issues, as well as an issue regarding the prosecutor's alleged interruptions of defendant's grand jury testimony, his attorney rendered ineffective assistance. However, to the extent the present record permits review, we conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even if counsel should have made all the arguments at issue, his failure to do so did not cause defendant any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]).

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

ENTERED: FEBRUARY 24, 2009



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Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5321 In re Michael Brooke Webster, Index 107302/06
Petitioner-Appellant,

-against-

Police Department of the City
of New York, et al.,
Respondents-Respondents.

Stuart Salles, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondents.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about September 10, 2007, which, in an article 78 proceeding challenging respondent Police Department's determination to dismiss petitioner as an Auxiliary Police Officer, after a hearing, granted respondent's cross motion to dismiss the petition as barred by the statute of limitations, unanimously reversed, on the law, without costs, the cross motion denied, and the matter remanded for further proceedings.

Petitioner testified, without contradiction, that several months after being told not to go out on patrol, he was instructed to attend a "fact-finding" interview with the Internal Affairs Bureau, that the interview concerned the engagement of fundraisers by an auxiliary police association of which petitioner was president, and that petitioner was assured that there would be a second interview at which he would have an

opportunity to bring in additional information he did not have with him because he was not informed in advance of the subject of the interview, but that the second interview never took place. Instead, about six weeks later, petitioner received a phone call instructing him to turn in his badge and ID. The Commanding Officer of the Auxiliary Police testified that when petitioner called him next day for an explanation, he told petitioner that he was being terminated because of the results of the IAB investigation into petitioner's association with an internet telemarketing company, that the termination could not be changed to a resignation, and that the order came straight from the Commissioner himself. The Commanding Officer also testified that he did not share with petitioner a report about the investigation and other items of information in his possession because the conversation was "too quick" to "go into specific[s]," that an instruction to turn in a badge and ID is consistent with a suspension, and that the process of termination for disciplinary reasons, which would ordinarily involve an administrative hearing with notice of charges, in this instance was "totally out of the ordinary." Petitioner, for his part, denied the substance of the Commanding Officer's testimony, testifying that the latter made it clear that he simply had no information to give.

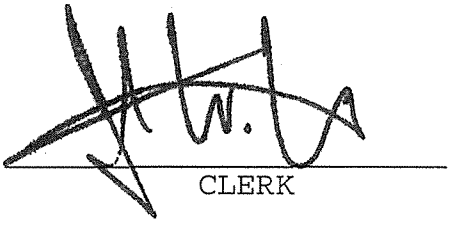
Supreme Court did not explicitly credit the Commanding Officer's testimony that he had told petitioner that he was being

terminated. Instead the court found that the Commanding Officer "confirmed" the instruction to petitioner to turn in his badge and ID, and that such instruction, together with petitioner's inactive status and the IAB interview, had to have given "any reasonable person in [petitioner's] position" notice that he was being terminated. We disagree. The instruction was admittedly consistent with a suspension, and was especially ambiguous here since petitioner had already been placed on inactive duty, an apparent de facto suspension. Furthermore, respondent's own Auxiliary Patrol Guide provides for specific due-process procedures to be followed when charges are brought seeking dismissal of an Auxiliary Officer, including a hearing at which the testimony is to be taped, but none of these procedures were followed here. Assuming, as respondent argued before Supreme Court, that the Commissioner, who made the decision to terminate petitioner, need not comply with these procedures, the failure to do so added to the ambiguity of the purported notice. In short, we find that respondent failed to carry its burden of demonstrating that it gave petitioner unambiguous notice of his termination. Accordingly, the four-month statute of limitations began to run, not on the date in late December 2004, when petitioner spoke with the Commanding Officer, but on January 30, 2006, when petitioner's counsel was advised that he had been

terminated (*see Matter of Vadell v City of New York Health & Hosps. Corp.*, 233 AD2d 224, 225 [1996], citing, inter alia, *Matter of Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]; *see also City of New York v State of New York*, 40 NY2d 659, 670 [1976]).

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

ENTERED: FEBRUARY 24, 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 24, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Leland G. DeGrasse, Justices.

The People of the State of New York, SCI 3867/03
Respondent,

-against- 5322

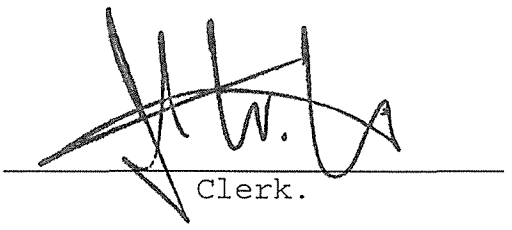
Alex Rudd,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, Bronx County (Joseph Fisch, J.), rendered on or about October 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.

ENTER:



Clerk.

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

Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5323N In re JJF Associates, LLC, Index 108893/08
Petitioner-Appellant,

-against-

John Joyce, Jr., et al.,
Respondents-Respondents.

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith and Jeremy S. Rosof of counsel), for appellant.

Wayne Greenwald, P.C., New York (Wayne Greenwald of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered August 19, 2008, which denied petitioner's motion for a preliminary injunction to stay arbitration, and granted respondents' cross motion to dismiss this proceeding, unanimously affirmed, with costs.

The application to stay was untimely, having been brought more than 20 days after the demand for arbitration (CPLR 7503[c]). The court thus lacked the authority to address the issue of the arbitrator's jurisdiction (*Matter of Hartford Ins. Co. [Martin]*, 16 AD3d 149 [2005]). The exception stated in *Matter of Matarasso (Continental Cas. Co.)* (56 NY2d 264 [1982]) does not apply because it is undisputed that an arbitration agreement existed between the parties. In fact, it was

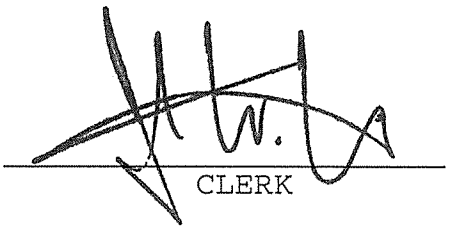
petitioner who first compelled arbitration of the dispute; its current argument simply attacks the present viability of the contract containing the agreement to arbitrate (*see Matter of Fiveco, Inc. v Haber*, 11 NY3d 140, 145 [2008]).

Moreover, petitioner cannot avail itself of CPLR 7503 since it participated in the arbitration to the extent of attending a pre-hearing conference with the selected arbitrator, at which a hearing schedule and ground rules were decided upon, and even moved before the arbitrator to dismiss the proceeding on the ground that it was improperly brought (*see Matter of North Riv. Ins. Co. [Morgan]*, 291 AD2d 230, 233 [2002]; *Matter of Arner v Liberty Mut. Ins Co.*, 233 AD3d 321 [1996]; *Mufale v Romeo*, 122 AD2d 591 [1986]). Clearly, petitioner's attack on the propriety of the arbitrator's determination -- on the ground that any defect in the original demand was rectified -- constitutes an improper appeal of a nonfinal decision (*see Mobil Oil Indonesia v Asamera Oil [Indonesia]*, 43 NY2d 276, 281-282 [1977]). Because petitioner failed to establish a likelihood of success on the merits, the court properly denied the motion for a preliminary injunction to stay arbitration, and dismissed the proceeding (*Mark Ross & Co., Inc. v XE Capital Mgt., LLC.*, 46 AD3d 296 [2007]).

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

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

ENTERED: FEBRUARY 24, 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 24, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Leland G. DeGrasse, Justices.

In re Marcus Johnson,
Petitioner,

-against-

Ind. 1748/99

5324-
[M-5968]

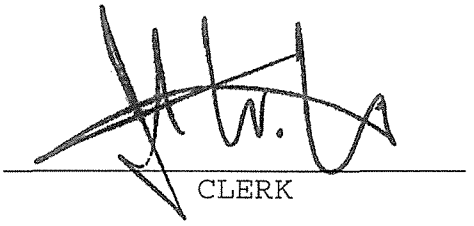
Hon. Marcy L. Kahn, etc.,
Respondent.

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

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

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

ENTER:



CLERK

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5325 The People of the State of New York, Ind. 1982/05
Respondent,

-against-

Jose Tolentino, etc.,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered September 28, 2005, convicting defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

The court properly denied, without granting a hearing, defendant's motion to suppress Department of Motor Vehicles records relating to the suspension of his driver's license. Defendant moved to suppress these records as fruits of an allegedly unlawful vehicular stop, during which the police obtained defendant's pedigree information and thereby obtained his DMV information through a computer check.

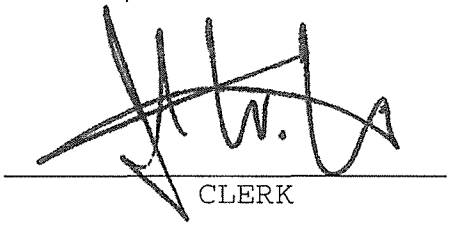
Although a defendant need not establish a privacy interest in an alleged fruit of a preexisting violation of his or her Fourth Amendment rights, we agree with those courts (*see e.g.*

People v Cobb, 182 Misc 2d 808 [Crim Ct, Kings County 1997]) that have concluded that DMV records are not suppressible fruits. "The...identity of a defendant...is never itself suppressible as a fruit of an unlawful arrest..." (*Immigration & Naturalization Serv. v Lopez-Mendoza*, 468 US 1032, 1039 [1984]). Thus, "there is no sanction to be applied when an illegal arrest only leads to discovery of [a person's] identity and that merely leads to the official file" (*United States v Guzman-Bruno*, 27 F3d 420, 422 [9th Cir 1994], *cert denied* 513 US 975 [1994] [internal quotation marks omitted]). Furthermore, the DMV records were compiled independently of defendant's arrest (*see People v Pleasant*, 54 NY2d 972, 973-974 [1981], *cert denied* 455 US 924 [1982]; *People v Bargas*, 101 AD2d 751, 752 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 24, 2009



CLERK

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5326 Gail Anderson, Index 23558/06
Plaintiff-Respondent,

-against-

Creston Associates, LLC,
Defendant-Appellant.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for appellant.

Jason Levine, New York, for respondent.

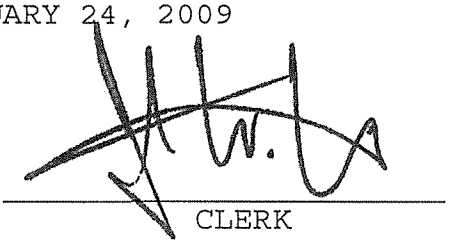
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 2, 2008, which granted plaintiff's motion for partial summary judgment, unanimously reversed, on the law, without costs, the motion denied and the matter remanded for further proceedings.

General Municipal Law § 205-e created a cause of action for police officers injured in the course of their duties, where such injuries are shown to be practically and reasonably connected to a violation by the defendant of a statute or code. There are triable issues of fact here as to the applicability of various provisions of the Building Code relied on by plaintiff (*see Sarmiento v C & E Assoc.*, 40 AD3d 524 [2007]). Defendant contends that the cited provisions of the 1968 Building Code and 1929 Multiple Dwelling Law are inapplicable because the building in question was erected in 1892. Plaintiff contends that certain

"alterations" brought the building within the purview of the 1968 Code, but has not demonstrated that the nature and extent of the alterations subjected the building to the Code provisions cited. Furthermore, on this record, a factual dispute exists as to the applicability of the Housing Maintenance Code (New York City Administrative Code § 27-2005).

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

ENTERED: FEBRUARY 24, 2009



CLERK

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5327 In re Brenda J.,
Petitioner-Respondent,

-against-

Nicole M.,
Respondent-Appellant.

Law Office of Kenneth M. Tuccillo, Hastings-On-Hudson (Kenneth M. Tuccillo of counsel), for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Lisa L. Ruesch of counsel), Law Guardian.

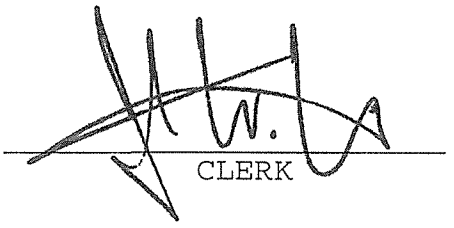
Order, Family Court, Bronx County (Marian R. Shelton, J.), entered on or about December 24, 2007, finding that respondent, the child's mother, is an unfit parent and represents an ongoing danger to the subject child, and awarding custody of the child to petitioner, the child's grandmother and respondent's mother, unanimously affirmed, without costs.

The finding of unfitness (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]) has ample support in the record, including petitioner's testimony, which was credited by the court; respondent's admissions concerning her use of corporal punishment and testimony that she continues to believe in it; photographs, hospital records and the report of the ACS caseworker documenting scars that resulted from the punishment; and the testimony of the court-appointed psychologist that, despite parenting classes and counseling, the child would be in

danger were he to be left in an unsupervised situation with respondent because of her history of explosive, aggressive behavior and lack of self-control. The psychologist also testified that respondent was unwilling to continue therapy, lacked insight into her weaknesses as a parent, and suffered from significant mental problems. The finding as to the child's best interests is supported by the psychologist's testimony that petitioner is supportive and sensitive to the child's needs, went to great lengths to ensure that the child was safe from respondent, and provided a stable and loving home environment. Any irregularity in the temporary custody award to petitioner was rendered academic by the subsequent permanent custody award, which was reached after a full and fair hearing (*see Matter of Miller v Shaw*, 51 AD3d 927, 927-928 [2008], *lv denied* 11 NY3d 706 [2008]).

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

ENTERED: FEBRUARY 24, 2009



Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5328 Bruce Juliani, Index 118798/06
Plaintiff-Respondent,

-against-

Sam Nahorai doing business as
International Antique Buyers,
Defendant-Appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Hauser & Associates PC, New York (Seth A. Hauser of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 11, 2008, which granted plaintiff's motion to direct entry of judgment on a California judgment, unanimously affirmed, without costs.

Although plaintiff proceeded to enforce a foreign judgment by plenary action, authorized by CPLR 5406 as an additional option to the filing procedure in Article 54, defendant was not prejudiced by the notice of motion stating that judgment was sought pursuant to Article 54. Contrary to defendant's contention, arguments he might have made in opposition to the summary judgment motion were foreclosed by the California court orders denying vacatur of his default, retaining jurisdiction in the face of his claimed lack of service and rejecting his

defenses to the action and to procurement of the judgment (*see* *Ionescu v Brancoveanu*, 246 AD2d 414, 416-417 [1998]).

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

ENTERED: FEBRUARY 24, 2009

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5329 Francisco Colon, et al., Index 14484/07
Plaintiffs-Appellants,

-against-

Banco Popular North America,
Defendant-Respondent.

Edwin Peralta-Millan, New York, for appellants.

Jeffrey F. Cohen, Bronx, for respondent.

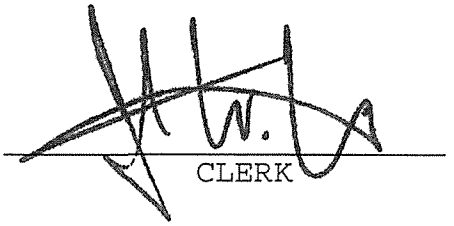
Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered November 20, 2007, which, in an action to recover for emotional injuries sustained when plaintiff Francisco Colon was arrested, incarcerated and prosecuted allegedly due to defendant's negligent misrepresentations, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Even were we to find that plaintiffs sufficiently pleaded a cause of action for negligent misrepresentation, we would find the claim untimely. Plaintiffs acknowledge that the point of injury occurred when he was arrested and incarcerated on December 1, 2003, and accordingly, the action, commenced in April 2007, is barred by the applicable three-year statute of limitations (CPLR 214). Contrary to plaintiffs' contention, the action is not governed by a six-year limitations period (CPLR 213), since they

neither alleged fraud nor constructive fraud against defendant (*see e.g. Fandy Corp. v Lung-Fong Chen*, 262 AD2d 352 [1999]).

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

ENTERED: FEBRUARY 24, 2009



Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5330 John J. Murphy, Index 106059/06
Plaintiff-Appellant,

-against-

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

Rosemary Carroll, Clermont, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered July 8, 2008, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The complaint failed to establish all the elements of defamation, inasmuch as plaintiff did not allege the time, the manner and the persons to whom the publication was made (*Seltzer v Fields*, 20 AD2d 60, 64 [1963], *affd* 14 NY2d 624 [1964]), nor did he identify the person who made it. In any event, the statements allegedly issued by these defendants were contained in an investigative report and were protected by at least a qualified privilege (*see Acquilone v City of New York*, 262 AD2d 13 (1st Dept 1999), *lv denied* 93 NY2d 819 (1999). Moreover, the statements were substantially true and to the extent that they may not have been, plaintiff failed to offer evidence of malice

or reckless disregard for the truth (*see Foster v Churchill*, 87 NY2d 744, 751-752 [1996]).

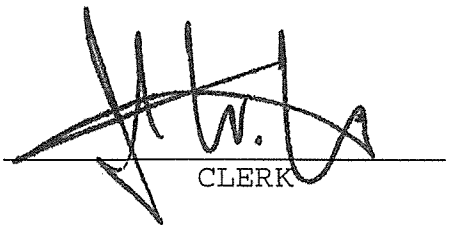
As to the cause of action for tortious interference with prospective employment, plaintiff failed to demonstrate the existence of a job offer, and failed to submit evidence sufficient to raise any issue of fact as to whether defendants acted with the sole purpose of harming him or engaged in any improper or unlawful conduct (*see Glen Cove Assoc. v North Shore Univ. Hosp.*, 240 AD2d 701 [1997], *lv denied* 91 NY2d 801 [1997]; *Nassau Diagnostic Imaging & Radiation Oncology Assoc. v Winthrop-Univ. Hosp.*, 197 AD2d 563 [1993], *lv denied* 83 NY2d 756 [1994]). Nor did plaintiff establish that he would have been offered the job "but for" defendants' alleged bad acts (*see Union Car Adv. Co. v Collier*, 263 NY 386, 401 [1934]; *Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421 [2006]).

Finally, plaintiff's allegations that defendants violated § 803 and § 805 of the New York City Charter are without merit in that those provisions relating to the conduct of investigations and reports to individuals involved do not mandate that reports be kept confidential.

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

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

ENTERED: FEBRUARY 24, 2009



CLERK

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5331-
5332 The People of the State of New York,
Respondent,

Ind. 755/05

-against-

Charu Cole,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Alan S. Axelrod of counsel), and Proskauer Rose, LLP, New York (Paula L. Miller of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J. at suppression hearing; William A. Wetzel, J. at jury trial and sentence), rendered December 22, 2005, convicting defendant of robbery in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a statement he made while he was in a holding cell. Approximately an hour before the statement at issue, defendant received *Miranda* warnings, waived his right to remain silent and made an exculpatory oral statement. Although he refused to give a written statement, this did not invoke his right to remain silent (*see People v Hendricks*, 90 NY2d 956 [1997]). Defendant did not preserve his claim that his use of the words "I have nothing to say to you" in the course of his initial statement constituted an

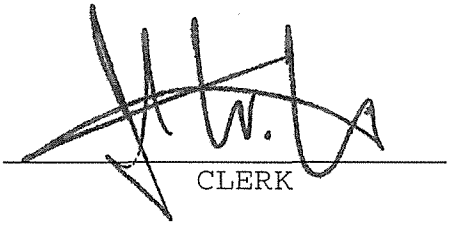
invocation of the right of silence, and we decline to review it in the interest of justice. As an alternative holding, we find that this declaration, when viewed in the context of defendant's full statement denying involvement in the robberies in question, was ambiguous, and was not an unequivocal invocation of his right to cut off questioning (*see People v Goss*, 162 AD2d 466 [1990], *revd on other grounds*, 78 NY2d 996 [1991]; *People v Allen*, 147 AD2d 968 [1989], *lv denied* 73 NY2d 1010 [1989]). Accordingly, the police were entitled to question him further. In any event, we find that the subsequent holding cell statement was spontaneous. The hearing evidence establishes that the officers did not engage in the functional equivalent of interrogation when they engaged in normal arrest-related conversation with each other (*compare People v Lawrence*, 25 AD3d 498 [2006], *lv denied* 6 NY3d 835 [2006], *with People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]), or made brief and limited responses to questions and requests made by defendant (*compare People v Rivers*, 56 NY2d 476, 480 [1982], *with People v Lanahan*, 55 NY2d 711 [1981]).

The trial court properly concluded that, by eliciting testimony that the victim of one of the robberies was unable to make a positive photographic identification, defendant opened the door to testimony that the victim of the second robbery positively identified defendant in a photographic procedure (*see*

People v Massie, 2 NY3d 179, 180 [2004]; *People v Change Fe Lin*, 281 AD2d 321 [2001], *lv denied*, 96 NY2d 860 [2001]). Defendant created a misleading impression about how he came to be arrested, and, by revealing to the jury that he was the subject of a photographic procedure, he rendered moot the principal objection to evidence of photo identifications, that when such evidence is introduced "the inference to the jury is obvious that the person has been in trouble with the law before." (*People v Caserta*, 19 NY2d 18, 21 [1966]). Defendant's constitutional claim, and his claim that an officer's testimony about the identification procedure was improper bolstering, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find them without merit.

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

ENTERED: FEBRUARY 24, 2009



CLERK

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5333 Nancy Kohlasch, Index 108527/07
Plaintiff-Appellant,

-against-

Staples, the Office Superstore East, Inc.,
Defendant-Respondent.

Arnold I. Bernstein, White Plains (Susan R. Nudelman of counsel), for appellant.

Simmons, Jannace & Stagg, L.L.P., Syosset (George C. Fontana, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 5, 2007, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff alleges she was injured when suddenly struck by five falling rolls of bubble wrap as she pushed a shopping cart in defendant's store. Her prediscovery motion was based solely on her own self-serving observations, without any statement as to the presence of witnesses or what might have caused the rolls to

fall, and was thus insufficiently supported (*see e.g. Uddin v City of New York*, 52 AD3d 422 [2008]; *McGlynn v Palace Co.*, 262 AD2d 116 [1999]).

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

ENTERED: FEBRUARY 24, 2009

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5334 Jose R. Manon, Index 14122/04
Plaintiff-Appellant,

-against-

Diaby Doucoure, et al.,
Defendants-Respondents.

Belovin & Franzblau, LLP, Bronx (David A. Karlin of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for respondents.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered December 17, 2007, which granted defendants' 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.

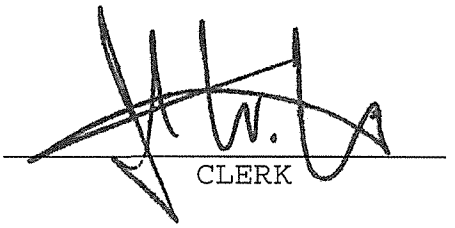
Defendants established prima facie that plaintiff did not sustain a serious injury of either a permanent or a non-permanent nature by submitting medical evidence indicating that his spinal and shoulder injuries had resolved within two months after the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). In opposition, plaintiff failed to adequately explain the three-year gap in his treatment (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]). As to the "90/180" category, plaintiff failed to support his claim with objective evidence of a "medically

determined injury or impairment of a non-permanent nature"

(Insurance Law § 5102[d]) (*Toure* at 357).

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

ENTERED: FEBRUARY 24, 2009



Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5335-
5335A Index 601892/07

Bank of America, N.A.,
Plaintiff-Respondent,

-against-

Sheldon H. Solow,
Defendant-Appellant.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for appellant.

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for respondent.

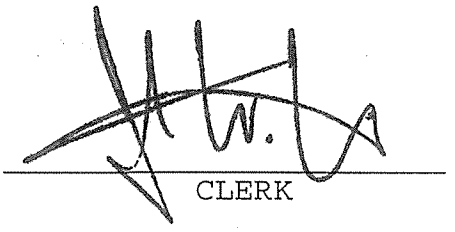
Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered June 12, 2008, awarding plaintiff the principal sum of $15,910,000, on a guarantee, and bringing up for review an order, same court and Justice, entered April 18, 2008, which granted plaintiff's CPLR 3213 motion for summary judgment in lieu of complaint on the aforementioned guarantee and denied defendant's cross motion to dismiss, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed within the appeal for the judgment.

Plaintiff demonstrated its entitlement to summary judgment by establishing the existence of a guaranty and submitting an affidavit of nonpayment (*see JP Morgan Chase Bank, N.A. v Complete Envtl. Servs., Inc.*, 21 Misc3d 1113A [Sup Ct Nassau Cty 2008]). The guaranty was absolute and unconditional, expressly waived demand or presentment and was expressly made a primary

obligation of the defendant, so that no formal demand, beyond the motion in lieu of complaint itself, was necessary to state a cause of action on the guaranty (*cf. First Natl. Bank v Story*, 200 NY 346, 354 [1911]). Recourse to CPLR 3213 was appropriate, since the guaranty was a "an instrument for the payment of money only" (CPLR 3213). The fact that the obligations guaranteed were evidenced in a series of underlying mortgages and modifications did not alter this fact, where the amount due was stipulated, and thus plain on the face of the document (*see European Am. Bank v Lofrese*, 182 AD2d 67, 71 [1992]).

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

ENTERED: FEBRUARY 24, 2009



CLERK

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5336 Hotel 57 L.L.C. doing business as Four Seasons Hotel, New York,
Plaintiff-Appellant,

-against-

Tyco Fire Products, et al.,
Defendants-Respondents,

ABC Entities 1 through 50 (Unknown Entities),
Defendants.

Index 602147/04

K&L Gates LLP, Newark, NJ (Christopher A. Barbarisi of counsel), for appellant.

Whitney & Bogris, LLP, White Plains (Gerald S. Gaetano of counsel), for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 16, 2007, which granted the motion of defendants Tyco Fire Products, Central Sprinkler Corporation and Central Sprinkler Company for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Giving the two prior California class action settlements in *Hart v Central Sprinkler Corp.* (BC 176727) and *County of Santa Clara v Central Sprinkler Corp.* (CV 771019) the preclusive effect they would be accorded in California (*Durfee v Duke*, 375 US 106, 109 [1963]), we find that the motion court correctly determined that plaintiff's claims of fraudulent misrepresentation and nondisclosures relating to the replacement of defendants' defective Omega fire sprinkler heads are barred by

the doctrine of res judicata (*see Federation of Hillside and Canyon Assns. v City of Los Angeles*, 24 Cal Rptr 3d 543, 557 [Cal Ct App 2004]; *see also Phillips Petroleum Co. v Shutts*, 472 US 797, 812 [1985] [holding that a state class action with right of opt-out satisfies due process and applies nationally]). Although the settlement provided for a right to opt-out, plaintiff failed to take advantage of that provision and failed to fulfill the requirements for having its sprinklers replaced despite having received proper notice.

Contrary to plaintiff's contention, its claims are neither "factually unique" nor "completely distinct" from those raised in the California actions when analyzed under "the same cause of action" prong of California's doctrine of res judicata (*see id.*). The California doctrine "is based upon the primary right theory" (*Mycogen Corp. v Monsanto Co.*, 123 Cal Rptr 2d 432, 443, 51 P3d 297, 306 [Cal 2002]), rather than the transactional theory favored in New York. "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action" (*id.* [internal quotation marks and citation omitted]). A comparison of the instant complaint and the California class action complaints shows that the primary right of the plaintiffs in all three actions was to have defective sprinklers replaced without incurring the expense of replacement and to be free of

any misrepresentations by defendants regarding the suitability of the Omega sprinkler heads. Moreover, the Omega Notice Packet and the class action documents identified the fire sprinkler products involved in the class actions as "including those containing EPDM and/or silicone o-rings" and listed their model numbers, which included those of the sprinklers installed in the hotel.

As to plaintiff's claims for fraud and negligent misrepresentation, the court correctly found as a matter of law that plaintiff could not show that it reasonably assumed that the Omega Notice Packet it received in connection with the settlement of the class actions did not pertain to the sprinklers that already had been installed by defendants to replace the originals. The packet stated that "[t]he recall terms may also provide benefits to those who have *already* replaced Omegas between May 1, 1996 and October 14, 1998." It informed all class members, including plaintiff, of the material elements of the settlement, including the opt-out provision, of which plaintiff did not avail itself. Contrary to its contention, plaintiff had in its possession, when it received the packet, all the information and forms needed to obtain any of the various forms of relief that were available (*see e.g. Wilkes v Phoenix Home Life Mut. Ins. Co.*, 587 Pa 590, 619-622, 902 A2d 366, 383-385 [2006], *cert denied* 549 US 1054 [2006]).

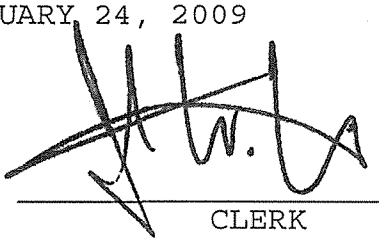
The court also correctly found that the above-cited

information negated any basis for plaintiff's claim of equitable estoppel (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1985]).

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 24, 2009



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Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5337 The People of the State of New York, Ind. 5739/06
Respondent,

-against-

Sean Paige,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Ana Vuk-Pavlovic of counsel), for appellant.

Sean Paige, appellant pro se.

Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered on or about June 20, 2007, unanimously affirmed.

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

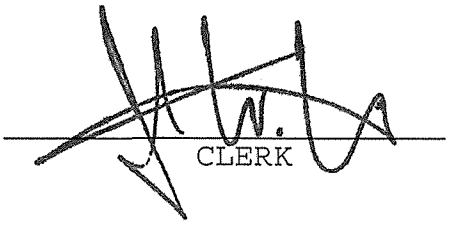
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: FEBRUARY 24, 2009



Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5338 The People of the State of New York, Ind. 4509/05
Respondent,

-against-

Walter Hannah,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Alan S. Axelrod of counsel), and Dewey & Leboeuf, LLP, New York (Joshua D. Arisohn of counsel), for appellant.

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

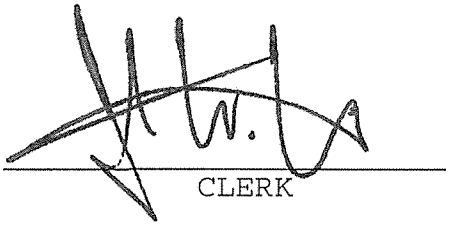
Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered April 3, 2006, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

Defendant's claim of ineffective assistance of counsel is unreviewable on direct appeal since it involves matters outside the record concerning his counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Defendant argues that when, on two occasions, his attorney opened the door to uncharged crimes evidence that had been precluded, these actions could only have been the product of mistake and poor preparation rather than strategy. However, the record suggests strategic justifications for each action (*see People v Gomez*, 52 AD3d 395 [2008], *lv denied* 11 NY3d 736 [2008]). On the existing record, to the

extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even if a reasonably competent attorney would have avoided both instances of door-opening, we conclude that, in each situation, the introduction of the precluded evidence did not affect the outcome of the case or deprive defendant of a fair trial. There was ample evidence to establish each of the elements of second-degree possession of a forged instrument, and the court's curative instructions, which the jury is presumed to have followed, were sufficient to prevent any prejudice.

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

ENTERED: FEBRUARY 24, 2009



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Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5339 Michael DiRienzo, Index 22344/05
Plaintiff-Respondent,

-against-

James McCullagh of New York, Inc., et al.,
Defendants-Appellants.

Morenus, Conway, Goren & Brandman, Melville (Christopher M. Lochner of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

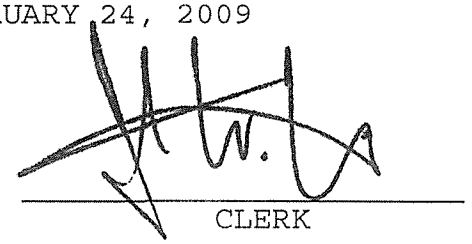
Order, Supreme Court, Bronx County (Alan Saks, J.), entered October 4, 2007, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The denial of defendants' summary judgment motion, which was brought prior to any discovery being conducted, was appropriate. Although defendants submitted certain documents purporting to demonstrate that they were not liable under the Labor Law for plaintiff's injuries, the documents raised a number of issues of fact concerning, inter alia, the relationship among various corporate entities and those entities' presence at the subject work site. Under the circumstances, plaintiff is entitled to

discovery to resolve such outstanding questions (*see e.g. Primedia Inc. v SBI USA LLC*, 43 AD3d 685, 686 [2007]; *see also La v New York Infirmary/Beekman Downtown Hosp.*, 214 AD2d 425 [1995]).

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

ENTERED: FEBRUARY 24, 2009



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Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5340 Kenneth E. Ramseur, Index 106397/06
Plaintiff-Appellant,

-against-

Hudsonview Company, et al.,
Defendants-Respondents.

Dewette C. Aughtry, Brooklyn, for appellant.

Nixon Peabody LLP, New York (Adam B. Gilbert of counsel), for respondents.

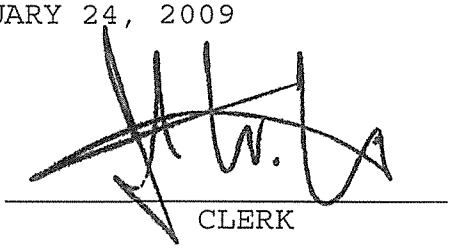
Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered January 17, 2008, inter alia, dismissing the complaint pursuant to an order that granted defendants' motion for summary judgment, unanimously affirmed, without costs.

Defendants established their entitlement to summary judgment by submitting an attorney's affidavit annexed with contracts and other documentary evidence (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325 [2004]), showing that there was no breach of the settlement agreement or overcharge of plaintiff's rent. Plaintiff's opposition failed to raise a triable issue of fact. Dismissal of plaintiff's claim under General Business Law § 349 was also appropriate, since the settlement agreement and renewed lease were private contracts between individual parties and did

not affect consumers at large (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]; *Revlon Consumer Prods. Corp.*, 238 AD2d 223, 224 [1997]).

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

ENTERED: FEBRUARY 24, 2009



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Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5342 Howard Olshewitz, Index 110025/04
Plaintiff-Respondent,

-against-

City of New York, et al.,
Defendants,

Slattery Skanska, Inc.,
Defendant-Appellant.

London Fischer LLP, New York (James Walsh of counsel), for appellant.

Law Office of Donald Friedman, P.C., Brooklyn (Mitchell Gorkin of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered March 26, 2008, which, to the extent appealed from, granted plaintiff partial summary judgment on his Labor Law § 241(6) claim, unanimously affirmed, without costs.

Plaintiff's Labor Law § 241(6) claim is predicated on a violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1), which regulates the safeguarding of hazardous openings. Defendant-appellant argues that the court erred in granting partial summary judgment as to liability on plaintiff's § 241(6) claim because there are triable issues of fact concerning proximate cause and comparative negligence. Plaintiff having demonstrated his entitlement to summary judgment, appellant failed to satisfy its burden to present evidence sufficient to raise a triable issue of

fact as to any of its alleged defenses *(see Catarino v State of New York*, 55 AD3d 467 [2008]).

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

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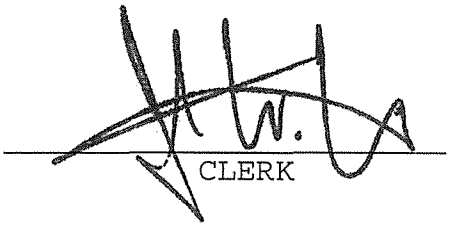


Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5343 Rosa Siri, et al., Index 104995/07
Plaintiffs-Appellants,

-against-

The Princeton Club of New York,
Defendant-Respondent.

Michael G. O'Neill, New York, for appellants.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C., New York (Richard H. Block of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered December 21, 2007, which, in an action alleging gender discrimination, granted defendant's motions to dismiss the complaint, unanimously reversed, on the law, without costs, the motions denied, the complaint reinstated, and the matter remanded for further proceedings.

Plaintiffs, part-time banquet servers, allege that defendant is in violation of the New York State and New York City Human Rights Laws (*see* Executive Law § 296; Administrative Code of City of NY § 8-107) by discriminating against them in the assignment of functions on the basis of gender. According to plaintiffs, although functions were supposed to be assigned first to full-time banquet servers and then to part-time banquet servers, based on seniority, employees from other job classifications were called upon to serve banquet functions, resulting in plaintiffs being discriminated against inasmuch as defendant assigned

functions to men from other job classifications, or with lower seniority, instead of to them, thereby causing them to earn significantly less money than men in comparable positions.

Defendant, in its first motion to dismiss plaintiffs' second cause of action alleging disparate impact, maintains that it has long been the practice of itself and the union that represents its wait-staff to staff banquets, depending upon the availability and seniority of employees within each job classification, in accordance with the parties' collective bargaining agreement. In a second motion to dismiss plaintiffs' first and third causes of action alleging intentional discrimination in the assignment of banquet work, which was brought before the first motion was argued and after the Supreme Court issued its decision in *Ledbetter v Goodyear Tire & Rubber Co., Inc.* (550 US 618 [2007]), wherein it was held that a pay-setting decision is a discrete act of discrimination with the relevant period of limitations beginning to run when the act first occurs[1], defendant asserts that plaintiffs' claims were time-barred.

Pursuant to 42 USC § 2000e-2(h), it is not unlawful for an employer to apply different standards of compensation on the

---

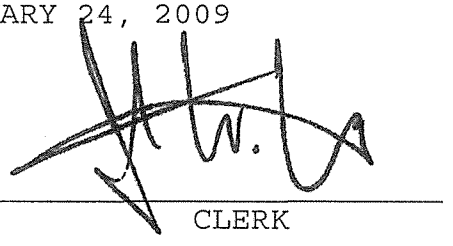
[1]The Lilly Ledbetter Fair Pay Act (Pub. L. No. 111-2, amending 42 USC § 2000e-5[e]), signed into law on January 29, 2009, which provides that "an unlawful employment practice occurs, with respect to discrimination in compensation[,] . . . each time wages, benefits, or other compensation is paid" and effectively nullifies *Ledbetter*, does not affect this court's analysis.

basis of a bona fide seniority or merit system (*see American Tobacco Co. v Patterson*, 456 US 63, 65 [1982]). Plaintiffs' opposition challenges defendant's claim that its system of assigning waiters to banquet functions operates strictly on a seniority basis. Plaintiffs have raised questions as to whether defendant is actually adhering to a seniority system, and accordingly, in the absence of any disclosure as to exactly how defendant's seniority rules operate in practice, it was premature to grant defendant's first motion.

Regarding defendant's second motion, plaintiffs are not paid any particular set salary but are alleged to earn what are sporadic and differing amounts of money, depending upon the number of functions to which they are assigned. Therefore, plaintiffs are, in effect, accusing defendant of a continuing practice of discrimination in its work assignments.

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

ENTERED: FEBRUARY 24, 2009



CLERK

Gonzalez, J.P., Sweeny, Renwick, Freedman, JJ.

5344N Vanessa R. Walls, etc., et al., Index 108867/07
Plaintiffs-Respondents,

-against-

Prestige Management, Inc., et al.,
Defendants-Appellants.

Barrett Lazar, LLC, Forest Hills (Dale E. Hibbard of counsel), for appellants.

Michael Mantell, New York, for respondents.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered January 2, 2008, which granted plaintiffs' motion to consolidate the instant action with an action previously commenced in Civil Court, unanimously affirmed, without costs.

The motion court appropriately exercised its discretion in consolidating this action with an action that was previously commenced by plaintiff Vanessa Walls pro se in Civil Court (*see* CPLR 602). The two cases present an identity of issues and common questions of law and fact, and defendants have failed to

demonstrate that consolidation will prejudice a substantial right (*Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 [2006]).

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

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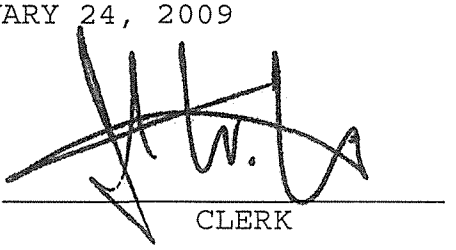

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Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5381 Richards Plumbing & Heating Co., Inc., Index 21436/05
Plaintiff, 85923/07

-against-

Washington Group
International, Inc., et al.,
Defendants.

- - - - -

Washington Group International, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Office for Architecture, Planning,
Design, P.C., et al.,
Third-Party Defendants-Respondents.

Gallagher Gosseen Faller & Crowley, Garden City (Robert A. Faller of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Patrick F. Palladino of counsel), for respondents.

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered on or about October 29, 2007, which granted third-party defendants' motion to dismiss the third-party complaint, unanimously affirmed, without costs.

This action arises out of a dispute concerning construction of a retirement facility owned by defendant The Home for the Aged for the Little Sisters of the Poor of the City of New York (owner). Pursuant to separate contracts with the owner, third-party plaintiff was the construction manager on the project and third-party defendants were the architect.

Plaintiff subcontractor brought an action against the construction manager and owner alleging nonpayment for work performed, and the owner asserted cross claims against the construction manager for breach of contract, consisting, inter alia, of failing to provide strict oversight and causing delays on the project. The construction manager then brought a third-party action against the architect asserting claims for common-law indemnification and contribution based on the architect's alleged failure to properly perform its work and obtain the necessary permits and approvals for the project, resulting in delays and increased costs.

The court properly dismissed the construction manager's third-party claim for common-law indemnification since plaintiff's claims and the owner's cross claims allege breach of contract by the construction manager, not vicarious liability attributed solely to the fault of the architect (*see Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1985] ["(s)ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine"]). Although the construction manager argues that it was entitled to indemnity because its relationship with the architect was so close as to

approach that of privity (*see e.g. Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [1989]), indemnification has been imposed on this basis only where negligent misrepresentation or similar torts were alleged. The construction manager has provided no authority to support its claim for indemnity in the context of a breach of contract action and the third-party complaint does not allege negligent misrepresentation by the architect.

The third-party claim for contribution also fails because the claims against the construction manager are based on alleged breaches of contract. While two or more entities that "are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution" from the other (CPLR 1401), a purely economic loss resulting from a breach of contract does not constitute an "injury to property" within the meaning of CPLR 1401 (*see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]).

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

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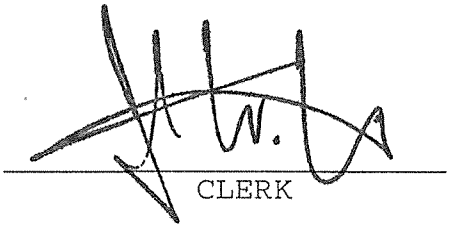

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, JJ.

4895-
4895A-
4895B

Index 109122/06

Doug Copp, et al.,
Plaintiffs-Appellants,

-against-

Rayner Ramirez, et al.,
Defendants-Respondents,

John & Jane Does 1-100,
Defendants.

Plaintiffs appeal from orders of the Supreme Court, New York County (Richard F. Braun, J.), entered on or about October 2 and 5, 2007, which dismissed the complaint against defendants Grace, Miller and Linthicum; and from separate order, same court and Justice, also entered on or about October 5, 2007, dismissing the complaint against defendants Ramirez, Hockenberry, Phillips and NBC-Universal.

Karasik & Associates, LLC, New York (Andrew C. Miller and Sheldon Karasik of counsel), for appellants.

Julie Rikelman, New York, for Rayner Ramirez, John Hockenberry, Stone Phillips and NBC-Universal, Inc., respondents.

Satterlee Stephens Burke & Burke LLP, New York (Mark A. Fowler and James Regan of counsel), for Leslie Linthicum, respondent.

Fross Zelnick Lehrman & Zissu, P.C., New York (David A. Donahue and Betsy Judelson Newman of counsel), for John Grace and Mike Miller, respondents.

RENWICK, J.

Plaintiff Copp commenced this defamation action after his tale of courage and sacrifice at Ground Zero was called into question by eyewitnesses to his activities on the rescue site, but not before his tale convinced the September 11 Victims' Compensation Fund to award him $650,000. Copp, an out-of-state plaintiff, sued out-of-state defendants Miller, Grace and Linthicum (the last of whom is a reporter for the Albuquerque Journal) for allegedly making defamatory statements in New Mexico to reporters from New York's NBC-Dateline program concerning events they observed during their brief visit to Ground Zero three years earlier. Plaintiffs also sued NBC-Universal and its employees (Ramirez, Hockenberry and Phillips) involved in the Dateline report (the NBC defendants). The claims against the out-of-state defendants must be dismissed because none of them is subject to personal jurisdiction in New York with regard to statements made against Copp in New Mexico. Likewise, the appeal as to the NBC defendants must be dismissed because plaintiffs failed to properly perfect their appeal against them.

A.

Doug Copp founded and ran the American Rescue Team International (ARTI), a California Corporation which purportedly engaged in missions to recover humans and human remains at

disaster sites. Two days after the September 11, 2001 terrorist attacks, Copp flew to New York on a corporate jet owned by the Albuquerque Journal and piloted by the Journal's publisher. The office of a New Mexico congressman had obtained special federal clearance for the flight based upon Copp's credentials as an experienced worldwide disaster rescuer. At Ground Zero, Copp intended to use his "Copp Casualty Locator" (CCL), a special device he had invented to locate human remains.

New Mexico residents Michael L. Miller, John M. Grace, and Leslie Linthicum accompanied Copp on the plane from New Mexico to Ground Zero. Miller, who owned and operated a film production company in New Mexico, reportedly accompanied Copp on this trip to explore the possibility of producing a documentary about Copp's life as a rescuer. Miller visited Ground Zero on four occasions for a total of 12 hours; he stayed in New York for about 60 hours. Grace, a freelance director of photography and a cameraman, with his principal place of business in New Mexico, reportedly visited Ground Zero with Copp for less than four hours; he stayed in New York for no more than 36 hours. Linthicum accompanied Copp to Ground Zero as a reporter for the Albuquerque Journal; she stayed in New York about 48 hours.

During his two weeks at Ground Zero, Copp did not recover any human remains; however, he claims that his team was able to

recover remains at the Staten Island landfill. He also claims that as a result of his exposure to the "toxic soup" that accumulated at Ground Zero, he sustained life-threatening injuries. The 9/11 Victims' Compensation Fund awarded him $650,000 for medical expenses and lost wages.

From July 11 to 18, 2004, the Albuquerque Journal published a series of articles written by Linthicum, casting doubt on whether Copp was entitled to the $650,000 he received from the 9/11 Fund. These articles also reported that the Department of Justice had launched an investigation into the legitimacy of Copp's petition to the 9/11 Fund. Search and rescue experts around the world who were interviewed also questioned Copp's claims about his exploits.

On July 15, 2005, NBC-Universal, a New York-based corporation, broadcast on its Dateline news magazine program a story addressing the controversy that led to the Department of Justice's investigation and the questions raised by the Journal articles.[1] Miller, Grace and Linthicum were interviewed and filmed in New Mexico for the Dateline report; segments of their interviews were broadcast on Dateline. The last segment of the

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[1] Defendant Phillips hosted the program, defendant Hockenberry reported the story, and defendant Ramirez produced it.

Dateline report addressed Copp's responses to the allegations that he had defrauded the 9/11 Fund.[2]

In July 2006, one year after the NBC report aired, Copp and ARTI commenced this action against the NBC defendants and the New Mexico defendants. In the complaint, plaintiffs aver claims of defamation, intentional infliction of emotional distress and fraud, all stemming from the alleged defamatory statements aired on Dateline. Subsequently, Supreme Court granted defendants' respective motions dismissing the complaint against them. First, the court found that plaintiffs failed to establish the falsity of the factual assertions upon which their cause of action for defamation is based. With respect to the causes of action for intentional infliction of emotional distress and fraud, the court found that these causes of action "are largely duplicative" of the defamation claim and improperly seek only punitive damages. Furthermore, the court found that the cause of action for intentional infliction of emotional distress "does not come close to sufficiently pleading the elements of such a claim," and that the fraud cause of action "is not pled with the specificity required by CPLR 3016(b)." Lastly, the court found that it had

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[2] It includes interviews with Copp and his physicians, including the physician who submitted a medical report to the 9/11 Fund in support of Copp's petition.

no personal jurisdiction over the out-of-state defendants Linthicum, Grace and Miller because "the events relied upon against those defendants for the alleged defamation occurred outside of New York State." Plaintiffs have appealed the dismissal of the action against all defendants, and we affirm.

B.

As an initial matter, we examine the NBC defendants' argument on appeal that plaintiffs have not properly appealed the Supreme Court order concerning them. Supreme Court issued three orders in this action relevant to this appeal. The first, dated October 2, 2007, granted the joint motion of defendants Grace and Miller to dismiss the complaint against them. The second, dated three days later, granted the motion of defendant Linthicum to dismiss the complaint against her. The third, also dated October 5, 2007, granted the joint motion of the NBC defendants to dismiss the complaint against them. Supreme Court issued an opinion on October 9, 2007, explaining why it had granted the motions. Plaintiffs filed and served a notice of appeal "from the two Short Form Orders and Opinion," dated October 2, 5, and 9 that had dismissed the Complaint in its entirety as to all defendants." The two short from orders that plaintiffs included in their appendix were the orders granting the motions of Grace and Miller, and Linthicum; the order granting the motion of the

NBC defendants was not included in the appendix.

The NBC defendants argue that plaintiffs' purported appeal from the order granting the NBC defendants' motion to dismiss must be dismissed as jurisdictionally defective because plaintiffs did not refer to that order in their notice of appeal or include a copy of the order with it. We agree with the NBC defendants and hold that the notice of appeal does not contain an accurate description of the October 5, 2007 order dismissing the action against them. Although we have the authority in our "discretion, when the interests of justice so demand," to treat certain inaccurate notices of appeal as valid (CPLR 5520[c]; *see Robertson v Greenstein*, 308 AD2d 381 [2003] *lv dismissed*, 2 NY3d 759 [2004]; Siegel, NY Prac § 534, at 922 [4th ed]), we decline to do so under these circumstances (*see Rupp-Elmasri v Elmasri*, 8 AD3d 464 [2004]). Plaintiffs failed to include in their appendix a copy of the NBC defendants' order, a relevant and necessary document of the record, which serves as yet another ground to dismiss the appeal (CPLR 5528[a][5]; *Reiss v Reiss*, 280 AD2d 315 [2001]; *Kraham Realty v Rothschild*, 10 AD2d 634 [1960]; *cf. Vertical Computer Sys., Inc. v Ross Sys., Inc.*, 11 AD3d 375, 379-380 [2004]). Accordingly, the only issues properly before this Court are those dealing with out-of-state defendants Miller, Grace and Linthicum.

C.

We next examine the argument raised by all the out-of-state defendants that New York courts may not exercise personal jurisdiction over them based upon statements they made in New Mexico with regard to plaintiffs' activities that took place in New York three years earlier. Because these defendants are not New York residents, they cannot be subject to personal jurisdiction in New York unless plaintiffs prove that New York's long-arm statute confers jurisdiction over them by reason of their contacts within the State. The burden rests on plaintiffs, as the parties asserting jurisdiction (*Bunkoff Gen. Contrs. v State Auto. Mut. Ins. Co.*, 296 AD2d 699, 700 [2002]).

Under CPLR 302(a)(1), the provision solely at issue on this appeal, long-arm jurisdiction over a non-domiciliary exists where a defendant transacted business within the state, and the cause of action arose from that transaction. "If either prong of the statute is not met, jurisdiction cannot be conferred" (*Johnson v Ward*, 4 NY3d 516, 519 [2005]). Under the statute, "proof of one transaction in New York is sufficient to invoke jurisdiction . . . so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). "[J]urisdiction is not justified where the

relationship between the claim and transaction is too attenuated" (*Johnson*, 4 NY3d at 520).

Supreme Court properly determined that plaintiffs failed to make a prima facie showing of personal jurisdiction over the out-of-state defendants. Plaintiffs contend that jurisdiction exists over these defendants because of their activities in New York during the 9/11 rescue efforts at Ground Zero. It is undisputed that defendant Linthicum's presence in New York State, as a reporter for the Albuquerque Journal, lasted no longer than 48 hours, during which she visited Ground Zero for less than four hours. With regard to Miller and Grace, Copp alleges that these defendants were his business partners and were working with him on patenting and marketing the CCL device. Furthermore, in the affidavit submitted in opposition to defendants' motion to dismiss, Copp explains that Grace and Miller traveled to New York to advance this commercial enterprise (i.e., to document Copp's use of the CCL device in order to promote it), and that they intentionally provided false information to Dateline about their experience with Copp at Ground Zero to advance their own interest.

There is no need to address the issue of whether these activities constitute transacting business in the state within

the purview of CPLR 302(a)(1).[3] Even if we were to find that these activities by defendants in New York during the Ground Zero rescue effort satisfy the requirements of transacting business in New York, plaintiffs have failed to meet the second prong of CPLR 302(a)(1), that these activities are substantially related to the defamation claims alleged in this action. Plaintiffs claim that the defamatory statements made in New Mexico to New York reporters from the Dateline program are related to their activities in New York because the statements concern Copp's rescue efforts that defendants observed during their visit to Ground Zero three years earlier. In our view, the alleged nexus between the out-of-state statements and defendants' activities in New York is too attenuated for the purpose of long-arm jurisdiction (*see Kim v Dvorak*, 230 AD2d 286 [1997] [Massachusetts defendant who sent allegedly defamatory letters to New York complaining of parent's medical treatment here was not engaged in purposeful activity in this State]).

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[3] Indeed, this Court has doubts as to whether the out-of-state defendants' minimal contacts with New York would be sufficient proof to establish the element of transacting business within the purview of the long-arm statute. In fact, plaintiffs do not dispute defendants' assertions that during their brief visit to New York the only pertinent activities they carried out were short visits to Ground Zero for a few hours (*see Strelsin v Barrett*, 36 AD2d 923 [1971]).

The facts in this case are indistinguishable from *Talbot v Johnson Newspaper Corp.* (71 NY2d 827 [1988]), where the allegedly defamatory statements were too attenuated for the purpose of long-arm jurisdiction. There, two individual nonresidents were sued for defamation based on comments they made in California concerning events that one of them had observed in New York two years earlier. In particular, one of the defendants, a student enrolled at a New York university, had witnessed a coach at the school behaving inappropriately at a campus party. Two years after the student's graduation, her father, a California resident, sent several letters to university officials and trustees describing his daughter's account of the coach's behavior and criticizing the university's handling of the situation. The daughter, while living in California, subsequently gave a telephone interview to a local New York newspaper in which she described the events. After the newspaper published an article quoting from the daughter's telephone interview as well as her father's letters, the coach sued the former student, her father and the newspaper for defamation. The Court of Appeals ruled that the complaint against the individual defendants should be dismissed for lack of personal jurisdiction. "Even if [the daughter's] previous enrollment and attendance at a New York university satisfied the requirement of purposeful

activities in New York, there was no showing that -- years after termination of that relationship -- there was the required nexus between the [defendants'] New York 'business' and the present cause of action" (*id.* at 829).

Here, as in *Talbot*, even though the out-of-state defendants' statements about their experience in New York were published in a New York newspaper, their contacts with New York are sufficiently separated in time from their allegedly defamatory statements that the relationship between them is too attenuated. Plaintiffs' argument that *Talbot* is distinguishable because it did not involve a "commercial business deal" or statements "aimed at destroying the commercial prospects of a competitor" is unpersuasive. Even if Grace and Miller had gone to New York for profit-making purposes, since the alleged defamatory statements occurred outside New York, years after the trip, as in *Talbot*, the nexus between the alleged business transaction in New York and plaintiffs' defamation claim is too attenuated (see also *Kim v Dvorak*, 230 AD2d 286, *supra*).

Moreover, even if the out-of-state defendants' contacts with New York fell within New York's long-arm statute, the exercise of such jurisdiction would violate due process. Due process is satisfied if (1) defendants had "minimum contacts" with New York State so they could reasonably foresee defending a suit here, and

(2) the prospect of defending a suit in New York State comports with "traditional notions of fair play and substantial justice" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000] *citing International Shoe Co. v Washington*, 326 US 310, 316 [1945]). In determining the second prong of the test, "A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief" (*Asahi Metal Indus. Co. v Superior Ct. of Cal*ifornia, 480 US 102, 113 [1987]), as well as "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 292 [1980]).

Even if defendants had "minimum contacts" with New York State, subjecting them to jurisdiction here would be unreasonable since they are all residents of New Mexico, they made the allegedly defamatory statements in New Mexico three years after their brief contacts with New York, and plaintiffs are not residents of New York. Moreover, since Grace, Miller and Linthicum are currently defending allegations of defamation and intentional infliction of emotional distress in federal court in New Mexico based on the same underlying facts (*see Copp v Journal Pub. Co.*, 07-CV-00651 [D NM 2007]), a New York action would not promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy (*cf.*

LaMarca, 95 NY2d at 218-219 [New York was reasonable forum where the plaintiff was a New York resident who was injured in New York and the defendant was an out-of-state corporation with a New York distributor]).

We also reject plaintiffs' argument that Supreme Court's ruling was premature because it did not allow discovery on the "full scope" of the out-of-state defendants' contacts with New York." Plaintiffs' argument is unpreserved since they raised it for the first time on appeal (*see generally Sean M. v City of New York*, 20 AD3d 146, 149-150 [2005]). In fact, plaintiffs never argued before the court below that further discovery was required because essential jurisdictional facts were not presently known. In any event, the argument lacks any merit.

In order to obtain jurisdictional discovery pursuant to CPLR 3211(d), plaintiffs must demonstrate the possible existence of essential jurisdictional facts that are not yet known (*Peterson v Spartan Indus.*, 33 NY2d 463, 466 [1974]). Here, it does not appear from plaintiffs' complaint or affidavits that "facts essential to justify opposition may exist, but cannot now be stated" (*see Findlay v Duthuit*, 86 AD2d 789, 790-791 [1982], where this Court found the plaintiff's opposition to the motion to dismiss to be "frivolous").

For the foregoing reasons, we find that there is no personal

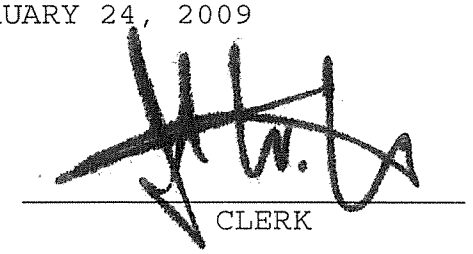
jurisdiction over Grace, Miller or Linthicum in connection with the cause of action for defamation. Moreover, because, on appeal, plaintiffs' arguments with respect to their causes of action for fraud and intentional infliction of emotional distress are not directed at Grace, Miller and Linthicum, we deem any such claims against those defendants to be abandoned (*see Matter of Pessano*, 269 App Div 337, 341 [1945], *affd* 296 NY 564 [1946]).

Accordingly, the orders of the Supreme Court, New York County (Richard F. Braun, J.), entered on or about October 2 and 5, 2007, which dismissed the complaint against defendants Grace, Miller and Linthicum, should be affirmed, with one bill of costs. Purported appeal from separate order, same court and Justice, also entered on or about October 5, 2007, affecting defendants Ramirez, Hockenberry, Phillips and NBC-Universal, should be dismissed, without costs.

All concur.

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

ENTERED: FEBRUARY 24, 2009



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