SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 9, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

331 Edward Hanley,
Plaintiff-Respondent,

Index 28084/01
83439/02

-against-

McClier Corporation,
Defendant-Respondent-Appellant,

NYP Holdings, Inc., et al.,
Defendants-Respondents,

Hirani Engineering and Land Surveying, P.C.,
Defendant-Appellant-Respondent.

[And a Third-Party Action]

Marshall, Conway, Wright & Bradley, P.C., New York (Cristen Sommers of counsel), for appellant-respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondent-appellant and NYP Holdings Inc. and News Corporation, Ltd., respondents.

Ferro, Kuba, Mangano, Skylar, P.C., Hauppauge (Kenneth E. Mangano of counsel), for Edward Hanley, respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Safeway Steel Products, Inc., respondents.

London Fischer LLP, New York (Brian A. Kalman of counsel), for Allsafe Height Contracting Corp., respondent.

Law Office of Lori Fischman, Tarrytown (George Dieter of counsel), for Fred Geller Electric, respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.),

entered October 5, 2007, to the extent it denied defendant Hirani

Engineering and Land Surveying, P.C.'s motion for summary judgment dismissing defendant McClier Corporation's cross claim for contractual indemnification against it, denied McClier's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it, and granted defendants Allsafe Height Contracting Corp.'s and Safeway Steel Products, Inc.'s motions for summary judgment dismissing McClier's cross claims for indemnification against them, unanimously modified, on the law, Hirani's motion granted, Safeway's and Allsafe's motions denied and otherwise affirmed, without costs.

Plaintiff, an employee of Fred Geller Electric, an electrical subcontractor, became injured while he was running conduit and wiring lighting on the ceiling of the press area in a building. Plaintiff had been standing on a platform that AllSafe had constructed especially for the project. This platform collapsed six to eight inches causing a wire rig to fall on plaintiff's hip.

The motion court found that Hirani, the site safety manager, was not a statutory agent and did not exercise the requisite degree of control over the work giving rise to plaintiff's injury to be liable, and therefore dismissed plaintiff's claims against Hirani based on Labor Law § 200 and common law-negligence. Neither plaintiff nor McClier (the general contractor) challenges

this finding on appeal and McClier fails to make additional arguments concerning Hirani's negligence. Accordingly, the court's dismissal of all of plaintiff's claims against Hirani forms the basis for dismissal of McClier's contractual indemnification claims against Hirani as well, because the relevant contractual indemnification clause provides for Hirani to indemnify McClier for claims arising only from Hirani's "actions or inactions."

The motion court was correct to deny McClier's motion for summary judgment. The parties agree that, to establish liability against a general contractor under section 200, plaintiff must establish that the general contractor directed, controlled or supervised the manner, means or methods of plaintiff's work. The evidence here raises an issue of fact as to the extent of McClier's control. In particular, there was testimony that every time the scaffold was moved, McClier would inspect it. Only McClier knew of the weight-bearing capacity of the scaffold. McClier had the authority to stop the work were it to notice an unsafe condition. McClier would receive daily site safety reports concerning its subcontractors and would sometimes inspect their work. McClier's contract with Safeway, the entity McClier hired to construct the scaffold, required McClier to check the platform and report problems to Safeway and to monitor use of and entry onto the platform.

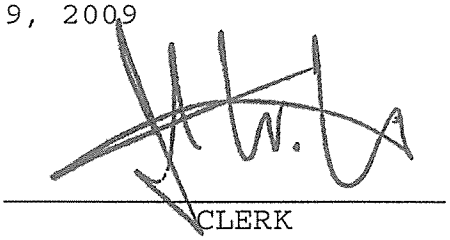
The court should not have dismissed McClier's common-law indemnification claim against Allsafe, that erected and moved the rolling platform where plaintiff became injured. No one has established that the platform was free from defect, and a factual issue exists whether any negligence on the part of Allsafe contributed to the accident (*see Keohane v Littlepark House Corp.*, 290 AD2d 382, 383 [2002]). The testimony of the nonparty platform designer's principal was insufficient to establish Allsafe's prima facie case. Although he said that the photographs - that he could not authenticate - appeared to indicate that the construction of the platform conformed to its design, he had no firsthand knowledge of the platform and could not opine whether Allsafe had actually constructed the platform in accordance with the design. Indeed, the designer's witness testified that, to his knowledge, no one from his firm ensured that the platform conformed to the design specifications. Further, plaintiff's testimony about the 3½-inch gap in the planks where the floor collapsed sufficed to raise an issue of fact as to the adequacy of the platform's construction. In addition, the testimony of plaintiff's coworker, who observed the floor buckling, corroborated plaintiff's testimony.

Nor should the motion court have dismissed McClier's contractual indemnification claim against Safeway. Safeway's

contract with McClier obligates Safeway to indemnify McClier for any negligence on Allsafe's part, and a factual issue exists as to Allsafe's negligence.

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

ENTERED: JUNE 9, 2009



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Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

333-
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The Insurance Corporation of New York,
Plaintiff-Respondent,

-against-

United States Fire Insurance Company,
Defendant-Appellant,

BFC Construction Corp.,
Defendant.

Index 600469/07

Carroll, McNulty & Kull L.L.C., New York (Ann Odelson of counsel), for appellant.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 7, 2008, which, insofar as appealed from, denied the cross motion of defendant United States Fire Insurance Company (US Fire) for summary judgment dismissing the complaint as against it, reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment dismissing the complaint as against US Fire. Appeal from order, same court and Justice, entered June 24, 2008, which, inter alia, denied US Fire's request to rescind an insurance policy, unanimously dismissed, without costs, as abandoned.

While the motion court found that the insured, defendant BFC Construction Corp., gave late notice of two claims to US Fire, its excess insurer, the court also deemed US Fire's disclaimer

untimely. US Fire issued its disclaimers on April 28, 2006, and the court determined that US Fire had notice on March 16, 2006.

However, the record establishes that US Fire actually received proper notice on April 20 rather than March 16. Pursuant to the terms of its excess policy with US Fire, BFC was required to provide US Fire "prompt written notice of an occurrence, which might result in a claim." Notice was to include how, when and where the occurrence took place; the names and addresses of injured parties and witnesses; and the nature and location of any injury or damage. "An insurer's obligation to cover its insured's loss is not triggered unless the insured gives timely notice of loss in accordance with the terms of the insurance contract" (*Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336, 339 [1986], citing *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]; *see also Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40 [2002]). Accordingly, US Fire's disclaimers, issued eight days after receiving notice, were timely as a matter of law (*see e.g. Public Serv. Mut. Ins. Co. v Harlen Hous. Assoc.*, 7 AD3d 421, 423 [2004]).

All concur except Nardelli and Catterson, JJ. who concur in a separate memorandum by Catterson, J. as follows:

CATTERSON, J. (concurring)

I concur with the result reached by the majority but write separately because I believe that the issue of notice obligations under the primary policy of insurance and under an excess policy of insurance requires greater explication.

This is a dispute between a primary insurer (plaintiff) and an excess insurer (hereinafter referred to as "U.S. Fire"). The plaintiff issued a commercial general liability policy to the defendant BFC Construction Corp. (hereinafter referred to as "BFC") for the period January 1, 2001 to January 1, 2002. U.S. Fire, through Crum & Forster, issued an excess insurance policy to BFC for the same period. BFC has primary coverage from other insurers in addition to plaintiff.

The primary policy issued by plaintiff has a $2 million general aggregate limit (except for products-completed operations, which are not at issue). The excess insurance policy issued by U.S. Fire states:

> "1. YOU must see to it that WE receive prompt written notice of an occurrence, which may result in a claim. Notice should include:
>
> a. How, when and where the occurrence took place;
>
> b. The nature and addresses of any injured persons and witnesses.
>
> c. The nature and location of any injury or damage arising out of the occurrence.

"2. If a claim is made or suit is brought against YOU, YOU must see to it that WE receive prompt written notice of the claim or suit.

"3. YOU and any other involved insured must:

a. Immediately send US copies of any demands, notices, summons, or legal papers received in connection with the claim or suit [...]"

The policy also says, "A notice given by, or on behalf of, the insured, or written notice by, or on behalf of, the injured person or any other claimant, to any licensed agent of ours in New York State with particulars sufficient to identify you, shall be deemed notice to us."

On March 9, 2006, Tom Ward of Ward North America, LP - plaintiff's third-party claims administrator, sent an e-mail to Jill Pompeii of Crum & Forster. He wrote:

> "As we discussed, this matter [Dagati v. BFC Constr.] is scheduled for trial on March 16, 2006. As I advised you, the Inscorp [i.e., plaintiff's] policy issued to BFC Construction had $1 million per occurrence and $2 million aggregate coverage. To date, $1.2 million has been paid as indemnity, leaving $800,000 as the remainder of the aggregate.
>
> "I am issuing the attached letter today to our insured. You should receive a hard copy shortly.
>
> "Inscorp currently has two other claims open on this policy: Daniel Torres [...] and Regolodo [...]"

The attached letter stated, "the General Aggregate Limit is likely to be used up in the payment of judgments or settlements."

Pompeii replied, "it is my tentative plan to attend this trial [...] [P]lease provide details regarding where and when

pretrial settlement negotiations will occur."

Ward forwarded the e-mails to another person within his company, adding, "I don't know if she [Pompeii] is monitoring the other two claims [Torres and Regolodo]."

On March 16, 2006, Ward North America faxed to Crum & Foster a letter that it had sent to BFC on March 15. The letter said:

> "Our office previously received a copy of the Summons and Complaint filed on behalf of Daniel Torres. It is alleged that Mr. Torres sustained injury on July 30, 2001 on a sidewalk located adjacent to your construction project at 223/225 East 7th Street, New York [...]
>
> "Please allow this correspondence to serve as The Insurance Corporation of New York's notification that based upon occurrences, offenses, claims or suits which have been reported to INSCORP and to which this insurance may apply, the General Aggregate Limit is likely to be used up in the payment of judgments or settlements."

Ward North America also faxed Crum & Foster a copy of the summons and complaint in the Regolodo action.

On April 20, 2006, Ward North America sent Crum & Foster a tender letter stating that the primary policy was likely to be exhausted and that the excess policy would now be implicated.

U.S. Fire disclaimed any obligation to defend or indemnify BFC in light of the late notice in both cases. It also rejected Ward's tender in the Torres case.

In February 2007, the plaintiff brought the instant action. It sought a declaration that its policy had been exhausted and that U.S. Fire was required to defend and indemnify BFC in

Regolodo. It also sought $375,000 (the amount it had allegedly overpaid in the Torres settlement). Finally, it sought the "amount of defense costs which have been and will be incurred in the Regolodo action since January 31, 2007."

U.S. Fire answered. One of its affirmative defenses was that "[the] [p]laintiff and BFC failed to provide timely notice of the Torres and Regolodo claims to U.S. Fire."

Ultimately, the plaintiff moved for summary judgment and U.S. Fire cross moved on the basis of, inter alia, late notice. Supreme Court denied both motions.

Initially, U.S. Fire argues that the plaintiff could not rely on any correspondence prior to April 20, 2006 because under the terms of the excess policy, the actual insured, BFC Construction, was required to provide notice. U.S. Fire cites Sorbara Constr. Corp. v. AIU Ins. Co. (41 A.D.3d 245, 246, 838 N.Y.S.2d 531, 533 (1st Dept. 2007), aff'd, 11 N.Y.3d 805, 868 N.Y.S.2d 573, 897 N.E.2d 1054 (2008)), for the proposition that the insurer's actual knowledge of the claim from another source does not relieve the insured of its own obligation to provide notice.

This misstates the issue and furthermore, it is not determinative of the outcome. In Sorbara, the question presented to the Court was whether notice to a worker's compensation policy carrier would be sufficient notice to a liability insurance arm

of the same company. 41 A.D.3d at 246, 838 N.Y.S.2d at 533. In this case, notice was provided directly to U.S. Fire as the excess carrier, rather than to a different division of the same carrier. Indeed, the notice provided by an agent of the primary liability carrier to U.S. Fire was specifically contemplated by the policy as quoted above.

In my view, the question then turns on whether the notice provided in the pre-April 20, 2006 correspondence is sufficient under the terms of the excess policy. For the reasons that follow, I would find that the pre-April 20 correspondence failed to comport with the clear policy provisions.

Under the law in existence at the time the dispute arose[1], it was beyond dispute that:

> "prompt notice to primary insurers is a condition precedent to coverage. Apart from the fact that their coverage does not immediately attach after an occurrence but rather attaches only after the primary coverage for the occurrence is exhausted (see, e.g. Hartford Acc & Indem. Co. v. Michigan Mut. Ins. Co., 93 A.D.2d 337, 462 N.Y.S.2d 175, aff'd 61 N.Y.2d 569, 475 N.Y.S.2d 267, 463 N.E.2d 608), excess insurers have most of the rights and obligations of primary insurers. They have the right to investigate claims and to participate in settlement negotiations [...] Accordingly, all of the salient factors point to the conclusion that excess carriers have the same vital interest in prompt notice as do primary insurers and that the Security Mut. rule should be applicable. American Home

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[1]Effective January 17, 2009, Insurance Law 3420 now requires insurance companies to show prejudice as a condition to denying coverage based on late notice of claim if notice is provided within two years of the time it was due. If notice is provided more than two years after it was due, insured must show a lack of prejudice.

> Assur. Co. v. International Ins. Co., 90 N.Y.2d 433, 442-443, 661 N.Y.S.2d 584, 588, 684 N.E.2d 14, 18 (1992), citing, Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 340 N.Y.S.2d 902, 293 N.E.2d 76 (1972).

Given the clear pronouncement of American Home, the sufficiency of the notice provided by the primary insurance carrier to U.S. Fire as excess carrier must be measured by the specific terms of U.S. Fire's policy. The terms of the policy circumscribe the "vital interests" of the excess carrier.

The excess policy, as set forth above, plainly required that notice include far more detail about the occurrences at issue than was supplied by the primary carrier. Indeed, the record contains no evidence that the primary carrier ever complied with the bulk of the notice requirements. The March 16th fax to U.S. Fire merely attached the summons and complaint in Regolodo and a letter concerning Torres. The March 14th email asked U.S. Fire to attend the trial in Dagati. The March 9th email to U.S. Fire merely notified U.S. Fire that Dagati was scheduled for trial. None of these communications satisfied the policy provisions.

It should also be noted that none of these communications put U.S. Fire on notice that the excess policy would be implicated, or even that it was "reasonably likely" that the excess policy would be involved. See Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 24 A.D.3d 172, 173, 805 N.Y.S.2d 74 (1st Dept. 2005), lv. dismissed, 6 N.Y.3d 844, 814 N.Y.S.2d

77, 847 N.E.2d 374 (2006). Thus, the only possible notice to U.S. Fire was the tender letter of April 20, 2006. Given the paucity of information conveyed to U.S. Fire prior to that time as well as the age of the claims involved, U.S. Fire's disclaimer was timely.

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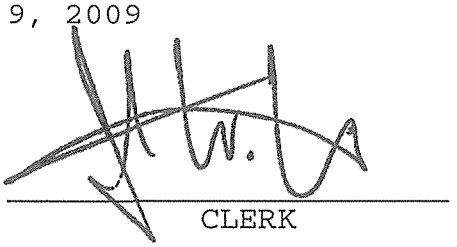
ENTERED: JUNE 9, 2009



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Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

395 The People of the State of New York, Ind. 13770/89
Respondent,

-against-

Randolph Jamison,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about November 9, 2007, which granted defendant's motion for resentencing under the Drug Law Reform Act to the extent of specifying and informing him that the court would resentence him to a term of 15 years for his conviction of criminal possession of a controlled substance in the first degree, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings upon defendant's application for resentencing.

To the extent defendant contends that the court abused its discretion in determining that his reduced sentence would remain consecutive to the term he is serving on a murder conviction, the argument is academic. The court lacked any authority under the 2004 DLRA to modify the sentence to run concurrently to the

earlier sentence instead of consecutively (*see People v Vaughan*, __ AD3d __, 867 NYS2d 82 [2009]).

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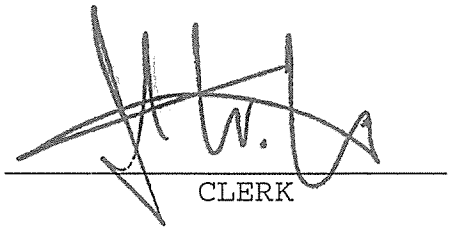

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Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

136 Diomara DeJesus, etc., Index 23568/06
Plaintiff-Respondent,

-against-

Jose J. Alba, et al.,
Defendants-Appellants.

Picciano & Scahill, P.C., Westbury (Thomas R. Craven, Jr. of counsel), for appellants.

Ami Morgenstern, Long Island City (Howard A. Chetkof of counsel), for respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered August 4, 2008, which denied defendants' motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

There is no question of fact as to how the accident occurred. The record supports the conclusion that plaintiff, 16 years old at the time of the accident, elected to enter the street between cars and, as a result, ran (or in plaintiff's hastily contrived revision, "walked") into defendant's car, without warning.

At her deposition, plaintiff gave two versions of the accident. She first testified that the accident occurred in front of her then-boyfriend's house, where she was playing at an open fire pump. When the accident happened, she was "running

away from a guy" called Wacho, a 20-year-old friend, who was trying to get her wet. When he started chasing her, she was on the sidewalk and then she ran into the street. Before she ran into the street she saw a car waiting for the light to change towards her right.

Plaintiff testified that she did not see the car before it hit her. She was hit by the "front" of the car, coming from her right side, and it hit her left leg. The impact was light, but knocked her to the ground on her left side.

She also testified that the police asked her questions at the accident scene, and, specifically, she was asked how the accident happened. She said that she told the police, "I didn't remember." This initial inability to remember is particularly significant, because, after her testimony, her counsel requested a recess, and, when the parties went back on the record, stated that plaintiff wanted to "correct the previous statement she made." Plaintiff then testified that she had run across the street, and then walked back out into the street to get her sandal. She was actually walking at the time she was hit.

Defendant Yves Alba testified that when the accident occurred, she was driving two friends and her two children home from church in her minivan. One of her friends lived on Minerva Place, about two buildings down from the open fire hydrant, and defendant had been there before. The weather was sunny, nothing

obstructed her vision, and she was not engaged in conversation, eating, drinking, smoking, or using a cell phone. Her maximum rate of speed was between 10 and 20 miles per hour.

She turned right onto Minerva Place from Jerome Avenue after waiting for a traffic light to change, and saw a fire hydrant spraying water, and five or more children playing in the street and on the sidewalk. She slowed her car down to about 10 miles an hour when she saw them.

The pedestrian came into contact with the driver's side door and mirror of her van. She did not apply the brakes or hear any warning sound before the impact. After the contact, she stopped, got out of the car, and asked the "young girl" who had been hit what was wrong. Plaintiff said "nothing," and then defendant asked her what happened. Plaintiff told defendant driver that "she was running away from the water pump" because somebody was going to spray her with water and she did not see defendant and "ran halfway into the street, and she ran into my car." Defendant called the police and waited until they came.

A nonparty witness, Rodolfo Vittini, who resides at Minerva Place, testified that, at the time of the accident, he was outside watching his son at play with the other children. He does not know either plaintiff or defendant. He testified that, before the accident occurred, plaintiff and 8 to 10 other children were running around and playing in the water at the fire

hydrant. They were throwing water at each other and running up and down the street, and back and forth across the street. Vittini first said that he was sitting in front of his building and remained there the entire time, but later said that he had been sitting on a step of a building across the street from his house, and crossed back shortly before the accident because his son wanted to go home.

He saw defendant's car turning onto Minerva Place, and then it slowed down because a person was crossing the street. At the time of the accident, the car was "moving very slow." Plaintiff was being chased by a young boy who was trying to pour water on her, and "crossed in between two cars and then she crashed against the van" on the driver's side. When he first saw the van, he told the girl to be careful and yelled "watch out," but she continued. The girl crossed Minerva, and then tried to cross back, which is when the accident occurred. When he said "[w]atch out," the girl was "coming, running towards me, and she turned around, like avoiding a young boy," then ran between the two cars towards the street. She "never stopped," because "[s]he was looking backwards" at the boy who was chasing her.

The police report of the accident states, in pertinent part, "pedestrian jumped out from between two cars."

Defendants moved for summary judgment dismissing the complaint, arguing that there was no issue of fact as to

defendant driver's negligence, because the record demonstrated that plaintiff ran into the van. The motion court found that defendants had not satisfied their prima facie burden, because there were issues of credibility as to whether plaintiff was walking when she was hit, as well as whether she was struck by the front end of the car, in which case "the defendant may have had an opportunity to see the plaintiff before the accident occurred," and "also should have seen the plaintiff run across the street the first time before she came back for her sandal." The court also found that there was "a question of reasonableness that must be resolved by the trier of fact," given that the conditions on Minerva Place just prior to the accident "included children playing in the street and a fire hydrant spraying water onto the street."

In the first instance, there is no doubt that the accident occurred, whether plaintiff was running or walking, after she entered the street, without warning, from between two parked cars. Under even plaintiff's revised version that she was walking back to get her sandal, she came into contact with the vehicle after entering the street other than in the crosswalk. Had plaintiff, who was 16 years old, not entered the street, without warning, there would have been no accident. Such a

factual scenario warrants dismissal of the complaint (*see e.g. Jellal v Brown*, 37 AD3d 179 [2007]; *Cunillera v Randall*, 196 AD2d 75 [1994], *lv denied* 84 NY2d 808 [1994]).

A driver in an area where children are playing need not exercise "extreme care or caution," although she must exercise the care that a reasonably prudent person would exercise under the circumstances (*Quarcini v Blackwell*, 10 NY2d 843, 844 [1961]).

The dissent relies on the decision in *St. Andrew v O'Brien* (45 AD3d 1024 [2007], *lv dismissed in part, denied in part* 10 NY3d 929 [2008]), for its conclusion that there are unresolved factual issues. In *St. Andrew*, the 15-year-old plaintiff was attending a festival held in a community center parking lot and, while being chased by friends, dashed between two parked cars into the street and was struck by the defendant's vehicle. The Court, acknowledging that the issue of the driver's potential liability was "problematic," nevertheless found that since the driver knew "she was approaching an area congested with people, including children, on a street that was narrowed by parked cars," there was a question as to whether her speed was reasonable under the circumstances (*id.* at 1028, citing Vehicle and Traffic Law § 1180[a]).

Unlike the situation in *St. Andrew*, however, there is testimony by both the driver and the non-party witness here that

defendant slowed down her car, and even plaintiff acknowledged that the impact was light. The only way there could have been no impact was if defendant had stopped her car entirely. Yet, stopping the car was unnecessary since plaintiff was on the sidewalk prior to the accident. It should also be noted that the 17-year-old driver in *St. Andrew* was in violation of section 501(3)(b) of the Vehicle and Traffic Law, because she was operating her vehicle after 9:00 P.M. with only a junior license, and was unaccompanied by an adult.

Under the circumstances presented here, we find that there is no issue of fact as to whether the adult driver acted prudently, particularly because the version of the incident that plaintiff first gave at her deposition did not assign liability to defendant.

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

MAZZARELLI, J. (dissenting)

Plaintiff, a teenager, and several other children, were playing at an open fire hydrant on a hot summer day. The hydrant was located on the sidewalk of Minerva Place in the Bronx, close to the intersection of Minerva Place and Jerome Avenue. Plaintiff claims that a minivan operated by defendant Ynes Alba struck her after she had walked into the middle of Minerva Place, near the hydrant. Alba, however, asserts that plaintiff suddenly "darted" into the street from between some parked cars and ran into the side of her car.

At her deposition, plaintiff testified first that she had run into the middle of the road because she was escaping from a friend who was trying to get her wet with water from the hydrant. After a consultation with her attorney, plaintiff clarified that she had not run into the middle of the street *immediately* prior to being struck. Rather, she stated, she had walked back into the street to retrieve a sandal that had fallen off while she was being chased. Plaintiff also asserted that she did not see the minivan before it hit her.

When deposed, Alba testified that immediately before the accident she had been stopped at a traffic light on Jerome Avenue. She said she made the right turn onto Minerva Place, where there were cars parked on both sides of the street. Alba stated that she had moved approximately four car lengths onto

Minerva Place when the accident happened. During that time, she recalled having achieved a rate of speed no slower than 10 miles per hour, but possibly as fast as 20 miles per hour. She also related that, as she traveled those four car lengths before the accident occurred, she was able to observe the open hydrant, and that there were "a lot" of children in the area, both on the sidewalk and in the street.

Initially, Alba testified that she never applied her brakes before the accident occurred. Then, she stated that she slowed her car down to 10 miles per hour upon observing the children. When asked to repeat how she related the accident to police officers who arrived on the scene, Alba gave the following answer:

> "I was coming from Jerome. I had left the traffic light at Jerome. I got onto Minerva Place. The girl came from my left side and hit up against my car. I hadn't seen her ... she didn't cross in front of me. It was on my side. When she hit my car, because of that impact against my car, is when I saw her.
>
> "I was driving along Minerva. The little the girl [*sic*] was running along the sidewalk on my left side, then suddenly turned and ran between two cars and ran up against my driver's side door. She was screaming, 'I didn't see her. I didn't see her. I didn't see her.'"

Nonparty witness Rodolfo Vittini testified that he was sitting on the stoop of a building on the same sidewalk as the hydrant for nearly two hours prior to the accident. He stated

that approximately 15 minutes before the accident he observed plaintiff chasing and being chased by her friends in and around the hydrant. He further related that immediately before the accident he crossed the street to enter his own apartment building. When he arrived on the other side of the street he observed Alba's minivan approaching. He also saw plaintiff crossing from the side that he was now on back to the other side of the street (where the hydrant was). He told her to "watch out." After he uttered this warning, he asserted that plaintiff crossed all the way back to his side, and then, while she was crossing again to the other side, came into contact with Alba's minivan. According to Vittini, plaintiff ran into the minivan behind its left rear tire.

Defendants moved for summary judgment. They posited that the collective deposition testimony established that Alba was not negligent as a matter of law and that there were no issues of fact necessitating a trial. Plaintiff argued that summary judgment was not warranted because the testimony created questions of fact as to whether Alba had sufficient time prior to the accident to avoid, or at least minimize, it.

The court denied the motion. It held that defendants failed to satisfy their burden of making a prima facie case. Moreover, plaintiff's testimony that she was walking immediately before the accident, and that Alba's minivan hit her head on, raised a

question of fact as to whether Alba had an opportunity to observe plaintiff and, if so, whether Alba took appropriate steps to avoid the accident.

Negligence cases can "rarely be decided as a matter of law" because "even when the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). This is just such a case. The descriptions of the accident given by plaintiff and defendant are at odds and cannot be resolved without a trial.

Plaintiff's deposition testimony alone could warrant a different conclusion than that urged by defendants. If a jury were to find plaintiff to be credible, it could conclude that she was struck by the front of Alba's minivan. It could further decide that she was in the middle of the street not because she had "darted" into it, but because she had walked there to retrieve her sandal.

Even if plaintiff did dart into traffic, issues of fact requiring a trial remain. For example, the portion of Alba's testimony where she recounts her description of the accident to police officers is internally contradictory. First, Alba stated that she "hadn't seen" plaintiff before plaintiff hit her car. Then she stated that plaintiff "was running along the sidewalk on my left side, then suddenly turned and ran between two cars."

This latter statement suggests that Alba *did* see plaintiff before impact.

In addition, although Alba observed children playing on the sidewalk in front of the hydrant and on the street, she testified that she had reached a speed as high as 20 miles per hour while traveling only four car lengths. Given the presence of the children playing on the sidewalk and street, and the reasonable likelihood that one or more would dart into traffic from between the parked cars, it cannot be concluded as a matter of law that defendant took all reasonable steps to avoid an accident. Moreover, Vittini testified that plaintiff crossed the street two times before the accident, but after Alba's car turned onto Minerva Place. This raises a serious question as to whether Alba should have observed plaintiff and ensured that she was safely on the sidewalk before she decided to proceed.

To support their position, defendants rely on *Jellal v Brown* (37 AD3d 179 [2007]) as "the closest analogy" to this case. However, in that case, it was "unrefuted that the infant plaintiff left the safety of the sidewalk, attempted to cross the roadway not at the crosswalk, and moved into the path of the vehicle." Further, in that case, unlike here, there was no indication that the driver should have had reason to anticipate that a child would step into traffic. In another case where it was obvious that there were children in the immediate vicinity of

the street, the Fourth Department declined to award the driver summary judgment (*St. Andrew v O'Brien*, 45 AD3d 1024 [2007], *lv dismissed in part, denied in part* 10 NY3d 929 [2008]). There, the plaintiff was being chased by friends at an outdoor festival. The plaintiff ran into the street from between two cars and was struck by the defendant's car. The court held that the driver "had knowledge that she was approaching an area congested with people, including children, on a street that was narrowed by parked cars. As such, whether the driver's speed was reasonable under the particular circumstances in which she knowingly proceeded (*see* Vehicle and Traffic Law § 1180[a])[2] is a question for the trier of fact to resolve" (45 AD3d at 1028).

The majority argues that *St. Andrew* is inapposite because Alba slowed her car. However, the point of *St. Andrew* is that it cannot be concluded as a matter of law what the appropriate speed and driver behavior are in circumstances such as these. Indeed, as the Fourth Department observed in *St. Andrew*, "in all but the most extraordinary circumstances, whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial" (*id.* [internal quotation marks and citations omitted]). Here, even if Alba did slow down

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[2] VTL 1180[a] provides that "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing."

to 10 miles per hour, a jury must decide whether she should have slowed down even more, or possibly stopped, until she could be sure that it was safe to proceed.

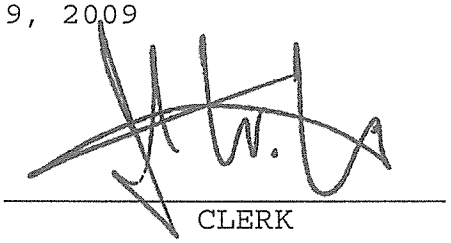
The majority describes as "significant" the fact that, when asked by the police at the scene to describe the accident, plaintiff could not remember. It suggests that her initial failure to recall somehow makes suspect her request to correct certain testimony during her deposition. However, her lack of memory at the scene does not compel the conclusion that the fresh trauma of the accident caused anything more than a temporary lapse.

Nor does plaintiff's correction of her testimony in the middle of the deposition support the majority's implication that the new testimony was concocted. There are a variety of reasons why plaintiff may have felt the need to clarify her testimony. In any event, neither plaintiff's nor Alba's recollection of the accident is perfect, nor is Vittini's, and plaintiff clearly disputes the version of events offered by Alba and Vittini. While defendants may believe that plaintiff's testimony is not true, that is for a jury, and only a jury, to decide. Our role on a motion for summary judgment is to identify factual issues, not to resolve them (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). I cannot, on this record,

conclude that any flaws in plaintiff's memory make her completely incompetent to testify as to the cause of the accident. In any event, Alba's deposition testimony, standing alone, presents issues of fact and precludes summary judgment. Accordingly, I would affirm the order.

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

ENTERED: JUNE 9, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

545 Eddie Salas, Index 111565/07
Petitioner-Appellant,

-against-

New York City Police Department, etc.,
Respondent-Respondent.

Noah A. Kinigstein, New York, for appellant.

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

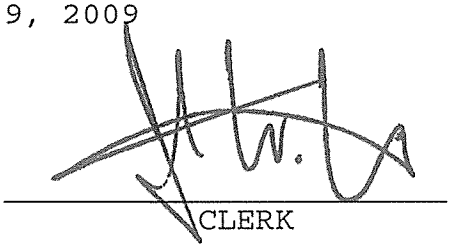
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 6, 2008, which, in an article 78 proceeding by a former police officer challenging respondent Police Department's determination denying petitioner's request for reinstatement, granted respondent's cross motion to dismiss the petition for failure to state a cause of action, unanimously affirmed, without costs.

Petitioner alleges that he resigned as a New York City police officer on the eve of a departmental hearing involving charges that he refused to obey an order to make an arrest of a sleeping homeless person, and that the denial of reinstatement was arbitrary and capricious because the arrest would have been unlawful, he was not given proper notice or time to prepare for the hearing, and, contrary to representations made in respondent's acknowledgment of receipt of his request for reinstatement, an investigation of his job performance and post-

resignation activities was not conducted and he was not given an opportunity to undergo medical and psychological tests. These allegations show a rational basis for the determination not to reinstate (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]), namely, a resignation in the face of departmental charges. The appropriate forum for petitioner's challenge to the lawfulness of the arrest he refused to make, and the merits of the resulting charges against him, was the departmental hearing. If he was unable to attend or had insufficient time to prepare, his attorney could have appeared on his behalf and raised these issues before the tribunal. Petitioner cites no rule or regulation that required respondent to consider the merits of the departmental charges, petitioner's job performance, or the results of medical and psychological examinations. Nor was respondent required to state a reason for denying reinstatement (*Matter of Spurling v Police Dept. of City of N.Y.*, 49 AD2d 823 [1975], *appeal dismissed* 38 NY2d 826 [1975], quoting *Matter of Doering v Hinrichs*, 289 NY 29, 33 [1942], and citing Department of Citywide Admin. Servs., Rule VI, § II, 6.2.1).

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

ENTERED: JUNE 9, 2009



CLERK

Tom, J.P., Saxe, Sweeny, Abdus-Salaam, JJ.

711N Francois Rivera, Index 114858/06
Plaintiff-Respondent,

-against-

NYP Holdings Inc., et al.,
Defendants-Appellants,

Time Warner Cable Inc., et al.,
Defendants.

Hogan & Hartson LLP, New York (Slade R. Metcalf of counsel), for appellants.

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), and Caraballo & Mandel, LLP, New York (Dolly Caraballo of counsel), for respondent.

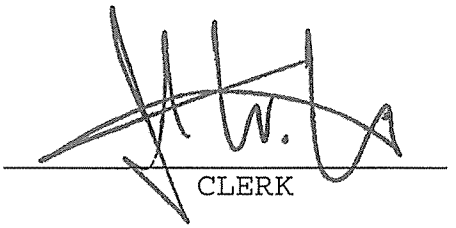
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 18, 2008, which, to the extent appealed from, denied the motion of defendants NYP Holdings Inc., Zach Haberman and Jim Hinch to compel certain discovery, unanimously reversed, on the law and the facts, without costs, and the motion to compel the sought disclosure granted.

We conclude that the denial of defendants' motion to compel constituted an improvident exercise of discretion. Full disclosure is required of "all matter material and necessary" to the defense of an action (CPLR 3101[a]), and the words "material and necessary" are "to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

Defendants are entitled to the discovery they seek in their efforts both to establish their defense of truth to plaintiff's defamation claims (*see Wright v Snow*, 175 AD2d 451 [1991], *lv dismissed* 79 NY2d 822 [1991]), and to defend against plaintiff's assertion of damage to his reputation (*cf. Burdick v Shearson Am. Express*, 160 AD2d 642 [1990], *lv denied* 76 NY2d 706 [1990]). Moreover, defendants are entitled to the opportunity to demonstrate the truth of the articles *as a whole* (*see Miller v Journal News*, 211 AD2d 626, 627 [1995]), warranting disclosure even as to assertions in those articles that are not directly challenged in plaintiff's complaint. Therefore, the inquiries related to grand jury testimony by plaintiff, information sought from or provided by plaintiff to the Commission on Judicial Conduct, and plaintiff's arrest record, if any, seek information sufficiently material and relevant to the defense of the action to warrant disclosure.

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

ENTERED: JUNE 9, 2009



CLERK

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

729 The People of the State of New York, Ind. 2546/06
Respondent,

-against-

Zavia Johnson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sally Pritchard of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered February 1, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and criminal mischief in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

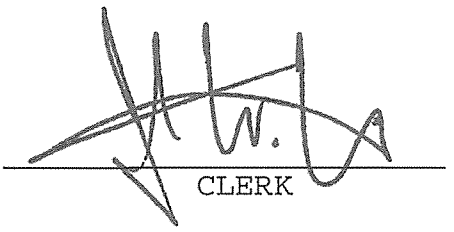
Defendant's challenge to the sufficiency of the evidence supporting his conviction of third-degree weapon possession is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that there was legally sufficient evidence to establish defendant's intent to use a baseball bat unlawfully against the victim, not merely against the victim's property, and that the bat constituted a dangerous instrument within the meaning of Penal Law § 10.00(13). The jury could have reasonably inferred that defendant menaced

the victim by conveying an implied threat to strike him with the bat, and that defendant also used the bat in a manner that was readily capable of causing serious physical injury even if intended to damage the victim's car. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]).

The court's *Sandoval* ruling, which placed appropriate limits on elicitation of defendant's extensive criminal record, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]).

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

ENTERED: JUNE 9, 2009



CLERK

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

730 Anna Mazur Kaplan, Index 101742/06
Plaintiff-Appellant,

-against-

Lucille Roberts Health Clubs Inc., etc. et al.,
Defendants-Respondents.

Jaroslawicz & Jaros, LLC, New York (David Jaroslawicz and David Tolchin of counsel), for appellant.

Law Offices of Vincent P. Crisci, New York (Stephanie L. Robbins of counsel), for respondents.

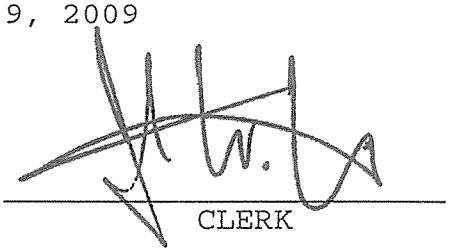
Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 28, 2008, which granted defendant health club's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

There are issues of fact as to whether, inter alia, plaintiff, a paying member at the club, was limited to choosing among defective step-aerobic boards supplied by the club for participation in a club-sponsored class, and whether defendants had notice that a fair number of those boards allegedly lacked stabilizing bottom grips. Factual issues exist as to whether the absence of these grips unreasonably increased the risk of use of the boards, whether this risk was apparent to plaintiff, and whether it proximately caused her injury (*see e.g. Morgan v State of New York*, 90 NY2d 471 [1997]).

The question of spoliation of evidence is reserved for the trial court's consideration.

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

ENTERED: JUNE 9, 2009



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

731 West 64th Street, LLC, et al., Index 105557/07
Plaintiffs-Appellants,

-against-

Axis U.S. Insurance, et al.,
Defendants-Respondents,

Wilson Silva, et al.,
Defendants.

Flynn, Gibbons & Dowd, New York (Lawrence A. Doris of counsel), for appellants.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Robert S. Nobel of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 22, 2008, which granted defendants-respondents' motion to dismiss the complaint and all cross claims against them, and declared that they have no obligation to defend or indemnify plaintiffs in connection with an underlying personal injury/Labor Law action, unanimously affirmed, with costs.

The motion court properly granted defendant insurers' motion to dismiss pursuant to CPLR 3211(a)(1) since the documentary evidence submitted in support of the motion "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff[s'] claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [2002] [internal quotation marks omitted]; *see*

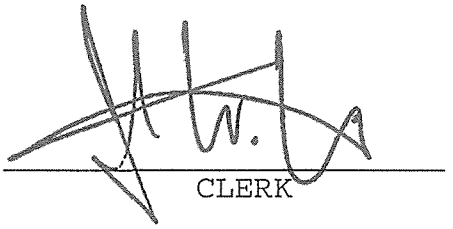
GuideOne Specialty Ins. Co. v Admiral Ins. Co., 57 AD3d 611 [2008]). The court was not required "to accept at face value every conclusory, patently unsupportable assertion of fact" found in the complaint, but could consider documentary evidence, proved or conceded to be authentic (*Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1987]).

Defendant insurers established that the blanket additional insured endorsement in the policy issued to plaintiffs' maintenance contractor provided coverage to any person or organization "that the insured is required by written contract to name as an additional insured," and that the contract between plaintiffs and the maintenance contractor did not contain such a requirement. Thus, plaintiffs were not additional insureds under the policy (*see ALIB, Inc. v Atlantic Cas. Ins. Co.*, 52 AD3d 419 [2008]; *Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253, 254 [2008]). The documentary evidence submitted by plaintiffs, including a certificate of insurance issued the same day as the accident giving rise to the underlying personal injury action, did not confer coverage, bring plaintiffs within the additional insured coverage afforded by the policy, or otherwise raise any factual issue which would warrant denial of the motion (*see Kermanshah Oriental Rugs, Inc. v Gollender*, 47 AD3d 438, 440 [2008]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [2004]).

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

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

ENTERED: JUNE 9, 2009



CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, JJ.

732-
733 Index 303086/07

Antonio A. Memmo,
Plaintiff-Appellant,

-against-

Elsa I. Perez,
Defendant,

Mayerson Stutman Abramowitz Royer LLP,
Movant-Respondent.

Alter & Alter, LLP, New York (Stanley Alter of counsel), for appellant.

Mayerson Stutman Abramowitz Royer LLP, New York (Harold A. Mayerson of counsel), respondent pro se.

Order, Supreme Court, New York County (Saralee Evans, J.), entered February 20, 2009, which, in an action for divorce, inter alia, directed plaintiff to satisfy the charging lien of his former attorneys (MSAR) "from the retirement accounts retained by or transferred to Plaintiff" pursuant to the settlement in the divorce action, unanimously modified, on the law, to delete the words "retained by or," and otherwise affirmed, without costs. Appeal from paper, denominated decision and order, which granted MSAR's motion seeking, inter alia, the above relief and directed settlement of an order, unanimously dismissed, without costs.

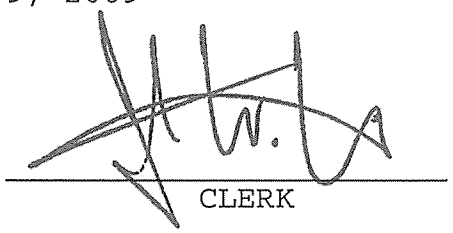
MSAR's charging lien came about not by virtue of Judiciary Law § 475, but rather a stipulation, so ordered by the court, in

which plaintiff agreed that MSAR "shall have a charging lien against plaintiff and plaintiff's share of equitable distribution, if any, in the amount of $70,000." Accordingly, plaintiff will not be heard to argue that because MSAR's efforts did not create a "new fund" greater than the value of interests already held by plaintiff, MSAR does not have a valid charging lien (*see Miller v Kassatly*, 216 AS2d 260 [1995]; *Resnick v Resnick*, 24 AD3d 238 [2005]). Nor is the stipulation rendered unenforceable by CPLR 5205(c)(2), exempting personal retirement accounts from application to the satisfaction of money judgments. First, the transfer of assets from defendant's IRA account to plaintiff's IRA account pursuant to the settlement in the divorce action admittedly took place within 90 days of plaintiff's stipulation to MSAR's lien (CPLR 5205[c][5][i]). Second, because the matrimonial settlement agreement left plaintiff with no immediate liquid assets to which MSAR's lien could attach, the court providently exercised its discretion to look behind that settlement to determine if plaintiff had used all liquid assets to which he had a claim to defray obligations other than the lien (*see Haser v Haser*, 271 AD2d 253 [2000]). However, the directive that payment be made of out of funds "retained by" plaintiff in retirement accounts is incorrect, since any funds originally held by plaintiff in his name would be exempt from judgment under CPLR

5205(c)(2). In accordance with CPLR 5205(c)(5)(i), only the funds transferred into plaintiff's IRA account from defendant's IRA account may be used to satisfy MSAR's lien. 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: JUNE 9, 2009



CLERK

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

734 In re Shon D.,

A Person Alleged to Be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Steven Banks, The Legal Aid Society, New York (Gary Solomon of counsel) and Davis Polk & Wardwell, New York (Keith McIntire of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for presentment agency.

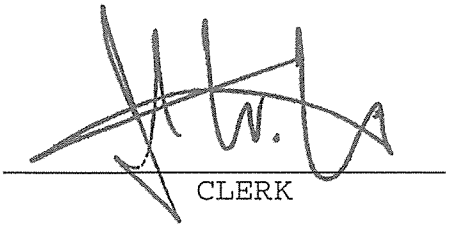
Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about October 10, 2008, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him with the Office of Children and Family Services for a period of up to 18 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The officer did not testify that he saw an undefined bulge; instead, he testified that he saw a bulge in appellant's jacket pocket with the specific shape of a

handgun. This provided reasonable suspicion for a stop and frisk (*see id.* at 762).

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

ENTERED: JUNE 9, 2009



CLERK

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

735-
735A-
735B-
735C-
735D

Index 600436/07

Walter R. Yetnikoff,
Plaintiff-Appellant,

-against-

Teresita Mascardo, et al.,
Defendants-Respondents,

Gross and Gross LLP, et al.,
Defendants.

Nathaniel B. Smith, New York, for appellant.

Debra J. Millman, New York (Steven P. Germansky of counsel), for respondents.

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 3, 2008, awarding defendants Mascardo, Ashe Group and Tirosh (the landlord defendants) collectively the principal sum of $101,750, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered 1) May 10, 2007, which denied plaintiff's motion to consolidate this action with another pending in Civil Court; 2) September 5, 2007, which granted the landlord defendants' motion to clarify the prior order; 3) January 25, 2008, which denied plaintiff's motion to amend the complaint, sua sponte dismissed the first and second causes of action of the complaint, granted on default the landlord defendants' motion for summary judgment on their first

and third counterclaims, severed six of plaintiff's causes of action and the second counterclaim and transferred the action to Civil Court; and 4) April 21, 2008, which denied plaintiff's motion to vacate its default in the prior order on the ground of excusable default, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleged that Tirosh, a real estate salesperson employed by Ashe Group, showed him a luxury apartment in a building owned by Mascardo and represented that it was quiet. When plaintiff moved into the apartment, he allegedly discovered a school playground adjoining the building's backyard where children played several hours a day, making a lot of noise.

Plaintiff paid the first month's rent, bounced the check for the next month's rent (which he claims was inadvertent), and then ceased making rent payments, allegedly because of the noise. The landlord commenced proceedings in Civil Court, and plaintiff countered with this action and one in federal court against the landlord defendants and the law firm and attorney representing them. Plaintiff unsuccessfully sought to consolidate the Civil Court proceeding with the instant action.

In denying the consolidation motion, the court noted the statement of the landlord defendants' counsel that the landlord had acquiesced to rescission of the lease. The landlord defendants moved to correct this statement by the court on the

ground that it was based on an error by their counsel. The landlord stated she would agree to rescind the lease only after plaintiff moved from the apartment. The court granted the motion clarifying its earlier decision and noted that the landlord was not bound by the erroneous statement in the prior order.

Plaintiff moved to amend the complaint to add claims against a co-owner of the building and the landlord defendants' counsel based on an alleged assault and battery. The landlord defendants moved for summary judgment on their counterclaims for 11 months of unpaid rent, plaintiff still not having vacated the apartment. Plaintiff failed to oppose the summary judgment motion, which was granted on default. The court also dismissed plaintiff's claims of fraudulent inducement and breach of the warranty of quiet enjoyment and habitability. Plaintiff's motion to amend the complaint was denied, and the balance of the action was remanded to Civil Court under CPLR 325(d).

Plaintiff moved to vacate his default, arguing he had never received the landlord defendants' motion for summary judgment on the counterclaims. This motion was also denied on the ground that plaintiff failed to provide a reasonable excuse for his default or evidence of a meritorious defense.

With respect to the court's modification of its statement concerning the landlord's position on rescission, the court correctly found that counsel's statement that she had made a

mistake in communicating to the court was new evidence properly considered on the motion. The law of the case is not implicated when a court alters its own ruling (*see Wells Fargo Bank, N.A. v Zurich Am. Ins. Co.*, 59 AD3d 333, 335 [2009]).

With respect to their summary judgment motion, the landlord defendants made a prima facie showing that plaintiff had failed to pay rent for several months, even while continuing to reside in the "excessively noisy apartment." Plaintiff's counterclaim defenses of fraudulent inducement and rescission did not raise a triable issue of material fact sufficient to defeat the motion. Unsworn defenses are not probative evidence *(see Access Capital v DeCicco*, 302 AD2d 48, 54 [2002]). The fraudulent inducement defense was also insufficiently particular. Moreover, rescission is an equitable defense, and plaintiff had an adequate remedy at law for money damages.

Plaintiff's motion to vacate his default was properly denied because he failed to rebut the presumption of proper mailing and also failed to establish a meritorious defense to the action. With respect to his defenses to the counterclaims, plaintiff simply recited those allegations verbatim, never addressing the undisputed fact that he continued to live in the apartment for almost a year without paying rent despite the allegedly intolerable noise *(see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]). He also failed to detail the

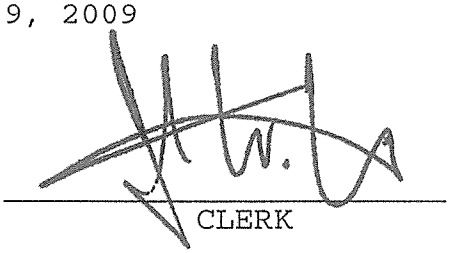
allegedly fraudulent statements made to him, and provided nothing suggesting the statements were knowingly false when made.

Finally, the court correctly denied plaintiff's motion to amend the complaint after it had granted summary judgment to the landlord defendants on plaintiff's first two causes of action and remanded the balance of the action to Civil Court. Adding an alleged co-owner of the building as a party -- an individual with no connection to the events at issue -- would have been pointless. As to his claims against the landlord defendants' counsel, plaintiff was free to pursue them in a separate action.

We have reviewed plaintiff's other arguments and find them without merit.

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

ENTERED: JUNE 9, 2009



CLERK

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

736 Wathne Imports, Ltd., Index 603250/05
Plaintiff-Appellant,

-against-

PRL USA, Inc., et al.,
Defendants-Respondents,

Ralph Lauren,
Defendant.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr. of counsel), for appellant.

Kelley Drye & Warren LLP, New York (John M. Callagy of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 16, 2008, which granted so much of defendants-respondents' motion for summary judgment as sought to dismiss the causes of action for breach of the license agreement with respect to plaintiff's exclusive licenses to manufacture products under the "Collection" trademark, to produce children's backpacks and to manufacture certain plastic bags; breach of the license agreement and design services agreement by failing to provide plaintiff with designs for handbags; and breach of the implied covenant of good faith and fair dealing, and denied plaintiff's cross motion for summary judgment, unanimously modified, on the law, to deny so much of defendants' motion as sought to dismiss the cause of

action for breach of the license agreement with respect to the "Collection" trademark, and the children's backpacks, and otherwise affirmed, without costs.

The court dismissed the claim that defendants usurped plaintiff's exclusive license to manufacture products under the Collection trademark upon on a finding that plaintiff had waived its rights under the license agreement. However, while there is evidence that plaintiff acquiesced in defendants' re-assumption of the Collection line and relinquished its interest in that trademark, whether it did so voluntarily or against its own wishes is disputed (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). In light of the evidence that plaintiff objected to defendants' re-assumption of the Collection line, that defendants unilaterally limited plaintiff's role to that of freight forwarder, and that only after it had been deprived of any economic benefit from the line did plaintiff divorce itself therefrom, plaintiff's alleged affirmative conduct was not so clear a manifestation of intent to waive exclusive rights as to warrant a finding of intent as a matter of law (*id.*; *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]; *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 [2007], *lv dismissed* 9 NY3d 1025 [2008]). Thus, a triable issue

of fact exists whether defendants breached the license agreement or plaintiff waived its exclusive rights. Nor does plaintiff's continued production of the Blue Label handbags establish as a matter of law that defendants satisfied their obligation under the license agreement to replace a discontinued trademark with one of "substantially equivalent market value."

The court also found as a matter of law that plaintiff had waived for a period of time its exclusive license with respect to the production and sale of children's backpacks. However, while there is evidence that plaintiff allowed a third party to produce certain children's backpacks for the fall 2003, spring 2004, and fall 2005 seasons, there is also evidence that supports plaintiff's claim that it agreed to forgo production on a limited quantity of expensive children's backpacks to be sold at defendants' stores because defendants represented that they were planning a one-time, limited production of backpacks that would not interfere with plaintiff's exclusive license, and that defendants deliberately lied in this regard. Thus, triable factual issues remain whether plaintiff waived its exclusive license and as to the scope of any such waiver.

With respect to plaintiff's claim of breach of the design services agreement, the court correctly found that the

unambiguous language of the agreement gave defendants full discretion as to how to present plaintiff with "Design Concepts," which encompassed the decisions not to provide detailed designs or sketches for handbags and to provide "rig rooms" rather than "spec packages," and, in the absence of any ambiguity, correctly declined to consider extrinsic evidence *(see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475-475 [2004]).

With respect to plaintiff's claim that defendants breached their duty of good faith and fair dealing by unreasonably restricting plaintiff's international sales, refusing to allow plaintiff to advertise its handbags, maliciously retracting approval of handbags, and restricting the sale of certain products to defendants' own retail stores, the court correctly found that the agreements provided defendants with full discretion as to these matters and that plaintiff failed to show that defendants' exercise of their discretion was arbitrary, irrational or not in good faith *(see Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]).

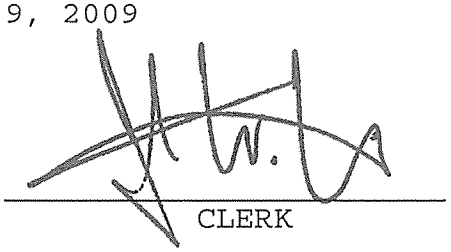
The court correctly found that the plastic tote bags distributed by defendants at the United States Open Tennis Tournament were not "Licensed Products" under the license agreement and that plaintiff failed to raise an inference that

its license was violated as a result of defendants' distribution of these items.

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: JUNE 9, 2009



CLERK

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

737 The People of the State of New York, Ind. 2223/06
Respondent,

-against-

Elias Langguth,
Defendant-Appellant.

James M. Branden, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered February 5, 2008, convicting defendant, after a nonjury trial, of falsely reporting an incident in the third degree and two counts of aggravated harassment in the second degree, and sentencing him to a conditional discharge for a period of 1 year with 50 hours of community service, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's identity as the person who made the calls at issue was established by voice identification testimony and strong circumstantial evidence, including cell phone records. The fact that the court acquitted defendant of some of the charges does not warrant the conclusion that the court rejected the identification evidence, as there

were other plausible reasons for convicting defendant of certain charges while acquitting him of others (*see People v Rayam*, 94 NY2d 557, 563 [2000]). The record fails to support defendant's suggestion that the court had an inclination to render a compromise verdict. Defendant's intent to "harass, annoy, threaten or alarm" (Penal Law § 240.30) is readily inferable from the abusive and statements made by defendant on the telephone.

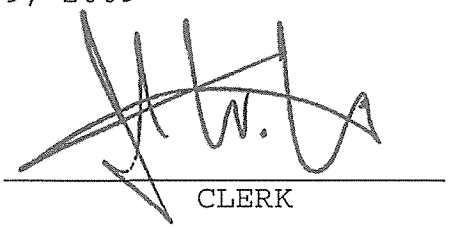
Defendant's constitutional arguments have no merit. Defendant was not subjected to "criminal liability for engaging in protected speech; his liability arose from his harassing conduct, not from any expression entitled to constitutional protection" (*People v Shack*, 86 NY2d 529, 536 [1995]).

When, during the trial, the prosecutor accused defense counsel of misconduct in allegedly obtaining unauthorized trial preparation assistance from an officer friendly to defendant, this did not create a conflict of interest. Since the attorney was not implicated in the crimes of his client, no per se conflict existed (*see United States v Fulton*, 5 F3d 605, 611 [2d Cir 1993]). Moreover, there is no evidence that any conflict, even if it existed, operated on or bore a substantial relation to

the conduct of the defense (*see People v Harris*, 99 NY2d 202, 210 [2002]; *People v Ortiz*, 76 NY2d 652, 657 [1990]).

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

ENTERED: JUNE 9, 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 June 9, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman
Sheila Abdus-Salaam, Justices.

The People of the State of New York, Ind. 5091/03
Respondent,

-against- 738

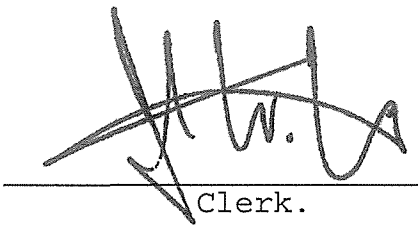
Alameche Henderson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Brenda Soloff, J.), rendered on or about September 25, 2006,

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

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

ENTER:



Clerk.

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

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 June 9, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman
Sheila Abdus-Salaam, Justices.

Stanley Sperber, et al.,
Plaintiffs-Appellants,

Index 109933/05

-against-

739-
739A

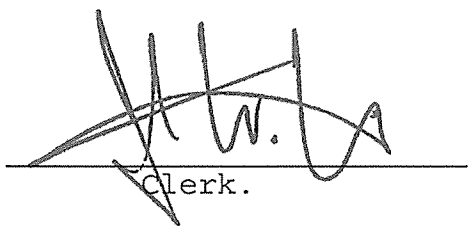
Sidney Rubell, et al.,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from orders of the Supreme Court, New York County (Walter B. Tolub, J.), entered on or about March 17, 2008 and December 15, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 18, 2009,

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

ENTER:



Clerk.

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

740 Barklee Realty Company LLC, et al., Index 113803/06
Petitioners-Appellants,

-against-

Michael Bloomberg, as Mayor of the City of New York, et al.,
Respondents-Respondents.

Barbara Kraebel, New York, for appellants.

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

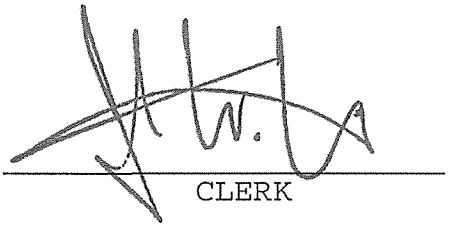
Judgment, Supreme Court, New York County (Charles J. Tejada, J.), entered November 23, 2007, which denied the petition seeking, inter alia, to vacate respondent Environmental Control Board's rejection of petitioner's appeal and dismissed the proceeding, unanimously affirmed, without costs.

The Board's rejection of petitioners' appeal from a decision that imposed fines for their failure to certify the correction of violations noticed by respondent Fire Department was not arbitrary and capricious. Contrary to petitioners' contention, the notices of violation were reasonably calculated to apprise petitioners of the rules violated and to afford them an opportunity to be heard and to present their objections at the

Board hearing. We have reviewed petitioners' remaining contentions and find them without merit.

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

ENTERED: JUNE 9, 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 June 9, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman
Sheila Abdus-Salaam, Justices.

The People of the State of New York, Ind. 886/07
Respondent,

-against- 742

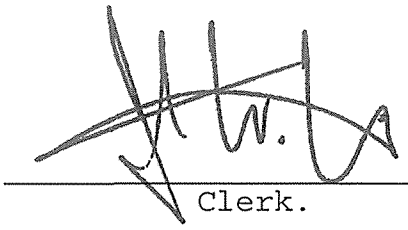
Joseph Alex,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about May 15, 2008,

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

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

ENTER:



Clerk.

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

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

744 The People of the State of New York, Ind. 4270/06
Respondent,

-against-

Ramiel Harris,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered June 7, 2007, convicting defendant, after a jury trial, of two counts of burglary in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 10 years, unanimously affirmed.

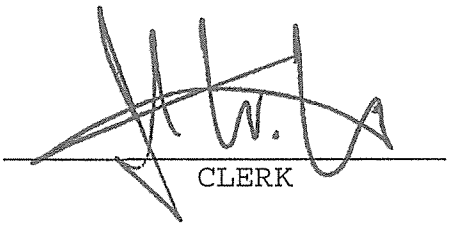
The court properly denied defendant's challenge for cause to a prospective juror who communicated articulately with the court and counsel in lengthy colloquies, thereby demonstrating a complete command of the English language, but who nevertheless expressed doubts that his knowledge of English was sufficient for jury service. The panelist never expressed doubts about his fairness, but only about his capacity. The court was able to make an objective evaluation of the panelist's knowledge of English (*see People v Berry*, 43 AD3d 1365 ([2007], *lv denied* 9 NY3d 1031 [2008]), and the panelist's subjective and unfounded

view of his own capacity was not controlling.

The court properly denied defendant's suppression motion regarding his written statement. The record supports the court's finding that the statement was attenuated from an arrest made in violation of *Payton v New York* (445 US 573 [1980]), since there was an interval of seven hours between defendant's arrest and interrogation, and there were sufficient intervening circumstances and no flagrant government misconduct (*see People v Harris*, 77 NY2d 434 [1991]; *People v Padilla*, 28 AD3d 236 [2006], *lv denied* 7 NY3d 760 [2006]). In any event, any error in the admission of the statement was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JUNE 9, 2009



CLERK

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

745 In re Steven Rabinowitz, etc., Index 530269/94
Petitioner,

-against-

James M., etc.,
Defendant-Respondent,

Thomas J. Spota, Suffolk County
District Attorney,
Appellant.

Thomas J. Spota, District Attorney, Suffolk (Guy Arcidiacono of counsel), appellant pro se.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane G. Temkin of counsel), for respondent.

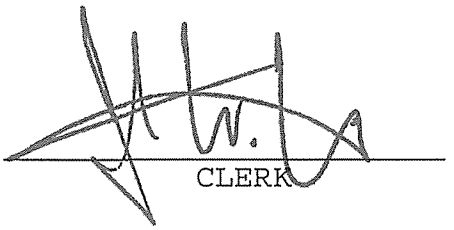
Order, Supreme Court, New York County (Kibbie F. Payne, J.), entered on or about November 26, 2008, which directed that defendant be transferred from a secure psychiatric facility to a nonsecure psychiatric facility, unanimously affirmed, without costs.

A fair interpretation of the evidence supports the application court's findings that while defendant continues to suffer from a mental illness, he no longer shows a level of dangerousness warranting retention in a secure facility, and that he otherwise meets the criteria for retention in a nonsecure

facility (*see Matter of David B.*, 97 NY2d 267, 276-279 [2002]; *Matter of George L.*, 85 NY2d 295, 305 [1995]; *cf. Matter of Richard S.*, 6 AD3d 1039 [2004], *appeal dismissed* 3 NY3d 700 [2004]).

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

ENTERED: JUNE 9, 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 June 9, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman
Sheila Abdus-Salaam, Justices.

The People of the State of New York,
Respondent,

Ind. 5537/07
6160/07

-against-

746-
746A

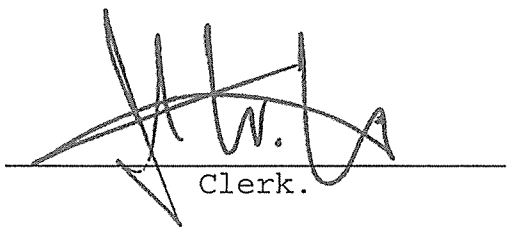
Larry Moye,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Micki Scherer, J. at plea; Charles J. Tejada, J. at sentence), rendered on or about April 9, 2008,

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

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

ENTER:



Clerk.

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

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

747-
747A The People of the State of New York,
Respondent,

-against-

Tashiem Bayard,
Defendant-Appellant.

Ind. 4252/04

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

Robert M. Morgenthau, District Attorney, New York (Karen Schlossberg of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert Straus, J.), rendered January 21, 2005, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him to an aggregate term of 7 years, and judgment, same court and Justice, rendered February 2, 2005, convicting defendant, upon his plea of guilty, of robbery in the first and second degrees, and sentencing him to a concurrent aggregate term of 7 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 identification and credibility.

The court properly declined to declare a mistrial, or to receive a hearsay document in evidence, on the ground that the

People had violated their disclosure obligations under *Brady v Maryland* (373 US 83 [1963]) or *People v Rosario* (9 NY2d 286 [1961]). Two weeks before trial, the People disclosed a police omniform system complaint report, containing a synopsis of the robbery and descriptions of the robbers. The report was prepared by an identified police administrative aide based entirely on information provided by an unidentified officer who was not one of the officers who testified at trial. The robbery was witnessed by three persons, only one of whom was available to testify at trial, and the report does not indicate which witness provided the underlying information, or whether the report is a composite of information received from two or three witnesses. The report contains a slightly different narrative of the crime, and a more detailed description of the robbers, than those found in the victim's trial testimony.

Defendant argues that by neglecting to at least preserve the identity of the officer who interviewed the witness or witnesses who provided the information in the report, the police and prosecution failed to disclose exculpatory information in a usable form. However, we find no basis for reversal. The information was not exculpatory; defendant was, in any event, able to make effective use of it in the form in which he received it; and neither the police department's failure to preserve the

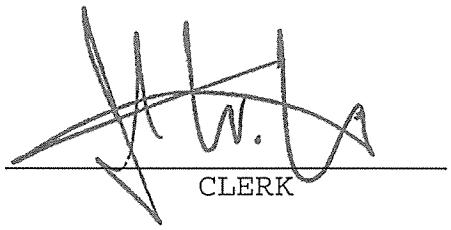
identity of the author, or the court's refusal to receive the report in evidence caused defendant any prejudice or affected the outcome of the trial.

We need not decide whether, in the case of genuinely exculpatory evidence in the People's possession, the People's failure to memorialize the source of the evidence can constitute a *Brady* violation, or what would be an appropriate remedy (*cf. United States v Rodriguez*, 496 F3d 221, 225-228 [2d Cir 2007]). Here, the information in the report had little or no impeachment or other exculpatory value, regardless of which witness or witnesses provided the underlying information. Furthermore, the prosecution disclosed the report in time to give defendant a reasonable opportunity to investigate its authorship. Finally, the court gave defendant extensive leeway to use this report in cross-examining the victim and the arresting detective, and defendant was able to reveal the report's contents to the jury (*see People v Fortunato*, 191 AD2d 221, 222 [1993], *lv denied* 81 NY2d 1013 [1993]). As it could not be determined which witness or witnesses provided the underlying information, the hearsay report was insufficiently reliable to be received in evidence as a prior inconsistent statement of the victim (*see id.*), or under

any other theory, and its exclusion did not violate defendant's right to present a defense.

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

ENTERED: JUNE 9, 2009



CLERK

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

748 In re Detective Andrew Nash, etc., Index 102272/08
Petitioner,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York, et al.,
Respondents.

Rae Downes Koshetz, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

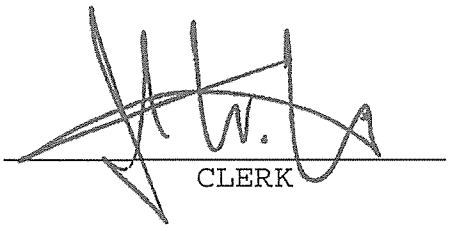
Determination of respondent Police Commissioner dated October 16, 2007, imposing a 30-day suspension, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan A. Madden, J.], entered June 24, 2008), dismissed, without costs.

No basis exists to disturb the hearing officer's findings. He credited the Department's witnesses who testified that petitioner, an information technologist, failed to comply with a lawful order of a superior officer to provide her with licensing information on a computer program used by the Department and was discourteous to that officer when questioned about such refusal. The Hearing Officer discredited petitioner's testimony that he got "a little loud and upset," but did not yell and scream, when, after telling the superior officer that he caught her assistant

hacking into his computer, she ordered him not to report the incident (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Substantial evidence supporting these findings includes the testimony of other officers concerning the tenor and tone of the verbal exchange between petitioner and the superior officer, and the absence of evidence showing why petitioner apparently believed he had a proprietary interest in the computer and its contents. The penalty does not shock our conscience (*cf. Matter of Clifford v Kelly*, 58 AD3d 432, 434 [2009]). We have considered petitioner's argument that he was denied a fair hearing and find it without merit.

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

ENTERED: JUNE 9, 2009



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

749 Yaniris Madera, parent and legal guardian of Stephanie Medina, et al., Plaintiffs-Respondents, Index 8501/04

-against-

The City of New York, Defendant-Appellant,

The Department of Education of the City of New York, Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for appellant.

Shapiro Law Office, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondents.

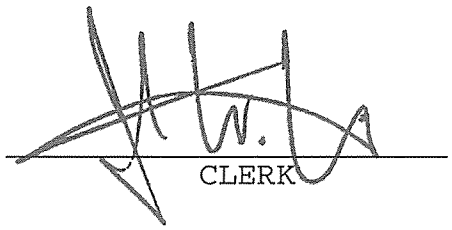
Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered May 15, 2008, which, in this action for personal injuries sustained when infant plaintiff was struck in the face by a baseball on public school grounds, to the extent appealed from, as limited by the briefs, upon reargument, adhered to its prior order, entered August 17, 2006, denying the City's cross motion to dismiss the complaint and/or for summary judgment, and which, inter alia, granted plaintiffs' cross motion to strike the City's answer, unanimously reversed, on the law, without costs, the cross motion to dismiss granted and the cross motion to strike the answer denied. The Clerk is directed to enter judgment in favor of defendant City dismissing the complaint as against it.

The complaint is dismissed against the City, since it is not a proper party to this action (*see Corzino v City of New York*, 56 AD3d 370 [2008]; *Bailey v City of New York*, 55 AD3d 426 [2008]; *Perez v City of New York*, 41 AD3d 378 [2007], *lv denied* 10 NY3d 708 [2008]).

In view of the foregoing, we need not address the parties' remaining arguments for affirmative relief.

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

ENTERED: JUNE 9, 2009



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

750N-
751N-
751NA

Index 23919/05

Julio Paulino,
Plaintiff-Respondent,

-against-

Café Billiards, et al.,
Defendants-Appellants.

Stephen Latzman, New York, for appellants.

Ross Legan Rosenberg Zelen & Flaks, LLP, New York (Richard H. Rosenberg of counsel), for respondent.

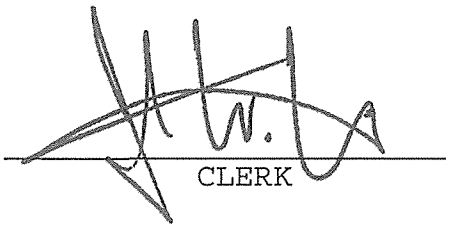
Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 23, 2008, which denied defendants' motion to vacate a default judgment, same court and Justice, entered December 3, 2007; order, same court (Alison Y. Tuitt, J.), entered March 2, 2007, granting plaintiff's motion to strike defendants' answer; and order, same court and Justice, entered October 24, 2008, which, to the extent appealable, denied defendants' motion to renew their motion to vacate, unanimously affirmed, without costs.

Defendants failed to demonstrate a reasonable excuse for their repeated defaults or a meritorious defense to the cause of

action (*see JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362 [2008]; *Slimani v Citibank, N.A.*, 47 AD3d 489 [2008]; *cf. Small v Applebaum*, 79 AD2d 572 [1980], *appeal dismissed* 53 NY2d 839 [1981]; *see also* CPLR 2221[e][3]; *Zelouf v Republic Natl. Bank of N.Y.*, 225 AD2d 419 [1996]).

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

ENTERED: JUNE 9, 2009



CLERK

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

757-
757A Index 603602/05

Rachel L. Arfa, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Gadi Zamir, et al.,
Defendants.
- - - - -
546-552 West 146th Street, LLC, et al.,
Intervenors-Defendants/Counterclaim
Plaintiffs/Cross-Claim
Plaintiffs-Respondents-Appellants,

2000 Davidson Ave., LLC,
Intervenor-Defendant/Counterclaim
Plaintiff/Cross-Claim Plaintiff,

-against-

Rachel L. Arfa, et al.,
Counterclaim-Defendants
-Appellants-Respondents,

Gadi Zamir, et al.,
Cross-Claim Defendants.
- - - - -
[And Another Action]

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for appellants-respondents.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (John Van Der Tuin of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 30, 2008, which, in determining the parties' respective motions to distribute certain funds, inter alia, directed that the payment owed by intervenor-defendants 546-552 West 146th Street LLC and 522-536 West 147th Street LLC to cross-

claim-defendant Harlem Holdings, LLC on account of the latter's "Put" include an "Upside" fee and that the "Upside" fee be calculated according to Schedule C of said intervenors' respective operating agreements, and order, same court and Justice, entered August 1, 2008, which, to the extent appealed from, upon reargument and renewal, amended the prior order to direct payment of certain amounts to plaintiff Argelt, LLC and defendant Zamir Properties, Inc., unanimously affirmed, with costs.

Section 8.6(c) of the relevant operating agreements provides that "[u]pon the removal of any of the initial Managers as a Manager of the Company ... Harlem Holdings, at any time thereafter, shall have the right to put to and the Company shall have the obligation to purchase all of the Interest of Harlem Holdings, LLC," and that the purchase price "shall be (i) the fair market value of such Interest ... plus (ii) 20% of the Upside [i.e., the proceeds of the sale]." Contrary to the intervenors' contention, this contractual provision is unambiguous and therefore must be given its "plain and ordinary meaning" (*see Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008] [internal quotation marks and citation omitted]). Section 8.6(c) expressly authorizes the exercise of the "Put" at any time *after* the removal of an initial manager, and it does not restrict payment of the "Upside" in the manner

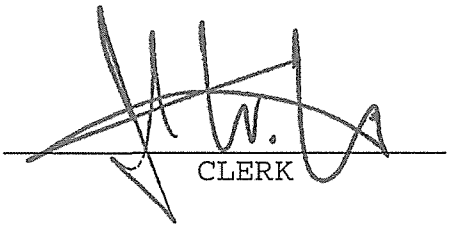
proposed by the intervenors. We will not "rewrite the terms of an agreement under the guise of interpretation" (*FCI Group, Inc. v City of New York*, 54 AD3d 171, 177 [2008], *lv denied* 11 NY3d 716 [2009] [internal quotation marks and citation omitted]).

Schedule C of the operating agreements, titled "Calculation of Refinancing Proceeds and Sale Proceeds," provides a more specific formula for calculating the "Upside" fee than the formula, with which it is inconsistent, provided in section 2.1 of the agreements. Therefore, the fee is correctly calculated according to Schedule C (*see Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1998]).

We have considered the intervenors' remaining arguments, including those pertaining to the order that directed distribution of most of the funds to Argelt and Zamir Properties, and find them unavailing.

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

ENTERED: JUNE 9, 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 June 9, 2009.

Present - Hon. David B. Saxe, Justice Presiding
John T. Buckley
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 6840/06
Respondent,

-against- 759

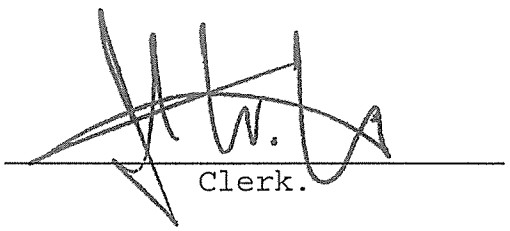
Jean Thelismond,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about January 3, 2008,

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.

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

760 A & E Stores, Inc., Index 535/07
Plaintiff-Respondent,

-against-

U.S. Team, Inc.,
Defendant,

Reuben Gross Associates, Architects, P.A.,
Defendant-Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered April 10, 2008, which denied the motion of defendant Reuben Gross Associates, Architects, P.A. (RGA) for summary judgment dismissing the third-party complaint as against it, unanimously modified, on the law, to grant the motion to the extent of dismissing the claims for contribution, contractual indemnification and breach of contract, and otherwise affirmed, without costs.

Plaintiff seeks contribution, indemnification and damages for breach of contract in connection with an underlying action for personal injuries sustained by a customer in a trip and fall on interior stairs in plaintiff's store. It is alleged that RGA

designed, and that defendant U.S. Team, Inc. constructed, the subject stairs.

As plaintiff acknowledges, the contribution claim should have been dismissed, since plaintiff settled the underlying personal injury action (*see* General Obligations Law § 15-108[c]).

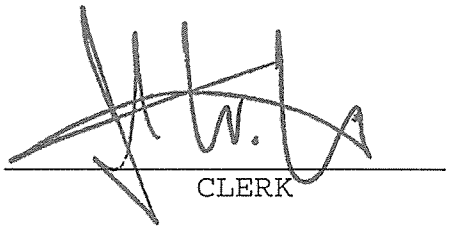
Plaintiff's claims for contractual indemnification and breach of contract for failure to procure insurance should have also been dismissed. In support of its motion, RGA submitted the affidavit of its principal who asserted that the oral agreement to provide plaintiff with architectural services did not include an agreement to indemnify plaintiff or procure insurance on its behalf. In opposition, plaintiff failed to raise a triable issue of fact as to the existence of an agreement to procure insurance or provide indemnification, and its speculation that useful information may be learned during discovery does not constitute grounds for denying the motion (*see* CPLR 3212[f]; *Billy v Consol. Mach. Tool Corp.*, 51 NY2d 152, 163-164 [1980]; *Auerbach v Bennett*, 47 NY2d 619, 636 [1979]).

However, dismissal of the common-law indemnification claim is not warranted, where the record shows that RGA failed to make a prima facie showing of entitlement to judgment as a matter of

law on that claim, which failure could not be remedied on reply (*see Hawthorne v City of New York*, 44 AD3d 544 [2007]).

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

ENTERED: JUNE 9, 2009



CLERK

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

761 Fulbright & Jaworski, LLP, Index 602287/08
Plaintiff-Respondent,

-against-

Sal Carucci,
Defendant-Appellant,

Seasons Contracting Corp.,
Defendant.

Agovino & Asselta, LLP, Mineola (Joseph P. Asselta of counsel), for appellant.

Fulbright & Jaworski LLP, New York (Rebecca Massimini of counsel), respondent pro se.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered December 10, 2008, which denied defendant Sal Carucci's motion to dismiss the complaint as against him pursuant to CPLR 3211(a), unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant Carucci dismissing the complaint as against him.

Plaintiff commenced this action against defendant Seasons Contracting Corp. and defendant Carucci, Seasons' president, to recover legal fees. In the complaint, plaintiff alleged, in relevant part, that:

> "4. Prior to December 2007, plaintiff performed legal services for both defendants including, among other things, representing Seasons in an action commenced by trustees of various multi-employer trust funds which had alleged that Seasons had failed to make appropriate contributions to those funds on account of the employee services performed by bargaining unit members of the

> Mason Tenders Council. That action had been commenced against Seasons in the United States District Court for the Southern District of New York ...
>
> "5. In addition to providing services in connection with that lawsuit, plaintiff provided legal services to Sal Carucci in connection with a claim made by various unions and trustees of multi-employer trust funds that an alter ego status existed between and among Seasons ..., Carucci, and other corporations and individuals. As a result of the representation of Carucci by plaintiff, the claims of an alter ego status were not pursued against Carucci.
>
> "6. Despite due demand, the sum of $57,632.04 for legal services tendered by plaintiff remains due and owing to plaintiff by Carucci and Seasons in breach of the agreement to compensate plaintiff for the services it had rendered to the defendants..."

Carucci moved to dismiss the action as against him on the ground that the complaint failed to state a cause of action against him. Alternatively, Carucci sought dismissal of the action on the ground that documentary evidence he submitted with the motion conclusively established that plaintiff had no claim against him. In support of the motion, Carucci submitted an affidavit in which he averred that he "never retained plaintiff for legal services in my individual capacity, but rather solely on behalf of ... Seasons"; he was not a named defendant in the federal action in which plaintiff represented Seasons; he did not sign or receive a retainer agreement from plaintiff; and he did not sign or receive a personal guarantee requiring him to assume responsibility for Seasons' legal bills. Documents relating to the federal action support Carucci's assertion that he was not a

defendant in that action.

Carucci also submitted five letters with accompanying invoices sent from plaintiff to Carucci. Each letter was addressed to "Mr. Sal Carucci, Seasons Contracting Corp.," and informed Carucci that plaintiff's "statement for legal services" for a specified period was enclosed with the letter. Each invoice, in turn, was addressed to "Seasons Contracting Corp." Finally, Carucci submitted a letter from an employee of plaintiff to Tina Girardo, an employee of Seasons, outlining the last four invoices. The letter makes plain that the invoices "were sent to the Company" and that no payment on the invoices had been received. The letter closed by stating that the "outstanding amounts total $55,058.98, and together with the outstanding balance on [a prior invoice] in the amount of $2,573.06 ..., *the Company* is indebted to [plaintiff] for legal services rendered in the amount of $57,632.04" (emphasis added).

Plaintiff submitted only an attorney's affirmation in opposition to the motion. Supreme Court denied the motion, finding that the complaint pled a cause of action for quantum meruit against Carucci, and this appeal by Carucci ensued.

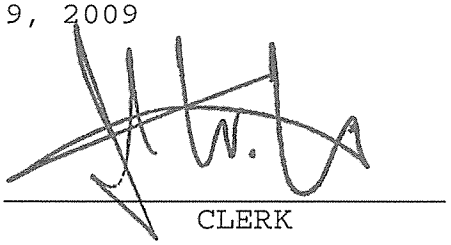
Accepting as true the facts pleaded by plaintiff and according plaintiff the benefit of every favorable inference to be drawn from those facts, plaintiff failed to state a cause of action for quantum meruit. To state such a cause of action,

plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*see Soumayah v Minnelli*, 41 AD3d 390, 391 [2007]). Here, there are simply no allegations supporting the last three elements as the claim relates to Carucci. Notably, plaintiff offered no allegations that (1) Carucci accepted services from plaintiff, (2) plaintiff had a reasonable expectation of compensation from Carucci, or (3) the reasonable value of the services performed for which Carucci was responsible. Nor did plaintiff allege facts from which any of these elements reasonably can be inferred. With respect to the latter element, plaintiff alleged that Carucci and Seasons owe plaintiff $57,632.04; plaintiff did not differentiate the amounts allegedly owed by Carucci for the services plaintiff claims it performed for him, on the one hand, and the amounts owed by Seasons for the services plaintiff performed for it. Plaintiff's failure to differentiate the amounts owed by Carucci and Seasons is all the more telling because plaintiff does not claim that Carucci is liable for Season's legal fees; plaintiff alleges that Carucci is liable for legal fees for services

plaintiff allegedly performed for him. For these reasons, that aspect of Carucci's motion seeking dismissal of the complaint under CPLR 3211(a)(7) should have been granted.

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

ENTERED: JUNE 9, 2009



CLERK

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

762 Martin Riskin, et al., Index 112188/99
Plaintiffs-Appellants,

-against-

Pam Vic Enterprises, Ltd. etc., et al.,
Defendants-Respondents,

The People of the State of New York, et al.,
Defendants,

Ted Singer,
Non-Party Intervenor-Respondent.

The Law Firm of Ravi Batra, P.C., New York (Ravi Batra of counsel), for appellants.

David Segal, New York, for respondents/respondent pro se.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 30, 2007, which, to the extent appealed from, denied plaintiffs' motion for a direction that defendants Pam Vic Enterprises and David Segal pay a sum certain, unanimously affirmed, with costs.

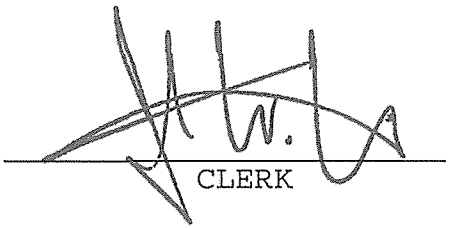
The court did not err in re-referring the matter of calculating the amount due to plaintiffs to a referee, inasmuch as no report was filed after the previous referral. Plaintiffs' claim, that the previous grant of partial summary judgment to them as against defendants in this foreclosure action became the "law of the case" and extinguished the claims of the proposed intervenor, Ted Singer, is unpreserved. Were we to review it, we would find that the law of the case doctrine does not apply,

since Singer was not a party to the earlier proceedings herein (*see Hass & Gottlieb v Sook Hi Lee*, 11 AD3d 230, 231-232 [2004]).

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

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

ENTERED: JUNE 9, 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 June 9, 2009.

Present - Hon. David B. Saxe, Justice Presiding
John T. Buckley
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 826/05
Respondent,

-against- 763

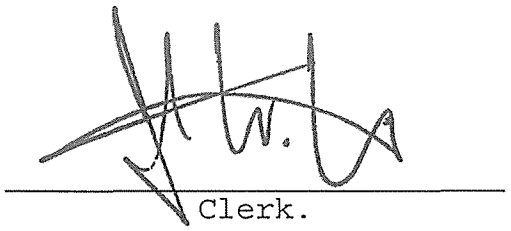
Kenneth Lynch,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Corriero, J.), rendered on or about December 16, 2005,

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

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

ENTER:



Clerk.

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

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

766 Cristobal Abreu, Index 105500/07
Petitioner-Respondent,

-against-

John J. Doherty, as Commissioner of the Department of Sanitation of the City of New York, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellants.

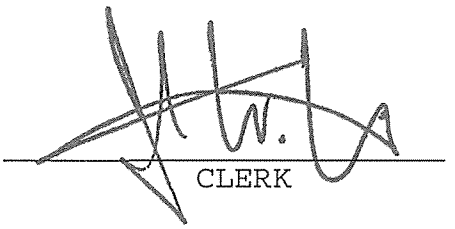
Order, Supreme Court, New York County (Judith J. Gische, J.), entered December 24, 2007, which granted the petition to annul respondent Department of Sanitation's determination terminating petitioner's employment to the extent of remanding the matter for consideration of a lesser penalty, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

Petitioner failed to demonstrate that respondent's determination to terminate his probationary employment was made in bad faith (*see Matter of Johnson v Katz*, 68 NY2d 649 [1996]; *Matter of Soto v Koehler*, 171 AD2d 567, 568 [1991], *lv denied* 78 NY2d 855 [1991]). The record establishes that on two occasions petitioner failed to timely notify respondent that he would be either late or absent due to illness, as required by respondent's rules governing probationary employees, and nothing in the record suggests that respondent's rejection of his explanations for

these failures was irrational (*see Matter of Hughes v Doherty*, 5 NY3d 100, 107 [2005]).

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

ENTERED: JUNE 9, 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 June 9, 2009.

Present - Hon. David B. Saxe, Justice Presiding
John T. Buckley
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, Justices.

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

-against- 768

Otis Austin,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about December 18, 2006,

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

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

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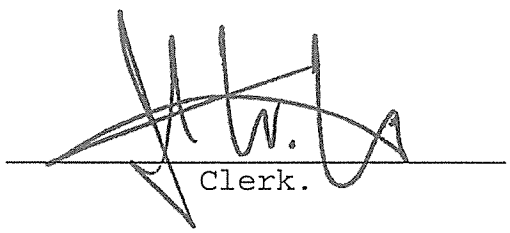


Clerk.

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

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

769 Woori American Bank, Index 603019/02
Plaintiff-Respondent,

-against-

Winopa International Ltd., etc., et al.,
Defendants-Appellants.

Allen M. Schwartz, New York, for appellants.

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

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 8, 2008, which denied defendants' motion to vacate an order of the same court (Sherry Klein Heitler, J.), entered October 21, 2004, granting plaintiff's motion for summary judgment and directing entry of judgment against defendants in the principal amount of $95,470.03, unanimously affirmed, with costs.

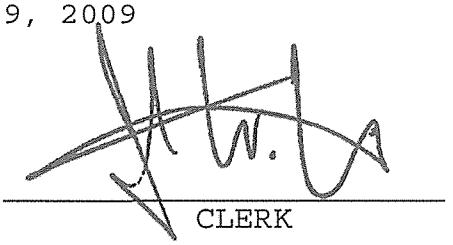
Defendants were properly denied relief under CPLR 5015 (a)(2) since they did not show that their new evidence refuted the essential findings underlying the order and would probably have resulted in a different outcome (*see Bongiasca v Bongiasca*, 289 AD2d 121, 122 [2001]). The evidence submitted did not establish that the statements in question were fabricated (*cf. McCarthy v Port of N.Y. Auth.*, 21 AD2d 125, 127 [1964]). In any event, Justice Heitler's determination did not rest solely on those statements, but also on defendants' initial failure to deny

their indebtedness and their inability to offer any other evidence that they had made the payments as they claimed.

We have considered the defendants' remaining contentions and find them unavailing.

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

ENTERED: JUNE 9, 2009



CLERK

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

770-
770A The People of the State of New York,
Respondent,

Ind. 2629/04

-against-

Christian Figueroa,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Dewey & LeBoeuf LLP, New York (Rebecca Reilly of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 23, 2005, convicting defendant, after a jury trial, of two counts of grand larceny in the third degree, and sentencing him to concurrent terms of 5 years' probation, and order, same court and Justice, entered on or about April 23, 2008, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly found that defendant received the effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). In this case involving thefts from defendant's employer by means of improper use of a company credit card, counsel negotiated a settlement agreement with the complainant company that included the company's agreement to ask the District

Attorney's Office to discontinue the prosecution, and counsel advised defendant to sign the agreement. These were reasonable strategic decisions, in which counsel sought to forestall the criminal prosecution. That this strategy ultimately proved unsuccessful does not constitute ineffective assistance of counsel (*see People v Berroa*, 99 NY2d 134, 138 [2002]). The fact that some of the statements in the settlement agreement were used against defendant on cross-examination likewise does not establish that this strategy was unreasonable or that defendant was prejudiced by it (*see People v Smith*, 59 NY2d 156, 166-167 [1983]). As the jury was made aware, the agreement also contained a clause stating that defendant denied all liability and that nothing in the agreement should be construed as an admission of liability, and defendant testified that he signed the agreement because he simply wanted to resolve the dispute with the company.

Even assuming, as defendant asserts, that counsel neglected to tell defendant, prior to entering into the agreement, that the prosecution could go forward even if defendant signed the agreement, that alleged failure did not cause defendant any prejudice or deprive him of a fair trial (*see People v Hobot*, 84 NY2d 1021 [1995]). If defendant had not signed the agreement, the prosecution would still go forward, and the statements in the agreement were not prejudicial in light of the disclaimers in the

agreement and the overwhelming evidence of guilt, including defendant's false denial, when confronted with the purchases, that he was ever issued such a credit card, his continued purchases after leaving the company, and his failure to make any arrangements with the company for repayment of his personal purchases. Moreover, the company did request of the District Attorney's Office that it discontinue the prosecution, and counsel reasonably could have determined that the possibility that the District Attorney would accede to the request was defendant's best chance to avoid being convicted.

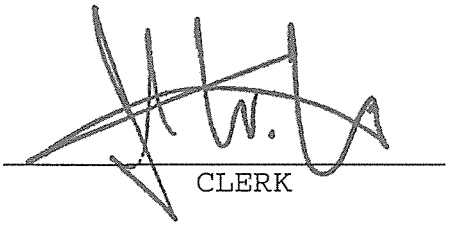
As the motion court found, counsel's conduct during the trial indicated a thorough understanding of the facts of the case, and demonstrated that counsel was prepared to cross-examine the prosecution witnesses. It was also apparent that defendant was prepared to testify, despite the claim that counsel had not prepared defendant "prior to trial." While in summation counsel argued that the critical time for purposes of defendant's intent was when he made the purchases, without also addressing the issue of whether defendant later formed the intent to withhold payment (*see People v Haupt*, 247 NY 369, 371 [1928]; Penal Law § 155.05[1]), this had a reasonable strategic explanation as well, in that there was little evidence of defendant's larcenous intent at the time of the purchases, but overwhelming evidence of his later intent to avoid payment. For this reason, any error by

counsel in this regard was harmless.

We have considered and rejected defendant's remaining claims.

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

ENTERED: JUNE 9, 2009



CLERK

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

771 Eunice Mangual, Index 21194/06
Plaintiff-Respondent,

-against-

U.S.A. Realty Corp.,
Defendant,

Annetta Banarsee,
Defendant-Appellant.

[And a Third-Party Action]

Fried & Epstein LLP, New York (John W. Fried of counsel), for appellant.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondent.

Order, Supreme Court, Bronx County (Paul Victor, J.), entered November 13, 2008, which, insofar as appealed from in this action for personal injuries sustained while exiting a building owned by defendant U.S.A. Realty Corp., denied defendant Banarsee's motion for partial summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Banarsee dismissing the complaint as against her.

The motion court erred in finding that an issue of fact existed concerning Banarsee's status as managing agent of the building. Regardless of whether Banarsee was acting as an officer of the corporate defendant or managing agent thereof,

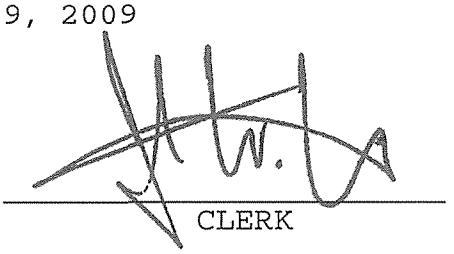
liability cannot be imposed absent a showing that Banarsee had exclusive control of the premises (*see Hakim v 65 Eighth Ave., LLC*, 42 AD3d 374, 375 [2007]; *Mendez v City of New York*, 259 AD2d 441, 442 [1999]). Here, the record establishes that Banarsee was not in exclusive control of the subject premises and plaintiff offered no evidence from which it could be inferred that Banarsee was in exclusive control.

M-2056 - Mangual v U.S.A. Realty Corp.

Motion seeking leave to supplement the record on appeal granted.

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

ENTERED: JUNE 9, 2009



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