SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 11, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

CORRECTED ORDER - FEBRUARY 15, 2012

Gonzalez, P.J., Mazzarelli, Sweeny, McGuire, DeGrasse, JJ.

5400N Anonymous,
Plaintiff-Respondent,

Index 305392/08

-against-

Anonymous,
Defendant-Appellant.

Mauro Goldberg & Lilling, LLP, Great Neck (Matthew W. Naparty of counsel), for appellant.

Leitner & Getz, LLP, New York (Jerome M. Leitner of counsel), for respondent.

Cohen Hennessy Bienstock & Rabin P.C., New York (Harriet Newman Cohen of counsel), Law Guardian.

Order, Supreme Court, New York County (Saralee Evans, J.), entered October 2, 2008, which, to the extent appealed from, granted plaintiff's motion for pendente lite relief in the form of monthly payments of $20,000 to maintain an apartment for plaintiff and the children, $7,000 in temporary child support, and $2,500 in temporary maintenance, as well as the cost of the children's private school tuition, child care and nursery school expenses, after-school and extracurricular activities, books,

supplies, camp and travel expenses, the children's medical, therapy, dental and pharmacological costs, and the family medical insurance premiums, modified, on the facts, defendant ordered to pay the actual monthly cost of the apartment in which plaintiff and the children presently reside in lieu of $20,000 per month to maintain an apartment, and otherwise affirmed, without costs.

Plaintiff wife and defendant husband were married in 1997. Together they had three children, who are 10, 7 and 3. The husband is the sole owner of a commercial bakery that employs approximately 125 people and generates annual revenues in excess of $22 million. The wife has an undergraduate degree in architecture and owned a design business prior to the marriage. However, she did not work outside the home during the marriage and has no income of her own. She claims that the husband kept her in the dark about the parties' finances and that for spending money she relied on weekly cash allowances that he gave her.

During the marriage, the family enjoyed what can only be described as an extravagant lifestyle. They resided in a 6-story townhouse on East 70th Street in Manhattan, which they purchased for $6 million and then gut-renovated. They owned a vacation home in the Hamptons, situated on three acres of land, that was designed by a renowned architect. All of the furnishings and appliances in the homes were state of the art. For example, the

mattress in the master bedroom in the townhouse cost approximately $50,000 and the speakers in the "audio/visual" room there cost approximately $150,000. Defendant's car collection is valued in excess of $1 million. The family's vacations were also extraordinary. They visited Paris each fall, and in the winter skied the slopes of Aspen, Vail, Beaver Creek and Bachelor Gulch. When they vacationed in Tuscany in the summer of 2005, they rented their own villa.

The parties also spared no expense when it came to their children. Each child's mattress cost approximately $6,500. When their oldest child wanted to learn how to play guitar, he received a $3,000 instrument. The children's annual birthday parties cost approximately $2,000 and their private school tuition is $30,000 per year each.

Shortly after she commenced this divorce action, the wife moved by order to show cause for pendente lite relief, including custody of the children, monthly maintenance, and monthly child support. The wife also sought to have defendant pay all carrying charges on the townhouse, medical insurance premiums for her and the children and private school tuition. In support of her motion the wife submitted her statement of net worth, in which she asserted that her monthly expenses were $52,658.80. These

included, among other things, $7,166.66 for food, $4,583.33 for clothing, $3,000 for babysitting, $7,270.82 for education, $9,813.66 for recreation and $2,054.33 for miscellaneous items.

The wife also claimed in the statement of net worth that her monthly housing cost was $15,000. This was the amount she anticipated she would have to spend to rent an apartment in Manhattan. The need for her to rent was made necessary by the fact that, as of the time the wife made the motion, the husband had entered into a contract to sell the townhouse. He had also signed an agreement to purchase a mansion in Scarsdale, New York. The wife claims that she adamantly rejected the husband's proposal that they sell the townhouse and that she had no desire to move the children out of the City.

The husband cross-moved for temporary custody of the children and the appointment of a law guardian for the children. In opposing the wife's motion, the husband asserted that the expenses claimed by the wife in her statement of net worth were "grossly exaggerated." For example, he stated that the parties never spent the specific amounts claimed by the wife for food and clothing. According to his own statement of net worth, those items cost $1,720 and $2,416, respectively. The husband further maintained that the wife was entitled only to maintenance in the

amount delineated in a pre-nuptial agreement between the parties.

The husband contended that the wife agreed to the concept of leaving the City. However, he conceded that he agreed to purchase the Scarsdale home unilaterally, after what he described as the wife changing her mind and refusing to cooperate in the search for a suitable home in Westchester County. The husband claimed that his desire to move to Scarsdale was motivated by the nearby presence of a particular private school well-suited to the special needs of one of the children, as well as the availability of good public schools for the other children. He also cited the declining real estate market in Manhattan and the rising cost of the children's private school tuition.

The husband claimed that the wife desires to remain in the City only to continue her own social life and that there is no reason for him to pay for an apartment when she and the children can live in the Scarsdale house. Further, he claimed that since two of his children could attend the Scarsdale public schools, it made no sense for him to also pay for private school tuition in the City. Indeed, he stated, he could not afford to carry the Scarsdale house and pay for private school. In support of the motion the husband submitted the parties' joint income tax returns for 2006, in which they stated adjusted gross income of $722,345.

After she replaced her original counsel, the wife's new attorneys brought an additional order to show cause that sought the same pendente lite relief as the first one. In her supporting affidavit, the wife asserted that the monthly rental cost of the apartments she had seen ranged from $15,000 to $22,000.

The court granted the wife's motion to the extent of directing the husband to pay her $20,000 per month to maintain an apartment in the City pending resolution of the action, as well as $40,000 for the initial rent payment and a security deposit. The husband was further ordered to pay up to $40,000 to furnish the apartment unless the parties agreed that the wife could furnish the apartment with items from the townhouse. In addition, the court directed the husband to pay the wife interim child support in the amount of $7,000 per month, maintenance in the amount of $2,500 per month, and an interim payment of attorneys' fees in the amount of $25,000. Finally, the court ordered the husband to pay the costs of the children's private school, child care, nursery school, after school and extracurricular activities, books, supplies, camps, travel and health care, and the family's health insurance premiums. In granting the award, the court stated that:

"This temporary award is reasonable in light

> of the children's prior standard of living and the great discrepancy between the parents' financial positions. *See Nayar v Nayar*, 225 AD2d 370 (1st Dept. 1996). In arriving at this calculation, the court has considered that rote application of the CSSA guidelines is not mandatory on a motion for temporary support. *Rizzo v Rizzo*, 163 AD2d 15 (1st Dept 1990)."

A pendente lite award should only be modified "rarely" (*Wittich v Wittich*, 210 AD2d 138, 140 [1994]) and the general rule is that an aggrieved party's remedy for perceived inequities in a pendente lite award is a speedy trial (*see Sumner v Sumner*, 289 AD2d 129 [2001]; *Gad v Gad*, 283 AD2d 200 [2001]). However, this rule, as the husband notes, may be set aside if exigent circumstances exist (*id.*).

While, in this case, the husband asserts that such exigent circumstances exist, he has failed to substantiate his claims. He argues that the court-mandated payments, combined with the cost of his own lifestyle, would exceed by $212,972 the gross income of $722,345 that he and the wife reported in their 2006 income tax return. However, he failed to establish his true income because he did not submit tax returns for 2007, nor did he offer any explanation for his failure. Further, it appears that in 2007 the husband had significantly more funds than he maintains he had in 2006. For example, he claimed in his Net

Worth Statement that in February 2007 he used his "separate property" to purchase a Lamborghini for over $200,000 in cash. This would have been highly unlikely, if the husband had income in 2007 equivalent to what he claimed in 2006, as it would have required that he devote more than one quarter of that income to a sports car. In any event, by purchasing the Lamborghini the husband confirmed his free-spending ways. This establishes that the award is not "so onerous as to deprive [the husband] of income and assets necessary to meet his own expenses." (*Moshy v Moshy*, 227 AD2d 182, 183 [1996]).

The husband further argues that the court impermissibly provided for a double housing allowance by ordering him to make both interim child support payments and separate payments for rental of an apartment. He asserts that at the very least the court was required to specifically delineate the components of the child support payment. The husband, however, misstates the law. In all of the cases cited by the husband in support of this point, the trial court had applied the Child Support Standards Act (Domestic Relations Law § 240[1-b]) in fashioning the pendente lite award (*Kaplan v Kaplan*, 192 AD2d 343 [1993]; *James v James*, 169 AD2d 441 [1991]; *Lenigan v Lenigan*, 159 AD2d 108 [1990]), or was directed to do so by the Appellate Division

(*Ryder v Ryder*, 267 AD2d 447 [1999]). Here, the court expressly and appropriately declined to apply the Child Support Standards Act. Thus, it was not required to deduct the amount awarded for carrying charges before determining the appropriate amount of child support (*see Otto v Otto*, 13 AD3d 503 [2004]; *Fischman v Fischman*, 209 AD2d 916, 917 [1994]).

In fashioning its award, the court properly considered the family's standard of living (*Winter v Winter*, 50 AD3d 431, 432 [2008]; *Lapkin v Lapkin*, 208 AD2d 474 [1994]; *Rizzo v Rizzo*, 163 AD2d 15, 16 [1990]). The husband cannot dispute that his children became accustomed to a lifestyle that is extremely expensive. The goal of child support is to continue the status quo pending the divorce and to satisfy the "overwhelming need to maintain a sense of continuity in the children's lives" (*Cron v Cron*, 8 AD3d 186, 187 [2004], *lv dismissed* 7 NY3d 864 [2006], *lv denied* 10 NY3d 703 [2008]). In this case, the trial court's child support award is consistent with that purpose. The same is true for those items that the husband characterizes as "open-ended" and "ambiguous," such as school supplies, summer camp and travel expenses (*see Rogers v Rogers*, 52 AD3d 354 [2008]).

The dissent loses sight of the goal of pendente lite

support, which is to return the parties to the pre-action status quo as quickly as possible. To require the exacting inquiry that the dissent favors would risk prolonging the process by which the parties can be returned to some sense of normalcy after the upheaval that often accompanies a separation. That this process be done speedily is especially critical where, as here, there are young children. Moreover, the dissent's approach would add an unnecessary burden to the matrimonial courts, whose resources are better spent shepherding the parties toward a final resolution.

The dissent's concern about the wife's financial responsibility is curious. This is especially so in light of the fact that the husband spent $200,000, more than one quarter of his alleged annual gross income for 2006, on a sports car. Moreover, there is no evidence that the husband objected to what he now argues are "unreasonable" expenditures during the marriage, such as the purchase of mattresses for the children that cost $6,500 each. Under such circumstances, there is no reason to impose a rebuttable presumption, as the dissent suggests, that the wife's expenditures above a specified amount are unreasonable. Of course, the wife should not interpret the order as requiring anything other than prudence and reason in making expenditures on behalf of the children. Nevertheless, the burden is on the husband to challenge the reasonableness of any

expenditures that he feels are excessive.

Finally, the award should be adjusted downward to reflect the actual amount (at present, approximately $17,000) that plaintiff is paying in monthly rent.

All concur except Gonzalez, P.J. and McGuire, J. who dissent in part a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting in part)

I agree that the order should be modified to reflect that the actual monthly cost of the apartment in which plaintiff and the three children of the marriage live is less than the monthly payments of $20,000 that defendant is required to pay under the order to maintain such an apartment. In my view, however, we should modify the award in two other respects.

First, we should vacate that portion of the pendente lite award directing defendant to make monthly payments of $7,000 in temporary child support over and above other child support payments. As defendant correctly argues, the pendente lite award separately requires him to pay for: (1) private school tuition, (2) child care and nursery school expenses, (3) after school and extra curricular activities, (4) books and supplies, (5) camp, (6) travel expenses, (7) all medical expenses for the children and (8) the family medical insurance premiums. As the housing costs for plaintiff and the children are otherwise provided for in the pendente lite award, the only expenses left for the children, who are 3, 7 and 10 years old, are food, clothing, entertainment (even assuming, what is at least doubtful, that this category of expenses is not subsumed within the categories of after-school and extracurricular activities), allowances and gifts. Even if it is not inconceivable that $84,000 ($7,000

times 12 months) a year is reasonably necessary to pay these specific categories of expenses, it is far from obvious that such a sum is reasonable.

It may be that because Supreme Court was determining the amount of *temporary* child support it was not required to apply the Child Support Guidelines and identify the factors it considered in deviating from the Guidelines (*compare Fischman v Fischman*, 209 AD2d 916, 917 [3rd Dept 1994] and *George v George*, 192 AD2d 693, 693 [2nd Dept 1993] *with Meyer v Meyer*, 173 AD2d 1021, 1022-1023 [3rd Dept 1991]). The parties cite no decision of this Court squarely on point. I need not decide the issue, however, because Supreme Court not only did not tie the award to the reasonable needs of the children, it provided no factual explanation at all of how it arrived at the $7,000 monthly sum.

As the mandated monthly payments of $7,000 in child support clearly do not include housing costs, it is not only entirely unclear but also puzzling (as is further discussed below) how Supreme Court arrived at this substantial sum for these specific categories of expenses. Although Supreme Court expressly recognized that a temporary child support award is designed to meet the reasonable needs of the children, it made no attempt to support the monthly award of $7,000 for food, clothing,

entertainment, allowances and gifts with any facts bearing on the amounts the parties previously had spent for these categories of expenses. Rather, Supreme Court simply proclaimed that its entire temporary award was "reasonable in light of the children's prior standard of living and the great discrepancy between the parents' financial positions." In my view, this reasoning proves too much and, at least where, as here, such a substantial award is made for specific categories of expenses, Supreme Court erred by providing no fact-based explanation for the award. Moreover, the complete absence of any explanation of this substantial component of the temporary child support award is troublesome for an additional reason. After all, as defendant correctly notes, a speedy trial is not an adequate remedy given that public policy generally precludes a reduction in permanent child support payments on account of excessive interim child support payments (*Coull v Rottman*, 35 AD3d 198, 200 [2006], *appeal dismissed* 8 NY3d 903 [2007]).

The fundamental problem with the monthly award of $7,000 for food, clothing, entertainment, allowances and gifts is that meaningful review of this aspect of the order is not possible. In this regard, *Matter of Cassano v Cassano* (85 NY2d 649 [1995]) is instructive. There, the issue was "whether the court must

articulate a reason for its award of child support on parental income exceeding $80,000 when it chooses simply to apply the statutory percentage" (*id.* at 654). Although the Court concluded that "an elaboration of needs-based reasons" was not required, it stated as follows:

> "That conclusion does not, however, end our analysis. Given that the statute explicitly vests discretion in the court and that the exercise of discretion is subject to review for abuse, some record articulation of the reasons for the court's choice to apply the percentage is necessary to facilitate that review (*see*, CPLR 4213 [b]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4213:2, at 336 [meaningful review is futile if court does not state facts upon which its decision rests]; *see also*, 4 Weinstein-Korn-Miller, NY Civ Prac ¶ 4213.07 [court must provide the ultimate facts which support its conclusion of law 'in order to enlighten the parties and to make more effective the review of judgments on appeal']])" (*id.* at 655).

As it cannot defend the $7,000 monthly award on the facts, the majority upholds it with a generality ("the court properly considered the family's standard of living") and by invoking a sweeping precept (the "goal of pendente lite support ... is to return the parties to the pre-action status quo as quickly as possible"). The generality could uphold an even greater monthly award (of, for example, $10,000 or $15,000) and the precept also proves too much. Meaningful review of the $7,000 monthly award

is not possible and the award for that reason is improper and unfair to defendant (*see generally Yunis v Yunis*, 94 NY2d 787 [1999]).

The majority also defends its position with the assertion that I would require "exacting inquiry." Why the majority imputes this position to me is unexplained. But even if the majority could provide a basis for characterizing the scrutiny I would require as "exacting," Supreme Court's failure to provide any factual support for its award would be no less stark. The need to avoid excessive scrutiny does not justify an inscrutable award. Contrary to the majority, requiring the articulation of at least some factual support for a pendente lite award does not "add an *unnecessary* burden to the matrimonial courts" (emphasis added). Rather, "[o]nly with such record articulation can appellate courts - especially intermediate appellate courts with plenary fact, law and discretion power - exercise meaningful, consistent and fair review of [temporary child support and maintenance] rulings" (*Yunis* at 789).

The majority thinks it relevant to note that "[e]ach child's mattress cost approximately $6,500." Unless the majority considers mattresses a recurring expense, however, it is unclear how this fact supports the $7,000 monthly award. By relying on

this apparent extravagance, the majority helps to make my point: the factual basis for its decision to uphold the award of such a substantial sum over and above the other child support payments, like Supreme Court's decision to make this award, is inscrutable.

For these reasons, I would vacate the temporary child support award, direct further proceedings and require Supreme Court to articulate the factual basis for this component of the interim child support award regardless of whether it is revised after remand.

The order should be modified in another, related respect. As defendant argues, the awards for travel, after-school expenses, extracurricular activities, books, supplies and camp are open ended (i.e., not fixed by any objective criteria). Moreover, the awards for camp, travel expenses, after-school expenses and extracurricular activities are ambiguous. For example, if, as appears to be the case, the term "travel expenses" includes vacations (and so the costs of vacations are not included in the $7,000 monthly award), defendant could be required to pay for any number of extraordinarily expensive vacations. How after-school and extracurricular activities are to be distinguished also is far from clear. I do not mean to suggest that we should decide this appeal on the assumption that

plaintiff would act unreasonably with respect to these expenses or that the order sensibly could be read to require boundless expenditures for travel, camp, after-school and extracurricular activities. But it is worthy of note that in her net worth statement submitted by her prior counsel, plaintiff requested a monthly child support award of $50,000. I think it self-evident that this request for an annual child support award of $600,000 is preposterous.

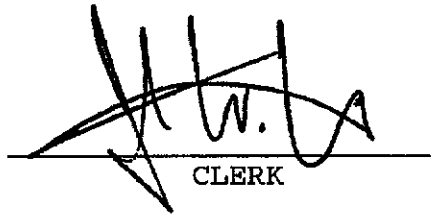
Under these circumstances, I would direct that the modified award set a monthly limit on the amount the husband is required to pay for travel, camp, after-school and extracurricular activities with any expenditures in excess of the specified amount to be approved in advance by the court unless defendant states that he does not object to the particular expenditure. Exquisite precision cannot be achieved when it comes to defining the scope of these expenses. Given that many divorce actions are highly contentious, it is prudent to require generally that the order expressly state that all the expenses must be reasonable. Doing so can do little if any real harm but can serve to deter unreasonable expenditures borne of bitterness.

Finally, I note that whether defendant is entitled to any

relief on account of the payments he made to maintain the apartment in excess of the monthly rent is not before us on this appeal.

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

ENTERED: JUNE 11, 2009



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

378 Eva Flores, Index 16038/05
Plaintiff-Respondent,

-against-

Langsam Property Services Corp, et al.
Defendants-Appellants.

McMahon, Martine & Gallagher, Brooklyn (Patrick W. Brophy of counsel), for appellants.

Raymond Schwartzberg & Associates, PLLC, New York (Steven I. Brizel of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about September 29, 2008, which, insofar as appealed from in this action for personal injuries allegedly sustained as a result of being burned by a burst of scalding water that emanated from plaintiff's showerhead after it was turned off, 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.

Plaintiff commenced this action in May 2005, asserting a cause of action in negligence to recover damages for burns she allegedly sustained in her shower in April 2004. In an order dated September 16, 2008, Supreme Court denied defendants' summary judgment motion, reasoning that defendants failed to "submit

evidence that [they] inspected and maintained [their] property in a reasonably safe condition as a matter of law; thereby obviating constructive notice."

Defendants' submissions, which consisted of the pleadings and plaintiff's verified bill of particulars and deposition testimony, were sufficient to show the absence of triable issues of fact regarding their constructive notice of the defective condition which the plaintiff alleges caused her injuries (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In her deposition, the plaintiff testified that the shower suddenly and without warning sprayed her with scalding hot water. Furthermore, this had never happened before. Plaintiff's prior complaints had concerned hot water dripping from the shower. The water that scalded plaintiff was, as described by her, a strong stream and very hot. Notice of a dripping shower will not suffice when the defect that injured the plaintiff was unrelated and not readily apparent (*see LaTronica v F.N.G. Realty Corp.*, 47 AD3d 550 [2008]; *Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500 [2007], *lv denied* 9 NY3d 809 [2007]; *Baumgardner v Rizzo*, 35 AD3d 223 [2006], *lv denied* 8 NY3d 806 [2007]).

Plaintiff failed to rebut defendants' prima facie showing that they had no notice of the defective condition or that they had no duty to inspect for a spontaneous occurrence.

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

FREEDMAN, J. (dissenting)

I would affirm the motion court's order. Contrary to the majority's position, I find that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiff testified in her deposition, that she had made a number of complaints to the super and the handyman about hot water dripping constantly from the shower, and although he assured her he would take care of it, nothing was done. She also stated that there were a number of grandchildren in the apartment, and that in order to bathe them, towels had to be put over the shower head. She further testified that other tenants had complained about hot water leaks and that nothing had been done.

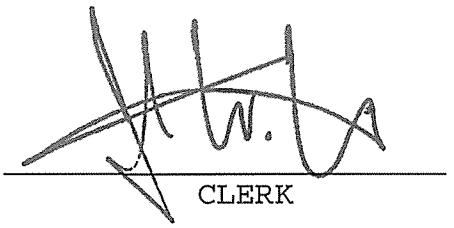
I disagree that the prior complaints were insufficiently related to the alleged defect that injured plaintiff to constitute notice. The sudden burst of hot water after the shower was turned off was close enough to the ongoing complaint of hot water constantly dripping or streaming from the shower head to raise a triable issue as to notice.

Defendants' submissions, which consisted of the pleadings and plaintiff's verified bill of particulars and deposition testimony, were insufficient to show the absence of triable

issues of fact regarding their constructive notice of the defective condition which plaintiff alleges caused her injuries (*see Paz v Trump Plaza Hotel & Casino*, 28 AD3d 212, 213 [2006]). Notably, defendants failed to produce the building superintendent to whom tenants would have complained of problems with the hot-water system, and failed to produce any records relating to the maintenance of and complaints about the boiler and hot-water system despite numerous requests and court orders to produce them (*see Carlos v 395 E. 151st St., LLC*, 41 AD3d 193, 196 [2007]; *Vaughan v 1720 Unico, Inc.*, 30 AD3d 315, 316 [2006]). The two witnesses produced, a repairman and a property manager, were unaware of the identity of the superintendent or sure of where maintenance records, if any, were kept.

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

ENTERED: JUNE 11, 2009



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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 11, 2009.

Present - Hon. Peter Tom, Justice Presiding
James M. Catterson
Rosalyn H. Richter
Sheila Abdus-Salaam,

Justices.

The People of the State of New York,
Respondent,

SCI. 29647/05

-against-

528 &
M-2195

Messiah Bey,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Byrne, J.), rendered on or about June 5, 2006,

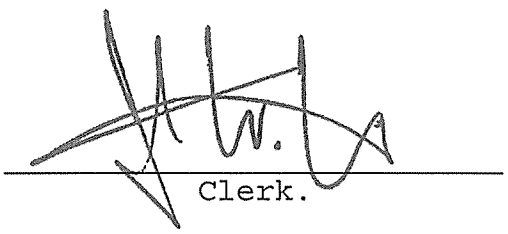
And said appeal having been argued by counsel for the respective parties;

And defendant having moved pro se to relieve appellate counsel and for other related relief,

And due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from is hereby affirmed, and the motion is hereby denied.

ENTER:



Clerk.

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

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

773 The People of the State of New York, Ind. 4609/06
Respondent,

-against-

Cedric Lawton,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

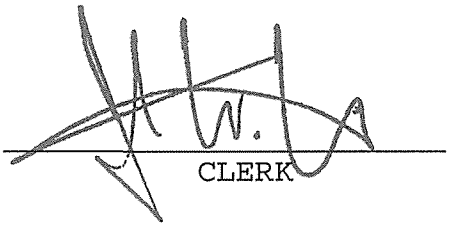
Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentence), rendered July 3, 2007, convicting defendant of murder in the second degree, manslaughter in the second degree and robbery in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress his oral, written and videotaped statements. The totality of the circumstances establishes that the statements were voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Mateo*, 2 NY3d 383, 413-416 [2004]). There is no evidence that anything about defendant's physical or mental condition impaired the voluntariness of the statements.

Defendant's arguments that the interrogating detective materially misrepresented to defendant the number of witnesses who had identified him, promised to fulfill defendant's requests for dry clothing, food and other comforts in exchange for his confession, and made improper comments prior to the videotaped statement are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also find them without merit.

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

ENTERED: JUNE 11, 2009



Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

774 Deysi Depena, Index 20954/06
Plaintiff-Respondent-Appellant,

-against-

Mohamed Sylla, et al.,
Defendants-Appellants-Respondents.

Law Office of Thomas Torto, New York (Jason Levine of counsel), for appellants-respondents.

Peña & Kahn, PLLC, Bronx (Ralph P. Franco, Jr. of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered January 9, 2009, which granted defendants' motion for summary judgment dismissing the complaint alleging serious injury only to the extent it sought to dismiss the 90/180-day claim, unanimously modified, on the law, without costs, to grant the motion in its entirety. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants established prima facie that plaintiff did not sustain a permanent consequential or significant injury, by submitting the affirmations of an orthopedist, neurologist and radiologist who found that the knee and shoulder conditions were degenerative in origin and did not cause significant limitations, that the lumbar spine condition was preexisting, and that there

were no limitations in range of motion of the cervical spine (*see Valentin v Pomilla*, 59 AD3d 184 [2009]). The conflict between the neurologist's findings of normal range of motion and the orthopedist's findings of limited range of motion in plaintiff's lumbar spine does not require denial of the motion, since defendants submitted sufficient evidence to establish that any lumbar injury was the result of an earlier work accident and surgery.

Plaintiff failed to submit sufficient evidence to raise an issue of fact as to any of the alleged injuries. As to her right knee, a radiologist, Dr. Lubin, reported that an MRI taken after the accident showed "[g]rade II linear signal abnormality within the posterior horn of the medial meniscus likely representing degenerative changes." Defendant's radiological expert similarly opined that the MRI showed degenerative changes but no evidence of acute or recent injury. While plaintiff's orthopedic surgeon, Dr. Silverman, opined that the knee condition resulted from the accident, he failed to address the medical findings of degenerative change by the radiologists and provided no support for his conclusion (*see Valentin, supra; Cruz v Aponte*, 60 AD3d 431 [2009]).

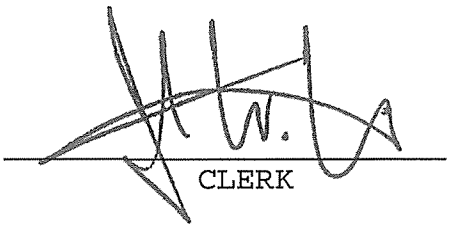
Dr. Silverman also failed to address defendants' experts' findings that plaintiff's restricted range of motion in the

lumbar spine was attributable to her prior surgeries and that her shoulder showed evidence of degenerative changes and no limitation in range of motion. Although plaintiff's MRIs showed herniated discs in the cervical spine, defendants' experts found full range of motion, as did a doctor and an acupuncturist who treated plaintiff after the accident (*see Valentin, supra*; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [2008]). Dr. Silverman's finding, two years after the accident, of some limitation in range of motion is too remote to raise an issue of fact whether the limitation was caused by the accident (*see Lopez v Simpson*, 39 AD3d 420 [2007]).

Plaintiff's claim that she could not perform substantially all her daily activities for 90 of the first 180 days following the accident because of an injury or impairment caused by the accident was not substantiated by competent medical evidence (*see Uddin v Cooper*, 32 AD3d 270, 272 [2006], *lv denied* 8 NY3d 808 [2007]).

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

ENTERED: JUNE 11, 2009



CLERK

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

776 Michael Arouh, Index 112956/07
Plaintiff-Appellant,

-against-

Budget Leasing, Inc., also known as Roger Beasley Porsche,
Defendant-Respondent.

Michael Arouh, appellant pro se.

Murtagh, Cohen & Byrne, Rockville Centre (John E. Gray of counsel), for respondent.

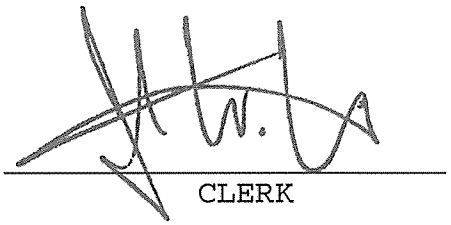
Order, Supreme Court, New York County (Edward H. Lehner, J.), entered May 2, 2008, which granted defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

Defendant's negotiation of the potential purchase of an automobile via email and telephone, which was initiated by plaintiff after viewing the car on defendant's website, is insufficient to constitute the "transaction" of business within New York (*see Granat v Bochner*, 268 AD2d 365 [2000]), and, since the car was to be picked up in Texas, there was no contract to "supply goods or services in the state" (CPLR 302[a][1]). Defendant's website, which described available cars and featured a link for email contact but did not permit a customer to

purchase a car, was not a projection of defendant into the State (*see Haber v Studium, Inc.*, 22 Misc 3d 1129(A), 2009 NY Slip Op 50368(U), *4-5 [2009]).

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

ENTERED: JUNE 11, 2009



CLERK

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

779 The People of the State of New York, Ind. 3818/99
Respondent,

-against-

Tyreek Page,
Defendant-Appellant.

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Romano & Kuan, PLLC, New York (Julia P. Kuan of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Michael J. Obus, J. at suppression hearing; Ronald A. Zweibel, J. at jury trial and sentence), rendered March 15, 2001, convicting defendant of murder in the second degree (two counts), attempted murder in the second degree, assault in the first degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree and reckless endangerment in the first degree, and sentencing him to an aggregate term of 60 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new aggregate term of 25 years to life, and otherwise affirmed.

Defendant's arguments that the court erred in failing to

suppress allegedly custodial statements made to the police before he received his *Miranda* warnings, as well as statements he made after he received those warnings, are unpreserved and we decline to review them in the interest of justice. The hearing court did not "expressly decide[ ]" (CPL 470.05 [2]) these issues (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]). On the contrary, while the court made reference to the question of custody, it expressly stated that no such issue was before it at the hearing, since defendant was only challenging the legality of the police entry into certain premises (an issue not pursued on appeal). As an alternative holding, we also reject defendant's claims on the merits. With respect to his pre-*Miranda* statements, a reasonable person in defendant's position, innocent of any wrongdoing, would not have believed that the interrogation was custodial (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *People v DeJesus*, 32 AD3d 753 [2006], *lv denied* 8 NY3d 879 [2007]). Although defendant was initially seized and handcuffed by parole officers, police detectives immediately removed the handcuffs and clearly conveyed to defendant that the detention had terminated, whereupon defendant agreed to accompany the detectives to be interviewed as a potential witness. In any event, regardless of the admissibility of the pre-*Miranda* statements, there was a definite, pronounced break in the

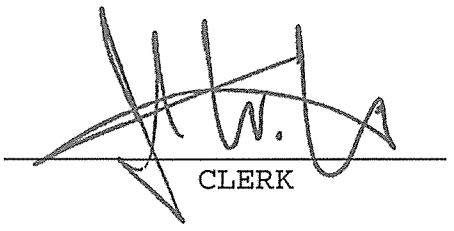
interrogation so that the post-*Miranda* statements were admissible (*see People v Paulman*, 5 NY3d 122, 130-131 [2005]).

Defendant's argument that his convictions for intentional murder (under a transferred intent theory) and depraved indifference murder should be reversed because the counts were not submitted to the jury in the alternative is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject the argument on the merits. Where, as here, more than one potential victim was present at the shooting, a defendant may be convicted of both counts because he or she may have possessed different states of mind with regard to different potential victims (*see People v Hamilton*, 52 AD3d 227, 228 [2008], *lv denied* 11 NY3d 737 [2008]; *People v Monserate*, 256 AD2d 15 [1998], *lv denied* 93 NY3d 855 [1999]).

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 11, 2009



Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

782 Pamela Pryor, et al., Index 116851/02
Plaintiffs-Appellants,

-against-

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

Judlau Contracting, Inc.,
Defendant-Respondent.

Rovegno & Taylor, P.C., Great Neck (Robert B. Taylor of counsel), for appellants.

Biedermann, Reif, Hoenig & Ruff, PC, New York (Peter W. Beadle of counsel), for respondent.

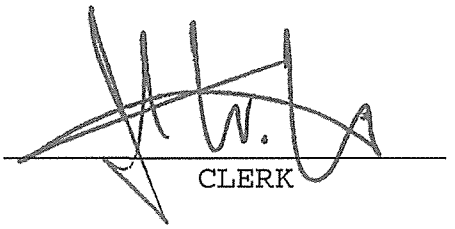
Order, Supreme Court, New York County (Karen S. Smith, J.), entered April 11, 2008, which, in an action for personal injuries allegedly sustained as the result of a trip and fall over an exposed base plate for a sidewalk bollard, granted defendant-respondent's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Respondent made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that it performed no construction work at or near the area where plaintiff fell. In opposition, plaintiff failed to raise a triable issue of fact. The testimony of plaintiff's expert as to

the cause of the accident was speculative and without support in the record, and, as such, insufficient to support a finding that respondent performed any work where plaintiff fell (*see Reyes v Kimball, Div. of Kimball Intl. Mktg.*, 269 AD2d 156, 157 [2000]).

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

ENTERED: JUNE 11, 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 11, 2009.

Present - Hon. Peter Tom, Justice Presiding
Eugene Nardelli
James M. Catterson
Dianne T. Renwick
Rosalyn H. Richter, Justices.

The People of the State of New York, Ind. 1983/07
Respondent,

-against- 784

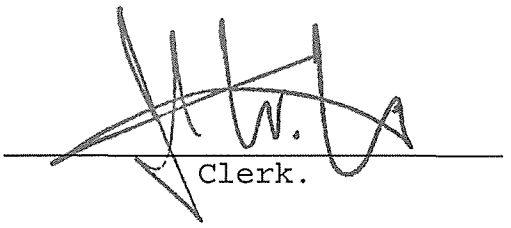
Jermin Coster,
Defendant-Appellant.

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

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

785 The People of the State of New York, Ind. 4593/05
Respondent,

-against-

Jayson Smith,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Wachtell, Lipton, Rosen & Katz, New York (Joshua A. Naftalis of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered November 21, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to term of 4 years, unanimously affirmed.

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

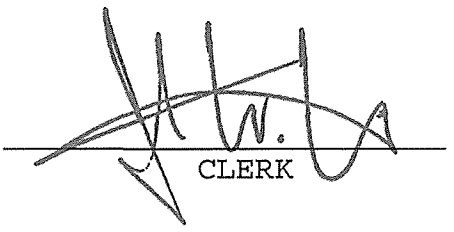
The record does not support defendant's claim that the People made a belated, midtrial disclosure of *Rosario* (*People v Rosario*, 9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]) material. Instead, it supports the conclusion that the People

made marked photocopies of prerecorded buy money, containing an officer's annotations, available to defendant for inspection prior to opening statements (*see* CPL 240.45[1][a]). In any event, regardless of the timing of the disclosure, there is no basis for reversal (*see* CPL 240.75), because the annotations were insignificant in the context of the case, defendant was able to cross-examine the officer about them, and defendant has not established any adverse effect on his trial strategy.

When a witness gave testimony that the court had previously precluded, the court directed the jury to disregard this testimony and defendant did not request any further remedy. Therefore, defendant did not preserve his present argument concerning this evidence (*see People v Heide*, 84 NY2d 943 [1994]), and we decline to review it in the interest of justice. As an alternative holding, we find that the curative instruction was sufficient to prevent any prejudice.

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

ENTERED: JUNE 11, 2009



Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

786 Mike Jean, Index 17588/06
Plaintiff-Respondent,

-against-

Mohamed Kabaya, et al.,
Defendants-Appellants.

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

Hach & Rose, LLP, New York (Philip S. Abate of counsel), for respondent.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered January 12, 2009, which denied defendants' motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants established prima facie entitlement to judgment by submitting the report of their expert orthopedist indicating that plaintiff had normal range of motion in his left knee and that there was no finding suggesting a traumatic injury. The expert further opined that the cartilage changes in plaintiff's left knee were due to a degenerative condition, probably caused by plaintiff's sports activity. Indeed, the same cartilage changes found in plaintiff's left knee during his arthroscopic surgery were also affecting in his right knee, according to the

expert.

In response, plaintiff proffered insufficient objective medical evidence contemporaneous with the accident to reveal significant limitations in his knee resulting from the accident (*Ali v Khan*, 50 AD3d 454 [2008]). This requirement exists even where there is surgery on the knee (*Danvers v New York City Tr. Auth.*, 57 AD3d 252 [2008]). Furthermore, plaintiff's expert physician failed to address defendants' prima facie showing that the knee condition was due to preexisting, degenerative changes unrelated to any traumatic injury attributable to the accident (*Colon v Tavares*, 60 AD3d 419 [2009]; *Valentin v Pomilla*, 59 AD3d 184 [2009]).

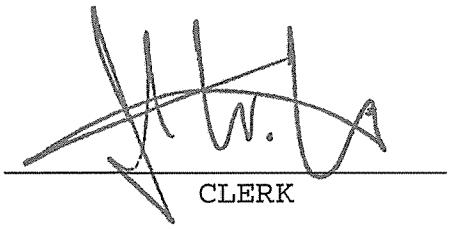
Plaintiff missed only two weeks of school and no work as a result of the accident. Without any objective medical evidence, plaintiff's statements that he was limited in his ability to perform his normal daily activities as he had before the accident were insufficient to establish a serious injury under the 90/180-day test of Insurance Law § 5102(d) (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

Plaintiff's argument regarding the evidence relied upon by

defendants' expert physician is raised for the first time on appeal, and is thus not properly before us.

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

ENTERED: JUNE 11, 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 11, 2009.

Present - Hon. Peter Tom, Justice Presiding
Eugene Nardelli
James M. Catterson
Dianne T. Renwick
Rosalyn H. Richter, Justices.

The People of the State of New York, Ind. 3494/05
Respondent,

-against- 787

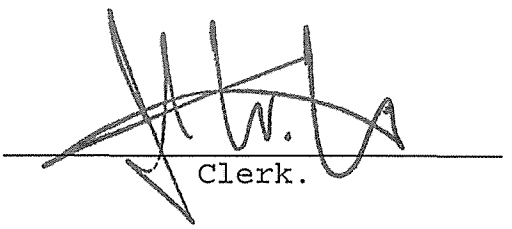
Claudio Labour,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about December 13, 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.

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

789 The People of the State of New York, Ind. 2143/07
Respondent,

-against-

Hockeem Smith,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered October 16, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police had probable cause to arrest defendant for assault, based on information provided by an unidentified citizen-informant that satisfied both prongs of the *Aguilar/Spinelli* test (*Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]). The basis of knowledge test was satisfied when the informant stated that she had personally witnessed the assault. Although the police did not have an opportunity to ascertain her identity during this fast-paced incident, the

reliability of her information was supported by several factors. She gave both the 911 operator and the officers who arrived at the scene a detailed description of an assault on a pregnant woman pushing a baby stroller, including a detailed description of defendant's clothing, and the officers were able to independently corroborate this information provided when they saw a woman and a man fitting the informant's descriptions. Furthermore, the officers observed the informant's excited demeanor, which suggested that she had just witnessed a disturbing event (*see People v Govantes*, 297 AD2d 551 [2002], *lv denied* 99 NY2d 558 [2002]). Finally, the predicate for police action was heightened when defendant did not simply exercise his "right to be let alone," but "actively fled from the police" (*People v Moore*, 6 NY3d 496, 500-501 [2006]) and put up a violent struggle when the police stopped him.

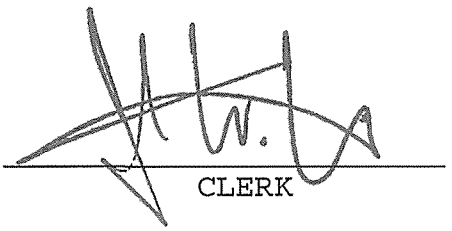
Although between the time that the police detained defendant and the time they recovered a weapon from his person, the alleged assault victim stated that defendant, her boyfriend, did not assault her and that she had only been arguing with him, this did not negate probable cause, given the other circumstances. Instead, it merely presented the officers with a contradictory version of the events, which, by itself, did not vitiate probable

cause (*see e.g. People v Roberson*, 299 AD2d 300 [2002], *lv denied* 99 NY2d 619 [2003]). In any event, regardless of whether defendant was still lawfully under arrest for assault at the time of the seizure, he was lawfully under arrest for resisting arrest because he had resisted an arrest that had clearly been lawful at the time of the resistance.

Defendant's remaining suppression argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: JUNE 11, 2009



CLERK

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

791N Leonidas Gomez, Index 21037/02
Plaintiff-Appellant,

-against-

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

Mr. Storeworks, LP, et al.,
Defendants-Respondents.

Broder & Reiter, New York (Glenn A. Herman of counsel), for appellant.

Gallo Vitucci & Klar LLP, New York (Kimberly A. Ricciardi of counsel), for respondents.

Order, Supreme Court, Bronx County (Barry Salman, J.), entered March 14, 2008, granting defendants-respondents' motion for reargument of an order entered on or about October 31, 2007 granting plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, which, to the extent appealed from as limited by the brief, upon reargument, recalled and vacated its prior order and denied plaintiff's motion, unanimously reversed, on the law, without costs, and plaintiff's motion granted.

Plaintiff was injured when he fell two stories when the fire escape on which he was working detached from the building and fell to the ground. Plaintiff established a prima facie

entitlement to summary judgment on the issue of liability on his Labor Law § 240(1) claim by showing that the subject fire escape was the functional equivalent of a scaffold and failed to provide adequate protection for the elevation-related work he was performing (*see De Jara v 44-14 Newtown Rd. Apt. Corp.*, 307 AD2d 948, 950 [2003]). The evidence shows that it was necessary for plaintiff to stand on the exterior fire escape to remove a window on the third floor of the building where he was performing demolition work and where the ceiling and floor between the second and third floors had already been removed. The fact that the fire escape was a permanent rather than a temporary structure does not warrant a different determination (*id.*). In opposition, respondents failed to raise a triable issue of fact regarding the manner in which the accident occurred.

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

ENTERED: JUNE 11, 2009