SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 16, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

792 The People of the State of New York, Respondent, Ind. 1232/90

-against-

Mario Soto,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Mark Dwyer of counsel), for respondent.

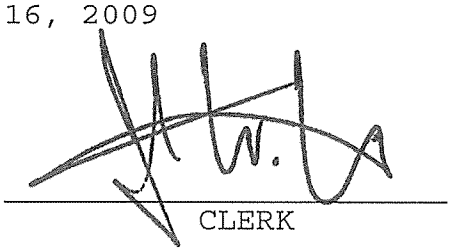
Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 20, 1991, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of 2 to 6 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There was probable cause for defendant's arrest, because a police officer saw him engage in what the officer reasonably believed to be a drug transaction (*see People v McRay*, 51 NY2d 594, 603-604 [1980]). The record establishes that, in a notorious "drug marketplace" (*id.* at 604), the officer saw the transfer of a shiny object that he recognized, based on his experience, to be

drug packaging, and not that he merely saw an unidentified object that he assumed to be drugs because of the character of the location. The record also supports the court's alternative finding that the officer recovered a handgun through a legitimate self-protective measure based on reasonable suspicion and concern for his safety.

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

ENTERED: JUNE 16, 2009



CLERK

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

793 The Lansco Corporation, Index 604080/07
Plaintiff-Appellant-Respondent,

-against -

N.Y. Brauser Realty Corp.,
Defendant,

James F. Glancy, et al.,
Defendants-Respondents-Appellants.

[And a Third-Party Action]

Lionel A. Barasch, New York, for appellant-respondent.

Hartman & Craven LLP, New York (Victor M. Metsch of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Herman Cahn, J.), entered January 16, 2009, which, in an action to recover a real estate brokerage commission, denied plaintiff's motion for summary judgment against defendants James F. Glancy and The Manhattan Music Group LLC, and denied Glancy and Manhattan Music's cross motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to grant partial summary judgment to plaintiff on the issue of Glancy's liability for breach of the letter agreement he signed, and to refer the matter for a hearing on the issue of damages, and otherwise affirmed, with costs in favor of plaintiff payable by defendants Glancy and The Manhattan Music Group LLC.

It is undisputed that plaintiff introduced Glancy to one of

the owners of the subject property, toured the property with him, and gave him written information about the property's specifications that plaintiff had prepared. At the conclusion of the 25-minute tour, Glancy signed the short one-page letter agreement that is in issue, in which he agreed that any further negotiations and discussions about the property would be conducted solely through plaintiff as broker, and which also provided that the owner would pay plaintiff's commission. Glancy claims that he was disoriented as a result of a slip and fall that occurred at the beginning of the tour and did not know what he was signing. Approximately three months later, a lease for the property was entered into by Manhattan Music, as tenant, an LLC in which Glancy is a member and manager, and which was formed eight days before execution of the lease. The lease acknowledges the use of brokers other than plaintiff in bringing about the transaction, and also provides that Manhattan Music would indemnify the owner for any real estate commission the owner may owe to any broker, other than the brokers named in the lease, who was instrumental in negotiating or bringing about the lease.

Defendants Glancy and Manhattan Music contend that the letter agreement is not enforceable and the complaint against them should be dismissed because, first, the agreement does not contain material terms such as duration, the duties of the parties, and the manner in which plaintiff's fee was to be

computed. However, we have previously recognized an agreement like this to be enforceable (*Lansco Corp. v World Zionist Org. Am. Section*, 198 AD2d 176 [1993] [plaintiff broker's claim for breach of contract to work only through it and to recognize it as the broker is based on defendant's interposition of another broker into the transaction and subsequent representation to landlord in the lease that other broker was only broker with whom it dealt; such interposition frustrated plaintiff's right to payment of commission by landlord, who, relying on defendant's representation, paid commission to other broker]). The amount of contact Glancy had with plaintiff after inspecting the property has no bearing on the enforceability of the letter agreement or its breach by Glancy by reason of using a different broker to negotiate the lease.

Glancy and Manhattan Music also argue that the letter agreement is unenforceable because, as a result of Glancy's fall and disorientation, he did not understand that the letter agreement was intended to be a binding contract. It is well settled that the signer of an instrument is conclusively bound by its terms regardless of whether he actually read it, and that his mind never gave assent to the terms expressed is not material (*see James Talcott, Inc. v Wilson Hosiery Co.*, 32 AD2d 524 [1969]). Further, Glancy's simple statement that he was disoriented as a result of his fall at the beginning of the tour

is insufficient to meet his burden of demonstrating that his mind was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction and that such incompetence or incapacity existed when he executed the document (*see Willis E. Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282, 1284-1285 [2007]).

Nor does the capacity in which Glancy signed the letter agreement raise any material issues of fact. The document, on its face, indicates that Glancy signed in his individual capacity, in which event he would be personally liable for its breach. But the result, i.e., Glancy's personal liability, would be the same even if he had signed on behalf of an undisclosed principal, namely, Bowery Presents, an LLC of which he was a member at the time (*see Tarolli Lbr. Co. v Andreassi*, 59 AD2d 1011, 1011-1012 [1977]), or the as yet to be formed Manhattan Music (*see id.* at 1012, *Universal Indus. Corp. v Lindstrom*, 92 AD2d 150 [1983]).

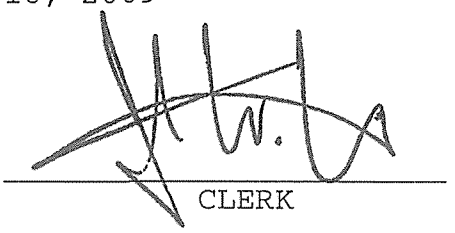
While plaintiff correctly argues that the measure of its damages is the amount of the commission it would have been paid by the owner had Glancy not used a different broker (*see Lansco Corp.* 198 AD2d 176, *supra; Sylvan Lawrence Co. v Pennie & Edmonds*, 235 AD2d 215 [1997]), there is no evidence conclusively demonstrating the amount, if any, of that commission. The commission agreement between plaintiff and the owner is not

controlling since it was entered into after the letter agreement was signed. Thus, it is not clear that, at the time plaintiff showed the property to Glancy and Glancy signed the letter agreement, the owner had retained plaintiff as its broker and agreed to a commission rate.

We have considered the parties' other arguments for affirmative relief and find them without merit.

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

ENTERED: JUNE 16, 2009



CLERK

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

795 In re Felton R.,
Petitioner-Appellant,

-against-

Gloria P.,
Respondent-Respondent.

Anne Reiniger, New York, for appellant.

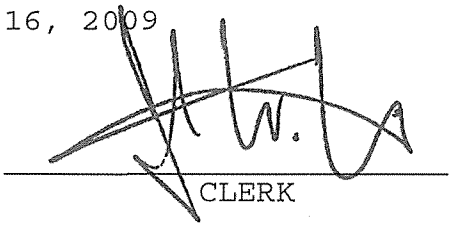
Louise Belulovich, New York, Law Guardian.

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about March 14, 2008, which dismissed the petition seeking to vacate an acknowledgment of paternity, unanimously affirmed, without costs.

This proceeding was brought well beyond the statutory deadline for rescinding an acknowledgment of paternity, and petitioner failed to make a prima facie showing of fraud, duress or material mistake of fact (*see* Family Court Act § 516-a[b]; *Ng v Calderon*, 6 AD3d 255 [2004]). Petitioner admitted that he signed the acknowledgment of paternity 12 years earlier with the knowledge that he was not the child's biological father.

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

ENTERED: JUNE 16, 2009



CLERK

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

796 The Board of Managers of the 60 Greene Condominium, etc., Plaintiff-Appellant-Respondent, Index 601158/07

-against-

Acacia SoHo, LLC, Defendant-Respondent-Appellant.

Wachs & Associates, Larchmont (Stuart Wachs of counsel), for appellant-respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered February 28, 2008, which denied the parties' respective motions for summary judgment and granted that branch of plaintiff's cross motion as sought leave to amend the complaint, unanimously affirmed, without costs.

Plaintiff is a residential condominium; defendant corporate unit owner purchased from the sponsor the right to develop a roof-top unit in formerly common space. In a first amendment to the offering plan, the sponsor indicated its intention to develop the penthouse and agreed that, within 60 days after obtaining City approval for the construction, it would amend the pertinent declaration so as to reflect the reallocation of common shares resulting from the addition of the penthouse to the building. After the sponsor sold its rights to the roof to defendant, it filed a fifth amendment disclosing the sale and stating that the

common charges would be reallocated upon, inter alia, the City's issuance of a temporary certificate of occupancy for the penthouse. Separately, in a so-called contribution agreement, defendant agreed to undertake roof work for which plaintiff agreed to make a cash payment to defendant.

Supreme Court correctly found an issue of fact as to defendant's liability for common charges that accrued prior to the issuance of the temporary certificate of occupancy. The first amendment contrasts with the fifth amendment in that only the latter has language making the reallocation of common interests self-effecting and automatic. A later agreement, however, specified that the obligation outlined in the first amendment belonged to the sponsor or its designee, and the fifth amendment named defendant as the sponsor's designee. Plaintiff argues that the fifth amendment merely determines when defendant became liable for the common charges, but that the first amendment still controls as to which common charges are owed, while defendant argues that the 60-day provision in the first amendment merely refers to the sponsor's obligation to amend the declaration. Because, taken together with the various agreements and declarations, the offering plan as amended can be parsed in two different, equally logical ways (*see Schechter Assoc. v Major League Baseball Players Assn.*, 256 AD2d 97, 97 [1998]), summary judgment was properly denied to both sides on this cause of

action. Defendant's argument that the claims are time-barred is without merit.

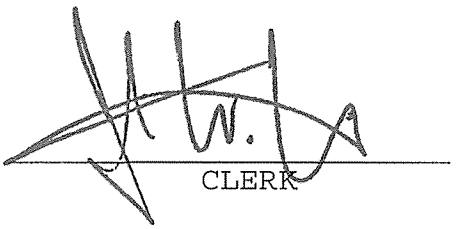
Both sides agree that defendant's counterclaim based on the contribution agreement should go to trial. Plaintiff's attempt to broaden the scope of the court's inquiry on this issue is without merit. The agreement specifies that plaintiff's payment is in "consideration of" defendant's "agreement to include certain waterproofing protection" to the penthouse floor, and there is no indication that the payment was to be in consideration of any other work.

The amended complaint (which is absent from the record, apparently due to defendant's counsel's representation to plaintiff's counsel that defendant's appeal would not be pursued) was accompanied by evidentiary material that included a detailed affidavit from plaintiff's engineering expert. We decline to disturb Supreme Court's exercise of discretion in granting leave to serve the amended complaint. The action is still in an early stage (*see Kocak v Egert*, 280 AD2d 335, 336 [2001]), and there is no "indication that the defendant has been hindered in the preparation of [its] case or has been prevented from taking some

measure in support of [its] position" (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007] [internal quotation marks omitted]).

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

ENTERED: JUNE 16, 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 16, 2009.

Present - Hon. David B. Saxe, Justice Presiding
John W. Sweeny, Jr.
Karla Moskowitz
Rolando T. Acosta
Rosalyn H. Richter, Justices.

Oscar Gomez, et al.,
Plaintiffs-Respondents, Index 601839/07

-against- 806

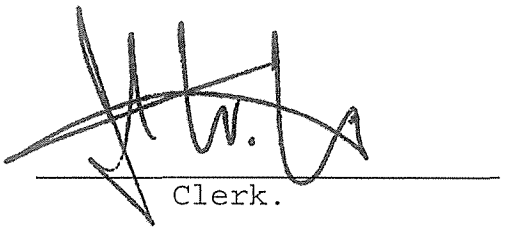
L-3 Communications Corporation,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Louis B. York, J.), entered June 21, 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 22, 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.

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 16, 2009.

Present - Hon. David B. Saxe, Justice Presiding
John W. Sweeny, Jr.
Karla Moskowitz
Rolando T. Acosta
Rosalyn H. Richter, Justices.

The People of the State of New York, Ind. 4674/06
Respondent,

-against- 808

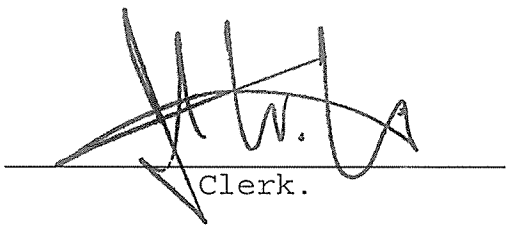
Keith Kidd,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J.), rendered on or about June 28, 2007,

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

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

ENTER:



Clerk.

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

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

809 The People of the State of New York, Ind. 4274/06
Respondent,

-against-

Mark Johnson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Kassandra King of counsel), for respondent.

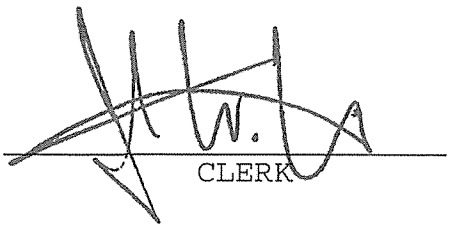
Judgment, Supreme Court, New York County (John Cataldo, J.), rendered March 15, 2007, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant precisely matched a radioed description of a person who had just completed a drug sale. The description, which included the seller's location, race, height, weight and the colors of several clothing items, was sufficiently specific to provide probable cause, given the very close temporal and spatial proximity between the sale and the arrest, and the fact that defendant was the only person matching the description (*see e.g. People v Rampersant*, 272 AD2d 202 [2000], *lv denied* 95 NY2d 870 [2000]). That proximity made it highly unlikely that the suspect

had departed and that, almost at the same moment, an innocent person of identical appearance coincidentally arrived on the scene.

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

ENTERED: JUNE 16, 2009



Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

811 Mansuru Bala,
Plaintiff-Appellant,

Index 17425/03
84227/04
84453/05

-against-

Target Corporation, et al.,
Defendants,

Macy's, et al.,
Defendants-Respondents.

[And Other Actions]

David M. Schwarz, Dix Hills, for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for Macy's, respondent.

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for Ibex Construction, LLC, respondent.

Methfessel & Werbel, New York (Timothy J. Fonseca of counsel), for Able Rolling Steel Door, respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered April 8, 2008, which, to the extent appealed from, as limited by the briefs, granted defendants Macy's East (Macy's) and Ibex Construction, LLC's (IBEX) motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The motion court correctly determined that Macy's, the owner of the property, hired an independent contractor to perform the work at issue and was not, as a matter of law, liable for the

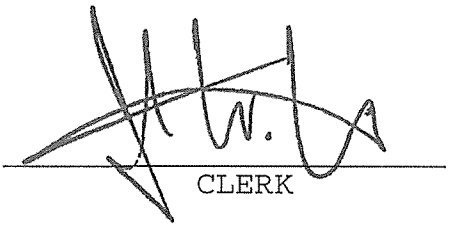
negligent act, if any, of its independent contractor (*see e.g. Fischer v Battery Bldg. Maintenance Co.*, 135 AD2d 378, 379 [1987]). The contentions cited by plaintiff in opposition are unavailing. The hazardous condition did not exist long enough for Macy's to have had actual or constructive notice of it. Moreover, the record does not indicate that Macy's was aware of a dangerous or deteriorating condition requiring it to inspect the premises (*see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500 [2007], *lv denied* 9 NY3d 809 [2007]).

Insofar as plaintiff claims that the action against IBEX should not be barred by the statute of limitations through application of the relation back doctrine, plaintiff has not adduced any evidence to show a unity of interest between Macy's and IBEX such that Macy's would be vicariously liable for the acts of IBEX (*see e.g. Raschel v Risch*, 69 NY2d 694, 697 [1986]).

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

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

ENTERED: JUNE 16, 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 16, 2009.

Present - Hon. David B. Saxe, Justice Presiding
John W. Sweeny, Jr.
Karla Moskowitz
Rolando T. Acosta
Rosalyn H. Richter, Justices.

The People of the State of New York, Ind. 2058/05
Respondent,

-against- 812

Calvin Chan,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about September 19, 2007,

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

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

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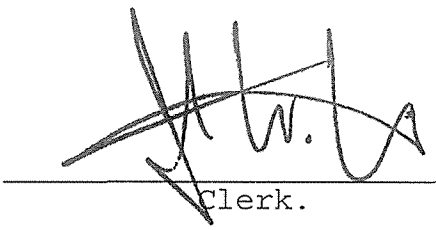


Clerk.

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

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

813 The People of the State of New York, Ind. 2244/07
Respondent,

-against-

David Sanders, Jr.,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 13, 2008, 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 a term of 3½ years, unanimously affirmed.

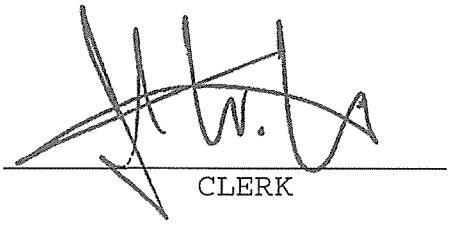
The court's main and supplemental charges on the agency defense sufficiently conveyed the appropriate principles. The court properly instructed the jury to consider all the relevant factors, and any emphasis on the principle that a person who arranges a drug transaction primarily for his or her own benefit is not an agent (*see People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]; *People v Brown*, 52 AD3d 204 [2008], *lv denied* 11 NY3d 786 [2008]; *People v Sanchez*, 35 AD3d 161 [2006], *lv denied* 8 NY3d 949 [2007]) was prompted by

defendant's own testimony revealing that he made the equivalent of a 50% commission on the transaction, as well as by the jury's request for reinstruction on this factor.

The surcharges and fees were properly imposed (*see People v Guerrero*, 12 NY3d 45 [2009]).

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

ENTERED: JUNE 16, 2009



CLERK

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

814-
814A In re Eshina Realty Corp., Index 20358/06
Petitioner-Respondent,

-against-

New York City Water Board, et al.,
Respondents-Appellants.

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

Goldberg & Bokor, LLP, Long Beach (Scott Goldberg of counsel), for respondent.

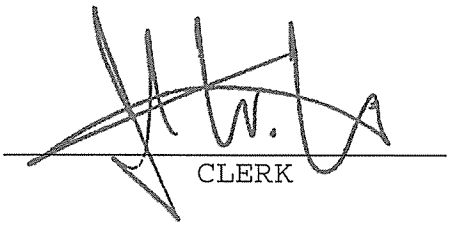
Orders, Supreme Court, Bronx County (Barry Salman, J.), entered on or about November 8, 2007, which, in a proceeding challenging respondents' imposition of surcharges for failure to install a water meter, granted the petition to the extent of finding that petitioner's administrative challenge to the surcharges was timely interposed with respect to the surcharges imposed after February 21, 2001, i.e., within four years of the filing of petitioner's administrative complaint, and directing respondents to render a final determination on the merits of petitioner's administrative complaint with respect to such surcharges, unanimously affirmed, without costs.

We reject respondents' argument that a single, one-time surcharge was imposed on July, 1, 2000 that continued to accrue annually until such time as petitioner installed a water meter, and that petitioner's challenge thereto, which was not made until

after July 1, 2004, is barred by a four-year administrative statute of limitations. The challenged assessments should be viewed as separate and discrete where they were separately imposed in and based on petitioner's annual water bills.

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

ENTERED: JUNE 16, 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 16, 2009.

Present - Hon. David B. Saxe, Justice Presiding
John W. Sweeny, Jr.
Karla Moskowitz
Rolando T. Acosta
Rosalyn H. Richter, Justices.

The People of the State of New York, Ind. 1293/07
Respondent,

-against- 815

Angel Santiago,
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 (Thomas Farber, J.), rendered on or about March 13, 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.

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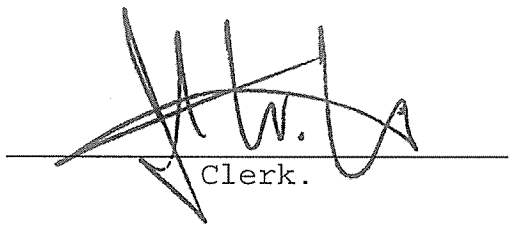


Clerk.

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

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

816 Natasha Hernandez,
Plaintiff-Respondent,

Index 8536/07
303535/07

-against-

Mariluz Rodriguez,
Defendant-Appellant,

Maria T. Cordero, et al.,
Defendants.

[And Other Actions]

Buratti, Kaplan, McCarthy & McCarthy, Yonkers (Jeffrey A. Domoto of counsel), for appellant.

Julio J. Marino, Great Neck, for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered January 23, 2009, which denied defendant-appellant's motion for summary judgment dismissing the complaint as against her on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to dismiss plaintiff's 90/180-day claim of serious injury as against all defendants, and otherwise affirmed, without costs.

Appellant made a prima facie showing of entitlement to summary judgment by submitting, inter alia, the affirmed reports of a neurologist and an orthopedist, who both examined plaintiff and determined, based upon the objective tests conducted, that she had not sustained a serious injury.

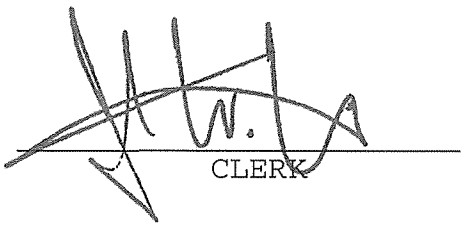
In opposition, plaintiff raised a triable issue of fact as to whether she suffered a permanent consequential limitation or a significant limitation of her cervical and lumbar spines as a result of the accident. The affirmed report of plaintiff's treating physician provided that as a result of the accident, plaintiff sustained, inter alia, disc bulges and herniations and had decreased range of motion in her cervical and lumbar spine (*see Ayala v Douglas*, 57 AD3d 266 [2008]). Furthermore, appellant's claim that plaintiff's condition was degenerative in nature was speculative as the physician who offered this opinion did not review the MRIs taken of plaintiff's cervical and lumbar spine (*compare Valentin v Pomilla*, 59 AD3d 184 [2009]. Nor was there an unexplained gap in treatment as the record shows that following the accident, plaintiff underwent physical therapy and ceased such therapy after reaching the maximum medical improvement (*see Pommells v Perez*, 4 NY3d 566, 577 [2005]).

Plaintiff, however, failed to raise an issue of fact regarding whether she suffered a 90/180-day injury (*see e.g. Blackmon v Dinstuhl*, 27 AD3d 241 [2006]). Notably, plaintiff's bill of particulars provided that she was confined to bed and home for one week following the accident. In view of this finding, plaintiff's claim of serious injury under the 90/180-day

category is dismissed as against all defendants (*see Lopez v Simpson*, 39 AD3d 420, 421 [2007]).

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

ENTERED: JUNE 16, 2009



Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

817N Verizon New York Inc., Index 105534/08
Plaintiff-Appellant,

-against-

Case Construction Co., Inc.,
Defendant-Respondent.

Solomon & Solomon, Albany (Douglas M. Fisher of counsel), for appellant.

Bauman Katz & Grill, LLP, New York (Daniel E. Katz of counsel), for respondent.

Order, Supreme Court, New York County (Jane Solomon, J.), entered January 23, 2009, which granted defendant's motion for an extension of time to answer and denied plaintiff's cross motion for a default judgment, unanimously affirmed, with costs.

Defendant demonstrated a reasonable excuse for its delay in answering the complaint (*see* CPLR 3012[d]; *Finkelstein v East 65th St. Laundromat*, 215 AD2d 178 [1995]). In addition, although it was not required to do so, defendant demonstrated the existence of meritorious defenses (*see Terrones v Morera*, 295 AD2d 254 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER
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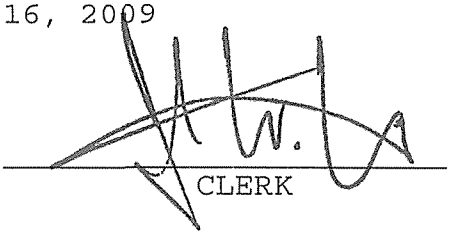

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

818 The People of the State of New York, Ind. 4896/06
Respondent,

-against-

Derrick Lattimore,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered July 16, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 5 years, unanimously modified, on the law, to the extent of remanding for a new sentencing proceeding, and otherwise affirmed.

Defendant was properly represented by counsel throughout the trial, and the record, which defendant has not sought to expand by way of a CPL 440.10 motion, does not support his claim that he took over counsel's normal decision-making role (*see People v Ferguson*, 67 NY2d 383, 390 [1986]) to such a degree that he was effectively proceeding pro se without the necessary colloquy about the risks of self-representation. To the extent the record

permits review, it establishes that any decision-making by defendant "did not constitute self-representation requiring the court to warn him of the risks of proceeding pro se" (*People v Blak*, 6 AD3d 301, 302 [2004], *lv denied* 3 NY3d 637 [2004]; *see also People v Cabassa*, 79 NY2d 722, 730-731 [1992], *cert denied sub nom. Lind v New York*, 506 US 1011 [1992]).

Defendant's claim that the court improperly modified its original *Sandoval* ruling after defendant's direct testimony, and his related claims regarding the prosecutor's summation, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that defendant opened the door to the modified ruling (*see People v Fardan*, 82 NY2d 638, 646 [1993]), and that the summation comments at issue were fair comment on the evidence (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]). We also reject defendant's ineffective assistance of counsel claim relating to these issues (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

As the People concede, defendant is entitled to a new

sentencing proceeding because he was deprived of his right to counsel at sentencing.

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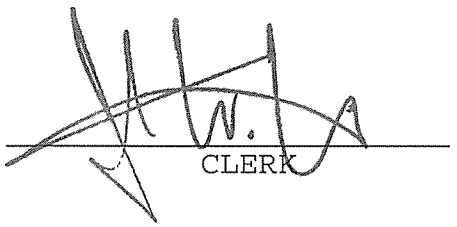


Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

820 In re Kazmir K.,

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

Marcus K.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Susan Jacobs, Center for Family Representation, Inc., New York (Karen Fisher McGee of counsel), for appellant.

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

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

Order of fact-finding and disposition (one paper), Family Court, New York County (Sara P. Schechter, J.), entered on or about February 21, 2008, which determined that appellant had neglected his son, Kazmir K., and directed that the child be released to his father's custody, under supervision of a child protective agency, for a period of one year, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed as moot, without costs.

The law guardian's challenge to the disposition is moot, since the order has expired, along with the agency supervision,

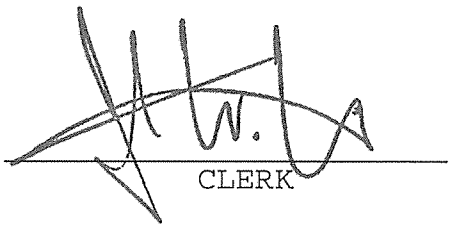
and Kazmir remains in his father's custody (*see Matter of Lashina P.*, 52 AD3d 293, 293 [2008]).

The finding that appellant neglected his son was supported by a preponderance of the evidence (*see* Family Court Act § 1046[b][i]). The hospital records submitted comprised clear evidence of a long history of mental illness on the father's part, including prior suicide attempts (*see Matter of Zariyasta S.*, 158 AD2d 45, 47-48 [1990]). Appellant's problems culminated in another suicide attempt on August 7, 2007, which resulted in appellant being hospitalized for three days. Despite his history of suicide attempts, including prior hospitalization, appellant made no plans for the care of his 13-year-old son during his hospitalization. This presented an imminent risk of harm to his son, who, unsupervised, quickly left the hospital by himself and went to a friend's house (*see Lashina P.*, 52 AD3d at 293; *Matter of Pedro C.*, 1 AD3d 267, 268 [2003]). The finding of neglect is strengthened by the negative inference properly drawn against the father from his failure to testify at the fact-finding hearing (*see Matter of Daniel D.*, 57 AD3d 444, 444 [2008]; *Matter of Devante S.*, 51 AD3d 482 [2008]). The father's clear concern for his son, amply reflected in both the medical records and the

testimony of the ACS child protective specialist, does not obviate the risk of imminent harm posed to his son by his failure to plan (*see Matter of Caress S.*, 250 AD2d 490 [1998]).

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

ENTERED: JUNE 16, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

821 Board of Managers of the 195 Hudson Street Condominium, Plaintiff-Appellant-Respondent,

-against-

195 Hudson Street Associates, LLC, et al., Defendants,

K&J Construction Co., LP, et al., Defendants-Respondents-Appellants.

[And a Third-Party Action]

Index 118784/03
590188/06

Judd Burstein, New York, for appellant-respondent.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for respondents-appellants.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered January 8, 2008, awarding plaintiff the principal sum of $2,059,692.09, and bringing up for review the court's post-trial order, entered December 24, 2007, which, to the extent appealed from as limited by the briefs, precluded plaintiff's expert from testifying as to future costs and directed a verdict to that effect, and denied the motion by defendants K&J and Gonzalez to set off the amount paid by the settling codefendants as against the verdict, unanimously modified, on the law, the directed verdict precluding expert testimony as to future costs estimates vacated, the matter remanded for a new trial as to these damages, and otherwise affirmed, without costs.

Plaintiff's argument that the court abused its discretion by

precluding their expert from testifying as to future costs is preserved (*see* CPLR 5501[a][3]; *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 382 [1983]). "Given the lengthy colloquy on the subject, the court obviously was aware of the nature of the objection and, more importantly, it recognized that the issue would be subject to appellate review" (*Gallegos v Elite Model Mgt. Corp.*, 28 AD3d 50, 59 [2005]).

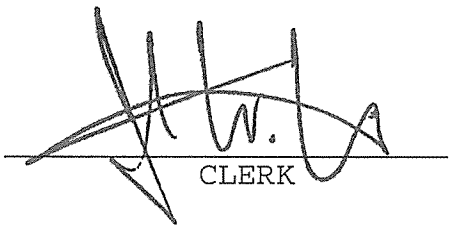
While the "qualification of an expert witness is within the court's sound discretion, and its determination will not be disturbed in the absence of serious mistake, an error of law or abuse of discretion" (*People v Jones*, 171 AD2d 609, 610 [1991], *lv denied* 77 NY2d 996 [1991]), this expert should not have been precluded from testifying as to future cost estimates (*see generally Issacs v Incentive Sys.*, 52 AD2d 550 [1976]). Licensed professionals acting as experts have been found qualified to give their opinions regarding future or estimated costs (*see Matter of City of Troy v Town of Pittstown*, 306 AD2d 718, 719 [2003], *lv denied* 1 NY3d 505 [2003]), and this witness's education, training and experience qualified him to testify as an expert in connection with estimating costs. The computer database utilized by plaintiff's expert to prepare pre-bid cost estimates was based on the same methodology employed in connection with the completed remediation work -- specifications and bids of hundreds of prior projects on which the expert had worked. Furthermore, "any

alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony," and could have been cured with a limiting instruction to the jury (*see Moon Ok Kwon v Martin*, 19 AD3d 664 [2005]).

K&J/Gonzalez's argument that it is entitled to set off against the $2,059,692.09 jury verdict the $1,960,000 received from the settling codefendants is unsupported by the record (*see e.g. Promenade v Schindler El. Corp.*, 39 AD3d 221, 222-223 [2007], *lv dismissed* 9 NY3d 839 [2007]). Based on the explicit language of the second amended complaint, the verdict sheet and the settling agreements, there is no basis for concluding that the jury allocated damages to these defendants based on the same claims or injuries by which plaintiff had entered into its agreements with the settling codefendants. Plaintiff's Amended CPLR 3101(d) Expert Disclosure clearly indicated that this expert's testimony would address construction defects caused by K&J and the "costs to remedy" those defects.

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

ENTERED: JUNE 16, 2009



Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

822 Seward Park Housing Corporation, Index 600059/01
Plaintiff-Appellant-Respondent,

-against-

Greater New York Mutual Insurance Company,
Defendant-Respondent-Appellant.

Anderson & Ochs, LLP, New York (Mitchel H. Ochs of counsel), for appellant-respondent.

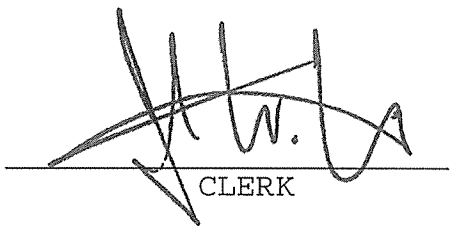
Thomas D. Hughes, New York, for respondent-appellant.

Order, Supreme Court, New York County (Louis B. York, J.), entered April 16, 2008, which, in an action to recover on a policy of property insurance, upon defendant insurer's motion for restitution of $1,596,639.14 of the approximate $18.4 million it paid to plaintiff insured in satisfaction of a judgment that was partially vacated by this Court on a prior appeal (43 AD3d 23 [2007]), plus the prejudgment interest it paid on the $1,596,639.14, inter alia, granted defendant's motion to the extent of awarding it $1,596,639.14, with interest at the statutory rate from May 13, 2005, i.e., the date defendant paid plaintiff the $18.4 million, unanimously modified, on the law, to award defendant in addition the prejudgment interest it paid on the $1,596,639.14, and otherwise affirmed, with costs in favor of defendant, and the matter remanded to Supreme Court for a calculation of such prejudgment interest and the entry of a judgment in favor of defendant accordingly.

Restitution was properly awarded in view of this Court's prior order that plaintiff was not entitled to recover for items worth some $1.6 million that were, as a matter of law, outside the scope of the policy (*see Polipo v Sanders*, 245 AD2d 2 [1997], *lv dismissed* 92 NY2d 845 [1998], and it being highly unlikely that any amount to be awarded plaintiff on the retrial ordered by this Court will be more than the amount awarded plaintiff on the first trial. However, Supreme Court's order, without explanation, failed to direct plaintiff's return of the portion of the prejudgment interest it received attributable to the $1.6 million, and we modify accordingly. Further, in order to avoid confusion as to the enforceability of the restitution being directed (*see Marlee, Inc. v Bittar*, 257 NY 240, 243 [1931]), the Clerk is directed to enter judgment in defendant's favor once Supreme Court calculates the amounts of such prejudgment interest, costs and disbursements.

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

ENTERED: JUNE 16, 2009



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Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

823 The People of the State of New York, Ind. 1981/06
Respondent,

-against-

Clifton Little, etc.,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Edward M. Davidowitz, J.), rendered on or about February 14, 2007, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

THIS CONSTITUTES THE DECISION AND ORDER
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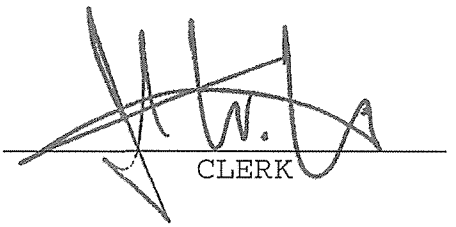


Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

824 The People of the State of New York, Ind. 1804/07
Respondent,

-against-

Pedro Mejias,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Erik Porcaro of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 10, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

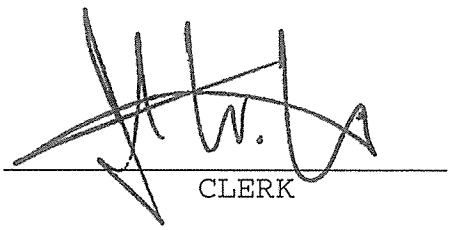
The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The arresting officer saw defendant and another man approach each other, look around as if to check if anyone was watching, engage in a transfer of a small object, and immediately leave each other without any kind of social interaction. Based upon his experience and training, the officer recognized this behavior as a possible drug transaction (*see People v Jones*, 90 NY2d 835 [1997]). Accordingly, the

officer had, at the very least, a founded suspicion of criminality which justified a common-law inquiry (*see People v Sylvain*, 33 AD3d 330, 311 [2006], *lv denied* 7 NY3d 904 [2006]), and we need not decide whether these observations provided an even higher level of suspicion. The officer did not seize or detain defendant until after the pistol that defendant was attempting to conceal came into plain view.

The court also properly denied defendant's motion to suppress his statement to an assistant district attorney, since the statement was sufficiently attenuated from the taint of an earlier statement made at the time of arrest, which was not preceded by *Miranda* warnings. The post-*Miranda* statement was made approximately 11 hours later, at a different location, and to a different interrogator (*see People v Paulman*, 5 NY3d 122, 130-134 [2005]).

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

ENTERED: JUNE 16, 2009



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Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

826 International Plaza Associates, L.P., Plaintiff-Respondent, Index 110711/06 590695/07

-against-

Michael A. Lacher, et al., Defendants-Appellants.

- - - - - - -

Michael A. Lacher, et al., Third-Party Plaintiffs-Appellants,

-against-

David Nevins, et al., Third-Party Defendants-Respondents.

Lacher & Lovell-Taylor, New York (Adam J. Rader of counsel), for appellants.

Itkowitz & Harwood, New York (Donald A. Harwood of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 18, 2008, which, to the extent appealed from as limited by the briefs, granted the CPLR 3211 motion of plaintiff and third-party defendants David Nevins and Charles Steven Cohen (1) dismissing the second counterclaim alleging fraudulent inducement; (2) dismissing the claims for punitive damages; and (3) dismissing the third-party claims against Nevins and Cohen, unanimously affirmed, with costs.

The motion court properly determined that defendants' second counterclaim failed to allege fraud extraneous and collateral to the contract. The second counterclaim simply alleges that

plaintiff failed to fulfill its contractual obligations to provide cleaning services and make certain improvements, and as such is merely a restatement of defendants' third and fourth counterclaims for breach of contract (*see Briefstein v P.J. Rotondo Constr. Co.*, 8 AD2d 349, 351 [1959]).

The motion court properly dismissed the third-party claims alleging fraud based on the rationale that defendants fail to allege reasonable reliance. As the motion court reasoned, the terms of the lease, including the no oral modification clause, preclude reasonable reliance on the alleged "misrepresentations," which are either at variance with the terms of the lease, or pertain to negotiations for a new lease which never came to fruition (*see Aris Indus. v 1411 Trizechahn-Swig*, 294 AD2d 107 [2002]).

Defendants argue that through Nevins' acceptance of late rent payments and his representations that defendants would be permitted to cure any defaults, Nevins established a course of dealing upon which defendants had a right to rely. However, such reliance is negated by the lease, which expressly provides that the landlord's failure to insist upon strict performance of the lease terms "shall not be construed as a waiver or relinquishment for the future of such term, covenant, condition, right or remedy," and that the landlord's acceptance of rent with knowledge of a breach of any term "shall not be deemed a waiver

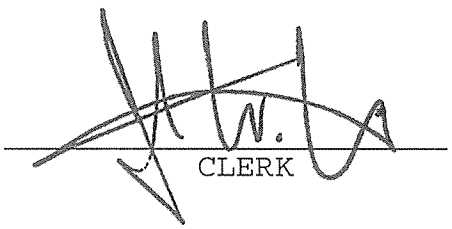
of such breach."

The motion court properly dismissed the claims for punitive damages. "'Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights'" (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [2005], quoting *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

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

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

ENTERED: JUNE 16, 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 16, 2009.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
Eugene Nardelli
John T. Buckley
Sheila Abdus-Salaam, Justices.

The People of the State of New York, Ind. 4769/06
Respondent,

-against- 829

Luis Dominguez,
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 (Renee Allyn White, J.), rendered on or about February 6, 2007,

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

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

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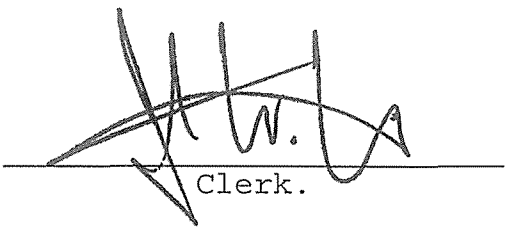

Clerk.

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

Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

830 The People of the State of New York, Ind. 4453/06
Respondent,

-against-

Greg Nobles,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Dewey & LeBoeuf, LLP, New York (Jamie J. Spannhake of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; A. Kirke Bartley, J. at plea and sentence), rendered August 7, 2007, convicting defendant 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. After observing traffic violations, the police properly stopped the livery cab in which defendant was a passenger. There is no merit to defendant's claim that the hearing evidence failed to establish a lawful stop based on speeding (*see People v White*, 40 AD3d 535 [2007], *lv denied* 9 NY3d 883 [2007]); in any event, the stop was also based on failure to signal lane changes.

As the police stopped the cab, defendant made body movements evincing nervousness, and pushed a bag that he had been carrying on his body away from himself. This provided a founded suspicion

of criminality justifying the officers' common-law inquiry as to the ownership of the bag (*see People v Eure*, 46 AD3d 386, 387 [2007], *lv denied* 10 NY3d 818 [2008]). Defendant's separation of himself from the bag was not innocuous, but was a clear signal that he did not want the police to associate him with the bag's contents.

The hearing court properly concluded that defendant is not entitled to suppression of the pistol the police found in the bag, because defendant abandoned the bag by both divesting himself of it and disclaiming ownership (*see e.g. People v Morales*, 243 AD2d 391, 392 [2007], *lv denied* 91 NY2d 877 [1997]). The record also supports the court's alternate basis for upholding the search of the bag (*see People v Mundo*, 99 NY2d 55 [2002]).

The court properly declined to suppress defendant's initial disclaimer of ownership, his subsequent spontaneous admission, and his videotaped statement made at the District Attorney's Office. There was an additional statement that the People did not intend to introduce at trial and for which they did not serve CPL 710.30(1)(a) notice. Even assuming this statement was the product of custodial interrogation without *Miranda* warnings, the evidence supports the hearing court's finding that defendant's videotaped statement was sufficiently attenuated from the earlier

police questioning (*see People v Paulman*, 5 NY3d 122, 130-134 [2005]).

We have considered and rejected defendant's remaining arguments.

THIS CONSTITUTES THE DECISION AND ORDER
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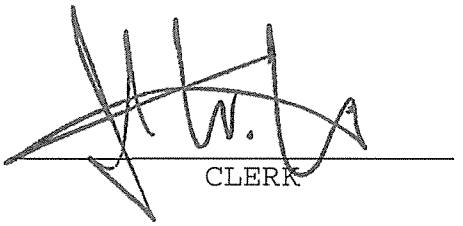
ENTERED: JUNE 16, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

831 Harriet Weksler, Index 113492/07
Plaintiff-Appellant,

-against-

Kane Kessler, P.C., et al.,
Defendants-Respondents.

Alan Drezin, Brooklyn (Nathan Belofsky of counsel), for appellant.

Callan, Koster, Brady & Brennan, LLP, New York (Paul F. Callan of counsel), for Kane Kessler, P.C. and Mitchell D. Hollander, respondents.

Putney, Twombly, Hall & Hirson LLP, New York (Thomas A. Martin of counsel), for Bruce Weksler and Joseph Weksler, respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 20, 2008, which, to the extent appealed from as limited by the briefs, granted the motion by the law firm (defendants Kane Kessler and Hollander) and the Weksler brothers (defendants Bruce and Joseph), dismissing the first, second, third, sixth and seventh causes of action in the amended complaint, unanimously affirmed, without costs.

Plaintiff alleges fraud and fraudulent inducement against all defendants, breach of contract against the Weksler brothers, and legal malpractice, tortious interference and negligent misrepresentation against the firm. Plaintiff was married to Jack Weksler from 2004 until his demise in 2007. She claimed it was the decedent's intention to provide for her by establishing

an annuity whereby Joseph and Bruce, his sons from a previous marriage, would pay plaintiff $4,000 per month after his death as long as neither he nor plaintiff had commenced divorce proceedings against the other. The law firm, at the decedent's behest, prepared an agreement memorializing his wishes. Plaintiff and the decedent were allegedly happy with and relied on the agreement, which would guarantee her future financial security. The decedent became seriously ill in January 2007. Four months later, after his discharge from the hospital, he retained the law firm to commence a divorce proceeding. The complaint was filed in New Jersey Superior Court in June 2007, and he died the following month.

Plaintiff alleges that defendants made material misrepresentations upon which she relied, which reasonably led her to believe that the agreement would be binding and valid and pay her $4,000 per month after Jack's death. Accepting the facts alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), she fails to allege sufficiently the elements of fraud and fraudulent inducement and plead with the necessary specificity the alleged misrepresentations made by defendants (CPLR 3016[b]; *Modell's N.Y. v Noodle Kidoodle*, 242 AD2d 248, 250 [1997]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]).

Furthermore, plaintiff fails to state a cause of action for breach of contract against the Weksler brothers. Even assuming the agreement was enforceable, it still memorialized the intent of the parties to extinguish any payment to plaintiff upon the filing of divorce papers.

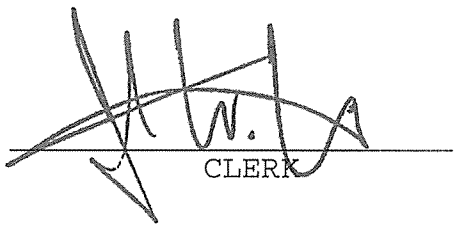
As to the claim for legal malpractice, there was never an attorney-client relationship between plaintiff and the firm. Even assuming plaintiff had been the firm's client, she failed to show how such alleged malpractice caused her injury, as the agreement simply effectuated the intent of the parties, i.e., to provide plaintiff with an annuity during her lifetime subject to the stated terms and conditions (*see Finova Capital Corp. v Berger*, 18 AD3d 256 [2005]; *cf. Mandel, Resnik & Kaiser, P.C. v E.I. Elecs., Inc.*, 41 AD3d 386 [2007]).

Plaintiff's remaining causes of action against the firm, for negligent misrepresention and tortious interference, are dismissed as redundant of the legal malpractice claim (*see Shwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193 [2003]; *Reyes v Leuzzi*, 2005 NY Misc LEXIS 2914, *3, 2005 WL 3501578, *4; *cf. William Kaufman Org. v Graham & James*, 269 AD2d 171 [2000]). Finally, although such affirmative relief was not sought, the court did not err in denying plaintiff an opportunity

to amend her complaint for a second time, as the proposed speculative allegations failed to establish any viable cause of action (*see Davis & Davis v Morson*, 286 AD2d 584 [2001]).

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

ENTERED: JUNE 16, 2009



Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

832 In re Antonio C.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for Presentment Agency.

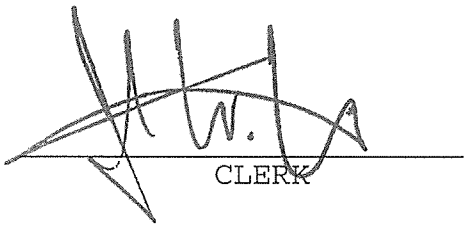
Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about October 17, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determination to credit the account of the

incident given by the victim, while discrediting that given by appellant.

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

ENTERED: JUNE 16, 2009



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Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

834 The People of the State of New York, Respondent, Ind. 5087/06 2704/07

-against-

Rendell Robinson, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mark Dwyer of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered October 31, 2007, convicting defendant, after a jury trial, of assault in the second degree and three counts of attempted assault in the second degree, and sentencing him, as a second felony offender, to a term of 3 years and three terms of 1½ to 3 years, all to be served consecutively, unanimously affirmed.

The court properly exercised its discretion when it excused all prospective jurors who would have been unavailable due to a two-day religious observance that immediately preceded a weekend (*see People v Paulino*, 287 AD2d 302 [2001], *lv denied* 97 NY2d 686 [2002]). A recess to accommodate these panelists' religious obligations would have seriously disrupted scheduling in this short trial, because the limitations on recessed deliberations set forth in CPL 310.10(2) would have required the court to

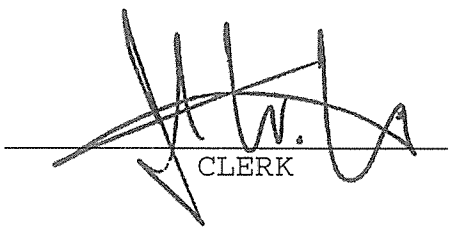
charge the jury almost a week after the expected close of testimony. The panelists were not excluded because of their religion, but because of their unavailability within the context of the particular case.

Defendant's general objections failed to preserve his present challenges to the prosecutor's summation (*see e.g. People v Harris*, 98 NY2d 452, 492 [2002]), and we decline to review them in the interest of justice. As an alternative holding, we find that the comments at issue were proper responses to defendant's attacks on the credibility of the People's witnesses (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

The surcharges and fees were properly imposed (*see People v Guerrero*, 12 NY3d 45 [2009]). We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 16, 2009



Tom, J.P., Friedman, Nardelli, Buckley, Abdus-Salaam, JJ.

835 In re Esther Goldman, Index 115382/06
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

Tenenbaum & Berger, LLP, Brooklyn (David M. Berger of counsel), for appellant.

Sonya M. Kaloyanides, New York (Stephen W. Goodman of counsel), respondent.

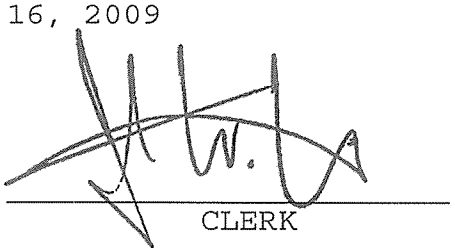
Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered December 18, 2007, denying the petition to annul respondent's determination rejecting petitioner's attempt to succeed a deceased public housing tenant as a remaining family member, unanimously affirmed, without costs.

The determination that petitioner was not eligible for "remaining family member" status upon the death of the nonrelated tenant was neither arbitrary nor capricious (*see generally Jamison v New York City Hous. Auth.*, 25 AD3d 501 [2006]). Petitioner was unable to demonstrate that she met several of the requirements outlined in respondent's Management Manual.

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

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

ENTERED: JUNE 16, 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 16, 2009.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
Eugene Nardelli
John T. Buckley
Sheila Abdus-Salaam, Justices.

The People of the State of New York, Ind. 3679/07
Respondent,

-against- 836

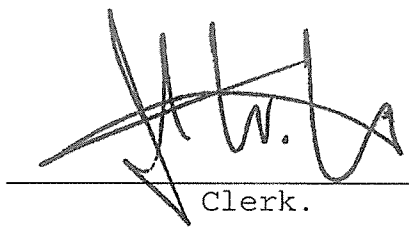
Mohamed Hossain,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about March 12, 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., Friedman, Buckley, Abdus-Salaam, JJ.

837N-
838N In re Donald R. Leo, etc., Index 108241/08
Petitioner-Respondent,

-against-

The City of New York,
Respondent,

New York Crane & Equipment Corp., et al.,
Respondents-Appellants.

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

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 18, 2008, which, in a proceeding for preaction disclosure (CPLR 3102[c]) arising out of a crane collapse, insofar as appealed from as limited by the briefs, in the eighth ordering paragraph, directed respondents-appellants, the corporate owner of the crane and its principal, to provide petitioner, administrator of the estate of a crane operator killed in the accident, and respondent City of New York, the present custodian of the crane, with copies of certain materials, unanimously reversed, on the law, without costs, and the eighth ordering paragraph vacated. Appeal from order, same court and Justice, entered November 26, 2008, which, insofar as appealable, denied respondents' motion to renew, unanimously dismissed,

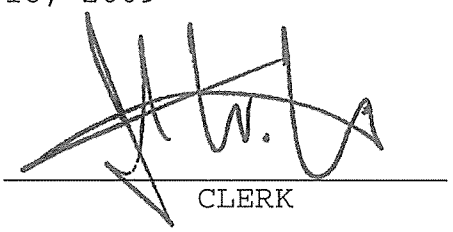
without costs, as academic.

Under ordering paragraph 6(m), appellants are required to provide petitioner and respondent City with a "list of documents and material" seized from appellants by any government agency; under the challenged ordering paragraph 8, appellants are required, within 10 business days after the return of any such seized material, to provide petitioner and the City with a "copy of that material." Appellants assert that paragraph 8 would require them to "copy" such items as zip lock bags, computer hard drives, address books, and the personnel and payroll folders of all of their employees, and persuasively argue that any and all seized material cannot be deemed necessary to the framing of a complaint or identification of potential defendants simply by virtue of having been seized. Petitioner, whose application identifies the crane's owners, the site owner, the City of New York as the present custodian of the crane, and the time, place and other particulars of the accident, plainly does not need preaction disclosure to frame a complaint against respondents and the City, and may not use preaction disclosure to explore alternative, unspecified theories of liability that may

also exist (*see Western Inv. LLC v Georgeson Shareholder Sec. Corp.*, 43 AD3d 333 [2007]; *Matter of Uddin v New York City Tr. Auth.*, 27 AD3d 265 [2006]; *Matter of Bliss v Jaffin*, 176 AD2d 106, 108 [1991]).

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

ENTERED: JUNE 16, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Eugene Nardelli
James M. Catterson
Karla Moskowitz
Dianne T. Renwick, JJ.

336
Index 601404/04
5910810/04
590431/05

x

NYP Holdings, Inc.,
Plaintiff,

-against-

McClier Corporation, et al.,
Defendants.
- - - - - -
McClier Corporation,
Third-Party Plaintiff-Respondent,

Leonard J. Skiba, et al.,
Third-Party Plaintiffs,

-against-

Ruttura & Sons Construction Company, Inc., et al.,
Third-Party Defendants-Appellants,

Botto Mechanical Corporation, et al.,
Third-Party Defendants.
- - - - - - -

McClier Corporation,
Second Third-Party
Plaintiff-Respondent,

-against-

Morrell Brown Corporation,
Second Third-Party
Defendant-Appellant.
_____x

Ruttura & Sons Construction Company, Inc., Proto Construction & Development Corp., First Women's Fire Systems Corp., and Morrell Brown Corporation appeal from an order of the Supreme Court, New York County (Herman Cahn, J.), entered July 25, 2008, which denied their motions for summary judgment dismissing the third-party and second third-party complaints.

Peckar & Abramson, P.C., New York (Alvin Goldstein of counsel), for Ruttura & Sons Construction Company, Inc.; Jaspan Schlesinger LLP, Garden City (Charles W. Segal of counsel), Proto Construction & Development Corp.; White and Williams LLP, New York (Michael J. Kozoriz of counsel), for First Women's Fire Systems Corp.; and McGivney & Kluger, P.C., New York (Lawrence J.T. McGivney of counsel), for Morrell Brown Corporation, appellants.

Zetlin & De Chiara LLP, New York (Raymond T. Mellon and Michelle Fiorito of counsel), for respondent.

NARDELLI, J.

The issue presented concerns the applicability of the volunteer doctrine when an insurer settles a claim against its insured, and seeks to proceed as subrogee against other parties who also allegedly bear responsibility for the underlying loss.

In August of 1998, plaintiff NYP Holdings, Inc. retained defendant McClier Corporation, a professional architectural firm, to provide certain design services related to the construction of a new printing plant in the Bronx. McClier thereupon produced a design for the contemplated premises, after which it hired various subcontractors, including the various third-party defendants, to perform the actual physical construction. NYP subsequently became dissatisfied with the quality of the work done on the project, and commenced this lawsuit, asserting causes of action for professional errors and omissions, malpractice, fraud, overbilling, delay damages and construction defects.

After being served, McClier instituted third-party actions against various entities, including appellants Ruttura & Sons Construction Company, Inc., Proto Construction & Development, First Women's Fire Systems Corp. and Morrell Brown Corporation (collectively referred to as Ruttura or appellants), who were involved in some phase of the construction. The third-party

complaints advanced claims predicated upon contractual and common-law indemnification, negligence, strict liability and breach of contract. The claims asserted by plaintiff aggregated over $100,000,000. During the course of the litigation, McClier settled its dispute with NYP by a payment in the total amount of $23,900,000. McClier paid $750,000, which constituted the aggregate of its deductible along with the balance on its self-insured retention. The remainder of the settlement, $23,150,000, was paid by McClier's insurer, Lloyd's of London. The settlement did not apportion damages between design defects, for which McClier would be responsible, and construction defects, for which the third-party defendants would be responsible.

The Lloyd's policy provided coverage for professional liability for architects and engineers, but not for construction work. As a result of its settlement payment, Lloyd's became subrogated to McClier's claims, although McClier remains the nominal party. McClier seeks indemnification for the sums paid to NYP in settlement of the main lawsuit. The Ruttura entities moved for summary judgment against McClier, arguing that Lloyd's was a volunteer whose payment to NYP was outside of its contractual responsibility and, thus, the settlement could not form the basis for a subrogation claim. McClier opposed the motion on the ground that the law of California, the domicile of

McClier's parent company, to which the policy was issued, is controlling, and that under California law Lloyd's was not a volunteer when it made the payment. Therefore, McClier claimed, it would be entitled to pursue its subrogation claim.

The motion court found that New York law governed the dispute since McClier had an office in Manhattan, and that New York, which does preclude claims by volunteers, was the state where the risk was located.

Although the court found that the Ruttura entities had met their burden, as the moving party, of establishing that Lloyd's paid the settlement amount when there was no obligation for Lloyd's to do so, it ultimately concluded that McClier had come forward with evidence that by virtue of the settlement payment, Lloyd's avoided exposure for significantly greater damages in the main action. The court also observed that it was not clear what percentage of the potential damages could be attributable to design errors and what percentage was attributable to construction defects.

The court reasoned that there was thus a question of fact as to Lloyd's status as a volunteer, and denied the motion for summary judgment. It specifically stated:

> "The argument that a settling insurer is a 'volunteer' and thus barred from making a subrogation claim should not be used without

> careful consideration. Its widespread use would discourage settlement, and might well require a separate 'action within an action' on the issue of the insurer's liability whenever it is raised."

The third-party defendants have appealed, arguing that there are no issues of fact, and that Lloyd's has not shown that it paid the settlement "under compulsion."

It is well-settled that the voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]; *see also Barnan Assoc. v 196 Owners Corp.*, 56 AD3d 309, 311 [2008]. On the other hand, "when an insurer pays for losses sustained by its insured that were occasioned by a wrongdoer, the insurer is entitled to seek recovery of the monies it expended under the doctrine of equitable subrogation" (*Fasso v Doerr*, 12 NY3d 80, 86 [2009]). Equitable subrogation is premised on the concept "that the party who causes injury or damage should be required to bear the loss by reimbursing the insurer for payments made on behalf of the injured party" (*id.* at 87).

In a claim made pursuant to an insurer's right to subrogation, the insurer stands in the shoes of the insured (*see e.g. Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 206 [2004]); *Winkelman v Excelsior Ins. Co.*, 85

NY2d 577, 581 [1995]). The insurer's right to recovery in subrogation is premised, not on a legal fabrication, such as an insurer's implied contract of indemnity with the tortfeasor, but, rather, by virtue of its succession to the position previously held by its insured (*Blue Cross and Blue Shield*, 3 NY3d at 206, citing *Great Am. Ins. Co. v United States*, 575 F2d 1031, 1033 [1978]).

Appellants urge that Lloyd's was not under any compulsion to pay for noncovered claims, and argue that if it paid $23,150,000 for the covered professional negligence claims, then they are not liable to reimburse Lloyd's because they performed no professional services.

The threshold issue, however, is not whether Lloyd's was a volunteer, but, rather whether its insured, McClier, had a cognizable claim against appellants. We need not determine the merits of any such claim to ascertain whether McClier has standing to pursue the third party claims. At this juncture of the litigation, there has not been any factual determination as to which of the parties were responsible for the losses suffered by NYP, nor any apportionment of responsibility. In the absence of the settlement funded by Lloyd's, there would not even be an issue as to whether McClier could pursue its claims for, inter alia, contractual and common law indemnification, as well as

contribution. Like any other party charged with wrongdoing, it would be perfectly within its rights to seek recovery against those whom it contends are actually responsible, in whole or in part, for the damages incurred by NYP.

That there was a settlement does not, in the circumstances, alter any of these basic principles. Regardless of whether Lloyd's is the true party in interest, the claims belong to McClier, and they remain viable at this juncture.

Even if the focus were solely on whether Lloyd's was a volunteer, it is evident, as the motion court concluded, that there are questions of fact as to whether it lost its right of subrogation. The existing record does not support a determination that Lloyd's settled a claim on behalf of its insured for which another party was wholly, or even partially, responsible. Further, the settlement itself was for a small fraction of the damages alleged by NYP, and was made to forestall the possibility of a larger recovery after trial of the first-party action. These damages could potentially have been assessed against any or all of the defendants. It would be inequitable, on this record, for the appellants to escape responsibility without an adjudication of liability by a fact-finder, merely because they chose not to join in the settlement.

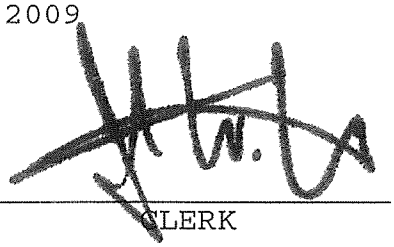
"Where property of one person is used in discharging an obligation owed by another . . . under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lienholder" (*King v Pelkofski*, 20 NY2d 326, 333 [1967], quoting Restatement of Restitution §162). Regardless of whether Lloyd's is the actual party in interest, permitting appellants to escape liability if they are responsible for some of the damages, would be the unjust enrichment that the principle of equitable subrogation seeks to avoid.

Accordingly, the order of the Supreme Court, New York County (Herman Cahn, J.), entered July 25, 2008, which denied third-party defendants-appellants' and second third-party defendant's motions for summary judgment dismissing the third-party complaint and second third-party complaint, should be affirmed, with costs.

All concur.

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

ENTERED: JUNE 16, 2009



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