SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 18, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., McGuire, Moskowitz, DeGrasse, JJ.

4501-
4501A Index 150024/06

HNH International, Ltd., et al.,
Plaintiffs-Appellants,

-against-

Pryor Cashman Sherman & Flynn LLP,
now known as Pryor Cashman LLP,
Defendant-Respondent,

Schiff Hardin, LLP, et al.,
Defendants.

Jeffrey A. Jannuzzo, New York, for appellants.

Pryor Cashman LLP, New York (Gideon Cashman of counsel), respondent pro se.

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered March 25, 2008, dismissing the complaint as against defendant Pryor Cashman LLP, and bringing up for review an order, same court and Justice, entered March 19, 2008, which granted said defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, the motion denied and the complaint reinstated. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs allege that defendant, a law firm, incorrectly

advised them concerning the early 20th century sound recordings they proposed to re-engineer, re-master and distribute as CDs. After the CDs had been manufactured and distributed, plaintiffs were sued and found liable for common-law copyright infringement.

The court dismissed the legal malpractice complaint, pursuant to CPLR 3211(a)(1), based on documentary evidence from which it concluded that the state of the law at the time the advice was given was unsettled and defendants therefore had not "'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession'" at that time (quoting *Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000]).

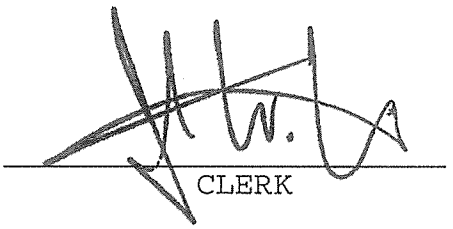
We conclude, however, that the state of the law was not so unsettled at the time the advice was given as to bar as a matter of law plaintiffs' claim that a reasonably skilled attorney would have advised that the CDs were or might be entitled to common-law copyright protection and would not have advised that the release of the CDs would not result in any copyright liability. Although defendant maintains that it did advise plaintiffs of the possibility of common-law liability and did not advise plaintiffs that the release of the CDs would not result in any copyright liability, we must accept the facts alleged in the complaint as true and accord plaintiffs the benefit of every possible

favorable inference (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]). The determination whether defendant exercised the requisite level of skill and care must await expert testimony (*compare Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen LLP*, 23 AD3d 243 [2005] [expert testimony required], *with Darby & Darby, supra* [legal malpractice counterclaim dismissed on summary judgment]).

The statute of limitations was tolled as to defendant because the attorneys who initially handled the matter continued to represent plaintiffs in the matter, albeit at different law firms, until 2005 (*see Antoniu v Ahearn*, 134 AD2d 151 [1987]).

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

ENTERED: JUNE 18, 2009



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Tom, J.P., Mazzarelli, Andrias, Acosta, JJ.

3529 The People of the State of New York, Ind. 613/06
Respondent,

-against-

Charlie Dunnell,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Namita Wahi, Cambridge, MA, for appellant.

Robert M. Morgenthau, District Attorney, New York (Jung Park of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered August 1, 2006, as amended on or about December 4, 2008, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Following this Court's remand (50 AD3d 606 [2008]), the hearing court properly denied defendant's suppression motion. The police responded to a radio transmission indicating that there was a robbery in progress and observed an identified citizen informant holding defendant against a car. The hearing evidence supports the conclusion that when the police arrived, the complainant continued to hold defendant and exclaimed that defendant had robbed him, whereupon the police handcuffed defendant, despite defendant's assertion that the other man had robbed him. We conclude that the police had probable cause for

defendant's arrest at the moment of the handcuffing. The requirements of probable cause (*see Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]) were satisfied because the complainant's status as a citizen informant established his reliability (*see People v Hetrick*, 80 NY2d 344, 348 [1992]; *People v Hicks*, 38 NY2d 90 [1975]), and he was speaking from personal knowledge. Moreover, his behavior in continuing to hold defendant after the police arrived was more consistent with that of a crime victim than a perpetrator. While defendant's claim to have been the actual victim may have raised a credibility issue to be resolved at trial, it did not undermine probable cause for his arrest (*see People v Taylor*, 61 AD3d 537 [2009]; *People v Roberson*, 299 AD2d 300 [2002], *lv denied* 99 NY2d 619 [2003]). Even if the circumstances could be viewed as providing probable cause to arrest both men on each other's complaints (*cf. Matter of Holtzman v Hellenbrand*, 130 AD2d 749 [1987], *lv denied* 70 NY2d 607 [1987] [whether to permit a defendant to make a cross complaint against an accuser is a matter of prosecutorial discretion]), this did not render defendant's arrest unlawful.

The court properly exercised its discretion in denying defendant's request for a mistrial or lengthy midtrial continuance for the purpose of obtaining further information about the underlying facts of one of the complainant's prior

convictions (*see People v Pitts*, 255 AD2d 220 [1998], *lv denied* 93 NY2d 976 [1999]). Defendant received ample opportunity to cross-examine the complainant about this conviction and its underlying facts, and his suggestion that the additional information would have had significant probative value is speculative.

The court's curative instruction was sufficient to prevent the challenged portion of the prosecutor's summation from causing any prejudice.

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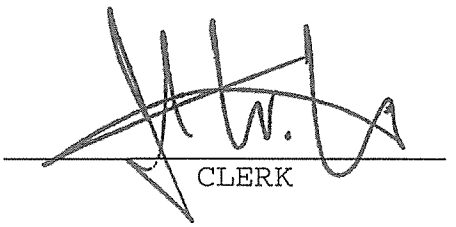

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5204 Jacqueline Klein-Bullock, Index 114009/05
Individually and as Administratrix
of the Estate of Ruth Klein, etc.,
Plaintiff-Appellant,

-against-

North Shore University Hospital
at Forest Hills, et al.,
Defendants-Respondents.

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

Wagner, Doman & Leto, P.C., Mineola (Daniel F. Doman of counsel), for respondents.

Judgment, Supreme Court, New York County (Joan B. Carey, J., and a jury), entered June 5, 2007, in an action for personal injuries and wrongful death alleging medical malpractice and general negligence, dismissing the complaint, unanimously affirmed, without costs.

The claimed errors in the verdict sheet are not preserved for appellate review since plaintiffs did not object thereto (CPLR 4110-b; *see Suria v Shiffman*, 67 NY2d 87, 97 [1986]), and we decline to review them (*see Pagnotta v Diamond*, 51 AD3d 1099, 1100 [2008]). In any event, nothing in the record or verdict indicates that the jury was confused by the wording of the interrogatories (*cf. e.g. Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 223 [1996]), and no issues were

raised as to general negligence (*see McKoy v County of Westchester*, 272 AD2d 307 [2000]; *Wahler v Lockport Physical Therapy*, 275 AD2d 906 [2000], *lv denied* 96 NY2d 701 [2001]) or res ipsa loquitur (*see Kruck v St. John's Episcopal Hosp.*, 228 AD2d 565 [1996]) that should have been charged and submitted to the jury.

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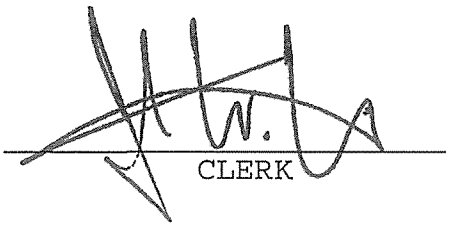

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

411 The People of the State of New York, Ind. 5117/06
Respondent,

-against-

Wayne Parker,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Alan S. Axelrod of counsel), and Kaye Scholer LLP, New York (Amanda Parsels of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki Scherer, J. on motion; John Cataldo, J. at jury trial and sentence), rendered May 10, 2007, convicting defendant of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, affirmed.

The court properly denied defendant's CPL 190.50 motion to dismiss the indictment, made on the ground that defendant was deprived of his right to testify before the grand jury. The People afforded defendant a reasonable opportunity to testify and any failure was due to defense counsel's lack of cooperation in effectuating that opportunity, by refusing to confirm with the prosecutor that defendant actually would testify, not checking her cell phone messages after giving the prosecutor that number as her contact number, and not even attempting to speak to defendant about whether or not he would testify until it was too

late (*see People v Watkins*, 40 AD3d 290 [2007], *lv denied* 9 NY3d 870 [2007]; *People v Jackson*, 298 AD2d 144 [2002], *lv denied* 99 NY2d 582 [2003]). The record establishes that defense counsel wished to interview her client, and that there was no need for the People to bring defendant from the court pens to the grand jury room until that interview took place.

Defendant did not preserve his Confrontation Clause claim. A police witness testified that he showed defendant's wife a gold medallion taken during the robbery, and that she did not recognize it as belonging to her husband. Although defendant made general objections, and there were unrecorded discussions whose contents are unknown, the first point in the trial at which defendant made a specific claim was in a mistrial motion made after summations. We find this belated motion insufficient to preserve the issue (*see People v Narayan*, 54 NY2d 106, 114 [1981]; *People v Kello*, 267 AD2d 123 [1999], *affd* 96 NY2d 740 [2001]; *cf. People v Ortiz*, 54 NY2d 288, 292 n 3 [1981]), and we decline to review it in the interest of justice. As an alternative holding, we find that the testimony was admissible not for its truth, but for the legitimate nonhearsay purpose of explaining the officer's actions in continuing to detain defendant, rather than the complainant, after defendant told the officer that he was the actual victim, and that the medallion was his (*see People v Tosca*, 98 NY2d 660 [2002]). This was

particularly significant, because one of the issues the defense raised at trial was the adequacy of the police investigation. Further, regardless of the admissibility of this evidence, the drastic remedy of a mistrial, the only remedy requested, would have been inappropriate. Any error regarding either the admission of, or the prosecutor's summation comments on, this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

All concur except Freedman, J. who dissents in a memorandum as follows:

FREEDMAN, J. (dissenting)

I would reverse the conviction based on the trial court's admission of clearly testimonial hearsay evidence and permission for the People to sum up on that evidence despite repeated objections by defense counsel.

Defendant was convicted of one count of robbery in the third degree (Penal Law § 160.05) pursuant to the following scenario. The complaining witness, a 22-year-old who had been released from prison about a year before, averred that he was walking with a friend after leaving his job at a bodega at 1:00 a.m. Shortly after he and the friend parted, defendant attacked him and grabbed a white gold chain with a Jesus medallion from around his neck that the complainant claimed to have purchased for $850 during the past year pursuant to a layaway plan. He yelled that someone had robbed him, and acquaintances who were still on the street immediately appeared and chased defendant, wrestled him to the ground and caused him to bleed. Defendant then got away and ran into a nearby bodega, bleeding and claiming that he had been robbed, and pleaded with the owner to call the police. Defendant then grabbed a knife and ran to an ambulance parked nearby, even though he lived in the neighborhood.

The complainant flagged down a police car, telling the officers that he had been robbed of his Jesus medallion and part of his chain, and that the robber had run to a nearby ambulance.

One of the police officers, Lenno Hendricks, entered the ambulance, saw the injured defendant and a knife on the floor, and arrested, handcuffed and searched him. Defendant told Hendricks that it was he who had been robbed, but the officer recovered the Jesus medallion and broken chain from defendant's pocket. Both complainant and defendant were taken to St. Luke's Hospital for treatment of injuries, each claiming that the medallion was his and that he had been attacked and robbed by the other.

Police Officer Hendricks testified at trial that when defendant's wife arrived in his hospital room, defendant asked his wife to bring receipts and then "kept telling his wife to take the pendant" from the police, but she "didn't know what he was talking about." Over repeated objections, he testified that defendant's wife "became irate with him," and that when the officer showed her the medallion and asked if she recognized it as belonging to her husband, she said "no." The trial court admitted the officer's testimony concerning defendant's wife's statement on the ground that it was admissible for the nonhearsay purpose of explaining why the officer, having already arrested defendant, continued to detain him. Although the record does not reflect the reason for defense counsel's objection, it is obvious that the testimony constituted hearsay. In his summation, the

prosecutor then made much of defendant's wife's failure to recognize the medallion. Again, defense counsel objected repeatedly and approached the bench, but the objections were overruled. The following day, counsel moved for a mistrial on the ground that the testimony was admitted in violation of the Confrontation Clause (see *Davis v Washington*, 547 US 813 [2006]; *Crawford v Washington*, 541 US 36 [2004]).

The majority finds that defendant did not preserve his Confrontation Clause claim because he only made general objections, and what was said at the bench was unrecorded. The first point at which an objection based on the Confrontation Clause was recorded was after summations. Although Confrontation Clause claims must be preserved separately from common law hearsay objections (*People v Kello*, 96 NY2d 740, 743 [2001]), the repeated objections, followed by a bench conference immediately after the offer of what was clearly hearsay, suffice to preserve the objection. Even were there some basis for admitting the hearsay during the trial, ostensibly to complete a narrative, there was absolutely no basis for allowing the prosecution to continue using it during summation for the clear purpose of substantiating the contention that the medallion did not belong to defendant; ownership of the medallion was the key issue at the

trial. While there was other evidence that the complainant possessed a pendant or medallion - specifically, what the defense calls a not very clear photograph allegedly taken at an unspecified time before the incident, showing him wearing a medallion or pendant - he produced no documentary evidence of this $850 item supposedly purchased on a layaway plan within the year prior to this incident. The photograph was not made a part of the record.

The majority also avers that any error in admitting and allowing repetition of the hearsay constituted harmless error, but this Court has held otherwise when a key issue was involved and the prosecutor emphasized the testimony during summation (see *People v Woods*, 9 AD3d 293 [2004]). For an error involving the Confrontation Clauses of the Sixth Amendment to the United States Constitution and article I, § 6 of the New York Constitution to be harmless, it must be shown that it was harmless beyond a reasonable doubt (*People v Goldstein*, 6 NY3d 119, 129 [2005], *cert denied* 547 US 1159 [2006], citing *Chapman v California*, 386 US 18, 24 [1967]). Even where, as here, there was significant evidence of defendant's guilt without the testimonial hearsay, the evidence was not so overwhelming as to support a finding that

its admission was harmless because it involved the main issue in the case, namely, who owned the medallion (*id.*).

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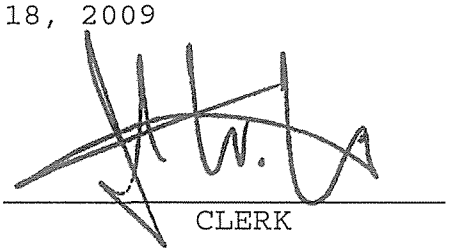

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Saxe, J.P., Buckley, McGuire, Moskowitz, Acosta, JJ.

755 Anne Fischer, Index 17131/07
Plaintiff-Appellant,

-against-

Crossard Realty Co., Inc.,
Defendant-Respondent.

Morton Povman, P.C., Forest Hills (Morton Povman of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered December 10, 2008, which, in an action for personal injuries allegedly caused by elevator misleveling, granted defendant building owner's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, defendant's motion denied and the complaint reinstated.

An issue of fact as to whether defendant had notice of the claimed misleveling is raised by the elevator's service records, as clarified by the testimony of the elevator maintenance company's president and the affidavit of plaintiff's expert. Defendant's argument that plaintiff's testimony shows that she fell not because of any misleveling, but when she tried to quickly move out of the way of elevator doors that allegedly were closing prematurely and frightened her, was improperly raised for the first time in its reply papers before the motion court, and

we decline to consider it (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1993]).

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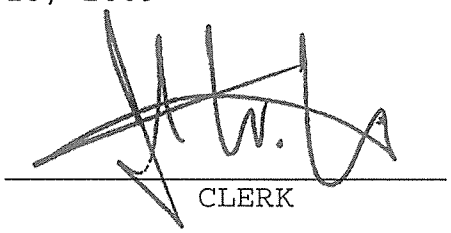

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Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

790 Joseph Orlino, Index 110110/04
Plaintiff-Appellant,

-against-

2 Gold, LLC,
Defendant-Respondent.

DeSimone, Aviles, Shorter & Oxamendi, LLP, New York (Ralph DeSimone of counsel), for appellant.

Fiedelman & McGaw, Jericho (Andrew Zajac of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 10, 2009, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant's motion for summary judgment was properly granted, given that the lumber over which plaintiff tripped at his worksite was not "debris," but an integral part of the work

being performed (*see* 12 NYCRR 23-1.7[e][2]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [2006], *affd* 7 NY3d 805 [2006]; *Harvey v Morse Diesel Intl.*, 299 AD2d 451 [2002], *lv denied* 99 NY2d 508 [2003]).

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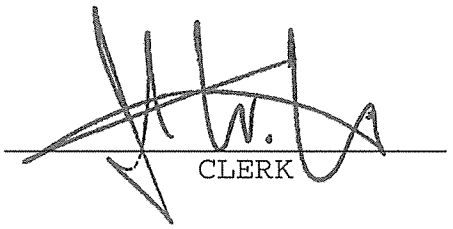

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

839 The People of the State of New York, Respondent, Ind. 5912/06

-against-

Alberto Nieves, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered June 25, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The prosecutor was not required to provide the grand jury with a circumstantial evidence charge. Even where the evidence is wholly circumstantial, a failure to charge the grand jury on circumstantial evidence does not impair the integrity of the proceeding (*see People v Wooten*, 283 AD2d 931, 932 [2001], *lv denied* 96 NY2d 943 [2001]).

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

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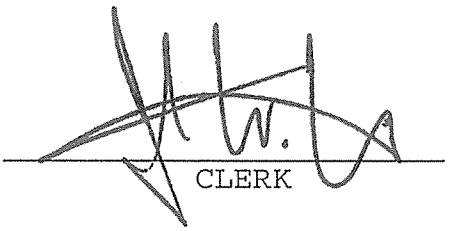

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

840 Frank J. Stubbolo, et al., Index 115474/06
Plaintiffs-Respondents-Appellants,

-against-

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

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

John F. Raio, Lindenhurst, for respondents-appellants.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 25, 2008, which, to the extent appealed from, denied defendants' motion to dismiss as to plaintiffs' 42 USC § 1983 claim based upon alleged fabrication of evidence prior to the initiation of certain grand jury proceedings and prosecutions against plaintiff Frank J. Stubbolo, and granted defendants' motion to dismiss as to plaintiffs' remaining claims, unanimously modified, on the law, without costs, to the extent of granting the motion in its entirety. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

The motion court erred in denying dismissal of plaintiffs' 42 USC § 1983 claim based on the theory of fabrication of evidence prior to the initiation of the grand jury proceedings and prosecutions against plaintiff Frank J. Stubbolo under Indictment Nos. 724/02 and 4133/03. The complaint fails to sufficiently allege such prosecutorial misconduct and, as a

result, the claim is barred by absolute prosecutorial immunity (*see Buckley v Fitzsimmons*, 509 US 259, 269-270 [1993]; *Imbler v Pachtman*, 424 US 409, 430-31 [1970]; *Hill v City of New York*, 45 F3d 653, 661 [2d Cir 1995]).

Contrary to plaintiffs' contentions on appeal, the motion court properly dismissed plaintiffs' remaining federal and state law claims as time-barred or for failure to state a cause of action (CPLR 3211[a][1], [7]).

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

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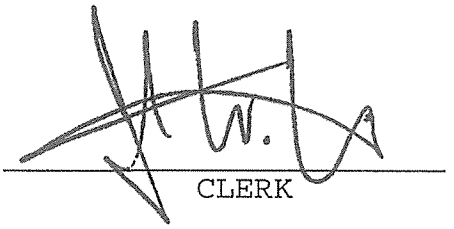

CLERK

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 18, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
James M. Catterson
Dianne T. Renwick
Leland G. DeGrasse
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 5734/05
Respondent,

-against- 843

Amin Perez, etc.,
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 Solomon, J.), rendered on or about April 17, 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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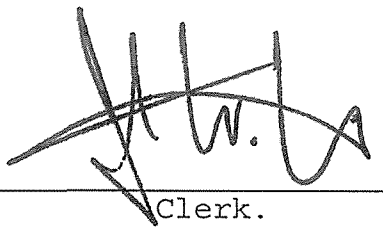

Clerk.

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

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

846 Denise Wohl, Index 300668/08
Plaintiff-Respondent,

-against-

Larry Wohl,
Defendant-Appellant.

Buchanan Ingersoll & Rooney, P.C., New York (Theodore Sternklar of counsel), for appellant.

Ira E. Garr, P.C., New York (Ira E. Garr of counsel), for respondent.

Order, Supreme Court, New York County (Harold Beeler, J.), entered November 21, 2008, which denied defendant's motion for partial summary judgment seeking to limit the evaluation period for the appreciation of certain of defendant's separate property, or, in the alternative, for a declaration limiting the evaluation period for the appreciation of this property to the period of time after this property was formally received by him from the estate of his father rather than from the time of his father's death and bequest, unanimously affirmed, with costs.

Marital property, subject to equitable distribution, "includes property acquired by either spouse during the marriage 'regardless of the form in which title is held'" (*Bartha v Bartha*, 15 AD3d 111, 115 [2005], quoting Domestic Relations Law § 236[B][1][c]). Here, the court properly denied defendant's motion because defendant acquired a property interest in certain

businesses upon his father's death in 1979 (*see Matter of Columbia Trust Co.*, 186 App Div 377, 380 [1919]). It is irrelevant that the business interests inherited by defendant were not distributed for some 25 years, purportedly due to an internal family dispute. Thus, although defendant's actual interest in the subject businesses is his separate property, "any appreciation in value of such separate property may be subject to distribution if there is a nexus between the titled spouse's efforts and the increase in value and those efforts were 'aided or facilitated' by the nontitled spouse" (*Van Dyke v Van Dyke*, 273 AD2d 589, 592 [2000], quoting *Hartog v Hartog*, 85 NY2d 36, 46 [1995], quoting *Price v Price*, 69 NY2d 8, 18 [1986]).

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

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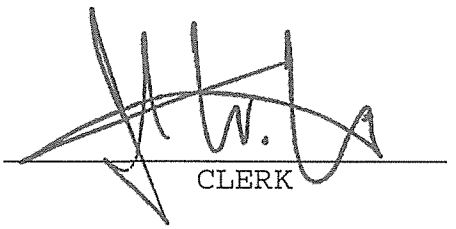

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Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

849 In re Tivoli Stock LLC, et al., Petitioners-Appellants, Index 115905/07

-against-

New York City Department of Housing Preservation and Development, Respondent-Respondent.

- - - - -

Tivoli Towers Tenants' Association, Respondent-Intervenor-Respondent.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for New York City Department of Housing Preservation and Development, respondent.

Collins, Dobkin & Miller, LLP, New York (Seth A. Miller of counsel), for Tivoli Towers Tenants' Association, respondent.

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered July 22, 2008, granting the cross motion of respondent New York City Department of Housing Preservation and Development (HPD) and intervenor-respondent Tivoli Towers Tenants' Association to dismiss the petition seeking a writ of mandamus to compel HPD to issue a letter of no objection permitting petitioners to remove the apartment building known as Tivoli Towers from the Private Housing Finance Law program, or, in the alternative, for an order setting aside as arbitrary and capricious HPD's August 1, 2007 decision not to make a new determination with respect to

petitioner's request for said letter of no objection, unanimously affirmed, with costs.

The court properly dismissed the petition as barred by the doctrine of res judicata. The claim asserted in the instant petition is based on the same facts as, and seeks the same relief sought in, petitioners' prior article 78 petition, and therefore arises from the same transaction or occurrence underlying the prior petition (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]), which petition was denied and dismissed by Supreme Court (*see Matter of Tivoli Stock LLC v New York City Dept. of Hous. Preserv. & Dev.*, 14 Misc 3d 1207[A], 2006 NY Slip Op 52439[U] [2006]), and which determination was affirmed by this Court (50 AD3d 572 [2008]). Accordingly, the claim is one that could and should have been asserted in the prior proceeding (*see O'Brien*, 54 NY2d at 357-358), but petitioners failed to do so until their motion for reargument, which was denied. Having bypassed the opportunity to raise their new theory at the appropriate time, petitioners are barred from making yet another attempt to have this theory considered by raising it in the instant petition.

Dismissal of the petition is also warranted since it is barred by the four-month statute of limitations provided for in CPLR 217(1). Although petitioners' first article 78 petition was timely, the instant petition was brought more than 19 months

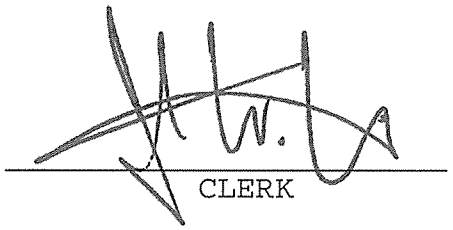
after HPD first notified them that it would not issue the requested letter of no objection, the point at which petitioners were aggrieved and when the limitations period commenced (*see Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986]; *Tamarkin v New York City Dept. of Educ.*, 44 AD3d 502, 502-503 [2007]). That petitioners sought reconsideration of HPD's denial in July 2007, received notice from HPD that it would not reconsider its prior determination or issue a new determination on August 1, 2007, and filed the instant petition within four months of that date, does not toll the limitations period (*see Matter of Lubin v Board of Educ.*, 60 NY2d 974, 976 [1983], *cert denied* 469 US 823 [1984]; *Concourse Nursing Home v Perales*, 219 AD2d 451, 453 [1995], *lv denied* 87 NY2d 812 [1996], *cert denied* 519 US 863 [1996]). Petitioners' characterization of its claim as entirely new and concerning the geographic scope of the restrictive covenant, as opposed to their claim in the first petition which concerned the nature of the use restriction contained in the covenant, is unavailing. It is clear that petitioners simply re-presented their earlier request for a letter of no objection permitting it to buy out of the Mitchell-Lama program and convert Tivoli Towers from a limited-profit housing project to market-rate housing, under the guise of a new legal theory.

Furthermore, were we to consider the claim asserted herein, we would find it lacking in merit. When all of the instruments effectuating the property conveyances, including the two deeds at issue and the Tivoli Towers Project and Plan that was approved by the City Board of Estimate, are considered as a whole, it is clear that the development included all three lots in question and that the intent was for all three lots, which were eventually merged for zoning and tax purposes, to be encumbered by the restrictive covenant contained in the City deed, regardless that the exact parcel upon which the apartment building itself was built was conveyed by a deed that contained no such covenant (*see 328 Owners Corp. v 330 W. 86 Oaks Corp.*, 8 NY3d 372, 381-83 [2007]). Indeed, the City would not have agreed to convey the two parcels conveyed by the deed containing the restrictive covenant without petitioners' commitment to abide by the terms of the covenant, and it is equally clear that Tivoli Towers would not have been built without the two City-conveyed parcels. Having benefitted substantially from the financial incentives offered through the Mitchell-Lama program for many years, petitioners should not be permitted to avoid the consequences of their reciprocal promise to maintain Tivoli Towers as affordable housing for at least 50 years by arguing that the restrictive

covenant only applies to the parking garage that was actually built upon the two City lots but not to the apartment building situated on the adjacent, privately conveyed lot.

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

ENTERED: JUNE 18, 2009



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

850 The People of the State of New York, Ind. 579/08
Respondent,

-against-

Francisco Pereyra,
Defendant-Appellant.

McMillan, Constabile, Maker & Perone, LLP, Larchmont (Stewart A. McMillan of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered July 1, 2008, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]. There is no basis for disturbing the jury's determinations concerning credibility. The jury properly drew the inference permitted by Penal Law § 265.15(3) that defendant possessed the pistol found in the car he was driving, and discredited testimony that was offered to rebut this inference (*see People v Lemmons*, 40 NY2d 505, 510 [1976]; *People v Lynch*, 116 AD2d 56, 60 [1986]).

The court's *Sandoval* ruling balanced the appropriate factors

and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *see People v Sandoval*, 34 NY2d 371 [1974]). Defendant's prior conviction for attempted criminal possession of stolen property is the sort of theft-related bad act that directly reflects on his credibility. Since defendant did not, in fact, receive youthful offender treatment, this conviction was a proper subject for impeachment purposes. Although defendant claims he had been a mandatory youthful offender (*see* CPL 720.20[1][b]), he never challenged the prior conviction by way of appeal or otherwise; in any event, the record does not establish that he met the statutory criteria for mandatory youthful offender treatment.

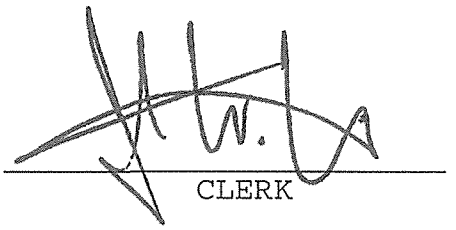
By failing to make a suitable offer of proof explaining the purpose of his questions, defendant failed to preserve his argument that the trial court unduly limited his cross-examination of a police officer concerning the possible connection of other occupants of the car to the pistol (*see People v George*, 67 NY2d 817, 818-819 [1986]; *People v Ramos*, 273 AD2d 10 [2000], *lv denied* 95 NY2d 856 [2000]). Furthermore, defendant never asserted a constitutional right to pursue any particular inquiry. Accordingly, defendant's present claims relating to his cross-examination of the officer are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Defendant received an adequate opportunity to present to the jury his claim that the pistol may have been attributable to one of the passengers, who were also arrested, and there was no violation of defendant's right to cross-examine witnesses and present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

Defendant's challenges to the court's denial of his suppression motion are without merit.

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

ENTERED: JUNE 18, 2009



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

851 In re Jeffrey R.,

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

Carmen M.,
Respondent-Appellant,

Catholic Guardian Society
and Home Bureau,
Petitioner-Respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Rhoda Cohen, J.), entered on or about December 20, 2007, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the child to the custody and guardianship of petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

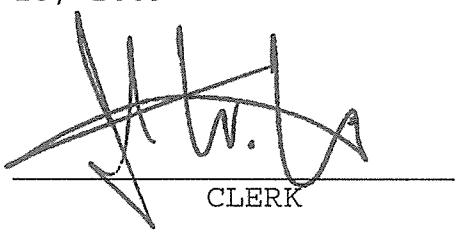
Clear and convincing evidence supports the court's finding that the agency made the requisite diligent efforts to reunite respondent with the subject child (*see Matter of Sheila G.*, 61 NY2d 368 [1984]) and that nevertheless respondent failed to plan

for the child's future (*see* Social Services Law § 384-b[7][a], [c]).

The court's finding that it is in the best interests of the child to terminate respondent's parental rights and free him to be adopted by his long-term foster mother, in whose home he has thrived and with whom he wishes to continue to live, is supported by the requisite preponderance of the evidence (*see Matter of Evelyse Luz S.*, 57 AD3d 329 [2008]).

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

ENTERED: JUNE 18, 2009



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

852 The People of the State of New York, Ind. 4782/02
Respondent,

-against-

David Fields,
Defendant-Appellant.

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

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

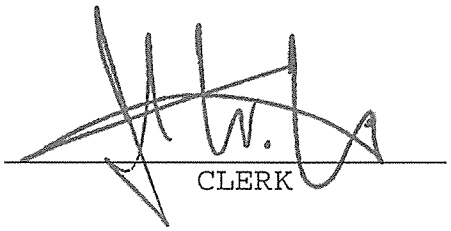
Judgment, Supreme Court, New York County (John Cataldo, J. at plea; Laura A. Ward, J. at sentence), rendered June 27, 2008, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him to a term of 4½ to 9 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 3 to 6 years, and otherwise affirmed.

The record does not establish a valid waiver of defendant's right to appeal. There was no oral discussion of such a waiver, and, unlike the written waiver upheld in *People v Ramos* (7 NY3d 737 [2006]), the reference to a waiver contained in defendant's written plea agreement was entirely perfunctory.

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 18, 2009



Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

853 Community Network Service, Inc., Index 605102/00
Plaintiff-Appellant,

-against-

Verizon New York, Inc.,
Defendant-Respondent.

Michael T. Stapleton, New York, for appellant.

Ledy-Gurren, Bass & Siff, L.L.P., New York (Nancy Ledy-Gurren of counsel), for respondent.

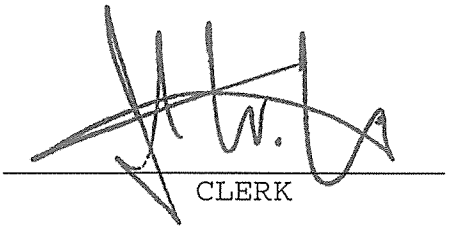
Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered November 17, 2008, which denied plaintiff's motion to vacate the judgment, same court and J.H.O., entered September 26, 2007, dismissing the action with prejudice for failure to proceed to trial, unanimously affirmed, with costs.

We reject plaintiff's argument that the trial court's assertedly erroneous oral, in limine ruling limiting plaintiff's proof of damages gave it a reasonable excuse for refusing to proceed to trial (*see* 48 AD3d 249 [2008]). A litigation strategy cannot be a reasonable excuse for a default (*cf. Manhattan Vermeer Co. v Guterman*, 179 AD2d 561 [1992]). Plaintiff's remedy was not to defy the court's order to proceed, but to make an offer of proof, concede that it has no case, and then appeal the in limine ruling as part of an appeal from the final judgment.

Absent a reasonable excuse we need not consider the merits of the action.

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

ENTERED: JUNE 18, 2009



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

854 The People of the State of New York, Ind. 6795/06
Respondent,

-against-

Nahine Wright,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lucrece Francois of counsel), for respondent.

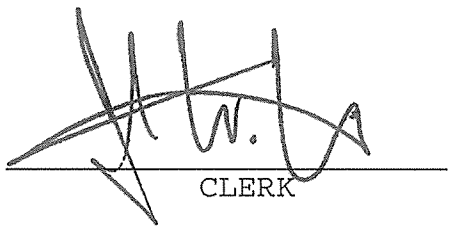
Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at hearing; Daniel P. FitzGerald, J. at plea and sentence), rendered March 3, 2008, convicting defendant of assault in the first degree, and sentencing him, as a second felony offender, to a term of 8 years, unanimously affirmed.

The court properly found, by clear and convincing evidence, that although a lineup had been suppressed on right to counsel grounds, the victim could make an in-court identification of defendant based upon an independent source (*see e.g. People v Robinson*, 8 AD3d 95 [2004], *lv denied* 3 NY3d 742 [2004]). There is no basis for disturbing the court's determinations concerning credibility. The victim had seen defendant numerous times in the neighborhood, and had an ample opportunity to observe him during a 20-minute incident that included several conversations between the two men, and ended when defendant shot the victim.

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 18, 2009



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

855 Terry Moses, Index 13701/06
Plaintiff-Appellant,

-against-

Gelco Corporation, et al.,
Defendants-Respondents,

Adoo Dome Services, et al.,
Defendants.

Pontisakos & Rossi, P.C., Roslyn (Elizabeth Mark Meyerson of counsel), for appellant.

Eustace & Marquez, White Plains (Rose M. Cotter of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about May 19, 2008, directing entry of judgment dismissing the complaint for lack of a serious injury as required by Insurance Law § 5102(d), unanimously affirmed, without costs.

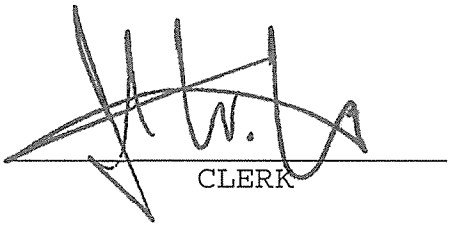
Defendants met their initial burden of demonstrating the lack of a serious injury by submitting the affirmed reports of various physicians establishing that plaintiff's injuries were the result of a degenerative condition (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]), and documentary evidence showing that plaintiff was involved in another accident three years before the subject accident for which he brought a lawsuit alleging injuries virtually identical to those alleged in this lawsuit (*see Becerril v Sol Cab Corp.*, 50 AD3d 261, 261-262 [2008]).

Plaintiff's opposition, which sought to establish a serious injury under the 90/180 category, failed to offer the requisite "competent medical proof" of incapacity caused by the accident (*Rossi v Alhassan*, 48 AD3d 270, 271 [2008]; *see also Marsh v City of New York*, __ AD3d __, 2009 NY Slip Op 3049 [1st Dept 2009] [absent evidence sufficient to raise an issue of fact as to causation, plaintiff's 90/180 claim also lacks merit]). Indeed, plaintiff's medical evidence, namely, the affidavit of his chiropractor, which failed to address, let alone refute, the degenerative causation found by defendants' physicians, and did not purport to explain why the prior accident could be ruled out as the cause of plaintiff's current alleged limitations, was aptly characterized by the motion court as speculative (*see Montgomery v Pena*, 19 AD3d 288, 290 [2005]; *Style v Joseph*, 32 AD3d 212, 215 [2006]). We note that plaintiff's claim that at the time of the accident he had been working in his physically demanding job for well over a year without complaint -- meant to show that he had healed from the injuries sustained in the prior

accident -- is directly contradicted by his deposition testimony in the other lawsuit. 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 18, 2009



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

857 David M Rubin, Index 350089/07
Plaintiff-Respondent-Appellant,

-against-

Karen E. Rubin,
Defendant-Appellant-Respondent.

Franklin S. Bonem, New York, for appellant-respondent.

Sheresky Aronson Mayefsky & Sloan, LLP, New York (Karen L. Robarge of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered December 11, 2008, which, to the extent appealed from, awarded defendant taxable maintenance in the amount of $8,000 per month for eight years and thereafter $7,000 per month for two years and retroactive non-taxable maintenance in the amount of $29,700, unanimously modified, on the law, to reduce the retroactive non-taxable maintenance award to $22,200, and to direct defendant to refund plaintiff an overpayment of $7,500 and otherwise affirmed, without costs.

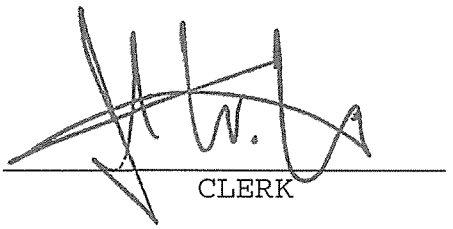
The court properly determined the amount and duration of maintenance upon consideration of the factors enumerated in Domestic Relations Law § 236(B)(6)(a) (*see e.g. Spencer v Spencer*, 230 AD2d 645, 648 [1996]), particularly the parties' standard of living before the divorce action was commenced and defendant's reasonable needs (*see Hartog v Hartog*, 85 NY2d 36, 51-52 [1995]). The court correctly excluded from its calculation

of maintenance plaintiff's earning capacity attributable to his law degree and license and the value of his practice, since these were capitalized and included in the award of equitable distribution (*see Grunfeld v Grunfeld*, 94 NY2d 696 [2000]; *Jarrell v Jarrell*, 276 AD2d 353, 353 [2000], *lv denied* 96 NY2d 710 [2001]).

The award of retroactive maintenance should have been calculated from February 1, 2007, the date on which this action was commenced (*see Solomon v Solomon*, 10 AD3d 584 [2004]). Plaintiff having paid defendant $29,700 for a period including January 2007, he is entitled to a pro rata refund of $7,500.

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

ENTERED: JUNE 18, 2009



CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

858 The People of the State of New York, Ind. 6509/07
Respondent,

-against-

Viannet Dom, also known as Viannet Espinal,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 19, 2008, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him, as a second felony offender, to a term of 3 years, unanimously affirmed.

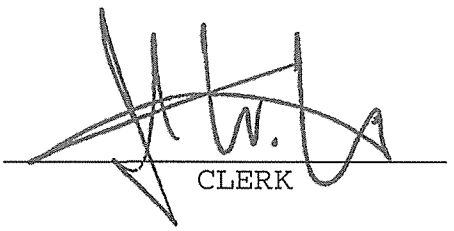
The court properly denied defendant's suppression motion. Defendant's arguments that he only committed traffic infractions, and that the officer should therefore have issued a summons rather than arresting defendant and conducting a search incident to that arrest, are unpreserved (*see People v Tutt*, 38 NY2d 1011 [1976]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. In the first place, the officer had probable cause to arrest defendant for driving while intoxicated, which is a misdemeanor. Moreover, even if there was only probable cause to

believe defendant committed the traffic infraction of driving while impaired, issuance of a summons, while technically permissible, would not have been a practicable alternative to arrest (*see People v Troiano*, 35 NY2d 476, 478 [1974]). The officer reasonably suspected that defendant's ability to drive had been affected by alcohol, he did not have a driver's license, and the rental agreement revealed that neither he, or any of his passengers, were authorized to drive the rented car. Accordingly, there is no basis for suppression of the knife recovered from defendant's pocket or his subsequent statement.

The plea was not rendered involuntary by the fact that the court did not mention the mandatory surcharge and fees during the allocution (*see People v Hoti*, 12 NY3d 742 [2009]).

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

ENTERED: JUNE 18, 2009



Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

860N Wellstone Mills, LLC, Index 110981/08
Petitioner-Appellant,

-against-

Dillon Yarn Corporation,
Respondent-Respondent.

Phillips Nizer LLP, New York (Donald L. Kreindler of counsel), for appellant.

Otterbourg, Steindler, Houston & Rosen, P.C., New York (Bernard Beitel of counsel), for respondent.

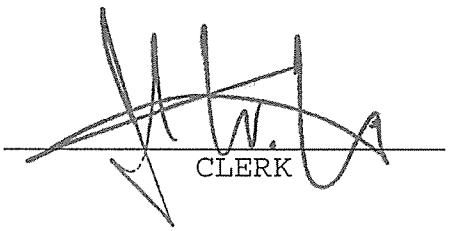
Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered February 3, 2009, denying respondent's petition to stay arbitration and dismissing the proceeding, unanimously affirmed, without costs.

The petition to stay arbitration was properly denied. Questions concerning conditions precedent to an obligation to arbitrate, such as time limits, are generally for the arbitrator to decide in the absence of a provision to the contrary or a provision that New York law (which provides that some timeliness issues are for the courts) governs both the agreement and its enforcement (*Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]). Since the contract between the parties did not contain such a provision, this dispute regarding whether the arbitration proceeding was

timely commenced and whether the time limit allegedly set forth in the contract is binding upon respondent is reserved for the arbitrator.

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

ENTERED: JUNE 18, 2009



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
John W. Sweeny, Jr.
Dianne T. Renwick
Leland DeGrasse, JJ.

5105
Index 604351/05

P.J.P. Mechanical Corp., Index 604351/05
Plaintiff-Appellant,

-against-

Commerce and Industry Insurance Company,
Defendant-Respondent.

Plaintiff appeals from a judgment of the Supreme Court, New York County (Karla Moskowitz, J.), entered April 24, 2007, which, upon the parties' respective motions for summary judgment, declared that defendant has no duty to pay the legal fees and other litigation expenses incurred by plaintiff in an underlying action plaintiff brought against the general contractor to recover the balance due under the subcontract.

Arthur J. Semetis, P.C., New York (Arthur J. Semetis and Shannon P. Gallagher of counsel), for appellant.

Law Offices of Green & Lavelle, Brooklyn (William J. Cleary and Martin P. Lavelle of counsel), for respondent.

SWEENY, J.

This case involves the extent of an insurer's duty to defend under the terms of its policy. Specifically, does an insurer have a duty either to fund or to reimburse for separate litigation commenced by its insured, where the responsive pleadings raise an affirmative defense based on a claim of offset? For the following reasons, we hold that it does not.

Plaintiff was insured under a commercial general liability policy issued by defendant. It entered into a contract with Cauldwell, a general contractor, to perform heating and ventilation work in a building leased by JP Morgan Chase Bank. Plaintiff subcontracted out part of its work to Penava Mechanical Corp. On November 30, 2001, a pipe separated from a water riser, causing damage to the building in excess of $500,000. Cauldwell immediately advised plaintiff and Penava that it considered them solely responsible for the property damage caused by the ruptured pipe.

Plaintiff, in turn, immediately notified defendant of Cauldwell's claim. Defendant conducted an investigation pursuant to the terms of its insurance policy and determined that preservation of the burst pipe was necessary in the event of litigation. Counsel was assigned to file a pre-suit motion to preserve the pipe. This counsel attended various meetings,

inspections and tests conducted by the insurance carriers for the parties involved in this incident, with each taking differing positions on the question of liability. On December 14, 2001, Cauldwell's insurer filed a notice of claim against plaintiff. However, no litigation was commenced by any of the parties for damages resulting from the burst pipe incident.

Thereafter, Cauldwell advised plaintiff that it was withholding the contract balance of approximately $650,000 owed to plaintiff because of Cauldwell's position that plaintiff was solely responsible for the property damage resulting from the ruptured pipe. Plaintiff requested defendant to assign counsel to defend it against Cauldwell's claim of negligence that resulted in the withholding of the contract balance. Defendant refused, taking the position that pursuant to the terms of the policy, Cauldwell's claim of negligence did not fall within the definition of a "claim" as defined in the insurance policy, as it was not a "suit, [or] a demand for injunctive or equitable relief."

In February 2003, plaintiff hired its own counsel and served an amended complaint[1] on Cauldwell, JP Morgan and others to recover the disputed contract balance. Cauldwell and the other

---

[1]The original complaint has not been made part of the record.

named defendants joined issue, asserting three affirmative defenses. The only substantive affirmative defense was Cauldwell's claim of the right to offset any recovery based on damages sustained as a result of the negligence of plaintiff or its subcontractor.

In November 2004, plaintiff filed a second amended complaint against Cauldwell, JP Morgan and others. In their answer, Cauldwell and JP Morgan asserted counterclaims against plaintiff to recover for property damage caused by the alleged negligence of plaintiff or its subcontractors. Plaintiff again forwarded this answer to defendant and demanded a defense. At this point, defendant notified plaintiff that counsel would be assigned to represent it, but that such representation would be limited solely to the defense of Cauldwell's counterclaim for negligence. In exchanges of correspondence, plaintiff demanded that defendant also reimburse it for legal fees and expenses it incurred and would incur in connection with the prosecution of the underlying action to collect the contract balance. Defendant refused such demands, again taking the position that the policy only provided for the defense of covered claims, not claims for breach of contract, and that it would only pay for legal expenses incurred at its request.

In December 2005, plaintiff commenced this declaratory judgment action, alleging that defendant had a duty to pay all legal expenses and costs directly incurred by plaintiff in the underlying collection action. Defendant moved for summary judgment, arguing that Cauldwell's affirmative defense of negligence in the underlying collection action was not an "occurrence" as defined in the policy, which would trigger coverage. Defendant contended that once Cauldwell and JP Morgan, in response to the second amended complaint, asserted counterclaims against plaintiff, it appointed counsel to represent plaintiff solely with respect to those counterclaims, while plaintiff's counsel continued to represent it in the collection action. Defendant further argued that since the collection action was ultimately settled for $930,000, plaintiff's demand for reimbursement of legal costs incurred in connection therewith did not constitute a claim for property damage or bodily injury as defined in the policy, and defendant thus was under no obligation to pay those sums.

Plaintiff cross-moved for summary judgment, arguing that the policy did not differentiate among a pre-suit claim of negligence, an affirmative defense of negligence, and a counterclaim for negligence with respect to the insured's duty to

defend. Plaintiff contended that although defendant maintained it could take no action as the matter was not in suit, it should have done a more extensive investigation and settled the claim resulting from the ruptured pipe.

Supreme Court held that the contract language of the policy controls. The policy definitions, when read in conjunction with the entire policy, placed no obligation on defendant to defend plaintiff against an affirmative defense filed in response to an action, even though that affirmative defense was couched in terms of plaintiff's negligence. The court granted defendant's motion and denied plaintiff's cross motion.

Well established principles governing the interpretation of insurance contracts provide that the unambiguous provisions of the policy must be given their plain and ordinary meaning (*Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 442 [2007]). This is a question of law for the court to determine (*Titlebaum Holdings v Gold*, 48 NY2d 51, 56 [1979]; *Seaport Park Condominium v Greater N.Y. Mut. Ins. Co.*, 39 AD3d 51, 54 [2007]). However, a court is not at liberty to "make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

The policy in question provides:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury and property damage to which this insurance applies. We will have the right and duty to defend any suit seeking those damages. We may at our discretion investigate any occurrence and settle any claim or suit that may result . . ."

With respect to the burst pipe, it is clear that defendant did exercise its discretion to investigate the occurrence and closed its file after determining that plaintiff was not liable for any property damage. The policy does not require the insurer to defend any "occurrence" which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Additionally, there is nothing in the policy language that requires defendant to either prosecute affirmative claims or reimburse plaintiff for the fees paid its counsel for such affirmative claims (*see National City Bank v New York Central Mut. Fire Ins. Co.*, 6 AD3d 1116, 1117 [2004], *lv denied* 3 NY3d 605 [2004]; *Goldberg v American Home Assur. Co.*, 80 AD2d 409, 411-12 [1981]).

We find no ambiguity in the contract reference to "suit," which is defined as

> "a civil proceeding in which damages to which this insurance applies are alleged. Suit includes:
>
> "a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does

submit with our consent; or

"b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent."

The policy, when read as a whole, clearly states that defendant has the duty to defend a suit, which means a proceeding brought against the insured, not by the insured. "Defend," by its clear import, does not envision affirmative litigation.

The only remaining question is whether an affirmative defense based on offset in the collection action triggered the insurer's duty to defend a "suit." The motion court properly held that it did not.

Contrary to plaintiff's arguments, an affirmative defense is substantively different from a counterclaim. A counterclaim is a cause of action asserted by a defendant against a plaintiff (CPLR 3019[a]). By its very nature, a counterclaim seeks affirmative relief.

Affirmative defenses, on the other hand, cannot seek such relief. Cauldwell could not obtain affirmative relief by asserting an offset defense. CPLR 3018(b) requires an affirmative defense to be raised in an answer for one of two reasons: (1) to prevent surprise against the adverse party, or (2) to raise issues of fact not appearing on the face of a prior

pleading. The effect of a successful affirmative defense is the dismissal of a plaintiff's complaint or cause of action. It does not give the defendant any affirmative relief against a plaintiff, such as monetary damages.

When raised as an affirmative defense, Cauldwell's claim of plaintiff's negligence merely sought dismissal of the suit for the balance of the contract amount. When raised as a counterclaim, however, it effectively sought damages from plaintiff, thus triggering the insurer's duty to defend, which it did.

The distinctions between affirmative defenses and counterclaims set forth in CPLR 3018(b) and 3019(b) are not merely semantic; these are substantive differences. The distinction has been succinctly explained as follows:

> "Facts pleaded which controvert the plaintiff's claim and serve merely to defeat it as a cause of action constitute a defense, and are inconsistent with the legal idea of a counterclaim, which is a separate and distinct cause of action. On the other hand, a claim that does not defeat the plaintiff's cause of action, but constitutes an independent cause of action for the defendant, should be pleaded as a counterclaim, and not as an affirmative defense." (84 NY Jur 2d, Pleading § 166.)

Significantly, if plaintiff believed that Cauldwell's defense was truly a counterclaim, the prudent action was to immediately move to strike the defense and force Cauldwell to

replead the claim as a counterclaim. This would have triggered the insurer's duty to defend. Had these steps been taken in the instant action, defendant would have been forced to defend plaintiff at the beginning of the case, rather than when the counterclaim was voluntarily asserted by Cauldwell several months later.

There do not appear to be any New York cases addressing the issue of whether the assertion of a claim such as Cauldwell's offset claim, when pleaded as an affirmative defense, triggered the insurer's duty to defend. Plaintiff relies on *Construction Protective Servs. v TIG Specialty Ins. Co.* (29 Cal 4th 189, 57 P3d 372 [2002]) and argues that we should adopt the rationale therein. In that case, a security firm sued the insurance company that provided its comprehensive general liability policy, claiming the insurer breached its duty to defend and indemnify against a setoff claim. The setoff was asserted as an affirmative defense in a lawsuit for unpaid services. The customer alleged that the security firm was legally responsible for fire damage at its construction site and thus was entitled to set those damages off against the amounts owed for security services. The trial court sustained the insurance company's demurrer without leave to amend, based on its conclusion that a liability insurer's duty to defend does not extend to affirmative

defenses raised in response to a lawsuit initiated by the insured. Based solely on its Code of Civil Procedure, the California Supreme Court held that the trial court had erroneously sustained the demurrer, but it declined to address the question on the facts where the precise terms of the insurance policy were not before the court. In an action on a written contract, a plaintiff could, under California procedure, plead "the legal effect of the contract rather than its precise language," thus enabling the court to determine whether "a prima facie right to relief" had adequately been stated, notwithstanding the specific language of the contract (29 Cal 4th at 198-199, 57 P3d at 377).

Despite the omission of a copy of the insurance policy as an exhibit to the complaint, the court concluded that the allegations in the complaint were sufficient to allege that the setoff claim fell within the scope of the contractual obligation to defend against suits seeking damages, and left open the question whether the duty would extend to the setoff claim once the precise language of the policy was known.

We decline to follow this holding. Were we to adopt the reasoning of *Construction*, it would represent a dramatic change in long-established New York law, which mandates that unambiguous contract language controls. It would essentially eliminate our

pleading distinctions between affirmative defenses and counterclaims by holding that how the setoff is pleaded does not control. While *Construction* recognized that a setoff is limited to defeating a plaintiff's claim in the same manner that an affirmative defense is so limited, it then went on to hold the effect of pleading a setoff defense is the same as if it were pleaded as a counterclaim, and thus, at least for the purposes of whether utilized defensively (as in an affirmative defense) or offensively (as in a counterclaim), there is no distinction between the two. In either case, an insurer would be mandated to assign counsel to defend the insured. This would impact the long-established business practices of insurers, and lead to uncertainty in the drafting of insurance contracts.

To ignore the clear language of an insurance policy and order a carrier to litigate an affirmative action chosen by the policyholder based on a mere claim in a defendant's answer that the affirmative action somehow relates, however tenuously, to an occurrence or allegation of negligence on the part of the insured would run afoul of the rule enunciated in *Breed* (46 NY2d at 355). We see no reason to set aside long-standing precedent on this issue.

Accordingly, the judgment of the Supreme Court, New York County (Karla Moskowitz, J.), entered April 24, 2007, upon the

parties' respective motions for summary judgment, declaring that defendant has no duty to pay the legal fees and other litigation expenses incurred by plaintiff in an underlying action plaintiff brought against the general contractor to recover the balance due under the subcontract, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 18, 2009