SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 23, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

885 The People of the State of New York, Respondent, Ind. 832/03

-against-

Joseph McNeil,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered December 10, 2007, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 18 years to life, unanimously affirmed.

The court properly declined to submit third-degree robbery as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, that he took the victim's property by means of some kind of force other than display of what appeared to be a firearm (*see e.g. People v Peaks*, 297 AD2d 578 [2002], *lv denied* 99 NY2d 562 [2002]). The victim testified that defendant simulated a firearm by gesturing

with his hand in his pocket and threatened to shoot her, thereby forcing her to accompany him to a nearby bank and withdraw funds from an ATM. "The victim testified that defendant [simulated] a gun. No other evidence, viewed reasonably, contradicted that testimony" (*People v James*, 11 NY3d 886, 888 [2008]). In addition, although his testimony differed from that of the victim as to minor details, a bystander also saw defendant holding one hand in his pocket. Furthermore, third-degree robbery requires the use of some type of force, and while there was evidence that defendant pushed the victim against a wall at the inception of the incident, there was nothing to suggest that he compelled her to go to a bank and withdraw money by any means other than simulating the presence of a firearm and placing her in reasonable fear of being shot.

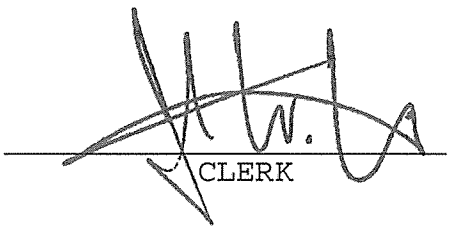
The court properly exercised its discretion (*see* CPL 240.70[1]) when it declined to preclude, on the ground of improper disclosure, the introduction of defendant's arrest photograph, which depicted defendant wearing distinctive clothing that was relevant to the issue of identity. This photograph had been introduced at defendant's first trial. Shortly before the instant retrial, the prosecutor advised defense counsel of his intention to introduce certain photographs, not including the photograph at issue. The prosecutor then told the court and counsel that, although he had been unable to locate some exhibits

from the first trial, no additional photographs would be used. Nevertheless, the prosecutor located the arrest photo and introduced it. We conclude that there was neither bad faith nor prejudice. Defense counsel's conclusory and unsubstantiated assertion that, had he known this damaging evidence would be admitted, he would have not pursued a misidentification defense did not warrant preclusion of the photograph. There is no reason to believe that earlier disclosure of the prosecutor's intent to use this photo would have changed the defense strategy.

Defendant's hearsay and Confrontation Clause claims regarding a communication between a police officer and a nontestifying declarant are unpreserved (*see e.g. People v Fleming*, 70 NY2d 947, 948 [1988]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Rather than being received for its truth, this evidence was received, with proper limiting instructions, for the legitimate, nonhearsay purpose of completing the narrative of events and explaining police actions (*see People v Tosca*, 98 NY2d 660 [2002]).

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

ENTERED: JUNE 23, 2009



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

886 Isabella Ayoub, Index 305392/08
Plaintiff-Appellant,

-against-

Joseph Ayoub,
Defendant-Respondent.

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

Robert A. Ross, Huntington, for respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered December 10, 2008, which, to the extent appealed from, denied plaintiff's request to modify the preliminary conference order to permit her to litigate the equitable distribution of the marital residence, unanimously affirmed, without costs.

The preliminary conference order indicated that the issue of equitable distribution was resolved and that all financial and property issues except for child support were resolved by the parties' prenuptial agreement. In her motion to modify the preliminary conference order, plaintiff did not demonstrate good cause (*see* 22 NYCRR 202.16[f][3]) to raise the issue of equitable distribution of the marital residence. Indeed, contrary to her contention, the prenuptial agreement is clear that the only property subject to equitable distribution is that titled in joint names, of which there is none. While the agreement contains a separate section dealing with a marital residence, the

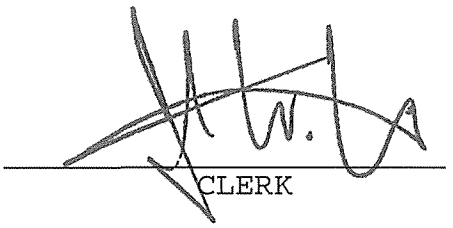
plain language of paragraph 4 of that section provides for equitable distribution only if "the Marital Residence is purchased as Jointly Owned Property."

Nor is relief available under CPLR 2001, since the waiver of the issue of equitable distribution in the preliminary conference order was not simply a slight mistake (*see People ex rel. Di Leo v Edwards*, 247 App Div 331 [1936]). Similarly, no relief is available under CPLR 2221. In her motion papers, plaintiff did not even assert that the preliminary conference order reflected a misapprehension of law or facts. Furthermore, the court correctly found that plaintiff's hiring of new counsel did not present a new fact permitting her to revisit the issues resolved in the preliminary conference order.

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

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

ENTERED: JUNE 23, 2009



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

887-
887A Steven Shanker, et al., Index 111969/07
Plaintiffs-Appellants,

-against-

119 East 30th, Ltd.,
Defendant-Respondent.

Shanker & Shanker, P.C., New York (Steven J. Shanker of counsel), for appellants.

Cutler Minikes & Adelman LLP, New York (Jonathan Z. Minikes of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 22, 2008, which vacated a prior order granting leave to enter a default judgment, and order, same court and Justice, entered March 27, 2008, which denied plaintiffs' motion for a default judgment and granted defendant's cross motion to serve its answer, unanimously affirmed, with costs.

Defendant asserts it did not receive a copy of the summons and complaint from the Secretary of State, pointing out that the process sent to defendant was returned marked "ATTEMPTED UNKNOWN/NOT KNOWN." Jurisdiction was obtained over this corporate defendant by service of process on the Secretary of State irrespective of whether the process ever actually reached defendant (*Associated Imports v Amiel Publ.*, 168 AD2d 354 [1990], *lv dismissed* 77 NY2d 873 [1991]). The failure to keep a current address with the Secretary of State pursuant to Business

Corporation Law § 306(b)(1) is generally not a reasonable excuse for default under CPLR 5015(a)(1) (*Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9-10 [2002]). However, where the court finds that a defendant failed to "personally receive notice of the summons in time to defend and has a meritorious defense," relief from a default may be granted (CPLR 317; *see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138 [1986]; *Arabesque Recs. LLC v Capacity LLC*, 45 AD3d 404 [2007]). Moreover, there is no evidence that defendant deliberately attempted to avoid notice of the action (*see Grosso v MTO Assoc. Ltd. Partnership*, 12 AD3d 402, 403 [2004]).

Defendant made a prima facie showing of a meritorious defense by submitting evidence of a promise to pay for plaintiffs' roof repairs through a series of emails (*see Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [2008], *lv dismissed* 10 NY3d 930 [2008]). With respect to defendant's failure to appear at oral argument, its attorneys' confusion over the court's calendar practices does not preclude defendant from vacating an

unintentional default (*see Price v Boston Rd. Dev. Corp.*, 56 AD3d 336 [2008]).

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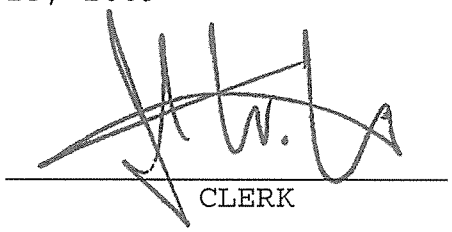

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Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

888-
889 Juvenex Ltd., etc., Index 601293/06
Plaintiff-Appellant,

-against-

The Burlington Insurance Company,
Defendant-Respondent.

Anthony Balsamo, New York, for appellant.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (James M. Adrian of counsel), for respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered June 25, 2008, dismissing the complaint and declaring that defendant is not obligated to defend or indemnify plaintiff in the underlying personal injury action, unanimously affirmed, with costs. Appeal from order, same court (Leland G. DeGrasse, J.), entered on or about May 23, 2008, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff's delay of two months in giving defendant notice of the claim was unreasonable as a matter of law (*see 2130 Willliamsbridge Corp. v Interstate Indem. Co.*, 55 AD3d 371 [2008]; *Republic N.Y. Corp. v American Home Assur. Co.*, 125 AD2d 247 [1986]). Notice to plaintiff's broker did not constitute notice to defendant (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 442 n 3 [1972]).

We decline to consider plaintiff's argument, raised for the first time on appeal, that the notice of claim provided to defendant by the injured person pursuant to Insurance Law § 3420(a)(3) was timely (*see Douglas Elliman-Gibbons & Ives v Kellerman*, 172 AD2d 307, 308 [1991], *lv denied* 78 NY2d 856 [1991]). Were we to consider it, we would find that the delay in the injured person's notice to defendant after he ascertained defendant's identity was also unreasonable as a matter of law (*see 2130 Willliamsbridge Corp., supra; Republic N.Y. Corp., supra*).

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

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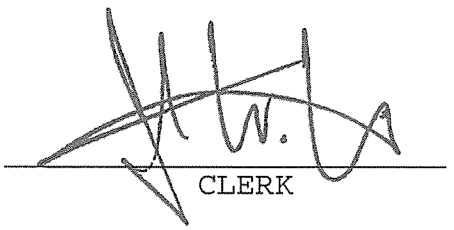

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Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

890 Jeffrey Fernandez, Index 28192/02
Plaintiff-Respondent-Appellant,

-against-

Riverdale Terrace, et al.,
Defendants,

Gotham Construction Company, LLC,
Defendant-Respondent,

Action Chutes, Inc.,
Defendant-Appellant.

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

Sullivan Papain Block McGrath & Cannavo P.C., New York (Susan M. Jaffe of counsel), for respondent-appellant.

Cozen O'Connor, New York (David A. Shimkin of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 15, 2008, which, in an action for personal injuries sustained by plaintiff while cleaning an allegedly defective building trash compactor during the course of his employment, denied the motion of defendant Action Chutes, Inc. (Action) for summary judgment dismissing the complaint as against it and granted the cross motion of defendant Gotham Construction Company, LLC (Gotham) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The record shows that Gotham, the general contractor for the construction of the building, contracted with Action for the sale

and installation of a trash compactor. Action chose the make and model of the subject compactor, purchased it directly from an entity related to the manufacturer at a "distributor" price and then subcontracted the installation of the compactor to that entity.

It is well established that "[a] party injured as a result of a defective product may seek relief against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing the injury" (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]). In this regard, "[t]he distributor of a defective product is subject to the doctrine of strict liability even if the distributor has merely taken an order and directed the manufacturer to ship the product directly to the purchaser, and has never inspected, controlled, installed or serviced the product" (86 NY Jur 2d, Products Liability § 108; *see Perillo v Pleasant View Assoc.*, 292 AD2d 773, 774 [2002]).

The motion court properly denied Action's motion as it failed to meet its prima facie burden in moving for summary judgment. Action did not submit any evidence to establish that it was not a distributor, claiming only that it did not design, manufacture, install or maintain the compactor. Action now seeks to negate its status as a "distributor," by arguing, for the first time on appeal, that the attendant liability does not apply here as the transaction involved both the sale and installation

of a device, with the sale merely incidental to the installation. This argument is unpreserved (*see e.g. Liddle, Robinson & Shoemaker v Shoemaker*, 12 AD3d 282, 283 [2004]), and we decline to review it. Were we to review the argument, we would find it unavailing as the fact that a distributor may also provide a service does not insulate it from strict products liability (*see Potaczala v Fitzsimmons*, 171 AD2d 1015, 1016-1017 [1991]; *Perazone v Sears Roebuck & Co.*, 128 AD2d 15, 20-21 [1987]). In any event, Action's claim that it was merely a service provider that incidentally provided a product is unsupported by the record.

Gotham, however, did establish its prima facie entitlement to summary judgment by showing that, other than contracting with Action and coordinating scheduling, it was not involved in and did not supervise the installation of the compactor or plaintiff's work at the time of the accident, which occurred months after Gotham had completed its work, and had no notice of any defect (*see Laecca v New York Univ.*, 7 AD3d 415, 416 [2004], *lv denied* 3 NY3d 608 [2004]). In opposition, plaintiff failed to establish the existence of a triable issue of fact.

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

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

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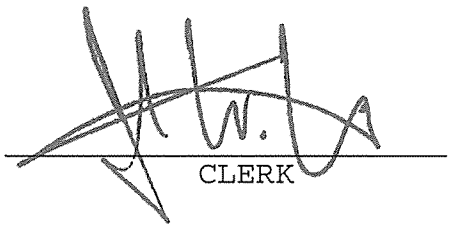

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Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

891 Edwin Ortiz, et al., Index 6028/07
Plaintiffs-Appellants,

-against-

Ash Leasing, Inc.,
Defendant-Respondent.

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for appellants.

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck (Elizabeth M. Hecht of counsel), for respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered October 30, 2008, which granted defendant's motion for summary judgment dismissing the complaint for lack of a serious injury, unanimously affirmed, without costs.

Defendants made a prima facie showing that none of the three plaintiffs sustained a 90/180-day injury by submitting their deposition testimony (*see Copeland v Kasalica*, 6 AD3d 253, 254 [2004]). Two of the plaintiffs admitted that they had not been confined to bed or home after the accident, and the third said nothing during his deposition about being prevented from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 days during the 180 days following the accident (Insurance Law § 5102[d]). That each plaintiff missed more than 90 days of work

is not determinative (*see Uddin v Cooper*, 32 AD3d 270, 271 [2006], *lv denied* 8 NY3d 808 [2007]). Defendant also made a prima facie showing that plaintiffs' complaints were caused by preexisting, degenerative conditions rather than the accident (*see Colon v Tavares*, 60 AD3d 419, 419-420 [2009]; *see generally Diaz v Anasco*, 38 AD3d 295, 295-296 [2007]).

Plaintiffs' opposition failed to raise a triable issue of fact. On the issue of incapacity, plaintiffs' doctor's affirmations did not mention any limitation on their daily activities except work (*see Gjelaj v Ludde*, 281 AD2d 211, 212 [2001], and plaintiffs did not submit "any substantiating documentation or affidavit from the[ir] employer[s]" about missing work (*Dembele v Cambisaca*, 59 AD3d 352, 353 [2009]). On the issue of causation, plaintiffs' doctor's affirmations failed to provide objective evidence, as opposed to boilerplate language (*see Copeland*, 6 AD3d at 254; *Thompson v Abbasi*, 15 AD3d 95, 99 [2005]), merely stating in conclusory fashion that plaintiffs' injuries were caused by the accident, and offering no "factually based medical opinions ruling out . . . degenerative conditions as the cause of" plaintiffs' limitations (*Rose v Citywide Auto Leasing, Inc.*, 60 AD3d 520 [2009]). Since plaintiffs did not "present objective medical evidence responsive to" defendant's showing of degenerative changes, "it does not avail plaintiff[s'] 90/180-day claim that defendant['s] experts did not address

[their] condition during the relevant period of time" (*Reyes v Esquilin*, 54 AD3d 615, 616 [2008]).

Nor does it avail plaintiff Ortiz that he had surgery for a meniscal tear, absent evidence of the permanency of his knee injury (*see Lopez v Mendoza*, 40 AD3d 436, 436-437 [2007]). Ortiz's doctor examined him on November 30, 2007 and found that his knee was normal, and Ortiz submitted no evidence that his doctor subsequently found that he was still having problems with his knee. Evidence of causation is also lacking. Ortiz's doctor's conclusory statement in July 2008 that the knee operation was related to the August 3, 2006 accident is contradicted by August 30, 2006 X-rays and a September 18, 2006 MRI showing degenerative changes (*see Thompson*, 15 AD3d at 99), and the doctor's "failure even to mention, let alone explain, why he ruled out degenerative changes as the cause of plaintiff's knee . . . injuries, rendered his opinion that they were caused by the accident speculative" (*Valentin v Pomilla*, 59 AD3d 184, 186 [2009]; *see also Perez v Hilarion*, 36 AD3d 536, 537 [2007]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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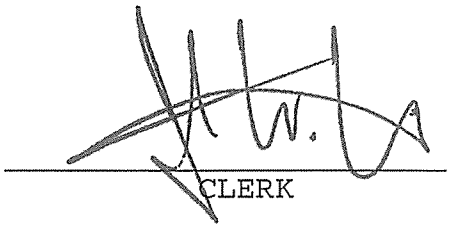

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Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

892 The People of the State of New York, Ind. 1168/07
Respondent,

-against-

Jose Gomez,
Defendant-Appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered on or about October 29, 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.

ENTERED: JUNE 23, 2009

CLERK

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

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

893 The People of the State of New York, Respondent,

-against-

Johnathan Padworski, also known as Gerald Davis, Defendant-Appellant.

Ind. 7538/89

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered May 23, 2007, convicting defendant of violation of probation, revoking his prior sentence of probation and resentencing him to a term of 1⅓ to 4 years, unanimously reversed, on the law, the conviction of violation of probation vacated, defendant's probationary status reinstated with respect to this indictment, and the matter remitted for further proceedings on the violation of probation.

A court "may not revoke a sentence of probation. . .unless (a) the court has found that the defendant has violated a condition of the sentence and (b) the defendant has had an opportunity to be heard" (CPL 410.70[1]). In addition to this statutory right, a person charged with violation of probation has a constitutional right to dispute the existence of the violation

or to present a justifiable excuse (*see Black v Romano*, 471 US 606, 612 [1985]). The proceedings of August 16 and September 13, 2006 did not provide defendant with a meaningful opportunity to dispute the alleged violation of probation based on his August 2004 conviction (*see People v Oskroba*, 305 NY 113, 117 [1953]; *People v Almonte*, 50 AD3d 696 [2008]). While CPL 410.70(3) provides for a summary hearing, it does not permit a summary denial of any hearing. Rather than asking defendant whether he wished to make any statement with respect to the violation (*see* CPL 410.70 [2]), the court refused to permit him to complete the statement he was clearly seeking to make. Defendant cannot be faulted for failing to explain why he was not in violation of his probation, since the court prevented him from doing so.

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

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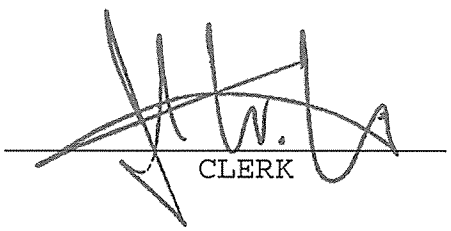

Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

895 Andre Gibbs, et al., Index 8611/07
Plaintiffs,

Tysheka Wiggins,
Plaintiff-Respondent,

-against-

Hee Hong, et al.,
Defendant-Appellants.

Richard T. Lau & Associates, Jericho (Gene W. Wiggins of counsel), for appellants.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered January 16, 2008, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint as to plaintiff-respondent, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants sustained their prima facie burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) by submitting the affirmed reports of their expert orthopedist, indicating that plaintiff had normal range of motion in her right knee and that any injury had resolved, and of their expert radiologist, stating that there was no evidence of acute traumatic injury to the knee (*see Perez v Rodriguez*, 25 AD3d 506, 508 [2006]). Plaintiff's

response failed to raise a triable issue of fact. The finding of a torn meniscus by plaintiff's radiologist in an MRI taken shortly after the May 2006 accident does not rebut the finding of defendant's orthopedist, based on his May 2008 examination of plaintiff, of a resolved contusion and no disability (*see Dembele v Cambisaca*, 59 AD3d 352, 352 [2009]; *Hoisington v Santos*, 48 AD3d 333, 334 [2008]); a torn meniscus, standing alone, is not evidence of a serious injury (*Dembele*). Moreover, plaintiff's radiologist did not link the torn meniscus to plaintiff's accident and indeed offered no opinion on causation whatsoever (*see id.*; *Medley v Lopez*, 7 AD3d 470 [2004]). Nor is an issue of fact raised by the report of plaintiff's treating physician of her August 2008 re-examination of plaintiff, where the report does not identify the objective tests she used to measure plaintiff's range of motion, does not explain the improvement in the range of motion in plaintiff's knee over the course of her treatment, and otherwise fails to indicate the significance of plaintiff's limitations (*see Dembele*; *Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 327 [2005]). Plaintiff's statements that she could not run, go upstairs, or stand for very long do not

constitute the loss of "substantially all" of plaintiff's usual activities required to make a showing of serious injury (*see Dembele*).

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

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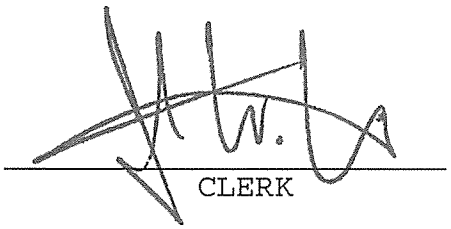

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Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

896 The People of the State of New York, Ind. 1489/06
Respondent,

-against-

Abuhassan Mujahid,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered April 19, 2007, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court properly permitted the People to question defendant about his convictions of deceit-related crimes involving the use of MetroCards, since they were probative of defendant's credibility and were not prejudicially similar to the instant case, which involved the very different crime of forcibly taking a MetroCard.

Since defendant objected only to certain "specific questions rather than to the Judge's general course of action or

participation as a whole" (*People v Charleston*, 56 NY2d 886, 888 [1982]), defendant's constitutional arguments concerning the court's questioning of witnesses and conduct of the trial are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

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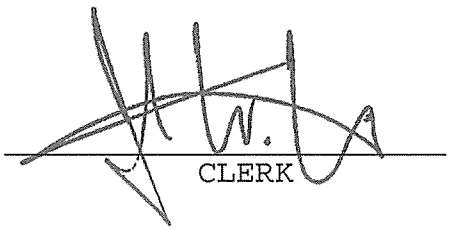


Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

897-
898 ADA Dining Corp., et al., Index 102255/06
Plaintiffs-Respondents,

-against-

208 East 58th Street, LLC,
Defendant-Appellant,

Kiran C. Patel,
Defendant.

Thomas M. Curtis, New York, for appellant.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 5, 2008, as amended by order, same court and Justice, entered June 3, 2008, which, to the extent appealed from, denied defendant-appellant's motion for summary judgment on its second, third and fourth counterclaims and for an order to turn over to appellant the cash undertaking in the amount of $100,000 which plaintiffs posted pursuant to a prior order, and which granted plaintiffs' cross motion for leave to amend the complaint, and order, same court and Justice, entered October 6, 2008, which, inter alia, denied appellant's motion to dismiss the amended complaint, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in granting the cross motion to amend the complaint (CPLR 3025[b]), and in declining to dismiss said amended complaint as materially

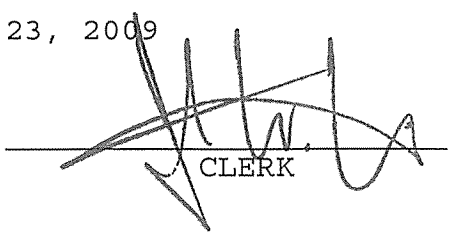
different from the proposed amended complaint inasmuch as the new claims had merit and were properly pleaded (*see Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]; *Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [2007]). There was no surprise since the court had not only discussed the issue of accord and satisfaction in its decision, but the amended complaint was in accordance with the June 3, 2008 order, which specifically permitted plaintiffs to include the allegations contained in the discontinued Florida action.

Furthermore, the allegations of accord and satisfaction sufficiently pleaded the existence of a written and signed accord (General Obligations Law § 15-501[2]), based upon the August 2007 agreement which included an option to purchase the building at a set price that purportedly subsumed the claimed overdue rent (*see Porthos v Arverne Houses*, 269 AD2d 377 [2000] [party seeking to establish an accord and satisfaction must show a disputed claim which the parties mutually resolved through a new contract discharging all or part of prior contractual obligations]).

We have considered appellant's remaining claims and find them unavailing.

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

ENTERED: JUNE 23, 2009



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

899 The People of the State of New York, Ind. 1342/07
Respondent,

-against-

Joaquin Bustamante,
Defendant-Appellant.

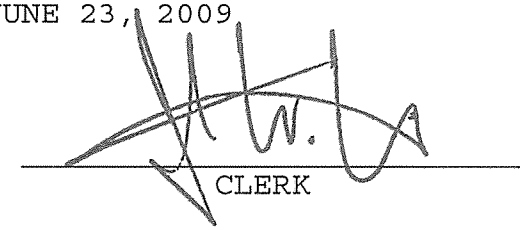
Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J. at plea; William A. Wetzel, J. at sentence), rendered on or about September 7, 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.

ENTERED: JUNE 23, 2009



CLERK

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

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

900 Millennium Import, LLC, Index 603350/07
Plaintiff, 59100/07

-against-

Reed Smith LLP, et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

James H. Berry, Jr., et al.,
Third-Party Defendants-Respondents.

Riker, Danzig, Scherer, Hyland & Perretti LLP, New York (Anthony J. Sylvester of counsel), for appellants.

Furman Kornfeld & Brennan, LLP, New York (A. Michael Furman of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 14, 2008, which granted third-party defendants' motion to dismiss the third-party action for lack of personal jurisdiction, unanimously reversed, on the law, without costs, and the motion denied.

While third-party defendants were retained in California by a non-New York plaintiff with respect to a California action, in conducting their representation of plaintiff they had contacts with this State of sufficient quantity and quality to confer jurisdiction over them (*see* CPLR 302[a][1]; *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]; *Scheuer v Schwartz*, 42 AD3d 314 [2007]). The record demonstrates that third-party defendants engaged in

extensive communications with New York counsel, both outside (defendants/third-party plaintiffs) and in-house, of an entity related to plaintiff, referred to as LVMH, which was acting on plaintiff's behalf. Third-party defendants related every aspect of the California litigation to the New York attorneys in detail and sought input from all counsel. The memorandum prepared by third-party defendants analyzing the underlying claim against plaintiff and recommending action to be taken by plaintiff was addressed to LVMH's counsel and an LVMH employee and cited previous discussions among them. In addition, the individual third-party defendant made at least three trips to New York in connection with the representation *(see e.g. L&R Exploration Venture v Grynberg*, 22 AD3d 221 [2005], *lv denied* 6 NY3d 749 [2005]).

Due process is not offended by the maintenance of this action against third-party defendants. Given their "purposeful activities" within this State (*see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 21 AD3d 90, 93 [2005], *affd* 7 NY3d 65 [2006], *cert denied* 549 US 1095 [2006]), they "should reasonably anticipate being haled into court []here" *(LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000], quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]), and the prospect of defending

such an action "comport[s] with traditional notions of fair play and substantial justice" (*id.* [internal quotation marks and citations omitted]).

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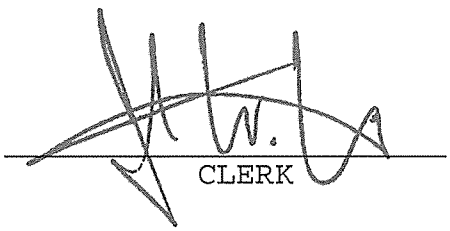

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Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

901 The People of the State of New York, Ind. 3425/07
Respondent,

-against-

Tyrone Nelson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 5, 2008, convicting defendant, after a jury trial, of aggravated criminal contempt (three counts) and criminal mischief in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 9 to 18 years, unanimously affirmed.

Defendant's expression of dissatisfaction with his counsel was insufficient to obligate the court to conduct the inquiry called for in *People v Sides* (75 NY2d 822 [1990]). In the first place, defendant did not explicitly ask for a new lawyer at any point in the proceeding at issue or thereafter. Instead, defendant addressed his remarks directly to the attorney, and simply grumbled as follows: "Look at how you treat me. Of course. There's a conflict of interest. Look how you talk to me." Furthermore, to the extent these remarks could be construed

as a request for assignment of new counsel, defendant's vague, eve-of-trial grievance was not a serious complaint about counsel's performance warranting a further inquiry (*see People v Linares*, 2 NY3d 507, 510 [2004]; *People v Sides*, 75 NY2d at 824-825; *People v Reed*, 35 AD3d 194 [2006], *lv denied* 8 NY3d 926 [2007]).

Defendant did not preserve his claim that the court replaced a sworn juror without establishing that the juror could not remain impartial (*see People v Hicks*, 6 NY3d 737, 739 [2005]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. After being sworn, the juror realized that defendant was a former coworker, and he unequivocally told the court he had a resultant "problem" or "difficulty" serving as a juror. The juror demonstrated that he had a state of mind that was inconsistent with serving as an impartial juror, and no further inquiry was necessary (*see People v Buford*, 69 NY2d 290, 298 [1987]).

We perceive no basis for reducing defendant's sentence in the interest of justice. We have considered and rejected defendant's remaining claims relating to his sentence.

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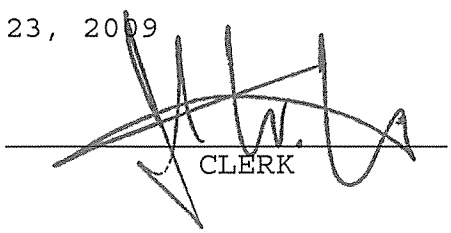

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Gonzalez, P.J., Sweeny, Buckley, Renwick, Freedman, JJ.

902 The People of the State of New York, Ind. 5914/07
Respondent, 714/08

-against-

Michael Neary,
Defendant-Appellant.

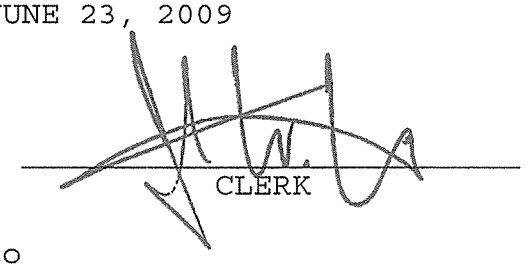
Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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 April 2, 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.

ENTERED: JUNE 23, 2009



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

CORRECTED ORDER - JULY 16, 2009

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

903N-
903NA-
903NB

Stanley Salomon, Executor of the Estate of Carl Levine,
Plaintiff-Appellant,

-against-

Laurette Angsten, et al.,
Defendants-Respondents.

- - - - -

David Fink,
Nonparty Appellant.

Index 604063/00

Silverstein Langer Newburgh & McElyea, LLP, New York (Morton Newburgh of counsel), for appellants.

Samuel Friedman, New York, for respondents.

Appeal from order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 17, 2007, upon the transcript of the proceedings conducted on May 16, 2007, which, insofar as appealed from, reaffirmed the court's March 22, 2007 decision that the entire action was brought in bad faith and that defendant is entitled to reimbursement of all of its attorneys' fees incurred in the action, unanimously dismissed, without costs. Appeal from judgment, same court and Justice, entered January 3, 2008, in favor of defendant and against nonparty Fink, plaintiff's attorney, for legal fees in the amount of $409,296.17, inclusive of interest, costs and disbursement, unanimously dismissed, without costs. Appeal from order, same court and Justice,

entered December 24, 2007, which, upon nonparty Fink's default in appearing at the inquest to determine the amount of his liability for the costs and attorneys' fees incurred by defendant in this action, directed that judgment be entered in favor of defendant and against nonparty Fink in the principal amount of $381,592, together with interest from March 22, 2007, unanimously dismissed, without costs. Appeals from orders denying nonparty Fink's motions to vacate his default in appearing at the inquest unanimously dismissed, without costs.

Plaintiff's appeal from the order entered July 17, 2007 is dismissed as the issue raised therein was previously raised in a prior appeal that plaintiff took from another order, which appeal was dismissed for failure to prosecute (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750 [1999]; *Inwood Tower v Fireman's Fund Ins. Co.* 290 AD2d 252 [2002]). Nonparty Fink's appeals from the judgment entered January 3, 2008 and its underlying order entered December 24, 2007 are dismissed as no appeal lies from a default judgment, or its underlying order, entered upon an uncontested inquest (*see Bank of Montreal v Predovan*, 71 NY2d 844 [1988]). Nonparty Fink's appeals from the orders denying his motions to vacate his default were previously

dismissed by order of this Court entered December 16, 2008 (2008 NY Slip Op 92069[U]).

M-198 - Stanley Salomon v Laurette Angsten

Motion insofar as it seeks to dismiss appeals granted, and otherwise denied.

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

ENTERED: JUNE 23, 2009

CLERK

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

904N R&R Capital LLC, et al., Index 604080/05
Plaintiffs-Appellants,

-against-

Linda Merritt, etc.,
Defendant-Respondent.

Certilman Balin Adler & Hyman, East Meadow (Paul B. Sweeney of counsel), for appellants.

Joseph M. Fioravanti (of the Pennsylvania Bar, admitted pro hac vice), Media, PA, for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 2, 2008, which granted defendant's motion for injunctive relief and, inter alia, ordered plaintiffs to withdraw related claims asserted in state actions in Pennsylvania and Delaware, unanimously reversed, on the law, without costs, and the motion denied.

The court lacked jurisdiction to order plaintiffs to withdraw claims pending in the state courts of Pennsylvania and Delaware, since, as we recently found in the companion appeal, "the relief sought did not relate to a cause of action raised in the initial complaint, nor was the issue involved previously litigated in this action" (60 AD3d 528, 529 [2009]). Furthermore, the order improperly intrudes on the jurisdiction of the Delaware and Pennsylvania courts, in violation of established

principles of comity (*see Ackerman v Ackerman*, 219 AD2d 515 [1995]). There is no basis for the court's finding that the Delaware and Pennsylvania actions were brought in bad faith or with an intent to harass defendant.

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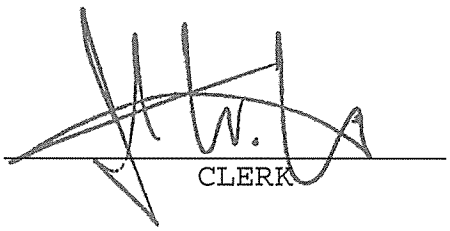


Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

861 The People of the State of New York, Ind. 5746/06
Respondent,

-against-

Chris Rivera,
Defendant-Appellant.

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

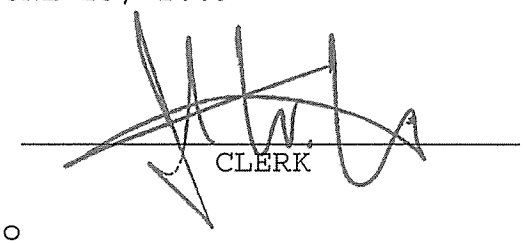
Robert M. Morgenthau, District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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.

ENTERED: JUNE 23, 2009



CLERK

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

Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

863 In re Kareem B.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about November 9, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of rape in the first degree and sexual abuse in the first degree, and placed him with the Office of Children and Family Services for a period of up to 18 months, unanimously affirmed, without costs.

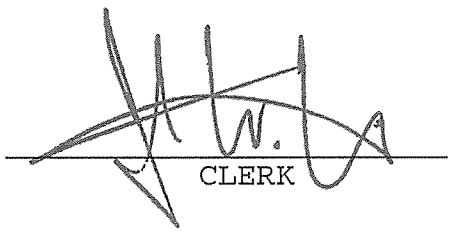
The court properly denied appellant's motion to suppress his statement to the police, since the totality of the circumstances establishes that the statement was voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). A detective's preliminary explanation of the Family Court process did not contain any promise that appellant would receive more favorable treatment if he confessed

or less favorable treatment if he failed to do so. The detectives' statements to appellant that they did not believe his initial story were not unduly coercive.

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 determinations concerning credibility, in which it accepted the victim's account of the incident.

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

ENTERED: JUNE 23, 2009



Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

864 The People of the State of New York, Ind. 6716/06
Respondent,

-against-

Jorge Disla,
Defendant-Appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James Yates, J.), rendered on or about August 30, 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.

ENTERED: JUNE 23, 2009

CLERK

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

Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

867 The People of the State of New York, Ind. 5079/05
Respondent,

-against-

Roger Jason Crique,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Amyjane Rettew of counsel), for respondent.

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 16, 2007, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). On the contrary, we find the evidence overwhelmingly established defendant's homicidal intent and disproved his justification defense. The evidence leads to the inescapable conclusion that defendant's claim that the victim was the initial aggressor was entirely false. Moreover, even under defendant's version of the facts, his use of force was entirely unjustified in view of the duty to retreat (*see* Penal Law § 35.15[2][a]). Accordingly, we find no evidence to support a theory that defendant was initially justified in using force, but

that he then used excessive force, and that such use of excessive force was merely reckless, or cannot be shown to be the cause of death.

Since defendant did not request a jury instruction on second-degree (reckless) manslaughter, "the court's failure to submit such offense does not constitute error" (CPL 300.50[2]). Furthermore, defendant did not preserve his claim that the court should have charged the jury that if it found defendant was initially justified but used excessive force, a conviction would also require a finding that the excessive portion of the force caused the victim's death, and we decline to review it in the interest of justice. Defendant's claim that his attorney rendered ineffective assistance by not making these requests is unreviewable on direct appeal because it involves matters outside the record regarding counsel's strategic choices and defendant's own participation in that strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). In this case, the fact that counsel requested submission of first-degree manslaughter is not dispositive of whether he had strategic reasons for not requesting instructions on second-degree manslaughter and excessive force. On the existing record, to the extent it permits review, we find that defendant received

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel could have reasonably concluded that a theory that defendant was initially justified, but then used excessive force, was unsupported by the evidence while carrying the potential of confusing the jury and undermining defendant's core defenses of complete justification and extreme emotional disturbance. In any event, regardless of whether a reasonably competent attorney would have made the requests at issue, we find that the absence of these instructions did not cause defendant any prejudice or deprive him of a fair trial. There is no reasonable possibility that the verdict would have been more favorable to defendant had his attorney made these requests (*see e.g. People v Kennedy*, 7 AD3d 272 [2004], *lv denied* 3 NY3d 676 [2004]).

The court's reasonable doubt charge was not constitutionally deficient. The court expressly instructed the jury that a reasonable doubt may be based on a lack of evidence, and that instruction was not contradicted by another portion of the charge directing the jury to decide the case "on the evidence," since that phrase was used in the context of cautioning the jury to avoid sympathy or prejudice.

The court properly exercised its discretion in precluding defendant from calling a handwriting expert, since nothing in the

expert's proposed testimony was relevant, even when taken together with the testimony of defendant's psychiatric expert witness. Defendant did not establish that the handwriting expert was competent to testify there was anything unusual or abnormal about defendant's use of several handwriting styles. Defendant received a full opportunity to advance his psychiatric claims by way of other evidence, and the court's ruling on the handwriting expert did not deprive defendant of his right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The court's other evidentiary rulings and denials of mistrial motions, including a motion that was based on a portion of the prosecutor's summation, were proper exercises of discretion. Defendant did not preserve his other challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find that the prosecutor made inappropriate sympathy arguments, but that these arguments did not deprive defendant of a fair trial.

THIS CONSTITUTES THE DECISION AND ORDER
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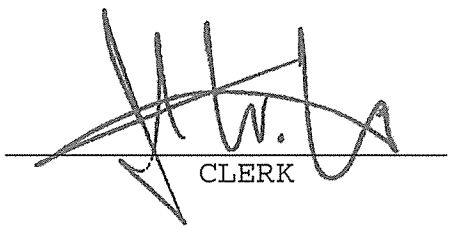

Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

869 In re Gladys Maldonado, Index 406326/07
Petitioner,

-against-

New York City Housing Authority,
Respondent.

Manhattan Legal Services, Inc., New York (Paul Peloquin of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Bryon S. Menegakis of counsel), for respondent.

Determination of respondent New York City Housing Authority, dated June 27, 2007, terminating petitioner's public housing tenancy on the grounds of nondesirability and breach of respondent's rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Paul G. Feinman, J.], entered on or about June 18, 2008), dismissed, without costs.

The finding that petitioner sold prescription drugs near the housing development is supported by substantial evidence, in particular, the testimony of a police officer that he observed petitioner doing so. No basis exists to disturb the Hearing Officer's findings of credibility (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). It is of no moment that the

offense occurred off the premises (*see* 42 USC § 1437f[d][1][B][iii]; 24 CFR 966.4[f][12][i][B]); nor does it avail petitioner that the District Attorney decided not to go forward with the charges (*see Matter of Bell v New York City Hous. Auth.*, 49 AD3d 284, 285 [2008]). The termination of petitioner's tenancy does not shock our sense of fairness (*see Matter of Featherstone v Franco*, 95 NY2d 550, 555 [2000]), especially where petitioner left a profoundly disabled daughter alone in the building hallway for extended periods of time, threatened to have the arresting officer killed and was observed by a police officer selling the drugs even while a hearing was in progress on pending charges against her of nondesirability and breach of the lease, resulting in an amendment of the charges and enlargement of the hearing to include the unlawful sale of drugs. There is no basis in the record for petitioner's contention that the Hearing Officer failed to consider mitigating evidence.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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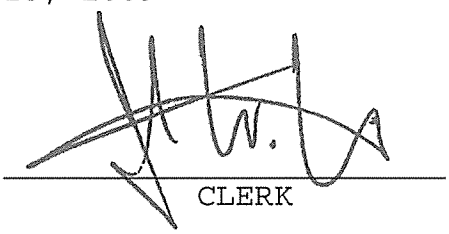

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Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

870 The Coby Group, LLC, Index 111818/06
Plaintiff-Appellant,

-against-

David Kriss, et al.,
Defendants-Respondents.

Vandenberg & Feliu, LLP, New York (Mark R. Kook of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered July 2, 2008, which, following the conversion of defendants attorneys' (collectively Kriss) preanswer motion to dismiss to a motion for summary judgment, granted defendants summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff alleges that Kriss represented it in connection with its efforts to obtain financing for a purchase of real estate, and that Kriss betrayed plaintiff by representing two potential co-venturers (collectively Adjmi) whose interests were adverse to plaintiff. Summary judgment was properly granted on the basis of the release that plaintiff gave Adjmi in settlement of an action that Adjmi brought to enjoin plaintiff's dealings with the prospective purchaser of the real estate on flip sale from plaintiff. That release, in clear and unambiguous terms,

broadly and expressly releases Adjmi's "agents and attorneys from any and all liability and accountability, directly or derivatively through Coby or otherwise" (*see Wells v Shearson Lehman/American Express*, 72 NY2d 11 [1988]; *Argyle Capital Mgt. Corp. v Lowenthal, Landau, Fischer & Bring*, 261 AD2d 282 [1999], *lv denied* 93 NY2d 817 [1999]); it does not limit the word "attorneys" and does not exclude the claims that plaintiff asserts herein. We reject plaintiff's contention that the release bars its claims against Kriss only in his capacity as Adjmi's attorney, not as plaintiff's attorney. First, at the time of the release plaintiff's principals were aware that Kriss was representing Adjmi; second, the record does not support a reasonable belief by plaintiff that it was ever represented by Kriss separate and apart from his representation of Adjmi (*see Jane St. Co. v Rosenberg & Estis,* 192 AD2d 451 [1993], *lv denied* 82 NY2d 654 [1993]). Plaintiff, a sophisticated real estate investment company, was introduced to Kriss by Adjmi when plaintiff and Adjmi were contemplating a joint venture. While it appears that Kriss purported to represent plaintiff while Adjmi and plaintiff had coinciding interests in obtaining financing, Kriss did so primarily in order to protect Adjmi's investment in the venture. The record demonstrates that plaintiff and Adjmi were at all times represented by separate counsel who worked together while their clients' interests were aligned, and stopped

working together once their interests diverged. We have considered plaintiff's other arguments and find them unavailing.

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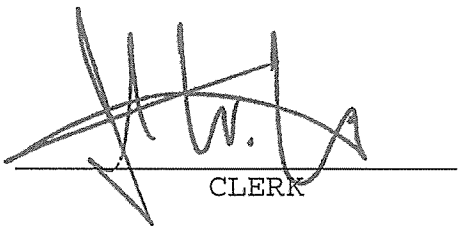

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Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

871-
872 The People of the State of New York, Ind. 3345C/05
Respondent,

-against-

Michael Marrero,
Defendant-Appellant.

Law Offices of Murray Richman, Bronx (Brian T. Pakett of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

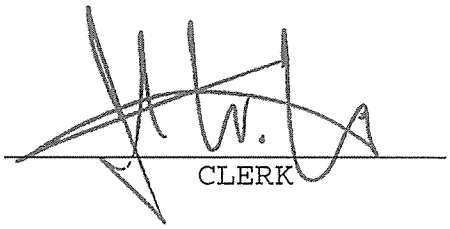
Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered December 22, 2006, convicting defendant, after a jury trial, of attempted coercion in the first degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the evidence was legally sufficient. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its resolution of inconsistencies in testimony. The fact that the

jury acquitted defendant of other charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

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

ENTERED: JUNE 23, 2009



Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

873 XL Insurance America, Inc., Index 601852/07
Plaintiff-Respondent,

-against-

Lumbermens Mutual Casualty Company,
Defendant-Appellant.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Douglas J. Steinke of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Eric A. Portuguese of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 13, 2009, which denied defendant's motions to dismiss and for summary judgment and granted plaintiff's cross motion for summary judgment to the extent of declaring that defendant has a duty to defend and indemnify in the underlying personal injury action, unanimously reversed, on the law, with costs, defendant's motion for summary judgment granted and plaintiff's cross motion denied, and it is declared that defendant has no duty to defend or indemnify.

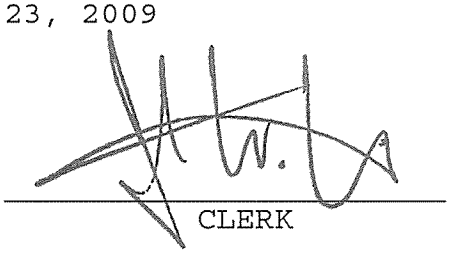
Although not addressed by the motion court, we find that the "completed operations" exclusion in defendant's automobile general liability policy, approved in a filing with insurance regulators in New Jersey and not violative of any express public

policy in New York, was effective (*see American Home Assur. Co. v Employers Mut. of Wausau*, 77 AD2d 421, 428-429 [1980], *affd* 54 NY2d 874 [1981]). While a co-insurer may be estopped from denying coverage in a coverage allocation dispute between insurers (*see Liberty Ins. Underwriters, Inc. v Arch Ins. Co.*, __ AD3d __, 877 NYS2d 44, 45 [2009]), plaintiff has not shown that it was prejudiced during the 3½ years that defendant defended the underlying action; the showing that plaintiff received notice of the underlying claim at its inception was unrebutted.

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

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

ENTERED: JUNE 23, 2009



CLERK

Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

874 The People of the State of New York, Respondent, Ind. 6597/05

-against-

Victor Hernandez, Defendant-Appellant.

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

Victor Hernandez, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 10, 2007, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 18½ years to life, unanimously affirmed.

Defendant did not preserve his claims that the victim gave "lay opinion" testimony about his injuries and that, in summation, the prosecutor improperly interpreted medical records in the absence of expert testimony, and we decline to review them in the interest of justice. As an alternative holding, we find that both the victim and the prosecutor essentially stated the obvious, and that any error in either respect was harmless. The People were not required to prove that the victim sustained a

serious physical injury, but only that defendant attempted to cause such injury, and the attempt, including the requisite intent, could be readily inferred from the evidence without reference to the alleged lay opinion evidence and the prosecutor's discussion of the medical records.

Defendant also failed to preserve his claim that the court should have instructed the jury on the limited probative value of flight evidence, and we decline to review it in the interest of justice. As an alternative holding, we find any error in this regard to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Regardless of whether defendant's attorney should have raised the issues suggested by defendant on appeal, his failure to do so did not deprive defendant of a fair trial or cause him any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]).

Defendant's constitutional challenge to his sentencing as a persistent violent felony offender is without merit (*see Almendarez-Torres v United States*, 523 US 224 [1998]).

We have considered and rejected defendant's pro se claims.

M-2438 - People v Victor Hernandez

Motion seeking leave to file pro se reply brief denied.

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

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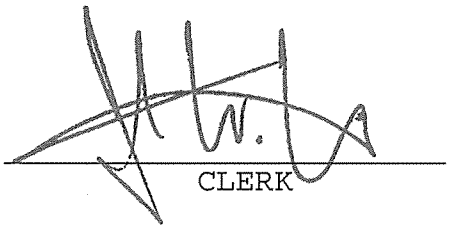

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Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

875 In re Richard Ivan, et al., Index 108807/08
Petitioners-Appellants,

-against-

New York City Department of
Health and Mental Hygiene, et al.,
Respondents-Respondents.

Schwartz, Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for appellants.

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

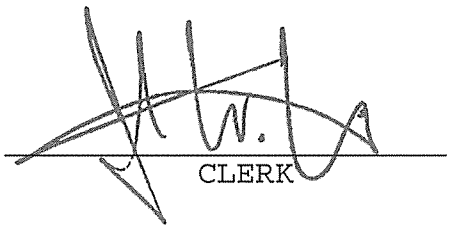
Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered February 3, 2009, which denied petitioners' application pursuant to CPLR article 78 seeking, inter alia, to compel respondent Department of Health and Mental Hygiene (DHMH) to take the necessary actions to provide petitioners with benefits of membership in the New York City Employees' Retirement System (NYCERS), and dismissed the petition, unanimously affirmed, without costs.

The determination that petitioners are not entitled to retirement credit with NYCERS by reason of having worked for private corporations under contract with DHMH but paid with funds

provided by the State is not arbitrary and capricious (*see Matter of Eastman v Department of Citywide Admin. Servs.*, 266 AD2d 53 [1999], citing definition of "city-service" in Administrative Code of City of NY § 13-101[3][a] as service "paid for by the city"]).

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

ENTERED: JUNE 23, 2009



Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

876 Barbara Parnell, individually and as parent and natural guardian of Latoya Fleming, etc., Plaintiffs-Appellants, Index 8794/03

-against-

Montefiore Medical Center, et al., Defendants-Respondents.

Bailly and McMillan, LLP, White Plains (Katherine G. Hall of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for Montefiore Medical Center, respondent.

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for Baron S. Lonner, M.D. and Baron S. Lonner, M.D., P.C., respondents.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 11, 2008, dismissing the complaint, unanimously modified, on the law, to reinstate the complaint as against defendant hospital, and otherwise affirmed, without costs.

Dr. Lonner established prima facie that the pneumothorax was not the result of intraoperative negligence. The record discloses that the infant plaintiff was stable during and immediately after surgery, and both intra- and postoperative x-rays showed that the chest tube was properly placed and that the right lung was fully inflated. Dr. Lonner's expert averred that there was no evidence to support the allegation that the right lung was injured during surgery. The infant plaintiff's vital signs, together with blood gases and pulse oximetry, ruled out

plaintiff's conclusion that her lung had been injured during surgery, as did a chest x-ray taken the day after the surgery. Defendant's expert opined that the pneumothorax on the second day after the surgery was caused by an acute event such as a kinked, blocked or disconnected chest tube.

The assertion of plaintiff's expert that Dr. Lonner was negligent in the insertion of the test tube is unsupported by a citation to any medical evidence and therefore fails to raise an issue of fact. Plaintiffs identify no medical evidence whatsoever that supports the allegation that the infant plaintiff's lung was injured during the surgery or that the chest tube was improperly inserted.

It is uncontroverted that the postoperative monitoring of the infant plaintiff and the chest tube rested with the thoracic surgeon and the hospital staff. Thus, Dr. Lonner owed the infant plaintiff no duty of care with respect to the monitoring of the chest tube (*see Cintron v New York Med. Coll. Flower & Fifth Ave. Hosps.*, 193 AD2d 551 [1993]; *Markley v Albany Med. Ctr. Hosp.*, 163 AD2d 639 [1990]).

However, we find that there is an issue of fact as to the hospital's negligence. It was the hospital's duty to monitor the patient postoperatively, including monitoring the chest tube and the Pleurovac closed drainage system and all its component parts. The drainage system provided continuous suction to assist in

drawing air and fluids out of the pleural space. The assertion of the hospital's expert that there was no evidence that the chest tube became detached from the suction is contrary to the record. Dr. Lonner testified that he noticed that the chest tube connection, specifically the connection between the patient and the canister attached in turn to the wall suction, was detached, and that he immediately re-attached the connection and proceeded with the resuscitation. Dr. Lonner also testified that if the tube became detached, air could go back into the pleural space and create a pneumothorax. This testimony alone, that an integral part of the drainage system had become detached and increased the risk of a pneumothorax, the very harm that befell the infant plaintiff, raises an issue of fact as to the hospital's negligence.

Further, plaintiffs' expert averred that it was good and accepted medical practice to check all the component parts of the chest tube and canister every time the patient was seen, at least once every hour, and that had the tube been properly monitored, it would not have become dislodged and the infant plaintiff would not have suffered a pneumothorax. He took issue with the conclusion of the hospital's expert that a mucus plug occasioned the infant plaintiff's respiratory arrest, pointing out that while there was evidence that the tube was dislodged when Dr.

Lonner found the infant plaintiff, the medical record contains no evidence of a mucus plug.

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

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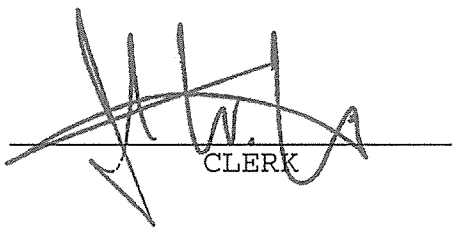


Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

877 The People of the State of New York, SCI. 1617/08
Respondent,

-against-

Matthew Lacks,
Defendant-Appellant.

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

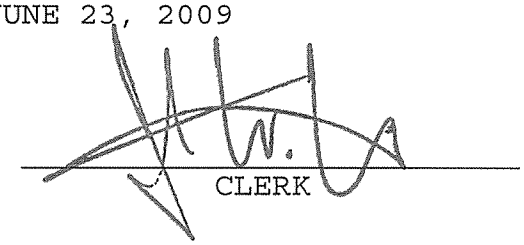
Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about May 6, 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.

ENTERED: JUNE 23, 2009



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

Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

878 Barbara Goldfischer, et al., Index 106195/06
Plaintiffs-Appellants,

-against-

The Great Atlantic & Pacific Tea Company, Inc., et al.,
Defendants-Respondents.

Kelley Drye & Warren LLP, New York (James M. Keneally of counsel), for appellants.

Boeggeman, George & Corde, P.C., White Plains (Cynthia Dolan of counsel), for respondents.

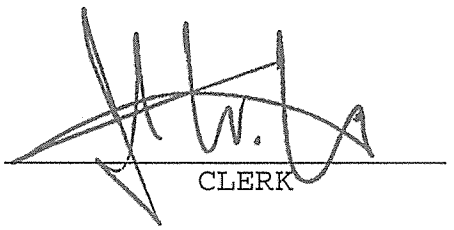
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 17, 2008, which, in a personal injury action for plaintiff's trip and fall in a supermarket owned and managed by defendants, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In opposition to defendants' prima facie showing that plaintiff failed to identify the cause of her fall, plaintiff failed to raise a triable issue of fact. Unaware of what caused her fall, she merely surmised that it was caused by the bump in the rubber floor mat that she observed for the first time after she fell. Co-plaintiff husband testified that he did not observe what seemed to be a crease in the mat until after his wife fell, and could not identify where the crease was on the mat or whether it was higher than one inch or "accurately describe it that

specifically." The failure to identify the condition that caused plaintiff's fall is fatal to plaintiffs' claim (*see Kwitney v Westchester Towers Owners Corp.*, 47 AD3d 495, 495-496 [2008]; *Pena v Woman's Outreach Network, Inc.*, 35 AD3d 104, 109-111 [2006]).

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

ENTERED: JUNE 23, 2009



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Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

879 Jim Beam Brands Co., Index 600122/08
Plaintiff-Respondent,

-against-

Tequila Cuervo La Rojeña S.A. de C.V.,
Defendant-Appellant,

Jose Cuervo International, Inc., et al.,
Defendants.

Abelman, Frayne & Schwab, New York (Michael Aschen of counsel), for appellant.

Kenyon & Kenyon LLP, New York (Michelle Mancino Marsh and Edward T. Colbert of the Washington, D.C. Bar, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered August 4, 2008, which, in an action for breach of a settlement agreement limiting defendant's use of a trademark, denied defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

Long-arm jurisdiction under CPLR 302(a)(1) was correctly found where the complaint alleges that defendant breached the subject agreement in New York by permitting its licensee to sell nonconforming products here, and where the agreement regulates defendant's use of the subject trademark throughout the entire United States, was negotiated in New York by defendant's long-standing New York counsel, contains a New York choice-of-law clause, and extends to "all those acting in concert or

participation with [defendant] or under [its] direction and control" (*see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]; *Sunward Elecs., Inc. v McDonald*, 362 F3d 17, 22, 23 [2d Cir 2004]). Given long-arm jurisdiction under CPLR 302(a)(1), we need not reach the question of whether there is also jurisdiction under CPLR 301 (*see Deutsche Bank*, 7 NY3d at 72 n 2).

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

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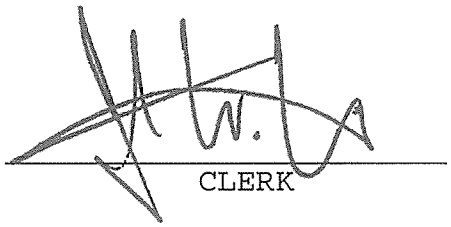

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Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

880 The People of the State of New York, Ind. 2918/07
Respondent,

-against-

Pedro Olivo,
Defendant-Appellant.

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

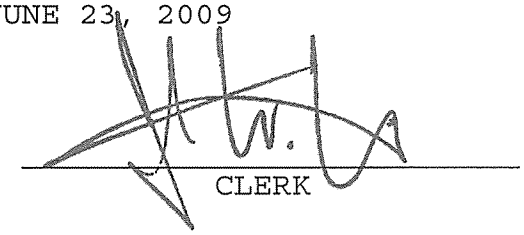
Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

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 February 20, 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.

ENTERED: JUNE 23, 2009



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

Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

881N-
882N-
883N The People of the State of New York by Andrew M. Cuomo, etc., Plaintiff-Respondent, Index 401720/05

-against-

Maurice R. Greenberg, et al., Defendants-Appellants,

American International Group, Inc., Nonparty-Respondent.

Boies, Schiller & Flexner LLP, New York (Nicholas A. Gravante, Jr. of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (David N. Ellenhorn of counsel), for state respondent.

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Andrew D. Goldstein of counsel), for AIG respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 17, 2008, which, insofar as appealed from, denied defendants' motion to compel nonparty American International Group, Inc. (AIG) to comply with *People v Greenberg* (50 AD3d 195 [2008], *lv dismissed* 10 NY3d 894 [2008]) to the extent the motion sought categories of documents outside the categories identified in *Greenberg*, unanimously affirmed, with costs. Order, same court and Justice, entered December 15, 2008, which, insofar as appealed from, denied defendants' motion to compel AIG to produce certain documents, unanimously affirmed, with costs. Order, same court and Justice, entered December 22,

2008, which, insofar as appealed from, denied defendants' motion to compel AIG to produce hitherto unproduced interview notes and memoranda, unanimously affirmed, with costs.

In September 2006, the motion court found that AIG had waived its privilege with respect to those interview memoranda that provided a basis upon which factual or legal conclusions were made in a report that AIG had turned over to the New York Attorney General's Office (interview memoranda). The court also denied defendants' motion to compel AIG to produce legal memoranda. Defendants appealed only the portion of the September 2006 order that denied their motion to compel production of legal memoranda. Thus, our previous decision dealt only with defendants' efforts to obtain "legal memoranda," which we defined as "all memoranda created during their tenure as officers and directors of AIG reflecting the advice of counsel, efforts to obtain the advice of counsel, and counsel's involvement in the four transactions giving rise to the subject charges" (50 AD3d at 197). The opinion makes it clear that defendants sought "the internal legal memoranda that were allegedly prepared for their use and relied upon by them in order to support their advice of counsel defense" (*id.* at 200). Accordingly, the motion court's April 17, 2008 order correctly limited defendants to viewing "AIG privileged documents that (a) reflect the advice they received from counsel, (b) their efforts to obtain the advice of counsel,

and (c) counsel's involvement in the four transactions that gave rise to the subject charges," and its December 15, 2008 order correctly recognized that the issue of interview memoranda was not before us on the prior appeal.

In the motion that was decided by the September 2006 order, defendants argued that AIG's disclosure of the report resulting from its internal investigation to the Attorney General and the Securities and Exchange Commission waived AIG's privilege as to the subject matters covered in the report. The court did not find a broad subject-matter waiver; it found a more limited waiver. Since, as noted, defendants did not appeal from that portion of the September 2006 order, on the current appeal, we will not consider any waiver arguments based on AIG's mere disclosure of the report.

To the extent that defendants base their waiver argument on AIG's allegedly selective disclosure since 2006, the argument is unavailing. Waiver is predicated on the privilege holder's placing the selectively disclosed privileged communications at issue (*see e.g. American Re-Insurance Co. v United States Fid. & Guar. Co.*, 40 AD3d 486, 492 [2007]), i.e., intending to prove an asserted claim or defense by use of the privileged materials (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 64 [2007]). AIG having not been a party since February 2006 (*see Greenberg*, 50 AD3d at 197 n 1), it has no claims or defenses

to prove.

The December 22, 2008 order does not impermissibly narrow the scope of the September 2006 order. The three categories set forth in the 2008 order are a reasonable definition of "provided a basis," the operative language in the 2006 order.

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

We deny AIG's motion to dismiss defendants' appeals as moot. AIG's stated intention to provide defendants with all the documents they seek is insufficient to render the appeals moot (*see Big Apple Concrete Corp. v Abrams*, 103 AD2d 609, 612 [1984]).

M-1967 - People v Maurice R. Greenberg, et al.

Motion seeking to
dismiss appeal denied.

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

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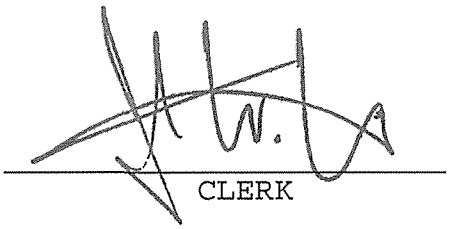

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela A. Mazzarelli
David B. Saxe
Karla Moskowitz
Rosalyn H. Richter, JJ.

Index 600053/08
393

Bleecker Street Tenants Corp.,
Plaintiff-Appellant,

-against-

Bleeker Jones LLC, et al.,
Defendants-Respondents,

Buffington Ltd., etc., et al.,
Defendants.

Plaintiff appeals from an order of the Supreme Court, New York County (Carol Robinson Edmead, J.), entered August 6, 2008, which granted the motion by the Bleeker Jones defendants for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment.

Genoa & Associates, P.C., Old Brookville (Marilyn K. Genoa of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for respondents.

SAXE, J.

This appeal requires us to consider the centuries-old Rule against Perpetuities, specifically, whether the exception to the prohibition against remote vesting of options appurtenant to a lease is applicable to the renewal option clause contained in the parties' lease.

Plaintiff Bleecker Street Tenants Corp. is the owner of the building located at 277-279 Bleecker Street, a six-story walkup that was converted to cooperative ownership effective September 1, 1983. Contemporaneously with the co-op conversion, the building's first-floor commercial space was leased to defendant Bleeker Jones LLC's predecessor in interest, Bleecker Jones Leasing Company, a partnership made up of the same four individuals who made up the sponsor partnership.

The lease, drafted by the tenant, provided for an initial term of 14 years, with nine options to renew for consecutive 10-year periods, exercisable through a series of notices. The tenant could exercise the renewal options by giving written notice at least six months before the end of the preceding term; the lease also provided that the landlord would send the tenant a "reminder notice" regarding the option, seven months before the end of the preceding term, if the tenant had not already exercised the option. In the event that the landlord did not

send the seven-month notice and the tenant did not exercise the option on six months' notice, then the renewal option would remain in effect until such time as the landlord sent the tenant notice of its right to exercise the option. Once the landlord sent the tenant this final written notice, the tenant would have 60 days within which to exercise the renewal option. The lease further provided that, in the event that the renewal option went unexercised and the landlord did not send the 60-day notice, then, "[i]f the term shall have expired, Lessee shall remain in possession as a month-to-month tenant" until such time as the landlord sent the 60-day notice.

At the end of the initial 14-year lease term, on August 30, 1997, there was no exercise of the lease option. Accordingly, the commercial tenant thereafter remained in possession as a month-to-month tenant.

Plaintiff commenced this action in December 2007, seeking a declaration that the lease renewal options are void under the statutory and common-law rules against perpetuities and unreasonable restraints on alienation.

Defendants moved, and plaintiff cross-moved, for summary judgment. The motion court granted defendants' motion, ruling that the Rule against Perpetuities does not apply because the lease's renewal option is appurtenant to the lease, in that it

"'originates in one of the lease provisions, is not exercisable after lease expiration, and is incapable of separation from the lease'" (quoting *Symphony Space v Pergola Props.*, 88 NY2d 466, 480 [1996]). The court reasoned that during the period of extended month-to-month possession, "[w]hile the 'term' of the lease may expire upon the failure of either party to issue their respective notices, the Lease itself does not."

New York's statutory Rule against Perpetuities includes a codification of the common-law rule prohibiting the remote vesting of interests and provides that "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate . . ." (EPTL 9-1.1[b]). Stated another way, subsection (b) "'invalidates any interest that may not vest within the prescribed time period'" (*Symphony Space v Pergola Props.*, 88 NY2d at 476, quoting *Wildenstein & Co. v Wallis*, 79 NY2d 641, 647-648 [1992]). The rule flows from "the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time" (*Symphony Space*, 88 NY2d at 475), and is designed to "'ensure the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing property from unknown or embarrassing impediments to alienability'" (*id.*,

quoting *Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 161 [1986]). Although the statutory period is lives in being plus 21 years, where -- as here -- the parties to the agreement are corporate entities and no measuring lives are stated in the instrument, "the perpetuities period is simply 21 years" (*Symphony Space*, 88 NY2d at 481; *Bruken Realty*, 67 NY2d at 161).

The rule against remote vesting has been held to be applicable to purchase options contained in leases (*see Symphony Space* at 476), as well as to lease renewal options contained in leases (*see Warren St. Assoc. v City Hall Tower Corp.*, 202 AD2d 200, 200-201 [1994]).

On their face, all except the first of the renewal options provided for here would run afoul of the rule, as they vest more than 21 years after execution of the lease (*see e.g. Warren St. Assoc., supra*). However, an exception to the rule's generally strict application exists for options appurtenant to a lease, which are considered "part of" the lease (*see Buffalo Seminary v McCarthy*, 86 AD2d 435, 441 n5 [1982], *affd* 58 NY2d 867 [1983]). The required characteristics of such options are that they (1) "originate[] in one of the lease provisions," (2) are "not exercisable after lease expiration," and (3) are "incapable of separation from the lease" (*Symphony Space*, 88 NY2d at 480).

An example of a lease renewal option that avoided application of the rule is found in this Court's recent decision in *Double C Realty Corp. v Craps, LLC* (58 AD3d 480 [2009]). There, the original lease term was 30 years, with a provision permitting the lessee, at its option, to extend the term of the lease for separate additional periods of five years after the expiration of the initial term; the options were to be exercised by written notice to the lessor at least one year before the expiration of the term. If a renewal option was exercised, the provision specified, the lease "shall remain in full force and effect, changed only as to the matters specified in this paragraph" (such as the amount of rent payable). The lease renewal provision did not provide for any exercise of the renewal options after the expiration of the lease term; it simply provided for exercise of the option during the lease term. Since the renewal option clause originated in the lease and was not capable of separation from the lease, it qualified as an option appurtenant and therefore did not run afoul of the Rule against Perpetuities.

In contrast, in *Warren St. Assoc. v City Hall Tower Corp.* (202 AD2d 200 [1994], *supra*), this Court ruled that lease renewal options were null and void because under the terms of the subject lease, the option could be exercised after the lease term had

already expired. The lease provided for a 50-year term with six 25-year options after the original term, to be exercised by the tenant by notifying the landlord at least three months before the expiration of the term then in effect; however, the clause included the following proviso:

> "(it being expressly understood, however, that a failure by Tenant to serve any such notice shall not extinguish the renewal option to which same would have related, and such renewal option will only be considered extinguished and not exercised after Landlord notifies Tenant that Tenant has not so exercised same and Tenant, within 40 days after receipt of such notice, still does not serve a notice exercising such option). If Tenant serves a renewal notice, the term hereof shall be deemed automatically renewed and extended."

This Court concluded that the lease allowed the renewal option to exist, and be exercised, even after the lease term expired as a result of the tenant's failure to serve a renewal notice before the lease term expired. Thus, the second requirement of *Symphony Space,* that the option not be exercisable after lease expiration, was not met.

It is also useful to consider *Deer Cross Shopping v Stop & Shop Supermarket Co.* (2 Misc 3d 401 [Sup Ct NY County 2003]), in which the lease renewal options were held not to run afoul of the rule. There, the original lease term was for 25 years, with the tenant having options to extend the lease for three additional 10-year terms, and the lease contained a provision similar to the

one under consideration here, under which the tenant was to give notice of its intention to exercise an option before commencement of the option period, and the landlord was required to notify the tenant of its failure to exercise the option. Importantly, however, the lease specifically provided that if the landlord failed to give the 60-day notice, then "*the term of the lease was automatically extended past the expiration date*" to 60 days after the date on which the landlord did give the notice (*id.* at 403). In reliance on that explicit extension of the term of the lease, the court reasoned that "the lease remained in full force and effect and did not end during the extended period" (*id.* at 404-405). Accordingly, the *Symphony Space* requirement that the option not be exercisable after the lease had expired was satisfied, and the renewal options qualified as options appurtenant to the lease.

Here, the critical difficulty lies in whether the options are exercisable after the expiration of the lease or only during the lease term. The lease contains no explicit extension of the term of the lease such as was present in *Deer Cross*. Rather, the lease's "savings provision" provides that in the event the landlord fails to give the 60-day notice, then, "*[i]f the term shall have expired*, Lessee shall remain in possession as a month-to-month tenant" until the landlord does give the 60-day notice

(emphasis added). This explicit recognition that the lease term expires if not renewed establishes that the renewal option clause was intended to give the tenant an ability to renew the lease after it had already expired, as in the lease renewal option considered and rejected in *Warren St. Assoc.* (202 AD2d at 200).

Defendants argue that a distinction must be made between the expiration of a *term* of the lease and the expiration of the lease itself, so that while the "term of the lease" may have expired, the lease itself did not. This is a semantic distinction that cannot avail the tenant here. Notably, in the definitions article of the lease, section 28.2 specifically directs that the words "term of this lease" "shall be construed to mean the initial term and any renewal term in respect to which Lessee has exercised its right of renewal," but does not include the month-to-month terms created after the term of the lease expires. We reject defendants' view that the lease must be viewed as surviving indefinitely, so long as the landlord does not serve its reminder notice, **and** so long as the tenant continues as a month-to-month tenant.

A month-to-month holdover tenancy that results by operation of law when a lease expires does not extend the term of the expired lease; rather, each month is a new term for a new period, each a separate and new contract (*see Kennedy v City of New York*,

196 NY 19, 23-24 [1909]; *Pedicini v D & M Metal Specialties, Inc.*, 199 Misc 399, 401 [App Term, 1st Dept 1950]). Similarly, a month-to-month tenancy that is created by a holdover provision in a lease does not create an extension of the original lease term (*see 120 Bay St. Realty Corp. v City of New York*, 44 NY2d 907 [1978]). In *120 Bay Street*, the tenant's lease term had expired without its formal exercise of the renewal option, although the tenant continued in possession pursuant to the lease's holdover provision. The Court of Appeals made a clear distinction between an extension of a lease term and an extension of a tenancy as a month-to-month tenant, observing that "defendant occupies the subject premises as a month-to-month tenant *rather than* as a tenant under a valid and existing lease" (44 NY2d at 907 [emphasis added]). Like the tenant in *120 Bay Street*, here, the tenant's month-to-month tenancy pursuant to the lease's holdover provision cannot be equated with a tenancy under an extended existing lease term. Therefore, its right to exercise the renewal options during the month-to-month tenancy that followed the termination of the lease term cannot satisfy the requirement that the option be exercisable during the lease term. Rather, the option provision actually allows its exercise after the termination of the lease term, precluding it from falling within the category of options appurtenant to a lease.

In addition, while the "saving statute" in the rules of construction accompanying the Rule against Perpetuities creates a presumption that "the creator intended the estate to be valid" (EPTL 9-1.3[a]-[b]), that provision "does not authorize courts to rewrite instruments that unequivocally allow interests to vest outside the perpetuities period" (*see Symphony Space*, 88 NY2d at 482). Indeed, if there is any doubt as to how to construe the parties' lease with regard to whether it expired when the specified term ended without renewal notice, it is important to recognize that defendants' predecessors in interest drafted this sweetheart lease, and therefore there is reason to construe it against their interest (*see Taylor v United States Cas. Co.*, 269 NY 360, 364 [1936]). In fact, the present situation calls to mind the very object of the Rule against Perpetuities, "to defeat an intent of a ... grantor to create unreasonably long restrictions upon the use or marketability of both real and personal property" (*Matter of Kellogg*, 35 AD2d 145, 148 [1970], *lv denied* 28 NY2d 481 [1971]).

In conclusion, we hold that the savings provision of the options clause allows the renewal option to be exercised after the lease has expired, which renders the options clause of the lease violative of the remote vesting rule of EPTL 9-1.1[b] under *Warren St. Assoc. v City Hall Tower Corp.* (202 AD2d 200, *supra*).

However, we reject plaintiff's claim under EPTL 9-1.1(a) and the common-law rule against unreasonable restraints on alienation (*see Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 167 [1986]; *Buffalo Seminary v McCarthy*, 86 AD2d 435, 447-449 [1982], *affd on other grounds* 58 NY2d 867 [1983]). The renewal option clause does not directly restrain plaintiff from transferring its property (*see Buffalo Seminary*, 86 AD2d at 448). While in theory the options may constitute an indirect restraint on alienation, by reducing the rental value of the building's commercial space and correspondingly reducing the building's sales price, nothing in the existing record addresses the effect the options may have on the building's sales price, and accordingly there is no basis for finding any indirect restraint to be unreasonable (*see Buffalo Seminary*, 86 AD2d at 449).

Accordingly, the order of the Supreme Court, New York County (Carol Robinson Edmead, J.), entered August 6, 2008, which granted the motion by the Bleeker Jones defendants for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment, should be reversed, on the law, without costs, defendants' motion denied and plaintiff's cross motion granted to the extent of declaring that the renewal options clause of the lease is void under EPTL 9-1.1(b) and that Bleeker Jones LLC and Bleecker Jones Leasing and their subtenants

and/or assignees are month-to-month tenants.

All concur.

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

ENTERED: JUNE 23, 2009