SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 30, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

930 Howard J. Matz, Index 109217/07
Plaintiff-Appellant,

-against-

Prospect Energy Corporation, et al.,
Defendants-Respondents.

Thompson Wigdor & Gilly LLP, New York (Scott B. Gilly of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Maura Barry Grinalds of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered November 19, 2008, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint was properly dismissed in this action where plaintiff, a job applicant for a senior management position, alleges that defendants refused to hire him after inquiring and learning of his sexual orientation during a reference check. Plaintiff did not establish a prima facie case of discrimination inasmuch as he failed to show that he was denied employment under circumstances giving rise to an inference of discrimination (*see Brennan v Metropolitan Opera Assn.*, 284 AD2d 66, 70 [2001]).

The documentary evidence shows that defendants maintained

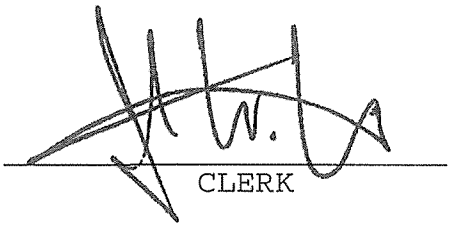
throughout the hiring process that they did not offer plaintiff a job, but were interested in evaluating his capabilities by having him work on various projects. The evidence further demonstrates that prior to learning of plaintiff's sexual orientation, defendants had concerns regarding plaintiff's skills and rejected his aggressive style and attempts to accelerate the hiring process (*see Bishop v Maurer*, 33 AD3d 497, 498 [2006], *affd* 9 NY3d 910 [2007] [on motion to dismiss "court...is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are plainly contradicted by documentary evidence"]).

Plaintiff failed to show any facts as to warrant discovery pursuant to CPLR 3211(d) (*see e.g. Fitz-Gerald v Donaldson, Lufkin & Jenrette*, 294 AD2d 176 [2002]).

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

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

ENTERED: JUNE 30, 2009



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Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

932-
933 In re Patrice S.,

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

Karen B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about February 22, 2007, which found that respondent mother had neglected the subject child, and order, same court and Judge, entered on or about December 21, 2007, which, inter alia, changed the child's permanency goal from return to parent to placement for adoption, unanimously affirmed, without costs.

A preponderance of the evidence supported the finding of neglect (*see* Family Court Act § 1012[f][i][B]; § 1046[b][i]). The record shows that the mother's behavior posed a threat to the emotional well-being of her eight-year-old daughter, as she was repeatedly hostile towards her daughter, who had a history of

behavioral problems, and made repeated statements that she could not handle her daughter and suggested, in front of her daughter, that others should take her if they thought they could do a better job of raising her (*see Matter of Jessica R.*, 230 AD2d 108 [1997]). Despite her own emotional volatility and history of mental health issues, the mother refused to consider anger management, mental health, or parenting services for herself. While the mother denied many of the allegations of misconduct against her, the court implicitly discredited her testimony, and its credibility assessment is entitled to deference (*see Matter of Daquan D.*, 18 AD3d 363, 364 [2005]), and is supported by the record. The evidence pointed towards a causal relationship between the mother's hostile behavior and her daughter's emotional troubles, and supported the court's finding that the mother's volatile and emotionally abusive conduct placed her daughter at imminent risk of harm (*see Matter of Nichelle McF.*, 23 AD3d 209 [2005]).

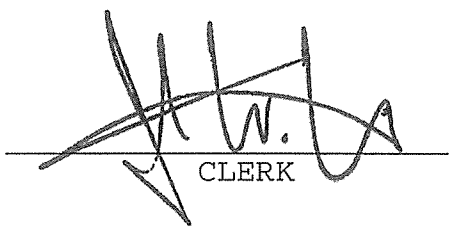
The mother's argument that the court erred in changing the child's permanency planning goal without consulting the child is unavailing, as the amendment to Family Court Act § 1089(d) mandating age-appropriate consultation took effect only after the issuance of the permanency hearing order, which was proper under the law in effect at the time it was issued. By the time of the hearing in December 2007, the child had been in foster care for

over 22 months, and in such circumstances, the Social Services Law provides for the filing of a petition to terminate parental rights, absent a showing of compelling reasons that termination would not be in the child's best interests (*see* Social Services Law § 384-b[3][l][i]). During that time, the mother continued to engage in the sort of hostile behavior that led to the initial finding of neglect and refused during this time period to undergo the intensive psychotherapy recommended by the agency as a means of improving her behavior. The record thus supported the finding that a change of goal to adoption was in the child's best interests at that time (*see Matter of Jennifer R.*, 29 AD3d 1003, 1004-05 [2006]; *Matter of Amanda C.*, 309 AD2d 744 [2003]).

We note that, subsequent to the Family Court's hearings and decisions, the mother has undergone extensive psychotherapy, that she and Patrice have participated in family therapy and that a new permanency hearing has been scheduled.

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

ENTERED: JUNE 30, 2009



Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

934 Noel Collins,
Plaintiff-Respondent,

Index 100480/04
594209/04
590095/08

-against-

West 13th Street Owners Corp., et al.,
Defendants-Appellants,

Elliot Kanbar, etc.,
Defendant.

[And Other Actions]

Flynn, Gibbons & Dowd, New York (Lawrence A. Doris of counsel), for West 13th Street Owners Corp., appellant.

Tarshis & Hammerman, LLP, New York (Carol R. Finocchio of counsel), for Cinema Four, Inc., appellant.

Bisogno & Meyerson, Brooklyn (Elizabeth Mark Meyerson of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 30, 2008, which, insofar as appealed from, denied the motion of defendant Cinema Four, Inc. and the cross motion of West 13th Street Owners Corp. for summary judgment dismissing plaintiffs' Labor Law § 240(1) and § 241(6) causes of action, and granted plaintiff partial summary judgment on the issue of liability on his section 240(1) claim, unanimously affirmed, without costs.

Upon a search of the record, partial summary judgment in favor of plaintiff is appropriate in this action where plaintiff was injured when, while installing acoustical ceiling tile in a

movie theatre owned by West 13th and leased by Cinema Four, he fell from a makeshift scaffold that he constructed and which consisted of resting one end of a piece of plywood on top of an A-frame ladder and resting the other end on the top of a knee wall that was the same height as the ladder. The work being performed was an activity within the ambit of section 240(1), and the record shows that he was not provided with an appropriate safety device to perform such work (*see Casabianca v Port Auth. of N.Y. & N.J.*, 237 AD2d 112 [1997]).

We reject defendants' argument that plaintiff was the sole proximate cause of his injuries. In order for a plaintiff to be considered the sole proximate cause of his injuries, it must be shown that an appropriate safety device was available, but that plaintiff chose not to use the device (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Here, plaintiff testified that he fell from an unsecured scaffold and that there were no appropriate safety devices available on-site. Defendants relied on, inter alia, the affidavit of a principal of plaintiff's employer, who said that plaintiff had available to him the materials necessary to construct a proper scaffold, including wood boards and planks of various lengths, as well as the tools necessary to modify the boards and planks to the required length. The motion court properly recognized that defendants' argument, that the onus is on plaintiff to construct an adequate safety

device, using assorted materials on-site which are not themselves adequate safety devices but which may be used to construct a safety device, improperly shifted to the worker the responsibility for creating a proper safety device.

Contrary to West 13th Street's contention, it is an "owner" for purposes of section 240(1). "[S]o long as a violation of the statute proximately results in injury, the owner's lack of notice or control over the work is not conclusive - this is precisely what is meant by absolute or strict liability in this context" (*Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 340 [2008]).

We have considered defendants' remaining contentions, including that plaintiff could not rely on his unsigned deposition transcript in support of his cross motion, and find them unavailing.

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

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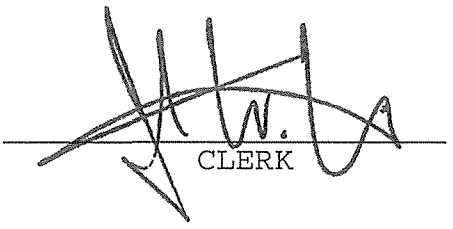


Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

935-
935A-
935B-
935C-
936-
936A-
936B Donald J. Trump, etc., et al., Index 602877/05
Plaintiffs-Appellants,

-against-

Henry Cheng, et al.,
Defendants-Respondents,

John Doe I, et al.,
Defendants.

Jay Goldberg, New York, for appellant.

Dornbush Schaeffer Strongin & Venaglia, LLP, New York (Richard Schaeffer of counsel), for Henry Cheng, Vincent Lo, Hudson Westside Assoc., L.P., Hudson Westside Assoc. I, L.P., Hudson Westside Assoc. II, L.P., Hudson Westside Assoc. III, L.P., Hudson Westside Assoc. IV, L.P. and Hudson Westside Assoc. V, L.P., respondents.

Sullivan & Cromwell LLP, New York (Robert J. Giuffra, Jr., of counsel), for Hudson Waterfront Corp. I, II, III, IV and V Corporations, respondents.

Bryan Cave, LLP, New York (Kristina Oliver of counsel), for Hudson Waterfront Associates I, II, III, IV, and V, L.P., respondents.

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 19, 2006, in an action arising out of the sale of certain real estate for an allegedly inadequate price brought by a minority limited partner against the majority limited partners and general partners of limited partnerships

organized by the parties to develop the real estate, dismissing all but the 18th cause of action, and bringing up for review orders, same court and Justice, entered July 27, 2006, which, inter alia, granted defendants' motion to dismiss the amended complaint with the exception of that part of the 18th cause of action seeking access to certain books and records; order, same court and Justice, entered October 3, 2007, which denied plaintiff's motion for access to certain additional books and records; and order, same court and Justice, entered January 7, 2009, which denied plaintiff's motion to vacate the above judgment on the ground of newly discovered evidence, and, sub silentio, denied plaintiff's motion that the court recuse itself, unanimously affirmed, with costs. Appeals from the orders entered July 27, 2006 unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

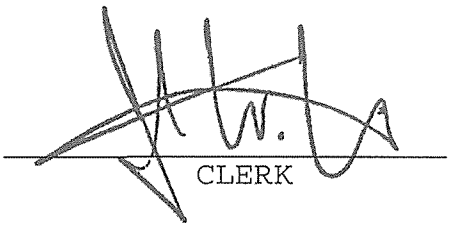
The court did not abuse its discretion in refusing to recuse itself (*see People v Moreno*, 70 NY2d 403, 406 [1987]; *Robert Marini Bldr. v Rao*, 263 AD2d 846, 847-848 [1999]). With respect to the books-and-records claim, the court correctly construed section 12.2 of the partnership agreements as conferring a right of inspection no broader than that under Delaware's Revised Uniform Limited Partnership Act (6 Del Code) § 17-305, such that plaintiff had a right to inspect records of "transactions" consummated by the partnerships but no right to a full discovery

of matters that did not involve partnership "transactions" (*see Security First Corp. v U.S. Die Casting & Dev. Co.*, 687 A2d 563, 570 [Del Sup Ct 1997]). Plaintiff's remaining claims were properly dismissed. His direct claims, in fact, are derivative claims (*see Tooley v Donaldson, Lufkin, & Jenrette*, 845 A2d 1031 [Del Sup Ct 2004]), and his derivative claims do not allege "with particularity" the reasons why a presuit demand on the general partners was not "likely to succeed" (6 Del Code § 17-1003, § 17-1001). In the latter regard, plaintiff's allegations are insufficient "to create a reasonable doubt either as to whether the directors are disinterested and independent or whether the transaction at issue resulted from a valid exercise of business judgment" (*Simon v Becherer*, 7 AD3d 66, 71-72 [2004]). The court also properly denied vacatur of the judgment based on newly discovered evidence as plaintiff failed to demonstrate that the purported new evidence was recently discovered or could not have been earlier discovered by the exercise of due diligence (*Nutmeg Fin. Servs. v Richstone*, 186 AD2d 58, 59 [1992]). We have

considered plaintiff's other arguments, including that the court has personal jurisdiction over defendant Lo, and find them without merit.

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

ENTERED: JUNE 30, 2009



Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

937 The People of the State of New York, Ind. 2218/07
Respondent,

-against-

Phillip Stephens,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Simpson Thacher & Bartlett LLP, New York (Kenneth S. Ziman and Jonathan K. Youngwood of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 19, 2007, convicting defendant, after a jury trial, of two counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, unanimously affirmed.

When, after the jury sent a note at 3:40 p.m. on the second day of deliberations stating, "We the jury request the court to know that we have not been able to come to a unanimous decision," the court properly exercised its discretion in denying defendant's motion for a mistrial and instead delivering an appropriate supplemental charge to encourage the jury to reach a verdict. Although the trial was short, the jury had not been deliberating for such an extensive period that further

deliberations would not be fruitful (*see Matter of Plummer v Rothwax*, 63 NY2d 243, 250-251 [1984]), and the wording of the jury's note was not indicative of a deadlock.

The events described above took place the day before a juror was scheduled, according to her statement during jury selection, to leave for a conference. Defendant did not preserve his present claim that, upon receipt of the jury's note, the court should have asked this juror whether she could still render a fair and impartial verdict (*see People v Colon*, 46 AD3d 260, 263 [2007]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we also reject it on the merits. The type of inquiry contemplated by CPL 270.35 would have been premature, because during deliberations the juror never raised any issue about her impending conference, and because at the time of the jury's note there was still ample time that day for the jury to reach a verdict. Defendant's remaining contentions concerning the court's actions following the jury note are also unpreserved and we decline to review them in the interest of justice. As an alternative holding, we likewise reject them on the merits.

The court properly received in evidence surveillance tapes depicting a man who matched defendant's description using the victim's credit card shortly after the crime. While defendant

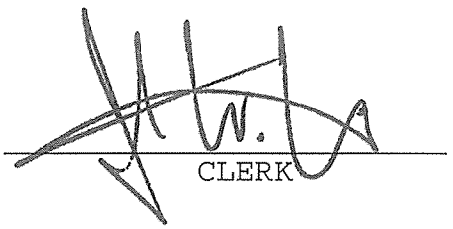
characterizes these tapes as evidence of uncharged crimes, we note that the use of the cards was closely connected to the theft, and there was no danger of the jury drawing an improper inference that defendant was guilty of the charged crime because he had a "propensity" to commit crimes. In any event, these tapes provided strong circumstantial evidence of identity, even though they did not clearly show defendant's face. "Contrary to defendant's argument, a pattern of crimes employing a unique modus operandi is not the exclusive situation in which uncharged crimes may be probative of identity" (*People v Laverpool*, 267 AD2d 93, 94 [1999], *lv denied* 94 NY2d 904 [2000]). Here, the short lapse of time between the theft and the use, the documentary evidence that the man shown on the tapes was using the particular credit card taken from the victim, and the similarities between defendant's description and the appearance of the man on the tapes gave the tapes a high degree of probative value. Furthermore, the tapes were also admissible to establish that the credit card had been stolen rather than lost, and that the taker had the intent to benefit himself.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for

reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JUNE 30, 2009



Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

938 The People of the State of New York, Ind. 5315/04
Respondent,

-against-

Mark Rutkowski,
Defendant-Appellant.

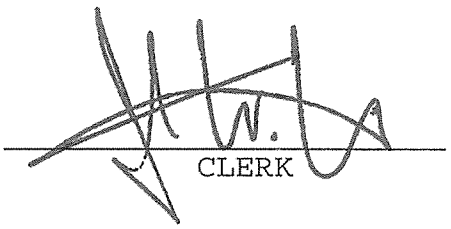
Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered on or about July 30, 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 30, 2009



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

Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

939 New York City Housing Authority, Index 403978/06
Plaintiff-Respondent,

-against-

Rutgers Casualty Insurance Company, etc.,
Defendant-Appellant.

Bivona & Cohen, P.C., New York (Elio M. DiBerardino of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered on or about September 23, 2008, which, upon reargument, adhered to its prior order, entered January 18, 2008, inter alia, granting the motion of plaintiff New York City Housing Authority (NYCHA) for partial summary judgment to the extent of declaring that defendant is obligated to defend NYCHA in an underlying personal injury action and directing defendant to reimburse NYCHA for any defense costs expended, unanimously affirmed, without costs.

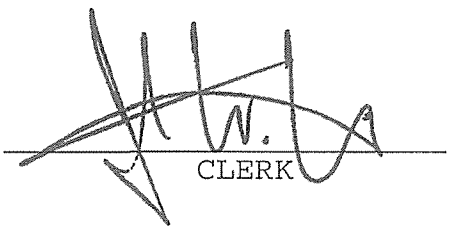
The motion court properly determined that NYCHA, as an additional insured under the policy defendant issued to NYCHA's contractor, is entitled to a defense from defendant in the underlying action, where it is alleged that the plaintiff fell on construction debris that was negligently placed and allowed to remain at the exterior stairwell at the entrance of a building.

Since the allegations of the underlying complaint suggest a reasonable possibility of coverage, defendant is obligated to defend NYCHA in that action (*see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). Contrary to defendant's claim, there are triable issues of fact as to whether the contractor created the alleged defective condition and whether its work was ongoing at the time of the accident (*see Perez v New York City Hous. Auth.*, 302 AD2d 222 [2003]).

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

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

ENTERED: JUNE 30, 2009



Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

941 The People of the State of New York, Ind. 6914/06
Respondent,

-against-

Keith Cox,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered June 8, 2007, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

A series of trespass notices barring defendant from entering Duane Reade drugstores did not violate defendant's right of confrontation (*see People v Liner*, 33 AD3d 479 [2006], *affd* 9 NY3d 856 [2007], *see also Liner v Artus*, 2008 WL 5114485, *3-*4 2008 US Dist LEXIS 98558, *7-*11 [SD NY 2008]). These records lacked any of the "indicia of testimoniality" discussed in *People v Rawlins* (10 NY3d 136, 151 [2008]; *see also People v Freycinet*, 11 NY3d 38, 41-42 [2008]).

The court properly allowed the prosecution to introduce seven trespass notices, six of which defendant had signed, since

the probative value of this large number of notices, in the context of the case, exceeded any prejudicial effect. Defendant's awareness that he had been barred from all Duane Reade stores was a principal issue in the case, with defendant contending that these notices were never read to him, and that he never read them himself. Accordingly, the number of trespass notices tended to reduce the likelihood that defendant was unaware of any such ban (*see People v Marrin*, 205 NY 275, 280-281 [1912]). Furthermore, the court minimized any prejudice by ordering the notices redacted to eliminate any reference to the conduct that prompted them, and by charging the jury that the notices were not proof that defendant committed any crimes on prior occasions or had any propensity to commit crimes.

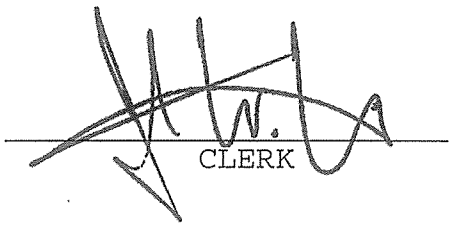
Defendant's only specific objection to the prosecutor's opening statement was that it was "argumentative," and his only specific objection to the prosecutor's summation was that it made improper use of prior convictions that had been elicited when defendant testified at trial. We find no merit to either objection. All of defendant's remaining challenges to the opening statement and summation are unpreserved and we decline to review them in the interest of justice. As an alternative

holding, we also reject them on the merits (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 30, 2009



Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

942 Gabriel Fischbarg, Index 101427/05
Plaintiff-Respondent,

-against-

Suzanne Doucet, etc., et al.,
Defendants-Appellants.

Samuel E. Kramer, New York, for appellants.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 16, 2008, which, to the extent appealed from as limited by the brief, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

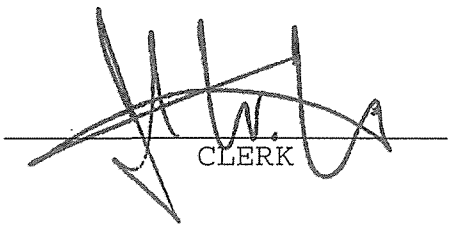
Plaintiff's failure to provide defendants with a writing identifying the method by which the contingency fee was to be determined and how expenses were to be paid, in violation of former Code of Professional Responsibility DR 2-106(d) (22 NYCRR 1200.11[d]) (now Rules of Professional Conduct [22 NYCRR part 1200] rule 1.5[c]), does not preclude his recovery for services rendered on a quantum meruit basis (*see Matter of Santemma v Chasco Co.*, 242 AD2d 273 [1997]). Issues of fact as to plaintiff's right to recovery are raised by the parties' dispute over whether his resignation was justified and whether there

existed cause for defendants to discharge him (*see Klein v Eubank*, 87 NY2d 459, 464 [1996]; *Shalom Toy v Each & Every One of Members of N.Y. Prop. Ins. Underwriting Assn.*, 239 AD2d 196, 198 [1997]).

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

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

ENTERED: JUNE 30, 2009



Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

943 The People of the State of New York, Ind. 5811/07
Respondent,

-against-

Jamel Dean,
Defendant-Appellant.

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

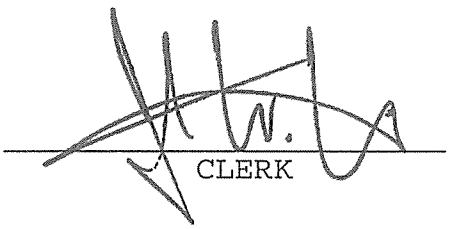
Robert M. Morgenthau, District Attorney, New York (Martin J. Foncelo of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered on or about March 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 30, 2009



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

Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

944 MNY 260 Park Avenue South, LLC, et al., Plaintiffs-Respondents, Index 603184/05

-against-

Max 260 Park Avenue South, LLC, Defendant-Appellant,

Anthony E. Westreich, et al., Defendants.

Kramer Levin LLP, New York (Marshall H. Fishman of counsel), for appellant.

Morgan, Lewis & Bockius LLP, New York (John M. Vassos of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered November 13, 2008, which, to the extent appealed from as limited by the briefs, denied defendant Max 260 Park Avenue South, LLC's motion for summary judgment on its third and fourth cause of action only with respect to the December capital call, and granted plaintiffs' motion for summary judgment on the same issue, unanimously affirmed, with costs.

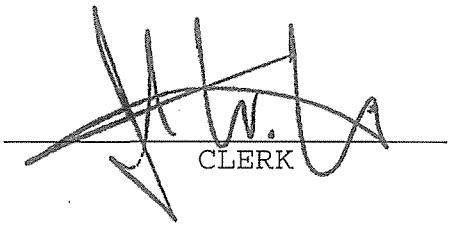
The court correctly found that the moving defendant failed to make its initial prima facie showing that plaintiffs' interests were properly diluted. Plaintiffs demonstrated that dilution was improper because there was no adherence to the requirements set forth in defendant's limited liability corporation agreement regarding the qualifications of a "Funding

Member" (*see Hanson v Capital Dist. Sports*, 218 AD2d 909, 911 [1995]), and defendant failed to overcome that demonstration (*see Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282 [1997]).

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

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

ENTERED: JUNE 30, 2009



Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ

945 The People of the State of New York, Ind. 1797/07
Respondent,

-against-

Leroy Nelson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered December 18, 2007, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him to concurrent terms of 5 years, 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]). There is no basis for disturbing the jury's determinations concerning credibility, or its finding that, by throwing him to the ground and repeatedly kicking him, defendant caused physical injury to the victim. To establish the element of physical injury, the People were only required to prove that the victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]). Relatively minor injuries causing moderate,

but "more than slight or trivial pain" may suffice (*see People v Chiddick*, 8 NY3d 445, 447 [2007] [fingernail injury]), as may injuries that did not lead to any medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]). The evidence supports the conclusion that the victim's injuries were well above the required threshold.

Given the particular sequence of events, the court properly exercised its discretion in precluding defendant from cross-examining the cooperating former codefendant regarding the potential sentence to which he would have been exposed had he been convicted of the original charges, and the court's ruling did not deprive defendant of his right to confront witnesses (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). The record establishes that the codefendant's original attempt to seek leniency in return for cooperation was rejected by the prosecutor. The codefendant then pleaded guilty to attempted robbery in the second degree with a promised sentence of one year, not in return for any cooperation. Prior to his sentencing, the codefendant, whose exposure was already down to one year, then successfully negotiated a cooperation agreement that contemplated further leniency in return for his testimony. Under these circumstances, the 15-year maximum term he might have faced had he not already pleaded guilty was no longer relevant to the codefendant's credibility at the time of trial. While that

exposure may have motivated his initial, unsuccessful attempt to cooperate, that exposure no longer existed at the time of the trial, and the codefendant's motivation, as fully explored before the jury, was to obtain a sentence of less than one year.

Although the People were obligated to disclose a prior inconsistent statement made by the cooperating former codefendant (*see Brady v Maryland*, 373 US 83 [1963]), there is no reasonable possibility that the nondisclosure contributed to the verdict (*see People v Vilardi*, 76 NY2d 67, 77 [1990]). The inconsistency was limited to the precise manner in which the codefendant, while acting in concert with defendant, obtained the victim's wallet. However, impeachment of the codefendant by this inconsistency would have been cumulative, since the jury was made aware of a much more damaging inconsistent statement he made to the police, as well as the fact that he was testifying under a cooperation agreement. Furthermore, the codefendant's testimony, in turn, was cumulative to that of the victim, whose credible testimony established defendant's guilt beyond a reasonable doubt.

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

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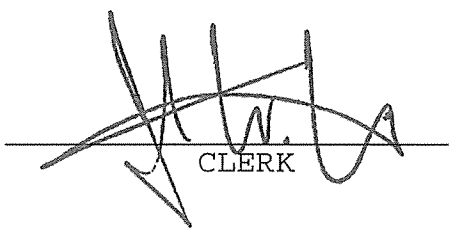

Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

947 Nuri Taub, Index 103988/04
Plaintiff-Appellant,

-against-

The Art Students League of New York,
Defendant,

Americon Construction, Inc.,
Defendant-Respondent.

Edward T. Chase, Mount Vernon, for appellant.

Zichello & McIntyre, LLP, New York (Ann Teresa McIntyre of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 9, 2008, which granted plaintiff's motion to renew (denominated by the court as one to reargue) a prior order granting defendants' motion for summary judgment dismissing the complaint, and, upon renewal, adhered to the prior order, deemed to have denied renewal, and, so considered, unanimously affirmed, without costs.

While the motion court incorrectly denominated plaintiff's motion as one to reargue, it clearly treated it as one to renew, describing the evidentiary material submitted by plaintiff on the motion, a witness statement, and rejecting it for lack of an explanation why it was not submitted on defendant's prior motion for summary judgment dismissing the complaint for lack of evidence of, inter alia, the cause of plaintiff's fall (*see* CPLR

2221[e][2],[3]; *Dupont v Joedon & Co.*, 107 AD2d 369, 373 [1985]). In any event, the new evidence, however, should be rejected for failure to show due diligence in attempting to obtain the statement before the submission of the prior motion (*see Rubinstein v Goldman*, 225 AD2d 328, 328-329 [1996], *lv denied* 88 NY2d 815 [1996]; *Elson v Defren*, 283 AD2d 109, 113 [2001]). The hearsay statement of plaintiff's attorney describing his investigator's efforts to locate the witness lacks probative value. Even if we were to accept the attorney's statement, we would find that the investigator's efforts fell short of due diligence. Moreover, were we to accept the witness statement, it would not change the prior determination that there is no evidence probative of what caused plaintiff to trip and fall (CPLR 2221[e][2]). The witness does not identify plaintiff as the person who fell, stating only that he saw "a woman" fall, or specify when he saw the woman fall, stating only that it happened in the "fall of 2003."

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

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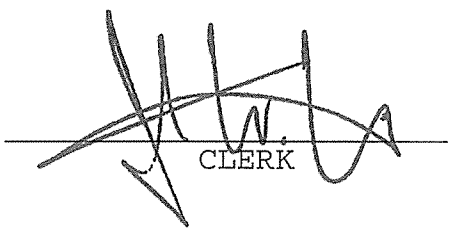

Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

948 The People of the State of New York, Ind. 1353N/05
Respondent,

-against-

Tirnn Branch,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Michael A. Corriero, J.), rendered April 24, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal sale of a controlled substance in or near school grounds, and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 3½ years, 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]). There is no basis for disturbing the jury's determinations concerning credibility. In this observation sale case, the totality of defendant's interactions with the codefendant and with the buyers supports the conclusion that defendant took part in the transaction as part of a team of

drug dealers (*see People v Eduardo*, 11 NY3d 484, 493 [2008]), and that he was a joint possessor of the additional drugs found on the codefendant.

To the extent that a summation remark by the prosecutor could be viewed as improperly implying that the jury should draw an inference of guilt from the fact that defendant had been indicted by a grand jury, we conclude that the court's instructions on the meaning of an indictment were sufficient to prevent any prejudice (*see People v James*, 197 AD2d 429 [1993], *lv denied* 83 NY2d 806 [1994]). Defendant's remaining challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

THIS CONSTITUTES THE DECISION AND ORDER
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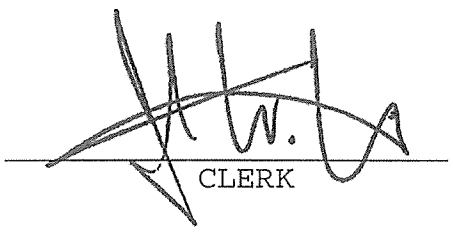


Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

949 David Medina, Index 303240/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Rawlins & Gibbs, LLP, New York (Earl A. Rawlins of counsel), for appellant.

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

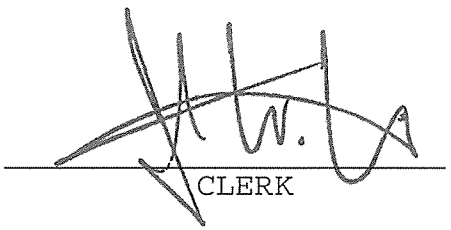
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 17, 2008, which dismissed plaintiff's complaint as barred by the statute of limitations, unanimously affirmed, without costs.

The commencement of this action was untimely (General Municipal Law § 50-i). Plaintiff's objection that defendant's answer should be considered a nullity was effectively waived when he retained that responsive pleading for two months before moving to dismiss (*see e.g. Rosenshein v Ernstoff*, 176 AD2d 686 [1991]). He also failed to offer any evidence that defendant had induced him to delay bringing the action by misleading him into believing settlement negotiations were imminent. There are no grounds for estopping defendant from asserting the statute of limitations

(*see e.g. Dowdell v Greene County*, 14 AD3d 750 [2005]; *Dailey v Mazel Stores*, 309 AD2d 661, 663-664 [2003]).

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

ENTERED: JUNE 30, 2009



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Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

950N Jorge Chelli, Index 102175/08
Plaintiff-Respondent,

-against-

The Kelly Group, P.C., et al.,
Defendants-Appellants.

Barger & Wolen LLP, New York (Michael J. Levin of counsel), for appellants.

The Neurolaw Trial Group at Jacoby Meyers, Newburgh (Benedene Cannata of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered on or about February 19, 2009, which denied defendants' motion to vacate a default order entered five weeks earlier, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, and the motion granted on condition that defendants' counsel pay the sum of $1,000 to plaintiff's counsel within 30 days of service of a copy of this order.

In light of the strong public policy of this State to dispose of cases on their merits, the motion court improvidently exercised its discretion in denying defendants' motion to vacate the default order (*Harwood v Chaliha*, 291 AD2d 234 [2002]). An order striking an answer and directing an inquest pursuant to 22 NYCRR 202.27(a) should be vacated where a defendant can show a reasonable excuse for failure to appear (CPLR 5015[a]) and a meritorious defense or counterclaim (*Harwood*). Here, defendants

demonstrated their failure to appear was neither willful nor part of a pattern of dilatory behavior, but was purely the result of inadvertent law office failure on the part of the attorneys to whom they had entrusted their defense (*see id.*; *Dokmecian v ABN Amro N. Am.*, 304 AD2d 445 [2003]). The attorneys did not willfully default, but despite having implemented systems to track court appearances, they apparently were not alerted to the upcoming compliance conference (*see Carela v Pelham Realty, Inc.*, 57 AD3d 389 [2008]; *Perez v New York City Hous. Auth.*, 290 AD2d 265 [2002]). There was no prejudice to plaintiff, as the case had not been pending long, and the parties had agreed to attempt to resolve the matter through the court-annexed mediation program shortly before counsel's inadvertent default.

Defendants also demonstrated potentially meritorious legal and factual defenses to plaintiff's claims, which seek to recover a total of $21 million, including disgorgement of the $4 million contingency fee paid upon successful resolution of plaintiff's personal injury action, treble damages, and punitive damages. Alternatively, defendants showed that even if they violated a rule governing the conduct of lawyers, they may still be entitled to recover on their quantum meruit counterclaim (*see generally Matter of Cooperman*, 83 NY2d 465, 475 [1994]). "A client should not be deprived of his day in court by his attorney's neglect or inadvertent error, especially where the other party cannot show

prejudice" and his position has merit (*Paoli v Sullercraft Mfg. Co.*, 104 AD2d 333, 334 [1984]).

While defendants had a reasonable excuse for nonappearance based on law office failure, their attorneys' conduct nonetheless warrants imposition of the penalty in the amount indicated as a condition of the reversal.

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

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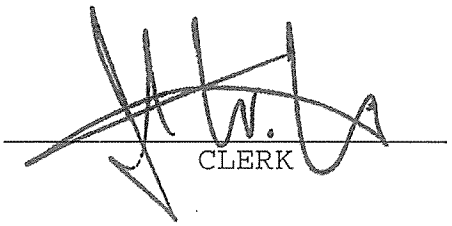


Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

951 [M-2088] In re Jonathan R. Steinberg, Petitioner, Index 114728/99

-against-

Hon. Shirley Werner Kornreich, etc. et al., Respondents.

Jonathan R. Steinberg, New York, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Susan Anspach of counsel), for Shirley Werner Kornreich, respondent.

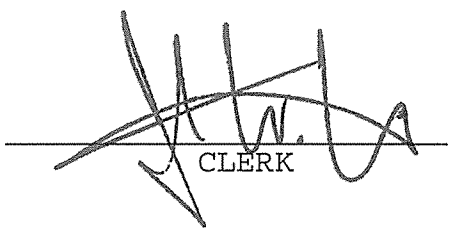
Robert E. Michael & Associates PLLC, New York (Robert E. Michael of counsel), for Queen's Import Motors, Alan and Marie Gerst, respondents.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JUNE 30, 2009



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Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

952 In re Robert M. Morgenthau, SCI 106697/09
[M-2557] Petitioner,

-against-

Hon. Paul G. Feinman, etc., et al.,
Respondents.

The above-named petitioner having presented a petition to this Court on June 9, 2009, against the above named respondents, pursuant to article 78 of the Civil Practice Law and Rules, in the nature of a writ of prohibition,

Now, upon reading and filing the aforesaid petition, including the affirmation of Sean Sullivan, Esq. dated June 1, 2009,

It is unanimously ordered that the petition be and the same hereby is deemed withdrawn without costs or disbursements.

ENTERED: JUNE 30, 2009

CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4538 The People of the State of New York, Ind. 4984/06
Respondent,

-against-

Leroy McFarlane,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered June 26, 2007, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree (ten counts), loitering, and harassment in the second degree, and sentencing him to an aggregate term of 2 to 4 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the conviction of criminal possession of a forged instrument in the second degree under the first count of the indictment and dismissing that count, and otherwise affirmed.

Defendant did not preserve his challenges to the sufficiency of the evidence, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. As determined in *People v Mattocks* (12 NY3d 326 [2009], *affg* 51 AD3d 301 [2008]), a MetroCard bent across its magnetic

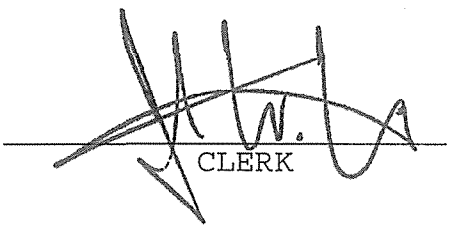
strip so as to obliterate the encoded data of the value remaining on the card falls within the statutory definition of a forged instrument. Although bending a MetroCard with a zero value does not always result in a card that allows an extra ride, the People were not required to establish that the alteration was successful. By way of analogy, a falsely altered check would still be a forgery even if the alteration were so unskillful as to be unlikely to fool anyone. Furthermore, viewing the evidence in light of the court's charge to the jury, we find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

The People concede that the first count should be dismissed because, unlike the other counts involving value-based MetroCards, this count involved an expired, time-based, unlimited-ride MetroCard, and there was no evidence that it had been altered in a way that would evade its time limitation.

We have considered and rejected defendant's ineffective assistance claim.

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

ENTERED: JUNE 30, 2009



Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5380 The People of the State of New York, Ind. 595/04
Respondent,

-against-

Anthony Griffin,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jennifer Marinaccio of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered October 24, 2006, 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.

On October 21, 2002, Ariann Jackson returned to her apartment from work to find the lifeless body of Chauncey Warren, her 23-year-old boyfriend who had been stabbed to death. Although defendant was indicted for the crime on theories that included the commission of the homicidal act while acting in concert with another, the case was presented to the jury on the theory that it was defendant himself who fatally stabbed Warren. Defendant asserts on this appeal that his conviction was against the weight of the evidence.

At trial, the People presented evidence that Warren had been very close with his uncle, Lester Dixon, and lived with him in

2001. Dixon knew defendant as a person his nephew grew up with. In the summer of 2002, Dixon learned that Warren was having a problem with the Murder Unit, a group of neighborhood drug dealers. The problem stemmed from the group's suspicion that Warren had slashed the face of someone named Jason. Accompanied by his uncle, Warren met with and explained to the Murder Unit that it was defendant and not he who committed the assault. The Murder Unit instructed Warren to notify them as soon as he saw defendant. On the way home, Warren met an acquaintance whom he told about the encounter with the Murder Unit and their instruction for him to deliver defendant up to them.

For about a year before his death, Warren lived with Jackson in her first-floor apartment. Jackson's mother, Britt Minott, and her stepfather, Nathaniel Mouzon, lived in an apartment on the second floor of the building. In keeping with her weekly routine, Jackson thoroughly cleaned the apartment, including the bathroom sink and mirror, on Sunday, October 20, 2002, the day before the murder. The next day, Jackson left at 7:30 a.m. to go to work, leaving Warren at the apartment. Warren had to go to court that day to appear on a summons. At about 10:30 a.m., defendant and another man approached Mouzon in front of the building and said they were looking for Warren. Mouzon rang Warren's doorbell and got no response. The two men waited outside until Warren returned about half an hour later. At that

time Warren entered his apartment with defendant and the other visitor. At about 1:00 p.m., Warren unlocked the door to allow Mouzon access to an electrical outlet for a power tool he was using to fix a lock in the hallway. Upon entering the apartment, Mouzon saw Warren and the other man in the living room and heard someone else playing video games. Mouzon finished using the outlet at 1:40 p.m. when he believed Warren locked the door. At about 3:00 p.m., Mouzon and Minott went to a check-cashing establishment and returned to the building 10 minutes later. Mouzon, who had been in the hallway outside of Warren's door or in front of the building for the entire day up to that point, did not see defendant or the other visitor leave Warren's apartment.

Shortly after 6:20 p.m., Jackson returned to her apartment to find the front door unlocked. She then saw Warren's dead body in the living room with a very deep cut in the neck. The apartment had been ransacked and Warren's pinky ring, chain and a Play Station video game system were missing. The kitchen window, which led to a back alley fire escape, was open. Flower pots by the window were in disarray and there was blood on the curtain.

Jackson never again stayed at the apartment, but returned to it on November 13 with Mouzon and Minott to retrieve some of her clothing. At that time, Jackson noticed a plastic bag containing a football jersey and a grey hooded sweatshirt. Both garments were bloodstained and neither belonged to Warren or Jackson.

Jackson, however, remembered seeing defendant wearing the sweatshirt when she and Warren encountered him in the street two days before the murder. After receiving a call from Jackson, Detective Robert D'Amico took possession of and vouchered both items of clothing, which were later tested for DNA.

An autopsy revealed that Warren, who was considerably larger than defendant, suffered a combination of 21 stab wounds and slashes to his body. Among the wounds were three deep stab wounds to the neck, which perforated jugular veins, and two stab wounds to the right and left sides of the back, which respectively caused the chest cavity to fill with blood and the left lung to collapse. Dr. James Gill of the Office of the Chief Medical Examiner opined that each of these five wounds was potentially fatal in itself, and the stab wounds to the back occurred first.

During the course of the investigation, a fingerprint lifted from the bathroom mirror was matched to defendant. On May 5, 2003, D'Amico interviewed defendant in North Carolina. After waiving his *Miranda* rights, defendant stated that he had traveled to New York from North Carolina around October 21, 2002. Over the following week, defendant and Warren saw each other every day, often playing video games at Warren's apartment. Defendant also told D'Amico that the Murder Unit was looking for him and had issued a $20,000 "hit" on him because of Jason's slashing.

Defendant said he thought Warren might have told someone that he was back in New York. Pursuant to a search warrant, D'Amico took four swabs of saliva from defendant's mouth for DNA testing. The samples were secured and brought to New York for laboratory analysis.

Dr. Mechthild Prinz, the Director of the Department of Forensic Biology of the Office of the Chief Medical Examiner, testified that the saliva samples recovered from defendant were used to create a DNA profile of him. Similarly, a DNA profile of Warren was created from a sample of his blood. DNA profiles of bloodstains on the jersey and the hooded sweatshirt matched Warren. The sweatshirt was also turned inside out and scraped for skin cells in the areas of the neck and armpits. Dr. Prinz opined that the armpit DNA profile did not come from Warren, but was consistent with defendant's DNA profile.

At the prosecution's request, the case was not submitted to the jury on an acting-in-concert theory. Rather, the jury was instructed that the prosecution had to prove defendant caused Warren's death and did so by stabbing and slashing him with a sharp object. Defendant asserts that in this circumstantial evidence case his conviction of second degree intentional murder is against the weight of evidence.

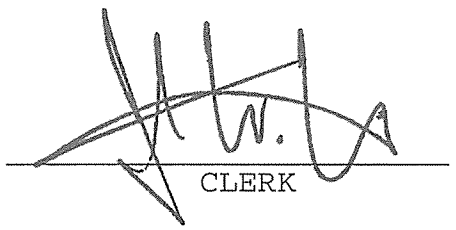
Our weight-of-evidence review requires us first to determine whether an acquittal would not have been unreasonable. If so, we

must next weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Then, based on the weight of the credible evidence, we must next decide whether the jury was justified in finding defendant guilty beyond a reasonable doubt (*People v Danielson*, 9 NY3d 342, 348 [2007]). In conducting the required analysis, based upon the evidence adduced at trial, we determine that an acquittal of the charge of second-degree intentional murder on a sole-actor theory would have been unreasonable. Even if a contrary conclusion would have been reasonable, we conclude that the verdict was not against the weight of the credible evidence. As noted above, testimony at trial placed defendant at Warren's apartment during a period when the crime could have been committed. The DNA analyses of the bloodstains and armpit skin cells found on the gray hooded sweatshirt provided a compelling link between defendant and the stabbing. Defendant's attack on the credibility of Jackson's testimony that she saw him wearing the sweatshirt shortly before the murder is unavailing. Under a weight-of-evidence analysis, a court does not take the place of the jury in passing on questions of the reliability of witnesses and the credibility of testimony, instead it gives great deference to the jury's findings (*see People v Romero*, 7 NY3d 633, 642, 643 [2006]). As indicated above, it was determined that the fatal wounds to Warren's back

were the first to be inflicted. This factor, considered in conjunction with the element of surprise, suffices to allow the jury to discount Warren's relatively larger size as a basis for a reasonable doubt that defendant acted alone. Accordingly, the record amply supports the jury's conclusion that defendant himself committed the homicidal act. To the extent defendant is challenging the legal sufficiency of the evidence, that claim has not been preserved, inasmuch as his trial motion to dismiss was based on a different ground (*see People v Wells*, 53 AD3d 181, 188-189 [2008], *lv denied* 11 NY3d 858 [2008]; *People v Crawford*, 38 AD3d 680 [2007], *lv denied* 9 NY3d 842 [2007]). We decline to reach the issue in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: JUNE 30, 2009



Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

953 The People of the State of New York, Ind. 4854/06
Respondent,

-against-

Ernest Soberanis,
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 (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki Scherer, J. on speedy trial motion; Lewis Bart Stone, J. at jury trial and sentence), rendered August 23, 2007, convicting defendant of eight counts of burglary in the third degree, and sentencing him, as a second felony offender, to consecutive terms of 2 to 4 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that only the sentences for the convictions under counts one and two of the indictment be served consecutively, and that all other sentences be served concurrently with each other and with the sentences under the first two counts, resulting in an aggregate term of 4 to 8 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

We have considered and rejected defendant's remaining claims.

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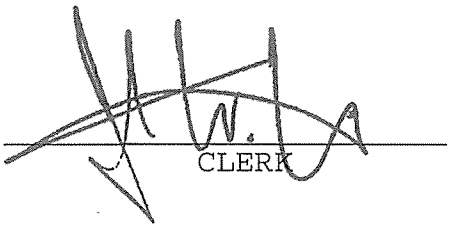
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 30, 2009



Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

954 William Caban, et al., Index 109711/06
Plaintiffs-Respondents,

-against-

Maria Estela Houses I
Associates, L.P., et al.,
Defendants-Appellants.

The Sullivan Law Group, LLP, New York (Robert M. Sullivan and Sara B. Feldman of counsel), for appellants.

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered January 14, 2009, which, inter alia, denied defendants' motion for summary judgment dismissing plaintiffs' causes of action under Labor Law § 240(1) and § 241(6), and granted plaintiffs' cross motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240(1), unanimously modified, on the law, to dismiss the cause of action under Labor Law § 241(6), and otherwise affirmed, without costs.

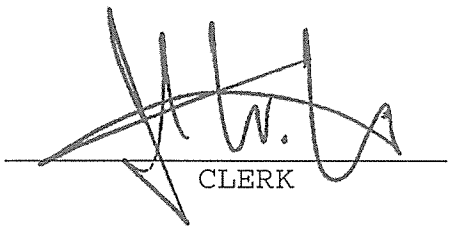
The injured plaintiff, a journeyman electrician employed by an electrical contractor retained by defendants building owners and manager, was engaged in repairing malfunctioning exterior floodlights on one side of defendants' building when he sustained injury as the result of an electric shock that caused him to

shake and fall off the ladder he was using to reach one of the lights. With respect to the section 240(1) claim, the motion court correctly rejected defendants' argument that the work plaintiff was performing was routine maintenance outside the protective scope of the statute. The work, viewed in its totality (*see Fitzpatrick v State of New York*, 25 AD3d 755, 756-757 [2006]), involved much more than simply changing a lightbulb; it required replacement of a photocell, dismantlement of lamp housings and their ultimate rebuilding, replacement of ballasts and bulbs, and the disconnection and reconnection of termination wiring to power sources (*see Rios v WVF-Paramount 545 Prop., LLP*, 36 AD3d 511 [2007]; *Piccione v 1165 Park Ave.*, 258 AD2d 357 [1999], *lv dismissed* 93 NY2d 957 1999]). With respect to the section 241(6) claim, that section is "inapplicable outside the construction, demolition or excavation contexts" (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]), and "[t]he Industrial Code definition of 'construction work' [12 NYCRR 23-1.4(b)(13)], which includes maintenance [and repair], must be construed consistently with this Court's understanding that section 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002]). Since plaintiff's work

was not performed in any such context, we modify to dismiss the section 241(6) claim. We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: JUNE 30, 2009



CLERK

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

955-
956 In re Stephon Elijah G.,

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

Stephanie G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

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

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about March 12, 2008, placing the subject child, until completion of the next permanency hearing, with petitioner upon a fact-finding determination of neglect, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot, without costs. Appeal from fact-finding order, same court and Judge, entered on or about March 12, 2008, unanimously dismissed, without costs, as superseded by the appeal from the order of disposition.

The placement has been rendered moot by the expiration of the dispositional order from which respondent appeals (*Matter of*

Taisha R., 14 AD3d 410 [2005]). The finding of neglect is supported by a preponderance of the evidence showing, inter alia, that respondent has a history of unresolved psychiatric and drug-related problems; failed to comply with a 2005 neglect order, issued in a proceeding involving another child who was ultimately adopted, directing her to seek treatment for such conditions; used marijuana while pregnant with the subject child; and was too confused at times to address her own needs (Family Ct Act § 1012[f][i]; *see Matter of Jesse DD.*, 223 AD2d 929 [1996], *lv denied* 88 NY2d 803 [1996], citing, inter alia, *Matter of Madeline R.*, 214 AD2d 445 [1995]).

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

ENTERED: JUNE 30, 2009

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Abdus-Salaam, JJ.

958-
958A Index 104636/08

Gilbert Lau,
Plaintiff-Appellant,

-against-

Capital One Bank, et al.,
Defendants,

Forster & Garbus, et al.,
Defendants-Respondents.

Gilbert Lau, appellant pro se.

Groezinger Law, P.C., Patterson (Robert R. Groezinger of counsel), for respondents.

Orders, Supreme Court, New York County (Marilyn Shafer, J.), entered October 30, 2008, which denied plaintiff's motion to transfer a related Civil Court action to Supreme Court and granted the motion of defendants Forster & Garbus, Ronald Forster, Mark Garbus and Brandi P. Klineberg to dismiss the amended complaint, unanimously affirmed, without costs.

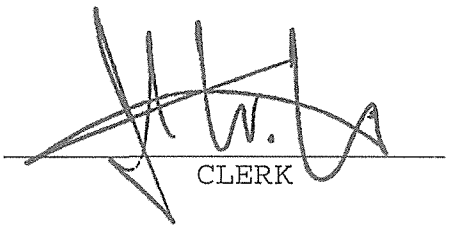
Plaintiff's claims against the defendants named in both the Civil Court and Supreme Court actions are barred by the doctrine of res judicata (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]), notwithstanding that some of the claims now asserted are based on different theories (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Plaintiff is also barred by the doctrine of collateral estoppel from re-litigating the issues decided in the Civil Court action against newly named parties,

who were in privity with defendants in the prior Civil Court action (*see Prospect Owners Corp. v Tudor Realty Servs. Corp.*, 260 AD2d 299 [1999]; *Corto v Lefrak*, 203 AD2d 94 [1994], *lv dismissed* 86 NY2d 774 [1995]). To the extent that any of plaintiff's claims are not otherwise barred, the amended complaint fails to state a cause of action against any of the defendants.

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

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

ENTERED: JUNE 30, 2009



Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

959 The People of the State of New York, Respondent, Ind. 6779/01

-against-

Juan Castillo, etc., Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

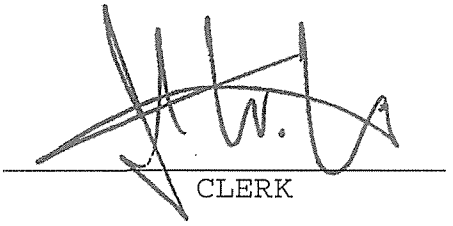
Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about June 5, 2007, which denied defendant's motion to be resentenced under the Drug Law Reform Act of 2004, unanimously affirmed.

There is no basis for disturbing the court's determination that substantial justice dictated denial of resentencing. The court properly concluded that the seriousness of the underlying crime outweighed defendant's efforts at rehabilitation and the other mitigating factors he cited (*see e.g. People v Franco*, 55 AD3d 319, 320, *lv dismissed* 11 NY3d 854 [2008]; *People v Marte*, 44 AD3d 442 [2007], *lv dismissed* 9 NY3d 991 [2007]). The record

does not establish that the denial of resentencing was based on any inappropriate criteria.

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

ENTERED: JUNE 30, 2009



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Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

962 The People of the State of New York, Ind. 1104/95
Respondent,

-against-

Donnell Thomas,
also known as Raymond Rodriguez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John P. Collins, J.), rendered September 6, 2007, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to a term of 4 to 8 years, unanimously affirmed.

Defendant's unpreserved challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The record establishes that defendant knowingly, intelligently, and voluntarily pleaded guilty (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). Defendant pleaded guilty twice in this case, and the second plea differed from the first only to the extent of reducing the degree of the crime for defendant's benefit, thereby

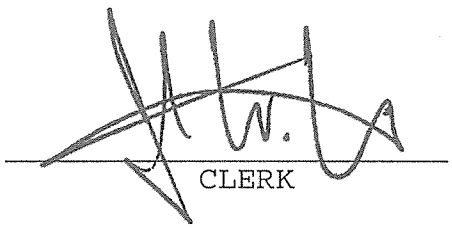
qualifying him for a more lenient sentence than the one to which he had originally agreed. The second plea proceeding validly incorporated by reference the full allocution, including defendant's rights under *Boykin v Alabama* (395 US 238 [1969]), that had been conducted at the first plea proceeding.

Defendant's claim that the court should have conducted an inquiry into the circumstances of his failure to complete a drug program is also unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 30, 2009



CLERK

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

963 The People of the State of New York, Ind. 5997/07
Respondent,

-against-

Bernardo Quiroz,
Defendant-Appellant.

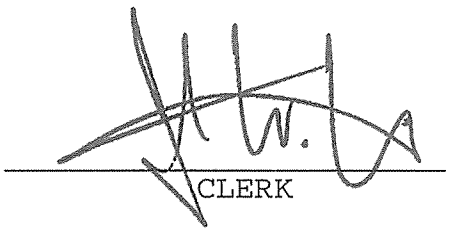
Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about April 29, 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 30, 2009



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

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

964 Mahmoud Mozaffari, Index 300666/08
Petitioner,

-against-

New York State Division of Human Rights,
Respondent,

Patricia Schatz,
Intervenor-Respondent.

- - - - -

New York State Division of Human Rights,
Cross-Petitioner,

-against-

Mahmoud Mozaffari,
Cross-Respondent,

Patricia Schatz,
Intervenor-Cross-Respondent.

The Finkelstein Firm LLP, New York (Robert Finkelstein of counsel), for Mahmoud Mozaffari, petitioner/cross-respondent.

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for NYS Division of Human Rights, respondent/cross-petitioner.

Jeffrey S. Ween & Associates, New York (Hattie F. Ragone and Jeffrey S. Ween of counsel), for Patricia Schatz, intervenor.

Determination of respondent State Division of Human Rights, dated November 27, 2007, which, after a hearing, found that petitioner Mozaffari had discriminated against intervenor Patricia Schatz, a person with a disability, on the basis of her use of a hearing dog and, inter alia, awarded Schatz $10,000 for mental anguish, unanimously modified, on the facts, to reduce said award to $1,000, the petition granted to that extent, the

proceeding, brought pursuant to Executive Law § 298 (transferred to this Court by order of the Supreme Court, Bronx County [Alexander W. Hunter, Jr., J.], entered on or about March 13, 2008), otherwise disposed of by confirming the remainder of the determination, without costs, granting the cross petition for enforcement of the determination as modified, and directing petitioner Mozaffari to comply with the determination as modified.

As the person designated by the Commissioner to issue the final order in this case on her behalf, adjudication counsel was under no obligation to issue a proposed order (*see* 9 NYCRR 465.17[c][3]). DHR issued a modified version of the administrative law judge's recommended order, rejecting some of the ALJ's legal conclusions but relying on the facts found by the ALJ. Nor did adjudication counsel participate in "ex parte" communications. He wrote to Schatz's counsel, with notice to petitioner Mozaffari's counsel, requesting additional information regarding attorney's fees, specifically limiting submissions to this issue, and affording petitioner's counsel the opportunity to make objections.

The Commissioner's findings that Schatz was disabled within the meaning of Executive Law § 292(21) and that petitioner Mozaffari failed to provide the reasonable accommodation she requested to afford her an equal opportunity to use and enjoy her

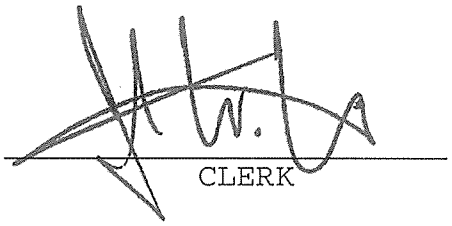
apartment (*see* Executive Law § 296[18][2]) are "supported by sufficient evidence on the record considered as a whole" and are therefore "conclusive" (Executive Law § 298; *see City of Schenectady v State Div. of Human Rights*, 37 NY2d 421, 424 [1975]). Contrary to petitioner Mozaffari's argument that Schatz did not adequately inform him of or document her need for a hearing dog, by letter dated August 18, 2005, Schatz's attorney informed petitioner that Schatz was suffering from a hearing disability and that she needed a service animal at her apartment in connection with that disability. Attached to the attorney's letter was a letter dated February 22, 2005 from an otologist stating, based upon his examination of Schatz, that she had bilateral hearing loss and would benefit from a hearing dog.

We find that the evidence of severity and duration of Schatz's distress is sufficient to support an award only to the extent indicated, and we modify the determination accordingly (*see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 217 [1991]).

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

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

ENTERED: JUNE 30, 2009



CLERK

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

965 Jadida Romero, an Infant by mother and natural Guardian Aixa Canales, etc. et al., Plaintiffs-Appellants, Index 16624/97

-against-

Jametta Smith, et al., Defendants,

The Motor Vehicle Accident Indemnification Corporation, et al., Non-Party Respondents.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond Schwartzberg of counsel), for appellants.

Kornfeld, Rew, Newman & Simeone, Suffern (Scott A. Dow of counsel), for respondents.

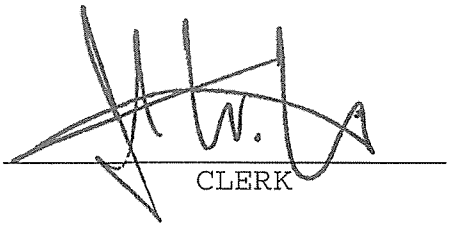
Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered February 15, 2008, which, in an action for personal injuries sustained in a car accident, denied plaintiffs' motion seeking, inter alia, to vacate an allegedly incorrect notation on the court's Web site indicating that this action was disposed of and settled at trial on September 10, 2001, to reargue and/or renew a prior order, same court (Joseph N. Giamboi, J.), entered November 20, 2001, which shows no disposition on a prior motion by plaintiffs to hold an insurance carrier in contempt for failing to appear at a framed issued hearing, and for related relief permitting the action to proceed to the inquest that was directed in an order, same court (Gerald Esposito, J.), entered

November 19, 1999, granting plaintiffs a default judgment, unanimously affirmed, without costs.

The relief requested should be denied because, as the motion court stated, plaintiffs fail to offer an "appropriate excuse for the enormous delay herein." As a result of the delay, the Motor Vehicle Accident and Indemnification Corporation, which plaintiffs claim is obligated to defend and indemnify the defaulting defendants, is presently unable to locate insurance records pertaining to this 1995 accident, having destroyed all of its records pertaining to this matter pursuant to an office policy to destroy files six years after they have been closed, and has been otherwise prejudiced (*see Matter of Linker*, 23 AD3d 186, 189-190 [2005]; *see also Matter of Vickery v Saugerties*, 106 AD2d 721, 723 [1984], *affd* 64 NY2d 1161 [1985]).

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

ENTERED: JUNE 30, 2009



CLERK

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

967 The People of the State of New York, Ind. 3030/03
Respondent,

-against-

Felix Moret,
Defendant-Appellant.

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

Felix Moret, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered May 18, 2005, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously affirmed.

Defendant's challenge to a phrase in the court's charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The query "who speaks the truth," a part of an old pattern charge that was superseded by the Criminal Jury Instructions, should be avoided (*see e.g. People v Pippin*, 67 AD2d 413, 418 [1979]). However, viewing the main and supplemental charges as a whole, we find no reasonable possibility the jury could have misunderstood this language as reducing the People's burden of proof, shifting that burden, or

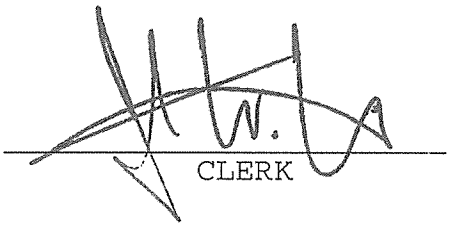
commenting adversely on defendant's failure to testify.

We perceive no basis for reducing the sentence.

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

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

ENTERED: JUNE 30, 2009



Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

968 Priscilla Rodriquez, Index 14159/05
Plaintiff-Appellant,

-against-

Angela Chapman-Perry, et al.,
Defendants-Appellants,

Gustavo DeLeon, et al.,
Defendants-Respondents.

Paul Ajlouny & Associates, P.C., Garden City (Neil Flynn of counsel), for Priscilla Rodriquez, appellant.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Dennis J. Monaco of counsel), for Perry, appellants.

Boeggeman, George & Corde, P.C., White Plains (Daniel E. O'Neill of counsel), for Gustavo Deleon, respondent.

White, Quinlan & Staley, LLP, Garden City (Eileen Farrell of counsel), for Emanuel Salazar, respondent.

Appeal from decision, Supreme Court, Bronx County (John A. Barone, J.), entered May 19, 2008, which, in an action for personal injuries resulting from a multi-vehicle accident, granted the motions of defendants-respondents for summary judgment dismissing the complaint and all cross claims as against them, unanimously dismissed, without costs, as taken from a nonappealable paper.

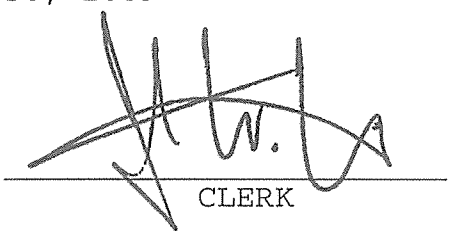
Since the record does not contain the settled order that the motion court directed to implement its decision to dismiss the complaint as to respondents, the issues regarding the finding that respondents are entitled to summary judgment are not

properly before this Court. No appeal lies from a decision (*see* CPLR 5512[a]; Gunn v Palmieri, 86 NY2d 830 [1995]), or from an appealed paper directing the settlement of an order (*see Murray Hill Manor Co. v Destination Paradise*, 266 AD2d 132 [1999]).

Were we to deem the appeal properly taken from a duly entered appealable order or judgment, we would uphold the grant of summary judgment to respondents. There is no evidence that either respondent contributed to the happening of the accident (*see Gonzalez v City of New York*, 295 AD2d 122 [2002]).

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

ENTERED: JUNE 30, 2009



CLERK

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

969 The People of the State of New York, Ind. 3810/06
Respondent,

-against-

Cary Hubert, also known as Hubert Cary,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered on or about April 13, 2007, unanimously affirmed.

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

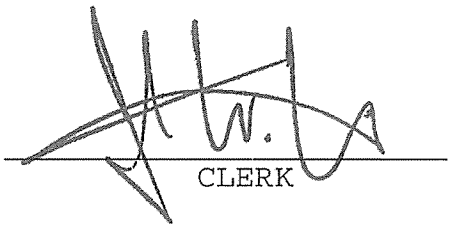
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: JUNE 30, 2009



CLERK

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

970 Digital Broadcast Corporation, Index 117041/05
Plaintiff-Appellant,

-against-

Ladenburg, Thalmann & Co., Inc., et al.,
Defendants-Respondents,

Silverman, Collura & Chernis, P.C., et al.,
Defendants.

Sheldon H. Gopstein, New York, for appellant.

Arkin Kaplan Rice LLP, New York (Sean R. O'Brien of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered December 26, 2008, which denied plaintiff's motion for partial summary judgment on its cause of action for breach of contract and for summary judgment dismissing the fourth affirmative defense and the counterclaim, and granted the Ladenburg and Intrater defendants' motion for summary judgment dismissing the complaint against them, unanimously affirmed, with costs.

The breach of contract claim was properly dismissed because there was no objective criteria against which the Ladenburg and Intrater defendants' efforts could be measured (*Timberline Dev. v Kronman*, 263 AD2d 175, 178 [2000]). Furthermore, these defendants' efforts to market the securities only to institutional investors are protected as an exercise of good-

faith business judgment (see *In re Chateaugay Corp.*, 186 BR 561, 594 [SD NY 1995]). In any event, the claim was properly dismissed because the agreement provided that defendants shall have no liability except for losses resulting from gross negligence or willful misconduct, neither of which occurred.

Plaintiff is also unable to show any evidence of damages caused by defendants' failure to terminate the agreement in writing. Specifically, it has not been demonstrated plaintiff would have behaved differently had it been sent a written termination notice.

Even if plaintiff could demonstrate it had a viable claim for breach of contract, it could not demonstrate it suffered any damages as a result of the breach. This is because it could not clear the initial hurdle of demonstrating "that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made" (*Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]; *see also Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178 [2007], *lv dismissed* 9 NY3d 1025 [2007]). Furthermore, the parties' agreement contains no mention of consequential damages.

Moreover, since plaintiff was a "development stage" company and had never generated any revenue, it could not meet the stricter standard for the award of lost profits it seeks because "there does not exist a reasonable basis of experience upon which

to estimate lost profits with the requisite degree of reasonable certainty" (*Kenford*, 67 NY2d at 261).

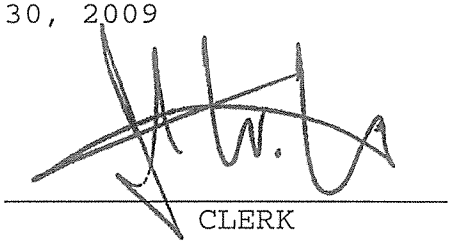
The court properly dismissed the fraud and breach of fiduciary duty claims, which were premised on the same ground. Indeed, the record evidence demonstrates that plaintiff did not cease its own efforts to raise money in reliance on defendants' purported statements. Furthermore, the expenditures plaintiff allegedly made in reliance on the statements were actually made by its subsidiary, a nonparty to the action, and plaintiff lacks standing to sue for injury to its subsidiary, absent a showing of complete dominion and control (*see Alexander & Alexander of N.Y. v Fritzen*, 114 AD2d 814 [1985], *affd* 68 NY2d 968 [1986]).

The court properly refused to grant summary judgment to plaintiff dismissing the counterclaim. Indeed, as the court found and as plaintiff concedes, the parties' agreement was ambiguous, leaving a triable issue of fact as to whether they intended the agreement to cover any and all sales of securities during the term of the agreement (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [2008]).

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 30, 2009



CLERK

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

971 The People of the State of New York, Ind. 5737/99
Respondent,

-against-

Jose Carrion,
Defendant-Appellant.

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

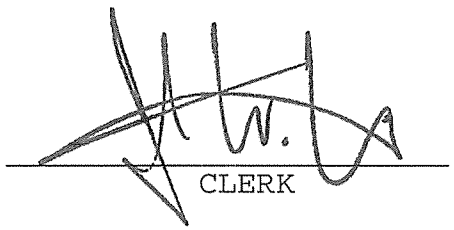
Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J. at plea; Michael R. Ambrecht, J. at sentence), rendered November 3, 2006, convicting defendant of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4 to 8 years, unanimously reversed, as a matter of discretion in the interest of justice, and the indictment dismissed.

Under the unique circumstances of this case, we dismiss the indictment in the interest of justice.

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

ENTERED: JUNE 30, 2009



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Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

972 Balla Tounkara,
Plaintiff,

Index 21870/04
84411/05

-against-

Anthony Fernicola, et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

Canadian Arctic Builders Corp.,
Third-Party Defendant-Respondent.

Shaub Ahmuty Citrin & Spratt LLP, Lake Success (Robert M. Ortiz of counsel), for appellants.

Gates & Goldstein, LLP, Garden City (Kim Goldstein of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 30, 2008, which, in an action under the Labor Law for personal injuries, and a third-party action by defendants project owner and general contractor (collectively AMF) against plaintiff's purported employer (Canadian Arctic), granted Canadian Arctic's motion to reargue its prior motion to dismiss the third-party complaint on the ground of collateral estoppel, and, upon reargument, vacated the prior order denying Canadian Arctic's motion to dismiss the third-party complaint and granted the motion, unanimously reversed, on the law, without costs, the motion to reargue denied and the third-party complaint reinstated.

A workers' compensation board judge determined that at the time of the accident, plaintiff was employed not by Canadian Arctic but by nonparty Mt. Moriah. The motion court initially decided that this administrative determination had no collateral estoppel effect on AMF's contractual indemnity claim against Canadian Arctic, and denied Canadian Arctic's motion to dismiss. Subsequently, Canadian Arctic moved to reargue on the ground that the court overlooked evidence, first submitted in its reply papers on its motion to dismiss, of another court's decision to give collateral estoppel effect, in favor of Canadian Arctic and against AMF, to another workers' compensation judge's determination that another worker (Hamilton), who had been injured at the same job site one day after plaintiff's accident, was employed by Mt. Moriah, not Canadian Arctic. The motion court granted reargument, vacated its prior decision, gave collateral estoppel effect to the compensation judge's determination that plaintiff was not employed by Canadian Arctic, and dismissed AMF's third-party complaint against Canadian Arctic.

Canadian Arctic's motion for reargument did not establish that the court overlooked or misapprehended any issue of law or fact that was properly raised in its original motion, and was improperly based on argument that Canadian Arctic had improperly raised for the first time in its reply papers on the original

motion (see *Yasgour v City of New York*, 169 AD2d 673, 674 [1991]; *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626 [1995]). Accordingly, we reverse the granting of reargument.

In any event, were we to consider all of the Canadian Arctic's arguments raised in its reargument motion, we would conclude that the motion court's initial decision was correct. Canadian Arctic failed to establish an identity of issues between the compensation proceeding, which involved whether Canadian Arctic was plaintiff's employer for purposes of workers' compensation coverage, and the instant third-party action, which involves whether Canadian Arctic was plaintiff's employer for purposes of the indemnification provision in the construction subcontract between AMF and Canadian Arctic, and raises many issues, not raised in the compensation proceeding, bearing on the relationship between Canadian Arctic and Mt. Moriah, and on the course of dealing between Mt. Moriah, Canadian Arctic and AMF (*see O'Gorman v Journal News Westchester*, 2 AD3d 815, 817 [2003]). Nor did AMF have a full and fair opportunity to litigate the issue of Canadian Arctic's employer status in the compensation proceeding, where it was not a party to the compensation proceeding and had no direct stake in its outcome except for its potential collateral estoppel effect on this case (*see Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 154-155 [1988]; *Liss v Trans Auto Sys.*, 68 NY2d 15 [1986]), and

where the determination that plaintiff was not employed by Canadian Arctic rested on the unchallenged testimony of Canadian Arctic's owner (*see generally Jeffreys v Griffin*, 1 NY3d 34, 41 [2003]). That AMF testified as a nonparty in the Hamilton compensation proceeding does not require a different result (*see Liss*, 68 NY2d at 22).

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

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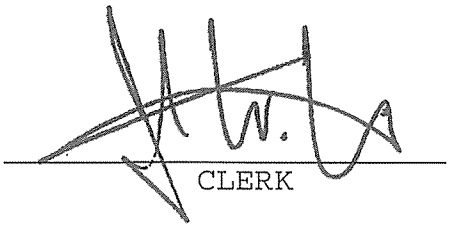


Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

973 The People of the State of New York, Ind. 38890C/05
Respondent,

-against-

Alfredo Perez,
Defendant-Appellant.

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

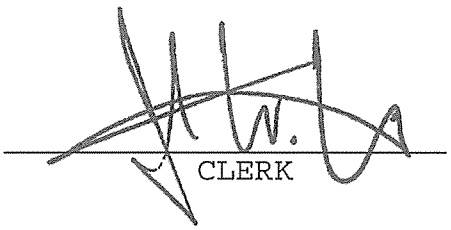
Robert T. Johnson, District Attorney, Bronx (Maureen A. Lee of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about December 18, 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 30, 2009



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

Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

974N Terry Winters, Index 106538/08
Plaintiff-Respondent,

-against-

J. Patrick Dowdall, et al.,
Defendants-Appellants,

Jay H. Litzman, et al.,
Defendants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Brett A. Scher of counsel), for appellants.

Massoud & Pashkoff, LLP, New York (Lisa Pashkoff of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered January 28, 2009, which, to the extent appealed from, denied the motion of J. Patrick Dowdall, Esq. and Dowdall & Associates, P.C. (the Dowdall defendants) to dismiss plaintiff's claim of legal malpractice against them pursuant to CPLR 3211(a)(1),(4) and (7), unanimously affirmed, without costs.

Plaintiff alleges that he retained the Dowdall defendants, purported experts in the field, to provide legal services in connection with the sale of plaintiff's real estate in accordance with Section 1031 of the Internal Revenue Code (26 USC § 1031) (exchange transactions). The complaint alleges that the legal services which the Dowdall defendants undertook to provide plaintiff "included, but were not limited to: advising him with respect to the proposed Section 1031 exchange; advising him in

connection with the selection of a qualified intermediary for the exchange; coordinating with other professionals in connection with the transaction; and otherwise providing services with respect to facilitating the sale as a Section 1031 exchange." The complaint further alleges that the Dowdall defendants failed to properly investigate Atlantic Exchange Company (AEC) prior to selecting it to act as the qualified intermediary in the exchange transaction; failed to ensure that AEC was adequately bonded prior to selecting it as the qualified intermediary; and failed to ensure that the plaintiff's exchange funds were deposited into an account for plaintiff's sole benefit as required by the exchange agreement; and that these failures were the proximate cause of plaintiff incurring damages in the amount of $604,919.73.

Accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference *(see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), plaintiff has pleaded a cause of action against the Dowdall defendants for legal malpractice (*see McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]; *cf. Bazinet v Kluge*, 14 AD3d 324 [2005]). The subsequent theft of plaintiff's exchange funds by AEC and Edward Hugh Okun, AEC's sole member, did not relieve the Dowdall defendants from the consequences of

their own initial negligence (*see Garten v Shearman & Sterling LLP*, 52 AD3d 207 [2008]).

Further, the Dowdall defendants cannot seek dismissal under CPLR 3211(a)(4) as none of the parties to this action are the same parties to the AEC bankruptcy proceeding (*see Allied Props. v 236 Cannon Realty LLC*, 3 AD3d 318, 319 [2004]). Finally, the automatic stay provision only applies to those proceedings which would involve the debtor AEC, or its parent 1031 Tax Group LLC, neither of which is a party to this action (*see* 11 USC § 362(a); *Teachers Ins. & Annuity Assn. of America v Butler*, 803 F2d 61, 65 [2d Cir 1986]).

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

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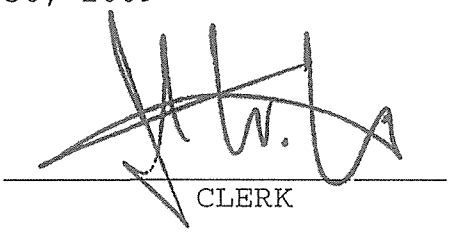

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JUN 30 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick, JJ.

201
Index 108530/08

x

In re 25-24 Café Concerto Ltd.,
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

x

In this Article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Walter B. Tolub, J.], entered September 5, 2008), the petition challenges the determination of respondent New York State Liquor Authority, dated May 20, 2008, which, upon a finding that petitioner violated Alcoholic Beverage Control Law § 65(1) and State Liquor Authority Rule 54.2 (9 NYCRR 48.2), imposed a civil penalty.

Mehler & Buscemi, New York (Martin P. Mehler of counsel), for petitioner.

Thomas J. Donohue, New York (Scott A. Weiner of counsel), for respondent.

CATTERSON, J.

On the evening of January 15, 2006, in response to a complaint about underage drinking, a group of New York City police officers arrived on the petitioner's premises, a nightclub located in Astoria, Queens. Subsequently, four charges were brought against the petitioner by the New York State Liquor Authority (hereinafter referred to as the "SLA"): (1) allowing the sale of alcohol to an underage person or persons on January 15, 2006 in violation of section 65(1) of the Alcoholic Beverage Control Law (hereinafter referred to as the "ABC Law"); (2) failure to exercise adequate supervision over the conduct of the licensed business in violation of rules 54.2 (9 NYCRR 48.2) and 36.1(f) (9 NYCRR 53.1(f)) of the Rules of the SLA; (3) suffering or permitting the premises to become disorderly in violation of section 106(6) of the ABC Law; and (4) allowing the premises to become disorderly by suffering or permitting an altercation to occur on the licensed premises in violation of ABC Law 106(6).

In support of the charges, the SLA submitted copies of summonses issued by Officer Chowdhury to two individuals at the premises, for "possession of alcohol by minor" and "consumption of alcohol by minor." These summonses list the birth dates of two individuals and indicate that both were under 21 years of age on the date the summonses were issued. The SLA also submitted

six summonses issued by Officer Chowdhury to a bartender at the club, which stated that the bartender had violated section 65(1) of the ABC Law insofar as he sold (or permitted to be sold) alcohol to minors.

A hearing was held before an administrative law judge on October 5, 2007. At the hearing, Officer Chowdhury, a member of the 114th precinct's Conditions Unit, testified that on the evening of January 15, 2006, he was assigned to midnight patrol duty. Officer Chowdhury further testified that after he received a call about underage drinking at the petitioner's premises, he immediately went to inspect the premises with a group of other police officers. Upon entering the premises, Officer Chowdhury stated that he "saw a lot of individuals drinking at a bar." He testified that it was his belief that many of the individuals "appeared [...] to be underage."

Approximately five minutes after entering the premises, Officer Chowdhury approached a group of eight individuals drinking out of unmarked containers near the bar. He then asked the group to step away from the bar to a different location "where they could talk." After removing the group to a quieter location outside of the premises, Officer Chowdhury asked the eight individuals to provide him with identification.

Two of the individuals handed him their New York State

driver's licenses. Officer Chowdhury testified that both of the licenses indicated the individuals were under 21 years old. The officer then sniffed the drinks that the two individuals were holding and determined by the smell that they contained alcohol. The officer stated that he recognized the smell of alcohol from his experience as a police officer. He admitted, however, that there is no special training given for identifying alcohol by its smell. Moreover, he could not recall whether he smelled beer, wine or hard liquor.

He then issued each of the two individuals a summons for "possession of alcohol by minor" and a summons for "consumption of alcohol." After issuing the summonses, Officer Chowdhury returned their licenses. He did not make a copy of either of the licenses so the licenses were not before the ALJ.

Officer Chowdhury further testified that the other six individuals did not have any identification, and that he told them to leave the premises because he was *convinced* that "they were underage and drinking." The record is unclear whether Officer Chowdhury sniffed any beverages possessed by these individuals.

After the group of eight individuals dispersed, Officer Chowdhury went back to the bar where he identified the bartender, Halambros Ioannides, as "the person in charge." He then issued

Ioannides six summonses. Each of the summonses stated that Ioannides had violated section 65(1) of the ABC Law insofar as he allegedly sold alcohol to a minor. Officer Chowdhury testified that he issued the summonses to Ioannides "for the six individuals who did not have [identification]." Notably, the officer conceded that, at no point, did he observe Ioannides serve alcohol to anyone while he was inspecting the premises and that he was instructed to write the summonses by his supervising officer.

Ioannides testified that he did not sell alcoholic beverages to any underage individuals on the premises. He explained that the petitioner used a system where only individuals 21 years or older were given wristbands upon entry to the club and that he sold alcohol only to individuals with wristbands. Ioannides also testified that, even if a patron has a wristband, he would decline to serve the individual alcoholic beverages if he or she appeared to be under 21 years of age. It is undisputed that the six summonses that were issued to Ioannides were dismissed in Criminal Court.

One of the petitioner's principals, Nikitas Dallaris, testified that he was present at the club on the night in question. He stated that there were six security officers working that night. Dallaris testified that prospective patrons

are asked for identification at the entrance and that the identification is scanned by a machine. Anyone without identification is prohibited from entry. Those over 21 are issued wristbands and the bartenders are instructed not to sell to anyone without a wristband.

In a report dated October 25, 2007, the ALJ found Officer Chowdhury's testimony credible and sustained charges 1 and 2: that the petitioner sold an alcoholic beverage to a minor, and failed to exercise adequate control of the licensed business. The ALJ stated:

> "[The] [l]icensee permitted the consumption of [alcoholic] beverages, however obtained, by [patrons under the age of 21]. Moreover, [the] [l]icensee's own witness Ioannides admitted in his testimony that the 'wristband' system, the supposed protection against under age drinking at the [l]icensed [p]remises, was not foolproof [...] Moreover, it is undisputed that six (6) individuals, apparently under the age of 21, were unable to produce any form of governmentally issued identification upon [Officer] Chowdhury's request. In sum and substance, contrary to [the petitioner's] contention, the State has not only made a prima facie showing of violation per the [c]harges No. 1 and 2, but has borne its burden of proof in this matter, which [l]icensee has failed to rebut effectively."

Notably, the ALJ determined that there was no evidence to substantiate charge 3: that the petitioner suffered or permitted the premises to become disorderly in violation of section 106(6) of the ABC Law. The ALJ further determined that there was no evidence to sustain charge 4: that the petitioner allowed the

premises to become disorderly by suffering or permitting an altercation to occur on the licensed premises in violation of ABC Law 106(6). The respondent adopted the findings, sustained the charges 1 and 2, and imposed a $7,000 civil penalty on petitioner.

The petitioner then commenced the instant article 78 proceeding alleging that the imposition of the penalty was "arbitrary, capricious, unreasonable, unsupported by substantial evidence, and not based upon a reasonable basis." The petitioner seeks an order annulling the determination of the respondent or in the alternative, modifying the punishment as excessive.

The petitioner contends that the respondent failed to establish a prima facie showing that the sales of alcoholic beverages had in fact been made by the petitioner to any individuals under the age of 21. The respondent argues that Officer Chowdhury's testimony, together with the summonses issued on the night in question, confirmed that the petitioner had permitted the sale of alcoholic beverages to individuals under the age of 21 in violation of section 65(1) of the ABC Law. For the reasons set forth below, we disagree and find that the finding sustaining charges 1 and 2 is not supported by substantial evidence.

We note, at the outset, that it is "an inherent

contradiction" to dismiss a charge that a licensee has "suffered or permitted" the premises to become "disorderly" in violation of section 106(6) of the ABC Law while at the same time find substantial evidence that the premises was allowed to become disorderly under 9 NYCRR 48.2. 47 Ave. B East Inc. v. New York State Liquor Authority, __ A.D.3d __, 2009 NY Slip Op 4014, 4 (1st Dept. 2009). In any event, we conclude that respondent's findings that petitioner sold alcoholic beverages to minors in violation of ABC Law 65(1) and thus failed to exercise adequate supervision over the conduct of the licensed business in violation of 9 NYCRR 48.2 are not supported by substantial evidence.

"Judicial review of the determination made by an administrative agency [...] is limited to a consideration of whether that resolution was supported by substantial evidence upon the whole record". 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 181, 408 N.Y.S.2d 54, 57, 379 N.E.2d 1183, 1186 (1978). Substantial evidence "is less than a preponderance of evidence" and requires only that there be enough "relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 N.Y.2d at 180-81, 408 N.Y.S.2d at 56. Whether evidence is substantial is to be determined in

the light of the record as a whole and involves a weighing of the quality and quantity of the proof. Id., 45 N.Y.2d at 181-82, 408 N.Y.S.2d at 57.

Subdivision 1 of section 65 of the ABC Law states:

> "No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to
>
> "1. Any person, actually or apparently, under the age of twenty-one years"

In a proceeding against a liquor licensee for selling alcoholic beverages to a minor, the burden of proof rests upon the SLA to establish by substantial evidence the age of the alleged minor at the time of the alleged violation. Matter of West 151st St. Liq. Store v. State Liq. Auth., 13 A.D.2d 731, 214 N.Y.S.2d 604 (1st Dept. 1961), aff'd, 11 N.Y.2d 678, 225 N.Y.S.2d 754, 180 N.E.2d 909 (1962) (sale to 14-year-old boy). It must also be shown that the beverage served was alcoholic; but in this connection, courts have noted as a matter of common knowledge that drinks of certain names and description are alcoholic beverages within the meaning of regulatory statutes. People v. Leonard, 8 N.Y.2d 60, 201 N.Y.S.2d 509, 167 N.E.2d 842 (1960).

Likewise, in such a proceeding against a liquor licensee for selling an alcoholic beverage to a minor, there must also be proof of the delivery, or the permitting of delivery, of an

alcoholic beverage to a minor. Matter of Sheibar v. New York State Liq. Auth., 4 A.D.2d 442, 166 N.Y.S.2d 394 (1st Dept. 1957), aff'd, 4 N.Y.2d 984, 177 N.Y.S.2d 505, 152 N.E.2d 528 (1958). "In order to find that the licensee 'caused or permitted' the service or delivery of alcoholic beverages to a minor, the conduct must be 'open, observable and of such nature that its continuance could, by the exercise of reasonable diligence, have been prevented.'" See Matter of Park II Villa Corp. v. New York State Liq. Auth., 141 A.D.2d 646, 647, 529 N.Y.S.2d 370, 371 (2nd Dept. 1988), quoting Matter of 4373 Tavern Corp. v. New York State Liq. Auth., 50 A.D.2d 855, 856, 377 N.Y.S.2d 135, 136 (2nd Dept. 1975).

First, it is not established by substantial evidence that any of the individuals questioned by Officer Chowdhury were actually under the age of 21. Previous decisions by this court establish that the age of an alleged minor must be proven by an official document or by the minor's own testimony. See Matter of New Stratford Rest. v. New York State Liq. Auth., 257 A.D.2d 454, 683 N.Y.S.2d 261 (1st Dept. 1999) (where undercover officer's testimony that his partner, an undercover police cadet, was served an alcoholic beverage by restaurant's bartender without being asked for identification, together with cadet's driver license and police identification card, showing that at time he

was so served the cadet was under 21 years of age, constituted substantial evidence of restaurant's violation of ABC Law § 65(1)); Matter of Sue's Rendezvous of Westchester v. New York State Liq. Auth., 177 A.D.2d 273, 576 N.Y.S.2d 14 (1st Dept. 1991)(finding that licensee had sold alcoholic beverages to underage persons as sufficiently supported by testimony of witnesses that they were under age 21, and that they were served alcoholic beverages by licensee without displaying proof of age).

Here, in support of its burden to establish the age of the alleged minors, the respondent submitted the "face pages" of the summonses issued to the two individuals for "possession" and "consumption" of alcohol by a minor. Scribbled on each of these summonses, apparently by Officer Chowdhury, is a notation of the alleged date of birth of each of the individuals. The respondent also submitted Officer Chowdhury's testimony that he examined each individual's license and determined that the individual was under the age of 21.

However, Officer Chowdhury returned the drivers' licenses to each of the individuals and did not make a copy of either license. In other words, there is nothing in the record, neither an official document nor testimony from the alleged minors themselves, which corroborates the dates of birth scribbled on the summonses.

With respect to the six other individuals alleged to be underage, the only evidence that these individuals were under 21 years old was Officer Chowdhury's testimony that they were "apparently underage." Office Chowdhury's bare assertion that he thought the individuals *looked* underage, without more, does not constitute substantial evidence that the individuals were actually underage.

In any event, we find there is inadequate evidence in the record that any of the beverages possessed by the eight individuals questioned by Officer Chowdhury were alcoholic. Although Officer Chowdhury stated that he "smelled" the drinks in question and that they were alcoholic, he did not taste or conduct any field test of any of the drinks. He did not state the type of beverage he "smelled" nor did he identify a label on the beverage which would indicate that the beverage contained alcohol. The officer could not even identify the beverages in the unmarked containers as beer, wine or hard liquor. Cf. Matter of Midway Mgt. Group v. New York State Liq. Auth., 201 A.D.2d 331, 607 N.Y.S.2d 320 (1st Dept. 1994) (substantial evidence sustained findings of SLA that disco had sold liquor to minors where several underage patrons identified beer they were served by brand name, one testified that she was served beer in a bottle, and several persons testified that underage patrons were

served mixed alcoholic drinks).

Further, it is uncontested that Officer Chowdhury, despite his entries to the contrary on the summonses issued to Ioannides that were affirmed under penalty of perjury, did not see any of the individuals served alcohol by any bartender on the premises.[1] Indeed, the respondent has presented no evidence that anyone connected with the licensed premises was aware of the alleged minors' presence in the premises, or knew, or should have known, that they were in possession of an alcoholic beverage. Indeed, the record does not even disclose whether any of the alleged underage individuals was wearing a "wristband" issued by the premises.

In Matter of Dawson v. New York State Liq. Auth. (226 A.D.2d 876, 876, 640 N.Y.S.2d 656, 657) (3d Dept. 1996)), the Third Department annulled a determination of the SLA for an alleged sale to a minor. The Court stated:

> "In this case, the only direct testimony implicating petitioner was given by a police officer who testified that, while he was outside the premises, he observed two minors drinking from bottles of beer. He was familiar with the two because they had previously been arrested. The officer observed them through a window from a distance of 12 to 15

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[1] Officer Chowdhury signed below the statement, "I personally observed the commission of the offense charged above. False statements made herein are punishable as a Class A Misdemeanor pursuant to Section 210.45 of the Penal Law. Affirmed under penalty of perjury."

> feet. The officer admitted that he only saw the two minors drinking one bottle each and that he observed them for only a 'couple of minutes.' He also testified that the two were standing at a table located approximately 10 feet from the bar which was extremely crowded."

The Court concluded that the evidence was "insufficient to justify the conclusion that petitioner knew, or should have known, of the manner in which the beer was obtained or that the beer obtained was ultimately intended for delivery to the minors for their consumption." Id.; See also Matter of 4373 Tavern Corp v. New York State Liq. Auth., 50 A.D.2d 855, 377 N.Y.S.2d 125 (2nd Dept. 1975), supra (when there is no testimony as to how an alleged minor received an alcoholic beverage, and there is no proof that the licensee knew or should have known of the presence of the minor of the delivery of the alcohol, there is no violation of section 65 of the ABC Law).

If anything, the quantum of proof, in the instant matter, is far less than that rejected by the Third Department in 4373 Tavern Corp. The only direct testimony implicating the petitioner was given by a single police officer. Officer Chowdhury testified that five minutes after entering the premises, he observed "a lot of individuals" that "appeared to [...] be underage" drinking unmarked containers of beverages. Officer Chowdhury further testified he issued six summonses to

the bartender for "selling" alcohol to persons underage. However, Officer Chowdhury admitted that he did not personally observe anyone on the premises sell beverages to any underage individuals.

The respondent relies on Matter of S & R Lake Lounge v. New York State Liq. Auth. (87 N.Y.2d 206, 210, 638 N.Y.S.2d 575, 577, 661 N.E.2d 1355, 1357 (1995)), for the proposition that a charge of violating section 65(1) can be upheld for underage possession of alcoholic beverages, without proof of a direct sale, where "the conduct was open and observable and could have been prevented with reasonable diligence." As a general matter, we agree. However, in S & R Lake Lounge, there was strong circumstantial evidence that the illegal conduct was open and observable: the minor was admitted to the petitioner's premises without showing proof of age, he spent close to one hour inside and was observed walking around with, and drinking from, a beer bottle, he also attempted to bribe the doorman to admit his underage companions while his own proof of age was not checked by the petitioner at that point, and it was the petitioner's policy to serve at least one drink to each new customer as means of covering the cost of entertainment.

In the instant matter, the respondent has simply presented no evidence that the alleged conduct was "open and observable."

There was no evidence concerning the manner in which the alleged minors obtained their drinks, the length of time that they were in possession of the drinks or their proximity to any of the petitioner's employees.

To the contrary, Nikitas Dallaris testified that there were six people working security on the night in question. The security guards were responsible for, among other things, checking identification and ensuring that no one under 21 was drinking an alcoholic beverage. Dallaris further testified that since minors were allowed on the premises, a wristband system was utilized to prevent underage drinking on the premises.

Therefore, because there is inadequate evidence that the petitioner suffered or permitted the sale of alcohol to underage individuals, the underlying basis for both charges, we conclude that neither charge can be sustained.

Accordingly, in this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Walter B. Tolub, J.], entered September 5, 2008), the petition, challenging the determination of respondent New York State Liquor Authority, dated May 20, 2008, which, upon a finding that petitioner violated Alcoholic Beverage Control Law § 65(1) and State Liquor Authority Rule 54.2 (9 NYCRR 48.2),

imposed a $7,000 civil penalty, should be granted and the determination annulled, without costs.

All concur except Tom, J. who dissents in an Opinion.

TOM, J. (dissenting)

Because there is substantial evidence to support respondent's findings that petitioner establishment sold alcoholic beverages to minors in violation of Alcoholic Beverage Control Law § 65(1) and failed to exercise adequate supervision over the conduct of the licensed business in violation of State Liquor Authority Rule 54.2 (9 NYCRR 48.2), I respectfully dissent and would confirm the agency's determination.

The record contains evidence that, on the night in issue, the police department received a call of underage drinking at petitioner's nightclub. The evidence further showed that a group of patrons who appeared to be under 21 years of age were observed at the bar on the licensed premises in possession of beverages in unmarked containers. From the odor, respondent's witness, Police Officer Adnan Chowdhury, determined that the beverages contained alcohol. Two patrons in the group, Paolo Curcio and Michael J. Marcone, produced driver's licenses showing them to be under age 21. Since Officer Chowdhury had observed them drinking the beverages, he issued 2 summonses to each of them for, respectively, the possession and the consumption of alcohol by a minor. Six other persons in the group could not produce valid proof of age and were directed to leave the premises by the

officer, who then issued six summonses to the bartender for selling alcoholic beverages to minors. The officer testified that he observed these six patrons "drinking from glasses of an alcoholic beverage," and stated that it was his customary procedure to ascertain that a patron was consuming alcohol before issuing any summons in connection with its sale.

Petitioner contends, and the majority accepts, that respondent's proof is insubstantial because Officer Chowdhury did not observe anyone actually sell Curcio and Marcone the beverages they had in their possession. As to the six patrons who could not produce identification, petitioner argues that in the absence of any documentation of their respective ages, there is no proof that its bartender sold alcoholic beverages to underage drinkers. Indeed, as the record reflects, the charges against the bartender for serving these individuals were dismissed because Officer Chowdhury failed to appear in Criminal Court.

Petitioner's witnesses testified that the establishment serves both alcoholic and nonalcoholic drinks and therefore admits persons under 21 years of age. Patrons who produce valid identification indicating they are at least 21 are issued wristbands that enable them to purchase alcoholic beverages. Even so, petitioner's bartenders do not serve patrons who appear to be under 21 without first obtaining valid proof of age.

It is settled that an administrative determination must be sustained if it is supported by substantial evidence upon the record as a whole (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]), which requires less than a preponderance of the evidence and may include hearsay testimony and circumstantial evidence (*see generally Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 280-281 [2007]). An administrative law judge is required to assess the credibility of witnesses and draw reasonable inferences, "and the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists" (*id.* at 281).

The summonses issued to Curcio and Marcone establish, at a minimum, that two patrons under the age of 21 were in possession of alcoholic beverages and drinking those beverages on petitioner's premises and, thus, that "the Licensee sold, delivered or gave away, or permitted to be sold, delivered or given away, alcoholic beverages to a person or persons actually under the age of twenty-one years," as preferred in the first administrative charge. The record further supports the conclusion that by permitting the consumption of alcohol by minors to take place, "the Licensee failed to exercise adequate supervision over the conduct of the Licensed business," as

specified in the second charge.

That deficient oversight did not result in the premises becoming disorderly so as to constitute a violation of Alcoholic Beverage Control Law § 106(6) does not serve to obviate petitioner's failure to exercise adequate supervision to prevent the possession and consumption of alcoholic beverages by persons under 21 years of age. Although testimony was received that no person appearing to be less than 21 would be served without producing valid proof of age, six patrons observed drinking alcoholic beverages were ejected by Officer Chowdhury when they were unable to produce any identification, and two persons were issued summonses when the driver's licenses they produced showed them to be underage. Thus, it is evident that the degree of oversight exercised by petitioner was not sufficient to prevent at least two, and apparently as many as eight, underage patrons from obtaining and consuming alcoholic beverages on the premises. Respondent's finding that these persons obtained their drinks as a result of petitioner's failure to exercise adequate supervision over the licensed premises so as to prevent violations of Alcoholic Beverage Control Law § 65(1) is "a conclusion or ultimate fact" that may be reasonably extracted from the record (*300 Gramatan Ave. Assoc.*, 45 NY2d at 180) and thus constitutes sufficient evidence to support the determination. Further,

Nikita Dallaris, one of the owners, testified that if a potential patron does not have an ID, he or she cannot get in. Yet there were six individuals on the premises who had no identification.

Accordingly, respondent's determination should be confirmed and the petition dismissed.

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

ENTERED: JUNE 30, 2009