SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 5, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

463 The People of the State of New York, Respondent, Ind. 4905/06

-against-

Rhondelesia Hernandez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at request for new counsel; Edwin Torres, J. at jury trial and sentence), rendered September 11, 2007, convicting defendant of robbery in the first and second degrees, and sentencing her, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

Since defendant withdrew her request for a new attorney, she waived her present claim that the court should have assigned new counsel. There is no support in the record for her argument that the attorney influenced her to withdraw her motion. In any event, as an alternative holding, we conclude that there is no

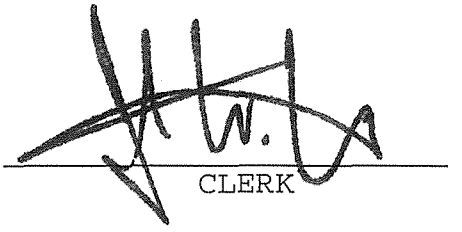
basis for reversal. Defendant concedes that her boilerplate motion did not establish good cause for a substitution, but argues that "an irreconcilable conflict had developed as soon as counsel called his client a liar." However, the conduct of counsel characterized as "calling his client a liar" consisted of the attorney's permissible defense of his own performance (*see People v Nelson*, 7 NY3d 883 [2006]), in which he described defendant's allegations as "inaccurate," "incorrect," and "misleading." Counsel appropriately brought these inaccuracies to the court's attention (*see People v DePallo*, 96 NY2d 437, 441-442 [2001]). Moreover, counsel did not accuse his client of perjury or falsehood, impugn her credibility before a trier of fact (*compare People v Berroa*, 99 NY2d 134 [2002]; *People v Darrett*, 2 AD3d 16 [2003]), or demonstrate any inability to continue providing effective assistance.

Defendant's challenge to the constitutionality of her adjudication as a persistent violent felony offender is not preserved for our review (*People v Rosen*, 96 NY2d 329, *cert denied* 534 US 899 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we conclude that

it is without merit (*see Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Leon*, 10 NY3d 122, 126 [2008], *cert denied* 554 US __, 128 S Ct 2976 [2008]).

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

ENTERED: MAY 5, 2009



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Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

465 In re Vincent Z.,
Petitioner-Appellant,

-against-

Dominique K.,
Respondent-Respondent.

Cohen Lans LLP, New York (Mara T. Thorpe of counsel), for appellant.

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about May 2, 2008, which, to the extent appealed from, granted respondent mother's objections, vacated the modified order of support dated February 13, 2008, and reinstated the prior order of support entered December 19, 2005, unanimously modified, on the law, the facts and in the exercise of discretion, the objections denied, and the modified order of February 13, 2008 reinstated, and otherwise affirmed, without costs.

Parties may agree to dispense with the "unanticipated or unreasonable change in circumstances" standard for modifying a support obligation (*see Colyer v Colyer*, 309 AD2d 9, 15-16 [2003]). Here, the record of the open court proceedings regarding the proposed stipulation of settlement indicates that the parties and the support magistrate intended to give the court broad power to modify the parties' child support obligations once respondent obtained full-time employment as a physician.

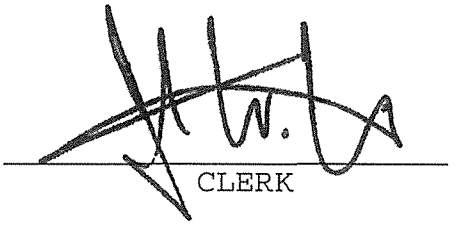
Accordingly, the court improperly granted her objections to the modified order of support and reinstated the prior order on the ground that petitioner father had failed to establish that the stipulation was unfair when entered into, or that respondent's increased earnings were unanticipated and unreasonable (*see generally Corniello v Gavalas*, 264 AD2d 418 [1999]).

Petitioner did not raise this issue before the Family Court, but it was raised before the Support Magistrate and we consider it in the interest of justice. As the Support Magistrate found, respondent's fivefold increase in earnings constituted a substantial change in circumstances warranting a downward modification of petitioner's child support obligations (*see generally Matter of Freedman v Horike*, 29 AD3d 1093, 1094 [2006]).

Petitioner is not, however, entitled to a credit against future child support payments for overpayments he has made by virtue of complying with the Family Court's order (*see Matter of Maksimyadis v Maksimyadis*, 275 AD2d 459, 461 [2000]).

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

ENTERED: MAY 5, 2009



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Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

466 In re John Halpin, Index 116257/07
Petitioner,

-against-

Joel I. Klein, Chancellor,
New York City Department of Education, et al.,
Respondents.

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondents.

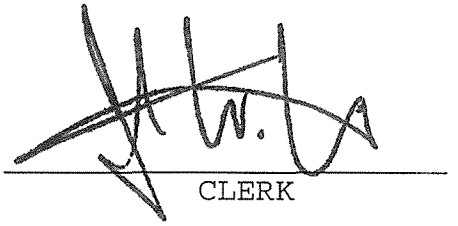
Determination of respondent Chancellor of the New York City Department of Education, dated August 30, 2007, terminating petitioner's employment, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Emily Jane Goodman, J.], entered March 12, 2008) dismissed, without costs.

The determination is supported by substantial evidence in the record (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]) -- including Global Positioning Software records, petitioner's time cards, and eyewitness testimony -- establishing that petitioner left work early on 63 occasions over a four-month period and submitted falsified time cards for his work on those dates. Given these circumstances, the penalty is not excessive

(*see* CPLR 7803[3]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234-236 [1974]).

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

ENTERED: MAY 5, 2009



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Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

467-
467A Lamont Ensley, Index 15468/05
Plaintiff-Appellant,

-against-

Snapper, Inc.,
Defendant-Respondent,

Trim-A-Lawn Equipment,
Defendant.

Segal & Lax, LLP, New York (Patrick Daniel Gatti of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Brian J. Carey of counsel), for respondent.

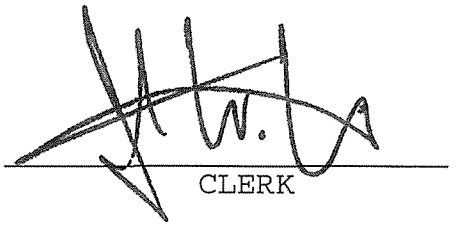
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 3, 2008, which conditionally granted defendant Snapper's motion to preclude plaintiff from offering certain evidence at trial, and order, same court and Justice, entered on or about May 6, 2008, which denied plaintiff's motion to vacate or modify the prior order and precluded the testimony of plaintiff's expert for all purposes, unanimously affirmed, without costs.

Plaintiff failed to comply in a timely fashion with three discovery orders, and failed to offer a reasonable excuse (*see Kihl v Pfeffer*, 94 NY2d 118 [1999]) or set forth the merits of his claim (*see Tejeda v 750 Gerard Props. Corp.*, 272 AD2d 124 [2000]) when moving to vacate the final, conditional order.

Since his counsel was personally present when the earlier order was issued, plaintiff was on notice of it and bound by its provisions (*see Matter of Raes Pharm. v Perales*, 181 AD2d 58, 61-62 [1992]).

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

ENTERED: MAY 5, 2009



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Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

468 Eveready Insurance Company, Index 102623/05
Plaintiff-Appellant,

-against-

Illinois National Insurance Company,
Defendant,

American Home Assurance Company,
Defendant-Respondent.

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

Law Offices of Beth Zaro Green, Brooklyn (William J. Cleary of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered on or about September 26, 2007, which, in a declaratory judgment action between insurers involving the parties' respective obligations to contribute to the settlement of an underlying action, upon the parties' respective motions for summary judgment, declared, inter alia, that plaintiff is a primary insurer and defendant-respondent an excess insurer, and that defendant is not required to contribute in the proportion that the limits of its policy bears to the total of the limits of both its policy and plaintiff's policy, unanimously affirmed, without costs.

The clear and unambiguous "other insurance" clause of defendant's policy limits its policy to "excess" coverage where a covered accident involves a vehicle not owned by its insured,

Dominos Pizza. As it was undisputed that the vehicle involved in the accident belonged to plaintiff's insured, a deliveryman for Dominos Pizza who was making a pizza delivery, defendant is an excess insurer required to contribute to the settlement only after the exhaustion of plaintiff's policy (*Federal Ins. Co. v Ryder Truck Rental*, 189 AD2d 582, *affd* 82 NY2d 909 [1994]). There is no merit to plaintiff's argument that this "excess" provision of the other insurance clause is contradicted and negated by the "proportionate payment" provision of the same clause. The latter, by its terms, only applies to coverage that is "on the same basis," i.e., where the policy is primary and there are other primary policies, the policy will pay pro rata with the other primary policies, and where the policy is excess and there are other excess policies, the policy will pay pro rata with the other excess policies (*General Acc. Fire & Life Assur. Corp. v Piazza*, 4 NY2d 659, 669). Here, plaintiff's policy is primary and defendant's policy is excess.

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

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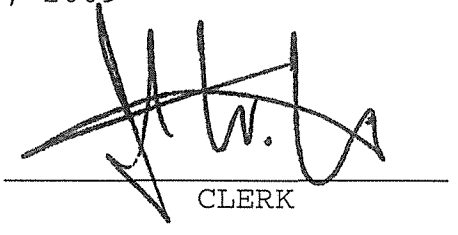

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Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

470-
471 The People of the State of New York, by Andrew M. Cuomo, etc., Plaintiff-Appellant, Index 405326/06

-against-

Wells Fargo Insurance Services, Inc., et al., Defendants-Respondents.

Andrew M. Cuomo, Attorney General, New York (Richard Dearing of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC (Richard Brusca of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 15, 2008, which, inter alia, granted defendants' motion to dismiss plaintiffs' causes of action for breach of fiduciary duty and fraud under Executive Law § 63(12), deemed to be an appeal from judgment, same court and Justice, entered March 17, 2008 (CPLR 5501[c]), dismissing, inter alia, the causes of action, and so considered, said judgment unanimously affirmed, without costs.

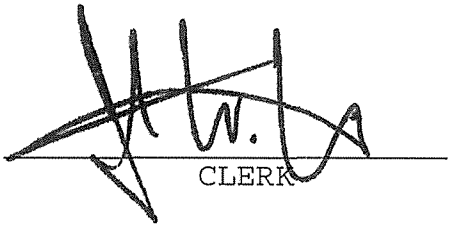
The complaint failed to state a cause of action for breach of fiduciary duty and we decline plaintiff's request that we not follow our decision in *People v Liberty Mut. Ins. Co.* (52 AD3d 378 [2008]), where we held, among other things, that an insurance broker may not be liable to its client for breach of fiduciary duty absent a special relationship, which does not exist here

(*id.* at 380; *see also Loevner v Sullivan & Strauss Agency, Inc.*, 35 AD3d 392, 393 [2006], *lv denied* 8 NY3d 808 [2007]). Nor has plaintiff pleaded a cause of action for breach of fiduciary duty based merely on the existence of contingent commissions (*see Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [2007]).

The motion court also appropriately determined that the complaint failed to state a cause of action for fraud under Executive Law § 63(12) with sufficient particularity (*see e.g. People v Katz*, 84 AD2d 381, 384-385 [1982]). The complaint fails to allege wrongdoing within the meaning of the statute as contingent commissions are not illegal in this State and disclosure of the commissions was not required as of the time of the conduct alleged in the complaint (*see People v Liberty Mut. Ins. Co.*, 52 AD3d at 379; *Hersch*, 43 AD3d at 645). We need not determine whether disclosure is required as a result of a circular letter issued by the Department of Insurance in 2008.

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

ENTERED: MAY 5, 2009



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Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

474 Rita Citrin, Index 602119/07
Plaintiff-Respondent,

-against-

Baratta and Goldstein, et al.,
Defendants-Appellants.

Renda & Associates, P.C., Brooklyn (Sigismondo F. Renda of counsel), for appellants.

Daniel L. Abrams, New York, for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 13, 2008, which denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Following a five-day jury trial in a prior action alleging fraud and conspiracy against plaintiff Citrin and three codefendants, the jury reached a verdict in favor of the plaintiffs and awarded substantial compensatory and punitive damages. A motion by Citrin for judgment notwithstanding the verdict was denied by the trial judge, who noted in his memorandum decision that the verdict had been supported by the evidence and also rejected Citrin's other claims, including conflict of interest based on the fact that the same attorney had represented her and a codefendant. Citrin, through a successor counsel, then settled the matter pursuant to a stipulation, so-ordered by the trial judge, who vacated his prior order "as it pertains to any and all liability against Rita Citrin, directly

and/or indirectly, in law and/or based on equitable claims, including all findings of fact supporting such liability."

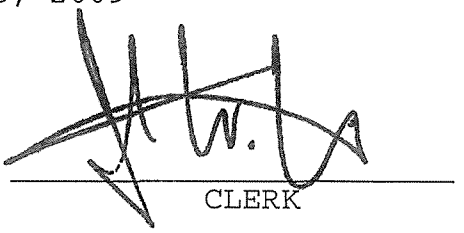
Citrin then commenced the instant action against her trial attorneys for legal malpractice and breach of contract, alleging a conflict of interest in their representation of both her and a codefendant in the prior action. Defendants moved to dismiss on the ground that Citrin was collaterally estopped from making this claim because of the trial judge's post-verdict order and memorandum decision.

The motion court correctly interpreted the trial judge's so-ordered stipulation as having vacated his own post-verdict decision in its entirety as it pertained to Citrin, including any finding with respect to conflict of interest (*see Church v New York State Thruway Auth.*, 16 AD3d 808, 810 [2005]; *Ruben v American & Foreign Ins. Co.*, 185 AD2d 63 [1992]). Furthermore, there was no identity of issues necessarily decided in the prior action, nor a full and fair opportunity to contest the issue of legal conflict of interest as might warrant collateral estoppel (*Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]).

We have considered defendants' remaining arguments and find them without merit.

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

ENTERED: MAY 5, 2009



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Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

476 The People of the State of New York, Ind. 3493/06
Respondent,

-against-

Omar Correa,
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 (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J. at suppression hearing; Edwin Torres, J. at plea and sentence), rendered January 16, 2007, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

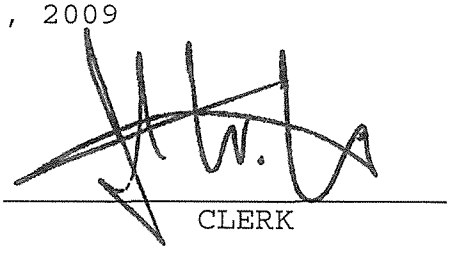
The court properly denied defendant's suppression motion. There is no basis for disturbing the court's well-reasoned and detailed findings of facts and credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The People established, by clear and convincing evidence, that an occupant of the apartment consented to the police entry (*see People v Gonzalez*, 39 NY2d 122 [1976]). The evidence also supported the court's alternative finding that the officers' entry was justified under the emergency doctrine (*see*

People v Mitchell, 39 NY2d 173, 177-178 [1976], *cert denied* 426 US 953 [1976]).

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

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

ENTERED: MAY 5, 2009



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Gonzalez, P.J., Buckley, Catterson, Renwick, JJ.

477 Thomas G. Issing, et al., Index 16265/06
Plaintiffs-Appellants, 590077/08

-against-

Madison Square Garden Center, Inc., et al.,
Defendants,

Madison Square Garden, L.P., etc.,
Defendant-Respondent.

[And a Third-Party Action]

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for appellants.

Tarshis & Hammerman, LLP, New York (Carol R. Finocchio of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered April 11, 2008, which granted defendant Madison Square Garden, L.P.'s (MSG LP) motion to dismiss the complaint as against it, and sua sponte dismissed the complaint as against defendant Madison Square Garden Center, Inc. (MSG Center), unanimously affirmed, without costs.

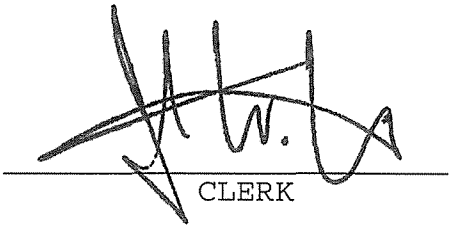
Plaintiff slipped and fell in Madison Square Garden while attending a basketball game and filed a complaint naming MSG Center that was served it on the Secretary of State pursuant to Business Corporation Law § 306. It appears that MSG Center, which once owned and managed the arena where plaintiff fell, is a foreign corporation that has not been authorized to do business in New York State since 1998, and that no attempt to serve MSG

LP, which has owned and managed the arena since 1998, was made until after the three-year statute of limitations had run. Plaintiffs, therefore, rely on the relation-back doctrine (CPLR 203[c]) to argue that the timely service made on MSG Center should be deemed to have been service on MSG LP. Such argument fails because MSG Center was not served pursuant to Business Corporation Law § 307, which sets forth procedures for serving an unauthorized foreign corporation that are jurisdictional and require "strict compliance" (*Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57 [1990]). Since plaintiffs argue that, for statute of limitations purposes, the service made on MSG Center amounted to service on MSG LP, MSG LP can assert defenses that could have been raised by MSG Center had it appeared in the action, and since MSG Center was not properly served pursuant to section 307, timely service cannot be deemed to have been made on MSG LP. In any event, the relation-back doctrine would not avail plaintiff even if MSG Center had been properly served where it does not appear that MSG Center and MSG LP are "united in interest" (*see generally Buran v Coupal*, 87 NY2d 173, 177-178 [1995]), i.e., that they "necessarily have the same defenses to the plaintiff[s'] claim" (*Lord Day & Lord, Barrett, Smith v Broadwell Mgt. Corp.*, 301 AD2d 362, 363 [2003] [internal quotation marks omitted]) -- MSG Center's defense is lack of jurisdiction and MSG LP's defense is the statute of limitations. Moreover, even

if MSG Center were properly served, plaintiffs do not show that MSG Center and MSG LP are the same entity such as might permit correction of a misnomer pursuant to CPLR 305(c) (*see Achtziger v Fuji Copian Corp.*, 299 AD2d 946, 947 [2002], *lv dismissed in part and denied in part* 100 NY2d 548 [2003]).

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

ENTERED: MAY 5, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 5, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
John T. Buckley
James M. Catterson
James M. McGuire
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 6643/06
Respondent,

-against- 478

Jeffery Washington, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about December 13, 2007,

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

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

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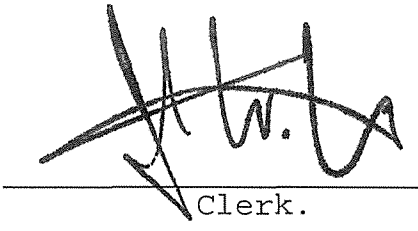


Clerk.

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

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

479 Johanna King Vespe, Index 13962/05
Plaintiff-Appellant, 16843/05

-against-

Ali A. Kazi, et al.,
Defendants,

Luis B. Padilla,
Defendant-Respondent.

[And a Third-Party Action]

Brown & Gropper, LLP, New York (Joshua Gropper of counsel), for appellant.

Russo, Keane & Toner LLP, New York (Brenda R. Hall of counsel), for respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered April 2, 2008, which, insofar as appealed from as limited by the briefs, granted defendant Padilla's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Plaintiff was a passenger in the second vehicle in a four-vehicle accident, in which that second vehicle rear-ended defendant Padilla's lead vehicle, which was stopped in the right lane of a bridge due to a mechanical failure.

"[A] rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the second vehicle" (*Johnson v Phillips*, 261 AD2d 269, 271 [1999]). Here, Padilla established his prima facie entitlement to judgment

as a matter of law, by submitting evidence that he was stopped in the right lane on the bridge, with no other place to go, due to the mechanical failure of his vehicle (*see Mankiewicz v Excellent*, 25 AD3d 591 [2006]; *Macauley v Elrac, Inc.*, 6 AD3d 584 [2004]).

In opposition, plaintiff failed to raise a triable issue of fact; she and co-defendant Kazi (driver of vehicle two) both testified that prior to the accident they observed Padilla's vehicle stopped on the bridge in the right lane approximately 50 feet ahead of them. While plaintiff claims that there is an issue of fact as to whether Padilla had his hazard lights on, such fact is irrelevant in light of the testimony of Kazi and plaintiff that they saw Padilla's vehicle stopped before the accident. Thus, any failure to use hazard lights was not the proximate cause of the accident (*see Barile v Lazzarini*, 222 AD2d 635 [1995]).

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: MAY 5, 2009

CLERK

Gonzalez, P.J., Buckley, Catterson, McGuire, JJ.

481N NYCTL 2004-A Trust, et al., Index 15523/05
Plaintiffs-Respondents,

-against-

Masjid-Al Faysal, etc.,
Defendant-Appellant.
- - - - -
Ron Gilbert,
Non-Party Purchaser-Respondent.

Paul W. Siegert, New York, for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Leonid Krechmer of counsel), for NYCTL 2004-A Trust and The Bank of New York, respondents.

Cuddy & Feder LLP, White Plains (Joshua E. Kimerling of counsel), for Ron Gilbert, respondent.

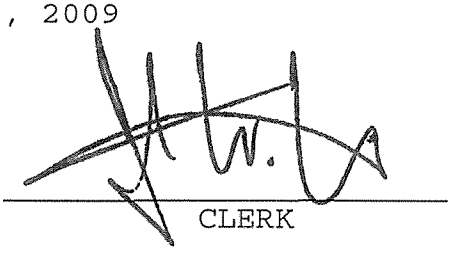
Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered September 19, 2008, which denied defendant Masjid-Al Faysal's motion to vacate the default judgment of foreclosure and sale of its property and to enjoin or annul the delivery of the deed to the purchaser, unanimously reversed, on the law, with costs, the motion granted, and the complaint dismissed for lack of jurisdiction. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiffs failed to properly serve defendant, a corporation (*see* CPLR 311[a][1]; Business Corporation Law § 306[b]; *Gouiran Family Trust v Gouiran*, 40 AD3d 400, 401 [2007] ["CPLR 308(5) provides for special service upon natural persons only"]).

Accordingly, the judgment must be vacated and the action dismissed (CPLR 5105[a][4]; *Security Pac. Natl. Trust (N.Y.) v Chunassamy*, 289 AD2d 151 [2001]; *Resolution Trust Corp. v Beck*, 243 AD2d 307 [1997]).

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

ENTERED: MAY 5, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 5, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
John T. Buckley
James M. Catterson
James M. McGuire
Dianne T. Renwick, Justices.

---

754 Fifth Avenue Associates, L.P.,
Petitioner,

Index 104406/06

-against-

482

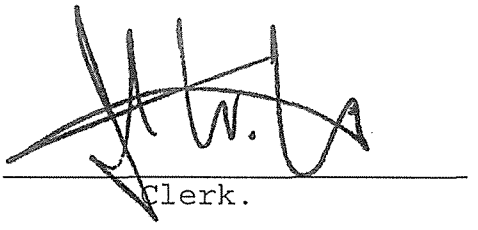
Hon. Emily Jane Goodman, etc., et al.,
Respondents.

An application having been taken to this Court by the above-named petitioner from an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and upon the letter of the petitioner dated April 27, 2009, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same is hereby withdrawn pursuant to the correspondence of the parties hereto.

ENTER:



Clerk.

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

3714 The People of the State of New York, Ind. 5602/02
Respondent,

-against-

Ismael Otero,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered October 6, 2005, convicting defendant, upon his guilty plea, 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.

This matter was previously held in abeyance and remanded for a hearing on defendant's motion to suppress the undercover officer's identification, and to suppress evidence recovered from a jacket found in defendant's vicinity (*see* 51 AD3d 553 [2008].

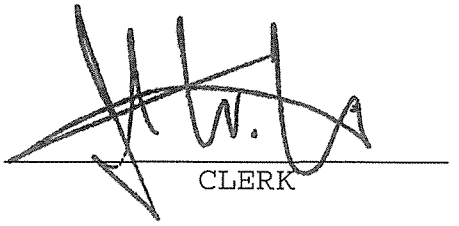
This Court is now in receipt of an order of Justice A. Kirke Bartley, entered November 25, 2008, indicating that defendant failed to appear for a hearing despite the matter being calendared on six different occasions. Furthermore, defense counsel submitted a letter advising that defendant has relocated to Florida and does not intend to return to New York to litigate

the motion, and that defendant has authorized him to withdraw the motion. Accordingly, the motion to suppress was denied as abandoned, and we deem the challenge to it on appeal abandoned as well.

Aside from the challenge to the denial of the suppression motion, the only other issue raised on appeal was the excessiveness of the sentence. Inasmuch as we do not find the sentence to be excessive, the judgment should be affirmed.

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

ENTERED: MAY 5, 2009



CLERK

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

4885 The People of the State of New York, Ind. 6437/99
Respondent,

-against-

William Hogue,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Order, Supreme Court, New York County (Charles H. Solomon J.), entered on or about February 27, 2007, which denied defendant's CPL 440.10 motion to vacate a judgment, same court and Justice, rendered on or about January 25, 2000, and denied his CPL 440.20 motion to set aside his sentence, unanimously modified, on the law, to the extent of vacating defendant's sentence and remanding for resentencing, and otherwise affirmed.

Although defendant's conviction required the imposition of a term of post-release supervision (PRS), the court did not mention PRS during the plea allocution (*see People v Catu*, 4 NY3d 242 [2005]), and failed to impose any term of PRS at sentencing, either orally or otherwise (*see People v Sparber*, 10 NY3d 457 [2008]). However, defendant did not raise any issue relating to PRS on his direct appeal to this Court. Defendant was not entitled to raise, by way of a CPL 440.10 motion, a claim that

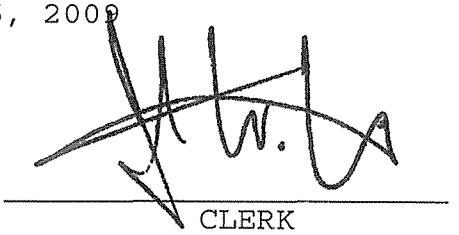
the lack of a warning that his sentence would include PRS rendered the plea involuntary under *Catu*, because "the omission at issue is clear from the face of the record" (*People v Louree*, 8 NY3d 541, 546 [2007]; *see also People v Cooks*, 67 NY2d 100 [1986]; CPL 440.10[2][c]). *People v Hill* (9 NY3d 189 [2007], *cert denied* 553 US __, 128 S Ct 2430 [2008]) is not to the contrary, as the issue there was raised on direct appeal. There was no impediment to defendant raising this issue on his direct appeal, and to the extent he contends the attorney who represented him on that appeal rendered ineffective assistance, that claim would require a coram nobis motion addressed to this Court (*see People v Cuadrado*, 37 AD3d 218, 223 [2007], *affd* 9 NY3d 362 [2007]).

Nevertheless, defendant's sentence is presently unlawful because it does not include a period of PRS.

The Decision and Order of this Court entered herein on December 23, 2008 is hereby recalled and vacated (*see* M-225 decided simultaneously herewith).

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

127 The People of the State of New York, Ind. 4805/05
Respondent,

-against-

Charles Smith,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered June 9, 2006, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of 3 years, unanimously reversed, on the law, and the matter remanded for a new trial.

Although it admirably devoted a great deal of time to considering this very close question, the court should have instructed the jury as to justification. That defense was supported by a reasonable view of the evidence, viewed in the light most favorable to defendant. We note that defendant's contention that there were two separate incidents is extraordinarily unlikely. Nevertheless, it would not have been entirely implausible for the jury to find that there were two separate encounters, that in the second of the two encounters, the complainant bus driver was the aggressor, that defendant's

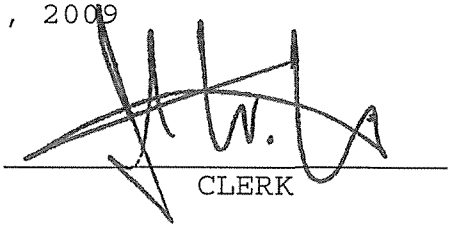
actions in rolling around with the complainant on the ground caused the complainant's injuries, and that defendant's actions were justified. The fact that defendant testified that he did not kick or punch the complainant while they rolled on the ground does not alone preclude a justification instruction, since the evidence, viewed as a whole, supported such an instruction (*see People v Suarez*, 148 AD2d 367, 368-369 [1989]; *People v Ingrassia*, 118 AD2d 587, 588 [1986]). To accept a justification defense, the jury would not have been required to speculate as to a scenario not supported by any testimony.

We note that defendant's conviction cannot stand based solely on the fact that defendant struck the complainant while he was still on the bus. That blow to the face does not appear, on this record, to have resulted in the physical injury required to sustain the People's burden (*see* Penal Law §§ 120.05[11]; 10.00[9]; *see also People v McDowell*, 28 NY2d 373 [1971] [incidental reference to an injury without development of its appearance or seriousness not sufficient to sustain conviction]).

Finally, the identification testimony at issue on this appeal did not require CPL 710.30(1)(b) notice (*see People v Burgos*, 219 AD2d 504 [1995], *lv denied* 86 NY2d 872 [1995]).

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

ENTERED: MAY 5, 2009



CLERK

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

371 Annette Dantzler, Index 18208/06
Plaintiff-Respondent,

-against-

2727 Realty LLC, et al.,
Defendants-Appellants.

Law Office of Margaret G. Klein & Associates, New York (Carol Morell of counsel), for appellants.

William A. Gallina, Bronx (Frank V. Kelly of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered December 3, 2008, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel plaintiff to appear for an independent medical examination by an orthopedic physician and to provide authorizations for medical and related records regarding treatment for a prior injury, unanimously modified, on the facts, to grant the motion to the extent of directing plaintiff to appear for an independent medical examination by an orthopedic physician and to provide authorizations for the release of medical records relating to plaintiff's right knee and leg in the possession of Montefiore Medical Center and the Radiology Department of Montefiore Medical Center, without limitation as to time, and otherwise affirmed, without costs.

When plaintiff, who is suing for an injury to her right

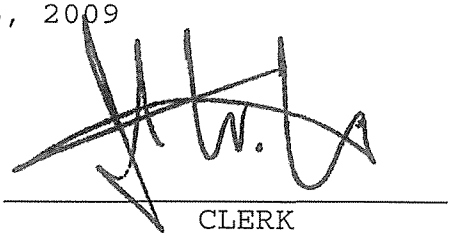
knee, appeared at the correct medical office for an orthopedic independent medical examination (IME), the orthopedist who was supposed to examine her was absent, and she was examined instead by a neurologist, although no neurological injuries are claimed. As it appears from the record that this was the result of a mutual misunderstanding of some kind, defendants should be afforded an additional opportunity to conduct an orthopedic IME, without which their defense would be severely prejudiced.

A prior order of the motion court, dated November 28, 2007, directed plaintiff to provide "HIPAA authorization for Montefiore Hospital *unlimited as to time* for all meds [*sic*] including films and all emergency room records as to treatment for [the right] knee & leg" (emphasis added), as well as "HIPAA authorization for Montefiore Radiology including all meds [*sic*] and films related to right knee & leg," with no time limitation mentioned. The absence of a time limitation is significant, as plaintiff admits to having been treated for an injury to her right knee at some point several years before the subject incident; she apparently does not recall the date or year of the prior injury. Nonetheless, plaintiff provided authorizations directed to Montefiore for the release of records dating back only to March 1, 2000. Plaintiff should provide defendants with authorizations for Montefiore without a time limitation, as required by the November 2007 order, which she has never challenged.

We have considered defendants' remaining contentions and find them without merit.

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

ENTERED: MAY 5, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 5, 2009.

Present - Hon. Peter Tom, Justice Presiding
Richard T. Andrias
David B. Saxe
Karla Moskowitz
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 624/04
Respondent,

-against- 483

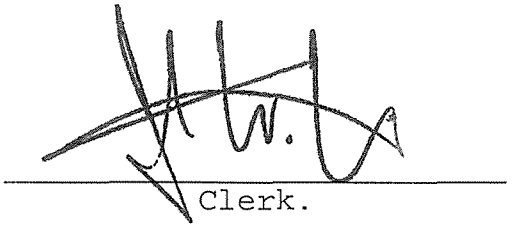
Curtis Nichols,
Defendant-Appellant.

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 October 4, 2005,

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

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

ENTER:



Clerk.

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

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

485 In re Jose F.,
Petitioner-Respondent,

-against-

Rosa R.N.A.,
Respondent.
- - - - -
Lawyers for Children, Inc.,
Appellant.

WolfBlock LLP, New York (Kenneth G. Roberts of counsel), for appellant.

Philip Schiff, New York, for Jose F., respondent.

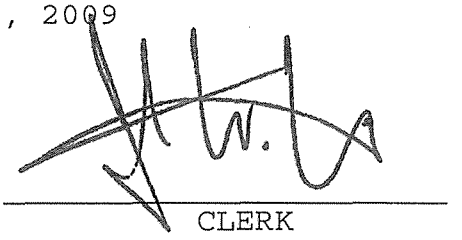
Order, Family Court, New York County (Helen C. Sturm, J.), entered on or about October 25, 2007, which changed custody of the subject child from respondent mother to petitioner-father, unanimously reversed, on the facts, without costs, and the matter remanded to Family Court for further proceedings consistent herewith.

While the decision of the Family Court was pending, and immediately after said decision was rendered, events took place which call into question whether the father has engaged in conduct detrimental to the well-being of the child, and thus, whether it is in the best interests of the child for custody to be changed to the father. Accordingly, this matter is remanded

to Family Court for further proceedings as to these issues.

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

486 The People of the State of New York, Respondent, Ind. 542/03

-against-

Jose Canaan, Defendant-Appellant.

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

Order, Supreme Court, New York County (A. Kirke Bartley, J. at resentence), entered on or about September 18, 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.

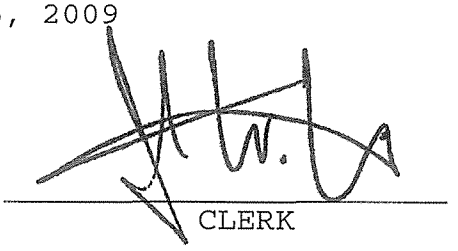
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

487 Joseph Mortenson, Index 112001/06
Plaintiff-Appellant,

-against-

Robert C. Shea, Esq., et al.,
Defendants-Respondents.

Robbins & Associates, P.C., New York (James A. Robbins of counsel), for appellant.

White Fleischner & Fino, LLP, New York (Janet P. Ford of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 1, 2008, which denied plaintiff's motion for summary judgment and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, the cross motion denied, the complaint reinstated, and otherwise affirmed, without costs.

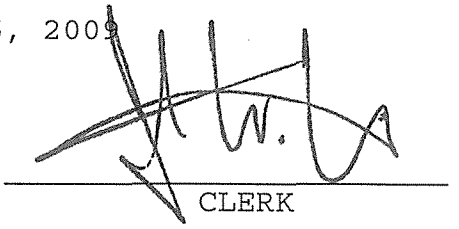
This action was dismissed on the erroneous grounds that the New Jersey defendants were not and could not be retained to actually commence a legal malpractice action against an attorney in New York State, and that the limited services provided by defendant law firm in attempting to settle the underlying claim did not include a duty to advise plaintiff about the applicable New York statute of limitations. A legal malpractice claim may arise out of the giving of faulty advice to a client (*see Scheller v Martabano*, 177 AD2d 690 [1991]). Furthermore, an

attorney may be liable for his ignorance of the rules of practice, his failure to comply with conditions precedent to suit, his neglect to prosecute an action, or his failure to conduct adequate legal research (*see McCoy v Tepper*, 261 AD2d 592 [1999]). Here, the documentary evidence -- in particular, an October 26, 2004 letter agreement -- established plaintiff's authorization for defendants "to proceed with any potential malpractice claim against Melisande Hill as it relates to the October 7, 2000 motor vehicle accident," and defendants apparently continued to pursue such a claim even after allegedly referring plaintiff to New York counsel, thus creating the impression that the underlying malpractice claim remained viable. By virtue of that conduct, defendants had a duty, at a minimum, to expressly advise plaintiff that a limitations period existed, and of the need to contact New York counsel immediately to insure that an action was timely filed (*see id.*). However, a question of fact exists as to whether plaintiff would have succeeded in the underlying action "but for" the attorney's negligence (*Leder v Spiegel*, 9 NY3d 836 [2007], *cert denied sub nom. Spiegel v Rowland*, __ US __, 128 S Ct 1696 [2008]), which warrants the

denial of all summary judgment motions.

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

488-
488A John Galliano, S.A., Index 109292/07
Plaintiff-Respondent,

-against-

Stallion, Inc.,
Defendant-Appellant.

Silverman Sclar Shin & Byrne PLLC, New York (Alan M. Sclar and Mikhail Ratner of counsel), for appellant.

Ellenoff Grossman & Schole LLP, New York (Ted Poretz of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Marylin G. Diamond, J.), entered April 29, 2008, awarding plaintiff, on its motion for summary judgment in lieu of complaint, the aggregate sum of $601,284.52, including interest at 5% prior to October 7, 2004, and 9% thereafter, and order, same court and Justice, entered September 26, 2008, which denied defendant's motion to renew, unanimously modified, on the law and the facts, renewal granted, the rate of interest after October 7, 2004 decreased to 5%, and otherwise affirmed, without costs.

The motion court should have granted renewal to consider the affidavit of Fran Cannara because the allegation that Cannara had accepted service of process voluntarily and told the process server she was authorized to accept service was only first raised in plaintiff's reply papers on its summary judgment motion (*see e.g. Welch v Scheinfeld*, 21 AD3d 802, 808 [2005]), and the

court's rules did not permit defendant to submit a sur-reply.

Renewal should also have been granted in the interest of justice (*see generally Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460 [2007]) to consider the documents that defendant obtained from the Department of Justice via a Freedom of Information request. In its opposition to plaintiff's summary judgment motion, defendant submitted printouts from the web site of the Hague Conference on Private International Law. While the court's rejection of the printouts was not sua sponte, defendant may very well have been surprised by such rejection, as other courts have relied on the Hague web site (*see e.g. Casa de Cambio Delgado v Casa de Cambio Puebla, S.A. de C.V.*, 196 Misc 2d 1, 6 [2003]; *Saysavanh v Saysavanh*, 145 P3d 1166, 1170 [2006]).

Even after considering the materials defendant submitted on renewal, we conclude that summary judgment was properly granted to plaintiff. It is true that CPLR 5304(a)(2) declares a foreign country judgment to be not conclusive if the foreign court never had personal jurisdiction over the defendant. However, CPLR 5305(a)(3) states that a foreign country judgment should not be refused recognition for lack of personal jurisdiction if "the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved." Prior to commencement of the French proceedings, defendant entered into a contract in which it

agreed that all disputes would be submitted to a French court, effectively establishing personal jurisdiction under CPLR 5305(a)(3) (*Dynamic Cassette Intl. Ltd. v Mike Lopez & Assoc.*, 923 F Supp 8, 11 [ED NY 1996]).

Defendant received notice of the French action; its service by personal delivery is unlikely to give rise to any objections based on due process (*see Burda Media, Inc. v Viertel*, 417 F3d 292, 303 [2d Cir 2005]).

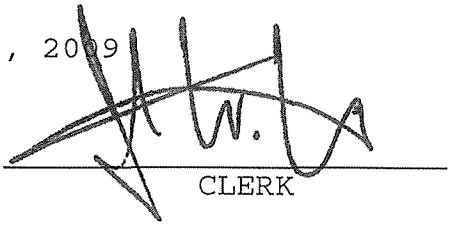
Contrary to defendant's claim, New York's public policy favoring resolution of disputes on the merits does not preclude enforcement of a foreign default judgment (*see Westland Garden State Plaza, L.P. v Ezat, Inc.*, 25 AD3d 516 [2006]).

Normally, plaintiff would be entitled to interest at the New York rate of 9% from October 7, 2004, the date of the French judgment (*see e.g. Wells Fargo & Co. v Davis*, 105 NY 670 [1887]). However, in its papers, plaintiff requested interest at only 5% (the French rate) from the date of the French judgment until the date of the New York award. Therefore, it waived its right to a higher interest rate for the period prior to that award (*see Goldbard v Empire State Mut. Ins. Co.*, 156 NYS2d 324, 329 [1956],

mod on other grounds 164 NYS2d 294 [App Term 1957], *mod* 5 AD2d 230 [1958]).

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

ENTERED: MAY 5, 2009



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Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

489 Lorraine K. Sullivan, et al., Index 14817/97
Plaintiffs-Respondents, 83148/02
83573/02
-against- 83911/04
83976/04
FC Bruckner Associates, L.P., sued herein 86024/07
as Bruckner Plaza Associates, L.P., et al.,
Defendants-Appellants.

- - - - -

FC Bruckner Associates, L.P., etc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

MCG Architects, also known as
McClellan, Cruz, Gaylord & Associates,
Third-Party Defendant-Appellant.

- - - - -

FC Bruckner Associates, L.P., etc., et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

York Hunter of New York, Inc.,
Second Third-Party Defendant-
Appellant-Respondent.

- - - - -

MCG Architects, also known as
McClellan, Cruz, Gaylord & Associates,
Third Third-Party Plaintiff-Respondent,

-against

McHenry & Associates, Inc.,
Third Third-Party Defendant-Appellant.

[And a Fourth-Party Action]

FC Bruckner Associates, L.P., etc., et al.,
Fifth Third-Party Plaintiffs-Respondents,

-against-

R & L Construction Management Corp.,
Fifth Third-Party Defendant-
Appellant-Respondent.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for FC Bruckner Associates, L.P. and First New York Management, Inc., appellants/respondents.

Gogick, Byrne & O'Neill, LLP, New York (Stephen P. Schreckinger of counsel), for MCG Architects, appellant/respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Michelle L. Meiselman of counsel), for York Hunter of New York, Inc., appellant-respondent.

L'Abate, Balkan, Colavita & Contini, L.L.P., Garden City (Martin A. Schwartzberg of counsel), for McHenry & Associates, Inc., appellant.

Carroll, McNulty & Kull, LLC, New York (Robert Seigal of counsel), for R & L Construction Management Corp., appellant-respondent.

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for Sullivan respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about October 31, 2008, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint, second third-party defendant York Hunter of New York, Inc.'s motion for summary judgment dismissing the complaint or, in the alternative, dismissing the second third-party complaint and all cross claims as against it, and fifth third-party defendant R & L Construction Management Corp.'s motion for summary judgment dismissing defendants' claims against it for indemnification and contribution, unanimously modified, on the law, to grant R&L's motion in its entirety, and otherwise affirmed, without costs. The Clerk is directed to enter judgment

accordingly. The caption is amended to substitute FC Bruckner Associates, LP and First New York Management, Inc. as defendants and third party plaintiffs.

After shopping at a store in defendants' newly constructed shopping center, at about 9 o'clock on a December night, plaintiff fell when she did not see the curb at the edge of the platform outside the store. The platform was the same color and texture as the concrete surface of the parking deck. The record indicates that lighting and paint demarcations required by plans for the shopping center had yet to be installed. Plaintiff's expert opined that the conditions were dangerous and traplike and that the failure to properly mark and illuminate the transition was a proximate cause of plaintiff's injury. Third-party defendant York Hunter's expert opined that the platform and parking deck complied with all applicable building codes and regulations and that it was customary for curbs to be unpainted. A question of fact exists whether the condition complained of was

inherently dangerous (*see Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1988]; *O'Neil v Port Auth. of N.Y. & N.J.*, 111 AD2d 375 [1985]; *Alger v CVS Mack Drug of N.Y., LLC*, 39 AD3d 928, 930 [2007]).

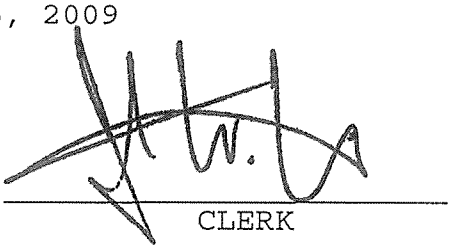
The third-party defendants cannot avoid liability under their indemnification agreements simply because the party named as the owner in those agreements was not named by plaintiff in the summons and complaint. The actual owner accepted service, appeared, and answered, acknowledging that it had been sued herein under a different name. Neither third-party defendant claims prejudice as a result of the error. These circumstances would warrant amendment of the summons and complaint to correct the error (*see Fink v Regent Hotel*, 234 AD2d 39, 41 [1996]), and the caption is hereby so amended.

R & L Construction Management, however, established its entitlement to dismissal of the indemnification and contribution claims against it on the ground that plaintiff's claim does not arise out of its performance or nonperformance of its work under the contract or out of any alleged negligence on its part. Plaintiff's allegations of negligence are based on the failure to

paint or demarcate the curb and the inadequacy of the lighting, which are unrelated to R & L's concrete work on the platform.

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

490-
491 The People of the State of New York, Ind. 7694/02
Respondent,

-against-

John DiMatteo,
Defendant-Appellant.

John Joseph Budnick, North Massapequa, for appellant.

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered May 23, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him, as a second felony drug offender, to a term of 6 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). On a particularly drug-prone block, an experienced officer saw a man come out of a building and walk quickly towards a car driven by defendant, who was the only occupant. Without any exchange of words, the man dropped an unidentified, softball-sized package through the passenger-side window and then ran back into the building as defendant immediately drove away. The officer testified that he recognized

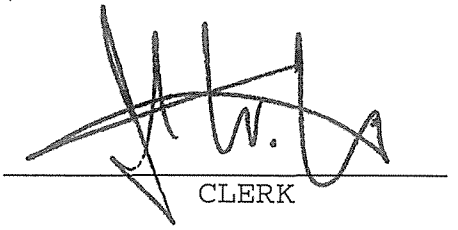
this particular pattern as a method of transferring drugs, and that he had often seen it occur in that neighborhood. This pattern, viewed in light of the officer's expertise, provided probable cause for defendant's arrest (*see People v Valentine*, 17 NY2d 128, 132 [1966]; *People v Ramos*, 11 AD2d 286 [2004], 4 NY3d 766 [2005]), regardless of the type of packaging employed (*see People v Jones*, 90 NY2d 835 [1997]; *People v Schlaich*, 218 AD2d 398 [1996], *lv denied* 88 NY2d 994 [1996]). A combination of factors rendered this conduct inconsistent with an innocuous transaction, including the haste of the participants, the fact that the package was dropped into the car rather than handed to its recipient, and the absence of the slightest greeting, acknowledgment or other conversation.

Since the officer had probable cause to believe that a drug transaction had occurred, he was entitled, under the automobile exception, to conduct a warrantless search of defendant's vehicle including the closed center console (*People v Yancy*, 86 NY2d 239, 245 [1995]). The record also supports the hearing court's alternative finding that the officer had reasonable suspicion on which to stop the car, and a reasonable basis to fear for his safety justifying a limited intrusion into the console, which was

within defendant's reach as he sat in the car (*see People v Grullon*, 44 AD3d 516 [2007], *lv denied* 10 NY3d 756 [2008]).

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

492 Yesenia Narvaez, an infant by her guardian, Ruth Osorio, et al., Plaintiffs-Appellants, Index 25383/98

-against-

New York City Housing Authority, Defendant-Respondent.

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

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered June 17, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Infant plaintiff was allegedly injured when the elevator door closed too quickly, causing her head to be pinched by the closing door. Defendant NYCHA demonstrated its prima facie entitlement to summary judgment as a matter of law by showing there had been no prior complaints about this condition prior to the accident. Evidence established that NYCHA, which serviced the elevator on a regular basis, had recorded no problems with the elevator door closing too quickly (*see Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]).

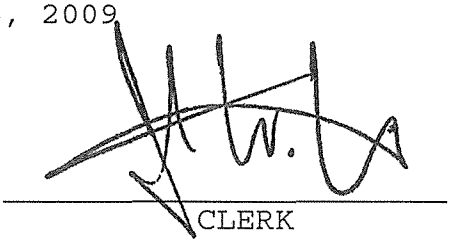
Plaintiffs' opposition papers failed to raise an issue of fact as to the existence of a defect and whether defendant had

actual or constructive notice of it. Plaintiffs failed to submit any expert testimony supporting their contention that the elevator was defective and that such defect caused the accident. Moreover, on this record, plaintiffs' proof of notice was entirely speculative (*see Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337 [2008]). Neither plaintiffs' deposition testimony nor an affidavit by a neighbor sufficiently established that anyone made any complaint to NYCHA or that NYCHA knew of any complaints concerning the elevator doors. Plaintiffs offered insufficient detail as to when and how often the elevator door closed too quickly and made unsubstantiated conclusions that there were prior accidents involving a similar malfunctioning of the door (*see Gjonaj*, 38 AD3d at 385).

The circumstances of this case do not warrant the application of the doctrine of res ipsa loquitur (*see Feblot v New York Times Co.*, 32 NY2d 486, 495 [1973]; *Parris v Port of N.Y. Auth.*, 47 AD3d 460, 461 [2008].

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

493 In re Brandon H.,

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

Leila Darlene H.,
Respondent-Appellant,

Hale House Center, Inc.,
Petitioner-Respondent.

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

Law Office of Alayne Katz, P.C., Irvington (Dana Forster-Navins of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Hal Silverman of counsel), Law Guardian.

Order, Family Court, New York County (Jody Adams, J.), entered on or about August 14, 2007, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed his custody and guardianship to petitioner agency for the purposes of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence that respondent failed to maintain contact or plan for the child's future despite the agency's diligent efforts to encourage and strengthen the parental relationship (*see* Social Services Law § 384-b[7][a]; *see also Matter of Star Leslie W.*, 63 NY2d 136 [1984]). The record shows that the agency explored the

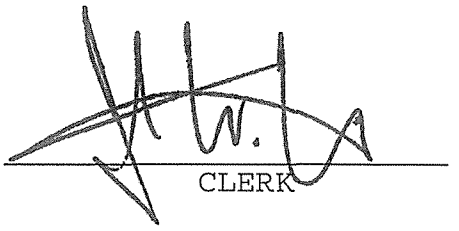
parental resources that were offered, emphasized to respondent the need to stay in contact with the child and to keep the agency informed of her location, located respondent when she failed to tell the agency that she had been transferred to a different correctional facility, and arranged visits between respondent and the child (*see Matter of Sheila G.*, 61 NY2d 368 [1984]).

The evidence at the dispositional hearing was preponderant that the best interests of the child would be served by terminating respondent's parental rights and freeing the child for adoption. Although respondent maintained a regular visitation schedule after the termination petition was filed, the quality of her visits did not improve. She did not focus on the child or interact with him and the child sought out agency staff to play with him. Respondent never lived independently; she had a long history of incarceration, mental illness and aggressive behavior and was not working. Although respondent claimed that she did play with and talk to her son, the court found that she was not credible, and we see no reason to disturb its findings (*see Matter of Gloria Melanie S.*, 47 AD3d 438; see *generally Matter of Trudya J.*, 223 AD2d 470 [1996], *lv denied* 87 NY2d 812 [1996]). In contrast, the pre-adoptive home, where the child had formed a strong bond with the parents, was better suited to address his special needs (*see Matter of Star Leslie W.*, 63 NY2d at 147).

We have considered respondent's other arguments and find them unavailing.

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

494 AIU Insurance Company, Index 107366/03
Plaintiff-Respondent-Appellant,

-against-

Nationwide Mutual Insurance Company,
Defendant-Appellant-Respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for appellant-respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered January 23, 2008, in an action between insurers involving their respective coverage obligations in an underlying action, inter alia, declaring, upon the parties' respective motions for summary judgment, that the parties have an equal obligation to indemnify their mutual insured in the underlying action and that defendant is obligated to reimburse plaintiff for one half of the settlement that plaintiff paid in the underlying action, and awarding plaintiff damages in accordance with such declaration, unanimously reversed, on the law, without costs, the judgment vacated, defendant's motion for summary judgment granted, and it is declared that defendant has no obligation to indemnify the parties' mutual insured or to reimburse plaintiff for one half of the settlement.

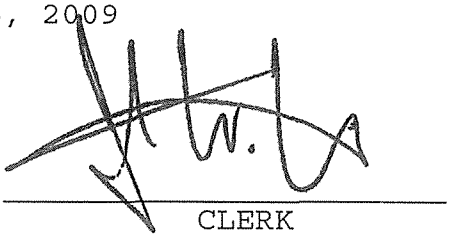
The underlying action giving rise to the coverage claims in

this action involved a fatal accident at a construction site. Under a so-called wrap-up insurance policy, plaintiff insured both the owner of the site and the subcontractor that employed the decedent; defendant also insured the employer under a workers' compensation policy that provided coverage for damages claimed by a "third party as a result of injury to your employee." After the decedent's wife was granted summary judgment against the owner on the issue of liability, plaintiff caused the owner to commence a third-party action against the employer, but plaintiff settled the main action after a trial on damages was held, and the employer was not involved in either the trial or the subsequent settlement. There is no merit to plaintiff's present claim that, because the employer was the only possible active tortfeasor, defendant is obligated to reimburse it for half of the settlement. Although the third-party action did not go forward after the settlement of the main action, the anti-subrogation rule would have required its dismissal, and thus any attempt by plaintiff, after having paid

the settlement, to obtain reimbursement from a co-insurer must fail (*National Cas. Co. v State Ins. Fund*, 227 AD2d 115, 116-117 [1996], *lv denied* 88 NY2d 813 [1996]).

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

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

-against-

Thomas Smith, Defendant-Appellant. Ind. 3435/05

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

Thomas Smith, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered March 9, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously affirmed.

After a suitable inquiry, the court properly exercised its discretion in denying defendant's challenge for cause to a prospective juror whose brother-in-law, like the principal witness in this case, was an undercover narcotics officer. The panelist never said anything that would "cast serious doubt on [his] ability to render an impartial verdict" (*People v Arnold*, 96 NY2d 358, 363 [2001]), and defendant's assertion that the panelist showed a predisposition to credit the testimony of undercover officers in general is contradicted by the record. In

any event, he then gave the court an unequivocal assurance of his impartiality. Given the totality of his responses, the panelist's assurance was not rendered equivocal by his use of the phrases "I believe so" and "I think so" (*see People v Chambers*, 97 NY2d 417, 419 [2002]).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters outside the record concerning counsel's tactical decisions and preparation (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

We perceive no basis for reducing the sentence.

M-1567 ***People v Thomas Smith***

Motion seeking leave to relieve counsel denied.

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

ENTERED: MAY 5, 2009

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

497 Superb General Contracting Co., Index 600744/04
Plaintiff-Appellant,

-against-

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

S.J. Rehab Corp.,
Defendant.

Agovino & Asselta, LLP, Mineola (Robert C. Buff of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for City of New York, respondent.

Landman Corsi Ballaine & Ford P.C., New York (Christopher G. Fretel of counsel), for Amherst Rehab Associates, Inc. and Amherst Development Services Corporation, respondents.

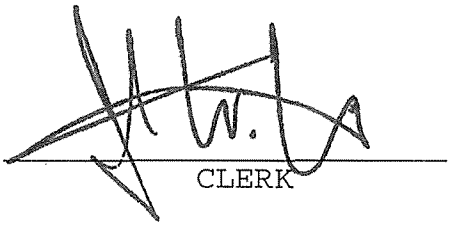
Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 18, 2008, which granted defendant City's motion for summary judgment dismissing the first cause of action and granted the other defendants' cross motion to dismiss the entire complaint against the Amherst defendants, unanimously affirmed, without costs.

On a prior order (39 AD3d 204, *lv dismissed* 10 NY3d 800), we dismissed the second through seventh causes of action against the City and the entire complaint against defendant S.J. Rehab., under the statute of limitations. That ruling constituted law of the case, precluding plaintiff from raising the issue on the

present appeal (*see Clark Constr. Corp. v BLF Realty Holding Corp.*, 54 AD3d 604 [2008]; *J-Mar Serv. Ctr., Inc. v Mahoney, Conner & Hussey*, 45 AD3d 809 [2007]), and plaintiff even conceded as much.

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

498 Skilled Investors, Inc., Index 603818/03
Plaintiff,

-against-

Bank Julius Baer & Co., Ltd., et al.
Defendants.
- - - - -
Bank Julius Baer & Co., Ltd.,
Plaintiff-Appellant,

Bernard Spilko,
Plaintiff,

-against-

Baruch Ivcher, et al.,
Defendants-Respondents,

Menachem Ivcher, et al.,
Defendants.

Wilmer Cutler Pickering Hale and Dorr LLP, New York (Catherine M. Rahm of counsel), for appellant.

The Law Office of Joseph Yerushalmi, Great Neck (Kenneth F. Peshkin of counsel), for respondents.

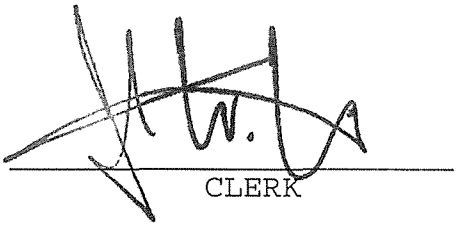
Order, Supreme Court, New York County (Helen E. Freedman, J.), entered June 3, 2008, which, to the extent appealed from, upon reargument, denied the motion of defendant/cross-claim plaintiff Bank Julius Baer & Co. Ltd. (the bank) for partial summary judgment against defendants/cross-claim defendants Baruch Ivcher and Waxfield Limited, unanimously reversed, on the law, with costs, and the motion granted.

After the bank settled this action with plaintiff, a victim

of a complex Ponzi scheme perpetrated by a now deceased individual, it was assigned all plaintiff's claims against Ivcher and Waxfield. Funds were improperly transferred from plaintiff's account to Ivcher and Waxfield. Thus, standing in the shoes of plaintiff, its assignor, the bank is entitled to summary judgment on its claims against Ivcher and Waxfield for money had and received and unjust enrichment (*see Madison Liquidity Invs. 119, LLC v Griffith*, 57 AD3d 438, 440 [2008]]). Ivcher and Waxfield have no defense to these claims based on the bank's own alleged unclean hands, since there is no evidence - indeed, there is no allegation - of wrongdoing on the part of plaintiff assignor (*see Pro Bono Investments, Inc. v Gerry*, 2008 WL 4755760, *20, 2008 US Dist LEXIS 87450, *56 [SD NY 2008]; *Rankin v Toberoff*, 1998 WL 370305, *5, 1998 US Dist LEXIS 9714, *20 [SD NY 1998]).

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

499-
500-
501 Skilled Investors, Inc., Index 603818/03
Plaintiff,

-against-

Bank Julius Baer & Co., Inc., et al.,
Defendants.
- - - - - -
Bank Julius Baer & Co., Ltd.,
Plaintiff-Respondent-Appellant,

Bernard Spilko,
Plaintiff,

-against-

Menachem Ivcher, et al.,
Defendants,

Eclectic Holdings, Inc.,
Defendant-Respondent,

Sydney Plastics, Inc.,
Defendant-Appellant.

Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., (Bruce E. Coolidge of counsel), for appellant.

Zaroff & Zaroff LLP, Garden City (Richard Zaroff of counsel), for Sydney Plastics, Inc., appellant, and Eclectic Holdings Inc., respondent.

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered February 14, 2008, and bringing up for appeal an order, same court and Justice, entered January 14, 2008, in favor of defendant/cross-claim plaintiff Bank Julius Baer & Co. Ltd. (the bank) against cross-claim defendant Sydney Plastics, Inc.,

unanimously modified, on the law, to award judgment in the same amounts against cross-claim defendant Eclectic Holdings, Inc. as well, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

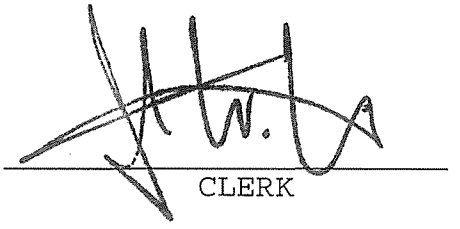
In opposition to the bank's prima facie showing that it extended loans to both Sydney and Eclectic and that the loans were not repaid (*see Takeuchi v Silberman*, 41 AD3d 336, 336-337 [2007]), Sydney purports to raise issues of fact as to, inter alia, the bank's complicity in a certain underlying Ponzi scheme, the paperwork for the loans, the bank's operational failures, and the authority of a certain individual to borrow money on behalf of Sydney. These issues are extrinsic to the uncontested existence of the loans and do not raise any material issues of fact (*see Warburg, Pincus Equity Partners, L.P. v O'Neill*, 11 AD3d 327 [2004]).

Eclectic argues that there is no proof it ever received any of the borrowed money, speculating that its corporate resolution, which expressly bestowed a power of attorney upon the individual who requested the loans, might have been doctored by the bank. A conclusory allegation of forgery is insufficient to create a question of fact (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]). Not only did this person have the

authority to act on Eclectic's behalf, but in addition there is evidence that the loans were accepted by the company, which reaped the benefit thereof, with the knowledge of its owner. Consequently, the loans cannot now be repudiated (*see Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 363-364 [2008], *lv denied* 11 NY3d 904 [2009]; *Matter of Cologne Life Reins. Co. v Zurich Reins. [N. Am.]*, 286 AD2d 118, 126 [2001]).

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

ENTERED: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

502N B.B.C.F.D., S.A. (A Panamanian corporation), et al., Plaintiffs, Index 604084/03 603818/03

-against-

Bank Julius Baer & Co. Ltd., et al., Defendants-Respondents,

Julius Baer Americas, Inc., etc., et al., Defendants,

Baruch Ivcher, et al., Defendants-Appellants.

[And Other Actions]

The Law Office of Joseph Yerushalmi, Great Neck (Kenneth F. Peshkin of counsel), for appellants.

Wilmer Cutler Pickering Hale and Dorr LLP, New York (Peter J. Macdonald of counsel), for Bank Julius Baer & Co. Ltd. and Raymond Baer, respondents.

Covington & Burling LLP, New York (Meghann E. Donahue of counsel), for URS Schwytter, respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered January 10, 2008, which denied defendants Baruch Ivcher's and Waxfield Limited's motion to amend their answer to include cross claims by Ivcher against defendant/cross-claim plaintiff Bank Julius Baer & Co. Ltd. and two of its officers, unanimously affirmed, with costs.

The facts underlying Ivcher's proposed cross claims have been known to him since no later than 2004, if not as long ago as

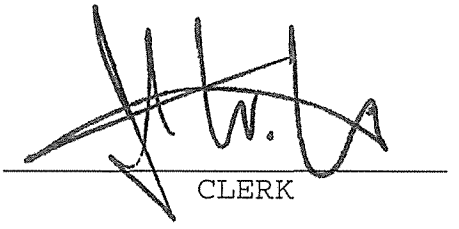
late 2001. His delay until August 2007 in requesting leave to amend his answer is inexcusable (*see Chichilnisky v The Trustees of Columbia Univ. in City of N.Y.*, 49 AD3d 388, 389 [2008]; *Spence v Bear Stearns & Co.*, 264 AD2d 601 [1999]).

Moreover, allowing the proposed amendment, which concerns events that took place no later than 1999, would significantly alter the status of this litigation by adding multiple new cross claims and a new cross-claim plaintiff, effectively resurrecting two cases that, after many years of litigation, are close to being resolved. In any event, the new cross claims are untimely (*see* CPLR 213[8]), and the "relation back" provision of CPLR 203(f) does not apply because "the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

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: MAY 5, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

503N Danica Plumbing & Heating, LLC, now known as Danica Group, LLC, Plaintiff-Appellant, Index 303947/07

-against-

3536 Cambridge Avenue, LLC, Defendant-Respondent,

3536 Cambridge Mews, LLC, et al., Defendants.

Allyn & Fortuna LLP, New York (Adam Drexler of counsel), for appellant.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr. J.), entered July 24, 2008, which granted the motion of defendant 3536 Cambridge Avenue, LLC (Cambridge) to terminate a mechanic's lien and to dismiss plaintiff's first cause of action seeking foreclosure on the lien, unanimously reversed, on the law, without costs, the motion denied, the cause of action reinstated and the lien filed with the Bronx County Clerk on February 1, 2008 reinstated.

As plaintiff concedes, the mechanic's lien it filed on or about November 2, 2007 incorrectly named the general contractor in the lien as 3536 Cambridge Mews, LLC, when the actual contractor was 915 East 107th Restaurant Corp., n/k/a Meridian Contracting Corp. (Meridian). Following the filing of the November 2007 lien, plaintiff commenced an action against Cambridge for, inter alia, foreclosure on the lien, and also

filed a notice of pendency. However, on or about February 1, 2008, plaintiff, upon realizing its mistake, filed a second lien, which was designated "Amended Notice of Mechanic's Lien." The February 2008 lien correctly identified Meridian as the general contractor, and on or about March 10, 2008, plaintiff filed an supplemental summons and amended complaint, adding Meridian as an additional defendant. Plaintiff also filed and served upon Meridian a notice of pendency, which referred to the second lien.

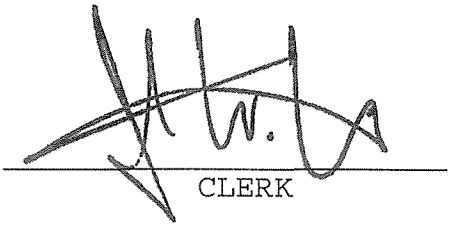
The motion court erred in terminating the lien and dismissing the lien foreclosure cause of action. Lien Law § 10(1) permits the filing of a notice of lien "at any time during the progress of the work and the furnishing of materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished." Moreover, the Lien Law is permissive and allows the filing of successive liens for the same work to cure an irregularity in an earlier lien, as long as the successive lien is filed within the period prescribed in section 10 (*see Madison Lexington Venture v Crimmins Contr. Co.*, 159 AD2d 256, 257 [1990], *lv dismissed* 78 NY2d 905 [1991]).

Here, the lien filed in February 2008 was not shown to be defective, and was filed well within the eight-month period applicable under Lien Law § 10. Furthermore, plaintiff filed an

amended complaint referring only to the second lien, and served and filed a notice of pendency, which also referred to the second lien. Under these circumstances, the motion court should have treated the second lien as a successive lien and allowed the foreclosure action to proceed under the amended complaint (*see Madison Lexington Venture*, 159 AD2d at 257-258; *AJ Contr. Co., Inc. v Farmore Realty*, 3 Misc 3d 1110[A], 2004 NY Slip Op 50540[U] [2004]; *see also Verizon N.Y. Inc. v Consolidated Edison, Inc.*, 38 AD3d 391 [2007]).

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

ENTERED: MAY 5, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 5, 2009.

Present - Hon. Peter Tom, Justice Presiding
Richard T. Andrias
David B. Saxe
Karla Moskowitz
Leland G. DeGrasse, Justices.

In re Quintin Xavier Drakeford,
Petitioner,

Index 10985/08

504
[M-1367]

-against-

Hon. Charles Solomon, etc., et al.,
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.

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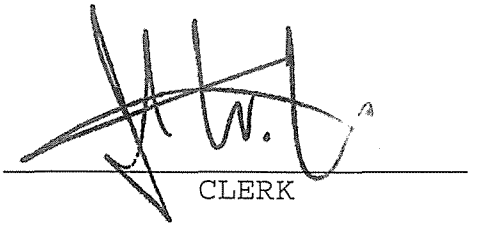

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
John W. Sweeny, Jr.
Eugene Nardelli
Leland G. DeGrasse, JJ.

5132-
5133
Index 604415/05
590264/07
6604371/06
590605/08

Castle Village Owners Corp.,
Plaintiff-Appellant,

-against-

Greater New York Mutual Insurance Company, et al.,
Defendants,

American International Specialty Lines Insurance Company,
Defendant-Respondent.

[And Other Actions]

Plaintiff appeals from an order of the Supreme Court, New York County (Helen E. Freedman, J.), entered February 5, 2008, which granted summary judgment to defendant American International Specialty Lines Insurance and declared that the insurer does not have to reimburse plaintiff Castle Village Owners Corp. for the reconstruction of the wall, and an order, same court and Justice, entered July 8, 2008, which denied plaintiff's motion to renew.

William Hart, Scarsdale, and Thelen LLP, New York, for appellant.

Drinker Biddle & Reath LLP, New York (Mark D. Sheridan, of the State of New Jersey Bar, admitted pro hac vice, and Heather M. Hughes of counsel), for respondent.

NARDELLI, J.

The threshold issue in this declaratory judgment action is whether an exclusion in a commercial umbrella liability policy from coverage for the insured's own property can be circumvented by a claim that ameliorative measures had to be effected to the insured's property so as to prevent or cure damage to adjoining property. We conclude, in the factual scenario presented, that the policy provision is unambiguous, and that the policy does not provide coverage for the claim.

Plaintiff, Castle Village Owners Corp., is a cooperative corporation which owns land bounded on three sides by a retaining wall. On May 12, 2005, a large section of the wall on the western perimeter of the parcel collapsed, causing a large quantity of debris, including dirt, benches, boulders and other objects, to fall onto an adjacent sidewalk and roadway. The debris caused damage to passing automobiles and surrounding property, and blocked the sidewalk and a portion of the northbound Henry Hudson Parkway.

Plaintiff's primary liability insurer was Greater New York Mutual Insurance Co. (GNY), which provided coverage up to $1,000,000 per occurrence. Plaintiff also had purchased a commercial umbrella liability policy from American International

Specialty Lines Insurance Co. (AISLIC), in the amount of $50,000,000 per occurrence. In pertinent part, however, the AISLIC policy excluded coverage for:

> "property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;"

After the collapse, the City of New York issued an emergency declaration, which required certain immediate remediation steps, including the removal of debris, stabilization of the wall, protection against rainwater, and the installation of a temporary means of protection for vehicular traffic. By letter dated May 16, 2005, the City advised Castle Village:

> "The referenced [section of retaining wall] has been declared unsafe and in imminent peril. It must be repaired or demolished immediately. The responsibility to take such action is yours and, because of the severity of the condition, the work must begin immediately . . . If you fail to do so, the City will perform the necessary work and seek to recover its expenses from you."

In the days following the collapse, the City retained contractors and engineers to clear the site and the surrounding area of debris, and to perform structural work to prevent further collapse and additional debris from falling on the surrounding sidewalks and roadways.

By letter dated July 5, 2005, the City informed Castle Village that its emergency remediation work had been completed, and it made formal demand upon Castle Village for reimbursement of its alleged costs in the amount of $2,163,067. The letter included a payment certification of approximately $1 million to Trocom Construction Co., the general contractor, for the performance of the "emergency work."

In a letter dated August 5, 2005, Christopher Santulli, then Deputy Borough Commissioner of the City's Department of Buildings, requested plaintiff to provide a work plan for future project tasks, including a solution to remedy permanently the slope and conditions that led to the wall's failure. In April 2006 Castle Village solicited bids for the performance of the work required by the City. After receiving a request for clarification as to the work needed to be done, the City advised, by letter dated June 5, 2006, that it required plaintiff, inter alia, to repair and stabilize the collapsed wall, which work was to include rebuilding the collapsed portion of the wall, stabilizing and/or regrading the remaining portion of the wall and slopes, and stabilizing the surrounding soil.

During this period of time, GNY and AISLIC had been conducting settlement negotiations with the City with regard to the costs incurred by the City in responding to the emergency.

In March 2006, GNY, AISLIC and the City agreed in principle that the City would accept $1,250,000 in settlement of its monetary claim against Castle Village, that GNY would contribute whatever was left of its $1 million policy limit at the time the settlement was concluded, and that AISLIC would pay the difference between $1,250,000 and the amount paid by GNY.

By letter dated October 4, 2006, AISLIC advised Castle Village that, pursuant to settlement negotiations with GNY and the City, AISLIC had preliminarily agreed to pay up to $280,000 in cleanup costs incurred by the City to "secure the area surrounding the Castle Village wall as well as the Henry Hudson Parkway." AISLIC specifically advised Castle Village, however, that its participation in the settlement "shall not operate as a waiver or estop AISLIC from asserting and/or reserving any of its rights, claims and/or defenses under the Policy or at law now or in the future." AISLIC noted that its investigation of the wall collapse was ongoing, and that it was reserving its rights to deny coverage for any claims associated with the wall collapse, including wall restoration. The letter pointedly advised that the policy did not provide coverage for property owned by the insured, and specifically referenced the "owned property" exclusion.

On December 11, 2006, Castle Village advised AISLIC that its primary coverage with GNY had been exhausted as a result of the settlement with the City, and, inter alia, demanded coverage for the restoration work to the wall as required by the City. By letter dated March 12, 2007, AISLIC acknowledged its responsibility to pay for, or at least assume the defense of, certain third-party claims, but denied coverage for permanent wall restoration work.

Castle Village had commenced this action in 2005. To the extent relevant to this appeal, one cause of action is asserted against AISLIC, and seeks a declaration that AISLIC was obligated to defend and indemnify Castle Village against claims arising from the collapse of the wall.

On May 8, 2007 AISLIC moved for summary judgment declaring that no coverage existed for the cost of repair work to Castle Village's wall. In moving, AISLIC acknowledged that it was prepared to defend Castle Village in the third-party actions, but took the position that the "owned property" exclusion absolved it from any liability for repair to the wall itself. Castle Village cross-moved for a declaration in its favor, arguing that, by virtue of the City's directives, it had become legally obligated to perform the remediation work required by the City. It reasoned that the "owned property" exclusion became inapplicable

when the City's property was damaged and the City required Castle Village to perform remediation work so that no further damage could occur. Castle Village also claimed that AISLIC did not take a coverage position until it reserved its rights on October 4, 2006, and it did not deny coverage for the remediation work until March 12, 2007, well after the settlement terms had been agreed upon, and long after Castle Village had commenced the remediation work the City required it to perform.

The motion court declared in AISLIC's favor, noting that the policy specifically excludes costs for restoration or repair of the insured's property for any reason, including prevention of injury to person or damage to property of another. The court also held that AISLIC's alleged delay in disclaiming coverage was inapplicable because AISLIC was the excess carrier, and had no duty until the primary coverage was exhausted. Moreover, AISLIC had reserved its rights under the policy exclusion in a letter dated October 4, 2006, before the primary coverage was exhausted.

A motion to reargue and renew was denied on July 8, 2008.

On appeal Castle Village asserts that, as a result of the emergency declaration, it was legally obligated to comply with the City's demand and perform the remediation work at issue, including repair of its own property. It reasons that since the policy affords coverage for sums the insured is obligated to pay

as a result of liability imposed by law, the effect of the emergency declaration was to render inapplicable the "owned property" exclusion, since the emergency declaration required it to repair the wall.

There are, of course, circumstances where an "owned property" exclusion may not be enforceable because of a legal obligation to prevent damage to another's property. In *State of New York v New York Cent. Mut. Fire Ins. Co.* (147 AD2d 77 [1989]), the property owner suffered an oil spill from a leak in a fuel line. The State sued the owner's insurer directly to recover the costs of the clean-up, and the insurer argued that the "owned property" exclusion in the policy precluded any liability on its part, since the oil had not migrated to anybody else's property. The court noted that the oil had entered groundwater, which was not the insured's property, but instead was property entrusted to the State by its citizens. Thus, it reasoned, damage had occurred to property belonging to someone other than the insured. Effecting the cleanup of the insured's property was necessary to protect the groundwater.

Likewise, in *Don Clark, Inc. v United States Fid. & Guar. Co.* (145 Misc 2d 218 [Sup Ct, Onondaga County 1989]), an oil spill on the owner's property was found to endanger groundwater as a result of seepage, and the State directed a

cleanup pursuant to its responsibilities under article 12 of the Navigation Law. The court rejected the insurer's claim that it could rely on the "owned property" exclusion in its policy, even though the cleanup was on the insured property, since the creek into which the oil spilled was not property owned by the insured (*id.* at 220). A similar result was reached by the Second Circuit in *Gerrish Corp. v Universal Underwriters Ins. Co.* (947 F2d 1023 [2d Cir 1991], *cert denied* 504 US 973 [1992]).

Central to these cases, and most of those cited by plaintiff, is that there was seepage on the insured's property, usually from an oil spill. The spills also presented a condition hazardous to the property of others, and were not capable of being remedied without the performance of cleanup measures on the insured's property. Furthermore, the conditions were ongoing, and damage was continuing.

By contrast, in this case, after the initial wall collapse and remedial measures, the hazardous condition was significantly mitigated. The possibility of a future collapse presented the need for permanent ameliorative measures, but, unlike those situations involving an oil spill, an imminent, continuing danger no longer existed.

In *R & D Maidman Family L.P. v Scottsdale Ins. Co.* (4 Misc 3d 728 [Sup Ct, NY County 2004]), upon which Castle Village

places a great deal of reliance, a situation more analogous to this case was presented. There plaintiffs had begun demolition on property they owned. After a brick or piece of masonry was dislodged and fell onto an adjoining roof, the New York City Department of Buildings issued notices of violation. In order to cure the condition, the plaintiffs erected a sidewalk bridge, scaffolding and net meshing, and then filed a claim with their insurer to recover the costs expended on their property to mitigate or prevent future damage. Finding that the notices of violation did not give rise to a legal obligation to bear the costs for remedial work that would trigger the indemnification provisions of the commercial general liability policy issued to the plaintiffs, the court initially awarded the defendant insurer summary judgment. The court, however, subsequently reversed itself, in an unpublished decision (Sup Ct, NY County, Oct 1, 2004, Edmead J., index No. 114437/02), and denied the insurer summary judgment, because it concluded that there were issues of fact as to whether the notices of violation were issued because of damage to adjacent property. The court indicated that if such were the case, coverage would attach.

We observe that we are obviously not bound by the Supreme Court's determination in *R & D Maidman*, but, in any event, we do not agree with the court's rationale that the test as to whether

the exclusion should be avoided is whether a legal directive had been issued. The answer to that question is only helpful in ascertaining whether coverage is triggered. If coverage were the only issue, and there were no "owned property" exclusion, Castle Village's damages, including its obligation to repair the wall, would have been covered.

The issue is not coverage, but, rather, the applicability of the exclusion. In determining whether the exclusion applies, the question becomes not whether the City ordered Castle Village to repair its own wall, but, rather, whether repair of the wall was necessary to stop ongoing and imminent damage to property belonging to another, such as in those cases where the threat of oil pollution was continuing.

Here, however, since the emergency work had been completed, the directive to perform repair work was necessary to safeguard against future incidents, and not immediate, recurring harm. Castle Village had an obligation to repair the wall, but it was not an obligation that AISLIC was required to indemnify. Even if there had never been a collapse, the City could have directed repair of the wall, and the "owned property" exclusion would have absolved AISLIC of the obligation to reimburse Castle Village.

Thus, the test for determining whether the exclusion applies must focus on the nexus between the condition of the insured's

property and the existence of ongoing and immediate harm to the property of others. Where the harm cannot be cured without performing work on the insured's property, the exclusion is not applicable. On the other hand, in cases like this, where the immediate danger has been corrected, the restorative work to the insured's property will not be covered.

Contrary to plaintiff's contentions, we do not find the language of the exclusion ambiguous. Plaintiff avers that there are two valid interpretations of the "owned property" exclusion. The first is AISLIC's position that it has no obligation under any circumstances, while the second, plaintiff's, is that the exclusion is only applicable when there has been no damage to the property of a third party. We do not construe AISLIC's interpretation to be inconsistent with those cases involving an oil spill, where the insurer was obligated to pay for work necessary to remediate an ongoing situation. Further, we do not find plaintiff's interpretation, that coverage will be available only when there is no third-party damage, to be reasonable. As discussed above, the question of the applicability of the exclusion turns on the nature of the damage, and the nexus of the insured's property to any recurring damage. Thus, there is no need to resort to the general principle that ambiguities should

be construed against the insurer drafter (*see e.g. Westview Assoc. v Guaranty Natl. Ins.* Co., 95 NY2d 334, 339 [2000]; *see also Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 94 [2005]). The policy provides coverage for damage to the property of another, and not for the property of the insured. If there is an overlap, work on the insured's property which is necessary to cure (as opposed to prevent) imminent and recurring damage to adjoining property falls outside the exclusion.

Castle Village also argues that AISLIC should be estopped from asserting the "owned property" exclusion because it allegedly delayed in disclaiming coverage, and its participation in the settlement of the City's monetary claim somehow led Castle Village to rely on those negotiations to its detriment.

First, AISLIC's policy provides that it applies "only in excess of the total applicable limits of Scheduled Underlying Insurance." Thus, its obligations were not even triggered until December 2006, when Castle Village notified AISLIC that its primary policy had been exhausted, but this came two months after Castle Village had been put on notice by AISLIC's October 4, 2006 reservation of rights letter that the "owned property" exclusion was applicable to any property owned by Castle Village. As an excess insurer, AISLIC did not have any duty to act until primary

coverage was exhausted by payment (*see Wilson v Galicia Contr. & Restoration Corp.*, 36 AD3d 695, 697 [2007], *affd* 10 NY3d 827 [2008]).

Although a reservation of rights letter by itself has no relevance to the question of timely notice of disclaimer (*see Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979]), the October 4 letter specifically advised that coverage was excluded for owned property, and effectively conveyed a coverage position which put Castle Village on notice that the costs of restoration would not be covered.

Finally, there has been no showing that Castle Village, which obviously, and ultimately, needed to repair its wall, was somehow beguiled by AISLIC into believing that AISLIC was going to pay for the restoration. We thus conclude that the plain language of the exclusion supports the conclusion that, in the circumstances presented, Castle Village's cost of restoring the wall was not to be borne by AISLIC.

Accordingly, the order of the Supreme Court, New York County (Helen E. Freedman, J.), entered February 5, 2008, which granted summary judgment to defendant American International Specialty Lines Insurance and declared that the insurer does not have to

reimburse plaintiff Castle Village Owners Corp. for the reconstruction of the wall, and the order of the same court and Justice, entered July 8, 2008, which denied plaintiff's motion to renew, should be affirmed, with one bill of costs.

All concur.

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

ENTERED: May 5, 2009