SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 12, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

519-
520 The People of the State of New York, Ind. 5588/01
Respondent,

-against-

Darren Edwards,
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 (Alan Gadlin of counsel), for respondent.

Judgment of resentence (denominated a clarification of sentence), Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 15, 2007, imposing a term of 5 years' postrelease supervision, and order, same court and Justice, entered on or about February 5, 2009, which denied defendant's CPL 440.20 motion to set aside the sentence, unanimously affirmed.

Defendant's original sentence of seven years upon his 2002 conviction after trial of second-degree assault was unlawful to the extent that it omitted any reference to postrelease supervision. "The sole remedy for a procedural error such as this is to vacate the sentence and remit for a resentencing

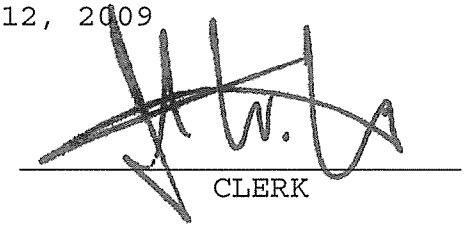
hearing so that the trial judge can make the required pronouncement" (*People v Sparber*, 10 NY3d 457, 471 [2008]). Accordingly, the resentencing court corrected the illegality in 2007 when it granted defendant's prior CPL 440.20 motion (15 Misc 3d 1115[A] [Sup Ct, NY County 2007]), to the extent of adding PRS to the sentence in defendant's presence. That action fully complied with the subsequent *Sparber* decision by the Court of Appeals, and it is of no legal consequence that the resentencing court described its remedy as a clarification of sentencing rather than a resentencing.

In denying defendant's subsequent CPL 440.20 motion, which is before us on this appeal, the resentencing court stated, among other things, that it would not have reduced defendant's prison term even if it had the power to do so (__ Misc 3d __, 2009 NY Slip Op 29048, *13 n9 [Sup Ct, New York County February 5, 2009]). Therefore, we see no reason to order another resentencing, and we find it unnecessary to decide whether a proceeding conducted for the purpose of compliance with *Sparber* is a plenary resentencing that permits the court to reconsider the length of the prison component of the sentence.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: MAY 12, 2009



CLERK

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

521 Thomas Black, Index 112368/06
Petitioner-Respondent,

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for appellants.

Shebitz Berman Cohen & Delforte, P.C., New York (Julia R. Cohen of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered April 10, 2008, which granted the petition and directed respondents to reinstate petitioner to his former position at the appropriate rate of pay, including all appropriate benefits, to pay petitioner past wages that he would have received, with interest, and to remove his name from the Ineligible/Inquiry list, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

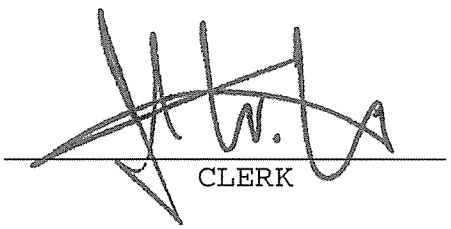
Petitioner failed to establish that the termination of his probationary employment under his physical education license, which was based on his alleged inappropriate sexual relationship with a New York City public high school student, "was for a constitutionally impermissible purpose, violative of a statute,

or done in bad faith" (*Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]; *see e.g. Curcio v New York City Dept. of Educ.*, 55 AD3d 438 [2008]). Contrary to petitioner's contention, this issue was preserved inasmuch as respondent raised it in the answer to the petition.

The Chancellor's determinations to terminate petitioner's license, give him an unsatisfactory rating and place him on the Ineligible/Inquiry list were not arbitrary and capricious (*see Matter of Andersen v Klein*, 50 AD3d 296 [2008]; *Matter of Watkins v New York City Dept. of Educ.*, 48 AD3d 339 [2008], *lv denied* 10 NY3d 713 [2008]; *Matter of Von Gizycki v Levy*, 3 AD3d 572, 574 [2004]).

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

ENTERED: MAY 12, 2009



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Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

522 In re Susan Elizabeth Z., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Rosemary Z.,
Respondent-Appellant,

Catholic Guardian Society,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Joseph T. Gatti, New York, for respondent.

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

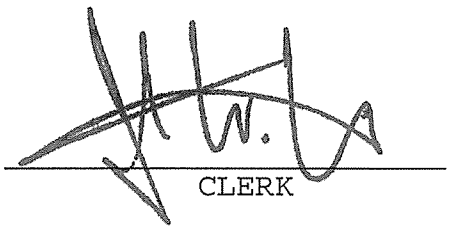
Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about June 14, 2007, insofar as appealed from, terminating respondent-appellant's parental rights to the subject children upon a finding of mental illness, unanimously affirmed, without costs.

The finding of mental illness (Social Services Law § 384-b[4][c],[6][a]) is supported by clear and convincing evidence. In particular, the court-appointed psychologist, who interviewed and tested respondent, reviewed records spanning 11 years from medical providers, mental health and other service providers and foster care agencies, and found, in addition to mental illness, significant cognitive impairments, poor insight and a poor prognosis (*see Matter of Robert K.*, 56 AD3d 353 [2008]). That

respondent's expert interviewed respondent eight months after the court-appointed expert provides no basis for disturbing Family Court's findings crediting the opinion of the court-appointed expert over that of respondent's expert (*see Matter of Ashanti A.*, 56 AD3d 373, 373 [2008]), who did not review respondent's medical or psychiatric records, and knew nothing about her mental health history and cognitive impairments (*see id.* at 374).

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

ENTERED: MAY 12, 2009



CLERK

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

523 The People of the State of New York, Ind. 1944/06
Respondent,

-against-

Bernard Fuller,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered August 1, 2007, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

After according defendant a suitable opportunity to be heard, the court properly denied his motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]), and there was no violation of his right to conflict-free representation (*see Cuyler v Sullivan*, 446 US 335, 348-350 [1980]; *Hines v Miller*, 318 F3d 157, 162-164 [2d Cir 2003], *cert denied* 538 US 1040 [2003]). Defense counsel, who negotiated a plea that was as lenient as possible, rendered effective assistance in connection with the plea (*see People v Ford*, 86 NY2d 397, 404 [1995]), as well as at sentencing, and the record

establishes the voluntariness of the plea.

Throughout the proceedings, defendant asserted a defense to the unlawful entry element of burglary that, under the facts of the case, was without any merit or hope of success at trial. Defendant made related, and equally baseless, claims that a trespass notice revoking his privilege to enter certain private property was inadmissible, and that he was entitled to a pretrial determination of its admissibility. In his plea withdrawal motion, defendant claimed that his attorney rendered ineffective assistance by failing to move to reargue unsuccessful applications raising these issues.

This ineffective assistance claim was devoid of merit, first, because counsel did in fact litigate these issues at great length, including by way of reargument, and second, because, as noted, the issues were meritless to begin with. Accordingly, the subject matter of the motion did not create a conflict requiring assignment of new counsel. Similarly, given the meritless nature of the plea withdrawal motion, counsel's statements in defense of his performance, even if they could be viewed as disparaging defendant's motion, could not have affected the court's decision to deny it (*see e.g. People v Miller*, 5 AD3d 192 [2004], *lv denied* 3 NY3d 644 [2004]).

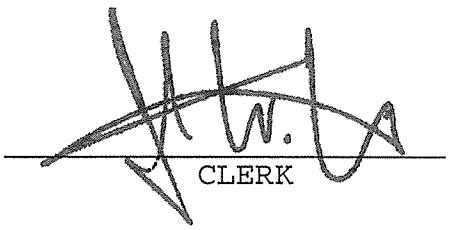
To the extent defendant also moved to withdraw his plea on the ground of innocence, that claim simply reiterated his

baseless challenges to the trespass notice. We have considered and rejected defendant's remaining arguments concerning the plea withdrawal motion.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 12, 2009



Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, JJ.

525 Miriam Chan, et al., Index 106692/05
Plaintiffs-Appellants,

-against-

Shew Foo Chin, et al.,
Defendants-Respondents.

Hofheimer, Gartlir & Gross, LLP, New York (David L. Birch of counsel), for appellants.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondents.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered October 2, 2008, after a nonjury trial, awarding plaintiffs the principal sum of $450,000, with interest from August 1, 2002, which, to the extent appealed from, dismissed plaintiffs' cause of action for specific performance, unanimously affirmed, with costs.

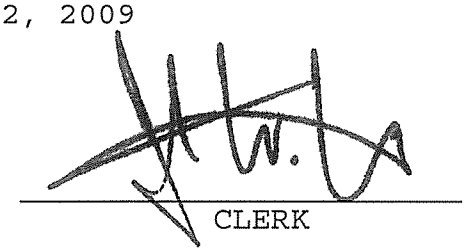
While it is true that an agreement sufficient to satisfy the statute of frauds may be pieced together from separate writings so long as they are "connected with one another either expressly or by the internal evidence of subject matter and occasion" (*see Marks v Cowdin*, 226 NY 138, 145 [1919]; *DeRosis v Kaufman*, 219 AD2d 376, 379 [1996]), the documents relied on by plaintiffs herein are not sufficient in that they fail to establish an essential term of the agreement, namely the purchase price. The record shows that in fact there was never a meeting of the minds

on this term; indeed, negotiations continued even after a closing was concluded unsuccessfully (*see Ross v Wu*, 27 AD3d 237 [2006], *lv denied* 7 NY3d 713 [2006]).

The court properly rejected plaintiffs' claim that the matter was removed from the requirements of the statute of frauds by their part performance, since their acts were not unequivocally referable to an agreement to sell the property at a certain price, "'but rather can be explained as preliminary steps which contemplate the future formulation of an agreement'" (*Raj Acquisition Corp. v Atamanuk*, 272 AD2d 164, 164-165 [2000], quoting *Francesconi v Nutter*, 125 AD2d 363, 364 [1986]). Similarly, defendants' admissions that they agreed to sell the property and eventually agreed on a price are insufficient, inasmuch as the admission did not encompass a mutually agreed upon, specific price (*see Tallini v Business Air, Inc.*, 148 AD2d 828, 829-830 [1989]; *cf. Cole v Macklowe*, 40 AD3d 396 [2007]).

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

ENTERED: MAY 12, 2009



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Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

526 Victoria Brightman, Index 18978/07
Plaintiff-Respondent,

-against-

Prison Health Services, Inc., et al.,
Defendants-Appellants.

Saiber LLC, New York (Jennine DiSomma of counsel), for appellants.

Taubman Kimelman & Soroka, LLP, New York (Antonette M. Milcetic of counsel), for respondent.

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered March 20, 2008, which denied defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the action, unanimously affirmed, without costs.

Plaintiff alleges that defendants retaliated against her for filing a complaint against one of them for sexual harassment. This retaliation took the form of, inter alia, giving her a more onerous workload than her similarly situated colleagues, denying her the opportunity to work overtime, failing to pay her on the rare occasions when she did work overtime, denying her vacation and holiday pay, transferring her from her preferred workplace to another location where her harasser worked, and forcing her to work as a "floater," with no permanent work location. Viewed in the light most favorable to plaintiff, these allegations state a claim for retaliation pursuant to the New York State Human Rights

Law, Executive Law § 296 (*see generally Clayton v Best Buy Co., Inc.*, 48 AD3d 277, 278 [2008]; *Mohammad v Board of Mgrs. of 50 E. 72nd St. Condominium*, 262 AD2d 76, 77 [1999]). A fortiori, they state a claim under the New York City Human Rights Law (Administrative Code of City of NY § 8-107), which is more liberal than either its state or federal counterpart (*see* Administrative Code of City of NY § 8-130; *Williams v New York City Hous. Auth.*, __ AD3d __, 872 NYS2d 27, 31 [2009]). Defendants' alleged retaliatory acts were "materially adverse" in that they "well might have dissuaded a reasonable worker from making . . . a charge of discrimination" (*Burlington N. & Santa Fe Ry. Co. v White*, 548 US 53, 68 [2006] [internal quotation marks omitted]). They also satisfy the requirement of the New York City Human Rights Law that they "must be reasonably likely to deter a person from engaging in protected activity" (Administrative Code of City of NY § 8-107[7]).

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

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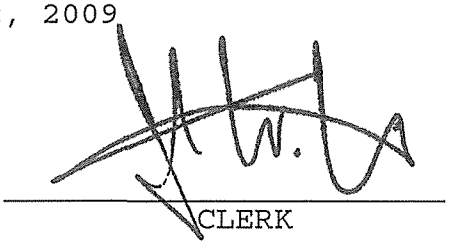


CLERK

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

529 Lee Weiss, et al., Index 110154/06
Plaintiffs-Respondents,

-against-

El Ad Properties NY LLC, et al.,
Defendants-Appellants,

Plaza Operating Partners Ltd., et al.,
Defendants.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for appellants.

Sacks & Sacks, LLP, New York (Scott Singer of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 17, 2008, which, to the extent appealed from, denied so much of the motion by defendants El Ad Properties and Tishman Construction for summary judgment dismissing the remaining cause of action based on Labor Law § 241(6), unanimously affirmed, without costs.

Plaintiff worker, a carpenter, was allegedly injured when an A-frame dolly he was guiding down a ramp veered into the side handrails, and he was struck in the face by the load of metal studs. El Ad was the property owner and Tishman the general contractor on the project. Plaintiff asserted, inter alia, a cause of action alleging that the ramp did not meet the specifications of Industrial Code.

In moving for summary judgment, El Ad and Tishman cited the

deposition testimony of the injured worker and a Tishman employee, which they asserted established compliance with the Code. However, the injured worker's deposition testimony raised a triable issue of fact as to whether the ramp was the proper width ("at least 48 inches") and whether the floor planks were "laid close, butt jointed and securely nailed" (12 NYCRR 23-1.22[b][3]). The injured plaintiff estimated the width at less than the mandated minimum, and testified that he saw a gap of one half to three quarters of an inch between the planks. El Ad and Tishman thus failed to carry their initial burden of establishing prima facie compliance with the Code.

M-1651 - Lee Weiss, et al. v El Ad Properties NY LLC, et al.

Motion seeking leave to strike brief granted.

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

ENTERED: MAY 12, 2009

CLERK

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

530 Linea Nuova, S.A., Index 110087/07
Plaintiff-Appellant,

-against-

Howard Slowchowsky, et al.,
Defendants-Respondents,

ABN Amro Bank N.V.,
Defendant.

Bronstein, Gewirtz & Grossman, LLC, New York (Edward N. Gewirtz of counsel), for appellant.

Schneider Goldstein Bloomfield LLP, New York (Donald F. Schneider of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 3, 2008, which, to the extent appealed from as limited by the briefs, granted defendant gold merchants' motion to dismiss the complaint as against Slowchowsky and the fraud claim as against GF Int'l Holding, unanimously affirmed, without costs.

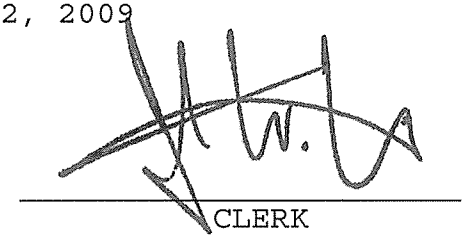
The fraud claim was duplicative of the breach-of-contract claim, since the alleged misrepresentation of an existing fact was made in the context of merely assuring plaintiff that GF would comply with its contractual obligation and no additional duty was allegedly breached (*cf. First Bank of the Ams. v Motor Car Funding*, 257 AD2d 287, 291 [1999]). Moreover, plaintiff sought no damages that were not also recoverable under its breach

of contract theory (*see Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [2008]).

We decline to address defendants-respondents' contentions for affirmative relief in light of their failure to appeal from the order.

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

ENTERED: MAY 12, 2009



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Gonzalez, P.J., Tom, Catterson, Abdus-Salaam, JJ.

531 Zahid J. Ullah, Index 301223/00
Plaintiff-Respondent,

-against-

Farrin B. Ullah,
Defendant-Appellant.

Farrin B. Ullah, appellant pro se.

Elayne Kesselman, New York, for respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered October 22, 2008, which, inter alia, vacated a prior order adjudging plaintiff in contempt for failure to comply with an August 2005 interim order directing him to pay tuition for the parties' children and outstanding carrying charges on the parties' two condominium units, unanimously reversed, on the law, without costs, and the matter remanded for findings as to the extent to which such payments are required under the parties' prejudgment stipulation of settlement, and for a contempt hearing to enforce any such payments that remain outstanding.

As noted in this Court's prior order (40 AD3d 201 [2007]), the hearing court's August 2005 interim order was intended to meet the immediate needs of defendant wife and the parties' children pending determination of a motion by defendant to enforce both a 2002 prejudgment stipulation of settlement, which required that the condominium-related payments to be made by

plaintiff husband continue until the two units were reconfigured into separate apartments by January 1, 2007 (*id.* at 202), and a 2004 postjudgment purported modification agreement, which required that the condominium-related payments continue "indefinitely" (*id.* at 204). The interim order, like enforcement motion, relied on both the prejudgment stipulation and the postjudgment purported modification (*id.*). As further noted in our prior order, in December 2005, the hearing court held plaintiff in contempt based on his admitted noncompliance with the August 2005 interim order (*id.* at 205); the hearing court, at the same time, also granted defendant's enforcement motion. Our prior order reversed the finding of contempt on the ground that the hearing court failed to advise plaintiff of his right to counsel, and directed "a new hearing on the contempt motion" (*id.* at 206). We also "noted that there is merit to the husband's argument that the hearing court erred in finding him in contempt for failing to pay the mortgage and common charge arrears on both apartments pursuant to the August 2005 interim order since it was based on the June 2004 modification, which was invalid because it was never judicially authorized" (*id.*).

On remand, the hearing court denied a motion by defendant to incorporate the 2004 modification into the judgment of divorce, finding that the modification was not in the form required for amending the terms of the 2002 stipulation, without prejudice to

defendant commencing a plenary action on the modification, a ruling that is not challenged on this appeal. The hearing court then proceeded to vacate the prior order of contempt, although this Court had already done so on the prior appeal, not on the ground of right to counsel, but rather because the August 2005 order "was based on plaintiff's conceded failure to abide by the requirements of the purported modification," which the hearing court had just held to be unenforceable. This was error.

There is no indication in the August 2005 interim order that it was based exclusively or even primarily on the invalid 2004 modification agreement, and, other than the duty to make the condominium-related payments "indefinitely," on this record it cannot be determined what, if any, additional payment obligations were assumed by plaintiff under the modification agreement that had not already been assumed by him under the enforceable 2002 stipulation. This Court's statement in the prior appeal that the August 2005 interim order "was based on" the 2004 modification was not intended to suggest any such exclusivity or primacy. As the order granting defendant's enforcement motion remains in force to the extent that plaintiff's outstanding payment obligations are based on the 2002 stipulation rather than the

2004 modification, we remand again for a new contempt hearing, with a directive that findings be made as to the extent to which the interim order was based on the 2002 stipulation alone.

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

ENTERED: MAY 12, 2009

CLERK

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

532 The People of the State of New York, Ind. 2737/06
Respondent,

-against-

Wesley Jackson,
Defendant-Appellant.

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

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

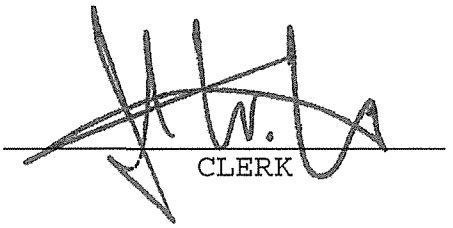
Judgment, Supreme Court, New York County (William A. Wetzel, J. at suppression hearing; Michael J. Obus, J., at plea and sentence), rendered May 22, 2008, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to a term of 5 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]). The hearing court properly exercised its discretion when it denied defendant's new attorney's application to reopen the suppression hearing to permit belated impeachment of the arresting officer by means of a minor discrepancy between his hearing and grand jury testimony

(*see e.g. People v Hardy*, 275 AD2d 656 [2000], *lv denied* 96 NY2d 735 [2001]). In any event, defendant received virtually the same remedy he would have received had the hearing been reopened; the court, which had been trier of fact at the hearing, considered the inconsistency and expressly ruled that it did not affect the suppression ruling.

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

ENTERED: MAY 12, 2009



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 12, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
Peter Tom
James M. Catterson
Rosalyn H. Richter
Sheila Abdus-Salaam, Justices.

Christopher Sanatass, et al.,
Plaintiffs,

Index 113875/01
591423/03
591038/04

-against-

Consolidated Investing Company, Inc., et al.,
Defendants-Appellants,

Norbert Natanson, et al.,
Defendants.

- - - -

Consolidated Investing Company, Inc., et al.,
Third-Party Plaintiffs-Appellants,

533

-against-

Chroma Copy International, Inc., et al.,
Third-Party Defendants,

C2 Media, LLC,
Third-Party Defendant-Respondent.

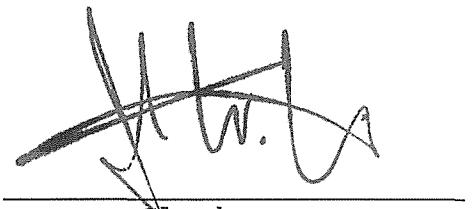
[And Another Action]

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Judith J. Gische, J.), entered on or about August 14, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 17, 2009,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:



Clerk.

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

220 NRT New York, Inc., doing business as The Corcoran Group, Plaintiff-Respondent, Index 600380/06

-against-

B&G Hamptons Properties LLC, et al., Defendants-Appellants,

Andrea Kringstein, et al., Defendants-Respondents.

The Law Offices of Christopher P. Di Giulio, P.C., New York (Christopher P. Di Giulio of counsel), for appellants.

Margolin & Pierce, LLP, New York (Errol F. Margolin of counsel), for NRT New York, Inc., respondent.

Pryor Cashman LLP, New York (Joshua D. Bernstein of counsel), for Kringstein respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 19, 2008, that to the extent appealed from, as limited by the briefs, in this action to recover a real estate broker's commission, granted plaintiff's motion for summary judgment on its first cause of action for breach of contract against defendant B&G Hampton Properties LLC (B&G) and awarded plaintiff the principal amount of $387,500 plus interest, and denied the cross motion of defendants B&G, Anne Borsch and James Griffo for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of denying plaintiff's motion for summary judgment on the first cause of action, and otherwise affirmed, without costs.

This case involves a dispute over the amount of plaintiff real estate broker, NRT New York, Inc. d/b/a The Corcoran Group's (CG) commission for the sale of property in the Hamptons. Plaintiff and defendant B&G, the owner of the subject property, had agreed to a modified exclusive brokerage agreement with the following fee structure:

> "The commission will be five (5%) of the actual selling price. The commission will be earned when a ready, willing and able buyer is procured, and [B&G] ha[s] agreed to the price and terms. The commission will be due upon title closing as follows: (a) if the property is sold by CG, 100% of the commission shall be distributed to CG; (b) if the property is sold by an agency with whom CG has a co-broke agreement, the commission shall be distributed 50% to the selling broker and 50% to CG, (c) if the property is sold by an agency with whom CG does not have a co-broke agreement, a commission of five (5%) shall be due and payable to CG upon demand. If [B&G] should sell the property through [its] sole efforts a one(1%) commission shall be due and payable to [CG] upon demand."

There is no dispute that CG is due some commission. The dispute lies over how much. CG argues that it is entitled to a 5% commission because B&G did not sell the property due to B&G's sole efforts, but rather its builder introduced the buyers to B&G. B&G contends that its builder was its business partner and therefore B&G sold the property through its "sole efforts" that would merit only a 1% commission to CG. To complicate matters further, there is evidence in the record that CG was the first to

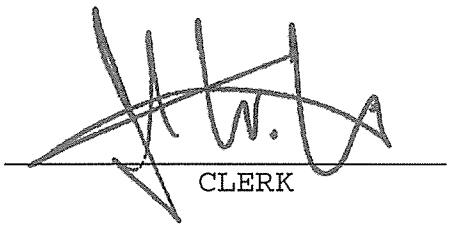
provide the buyers with information about the property.

The court improperly granted plaintiff's motion for summary judgment because the parties' agreement as to whether B&G sold the property through its "sole efforts" is ambiguous as applied here (*see Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 144 [2008]). It is unclear whether the parties intended for the term "sole efforts" to embrace the situation where B&G sold the property, not through another broker, but with the assistance of a nonbroker, who B&G alleges was its business partner.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: MAY 12, 2009



CLERK

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

431-
431A Law Offices of K.C. Okoli, P.C., Index No. 603139/07
Plaintiff,

Kenechukwu C. Okoli,
Plaintiff-Appellant,

-against-

Samuel O. Maduegbuna, et al.,
Defendants-Respondents.

Kenechukwu C. Okoli, New York, appellant pro se.

Samuel O. Maduegbuna, New York, respondent pro se.

Law Office of Robert Osuna, P.C., New York (Robert Osuna of counsel), for Maduegbuna Cooper LLP, respondent.

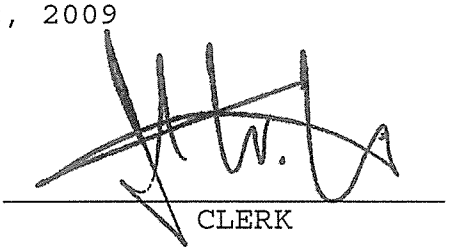
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 21, 2008, which, in an action between attorneys for breach of an oral fee-sharing agreement, to the extent appealed from, granted defendants' motion to dismiss the first cause of action sounding in contract for failure to state a cause of action, with leave to replead in quantum meruit, unanimously reversed, on the law, with costs, the motion denied and the first cause of action reinstated. Appeal from order, same court and Justice, entered September 29, 2008, which, to the extent appealed from, denied plaintiff's motion to renew, unanimously dismissed, without costs, as academic.

Plaintiff attorney alleges that he assisted defendants in a contingency fee case for which they paid him 20% of the fee they

realized on settlement, in breach of an oral agreement calling for a division of the fee as the parties "had done in the past," and that in all previous contingency-fee cases procured by defendants on which plaintiff had worked, they had paid him 50% of the fee. Contrary to the motion court's ruling, the complaint alleges a course of dealing sufficient to establish the terms of the parties' oral contract (*see Telecommunications Tech. Corp. v Deutsche Bank*, 235 AD2d 288 [1997]). Equally unavailing is defendants' argument that the parties' alleged fee-sharing agreement would be void under Code of Professional Responsibility DR 2-107(a)(2) (22 NYCRR 1200.12[a][2]). Defendants are also bound by the Code of Professional Responsibility, and cannot avoid a fee-sharing agreement on ethical grounds if they freely agreed to be bound by and received the benefit of same (*see Benjamin v Koeppel*, 85 NY2d 549, 556 [1995]).

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

ENTERED: MAY 12, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

536 The People of the State of New York, Ind. 4513/07
Respondent,

-against-

Vincent Richardson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Craig A. Ascher of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 1, 2008, convicting defendant, after a nonjury trial, of two counts of burglary in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

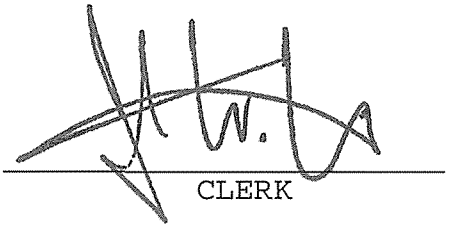
The court properly declined to order a midtrial CPL article 730 competency examination. Nothing in the record casts doubt on defendant's competency (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 881 [1995]). On the contrary, defendant engaged in a series of interchanges with the court that demonstrated his familiarity with legal procedures, his understanding of the charges, and his ability to assist in his defense (*see People v Russell*, 74 NY2d 901 [1989]).

Defendant received effective assistance of counsel under the

state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel could have reasonably concluded that a competency examination would have accomplished nothing except delaying the completion of the trial. Counsel appropriately informed the court that his client's pro se request for a competency examination was baseless, and defendant was not prejudiced by any statements counsel made to the court in that connection.

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

ENTERED: MAY 12, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

537 Daeun Corp., Index 602087/08
Plaintiff-Appellant,

-against-

A&L 444 LLC, et al.,
Defendants-Respondents.

Vishnick, McGovern Milizio LLP, Lake Success (Michael J. Stacchini of counsel), for appellant.

Eric Michael Pasinkoff, New York, for respondents.

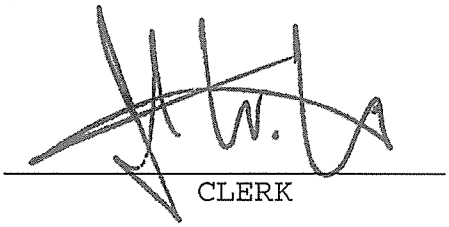
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 21, 2008, which granted defendants/landlords' motion to dismiss, and declared that plaintiff/tenant had not validly exercised an option to renew its lease and defendants were not required to accept the purported exercise, unanimously affirmed, with costs.

Contrary to plaintiff's contentions, the court properly determined the action based upon documentary evidence and the unambiguous lease agreement (*see Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [2001]. Because plaintiff had twice defaulted in payment of rent, from September 1, 2005 through February 1, 2006 and from September 1, 2006 through April 1, 2007, defendants could refuse to extend the lease pursuant to paragraph 3 of the Lease Modification dated November 2002, which granted the tenant the option to renew for an additional five year term "[p]rovided Tenant does not default

at anytime [*sic*] under the Lease." We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: MAY 12, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

538 In re Dayshawn A.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about September 25, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of attempted assault in the second and third degrees, criminal possession of a weapon in the fourth degree and menacing in the second and third degrees, and also committed the act of unlawful possession of a weapon by a person under sixteen, and placed him on enhanced supervised probation for a period of 12 months, unanimously modified, on the law, to the extent of vacating the findings as to attempted assault in the third degree and menacing in the third degree and dismissing those counts of the petition, and otherwise affirmed, without costs.

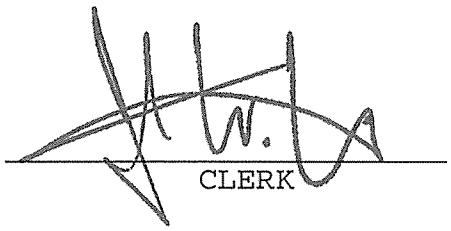
The court's finding was based on legally sufficient evidence

and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence established beyond a reasonable doubt that appellant was not justified in using a knife against the victim.

We dismiss, as lesser included offenses, the two counts indicated. We have considered and rejected appellant's remaining claims.

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

ENTERED: MAY 12, 2009



Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

539 Lyudmila Golubchik, Index 7602/07
Plaintiff,

-against-

Das Trading Corp., et al.,
Defendants-Respondents,

New York City Ambulette, et al.,
Defendants-Appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Alan C. Kelhoffer of counsel), for appellants.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for respondents.

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered November 20, 2008, which denied the motion of defendants New York City Ambulette and Arkady Neyshtat for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of said defendants dismissing the complaint as against them.

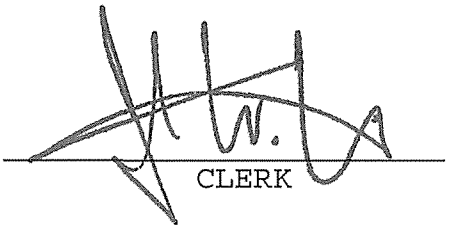
Plaintiff, a passenger in an ambulette owned by New York City Ambulette and driven by Arkady Neyshtat, seeks damages from defendants for injuries sustained in an accident when the ambulette was hit from behind by a van owned by defendant Das Trading Corp. and driven by defendant Wei Pan.

A rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the

moving vehicle (*see Mankiewicz v Excellent*, 25 AD3d 591, 592 [2006]; *Johnson v Phillips*, 261 AD2d 269, 271 [1999]). Here, defendants New York City Ambulette and Neyshtat established their prima facie entitlement to judgment as a matter of law, by submitting evidence that Neyshtat was stopped in the left lane on the Brooklyn-Queens Expressway. Defendant Pan fails to raise an issue of fact in rebuttal.

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

ENTERED: MAY 12, 2009



Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

540 Stela Daniarov, Index 103763/06
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Mark M. Basichas & Associates, P.C., New York (Aleksey Feygin of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered January 10, 2008, which, in an action for personal injuries allegedly sustained when plaintiff slipped on the third step from the bottom of a staircase in defendant's subway station, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

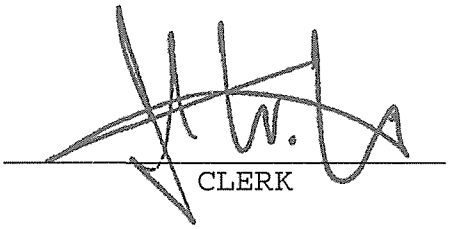
Defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence including, inter alia, plaintiff's testimony that although there was no handrail to break her fall, she did not know how she fell or what caused her to slip.

In opposition, plaintiff submitted an affidavit from her expert, who, in contrast to plaintiff's testimony, found a

handrail present at the point where plaintiff allegedly slipped, but asserted that alleged violations of the New York City Building Code with respect to the handrail caused plaintiff's accident. Plaintiff's failure to testify as to what caused her accident is fatal to her cause of action (*see Telfeyan v City of New York*, 40 AD3d 372 [2007]), and such failure cannot be cured by her expert's opinion that the subject handrails violated the Building Code, even if applicable, in the absence of any evidence connecting the alleged violations to plaintiff's fall (*see Reed v Piran Realty Corp.*, 30 AD3d 319 [2006], *lv denied* 8 NY3d 801 [2007]; *see also Ridolfi v Williams*, 49 AD3d 295 [2008]).

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

ENTERED: MAY 12, 2009



CLERK

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

541-
541A 2-10 Jerusalem Avenue Realty, LLC, Index 111924/07
Plaintiff-Respondent,

-against-

Utica First Insurance Company,
Defendant-Appellant,

Rado Restaurant, Inc., etc.,
Defendant.

Farber Brocks & Zane, L.L.P., Mineola (Tracy L. Frankel of counsel), for appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered August 8, 2008, which, in a declaratory judgment action involving defendant insurer's obligation to defend and indemnify plaintiff in an underlying action for personal injuries sustained on commercial premises owned by plaintiff and leased to defendant's named insured, insofar as it denied the insurer's motion for summary judgment declaring that it is not obligated to defend and indemnify the owner in the underlying action, and granted the owner's motion for summary judgment declaring that it is an additional insured on the policy entitled to a defense and indemnification in the underlying action, unanimously reversed, on the law, without costs, the insurer's motion for summary judgment granted, the owner's motion for summary judgment denied,

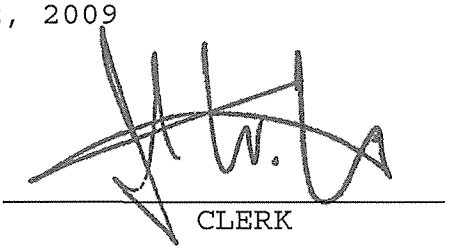
and it is declared that the insurer is not obligated to defend and indemnify the owner in the underlying action. Appeal from order, same court and Justice, entered April 2, 2008, which, insofar as appealed from, denied the insurer's motion for summary judgment, unanimously dismissed, without costs, as superseded by the appeal from the August 8, 2008 order.

The owner's tenant met with the insurer's agent on February 24, 2006, during the workday, and signed a writing requesting retroactive cancellation of the subject policy as of 12:01 a.m. on February 24, 2006. The accident involved in the underlying action also occurred on February 24, certainly after 12:01 a.m., although the exact time of day is not clear. There is no indication, or claim, that either the tenant or the insurer's agent was aware of the accident when they met and agreed to cancel the policy effective some hours earlier the same day. It does not avail the owner to argue that since the policy permits cancellation only as of a "future date" specified in a written notice, and since the written notice here did not specify a date in the future, the cancellation could not have been effective, under the "midnight rule" explained in *Savino v Merchants Mut. Ins. Co.* (44 NY2d 625, 629-630 [1978]) until at least the day after the accident. Any policy limitation on retroactive cancellation would be for the sole benefit of the insurer -- protecting it against an insured who waits until the end of the

policy period and, when no accidents have occurred, sends a retroactive cancellation to avoid paying for the policy -- and thus could be waived by the insurer (*cf. Matter of Country-Wide Ins. Co. v Wagoner*, 57 AD2d 498 [1977] [policy requirement that cancellation request by insured be in writing is for benefit of insurer and may be waived by insurer], *revd on other grounds*, 45 NY2d 581 [1978]). We therefore find that the policy was cancelled effective 12:01 a.m. on February 24, as the tenant requested (*cf. Savino*, 44 NY2d at 630 [parties may particularize as to the time of day when a cancellation is to be effective]), and was not in effect when the accident involved in the underlying action occurred some time later that day.

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

ENTERED: MAY 12, 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 12, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 5988/06
Respondent,

-against- 542

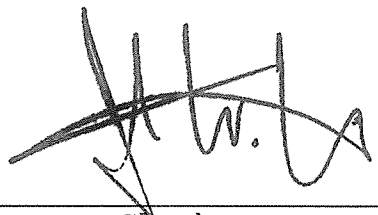
Maurice Newton,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J. at plea; Ronald A. Zweibel, J. at sentence), rendered on or about May 10, 2007,

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

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

ENTER:



Clerk.

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

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

543 The People of the State of New York, Ind. 4858/06
Respondent,

-against-

Arenzo Smith,
Defendant-Appellant.

Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered July 19, 2007, 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 whose prior felony conviction was a violent felony, to a term of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's guilt was established by the testimony of the drug purchaser and an observing officer, as well as surveillance videotapes.

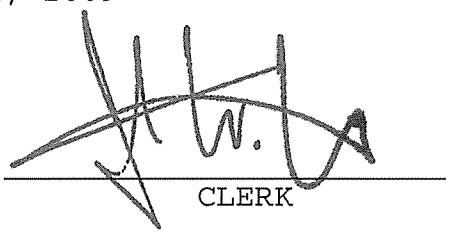
The trial court properly exercised its discretion in admitting into evidence a surveillance videotape depicting defendant about three hours prior to the drug sale, not engaging

in any criminal activity (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]). This segment showed defendant's face, clothing, body type and mannerisms. As such, it was highly relevant in identifying defendant as the drug seller, since, in the later tape of the drug sale itself, the seller's back was to the camera but the other characteristics were the same. Thus, the two tapes, taken together, warranted the inference that defendant was the person depicted in both.

Defendant's remaining evidentiary claims and his challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MAY 12, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

546 In re Jasmine Pauline M.,

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

Encarnacion N.S.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

Anne Reiniger, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

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

Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about March 14, 2008, which terminated respondent mother's parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

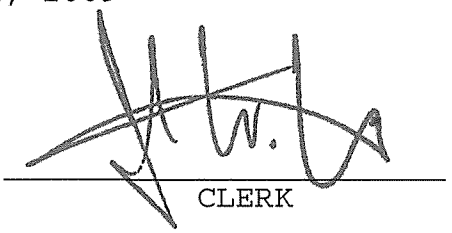
Clear and convincing evidence, including expert testimony from the psychologist who examined respondent and reviewed all her available medical records, supported the determination that she is presently and for the foreseeable future unable to provide proper and adequate care for her children (Social Services Law § 384-b[4][c]) by reason of mental illness (*id.*, subparagraph [6][a]) or mental retardation (subparagraph [6][b]). The

evidence showed that even though respondent's adaptive skills had improved, they were not enough to ensure the safety of her child while in her care (*Matter of Leomia Louise C.*, 41 AD3d 249 [2007]).

Termination of respondent's parental rights was proper inasmuch as adoption represents the child's only prospect of a permanent, stable and nurturing familial disposition (*Matter of Nadaniel Jackie P.*, 35 AD3d 305 [2006]). The court was not required to issue an order directing post-termination visitation between respondent and her child (*Matter of April S.*, 307 AD2d 204 [2003], *lv denied* 1 NY3d 504 [2003]).

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

ENTERED: MAY 12, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

547 The People of the State of New York, Ind. 675/06
Respondent,

-against-

Jason Williams,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Dana Levin of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered April 18, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and unlawful possession of marihuana, and sentencing him, as a second felony offender, to an aggregate term of 6 years, unanimously affirmed.

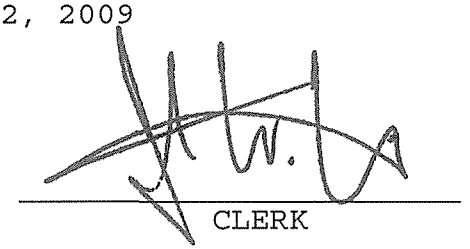
The record supports the court's denial (15 Misc 3d 1102[A]), of defendant's application to introduce the grand jury testimony of an unavailable declarant as a declaration against penal interest. The reliability prong for introduction of such a declaration (*see People v Settles*, 46 NY2d 154, 167-170 [1978]) was not met. The court properly concluded that any reliability this grand jury testimony may have had was completely undermined by the declarant's conviction of perjury arising out of that same testimony. Even though the declarant pleaded guilty to one of

several counts of perjury, the circumstances support the conclusion that his entire testimony failed the reliability test for admission, and we have considered and rejected defendant's arguments to the contrary. Accordingly, there was no violation of defendant's constitutional right to present a defense (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 12, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

548 W. 54-7, LLC, Index 114175/04
Plaintiff-Respondent,

-against-

Sheldon Farber, et al.,
Defendants-Appellants.

Sheldon Farber, New York, for appellants.

Hartman & Craven, LLP, New York (Edward L. Schiff of counsel), for respondent.

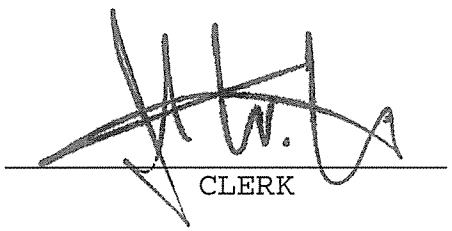
Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered May 9, 2008, which, in an action to recover rent arrears, insofar as appealed from, awarded plaintiff prejudgment interest on the arrears, unanimously reversed, on the law, without costs, and the award of prejudgment interest vacated. The Clerk is directed to enter an amended judgment accordingly.

In April and May 1998, defendants tendered their April and May 1998 rent payments to plaintiff on three occasions. Each time plaintiff rejected these tenders, stating, "[w]e are unable to accept any payment since there is a legal action pending against you." Plaintiff then stopped sending defendants monthly rent bills as had been its regular practice, and brought several other lawsuits against defendants. A landlord who rejects a tenant's tender of rent due to concern that acceptance might prejudice claims against the tenant, without having sought a court order that acceptance of the tender be without prejudice,

is not entitled to interest on an award of the unpaid rent (*see San-Dar Assoc. v Toro*, 213 AD2d 233, 234-235 [1995]; *cf. Knab Bros. v Town of Lewiston*, 58 AD2d 1016, 1017 [1977] [right to interest may be lost on equitable principles of estoppel, such as a creditor's refusal to accept a tender]). Plaintiff's rejection of defendants' tenders of rent, and its cessation of its usual practice of sending defendants monthly rent bills, combined to make it abundantly clear that any further tenders of rent while litigation remained pending would be futile, dispensing with the need to make further tenders (*see Strasbourger v Leerburger*, 233 NY 55, 60 [1922] [formal tender never required where by act or word other party has shown that if made it would not be accepted]).

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

ENTERED: MAY 12, 2009



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 12, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
David Friedman
John T. Buckley
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 4429/07
Respondent,

-against- 550

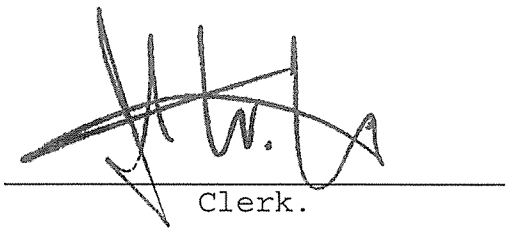
Lawrence Green,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about June 18, 2008,

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

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

ENTER:



Clerk.

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

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

551 Property Clerk, New York City Police Department,
Plaintiff-Respondent,

-against-

Dionte Smith,
Defendant-Appellant.

Index 403542/07

Latham & Watkins LLP, New York (George Royle V of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Stephen J. McGrath of counsel), for respondent.

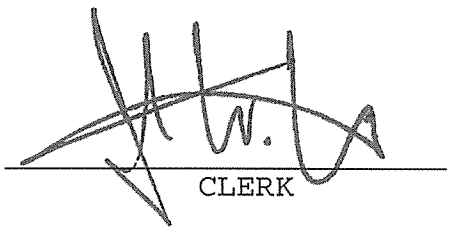
Order and judgment (one paper), Supreme Court, New York County (Martin Shulman, J.), entered March 6, 2008, which, in a civil forfeiture action, granted plaintiff's motion for summary judgment, denied defendant's cross motion for summary judgment, and declared that defendant's vehicle be forfeited, unanimously reversed, on the law and the facts, without costs, the order and judgment vacated, the motion denied, the cross motion granted, and it is declared that plaintiff does not have any right of ownership or possession in the subject vehicle.

Defendant's communications with plaintiff's personnel gave plaintiff notice, by no later than the date the *Krimstock* hearing was convened, that defendant was seeking the return of his vehicle; thus, this action, commenced more than 25 days later, was untimely (38 RCNY 12-36[a]; *see Matter of DeBellis v Property Clerk of City of N.Y.*, 79 NY2d 49, 58 [1992]). To the extent the

Property Clerk may require a DA's release (38 RCNY 12-35[d]), defendant's failure to provide one did not render his demand ineffective (*see Matter of Camacho v Kelly*, 57 AD3d 297, 298 [2008] [citing *Debellis*, *id.* at 57). Similarly, to the extent the Property Clerk may require title when the seized property is a motor vehicle (38 RCNY 12-35[f]), this cannot be understood as a required component of the demand; rather, it is a prerequisite to the release of the vehicle from police custody. In view of the foregoing, it is unnecessary to address the parties' other contentions.

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

ENTERED: MAY 12, 2009



CLERK

Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

552N 148 Magnolia, LLC, et al., Index 111200/07
Plaintiffs,

-against-

Merrimack Mutual Fire Insurance Company,
Defendant-Respondent,

Ral Services, Inc., et al.,
Defendants,

Public Contracting NYC, Inc.,
Defendant-Appellant.

Ahmuty Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for appellant.

Faust Goetz Schenker & Blee LLP, New York (Lisa L. Gokhulsingh of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered July 23, 2008, which denied defendant-appellant Public Contracting NYC, Inc.'s motion for a protective order and to quash a subpoena served by defendant-respondent Merrimack Mutual Fire Insurance Company, unanimously affirmed, with costs.

The demanded documents consist of a file reflecting the results of an investigation performed by appellant's insurance carrier's agent regarding the underlying fire incident which resulted in the instant litigation. The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes of the

underlying immunity (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]).

A trial court is vested with broad discretion regarding discovery, and its determination will not be disturbed absent a demonstrated abuse of that discretion (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [2007], *affd* 11 NY3d 843 [2008]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190 [2005]). Here the motion court properly determined that the documents were not protected because appellant failed to demonstrate that the investigation was conducted solely in anticipation of litigation. Such reports of insurance investigators or adjusters prepared during the processing of a claim are discoverable in the regular course of the insurance company's business (*see Brooklyn Union Gas Co.*, 23 AD3d at 190; *Roman Catholic Church of the Good Shepherd v Tempco Sys.*, 202 AD2d 257 [1994]).

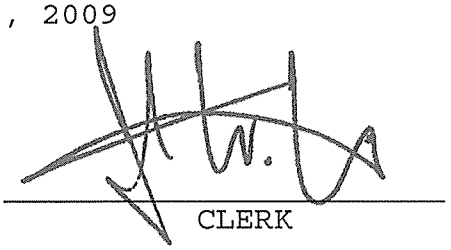
We further note that appellant failed to properly affix to its motion papers an attorney's affirmation of good faith effort to resolve disclosure issues (*see* 22 NYCRR § 202.7 [a] [2]; *Fanelli v Fanelli*, 296 AD2d 373 [2002]). Moreover, the affirmation of good faith appellant claims to have filed is deficient because it does not "indicate the time, place and nature of the consultation and the issues discussed and any

resolutions" as required by the rule (*see Amherst Synagogue v Schuele Paint Co.*, 30 AD3d 1055, 1057 [2006]).

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

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

ENTERED: MAY 12, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
David Friedman
John T. Buckley
James M. Catterson, JJ.

3915
Ind 603080/05

Sport Rock International, Inc., et al.,
Plaintiffs-Appellants,

-against-

American Casualty Company of Reading, PA,
Defendant-Respondent.

Plaintiffs appeal from an order of Supreme Court, New York County (Debra A. James, J.), entered August 27, 2007, which granted their motion for summary judgment to the extent of declaring that defendant American is obligated to defend plaintiff Sport Rock in the *Anaya* action, and otherwise denied the motion.

Callan, Koster, Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for appellants.

Bonner Kiernan Trebach & Crociata, LLP, New York (Alexander H. Gillespie of counsel), for respondent.

FRIEDMAN, J.

The main question presented on this appeal is whether the costs of defending an insured in an underlying personal injury action should be allocated between two primary liability insurers or, pursuant to the policies' respective "other insurance" clauses, imposed on only one of the two insurers on a primary basis. Consistent with longstanding precedent, we hold that the carrier whose coverage is rendered excess by reason of the competing "other insurance" clauses will not become obligated to defend the insured until the other carrier's coverage has been exhausted. This result is not affected by the fact that certain allegations against the insured in the underlying action, while within the scope of the excess carrier's coverage, were outside the scope of the other carrier's duty to indemnify the insured.

This declaratory judgment action arises from an underlying personal injury action captioned *Joseph Anaya v Town Sports International, Inc., et al.* (Supreme Court, New York County, Index No. 101027/2003) (the *Anaya* action). Joseph Anaya was severely injured on January 14, 2003, when he fell while using an artificial rock-climbing wall at a fitness club. The indoor wall-climbing system had been sold to the club by Sport Rock International, Inc. (Sport Rock), a plaintiff in this action. The wall-climbing equipment that the club purchased from Sport

Rock included a safety harness manufactured by Petzl America, Inc. (Petzl). It has been established in the *Anaya* action that "[t]he accident occurred because an employee of [the club] tied the safety line [Anaya] was using to a non-weight-bearing gear loop on the [Petzl] harness," rather than to the harness's "anchor point" (*Anaya v Town Sports Intl., Inc.*, 44 AD3d 485, 485 [2007]). The club having settled with Anaya (*see id.* at 486 n*), the *Anaya* action proceeds against Sport Rock and Petzl on two theories, namely, that Petzl's design for the harness was defective and that Petzl failed to include warning labels on the harness necessary to render it safe (*id.* at 486-488).

At the time of Joseph Anaya's accident, Sport Rock was covered as a named insured under a commercial general liability (CGL) policy issued by Evanston Insurance Company (Evanston), Sport Rock's co-plaintiff in this action. The Evanston policy provides that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies," and further provides that the insurer "will have the right and duty to defend the insured against any 'suit' seeking those damages." The insurance provided by the Evanston policy applies to, inter alia, "bodily injury" that "occurs during the policy period."

In addition, Sport Rock was covered at the time of the Anaya accident as an additional insured under the CGL policy issued to Petzl by American Casualty Company of Reading, Pa. (American), the defendant in this action. The American policy (like the Evanston policy) provides that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies," and further provides that the insurer "will have the right and duty to defend the insured against any 'suit' seeking those damages." The insurance provided by the American policy applies to, inter alia, "bodily injury" that occurs, and for which a claim against the insured is first made, during the policy period. Sport Rock is afforded additional insured coverage under the American policy pursuant to an endorsement entitled "Additional Insured - Vendors" (the vendor's endorsement), which provides in pertinent part:

> "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (referred to below as vendor) shown in the Schedule [including Sport Rock], but only with respect to 'bodily injury' or 'property damage' arising out of 'your [i.e., Petzl's] products' shown in the Schedule which are distributed or sold in the regular course of the vendor's business, subject to the following additional exclusions [omitted here]."[1]

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[1]As recognized by the Court of Appeals, a vendor's endorsement to a manufacturer's liability policy "'covers the vendors' liability arising out of their role in passing the

The relevant "other insurance" clause of Sport Rock's policy from Evanston states:

> "When you are added to a manufacturer's or distributor's policy as an additional insured because you are a vendor for such manufacture[r]'s or distributor's products, . . . [the] Other Insurance [clause of this policy] is amended by the addition of the following:
>
> "The coverage afforded the insured under this Coverage Part [i.e., the policy's CGL Form] will be excess over any valid and collectible insurance available to the insured as an additional insured under a policy issued to a manufacturer or distributor for products manufactured, sold, handled or distributed."

The "other insurance" clause of Petzl's policy from American states that the policy provides primary coverage (except under specified circumstances, none of which applies here), and that, if other primary insurance is available, "we will share with all that other insurance by the method" provided elsewhere in the policy (either by equal shares or in proportion to policy limits, depending on what the other insurance permits).[2]

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manufacturer's product on to customers, but does not cover vendors for their own negligence. Coverage under the vendor's endorsement is limited to injuries arising out of a defect in the manufacturer's product'" (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 164 [2005], quoting 9 Couch on Insurance 3d § 130:3 [1997]).

[2]The American policy's "other insurance" clause provides in pertinent part:

After the *Anaya* action was commenced, Evanston tendered Sport Rock's defense to American. American acknowledged that the policy it issued to Petzl affords Sport Rock coverage for the *Anaya* action as an additional insured pursuant to the policy's vendor's endorsement. Nonetheless, American ultimately refused to bear the entire cost of Sport Rock's defense. In support of this position, American pointed out that the claims and theories of liability asserted against Sport Rock in the *Anaya* action were not limited to the Petzl harness's allegedly defective design and lack of adequate warning labels. For example, the *Anaya* complaint alleged that Sport Rock had negligently installed the wall-climbing system and that features of the wall-climbing

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> "4. Other Insurance
>
> "If other valid and collectible insurance is available to the insured for a loss we cover under Coverage[] A [Bodily Injury and Property Damage Liability] . . . of this Coverage Part [the CGL Coverage Form], our obligations are limited as follows:
>
> "a. Primary Insurance
>
> "This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below."

Subsection b. specifies conditions under which the American policy's coverage will be deemed excess. None of those conditions is satisfied in this case.

system other than the Petzl harness (such as the landing mats) were also defective. Based on its assessment of the proportion of the claims in the *Anaya* action that were related to the Petzl harness, American offered to cover only 10% of the cost of Sport Rock's defense.

In response to American's refusal to take over Sport Rock's defense, Sport Rock and Evanston commenced this action seeking damages for breach of contract and a declaration that American is obligated to provide primary coverage for both defense and indemnification in the *Anaya* action and that, pursuant to the "other insurance" clause of the Evanston policy, Evanston's coverage of Sport Rock in the *Anaya* action "is in the nature of excess coverage only over and above the limits" of the American policy. After joinder of issue, Sport Rock and Evanston moved for summary judgment. The motion court granted the motion only to the extent of declaring that American has an obligation to defend Sport Rock in the *Anaya* action, refusing to declare that Evanston's coverage is excess to American's coverage for purposes of either defense or indemnification. In particular, the motion court was persuaded by American's argument that "the Evanston policy remained primary for those claims not within the vendor's endorsement" to the American policy. On Sport Rock's and Evanston's appeal, we modify to declare that, for purposes of the

Anaya action, Sport Rock's coverage from Evanston is excess to Sport Rock's primary coverage from American under the vendor's endorsement to Petzl's American policy.

Duty to Defend

The motion court recognized that Sport Rock, as an additional insured under the policy American issued to Petzl, is entitled to a complete defense from American in the *Anaya* action. "[T]he well-understood meaning of the term [additional insured] is an entity enjoying the same protection as the named insured" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714-715 [2007] [internal quotation marks and citation omitted]). "Thus, the standard for determining whether an additional named insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense" (*id.* at 715). An insurer's "duty to defend is broader than its duty to indemnify" and arises "whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks and citation omitted]). Further, "'[i]f any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action'"

(*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443 [2002], quoting *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]; *see also e.g. Bravo Realty Corp. v Mt. Hawley Ins. Co.*, 33 AD3d 447 [2006]; *Firemen's Ins. Co. of Washington, D.C. v Federal Ins. Co.*, 233 AD2d 193 [1996], *lv denied* 90 NY2d 803 [1997] ["Nor is plaintiff only required to pay the costs of defending the risks specified in its general liability policy, since an insurer's obligation to defend encompasses the entire complaint where, as here, the insurer has any potential indemnity obligations"]; 3 Couch on Insurance 3d § 40:28 ["an insurer has a duty to defend an additional insured in relation to the entire lawsuit, even though the lawsuit may involve both covered and uncovered claims"]). Accordingly, American's duty to defend Sport Rock encompasses all claims asserted against the latter in the *Anaya* action, both claims within the scope of American's potential indemnity obligation under the vendor's endorsement to the Petzl policy (i.e., those claims based on the Petzl harness's allegedly defective design or inadequate labeling) and claims outside the scope of that potential indemnity obligation.

The parties' dispute arises from the fact that Sport Rock's possible liability in the *Anaya* action is potentially covered both (1) by the primary policy issued to it (as a named insured)

by Evanston and (2) by the coverage afforded to it under the vendor's endorsement to the primary policy issued to Petzl by American. Thus, the question arises whether each insurer is obligated to defend Sport Rock concurrently with the other (as American argues) or, alternatively, whether one insurer has the primary defense obligation, with the other's defense obligation arising upon exhaustion of coverage under the first policy (as Sport Rock and Evanston argue, relying on the Evanston policy's "other insurance" clause). We hold that the latter position is correct.

Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage (as is the case here), priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective "other insurance" clauses (*see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687 [1999] [hereinafter, *Great Northern*], citing *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369 [1985]; *see also Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 372 [1998]). An "other insurance" clause "limit[s] an insurer's liability where other insurance may cover the same loss" (15 Couch on Insurance 3d § 219:1). This may be accomplished by providing that the insurance provided by the policy is excess to the insurance

provided by other policies, in which case the "other insurance" clause is known as an excess clause (15 Couch on Insurance 3d § 219:33; 23 Holmes' Appleman on Insurance 2d § 140.2[B][1]). Alternatively, an "other insurance" clause may limit the insurer's liability by providing that, if other insurance is available, all insurers will be responsible for a stated portion of the loss; an "other insurance" clause of this kind is known as a pro rata clause (15 Couch on Insurance 3d § 219:27-28; 23 Holmes' Appleman on Insurance 2d § 140.2[A]).

In this case, the applicable "other insurance" clause of the Evanston policy is an excess clause,[3] and the "other insurance" clause of the American policy is a pro rata clause.[4] It is well established under New York law that, where one of two concurrently applicable insurance policies contains an excess "other insurance" clause and the other contains a pro rata "other insurance" clause, the excess clause is given effect, meaning

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[3]As previously indicated, the applicable "other insurance" clause of the Evanston policy provides, in pertinent part, that the policy's coverage is "excess over any valid and collectible insurance available to the insured [Sport Rock] as an additional insured under a policy issued to a manufacturer or distributor for products manufactured, sold, handled or distributed."

[4]As previously indicated, the "other insurance" clause of the American policy provides, in pertinent part, that, if other primary insurance is available, "we will share with all that other insurance" either by equal shares or in proportion to policy limits.

that the coverage under the policy containing the excess clause does not come into play, and the carrier's duty to defend is not triggered, until the coverage under the policy containing the pro rata clause has been exhausted (*see General Acc. Fire & Life Assur. Corp. v Piazza*, 4 NY2d 659, 669 [1958]; *Harleysville Ins. Co. v Travelers Ins. Co.*, 38 AD3d 1364, 1367 [2007], *lv denied* 9 NY3d 811 [2007]; *Firemen's*, 233 AD2d at 193; *see also International Bus. Mach. Corp. v Liberty Mut. Fire Ins. Co.*, 303 F3d 419, 429 [2d Cir 2002] [applying New York law]; *Great Northern*, 92 NY2d at 687; *Pav-Lak Indus., Inc. v Arch Ins. Co.*, 56 AD3d 287, 288 [2008]; *Tishman Constr. Corp. of N.Y. v American Mfrs. Mut. Ins. Co.*, 303 AD2d 323, 324 [2003]).[5] By contrast, where each policy contains an excess "other insurance" clause, so that giving each policy's clause effect would leave the insured

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[5]It should be added, however, that an excess "other insurance" clause will not render a policy sold as primary insurance excess to a true excess or umbrella policy sold to provide a higher tier of coverage (*see Jefferson Ins. Co.*, 92 NY2d at 372; *LiMauro*, 65 NY2d at 371; *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 142, 148-150 [2008]; *Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, 32 AD3d 1265, 1267-1268 [2006]; 1 Ostrager and Newman, Insurance Coverage Disputes § 11.01, at 892 [14th ed] [although "'other insurance' clauses may operate to convert a primary policy into an excess policy . . . , insurance purchased as primary coverage must respond to a covered claim before policies specifically purchased as secondary coverage, regardless of the presence of 'other insurance' clauses in the primary policies"] [citations omitted]).

without primary insurance, the clauses are deemed to cancel each other out, and the insurers are required to cover the loss on a pro rata basis (*see Great Northern*, 92 NY2d at 687; *Jefferson Ins. Co.*, 92 NY2d at 372; *LiMauro*, 65 NY2d at 373-374; *Federal Ins. Co. v Atlantic Natl. Ins. Co.*, 25 NY2d 71, 75-76 [1969]).

The New York rule giving effect to an excess "other insurance" clause in one of two concurrent policies, where the other policy contains a pro rata "other insurance" clause, conforms to the majority rule throughout the nation (*see* 15 Couch on Insurance 3d § 219:51; 23 Holmes' Appleman on Insurance 2d § 140.3[2][a], at 126; 1 Ostrager and Newman, Insurance Coverage Disputes § 11.03[d][1][A], at 907). The reasoning behind the rule is that, because a pro rata clause applies only in the presence of other primary insurance, there is no conflict between a primary policy containing a pro rata clause and a second primary policy containing an excess clause rendering the latter excess to other primary insurance. Moreover, giving effect to the excess clause conforms to the insurers' intent as expressed in their respective policies. As the District of Columbia Court of Appeals has explained:

> "[T]he standard phrase 'other valid and collectible insurance' means other valid and collectible *primary* insurance. It follows, then, that the policy containing the pro rata clause is other valid and collectible primary insurance that triggers application of the excess clause in

> the second policy. The excess clause in the second policy therefore is given full effect and that carrier is liable only for the loss after the primary insurer had paid up to its policy limits. The policy containing the excess clause, however, is not considered to be other valid and collectible primary insurance for the purpose of triggering the operation of the pro rata clause, because when a stated contingency occurs, that is, when there is other valid and collectible primary insurance available to the insured, the policy containing the excess clause becomes secondary coverage only" (*Jones v Medox, Inc.*, 430 A2d 488, 491 [DC 1981]).

Accordingly, giving effect to the Evanston policy's excess "other insurance" clause, Sport Rock's coverage as a named insured under the Evanston policy is excess to Sport Rock's additional insured coverage under the American policy. Hence, Evanston's obligation to defend Sport Rock in the *Anaya* action will not be triggered until Sport Rock's coverage under the American policy has been exhausted or otherwise terminated.[6] And, to reiterate, Sport Rock's coverage under the American policy obligates American to defend every claim against Sport

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[6]We do not suggest that American would continue to have a duty to defend Sport Rock in the *Anaya* action in the event all claims within the scope of American's duty to indemnify Sport Rock were dismissed. However, this Court's decision resolving the prior appeal in the *Anaya* action establishes (as previously noted) that the only claims against Sport Rock that remain pending in that lawsuit are based on the allegedly defective design or inadequate labeling of the Petzl harness (*see Anaya*, 44 AD3d at 486-488). Thus, it is evident at this juncture that American will be obligated to indemnify Sport Rock for any judgment against the latter in the *Anaya* action.

Rock in the *Anaya* action, whether or not it is within the scope of American's potential duty to indemnify Sport Rock.

For the most part, American does not dispute the foregoing principles. Nonetheless, American argues that Evanston is obligated to share with American the expense of defending Sport Rock because Evanston remained Sport Rock's primary insurer for the now-dismissed claims formerly asserted against Sport Rock in the *Anaya* action that were outside the scope of American's indemnification obligations under the vendor's endorsement to Petzl's policy. The motion court was persuaded by this argument, but we are not.

The hallmark of New York's approach to "other insurance" issues is the "recogni[tion] [of] the right of each insurer to rely upon the terms of its own contract with its insured" (*LiMauro*, 65 NY2d at 373). Thus, in seeking to determine the effect of the Evanston policy's excess "other insurance" clause, our first resort is to the language of that clause, which, to reiterate, is as follows:

> "The coverage afforded the insured under this Coverage Part will be excess over any valid and collectible insurance available to the insured as an additional insured under a policy issued to a manufacturer or distributor for products manufactured, sold, handled or distributed."

The above-quoted "other insurance" clause of the Evanston policy does not qualify in any way "the coverage afforded the insured under this Coverage Part" to which it applies. Since such coverage includes both a duty to defend and a duty to indemnify, the "other insurance" clause renders *all* such coverage, the duty to defend no less than the duty to indemnify, excess to the referenced other insurance. Similarly, the above-quoted "other insurance" clause plainly states that the coverage provided by the Evanston policy is made excess over "*any* valid and collectible insurance available to the insured as an additional insured" (emphasis added) under a vendor's endorsement to a manufacturer's or distributor's policy. Thus, the clause renders *all* of Evanston's coverage excess over *all* insurance available to the insured under such a vendor's endorsement, including both the other insurer's duties to defend and to indemnify. In this regard, it should be borne in mind that a liability insurance policy "represent[ing] that it will provide the insured with a defense . . . actually constitutes litigation insurance in addition to liability coverage" (*Cook*, 7 NY3d at 137 [internal quotation marks and citations omitted]).

As previously discussed, American's duty to defend Sport Rock extends to all claims asserted against the latter in the *Anaya* action, even those claims that, if reduced to judgment,

would fall outside the scope of American's duty to indemnify under the vendor's endorsement to the Petzl policy (i.e., any claim against Sport Rock based on Sport Rock's own negligence or the alleged defectiveness of a product not manufactured by Petzl). Since the plain terms of the excess "other insurance" clause of the Evanston policy render all of Evanston's coverage obligations excess to all of American's coverage obligations, Evanston's duty to defend Sport Rock in the *Anaya* action is not triggered to any extent -- even as to claims not within American's duty to indemnify -- until American's duty to defend Sport Rock against all claims in that action has terminated, by reason of exhaustion of limits or otherwise. To hold otherwise would defeat Evanston's reasonable expectations based on its "right . . . to rely upon the terms of its own contract with its insured" (*LiMauro*, 65 NY2d at 373).

In holding Evanston's coverage excess to American's coverage for purposes of the obligation to defend Sport Rock against all claims in the *Anaya* action, we follow this Court's 1996 decision in *Firemen's* (*supra*), a case that American describes as "wrongly decided" while acknowledging that it supports Evanston's position. In *Firemen's*, the two polices at issue were Firemen's general liability policy, which had a pro rata "other insurance" clause, and Federal's directors' and officers' liability policy,

which had an excess "other insurance" clause.[7] We analyzed the issues in *Firemen's* as follows:

> "Construing the policies and their 'other insurance' clauses according to the reasonable expectation of an ordinary businessperson making an ordinary business contract, the IAS court properly determined [Federal] to be an excess insurer, where, as here, a loss, including defense costs, can be covered by another policy [i.e., the Firemen's policy]. *Nor is [Firemen's] only required to pay the costs of defending the risks specified in its general liability policy, since an insurer's obligation to defend encompasses the entire complaint where, as here, the insurer has any potential indemnity obligations*" (233 AD2d at 193 [emphasis added and citations omitted]).

On those grounds, we affirmed the judgment "declar[ing] that [Federal] was not obligated as a primary insurer to defend the underlying actions" (*id.*). Here, the same reasoning leads to the

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[7]Although the *Firemen's* decision does not fully spell out the terms of the Firemen's policy's "other insurance" clause, the record of that appeal shows that the Firemen's policy contained a pro rata "other insurance" clause generally similar to that of the American policy in this case. Specifically, under the "other insurance" clause of the Firemen's policy in the earlier case, as under the American policy here (*see* footnote 2 above), the insurer agreed to "share [coverage] with all that other [primary] insurance" available to the insured, except under certain conditions (none satisfied in the case at bar) that would render the policy excess to the other primary insurance. The *Firemen's* record also shows that the Federal policy in that case contained an excess "other insurance" clause, which provided in pertinent part: "If any Loss arising from any claim made against the Insured is insured under any other valid policy(ies), prior or current, then this policy shall cover such Loss . . . only to the extent that the amount of such Loss is in excess of the amount of such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such insurance is written only as specific excess insurance over the limits provided in this policy."

conclusion that Evanston will not be obligated to defend Sport Rock in the *Anaya* action until American's coverage has been exhausted.[8]

In arguing for a contrary result, American relies on *General Motors Acceptance Corp. v Nationwide Ins. Co.* (4 NY3d 451 [2005] [hereinafter, *GMAC*]). Such reliance is misplaced. True, *GMAC* did direct an allocation of defense costs between two primary policies even though "one [was] excess to the other by reason of competing 'other insurance' provisions" (*id.* at 453). As noted in the decision's opening paragraph, however, crucial to that result was the circumstance that "the excess carrier [Fireman's] ha[d] *voluntarily* assumed and marshaled the insured's [i.e., GMAC's] defense" (*id.* [emphasis added]) upon tender by Nationwide, which had issued a primary automobile liability policy for a leased vehicle that covered GMAC (the lessor) as an additional insured. The Court of Appeals explained later in the

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[8]*See also Federal Ins. Co. v St. Paul Fire & Mar. Ins. Co./St. Paul Mercury Ins. Co.*, 985 F2d 979, 980 [8th Cir 1993], *affg* 1992 US Dist LEXIS 1224 [WD Mo 1992] [holding, under Missouri law, that an insurer (St. Paul) whose policy had a pro rata "other insurance" clause was required to bear the entire cost of defending the insured in a suit alleging defamation and antitrust claims without contribution from a second insurer (Federal) whose policy had an excess "other insurance" clause, although Federal's policy covered both defamation and antitrust liability and St. Paul's policy covered only defamation liability]).

opinion that, "[i]n assuming the defense, Fireman's triggered its own duty to defend the action" (*id.* at 456). By contrast, Evanston, the excess carrier in this case, promptly tendered the insured's defense to American, the primary carrier, and Evanston only proceeded to conduct that defense after the tender was rebuffed. Thus, Evanston, unlike the excess carrier in *GMAC*, did nothing to trigger its duty to defend Sport Rock before that duty otherwise would have arisen.

Our conclusion that *GMAC* does not control the instant case is reinforced by another factor distinguishing this case from *GMAC*'s particular circumstances. The "other insurance" clause of the Fireman's policy in *GMAC* (*see* 4 NY3d at 454) rendered the Fireman's policy excess to other insurance of all kinds, not other insurance of a specific kind, as is true of the "other insurance" clause of the Evanston policy applicable here. Again, the latter clause applies only to coverage afforded Sport Rock as an additional insured under the vendor's endorsement to a policy issued to a manufacturer or distributor. Thus, the Evanston policy's "other insurance" clause made the policy excess to the particular kind of other insurance afforded Sport Rock by the American policy. This indicates that Evanston, in issuing Sport Rock's policy, did not contemplate assuming on a primary basis the risk of liability arising from Sport Rock's acting as a

vendor of products (such as the Petzl harness) manufactured or distributed by other firms, an expectation that presumably was reflected in the premium charged for the policy. In sum, the express exclusion of a particular class of risks from primary coverage under the terms of the Evanston policy's excess "other insurance" clause further distinguishes this case from *GMAC*.

We recognize that *GMAC* arguably could be read as a departure from prior case law giving effect to one policy's excess "other insurance" clause where another concurrent policy contains a pro rata "other insurance" clause. We are persuaded not to read *GMAC* as such a departure, however, by the Court of Appeals' express "reject[ion] [of] Nationwide's position . . . that an equitable allocation between a primary and excess insurer must be realized [in all cases]," immediately followed by the Court's statement that it was "hold[ing] *only* that, *under the circumstances of this case*, both insurers should be required to share defense costs" (4 NY3d at 457-458 [emphasis added]). Accordingly, we do not believe that the Court of Appeals intended *GMAC* to control cases, like this one, that present significantly different circumstances. Indeed, *GMAC*, by limiting its holding to the particular circumstances of that case, including the excess carrier's voluntary assumption of the defense, and by specifically rejecting Nationwide's broader position,

inferentially supports Evanston's position here.[9]

Recently, and after this appeal was submitted, a different panel of this Court decided another case raising a somewhat similar issue relating to the defense obligations of a primary insurer whose policy, like Evanston's, contained an excess "other insurance" clause. In *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.* (__ AD3d __, 873 NYS2d 607 [2009]), the insureds (a property owners association and certain of its directors and officers) were defended by Hermitage, the association's CGL carrier, in two underlying actions in which the insureds were sued for alleged interference with various rights of another property owner and for publishing alleged "injurious falsehood[s]." Hermitage, pointing out that its policy covered, at most, only the injurious falsehood claims, sought reimbursement of its defense costs from Federal, the insureds' directors and officers liability (D & O) carrier, whose policy covered at least some of the other claims in the underlying actions in addition to the injurious falsehood claims. Federal argued that Hermitage was required to bear all defense costs up

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[9]Also unavailing is American's reliance on *Cordial Greens Country Club v Aetna Cas. & Sur. Co.* (41 NY2d 996 [1977]), which, in holding that two insurers shared the duty to defend the insured in an underlying personal injury action, did not even mention the policies' "other insurance" clauses.

to its policy limit because the Federal policy had an excess "other insurance" clause, while the Hermitage policy had a pro rata "other insurance" clause. Nonetheless, this Court held:

> "Hermitage is entitled to contribution from Federal for Federal's equitable share of all the defense costs incurred by Hermitage, except for the costs Hermitage incurred in defending against the injurious falsehood claims if those claims are covered by both policies or are covered solely by the [Hermitage] CGL policy" (873 NYS2d at 612).

Thus, the *Fieldston* court applied the Federal policy's excess "other insurance" clause only to the defense of the injurious falsehood claims to the extent such claims were covered by both policies, not to the defense of the claims based on interference with property rights covered only by Federal.

In deciding *Fieldston*, this Court found it significant that "the [Hermitage] CGL and [Federal] D & O policies do not provide concurrent coverage as they do not insure against the same risks" (873 NYS2d at 611). This appears to refer to the fact that the Hermitage policy covered the claims against the insureds for injurious falsehood but none of the claims for interference with property rights, at least some of which were covered by the Federal policy. Evidently, the injurious falsehood claims, on the one hand, and the property-interference claims, on the other hand, sought recovery for different alleged losses, representing entirely different risks. Thus, since "other insurance"

principles govern "where two or more insurance policies cover the same risk" (*Great Northern*, 92 NY2d at 686-687), the Federal policy's excess "other insurance" clause arguably did not apply to the property-interference claims in the actions underlying *Fieldston*, which claims (unlike the injurious falsehood claims) represented losses of a kind not covered by the Hermitage policy.[10]

The concurrence suggests that *Fieldston* may be distinguished from the instant case insofar as the result in *Fieldston* was based on the concept that two policies constitute "other insurance" with respect to each other only to the extent that they "cover [the same insured for] the same risk" (*Great Northern*, 92 NY2d at 686-687, citing Ostrager and Newman, Insurance Coverage Disputes, § 11.01, at 581 [9th ed]; *see also* 15 Couch on Insurance 3d § 219:14). That condition, although found not to have been satisfied in *Fieldston*, is plainly satisfied here, where the two policies, notwithstanding their

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[10]As this Court also noted in *Fieldston*, the two policies at issue in that case also clearly covered different risks to the extent their respective periods of coverage did not overlap (*see* 873 NYS2d at 612 n 2; *see also Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 223 [2002] ["'other insurance' clauses . . . apply when two or more policies provide coverage during the same period"]). In this case, it is undisputed that Sport Rock was covered by both policies at issue when Anaya's accident occurred and when the claim arising from that accident was first made against Sport Rock.

differences in scope, covered the same risk of liability for "bodily injury." While certain of the theories of recovery formerly asserted against Sport Rock in the *Anaya* action were not within the scope of American's duty to indemnify Sport Rock, all claims that have been asserted in that lawsuit seek recovery for precisely the same loss, one plainly constituting a covered "bodily injury" under both the American policy and the Evanston policy. We reject American's argument that, to the extent its duty to indemnify Sport Rock does not extend to all theories of recovery asserted in the *Anaya* action, its policy and that of Evanston cover risks sufficiently different to render the Evanston policy's excess "other insurance" clause inapplicable. "The rule that the risks be identical in order for an 'other insurance' clause to apply does not mean that the total possible coverage under each policy be the same, but merely that with respect to the harm which has been sustained there be coverage under both policies" (15 Couch on Insurance 3d § 219:14; *see also id.* § 219:17 ["For the purposes of an 'other insurance' clause, it is sufficient that both policies provide overlapping coverage for the risk involved"]).

Inasmuch as the Evanston and American policies covered Sport Rock for the same risk, the resolution of this appeal does not require further discussion of the rights and obligations inter se

of two or more liability carriers, each covering the same insured for a different risk, whose coverage is implicated in the same litigation. To the extent, if any, *Fieldston* may be read to address the situation presented here (i.e., in which a lawsuit implicates the coverage of two policies covering the same insured for the same risk), we respectfully decline to follow it, recognizing that any conflict ultimately will have to be resolved by the Court of Appeals. The *Fieldston* opinion takes the position that its result is inconsistent with *Firemen's* (*supra*) (a case cited with approval by the Court of Appeals in *GMAC* [4 NY3d at 456]) and expressly "refuse[s] to follow our decision in *Firemen's*" (*Fieldston*, 873 NYS2d at 614) for what are, in our view, insufficient reasons. We disagree with the *Fieldston* opinion's assertion that the result in *Firemen's* "is not supported by the plain language of the 'other insurance' clause in that case" (873 NYS2d at 614).[11] Moreover, we find that the two more recent decisions cited in *Fieldston* as support for abandoning *Firemen's* have no bearing on the vitality of the *Firemen's* holding. One of those decisions, *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.* (*supra*), in the course of

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[11]The pertinent language of the "other insurance" clauses of the two policies at issue in *Firemen's* are set forth in footnote 7 above.

addressing the issue of allocation of coverage for a continuous loss among successive policies (98 NY2d at 221-225) (an issue not presented either here or in *Firemen's*), mentioned "other insurance" clauses only by way of noting that such "clauses have nothing to do with this determination" (*id.* at 223). The other decision, *Fireman's Fund Ins. Co. v Abax, Inc.* (12 AD3d 277 [2004]), simply held that the excess "other insurance" clause relied upon by the insurer claiming excess status in that case was not implicated in the underlying personal injury action because that clause was part of the subject policy's property coverage section, not its liability coverage section (*see id.* at 278).

Our concurring colleague, while reaching the same conclusion we do in this case, asserts that we "unnecessarily" challenge the validity of the *Fieldston* holding because, in his view, *Fieldston* is distinguishable from the instant case on the grounds discussed above. We welcome the attempt by the concurrence to harmonize the unanimous result here with the result in *Fieldston*, and, to reiterate, we do not challenge the specific result reached in *Fieldston* on the particular set of facts presented in that case. We cannot close our eyes, however, to the aspects of the *Fieldston* opinion that arguably represent a departure from the "settled law" we are following (as the concurrence acknowledges)

in deciding this appeal. In this regard, we point to the position apparently taken in *Fieldston* that Hermitage's duty to defend the insured against a claim outside the scope of its duty to indemnify did not constitute other insurance for purposes of the Federal policy's excess "other insurance" clause (*see* 873 NYS2d at 611 n 1]). Moreover, *Fieldston* expressly rejected this Court's precedent in *Firemen's* without relying on any theory that the carriers in *Firemen's* covered different risks (*see* 873 NYS2d at 614); in other words, the *Fieldston* opinion appears to regard *Firemen's* as wrongly decided whether the policies at issue in *Firemen's* covered the same risk or different risks.

Our concern that *Fieldston* represents a departure from precedent is compounded by the policy arguments it offers in support of its determination to require the excess carrier to share in defense costs (*see* 873 NYS2d at 613), which arguments do not appear to be limited to cases where the policies at issue insure against different risks. Since this bench unanimously considers our resolution of the instant appeal to be required by settled law, we have no occasion to respond to *Fieldston*'s policy arguments. We observe, however, that our present decision is consistent with the public policy favoring the enforcement of contractual agreements, including insurance policies, in accordance with their terms so as to give effect to "'the

reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract'" (*BP A.C. Corp.*, 8 NY3d at 716, quoting *Album Realty Corp. v American Home Assur. Co.*, 80 NY2d 1008, 1010 [1992]). Moreover, our adherence to settled law in deciding this appeal furthers the goals of "[c]larity and predictability," which "are particularly important in the interpretation of contracts" (*Moran v Erk*, 11 NY3d 452, 457 [2008]), to the end that "parties [engaged in commercial dealings] may intelligently negotiate and order their rights and duties" (*Matter of Southeast Banking Corp.*, 93 NY2d 178, 184 [1999]; *see also Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 381 [1986] ["when contractual rights are at issue, where it can reasonably be assumed that settled rules are necessary and necessarily relied upon, stability and adherence to precedent are generally more important than a better or even a 'correct' rule of law"] [some internal quotation marks and citation omitted]).

Since we conclude that Sport Rock's coverage under the Evanston policy is excess to its coverage under the American policy for purposes of the defense of the *Anaya* action, no question arises of the allocation of the costs of defending that lawsuit between the two carriers. American will be required to fund Sport Rock's defense, without contribution from Evanston, until American's coverage has been exhausted, whereupon Evanston

will be required to take over the defense (*see GMAC*, 4 NY3d at 456 ["a primary insurer has a duty to defend 'without any entitlement to contribution from an excess insurer'"], quoting *Firemen's*, 233 AD2d at 193]). Further, Evanston is entitled to reimbursement from American for all costs Evanston has heretofore reasonably incurred in defending Sport Rock in the *Anaya* action. If American believes that insurers other than Evanston may owe Sport Rock primary coverage in the *Anaya* action, American may seek contribution from such insurers.

Duty to Indemnify

As previously noted, on an appeal in the *Anaya* action, this Court ruled that the only remaining viable claims against Sport Rock in that suit are based on the theories that the Petzl harness was defectively designed and that it failed to include warning labels necessary to render it safe (*Anaya*, 44 AD3d at 486-488). Specifically, the motion court had granted both Sport Rock and Petzl summary judgment dismissing Joseph Anaya's complaint as against them (*id.* at 485). On Anaya's appeal, we modified the motion court's order to reinstate the claims against Sport Rock and Petzl, but only insofar as based on the contention that "the alleged defective design of the harness, the alleged inadequate warnings [on the harness], or both, was a substantial factor in causing plaintiff's injuries" (*id.* at 488). Thus, at

this point in the litigation, it is clear that any judgment that may be rendered against Sport Rock in the *Anaya* action will fall within the scope of American's duty to indemnify Sport Rock as an additional insured under the vendor's endorsement to Petzl's policy, which affords Sport Rock coverage for a "bodily injury . . . arising out of [Petzl's] products . . . which are distributed or sold in the regular course of [Sport Rock's] business" (internal quotation marks omitted). Accordingly, we grant Sport Rock summary judgment declaring that American will be obligated to indemnify Sport Rock, up to the limits of Sport Rock's coverage under the American policy, for any judgment against Sport Rock in the *Anaya* action. American's argument that we should not take notice of this Court's own published decision in the *Anaya* action is without merit.

Accordingly, the order of Supreme Court, New York County (Debra A. James, J.), entered August 27, 2007, which granted plaintiffs' motion for summary judgment to the extent of declaring that defendant American is obligated to defend plaintiff Sport Rock in the *Anaya* action, and otherwise denied the motion, unanimously modified, on the law, to further declare that the coverage afforded Sport Rock in the *Anaya* action under the policy issued to it by plaintiff Evanston is excess over the primary coverage afforded Sport Rock therein as an additional

insured under the policy American issued to nonparty Petzl, that Evanston will not be obligated to contribute to Sport Rock's defense or indemnification in the *Anaya* action until Sport Rock's coverage from American has been exhausted, and that American is obligated to reimburse Evanston up to the applicable limit of American's policy for all costs Evanston has heretofore incurred in defending Sport Rock in the *Anaya* action, and otherwise affirmed, with costs in favor of Sport Rock and Evanston payable by American.

All concur except Saxe and Catterson, JJ. who concur in a separate opinion by Saxe, J.

SAXE, J. (concurring)

I agree with the majority that the insurance coverage afforded to plaintiff Sport Rock International, Inc., under the commercial general liability policy issued to it by Evanston Insurance Co., is excess to the primary coverage afforded to Sport Rock as an additional insured under the commercial general liability policy issued by American Casualty to non-party Petzl. Accordingly, I concur in the resulting holding that Evanston is not obligated to contribute to Sport Rock's defense or indemnification in the underlying personal injury action until American's coverage has been exhausted and that American must reimburse Evanston for costs it has incurred in the defense. I part company to the extent the majority opinion challenges -- unnecessarily -- the validity of this Court's recent holding in *Fieldston Property Owners Assn. v Heritage Ins. Co.* (__ AD3d __, 873 NYS2d 607 [2009]).

The underlying claims at issue against Sport Rock are for bodily injury incurred while wall climbing at a sports club, using a safety harness manufactured by Petzl. The insurance policy issued to Petzl by American Casualty contains a vendor's endorsement providing primary coverage to purchasers of the product such as plaintiff Sport Rock, as additional insureds, for claims of bodily injury based upon alleged defects in Petzl's

products. Evanston, plaintiff's own insurer, similarly provides coverage for claims of bodily injury against the insured. Evanston's policy contains the following "other insurance" clause:

> "When [Sport Rock] [is] added to a manufacturer's or distributor's policy as an additional insured because [it] [is] a vendor for such manufacture[r]'s or distributor's products ... [t]he coverage afforded [Sport Rock] under this Coverage Part will be excess over any valid and collectible insurance available to the insured as an additional insured under a policy issued to a manufacturer or distributor for products manufactured, sold, handled or distributed."

In contrast, as the majority observes, the "other insurance" provision of American Casualty's policy provides that if other primary insurance is available, American Casualty will share coverage.

Under the settled law of this state, to the extent *the same risk* is covered by two primary policies, the two insurers' respective defense and indemnification obligations are determined by reference to each of the policies' "other insurance" provisions (*see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687 [1999]). This rule unquestionably applies here, where the two policies both cover the risk of the bodily injury alleged in the complaint; so Evanston, whose "other insurance" clause amounts to an excess clause, must be treated as

an excess insurer (*see Harleysville Ins. Co. v Travelers Ins. Co.*, 38 AD3d 1364 [2007], *lv denied* 9 NY3d 811 [2007]).

This Court's recent decision in *Fieldston Property Owners* (*supra*) is not in conflict with this ruling or the settled law on which it is based. There, the two insurance policies at issue did *not* cover the same risk: one commercial general liability carrier covered only an underlying injurious falsehood claim, while the insured's directors' and officers' liability policy covered claims for interference with property rights. The crux of the analysis in *Fieldston* was that -- unlike the circumstances here -- the two policies *did not insure against the same risks*, rendering inapplicable the settled law regarding two primary insurance carriers covering the same risk, and the import of their respective "other insurance" provisions. We therefore properly ordered an equitable sharing of the defense costs between the carriers in *Fieldston*.

Since the circumstances in *Fieldston* are distinguishable from those presented here, there is no need to analyze or criticize its reasoning. To the extent the majority discusses

and disapproves of the reasoning in *Fieldston*, I disagree with the majority opinion.

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

ENTERED: MAY 12, 2009