SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 14, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Nardelli, Moskowitz, Renwick, JJ.

4760 L.K. Station Group, LLC, Index 601015/08
Plaintiff-Appellant,

-against-

Quantek Media, LLC, etc., et al.,
Defendants-Respondents.

Jacobs DeBrauwere LLP, New York (John F. Burleigh of counsel), for appellant.

Wilmer Cutler Pickering Hale and Dorr LLP, New York (Peter K. Vigeland of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered on or about July 31, 2008, which granted defendants' motion to dismiss the amended complaint, alleging, inter alia, breach of contract and fraudulent concealment, unanimously affirmed, with costs.

Plaintiff L.K. Station Group is a Florida limited liability company in the business of purchasing television stations, with a focus on Hispanic markets. In 2007 it undertook to purchase two television stations in Santa Rosa, California and Bellingham, Washington, for which it required $30 million in financing. On or about July 31, 2007 its broker received a letter from

codefendant Bulltick Capital Markets in which it was represented that codefendant Quantek Asset Management, LLC, with which Bulltick was affiliated, was committed to provide a loan to fund the purchase of the television stations, and expressed the hope that a "mutually satisfactory asset purchase agreement" could be reached.

On August 20, 2007, Quantek Media and L.K. Station entered into a memorandum of understanding outlining the terms for them to pursue opportunities in the U.S. television and radio markets. Except for certain specified paragraphs, it was agreed that the memorandum of understanding was a "non-binding commitment [and was] submitted for discussion purposes only."

On August 30, 2007, codefendant Tvestments Ltd., another Bulltick-affiliated defendant (all ten of the defendants are represented by the same law firm), provided L.K. Station with $2 million in initial financing. It is alleged that the next day, L.K. Station, in reliance on the July letter, entered into an asset purchase agreement for the two television stations for the price of $26.6 million.

In an October 1, 2007 letter, Tvestments advised L.K. Station of its commitment to provide the entire principal amount of the financing, up to the amount of $30 million. In pertinent part, the commitment letter contained the following clause:

> "You further agree that no Indemnified Party [Tvestments or any of its affiliates] shall have any liability (whether in contract, tort or otherwise) to [L.K. Station] . . . for or in connection with the transactions contemplated hereby, except for direct damages (as opposed to special, indirect, consequential or punitive damages (including, without limitation, any loss of profits, business or anticipated savings)) determined . . . to have resulted primarily from such Indemnified Party's gross negligence or willful misconduct."

Section 8 of the commitment letter also stated, "You should be aware that Tvestments or one or more of its affiliates may be providing financing or other services to parties whose interests may conflict with yours." Section 9 provided that the agreement was to be governed in accordance with New York law, and recited that "[t]his Commitment Letter sets forth the entire agreement between the parties with respect to the matters addressed herein and supersedes all prior communications, written or oral, with respect hereto."

When L.K. Station sought to close the loan on March 31, 2008, it was advised that Tvestments would not provide financing, purportedly because L.K. Station had failed to close the purchase pursuant to the deadlines set in the asset purchase agreement, and because certain anticipated collateral was impaired.

The foregoing facts form the essence of the claim for breach of contract, including a request for specific performance. Some additional details are necessary for resolution of the claim for

fraudulent concealment. L.K. Station claims that when it first met with defendants' representatives, on July 24, 2007, they were emphatic that they had no interest in getting into the media or television business. Yet, it is alleged that in June 28, 2007, defendants had been in communication with representatives from a competitor of L.K. Station, CaribeVision Holdings, Inc., to acquire a competing economic interest in CaribeVision, and failed to disclose these negotiations, which ultimately did result in a partial acquisition in February 2008. L.K. Station claims that it was injured because it pursued its plans to purchase the two television stations in reliance on the belief that defendants were dealing with it alone, and that defendants' failure to lend it the money to complete the acquisition was a result of the surreptitious negotiations.

This action was filed on April 7, 2008. As amended, it alleged four causes of action, only two of which are at issue on this appeal.[1] The first cause of action is for breach of contract, and seeks either specific performance or damages resulting from the breach and defendants' willful misconduct. The second alleges fraudulent concealment in that some of the defendants had superior knowledge concerning their intent to acquire a competing interest in CaribeVision which barred their

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[1]Although L.K. Station seeks reinstatement of the entire complaint, its brief only addresses the first two causes of action for breach of contract and fraudulent concealment.

obligation to L.K. Station, they deliberately failed to disclose this information, such information was material to L.K. Station's decisions, and L.K. Station reasonably relied and acted upon such mistaken knowledge to its detriment, because it would not have otherwise entered into the contracts.

Defendants moved to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (7). They sought dismissal of the breach of contract claim on the ground that it was barred by the terms of the commitment letter, as L.K. Station failed to allege facts to show willful misconduct, and L.K. Station's remedy was limited to direct damages.

Defendants also sought to dismiss the fraud cause of action on the ground that they did not have a duty to disclose their CaribeVision dealings to L.K. Station, with whom they were engaged in an arms-length transaction, and claimed, in any event, that they disclosed their intent in the commitment letter. They asserted that the non-compete agreement with CaribeVision did not bar the L.K. Station loan, and, regardless, any recovery for fraud was limited to out-of-pocket expenses.

In opposition, L.K. Station argued that the July letter was an enforceable contract, that the terms of the commitment letter did not expressly preclude specific performance, and that the merger clause did not extend to the prior agreements as Tvestements was not a party thereto. L.K. Station also argued

that Florida law applied, as its place of injury was Florida, where it was located and defendants' actions occurred. L.K. Station maintained that defendants had a duty to disclose their plans with CaribeVision as (1) they undertook to disclose information; (2) their knowledge was superior and the failure to disclose rendered the transaction inherently unfair; and (3) by negotiating to become joint venturers, the parties assumed special duties to each other.

The court found that the commitment letter superseded all prior agreements, and held that the letter's terms limited liability to cases of gross negligence or willful misconduct. It reasoned that L.K. Station's claims that defendants financed a competitor and refused to loan it funds did not allege such tortious conduct as could be found to constitute willful misconduct. The court further noted that any recovery would be limited to direct damages. In dismissing the fraudulent concealment claim, the court found that defendants did not have any duty to disclose, and, in any event, defendants clearly informed plaintiff in the commitment letter that they might be providing financing or other services to parties whose interests may conflict.

We affirm. Even according, as we must on a motion to dismiss, a liberal construction to the pleadings (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we, nevertheless, conclude

that the allegations of the complaint fail to state a cause of action.

Initially, the only parties to the commitment letter are plaintiff L.K. Station and codefendant Tvestments. Concededly, throughout the commitment letter there are indications that parts of the agreement are intended to encompass nonsignatories (e.g. reference to Tvestments "and each of its affiliates" in the indemnification clause, and to Tvestments "or one or more of its affiliates" in the clause advising that financing may be provided to a potential competitor of L.K. Station). The merger clause of the commitment letter, however, only provides that it "sets forth the entire agreement between the parties . . . thereto." Thus, a fair interpretation of the clause leads to the conclusion that its preclusive effect is limited to the claims against Tvestments. Thus, if the other documents can be found to constitute an enforceable contract, the limitation of liability language in the commitment letter will have no effect.

L.K. Station claims that the July letter and the memorandum of understanding constitute enforceable agreements. These documents, however, do not contain some of the essential terms of a loan, such as the interest rate or maturity date, and are thus too uncertain to constitute enforceable agreements. "In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a

'meeting of the minds' regarding the material terms of the transaction" (*Central Fed. Sav. v National Westminster Bank, U.S.A.*, 176 AD2d 131, 132 [1991]). "[B]efore the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained" (Joseph *Martin, Jr. Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]).

The July letter indicates that Bulltick was committed to fund the purchase "provided that we achieve a mutually satisfactory asset purchase agreement," and expresses confidence that it can work within an expedited time frame, but makes no firm commitment about the terms of the loan. Likewise, the memorandum of understanding, executed on August 30th, makes clear that, with certain exceptions, it is "a non-binding commitment by the Parties hereto and is submitted for discussion purposes only." Consequently, neither of these documents, individually or in the aggregate, represents a binding agreement.

L.K. Station attempts to invoke the *Crabtree* doctrine (*see Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 53-54 [1953]), and claims that the July letter, the memorandum of understanding, and the commitment letter constitute integrated documents for purposes of demonstrating the existence of an enforceable agreement. This argument runs contrary to L.K. Station's contention that only Tvestments was a party to the commitment

letter. Regardless, however, of whether the three documents constituted an integrated transaction encompassing all of the defendants, or Tvestments is deemed to be the only party to the commitment agreement, the limitation of liability clause contained in the commitment letter warrants dismissal of the contract cause of action.

The contract provides that no indemnified party (Tvestments and its affiliates) "shall have any liability (whether in contract, tort or otherwise) . . . except for direct damages (as opposed to special, indirect, consequential or punitive damages . . .)." Loss of profits or business, as well as anticipated savings, fall within the category of damages which are excluded. L.K. Station argues that this clause does not preclude the grant of specific performance.

The Court of Appeals held in *Rubinstein v Rubinstein* (23 NY2d 293 [1968]):

> "[T]he law is now well settled that a liquidated damages provision will not in and of itself be construed as barring the remedy of specific performance. For there to be a complete bar to equitable relief there must be something more, such as explicit language in the contract that the liquidated damages provision was to be the sole remedy." (*Id.* at 297-298 [internal citations omitted]; *see also Granite Broadway Dev LLC v 1711 LLC*, 44 AD3d 594, 594-595 [2007], *lv denied* 10 NY3d 702 [2008]; *Sutton Madison, Inc. v 27 E. 65th St. Owners Corp.*, 8 AD3d 90, 92 [2004]).

In this case, however, the limiting language is broader than

it was in *Rubinstein* and its progeny, since it bars relief in "contract, tort or otherwise," except for direct damages resulting from a party's gross negligence or willful misconduct. The provision thus does more than recite the amount of liquidated damages that may be recovered. It pointedly circumscribes the remedies available to requests for direct damages. Consequently, the agreement manifests explicit language which curtails the availability of specific performance as a remedy.

The cause of action for fraudulent concealment should also be dismissed. Initially, L.K. Station maintains that Florida law, which provides recovery for lost profits (*see Nordyne, Inc. v Florida Mobile Home Supply, Inc.*, 625 So2d 1283, 1287 [Fla App 1st Dist 1993]), as well as punitive damages (*see Laney v American Equity Inv. Life Ins. Co.*, 243 F Supp 2d 1347, 1354 [MD Fla 2003]), should apply, because it, as well as a number of defendants reside or have offices in Florida, and since many of the events and transactions occurred there.

Choice of law analysis in tort law generally requires giving controlling interest to the "law of the jurisdiction having the greatest interest in resolving the particular issue" (*Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993]). The heart of the alleged misconduct here is the misleading July disclosure, which occurred in a meeting in New York. Notwithstanding the residence of some of the parties in Florida, since New York has a strong

interest in regulating conduct occurring in its borders (*id.*; *see also Padula v Lilarn Props. Corp.*, 84 NY2d 519, 522 [1994]), we conclude that New York law should apply. In this regard it is also of note that any of the agreements which expressed a choice of law preference (for instance, the non-disclosure agreement and the commitment letter), recited that New York law would apply.

Among the circumstances under which a cause of action for fraudulent concealment may arise is where there has been a misleading partial disclosure (*see Williams v Sidley Austin Brown & Wood, L.L.P.*, 38 AD3d 219, 220 [2007]). The only ground in this complaint upon which to find an actionable claim for partial disclosure is based upon the failure of defendants' representatives in July 2007 to advise of their negotiations to acquire an economic interest in another television station. Under other circumstances, the cause of action would be sustained. The allegations that defendants were covertly negotiating with another party, and that these negotiations resulted in the acquisition of an interest in CaribeVision, as well as defendants' refusal to lend money to L.K. Station, suggest the existence of factual issues as to whether defendants were liable for fraudulent concealment.

In this case, however, even if there were a duty to disclose, L.K. Station has not demonstrated that it has incurred legally compensable damages, i.e., actual out-of-pocket losses

(*see Lama Holding Co. v Smith Barney*, 88 NY2d at 421-422 [1996]).

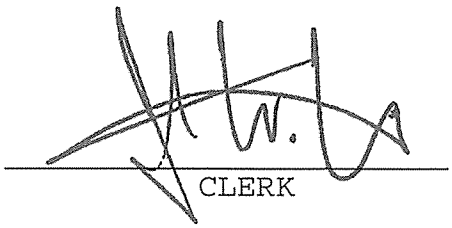
Thus, the fraudulent concealment claim cannot be sustained.

M-5279 ***L.K. Station Group, LLC v Quantek Media LLC, etc., et al.***

Motion seeking leave to enlarge record denied.

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

ENTERED: MAY 14, 2009



Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

391 The People of the State of New York, Ind. 659/07
Respondent,

-against-

Brett Huddleston,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County, (Robert M. Stolz, J.), rendered November 27, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and sentencing him, as a second felony drug offender, to a term of 8 1/2 years, unanimously affirmed.

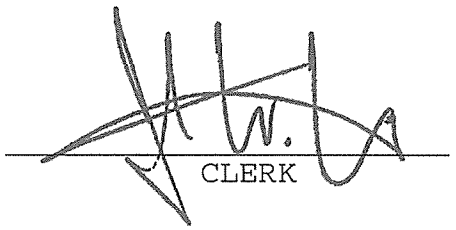
Although we perceive no basis for reducing the sentence, defendant's purported waiver of his right to appeal was invalid. The record reflects that discussion about waiver of appellate rights first occurred after the plea proceeding and completion of a predicate felony determination. It was never explained to defendant that, as a condition of the plea, he was waiving his right to appeal (*see People v Lopez*, 6 NY3d 248 [2006]; *People v Ramos*, 152 AD 2d 209 [1989]).

M-1774 *People v Brett Huddleston*

Motion seeking leave to file a supplemental pro se brief and related relief denied.

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

ENTERED: MAY 14, 2009



Mazzarelli, J.P., Friedman, Nardelli, Buckley, Freedman, JJ.

4687 In re Sidney Eisenberg, Index 111391/06
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

Thomas S. Fleishell & Associates, P.C., New York (Susan C. Stanley of counsel), for appellant.

Gary R. Connor, New York (Aida P. Reyes of counsel), for DHCR, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Brian Clark Haberly and Magda L. Cruz of counsel), for Colombus Limited Partnership and Rockrose Development Corp., respondents.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered July 5, 2007, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated July 3, 2006, which affirmed an order of the Rent Administrator deregulating petitioner's apartment based on his alleged default in answering a high income rent deregulation petition, unanimously affirmed, without costs.

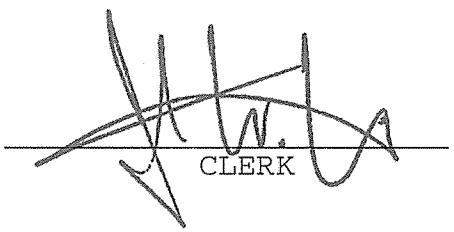
Since petitioner failed to submit any objective proof that he mailed his answer to the landlord's deregulation petition, DHCR's determination that petitioner defaulted was neither

arbitrary and capricious nor contrary to law (*see Matter of Szaro v New York State Div. of Hous. & Community Renewal*, 13 AD3d 93 [2004]). Petitioner's due process claim is unavailing. To the extent, if any, we may take cognizance of petitioner's belated suggestion (first raised in his reply brief on this appeal) that the matter be remanded to DHCR to consider whether his default is excusable by reason of his alleged diminished capacity, we find that petitioner has failed to raise any substantial issue as to his capacity at the time of his default.

The Decision and Order of this Court entered herein on December 16, 2008 is hereby recalled and vacated (*see* M-221 decided simultaneously herewith).

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

ENTERED: MAY 14, 2009



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

4877 Silas Quinonez, Index 108132/05
Plaintiff-Respondent, 590093/06
590768/06
-against- 659083/06

Manhattan Ford, Lincoln-Mercury, Inc.,
Defendant-Appellant,

All Taxi Management, Inc., et al.,
Defendants.
- - - - - - -
Manhattan Ford, Lincoln-Mercury, Inc.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Laz Parking of New York/New Jersey, Inc.,
Third-Party Defendant-Appellant-Respondent.

[And Other Third-Party Actions]

Thomas M. Bona, P.C., White Plains, (Michael Flake of counsel), for Manhattan Ford, Lincoln-Mercury, Inc., appellant/respondent-appellant.

Law Offices of Michael E. Pressman, New York (Michael E. Pressman and Stuart B. Cholewa of counsel), for Laz Parking of New York/New Jersey, Inc., appellant-respondent.

Davidson and Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), for Silas Quinonez, respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 4, 2008, which, to the extent appealed from, denied the motions of defendant Manhattan Ford and third-party defendant Laz Parking for summary judgment dismissing all claims, cross claims and counterclaims against them, unanimously reversed, on the law, without costs, Manhattan Ford's motion

granted, and Laz's motion granted except with respect to Manhattan Ford's third-party claim against Laz for contractual indemnification, and the matter remanded for further proceedings.

The accident underlying this lawsuit occurred in the parking garage of an automobile dealership owned by Manhattan Ford. By written agreement, Manhattan Ford had engaged Laz as its exclusive agent to operate the garage and its affiliated valet parking operation. The agreement required Laz to manage the processing, location and movement of all vehicles entering the garage.

Customers who brought their vehicles to be serviced at the dealership between the hours of 7:30 and 10 A.M. initially checked in on the first floor of the garage with Manhattan Ford service personnel who were told the type of vehicle service needed. Laz valet parking attendants then drove the vehicles up a spiral ramp to Manhattan Ford's service area on the fourth floor. A freight elevator was available for use in the event a vehicle could not be driven up the ramp. After 10 o'clock the service personnel returned to their third-floor offices and incoming customers were now greeted by Laz's employees, who took the necessary information and directed the customers to Manhattan Ford's service receptionist on the third floor.

Defendant Mahmood leased and operated the Ford taxicab involved in the accident. Mahmood began his shift at 4 A.M. on

March 31, 2005. He took the vehicle to the dealership later that morning because its brakes seemed to be "going low." While en route, Mahmood had no accidents and was able to stop the vehicle each time he applied the brakes. In fact, Mahmood had picked up approximately 15 fares before arriving at the dealership at 10:30. Upon entering the garage, he was approached by a security guard who asked why he had come in. Mahmood responded by stating: "I have the problem with the brakes, the brakes need to be checked and serviced" and "were low, going low." Mahmood exited the vehicle and proceeded to the third floor to meet with Manhattan Ford's service manager. He did not tell the service manager or anyone else that the vehicle was unsafe for driving, stating simply that the brakes needed service. In fact, Mahmood testified that he still intended to continue driving the taxi that day, even after being advised by the service manager that it could not be serviced on that day.

Plaintiff, a Laz parking attendant, drove the taxi up the ramp to the fourth-floor level. As plaintiff approached an intended parking spot, the taxi's brakes failed, causing it to crash into a parked vehicle. Plaintiff alleges in the complaint that Manhattan Ford was negligent in its operation of the dealership in failing to advise him of mechanical problems with the taxi that caused the accident.

In denying the motions, Supreme Court reached the erroneous

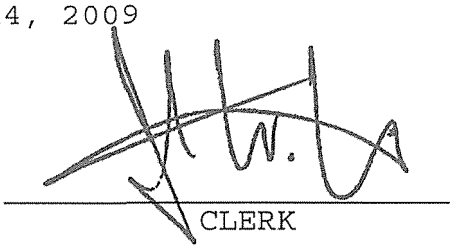
conclusion that Manhattan Ford and Laz should have discovered defects with the vehicle's brakes. As noted above, Mahmood drove the taxi into the garage without difficulty and essentially reported only that he had brought the vehicle in to have the brakes serviced. Therefore, based on the information known or available, neither Manhattan Ford nor Laz had any reason to believe that operation of the vehicle would be dangerous. Generally, liability for failure to warn may exist only where there is a known danger or a danger the defendant has reason to be aware of (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 246 [1983]).

The operating agreement requires Laz to indemnify Manhattan Ford against claims and expenses including reasonable attorneys' fees, arising out of any act or omission of Laz's employees. The indemnification provision is enforceable inasmuch as it does not require that the triggering act or omission constitute negligence (*see e.g. Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [2007]). Moreover, even if the agreement purported to indemnify Manhattan Ford against its own negligence, it would still be enforceable under General Obligations Law § 5-325, in any event, as Manhattan Ford was in fact not negligent (*see Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 434 [2007]). Notwithstanding Laz's argument to the contrary, the indemnification provision would apply with respect to litigation

costs and counsel fees incurred, even in the event of a dismissal of plaintiff's claims against Manhattan Ford (*see Perchinsky v Granny "G" Prods.*, 232 AD2d 34, 39 [1997], *lv dismissed*, 91 NY2d 830 [1997]).

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

ENTERED: MAY 14, 2009



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

5082 In re Alexis R.,

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

Ana R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Lisa H. Blitman, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Mitchell L. Katz of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about June 15, 2006, which, upon a finding of derivative neglect, released the subject child to respondent subject to the supervision of petitioner Administration for Children's Services, unanimously reversed, on the law and the facts, without costs, and the petition dismissed.

There is no hard and fast rule governing time proximity in determining whether proof of neglect of one child may, in appropriate circumstances, be sufficient to sustain a finding of abuse or neglect of a second child (*see Matter of Kadiatou B.*, 52 AD3d 388, 389 [2008], *lv denied* 12 NY3d 701 [2009]; *Matter of Cruz*, 121 AD2d 901, 902 [1986]). Here, however, given the evidence that respondent has been drug free since she stopped

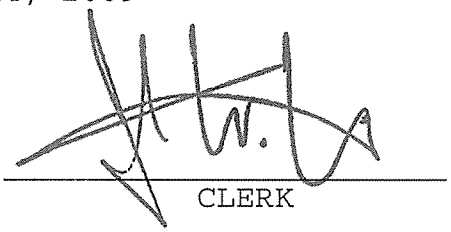
smoking marijuana after she discovered that she was pregnant, the fact that respondent's parental rights had previously been terminated upon a finding of permanent neglect of her two sons, who were voluntarily placed in foster care in 1998 and are now 16 and 13 years old, is insufficient to support a finding that respondent has neglected her daughter Alexis, who was born in July 2005.

Aside from being remote in time, the prior findings of neglect, unlike the allegations in this proceeding, were not based upon any drug use by respondent, but were based upon inadequate supervision and guardianship, namely, her having missed medical appointments regarding one son's surgery, and her having failed to address her other son's behavioral problems and properly manage her financial affairs. The court expressed concerns about respondent's decision, in January 2006, to leave the residential treatment program at Odyssey House, which she had voluntarily entered in September 2005, two months after her daughter's birth, and move in with her aunt because of dissatisfaction with its program; however, there was testimony by petitioner's child protective supervisor that she had told respondent that, because she was not required to be in an in-patient program, she did not have to stay there, so that her plan

to reside with her aunt and attend an outpatient program was "fine."

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

ENTERED: MAY 14, 2009



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

364 Regal Realty Services, LLC, Index 300132/08
Plaintiff-Respondent-Appellant,

-against-

2590 Frisby, LLC, et al.,
Defendants-Appellants-Respondents.

Neil B. Connelly, White Plains, for appellants-respondents.

Rose & Rose, New York (Phillip L. Wartell of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 16, 2008, which denied defendants' motion and plaintiff's cross motion for summary judgment, unanimously modified, on the law, defendants' motion granted, and otherwise affirmed, with costs. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

Plaintiff entered into a contract on March 7, 2007 for the purchase of real property from defendant 2590 Frisby. The contract terms provided for a purchase price of $3,050,000, with a down payment of $152,500 to be held in escrow by Frisby's attorney, payment of which was timely made.

The balance of the purchase price was to be secured by plaintiff through a mortgage on the property. Section 16 of the contract required plaintiff to obtain, within 30 days, a written mortgage commitment in the amount of $2,182,500, or such lesser sum as plaintiff would be willing to accept. It further

contained standard mortgage contingency language requiring plaintiff to make prompt application to an institutional lender, furnish accurate information, pay all fees, pursue such application with due diligence, and promptly identify the institutional lender to the seller. Frisby was obligated to provide plaintiff with any information needed for the application, and in the event the application was declined, plaintiff would provide Frisby with the consents necessary to obtain information concerning the application.

If plaintiff failed to secure the mortgage by the 30th day after the contract signing (the Commitment Date), both parties had a mutual option to cancel the contract on written notice, and in the event of such cancellation, the down payment was to be refunded. This mortgage contingency period would expire on the earlier of the date plaintiff received a mortgage commitment or five days after the Commitment Date, unless the parties agreed to an extension.

Section 17 of the contract provided that its terms could only be modified or changed in writing.

Plaintiff's initial mortgage application was to HSBC, and was rejected. Although the record is not clear as to the exact date that plaintiff's application was denied, the affidavit in support of plaintiff's cross motion for summary judgment states it was verbally advised of the denial "In the beginning of April,

2008." The reason for the denial had nothing to do with the marketability of title or condition of the premises. It was plaintiff that considered cancelling the contract, suggesting that the denial took place before the mortgage contingency expiration date in the contract of sale. Plaintiff advised Frisby's attorney of the rejection and contends that upon Frisby's suggestion, it applied to Frisby's current mortgagee, Hudson Valley Bank, for financing.

In August 2007, the parties attempted to renegotiate the terms of sale and amend the contract. Although the initial draft prepared by Frisby noted that the mortgage contingency in section 16 of the original contract had expired on April 11, 2007, plaintiff objected to that provision and it was removed from the final rider to the contract. That rider, executed on August 23, raised the purchase price to $3,075,000 and added a payment option in the form of a purchase money note and second mortgage.

A mortgage commitment letter was issued by Hudson Valley Bank on August 20, 2007, three days prior to the execution of the rider. That commitment was in the amount of $2,135,000, which was less than plaintiff was willing to accept for purchasing the property. Plaintiff took the position that the mortgage commitment was less than that applied for because certain "issues" involving the property's parking lot and a claim of mold in the building had arisen. No proof of these claims appears in

the record. In an attempt to resolve those issues, the commitment was extended to September 29.

On September 21, 2007, Frisby's attorney sent notice to plaintiff's counsel of record that plaintiff was in default of the contract and set a "time of the essence" closing for October 22. A different attorney representing plaintiff wrote to defendants' counsel on October 15, that it was terminating the contract, and demanded return of the down payment. The next day, another letter was sent, objecting to the October 22 closing date, and pointing out that the "condition precedent" of section 16 of the contract had not occurred, thus entitling plaintiff to a refund of the deposit.

Frisby's counsel responded on October 17, stating that the mortgage contingency provision had expired by its terms six months earlier, and as of April 13 the contract ceased to be conditioned upon the issuance of a mortgage commitment. This letter further objected to plaintiff's demand for a return of the down payment.

The October 22 "time of the essence" closing date passed without a closing taking place. Litigation commenced, and Frisby moved in March 2008 for summary judgment, arguing that the plain terms of the contract obligated plaintiff to obtain a written mortgage commitment within 30 days of the contract date, and if it failed to do so, the mortgage contingency would expire 5 days

later. By having failed to meet this obligation or to cancel the contract or obtain a written extension, plaintiff was considered in default, entitling Frisby to keep the deposit as liquidated damages pursuant to the terms of the contact.

Plaintiff cross-moved for summary judgment, arguing that since Frisby was working "hand in hand" with plaintiff's efforts to obtain a mortgage from Hudson Valley Bank, that constituted a waiver of the mortgage contingency clause, thus entitling plaintiff to a return of its deposit. In response, Frisby argued the contract by its terms could not be orally modified, that plaintiff never requested an extension of the mortgage contingency clause, and that other than the rider of August 23, 2007, no modifications were made to the original contract.

The motion court denied both motions, finding issues of fact including whether Frisby, by its actions, extended or waived the mortgage contingency clause. We disagree.

There is a fundamental concept that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no

reasonable basis for a difference of opinion'" (*id.*, *quoting Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

The mortgage contingency clause of the contract of sale expired by its terms on April 12, 2007. Based upon the unambiguous terms of section 16 of the contract of sale, plaintiff, when notified by HSBC of the denial of its initial financing application, could have cancelled the contract or requested an extension of time to obtain financing through Hudson Valley, but did neither. In either event, section 17 required any changes to be in writing.

Plaintiff's claim that Frisby's actions in assisting with financing from Hudson Valley led it to believe that Frisby had waived the terms of section 16 requires reliance on parol evidence to alter the terms of the written contract. This "ignores a vital first step in the analysis: before looking to evidence of what was in the parties' minds, a court must give due weight to what was in their contract" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Evidence from outside the four corners of an unambiguous document as to the parties' intentions is generally inadmissible to vary the writing (*Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]).

This is particularly so where, as here, section 17 unequivocally provided that "This Agreement may not be changed or

terminated orally or in any manner other than by written agreement executed by Seller and Purchaser." Additionally, section 28 of the contract provided that "No failure or delay of either party in the exercise of any right given to such party hereunder or the waiver by any party of any condition hereunder for its benefit (unless the time specified herein for exercise of such right, or satisfaction of such condition, has expired) shall constitute a waiver of any other or further right nor shall any single or partial exercise of any right preclude other or further exercise thereof or any other right." Frisby's failure to declare immediately, on April 13, 2007, the day after the mortgage contingency expired, that the contract was no longer contingent on financing did not prevent it from doing so later. On the other hand, plaintiff's failure either to cancel the contract or obtain an extension to obtain financing by April 12 did preclude it from seeking to attempt, as it did here, to cancel the contract some six months after the contingency expired.

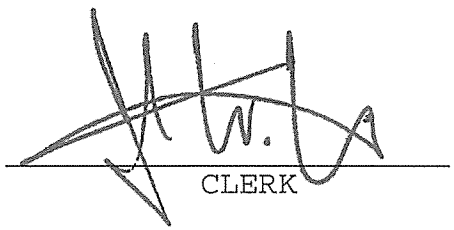
Plaintiff's failure to comply with the terms of section 16 resulted in the expiration of the financing contingency. Its inability to subsequently obtain what it considered sufficient financing from Hudson Valley Bank led to Frisby's declaration of a time-of-the-essence closing, giving plaintiff 30 days to close or be in default. Plaintiff's failure to close on the law day

placed it in default and subjected it to the liquidated damages clause in section 26(b)(ii) of the contract (*Opton Handler Feiler Landau & Hirsch v Patel*, 203 AD2d 72 [1994]). The validity of such liquidated damages provisions has long been established in this State (*see Maxton Bldrs. v Lo Galbo*, 68 NY2d 373 [1986]; *Uzan v 845 UN Ltd. Partnership*, 10 AD3d 230 [2004]; *Chateau D'If Corp. v City of New York*, 219 AD2d 205 [1996], *lv denied* 88 NY2d 811 [1996]).

We have considered plaintiff's other arguments and find them to be without merit.

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

553 The People of the State of New York, SCI 6247/05
Respondent,

-against-

Jose Tavarez,
Defendant-Appellant.

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

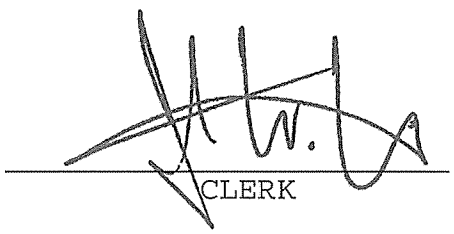
Robert M. Morgenthau, District Attorney, New York (Charlotte Fishman of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura A. Ward, J. at plea; Patricia M. Nunez, J. at sentence), rendered May 1, 2008, convicting defendant of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4 to 8 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 3 to 6 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Renwick, Freedman, JJ.

554 44 Court Street, LLC, Index 600584/05
Plaintiff-Appellant,

-against-

Edwin Gould Services for
Children and Families, etc.,
Defendant-Respondent.

Platte, Klarsfeld, Levine & Lachtman, LLP, New York (Jeffrey H. Klarsfeld of counsel), for appellant.

Shearman & Sterling LLP, New York (Brian P. Scibetta of counsel), for respondent.

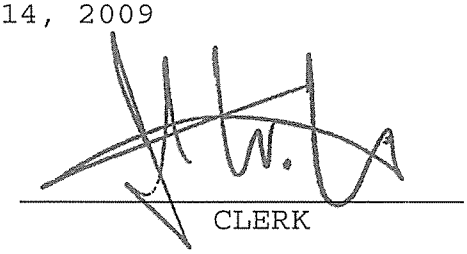
Order, Supreme Court, New York County (Karla Moskowitz, J.), entered January 4, 2008, which, after a nonjury trial, dismissed the complaint, unanimously affirmed, without costs.

The evidence at trial amply demonstrated that the parties understood the subject lease clause to refer to the level of funding for the foster care program, not to the level of funding for the agency as a whole (*see Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1999]). Furthermore, the parties' conduct during the duration of the lease demonstrated their understanding that the payment of rent was governed by the level of funding given to the foster care programs (*see id.*). The parties had twice before entered into lease modifications following changes to the foster care program.

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

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

555 In re Dominique M.,

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

Bernadette M.,
Respondent-Appellant,

Leake & Watts Services, Inc.,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, 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 (Judith Waksberg of counsel), and Proskauer Rose LLP, New York (David A. Lewis of counsel), Law Guardian.

Order of disposition, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about July 17, 2007, which, upon a finding of mental illness, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

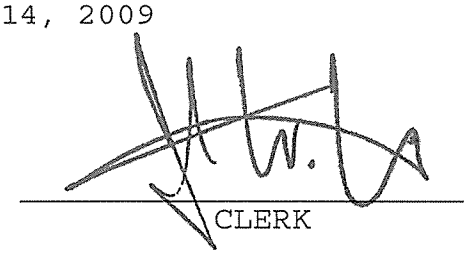
The finding that respondent was mentally ill and that she is, by reason of such illness, presently and for the foreseeable future, unable to properly and adequately care for the child, was supported by clear and convincing evidence, which included

medical records and unrebutted expert testimony (*see Matter of Hime Y.*, 52 NY2d 242 [1981]; *Matter of Mitchell Randell K.*, 41 AD3d 119 [2007]; Social Services Law § 384-b[4][c]; [6][a]). That the psychologist had not seen respondent for six months prior to the fact-finding hearing does not require a different result as he provided detailed testimony to support his conclusions and had considered respondent's long mental health history (*see Matter of Robert K.*, 56 AD3d 353 [2008]).

Respondent's claim, raised for the first time on appeal, that the appointment of a guardian ad litem was necessary during the proceedings, is unavailing. There is no indication that she did not understand the nature of the proceedings or was "incapable of adequately prosecuting or defending [her] rights" (CPLR 1201; *see Matter of Philip R.*, 293 AD2d 547, 548 [2002]).

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

556 Vivien Krieger, Index 23525/06
Plaintiff-Appellant,

-against-

Oumar Diallo, et al.,
Defendants-Respondents,

Christian Duran, et al.,
Defendants.

Weiser & Associates, LLP, New York (Martin J. Weiser of counsel), for appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered October 20, 2008, which, to the extent appealed from, granted the motion by defendants Diallo and Fernandez for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

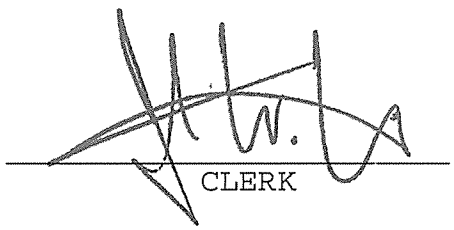
In opposition to defendants' prima facie showing that plaintiff did not suffer a serious injury causally related to the motor vehicle accident, plaintiff failed to raise a triable question of fact as to the purported injuries to her cervical and lumbar spine and jaw (*see Lopez v Carpio-Ceballo*, 20 AD3d 336 [2005]). The accident occurred in early September 2006, but there is no evidence that plaintiff received any medical treatment related thereto beyond December of that year, and her physical therapy sessions terminated in April 2007. Plaintiff's

visit and consultation with her doctor in January 2008 appear to have been related only to the present litigation. Her claim of serious injury is undermined by her unexplained cessation of treatment (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]). Moreover, her experts never correlated her deficits to this accident, and thus failed to offer objective medical proof of a causally related serious injury. An expert's conclusory statements in this regard, unsupported by probative evidence, are insufficient to defeat summary judgment (*see Mitchell v Atlantic Paratrans of NYC, Inc.*, 57 AD3d 336, 337 [2008]).

Plaintiff has also failed to present any evidence of inability to perform her usual and customary daily activities for at least 90 of the 180 days following the accident.

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

ENTERED: MAY 14, 2009



Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

557 Harry Donas, Index 100977/06
Plaintiff-Appellant,

-against-

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

Harry Donas, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered January 29, 2008, which granted defendants' motion to dismiss the complaint and denied plaintiff's motion for leave to file an amended complaint, unanimously affirmed, without costs.

Although plaintiff's claim accrued no later than September 2003, when he allegedly was told that he would never be promoted, plaintiff failed to serve defendants with a notice of claim within 90 days thereafter, as required by General Municipal Law § 50-e(1)(a). He did not serve his notice of claim until January 26, 2005. Nor did plaintiff seek permission to file a late notice of claim (*see* General Municipal Law §§ 50-e[5]; 50[i]; *Frank v City of New York*, 240 AD2d 198 [1997]). Moreover, a claim under Civil Service Law § 75-b must be brought within one year after it accrues (Civil Service Law § 75-b[3][c]; Labor Law § 740[4][a]).

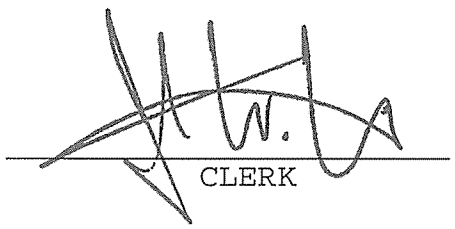
In his proposed amended complaint, plaintiff alleges ongoing

retaliatory acts. However, absent any details of new discrete acts, rather than the effects of past acts, in the 90 days preceding his January 26, 2005 notice of claim, plaintiff's allegations are insufficient to establish a continuing violation claim (*see generally National R.R. Passenger Corp. v Morgan*, 536 US 101, 114-115 [2002]; *Drayton v Veterans Admin.*, 654 F Supp 558, 567 [SD NY 1987]).

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

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

ENTERED: MAY 14, 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 14, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
Eugene Nardelli
Dianne T. Renwick
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 2680/07
Respondent,

-against- 558

Carroll Smith,
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 (Richard D. Carruthers, J.), rendered on or about March 5, 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.

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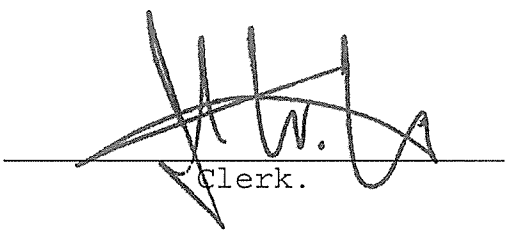


Clerk.

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

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

559 Snorkel Productions, Inc., et al., Index 108296/06
Plaintiffs-Appellants,

-against-

Beckman Lieberman & Barandes, LLP, et al.,
Defendants-Respondents.

Trachtenberg Rodes & Friedberg, LLP, New York (Michael J. Napoleone of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker, New York (Thomas W. Hyland of counsel), for respondents.

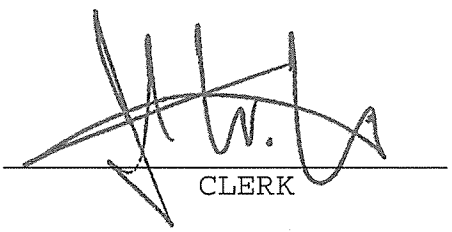
Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 29, 2008, which, in an action alleging legal malpractice, granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, the motion denied to the extent it sought to dismiss the cause of action asserted by plaintiff Snorkel Productions, Inc. for damages incurred in connection with an arbitration commenced against it by Barry Manilow and Appoggiatura Music, Inc., and otherwise affirmed, without costs.

In light of plaintiffs' admission that, had defendants properly advised them of the date on which the option to produce a dramatic-musical play written by Barry Manilow and Bruce Sussman, who held his rights through Appoggiatura, would lapse, they would have timely renewed the option and proceeded to invest, willingly assuming the risk that they would be unable to

obtain adequate financing and the production would fail, the motion court correctly concluded that, although the incorrect advice may have induced plaintiffs' continuing investment, it was not the proximate cause of their claimed losses, which resulted solely from the failure to obtain financing sufficient to support the production (*see Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424-425 [2007]; *Laub v Faessel*, 297 AD2d 28, 30-31 [2002]). The only loss proximately caused by defendants' negligent advice was plaintiff Snorkel's loss of its right to produce the play. While there is no nonspeculative basis for valuing that right, Snorkel may seek to recover as damages the expenses it incurred in connection with the arbitration commenced by Manilow and Appoggiatura to recover their rights.

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

560 Christopher Flores, etc., et al., Index 7532/05
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 8, 2008, which, in this action for personal injuries sustained when infant plaintiff fell against a hot radiator inside a school, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was appropriate since defendant is not a proper party to the action. As we have held, the 2002 amendments to the Education Law (L 2002, ch 91) do not provide a basis to hold defendant liable for the personal injuries sustained by the infant plaintiff (*see Corzino v City of New York*, 56 AD3d 370 [2008]; *Perez v City of New York*, 41 AD3d 378 [2007], *lv denied* 10 NY3d 708 [2008]).

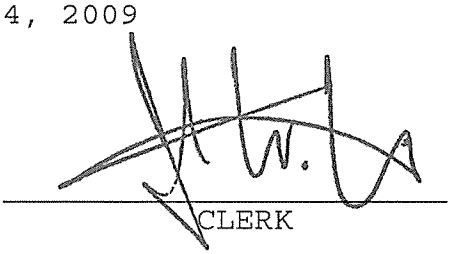
The record fails to support plaintiffs' contention that defendant should be equitably estopped from claiming it is not the proper party defendant. Although defendant's answer to the

complaint admitted owning the school building, it also, inter alia, denied plaintiffs' specific allegations that defendant runs or operates the Department of Education, or that it operates the New York City public school system "through the Department of Education," as well as denied that it operated, maintained, or managed the school at issue, or that it owned and operated the school "through the Department of Education." The motion court properly found that plaintiffs failed to make the requisite showing that they changed their position to their detriment or prejudice as a result of relying upon defendant's alleged wrongful conduct (*see Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482 [2007]; *Luka v New York City Tr. Auth.*, 100 AD2d 323, 325 [1984], *affd* 63 NY2d 667 [1984]).

We have considered plaintiffs' remaining arguments, including that we reconsider our decision in *Perez*, and find them unavailing.

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Nardelli, Renwick, Freedman, JJ.

561-
562 In re Angelina B.,
Petitioner-Respondent,

-against-

Ruben B.,
Respondent-Appellant.

Neal D. Futerfas, White Plains, for appellant.

Michael S. Bromberg, Sag Harbor, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Lisa Ruesch of counsel), Law Guardian.

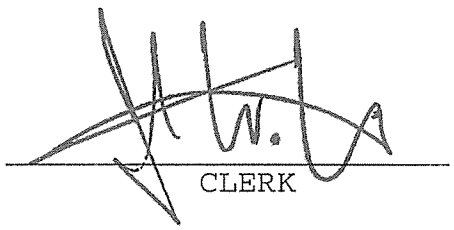
Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about December 19, 2007, which granted petitioner mother's request for custody of the parties' two children, with visitation privileges to respondent, unanimously affirmed, without costs.

The interests of these children will best be served by this custody arrangement with generous visitation privileges. The court's conclusion to this effect was based upon a thoughtful assessment of all the evidence and a comprehensive evaluation of the witnesses and their testimony (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]), and has a sound and substantial basis in the record (*Schneider v Schneider*, 40 AD3d 956 [2007]). The

court did not overlook or misconstrue material facts, or rely upon improper criteria, as respondent argues.

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

ENTERED: MAY 14, 2009



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Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

563 The People of the State of New York, Ind. 2994/06
Respondent,

-against-

John Garcia,
Defendant-Appellant.

Jack Gerald Goldberg, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 16, 2008, convicting defendant, upon his plea of guilty, of grand larceny in the second degree and identity theft in the first degree, and sentencing him to concurrent terms of 1 to 3 years, unanimously affirmed.

After reviewing the parties' extensive submissions and employing its own familiarity with the case, the court properly denied defendant's motion to withdraw his guilty plea, in which he alleged ineffective assistance of counsel. In deciding such a motion, "[t]he nature and extent of the fact-finding procedures . . . rest largely in the discretion of the Judge to whom the motion is made. Only in the rare instance will a defendant be entitled to an evidentiary hearing." (*People v Tinsley*, 35 NY2d 926, 927 [1974]; *see also People v Frederick*, 45 NY2d 520 [1978]). The record establishes that defendant received

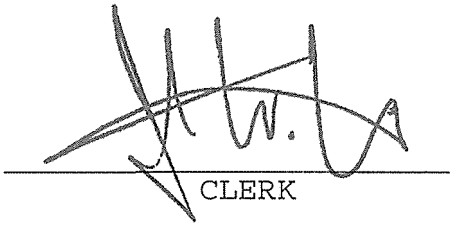
effective assistance of counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]). Defendant did not substantiate his claim that his attorney's investigation and preparation were inadequate, the evidence submitted on the motion demonstrated that the attorney's misstatement about the post-plea appealability of a statutory speedy trial ruling came after defendant had already pleaded guilty, and defendant's claim that counsel failed to advise him of a more favorable plea offer was supported only by defendant's self-serving statement, which was contradicted by extensive circumstantial evidence.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining argument.

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

564-
565-
565A Purvi Enterprises, LLC, Index 601102/08
Plaintiff-Appellant,

-against-

City of New York,
Defendants,

3206 Emmons Avenue Realty, LLC, et al.,
Defendants-Respondents.

Aronauer, Re & Yudell, LLP, New York (Kenneth S. Yudell of counsel), for appellant.

Castro & Karten LLP, New York (Claude Castro of counsel), for 3206 Emmons Avenue Realty, LLC, respondent.

Cozen O'Connor, P.C., New York (Julie B. Negovan of counsel), for Howard Hornstein and Cozen O'Connor, P.C., respondents.

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered July 3, 2008, which (1) denied plaintiff's motion for a temporary restraining order and preliminary injunction and granted defendant 3206 Emmons Avenue Realty, LLC's cross motion to dismiss the complaint as against it, and (2) granted Howard Hornstein and Cozen O'Connor, P.C.'s cross motion to dismiss the complaint as against them and sua sponte dismissed the complaint as against defendant City of New York, unanimously modified, on the law, to vacate the dismissal of the complaint as against the City and reinstate the complaint as against that defendant, to grant plaintiff leave to amend the complaint to assert a claim

for breach of contract against 3206 Emmons, and to reinstate so much of the sixth cause of action as against 3206 Emmons as seeks attorneys' fees, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 4, 2008, unanimously dismissed, without costs, as superseded by the appeal from the second aforesaid order entered July 3, 2008.

The complaint should not have been dismissed as against the City. The City did not move to dismiss and did not appear in connection with any of the cross motions, and thus the parties have not been heard with respect to the claims asserted against the City.

Plaintiff failed to demonstrate a likelihood of success on the merits of any of its claims for injunctive relief (*see* CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). With respect to its cause of action for mandatory injunctive relief against 3206 Emmons, plaintiff failed to demonstrate that 3206 Emmons is required by the Zoning Lot Development Agreement (ZLDA) to execute and deliver an authorization permitting plaintiff to file an application with the City Planning Commission (CPC) on its (plaintiff's) behalf without having the opportunity to review the application first to determine whether it would adversely affect 3206 Emmons' own property interests. To the extent that 3206 Emmons breached the ZLDA by contacting the City about the allegedly invalid certificate of occupancy (C/O) previously

issued to plaintiff, thereby instigating proceedings by the Department of Buildings (DOB) to revoke the C/O, that breach is past conduct adequately compensable by damages. An injunction against future breaches of the ZLDA would appear to be unnecessary in view of the fact that DOB has agreed not to continue with the revocation proceedings until the court determines whether 3206 Emmons is required to consent to plaintiff's filing of its application with the CPC. We sua sponte grant plaintiff leave to amend the complaint to allege a cause of action against 3206 Emmons for breach of contract, and, accordingly, reinstate so much of plaintiff's sixth cause of action as against 3206 Emmons as seeks attorneys' fees, as provided for in the ZLDA.

As to the Cozen O'Connor defendants, since they are not parties to the ZLDA, they cannot be enjoined from breaching it. To the extent plaintiff alleges that the Cozen O'Connor defendants either conspired with 3206 Emmons to breach the agreement or aided and abetted a breach thereof by 3206 Emmons, these defendants cannot be enjoined from such conduct because no such cause of action exists (*see Health-Loom Corp. v Soho Plaza Corp.*, 209 AD2d 197, 198 [1994]; *Galesi v Galesi*, 12 Misc 3d 1186(A), 2005 NY Slip Op 52310[U], *5 [2005], *affd in part, appeal dismissed in part* 37 AD3d 249 [2007]). To the extent plaintiff alleges that Cozen O'Connor committed tortious

interference with contract and seeks to enjoin further instances of such tortious conduct, Cozen O'Connor's conduct would be immune from liability "under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith" (*Beatie v DeLong*, 164 AD2d 104, 109 [1990]; *see also Lloyd I. Isler, P.C. v Sutter*, 160 AD2d 609, 610 [1990]). Plaintiff's attempt to enjoin the Cozen O'Connor defendants from further representing 3206 Emmons in matters in opposition to plaintiff, because of an alleged conflict of interest resulting from their prior representation of entities related to plaintiff, is in effect an attempt to disqualify Cozen O'Connor from representing 3206 Emmons in this action. However, even if plaintiff could prove that it is a former client of Cozen O'Connor (*see A.F.C. Enters., Inc. v New York City School Constr. Auth.*, 33 AD3d 736 [2006]), it could not show that the prior representation was either substantially related or materially adverse to the present representation of 3206 Emmons (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]).

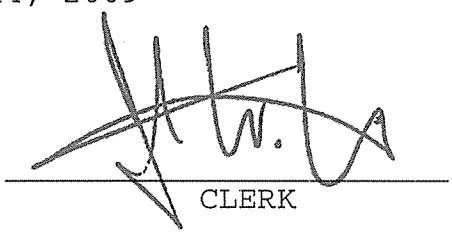
Finally, while the balance of the equities favors plaintiff since plaintiff would likely not be facing the revocation of its C/O if 3206 Emmons had not instigated the DOB's action against it, and enjoining 3206 Emmons from engaging in further interference and restraining the City from revoking the C/O

pending resolution of the litigation would merely preserve the status quo, the City's express agreement not to calendar the Board of Standards and Appeals hearing for a period of time to allow the contractual dispute between plaintiff and 3206 Emmons to be resolved undermines plaintiff's claim of irreparable harm from the revocation of its C/O.

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

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

566 Jean Walton Leser, doing business as The Luxury Portal, Plaintiff-Respondent, Index 104005/07

-against-

Luz Penido, also known as Karen Kooper, et al., Defendants-Appellants.

Richard A. Altman, New York, for appellants.

Victoria M. Brown, New York, for respondent.

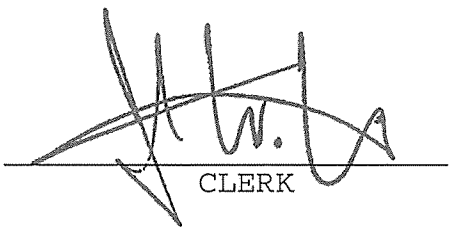
Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 23, 2008, which, inter alia, denied defendants' motion to dismiss the cause of action for libel per se, unanimously affirmed, with costs.

Plaintiff sufficiently stated a cause of action for libel per se based upon defendants' alleged postings on the internet, attributed to plaintiff, which plaintiff asserts damaged her business of selling luxury handbags online (*see Rall v Hellman*, 284 AD2d 113 [2001]). Furthermore, the pornographic pictures and statements linked to plaintiff's name and photograph on various websites "allegedly falsely imply[] that [s]he is sexually lustful and promiscuous" (*Rejent v Liberation Publs.*, 197 AD2d 240, 243 [1994]; *compare Bement v N.Y.P. Holdings*, 307 AD2d 86, 92 [2003], *lv denied* 100 NY2d 510 [2003]).

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

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

567 The People of the State of New York, Ind. 5778/06
Respondent,

-against-

Ronald Brooks,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered September 7, 2007, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 25 years to life, unanimously affirmed.

The trial court properly denied defendant's request for a missing witness charge with respect to the victim's cousin, an eyewitness to the shooting. Contrary to defendant's contention, the prosecution established that it made diligent but unsuccessful efforts to obtain the witness's testimony, in that detectives spoke to the witness to urge him to cooperate, made trips to his home, and delivered subpoenas (*see People v Rivera*, 249 AD2d 141 [1998], *lv denied* 92 NY2d 904 [1998]; *see also People v Savinon*, 100 NY2d 192, 198-200 [2003]). The People clearly established that their reasons for failing to call the

witness were not strategic, and that they did not "merely go through the motions of asking [the] witness to testify," with the "ulterior goal of keeping the witness off the stand" (*id.* at 200). Defendant's related claim regarding the prosecutor's summation is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

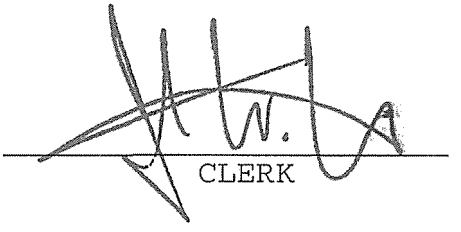
The court properly admitted evidence of defendant's gang membership as probative of motive since it provided an explanation as to why defendant would harass and shoot the victim, a member of a rival gang (*see e.g. People v Wilson*, 14 AD3d 463 [2005], *lv denied* 4 NY3d 857 [2005]). Regardless of how the court may have characterized its ruling, the connection between this evidence and the issue of motive is reflected in the People's application to admit the evidence, in the trial testimony, and in the court's jury instruction.

The court also properly admitted evidence of four incidents of defendant's uncharged possession of a pistol resembling the weapon used in this crime. In three of these incidents, defendant displayed the weapon in the presence of the victim. In addition to linking defendant to the crime by showing he possessed the same type of weapon (*see People v Marte*, 7 AD3d 405, 407 [2004], *lv denied* 3 NY3d 677 [2004]), this evidence also completed the narrative of events leading up to shooting,

explained the contentious relationship between defendant and the victim, and was probative of motive and intent (*see e.g. People v Rochez*, 289 AD2d 63 [2001], *lv denied* 97 NY2d 733 [2002]). Accordingly, we do not find that the number of incidents or the level of detail elicited was excessive. The court correctly weighed the probative value of the evidence against its prejudicial effect and minimized any prejudice by giving appropriate limiting instructions. Defendant has not shown that he was prejudiced by the timing of those instructions (*see People v Thomas*, 26 AD3d 241 [2006], *lv denied* 6 NY3d 898 [2006]).

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

ENTERED: MAY 14, 2009



Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

568 Security Pacific National Bank, Index 22899/92
Plaintiff-Respondent,

-against-

Tracie Evans,
Defendant-Appellant.

David Worth, New York, for appellant.

Berkman, Henoch, Peterson & Peddy, P.C., Garden City (Andrew M. Roth of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered on or about January 14, 2008, which, in this mortgage foreclosure action, granted plaintiff Citimortgage's motion to vacate and cancel a prior order of the same court, (Sherry Klein-Heitler, J.), entered on or about February 27, 2007, and to reinstate a prior order of the same court, (Sherry Klein-Heitler, J.), entered July 7, 2002, inter alia, reinstating a referee's deed of sale, and denied defendant's cross motion to hold plaintiff liable for its purported breach of the settlement agreement between the parties and to specifically perform its terms by removing or correcting certain allegedly incorrect information contained in defendant's credit report, unanimously modified, on the law, Citimortgage's motion denied, and otherwise affirmed, without costs.

In 1994, Security Pacific National Bank obtained a judgment of foreclosure and sale against defendant, the mortgagor of a

condominium apartment. In 1995, Security Pacific was granted the referee's deed of sale, and in 1997, it obtained a warrant of eviction and a judgment of possession. Due to bank mergers and the sale and assignment of the mortgage, in 2003 Citimortgage became the servicer on behalf of Banker's Trust Company of California, N.A., as trustee, with respect to the subject mortgage.

Following extensive litigation (*see* 31 AD3d 278 [2006], *appeal dismissed* 8 NY3d 837 [2007]), on January 31, 2007, the parties entered into a settlement agreement providing, inter alia, that defendant would remit the sum of $880,000 to Citimortgage within 60 days, which was later extended to April 13, 2007 by consent of the parties. To effectuate the settlement, Citimortgage agreed to execute any and all documents necessary to vacate and cancel the referee's deed of sale, which would result in title reverting to defendant. The parties further agreed to execute any and all documents necessary to effectuate the terms of the settlement agreement.

After signing the settlement agreement, defendant sought to refinance her condominium apartment to obtain the monies necessary to pay the settlement funds. On or about February 22, 2007, a senior loan officer with a mortgage banker supplied a letter to the court stating that his company was prepared to give defendant a loan of $880,000 to refinance the premises, and could

proceed as soon as the deed reverted back to defendant. On or about February 27, 2007, Justice Klein-Heitler vacated the referee's deed, thereby reverting the deed back to defendant, on the condition that defendant remit the settlement funds.

Because defendant allegedly had sufficient equity in the apartment and an excellent credit score, she believed that she would be able to obtain refinancing. However, Citimortgage had incorrectly listed on defendant's credit report that she had made late payments on 45 occasions, with each occasion listed as being four to six months late, and that she was in arrears of $65,000. At the request of defendant's counsel, Citimortgage's counsel provided two letters, the first stating that defendant's debt "has not been in default and there are no outstanding late fees and/or charges owed hereon from such date," and the second stating that "no payments to CitiMortgage were due nor have any late charges or arrears been assessed." However, when the independent credit bureau attempted to verify that information, as required by the prospective lender, Citimortgage's counsel allegedly would not do so, nor would he provide the phone number of the appropriate person at Citimortgage to contact. Defendant then attempted to obtain a loan from several other banks, but was allegedly informed that a loan could not be issued due to the inaccurate credit report, and ultimately, she was unable to obtain a loan in time to remit the settlement funds by the April

13, 2007 deadline. After that date, defendant was able to arrange for a "hard money" loan at a high rate of interest that would be available upon provision by Citimortgage of a payoff letter.

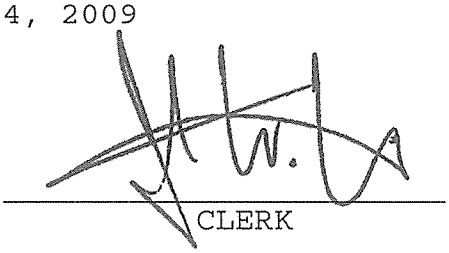
Under the circumstances presented, we find that the motion court improperly granted Citimortgage's motion. It is well settled that all contracts imply a covenant of good faith and fair dealing in the course of performance, and "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" *(Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995], quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]; *see 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

Here, the record presents triable issues of fact as to whether Citimortgage breached the implied covenant of good faith by failing to confirm that its letters, rather than the credit report, gave an accurate account of defendant's payment history, and whether the erroneous credit report was the cause of defendant's inability to perform her obligations under the settlement agreement (*see Wallace v Merrill Lynch Capital Servs, Inc.*, 29 AD3d 382, 383 [2006]). If Citimortgage indeed refused to confirm the veracity of the information contained in the letters, its action could well have had the "effect of destroying

. . . the right of [defendant] to receive the fruits of the contract" (*see 511 West 232nd Owners Corp.*, 98 NY2d at 153). The contractual duty that the parties execute any and all necessary documents would be meaningless if the parties were not obligated to stand behind such documents as well. Furthermore, the requirement that Citimortgage confirm that its letters were authentic certainly would not, as a matter of law, negate any explicit contractual right (*cf. Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302 [2003]).

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

570 The People of the State of New York, Ind. 1495/05
Respondent,

-against-

Ai Jiang,
Defendant-Appellant.

Joel S. Cohen, New York, for appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J. on consolidation motion; William A. Wetzel, J. at jury trial and sentence), rendered July 31, 2006, convicting defendant of attempted murder in the second degree, gang assault in the first degree, assault in the first degree (three counts) and assault in the second degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

The court properly exercised its discretion by joining defendant's indictments relating to separate incidents, since the charges were legally similar (*see* CPL 200.20[c]). Defendant has not demonstrated any substantial likelihood that the jury was unable to consider the proof as to each of the charges separately, or that he had important testimony to give in one case and a genuine need to refrain from testifying in the other

(*see* CPL 200.20[3]; *People v Lane*, 56 NY2d 1, 8-9 [1982]; *People v Streitferdt*, 169 AD2d 171, 176 [1991], *lv denied* 78 NY2d 1015 [1991]; *People v Ndeye*, 159 AD2d 397 [1990], *lv denied* 76 NY2d 793 [1990]).

All of defendant's challenges to the court's charge and to the prosecutor's opening statement, elicitation of evidence and summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. While the court should have instructed the jury to consider the incidents separately, the court's charge taken as a whole (*see People v Coleman*, 70 NY2d 817, 819 [1987]), as well as the verdict sheet which clearly set out the different incidents, informed the jury of the proper standard to be applied, and any error was harmless. Likewise, a portion of the prosecutor's opening that could be viewed as a propensity argument, and testimony that may have technically violated the principle set forth in *People v Trowbridge* (305 NY 471 [1953]) were, at worst, harmless error (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's remaining unpreserved claims are without merit (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

To the extent the record permits review, we find that defendant received effective assistance under the state and

federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant's ineffective assistance of counsel claims fall into two categories. First, with regard to the unpreserved errors discussed previously, defendant argues that his counsel was ineffective for failing to make objections or requests to charge. However, counsel's failure to do so did not deprive defendant of a fair trial or cause him any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]). None of these arguments, even if successfully made to the trial court, would have affected the outcome of the case.

Defendant's other ineffective assistance claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although defendant raised these claims in a presentence motion to set aside the verdict pursuant to CPL 330.30(1), that motion was procedurally defective because such a motion is limited to grounds appearing in the record (*see People v Wolf*, 98 NY2d 105, 119 [2002]). To the extent the motion could be deemed a de facto or premature motion to vacate judgment pursuant to CPL 440.10, the issues raised in the motion are unreviewable since defendant failed to obtain

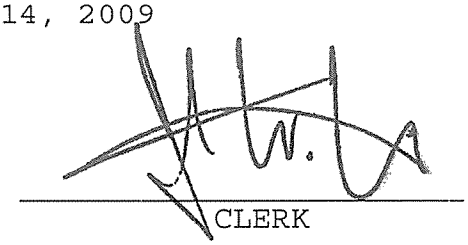
permission from this Court to appeal (*see* CPL 450.15[1]; 460.15; *People v Villegas*, 298 AD2d 122, 123 [2002], *lv denied* 99 NY2d 565 [2002]). As an alternative holding, we also reject the motion on the merits (*see* CPL 440.30[4][b],[d]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]). Defendant did not establish a basis for an evidentiary hearing. Defendant's factual allegations are supported by his motion counsel's affirmation rather than by witnesses with personal knowledge, or are supported only by defendant's affidavit. Furthermore, these claims are contradicted by defendant's trial counsel's detailed affirmation, the record of the trial and pretrial proceedings, and the court's own recollection.

M-1690 ***People v Ai Jiang***

Motion seeking leave to enlarge record denied.

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

571 Erika Wiesel, Index 111890/04
Plaintiff-Appellant,

-against-

310 East 46 LLC,
Defendant-Respondent.

Law Offices of Sanford F. Young, P.C., New York (Dennis Giacomo Vilella of counsel), for appellant.

London Fischer LLP, New York (Perry Kreidman of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about July 11, 2007, which granted defendant's motion to dismiss the complaint on the ground of untimeliness, unanimously modified, on the law, to reinstate the cause of action for breach of the warranty of habitability for the period January 31, 2001 to December 2001, and otherwise affirmed, without costs.

The court correctly dismissed as untimely the first three causes of action seeking damages based on a hazardous condition in plaintiff's apartment (*see* CPLR 214-c[2]) and correctly declined to apply the extraordinary remedy of equitable estoppel to prevent defendant from asserting the statute of limitations defense. Plaintiff contends that she delayed commencing this lawsuit in reliance on a stipulation of settlement in a housing court proceeding in which defendant promised, but then failed, to

cure the mold condition in her apartment, as well on other actions she claims defendant took to "derail [her] ability to exercise her rights." However, none of these alleged actions constituted affirmative wrongdoing, fraud or intentional misconduct that could reasonably have induced plaintiff to refrain from filing suit before the expiration of the statutory period (*see Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509 [2007]). There is no evidence that defendant's promise to inspect and repair the mold problem was contingent upon plaintiff's forgoing legal action as to injuries she had already suffered, and under the stipulation of settlement plaintiff expressly reserved the right to assert the tort-based causes of action that became the substance of the instant action.

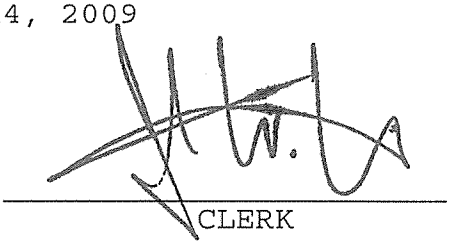
The court erred in dismissing plaintiff's timely claim for breach of the warranty of habitability for failure to sufficiently allege economic loss. Plaintiff sought a rent abatement in connection with this cause of action and triable issues of fact exist whether the warranty of habitability was breached as a result of the mold problem in her apartment. However, since, in the prior housing court stipulation of settlement, dated January 31, 2001, plaintiff settled any claim for a rent abatement based on the uninhabitability of her apartment through that date, she may assert this claim only with respect to the period between the date of the stipulation and the

end of her tenancy in December 2001.

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

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

ENTERED: MAY 14, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, Freedman, JJ.

572N Gladys Boston, et al., Index 24491/01
Plaintiffs-Respondents,

-against-

Clyde Weissbart, M.D., et al.,
Defendants,

The Jack D. Weiler Hospital of the Albert Einstein College of Medicine, etc., et al.,
Defendants-Appellants.

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains (Edward J. Guardaro, Jr. of counsel), for appellants.

Koss & Schonfeld, LLP, New York (Simcha D. Schonfeld of counsel), for respondents.

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered December 26, 2007, which, to the extent appealed from, granted plaintiffs' motion for reargument and vacated the court's prior order, entered July 18, 2007, and denied defendants-appellants' motion, unanimously modified, on the law, and motion granted with respect to defendant Harold Kim, M.D., and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendant Harold Kim, M.D. dismissing the complaint as against him.

The court properly granted plaintiffs' motion for reargument (*see Sheridan v Very, Ltd*, 56 AD3d 305 [2008], citing *Sciascia v Nevins*, 130 AD2d 649, 650 [1987]). Plaintiffs' expert's affirmation was not merely conclusory, relying as it did on the

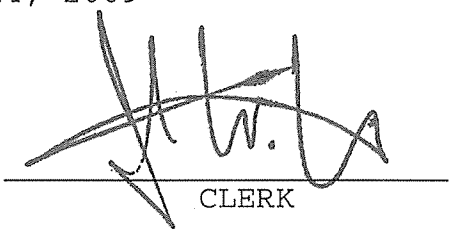
medical records to draw conclusions (*compare Margolese v Uribe*, 238 AD2d 164 [1997]). Upon reargument, the court properly found a triable issue of material fact regarding whether plaintiff's breathing was severely compromised, necessitating an emergency tracheotomy, or, as plaintiffs' expert affirmed, no emergency existed and defendants should have made a second attempt at intubation, performed by a qualified anesthesiologist under a sedative instead of local anesthesia, to explore plaintiff's complaints. Moreover, issues of fact exist as to whether the emergency tracheotomy was properly performed when the endotracheal tube was placed through the vocal cords. Plaintiffs' expert affirmed that a tracheotomy should not involve the vocal cords, and, if there were an emergency, defendants should have made "an incision . . . in the trachea or a cycoidthyroidotomy should [have been] performed which would involve an incision avoiding the vocal cords." The conflicting opinions of the parties' experts raise issues of fact (*see Cruz v St. Barnabas Hosp.*, 50 AD3d 382 [2008]).

There are no issues of fact as to whether defendant Dr. Kim may be held liable. "A resident who assists a doctor during a medical procedure, and who does not exercise any independent judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal

practice that the resident should be held liable for failing to intervene" (*Soto v Andaz*, 8 AD3d 470, 471 [2004]; *Buchheim v Sanghavi* 299 AD2d 229 [2002], *lv denied* 100 NY2d 506 [2003]).

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

ENTERED: MAY 14, 2009



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MAY 14 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
Eugene Nardelli
Karla Moskowitz
Dianne T. Renwick, JJ.

4773
Ind. 113095/06

JT Magen,
Plaintiff-Respondent,

-against-

Hartford Fire Insurance Company, et al.,
Defendants-Appellants,

Richard Seifert, et al.,
Defendants.

Defendants Hartford Fire Insurance Company and William Erath and Son appeal from an order of the Supreme Court, New York County (Marylin G. Diamond, J.), entered January 10, 2008, which denied their motion for summary judgment and granted plaintiff's cross motion for summary judgment declaring that Hartford's policy is primary to any other policy covering plaintiff, thus obligating Hartford to defend and indemnify plaintiff and nonparties IDA and Magen David Yeshiva in the underlying personal injury action.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Roger B. Lawrence and Mary Beth Reilly of counsel), for appellants.

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

RENWICK, J.

The issue before us is whether the prompt disclaimer requirement of the Insurance Law is triggered when an insurance carrier receives the notice of claim from another insurance carrier on behalf of a mutual insured asking that the insured be provided a defense and indemnity. In light of the apparent confusion on this issue, we take the opportunity to reiterate and clarify our holding in *Bovis Lend Lease LMB, Inc. v Royal* Surplus Lines Ins. Co. (27 AD3d 84 [2005]), which is dispositive.

Background

This insurance dispute arose out of injuries allegedly sustained by Richard Seifert when he tripped and fell on July 4, 2004, at a construction site owned by the New York City Industrial Development Agency (IDA) and Magen David Yeshiva. The owners hired plaintiff JT Magen as their construction manager. Plaintiff, in turn, hired defendant William Erath & Son as one of its subcontractors on the job. The injured worker was employed by Erath.

In the contract between plaintiff and Erath, the latter agreed to indemnify and hold the former harmless for personal injuries arising out of Erath's work. The contract also called for Erath to provide liability coverage of no less than $4 million, naming plaintiff, the Yeshiva and IDA as additional

insureds. To fulfill its obligations, Erath secured such a policy from defendant Hartford. At the time of the accident, plaintiff was the named insured under a commercial liability policy issued by St. Paul Travelers Insurance (Travelers).

On May 7, 2005, worker Seifert commenced a personal injury action against various defendants, including plaintiff herein, the Yeshiva and IDA. Plaintiff notified its insurance carrier, Travelers, of the occurrence. By letter dated June 24, 2005, Travelers advised Hartford of the underlying action and requested that Hartford defend and indemnify plaintiff, IDA and the Yeshiva as additional insureds under the policy Hartford had issued to Erath. By letter dated August 10, 2005, Hartford contended that Travelers' tender letter had failed to include a copy of the summons and complaint in the underlying action. Although it claimed a copy of the summons and complaint had been included in its tender letter, Travelers nonetheless mailed Hartford another set of the pleadings on August 16, 2005. Fifty-one days later, by letter dated October 6, 2005, Hartford informed Travelers that it was disclaiming coverage on the ground that plaintiff, IDA and the Yeshiva had failed to comply with the policy requirement that they provide notice "as soon as practical" of any "occurrence"

that might result in damages covered under the policy, even if no demand has been made against them. A copy of the disclaimer letter was also sent to the additional insureds.

Plaintiff commenced this action against Hartford, among others, seeking a declaration that Hartford owes it, and nonparties IDA and the Yeshiva, a defense and indemnification with respect to the underlying personal injury action brought against them by the injured worker. Hartford then brought the instant summary judgment motion to dismiss the complaint on the ground that plaintiff had failed to comply with the insurance contract's notification provision. Plaintiff cross moved for a declaration that as an additional insured under the policy, it was entitled to a defense by Hartford, which, it argued, was estopped from disclaiming coverage pursuant to Insurance Law § 3420(d). Hartford countered that the provision does not apply as between insurers. Because Travelers' tender was made on behalf of plaintiff, the insured, Supreme Court found the case law making Insurance Law § 3420(d) inapplicable to insurers to be inapposite. Accordingly, the court granted plaintiff's cross motion, concluding that Hartford was precluded from disclaiming coverage on the ground of late notice.

Discussion

Under Insurance Law § 3420(d), an insurer wishing to disclaim liability or deny coverage for death or bodily injury must "give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage." A failure to give such prompt notice precludes an effective disclaimer or denial (*Matter of Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836, 837 [1996]). However, an insurance carrier's duty to timely disclaim is not triggered until an insured satisfies a notice of claim provision in an insurance contract, because that provision is a condition precedent to coverage, and absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239 [2002]; *Town of Smithtown v National Union Fire Ins. Co.*, 191 AD2d 426, 427 [1993]).

We hold that the tender letter insurer Travelers wrote on behalf of plaintiff and others to insurance carrier Hartford -- asking that their mutual insureds be provided with a defense and indemnity, as additional insureds under the policy issued to Erath -- fulfills the policy's notice-of-claim requirements so as to trigger the insurer's obligation to issue a timely disclaimer

pursuant to Insurance Law § 3420(d). Indeed, as Supreme Court properly pointed out, this is precisely the implication of our ruling in *Bovis*, where we held that only the tendering carrier did not get the benefit of § 3420(d) from a tendering letter it sent on behalf of its insured because that section does not apply to claims between insurers.

A somewhat detailed discussion of the case is required to determine adequately its applicability to the case at bar. In *Bovis*, Columbia University decided to build a new building and hired Bovis as its construction manager. Bovis, in turn, hired Millennium Masonry as one of its subcontractors on the job. Dennis Winter worked for Millennium. In September 2002, Winter was injured on the job when he fell from a height. Two months later, Winter commenced a personal injury action against Columbia and Bovis. Bovis was insured by National Union Fire Insurance Company, and Columbia was an additional insured under that policy. Royal Surplus Lines Insurance Company insured Millennium, and Bovis and Columbia were named as additional insureds under that policy.

On February 28, 2003, National wrote to Royal, tendering to Royal, on behalf of Bovis and Columbia, the notice of its obligations to defend and indemnify both Bovis and Columbia. While National awaited Royal's response to its tender, National

hired attorneys to defend Bovis and Columbia. Sometime in late May, Royal wrote back to National, rejecting the tender. Royal's basis for this disclaimer was a "New Residential Work or Products" exclusion in its policy with Millennium. National received this disclaimer letter on May 21, 2003. A month earlier, National, Bovis, and Columbia had commenced an action against Royal, seeking a declaration that, pursuant to its policy covering Millennium, Royal was obligated to defend and indemnify Bovis and Columbia in the personal injury lawsuit. National also sought reimbursement of all defense fees it had incurred between the tender and the commencement of the lawsuit.

Royal then moved for summary judgment in the declaratory judgment action, arguing that the "New Residential Work or Products" exclusion in its policy excused Royal from any obligation to defend or indemnify its own insured (Millennium) as well as the additional insureds (Bovis and Columbia). In opposition, National argued that Royal's disclaimer was untimely under Insurance Law § 3420(d). Therefore, National argued, Royal could not rely on the exclusion and was obligated to defend and indemnify both Bovis and Columbia. Royal countered that § 3420(d) only requires insurance companies to be timely in response to an insured's claim -- not in response to a tender from another insurer; in other words, assuming arguendo that its

disclaimer was late, it could still argue the applicability of the exclusion.

In the declaratory judgment action, National was not the only plaintiff; Bovis and Columbia were also plaintiffs, and must receive the protections of § 3420(d) as additional insureds under the Royal policy because they were also "prospective claimants." Royal was thus under a legal obligation to timely disclaim pursuant to the statute. The question then became whether Royal's disclaimer was timely. We held that Royal's delay of somewhere between 36 and 60 days in issuing the disclaimer, after having received "sufficient facts" to render a coverage decision, was unlawful. Therefore, Royal was responsible for the defense and indemnity of both Bovis and Columbia.

National, however, did not get the benefit of Insurance Law § 3420(d). In the declaratory judgment action, National was also a plaintiff. From the time it assumed the defense and indemnity of Bovis and Columbia in the personal injury action, it had accrued significant attorney's fees, and it wished to recoup those expenses. Because National -- unlike Bovis and Columbia -- was not a prospective claimant to whom the benefits of

§ 3420(d) were intended, we held it could not receive the automatic benefit of Royal's untimely disclaimer (27 AD3d at 87-88).[1]

The *Bovis* case is consistent with other New York decisions -- including this Court's -- that Insurance Law § 3420(d) does not apply to claims between insurers. For instance, prior to *Bovis*, courts held that § 3420(d) is inapplicable to a request for pro rata contribution between coinsurers (*see e.g. Tops Mkts. v Maryland Cas.*, 267 AD2d 999, 1000 [1999]; *Thomson v Power Auth of State of New York*, 217 AD2d 495 [1995]). In *Bovis*, we extended this rule to an insurer's request for a full defense and indemnity. In doing so, however, we distinguished between an insurer's own claim for a defense and indemnity and a tender

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[1] This Court thus focused its attention on the basis for the Royal disclaimer, i.e. the applicability of the "New Residential Work or Products" exclusion, which, by its terms, applied to injuries arising out of Millennium's work "associated with new residential property." "New residential property" is defined in the exclusion as "apartments, single family and multi-family dwellings, condominiums, and townhouses." We found that the "Columbia University School and Faculty Residence" was a mixed-use building. By its terms, the exclusion applied to residential property and not to mixed use property. Therefore, Royal's disclaimer was invalid as a matter of law. National was thus entitled to recoup all of its incurred defense costs in the personal injury action from Royal.

letter by an insurer on behalf of its insured (27 AD3d at 87).[2]

More recently, in *Bovis Lend Lease LMB Inc. v Garito Contr., Inc.* (38 AD3d 260 [2007]), we were again faced with nearly identical facts -- an insurance carrier's letter advising another insurance carrier of the underlying personal injury action instituted against a mutual insured and requesting that the recipient insurance carrier defend and indemnify their mutual insured. Again we found that the notice triggered the prompt disclaimer requirement with regard to the mutual insured. In *Garito*, plaintiff Bovis, a general contractor, sought a declaration that it should be covered as an additional insured under the policy issued by defendant Twin City to Bovis's subcontractor, Garito. In opposition to the plaintiff's motion for summary judgment, defendant Twin City did not submit any evidence that it timely disclaimed coverage on the basis of the alleged late notice provided. Instead, like the defendant here, Twin City argued that the prompt disclaimer requirement of § 3420(d) did not apply because the notice of claim had been effectuated by Bovis's insurance carrier, AIG. We rejected that

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[2] In fact, in *Bovis*, we specifically ruled that the disclaimer letter issued in response to an insurer's tender of a defense and indemnity on behalf of its two insureds was untimely under § 3420(d), and that the issue of whether the disclaimer letter was substantively valid thus need not be reached with respect to the two insureds.

argument, as we had done in the seminal *Bovis* decision, by upholding Supreme Court's declaration that Twin City must provide primary coverage to Bovis as an additional insured under the policy issued to Garito.

The dissent's attempt to remove this case from the ambit of *Bovis* and its progeny is not persuasive. For instance, the dissent argues that "*Bovis* lacks precedential value" because "[t]he case does not even mention, let alone discuss, the source of the notice by the insurer." However, in *Bovis*, this Court explicitly noted that "By letter dated February 28, 2003, National Union tendered the defense and indemnification of Bovis and Columbia to Royal" (27 AD3d at 86). Therefore, contrary to the dissent's allegations, *Bovis* involves the same factual scenario we face here, where an insurance carrier receives the notice of claim from another insurance carrier on behalf of a mutual insured, asking that the insured be provided a defense and indemnity.

Likewise, the dissent lacks any factual or legal basis in averring that the real party in interest in this case is Travelers. In fact, it is undisputed that Travelers' tender letter of June 24, 2005, was sent on behalf of plaintiff, IDA and the Yeshiva, seeking coverage for them with respect to the underlying personal injury action. Moreover, unlike *Bovis*, where

one of the plaintiffs seeking declaratory relief was an insurer, the only plaintiff in this action is JT Magen, which seeks a defense and indemnification from Hartford. Travelers has not asserted any claim against Hartford for monetary relief covering the costs it incurred in the underlying personal injury action.

Finally, defendant Hartford has not made any attempt to justify its 45-to 50-day delay in disclaiming coverage of the underlying accident. Indeed, it has not even suggested that the letter tendering notice of the claim against plaintiff, IDA and the Yeshiva did not provide it with sufficient facts to disclaim coverage on any basis. Rather, misinterpreting the import of *Bovis*, Hartford argues that Insurance Law § 3420(d) is inapplicable since the tender letter was from an insurer and the statute does not require a prompt response to claims asserted by other insurers. We thus conclude that Hartford's disclaimer letter was untimely as a matter of law (*see e.g. West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [2002], *lv denied* 98 NY2d 605 [2002] [30 days unreasonable as a matter of law where sole ground on which coverage was disclaimed was insured's delay in notifying insurer of occurrence]), and that as a result, Hartford is precluded under § 3420(d) from disclaiming coverage.

Accordingly, the order of the Supreme Court, New York County (Marylin G. Diamond, J.), entered January 10, 2008, which denied the motion of defendants Hartford and Erath for summary judgment and granted plaintiff's cross motion for summary judgment declaring that Hartford's policy is primary to any other policy covering plaintiff, thus obligating Hartford to defend and indemnify plaintiff and nonparties IDA and Magen David Yeshiva in the underlying personal injury action, should be affirmed, without costs.

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

TOM, J. (dissenting)

This insurance coverage dispute arose out of injuries allegedly sustained by defendant Richard Seifert in July 2004 while in the employ of defendant William Erath and Son. Plaintiff JT Magen, the construction manager for the project, was insured under a policy obtained from St. Paul Travelers. Erath was a subcontractor at the site under a contract that required it to indemnify and hold Magen harmless for any personal injury arising out of Erath's work. In connection with its contractual obligation, Erath obtained comprehensive general liability insurance from defendant Hartford Fire Insurance Company, naming Magen as an additional insured.

On May 9, 2005, Seifert and his wife commenced an action for personal injuries against various defendants, including Magen. Magen notified only its own insurance carrier, Travelers, of the occurrence. Two months later, Magen commenced a third-party action against Erath seeking contribution and indemnification under the contract. On June 24, 2005, some 11 months after the accident, Travelers tendered Magen's defense in the underlying action to Hartford and, on October 6, 2005, Hartford disclaimed coverage on the ground that Magen had failed to comply with the notice requirement contained in its policy. The provision requires the insured to provide notice of a claim or lawsuit or

any "occurrence" that might result in damages covered under the policy "as soon as practicable."

Travelers commenced this declaratory judgment action against Hartford, as subrogee and in the name of Magen. Hartford then brought the instant motion seeking dismissal of the complaint on the ground that Magen had failed to comply with the contract's notification provision. Travelers cross-moved for a summary declaration that, as an additional insured under the policy, Magen was entitled to a defense by Hartford, which it argued was estopped from disclaiming coverage pursuant to Insurance Law § 3420(d). Hartford countered that the provision does not apply as between insurers.

Reasoning that Travelers' tender was made on behalf of Magen, the insured, Supreme Court found inapposite the case law making § 3420(d) inapplicable to insurers. Thus, the court granted Magen's cross motion, concluding that Hartford was precluded from disclaiming coverage on the ground of late notice.

With respect to policies of insurance, it is fundamental that notice is "a condition precedent to coverage" (*White v City of New York*, 81 NY2d 955, 957 [1993]). "Compliance with a proper notice-of-claim provision in an insurance policy is a condition precedent to all of an insurer's duty under the policy, including

the duty to defend" (*Town of Smithtown v National Union Fire Ins. Co.*, 191 AD2d 426, 427 [1993]). As the Court of Appeals stated in *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005], *revg* 13 AD2d 227 [2004]),

> "Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time. The insured's failure to satisfy the notice requirement constitutes 'a failure to comply with a condition precedent which, as a matter of law, vitiates the contract'" (citations omitted).

This Court's decisions have made clear that notice received from a third party[1] does not fulfill the insurance policy's notice requirement and thus does not implicate the insurer's obligation to issue a timely disclaimer (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40 [2002]). "An insurer's obligation to cover its insured's loss is not triggered unless the insured gives timely notice of loss in accordance with the terms of the insurance contract" (*Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336, 339 [1986]). In

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[1] A third party is someone other than the insured, the injured person or another party having a claim for which the insured may be liable (Insurance Law § 3420[a][3]; *see Hartford Acc. & Indem. Co. v J.J. Wicks, Inc.*, 104 AD2d 289, 293 [1984], *appeal dismissed* 65 NY2d 691 [1985], construing the predecessor statutue).

Hernandez v American Tr. Ins. Co. (31 AD3d 343, 343 [2006]), we held that "since neither [the injured party] nor the insured ever notified the insurer of the accident, the insurer had no duty to disclaim liability, notwithstanding that it was made aware of the accident by counsel to one of the insured's codefendants in the personal injury action" (*accord Webster v Mount Vernon Fire Ins. Co.*, 368 F3d 209, 215 [2d Cir 2004] ["an insurer's actual notice of a potential claim . . . does not relieve the insured of her notice obligations"]; *American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373 [1998]; *Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d 497, 499 [1989], *lv dismissed* 74 NY2d 651 [1989]).

Bovis Lend Lease LMB v Royal Surplus Lines Ins. Co. (27 AD3d 84 [2005]), relied upon by Travelers and the majority, is uncompelling. Although late notice of the accident was likewise received from another insurer, the decision merely applies settled law that an untimely disclaimer issued by a carrier to the insured party is ineffective, as well as the established rule that Insurance Law § 3420(d), requiring an insurer to issue a timely notice of disclaimer, does not apply to a demand for contribution or indemnity made by another insurer (*id.* at 91), matters about which there is no disagreement. As to the question that divides us, the case does not even mention, let alone discuss, the source of the notice received by the insurer or its

significance, and nothing in this Court's discussion of the third-party notice indicates that the issue of its effectiveness was before us (*id.* at 88).[2] *Bovis* thus lacks precedential value.

It should be noted that Magen was afforded coverage both as the primary insured under its policy with Travelers and as an additional insured under the policy obtained by Erath from Hartford. Magen chose to avail itself of the coverage afforded by the Travelers policy and the contractual indemnity provided by the agreement with its subcontractor, timely notifying Travelers of the occurrence and commencing a third-party action against Erath for contribution and indemnification. The insured's interests were thus well protected (*see Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 127 [1999]), and Travelers, the real party in interest in this dispute, is merely being asked to honor its contractual obligation to defend and indemnify its insured. As Magen's subrogee, Travelers lacks any basis upon which to seek indemnification as a third-party beneficiary of either Magen's contract of insurance with Hartford or its subcontract with Erath. Finally, Travelers does not contend that anything contained in the insurance policy it issued to Magen obligates the insured to file a claim under any other policy of

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[2] Indeed, the majority concedes that the rule it purports to extract is merely "the implication of our ruling in *Bovis*."

insurance covering the loss.

The effectiveness of Travelers' notice notwithstanding, it remains that Hartford was not notified of the underlying accident for more than 11 months. Accepting, for the sake of argument, the majority's proposition that notice was given on behalf of the insured, it was untimely because the delay was unreasonable as a matter of law (*see Reg-Tru Equities, Inc. v Valley Forge Ins. Co.*, 44 AD3d 570 [2007], *lv denied* 10 NY3d 701 [2008]).[3] Nor is Magen's professed belief of nonliability reasonable under the circumstances, which afford no indication that, upon learning of the underlying injury, the insured conducted an inquiry into the accident and its cause so as to provide a basis for such belief (*see id.*).

Accordingly, the order should be reversed, the cross motion

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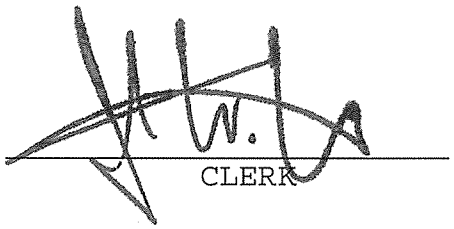
[3] The majority anomalously posits that Travelers' notice was given on behalf of Magen for the purpose of fulfilling the insured's notice requirement and on behalf of Travelers for the purpose of exempting it from the selfsame notice requirement.

denied, Hartford's motion granted, and a declaration issued that Hartford is not obligated to defend or indemnify plaintiff or other parties in the underlying action.

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

ENTERED: MAY 14, 2009



CLERK