SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 19, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4512 Robert Haynes, Index 20819/04
Plaintiff-Appellant, 85161/06

-against-

The Estate of Sol Goldman, et al.,
Defendants-Respondents,

Newmark & Company Real Estate, Inc.,
Defendant.

- - - - -

Alliance Elevator Company doing business
as Unitec Elevator Company,
Third-Party Plaintiff-Respondent,

-against-

Mohammad Fofana,
Third-Party Defendant.

- - - - -

4511 Robert Haynes,
Plaintiff,

-against-

The Estate of Sol Goldman, et al.,
Defendants-Respondents,

Newmark & Company Real Estate, Inc.
Defendant-Appellant.

[And a Third-party Action]

Law Offices of Richard M. Altman, Bronx (Richard M. Altman of counsel), for Robert Haynes, appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for Newmark & Company Real Estate, Inc., appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for Estate of Sol Goldman, 41-45 West 34, LLC, Midboro Holding Company, and Winoker Realty Co, respondents.

Geringer & Dolan, LLP, New York (John A. McCarthy of counsel), for Alliance Elevator Company, respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered August 17, 2007, which granted motions by defendants Estate of Sol Goldman, 41-45 West 34, Midboro Holding Company, Winoker Realty Co. (collectively the Goldman defendants) and Alliance Elevator Company d/b/a Unitec Elevator Company s/h/a Unitek/North American Elevator Service for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 18, 2007, which, to the extent appealed from, denied so much of the motion by defendant Newmark & Company Real Estate for summary judgment on its cross claim against Midboro Holding for contractual indemnification, unanimously reversed, on the law, without costs, that portion of the motion granted, and the matter remanded for further proceedings.

On February 6, 2004, plaintiff and another person named Mohammed Fofana were injured when they fell down the freight elevator hoistway from the fourth floor of a building located at 45 West 34th Street. The premises were net leased to Midboro

Holding at the time, and had been managed by Newmark. Plaintiff had a dispute with Fofana and the two engaged in a fight in a narrow hallway on the fourth floor. According to Fofana's deposition, plaintiff pushed him into the hoistway door. The complaint alleged negligence on the part of the building's owners, its managing agent and Alliance, the owners' elevator service contractor. Plaintiff testified that the hoistway door opened after Fofana stepped backward and came into contact with it. Plaintiff further swore that Fofana then clutched him in an effort to break his fall, causing both men to fall into the hoistway.

According to the affidavit of Patrick McPartland, P.E., the Goldman defendants' expert, the doors of the manually operated elevator in question consisted of two solid panels. The first panel opened by sliding right to left. The second panel was hinged to the wall. The sliding panel hung from a track by rollers, and was retained at the bottom by a six-inch guide which McPartland described as a "U" channel. Thomas Davies, a supervisor elevator inspector from the New York City Department of Buildings, inspected the site within 80 minutes after the accident. He testified that the sliding panel guide was bent and protruded into the hoistway in a manner indicating that a substantial horizontal force had been exerted against the sliding panel. In examining other parts of the building, Davies recorded

loose and missing hanger track bolts which rendered the 12th floor hoistway door ready to fall. Davies's report also noted that the rest of the hoistway doors were loose and poorly secured. McPartland opined that the damage to the guide could only have been caused by the application of the kind of force described by Davies in excess of 250 pounds. McPartland further opined that the applied force caused the sliding panel to swing out into the elevator shaft, creating the opening through which plaintiff and Fofana fell. Bernard Hughes, Alliance's elevator expert, who also inspected the elevator on the date of the accident, similarly concluded that a heavy horizontal blow from the direction of the hallway toward the hoistway significantly damaged the guide, causing the sliding door panel to deflect out of the guide and into the hoistway. Davies testified that the sliding doors were prevented from moving horizontally by an interlock. Both Davies and Hughes inspected the interlock and found it to be intact on the date of the accident. McPartland further opined that neither the hoistway door nor the elevator car could have been operated prior to the accident with the "U" channel in its bent condition. On this score, Lance Dixon and James Louallen, building employees who operated the freight elevator, testified there had been no problem with the fourth floor hoistway door before the accident occurred. Paul Reinert, an elevator mechanic employed by Alliance, stated in his

affidavit that he found nothing out of order with respect to the fourth floor hoistway door when he serviced the elevator on February 2 and 4, 2004, two days before the accident. Hank Krussman, a licensed elevator inspector, had conducted a Local Law 10 inspection of the elevator and the subject hoistway door five months before the accident, noting no problem with the hoistway door at that time. Based upon the foregoing, the Goldman defendants and Alliance have made a prima facie showing that the accident was not caused by any defect in the hoistway door.

Plaintiff countered with two affidavits in November 2006 by Patrick A. Carrajat, an elevator expert who inspected the site 16 months after the accident. Referring to Davies's report of defects in other hoistway doors, Carrajat opined that an insufficient "level of maintenance, repair and modernization" and "an advanced state of disrepair" of the elevator doors were the proximate causes of the accident. In this respect, Carrajat's opinion consisted of unfounded speculation, insufficient to raise a triable issue of fact as to the condition of the fourth floor hoistway door at the time of the accident (*see e.g. Avina v Verburg*, 47 AD3d 1188, 1189 [2008]). As noted above, Davies, McPartland and Hughes opined that the door guide was bent by a substantial horizontal force. Carrajat tried to refute these opinions with more speculation that freight door guides could

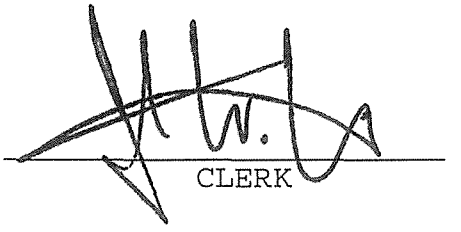
have been damaged by objects such as hand trucks or carts. However, Carrajat did not contradict McPartland's opinion that neither the hoistway door nor the elevator car could have been operated with the guide in its bent condition. Carrajat's affidavits were further flawed by their failure to address the findings by Davies and Hughes that the interlock, which secured the sliding door, was intact after the accident. Without identifying any relevant component part, Carrajat concluded one of his affidavits with the statement that the hoistway door was in an "advanced state of decay and deterioration." The other affidavit ended with the legal opinion that there are "many triable issues of fact" relating to defendants. These affidavits were insufficient to raise any triable factual issue because they are speculative and lacking in foundation (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 715 [2005]). Accordingly, summary judgment was properly granted in favor of the Goldman defendants and Alliance.

Supreme Court, however, should have awarded Newmark contractual indemnification against Midboro, having found that Newmark, like the other defendants, did not create or have notice of any defect that could have caused the accident. Although an indemnification clause that purports to insulate the indemnitee from liability for its own negligence is void under General Obligations Law § 5-322.1, the statute does not apply where, as

here, the indemnitee is found to have been free of negligence (*Crouse v Hellman Constr. Co., Inc.*, 38 AD3d 477, 478 [2007]). The absence of a recitation in the clause that the obligation to indemnify is limited to what the law allows does not dictate a contrary conclusion (*id.*).

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

ENTERED: MAY 19, 2009



Gonzalez, P.J., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4513N Mohammad Fofana, Index 1186/06
Plaintiff,

-against-

41 West 34th Street, LLC, et al.,
Defendants-Respondents,

Newmark & Company Real Estate, Inc.,
Defendant-Appellant,

Alliance Elevator Company, etc.,
Defendant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon and Marcia K. Raicus of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondents.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered July 18, 2007, which, to the extent appealed from, denied the motion by defendant Newmark, for summary judgment on its purported cross claim for contractual indemnification against defendant Midboro, unanimously affirmed, without costs.

In 2004, plaintiff and another individual named Haynes were injured in a fall down the freight elevator shaftway of a Manhattan building ground-leased to Midboro and managed by Newmark. Plaintiff commenced the instant action in Supreme Court, New York County, against Newmark and others, not including Midboro. In May 2006, the action was transferred to Bronx County for a joint trial with an action commenced by Haynes. In

February of that year, plaintiff had brought a separate action in New York County, naming Midboro as the only defendant. This appeal emanates from Newmark's motion, in August 2006, to consolidate this action with the action against Midboro, and grant Newmark "a defense and indemnification as against Midboro." Supreme Court denied as moot the motion insofar as Newmark sought consolidation, because by the time of the court's decision in July 2007, these actions had already been consolidated by order of Justice Tuitt in December 2006. With respect to Newmark's claim for indemnification, the court ruled that summary judgment could not be granted on a cross claim that at the time had yet to be asserted.

Summary judgment can only be awarded on an unpleaded claim if the proof supports such a claim and the opposing party has not been prejudiced (*Kramer v Danalis*, 49 AD3d 263 [2008]). Here, Midboro was not yet a party to this action when the motion was made. Consolidation did not occur until four months after Newmark sought summary judgment for indemnification.

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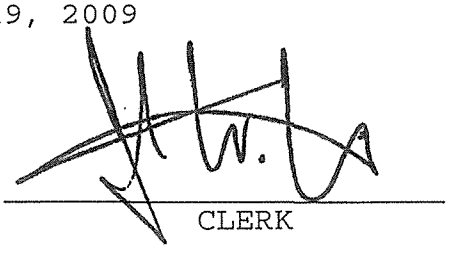
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 19, 2009



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Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

573-
574 The People of the State of New York, Ind. 297/04
Respondent,

-against-

Stacy Liggan,
Defendant-Appellant.

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

Stacy Liggan, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Hilary Hassler of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 11, 2005, as amended May 20, 2005, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, and judgment, same court (Carol Berkman, J. at suppression hearing; Ruth Pickholz, J. at jury trial and sentence), rendered December 14, 2005, convicting defendant of assault in the first degree, attempted robbery in the first and second degrees and conspiracy in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, concurrent with the prior sentence, unanimously affirmed.

At defendant's first trial, the court properly exercised its discretion in limiting defendant's testimony regarding the

alleged meaning of portions of an incriminating letter he wrote while incarcerated pending trial. Although defendant asserts that he was entitled to testify as to what he intended to mean by certain phrases, the excluded questions did not call for such testimony, but essentially asked defendant to analyze or interpret the meaning of language that contained no codes or obscure terminology requiring an explanation. The interpretation called for in defense counsel's questions was in the nature of argument that would be appropriate if made by counsel in summation, but not by a witness on the stand. Since defendant never made a timely assertion of a constitutional right to give the excluded testimony, his present constitutional claim is unpreserved (*People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]). In any event, any error in the court's ruling was harmless under the standards for both constitutional and nonconstitutional error.

At the first trial, the court properly permitted the People to impeach their own witness with a prior inconsistent statement. In context, the witness's denial that defendant made an incriminating statement to her was affirmatively damaging to the

People's case (*see* CPL 60.35[1]; *People v Winchell*, 98 AD2d 838, 841 [1983], *affd* 64 NY2d 826 [1985]; *compare People v Fitzpatrick*, 40 NY2d 44, 51-52 [1976]). In any event, any error in this ruling was harmless.

The court properly denied defendant's CPL 330.30(2) motion to set aside the first verdict on the ground of jury misconduct. During the trial, the court and all parties learned that one or more news articles about a jailhouse fight between one of defendant's original codefendants and a defendant in a notorious unrelated case tangentially mentioned that the codefendant had pleaded guilty in this case. At that time, defendant's counsel declined the trial court's invitation to conduct an inquiry of the jurors, instead requesting that the court reiterate its admonition to the jurors to avoid reading news accounts about the trial. After the trial, it came to light that a juror had been aware of the codefendant's guilty plea, but had not discussed it with other jurors. Since counsel was aware, during the trial, of a potential danger of exposure of jurors to this information, but declined a remedy that would have obviated the need for postverdict proceedings or a new trial, the postverdict disclosure was not a basis for setting aside the verdict (*cf. People v Albert*, 85 NY2d 851 [1995]; *People v Kelly*, 11 AD3d 133, 146-147 [2004], *affd* 5 NY3d 116 [2005]).

The branch of defendant's motion to set aside the verdict

that alleged he was convicted on an improper theory was contrary to the rule precluding jurors from impeaching their verdict with regard to their deliberative processes (*see People v De Lucia*, 20 NY2d 275 [1967]).

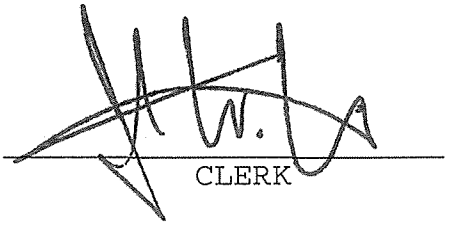
The hearing court properly denied defendant's motion to suppress a letter he wrote from prison that was intercepted and copied by prison authorities. Since the interception met constitutional standards, defendant was not entitled to exclusion of the letter on the ground that prison authorities failed to comply with a Department of Correctional Services regulation (7 NYCRR § 720.03[e][1]) concerning the factual content of an authorization for interception (*see United States v Workman*, 80 F3d 688, 698-699 [2d Cir 1996], *cert denied*, 519 US 938 [1996]). The exclusionary rule applies to a violation of a statute only where the purpose of the statute is to effectuate to a constitutionally protected right (*People v Taylor*, 73 NY2d 683, 690-691 [1989]; *see also People v Patterson*, 78 NY2d 711, 716-717 [1991]). The regulation at issue appears to be a record-keeping requirement not directly implicating a constitutional right. Moreover, there does not appear to be any authority for suppression of evidence in a criminal case based on a violation of a mere administrative regulation rather than a statute. We note that in the civil context, a clear distinction is drawn between a statutory violation and a violation of a regulation,

which, "lacking the force and effect of a substantive legislative enactment," is merely some evidence of negligence (*Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 453 [2002]).

We have considered and rejected defendant's arguments regarding his second trial, his constitutional challenge to his persistent violent felony offender adjudication, and his pro se claims.

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

ENTERED: MAY 19, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

575 Gerald Gliber, Index 116642/06
Plaintiff-Respondent,

-against-

Benjamin B. Choi, M.D.,
Defendant-Appellant,

New York Presbyterian Hospital,
Defendant.

Law Office of Marian Polovy, New York (John C. Hunt of counsel), for appellant.

Arnold E. DiJoseph, III, New York, for respondent.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about September 16, 2008, which granted the motion of defendant Benjamin B. Choi, M.D., to dismiss the action only to the extent of extending leave to defendant to seek sanctions, costs, and any other appropriate relief if plaintiff's attorney did not appear at the next conference, unanimously modified, on the law and the facts, to grant the motion in its entirety unless plaintiff's counsel pays to defendant's counsel $3,500 within 45 day of service of a copy of this order, and otherwise affirmed, without costs.

Plaintiff's counsel failed to appear at court conferences on October 30, 2007, November 27, 2007, March 28, 2008, and May 21, 2008. After warning plaintiff in a letter that he was going to move to dismiss the action for counsel's failure to appear at

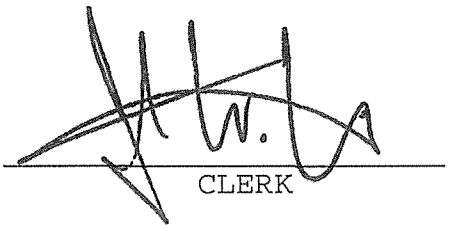
four conferences, defendant duly made a motion on notice to plaintiff. Plaintiff failed to oppose the motion.

On the appeal plaintiff's counsel makes no claim of a failure to receive notice of the scheduled conferences.

Under the circumstances, *the* motion court should have, at a minimum, penalized plaintiff's counsel as above indicated.

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

ENTERED: MAY 19, 2009



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Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

576 Kathleen Azzaro, Index 115949/05
Plaintiff-Appellant,

-against-

Super 8 Motels, Inc., et al.,
Defendants-Respondents.

Arnold E. DiJoseph, III, New York, for appellant.

Cascone & Kluepfel, LLP, Garden City (David F. Kluepfel of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 13, 2007, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

During a July 9, 2005 stay at defendants' Super 8 Motel in Cobbleskill, New York, plaintiff stepped out of her motel room shower onto the bath mat, slipped and fell, thereby sustaining injuries to her left wrist. Plaintiff's complaint alleges that both the tile floor of the bathroom area and the cotton floor mat supplied by defendants were unreasonably dangerous because neither had a nonskid surface.

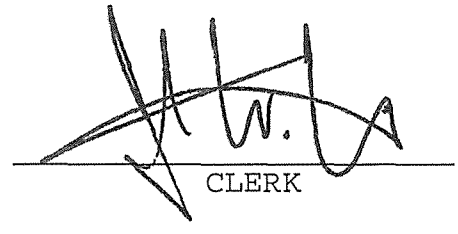
The motion court properly found that defendants made a prima facie showing that the accident was not attributable to a defect in the floor or the bath mat. Plaintiff, in opposition, failed to meet her burden of identifying any common law, statutory or relevant industry standard imposing on hotel owners the duty to

supply non-skid surfacing in the bathtub area (*see Lunan v Mormile*, 290 AD2d 249 [2002]; *Portanova v Trump Taj Mahal Assoc.*, 270 AD2d 757 [2000], *lv denied* 95 NY2d 765 [2000]. Nor did plaintiff present any competent evidence of any defect in either the bathroom flooring material or in the bath mat (*see Murphy v Conner*, 84 NY2d 969, 971-972 [1994]). The affidavit from plaintiff's expert, who never visited the accident site or examined the bath mat, referred to industry standards which were inapplicable to the bathroom. Moreover, this affidavit, submitted solely in response to defendants' motion, was purely speculative and conclusory (*see DiSanza v City of New York*, 11 NY3d 766 [2008]; *Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Matos v Challenger Equip. Corp.*, 50 AD3d 502 [2008]).

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

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

ENTERED: MAY 19, 2009



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Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

577 In re Jazmin A.,

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

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

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

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 16, 2008, which remanded appellant to a detention facility operated by the New York City Department of Juvenile Justice, unanimously reversed, on the law, without costs, and the order vacated.

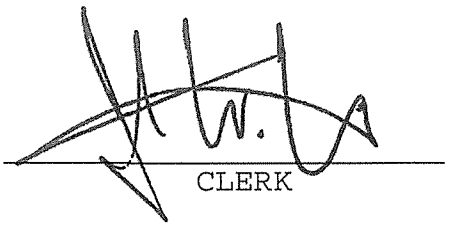
Having issued an order of disposition placing appellant on probation, the Family Court lacked authority to remand her to detention in the absence of a violation of probation petition (*see* Family Ct Act §§ 360.2, 360.3[2][b]; *People ex rel. Silbert v Cohen*, 29 NY2d 12 [1971]). For purposes of a detention determination under Family Court Act § 320.5, a court appearance for the purpose of monitoring compliance with the terms of probation is not an adjournment of the "initial appearance" on the underlying juvenile delinquency petition (*see* Family Ct Act § 320.1), because that petition has already been adjudicated and a

dispositional order entered. After probation has been imposed, the detention provisions of section 320.5 do not become relevant until a violation of probation petition has been filed.

We review this issue, despite its mootness, under the exception to the mootness doctrine for substantial and novel issues likely to recur and evade review (*see Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 505 [1998]). However, we do not decide the hypothetical questions of whether, assuming compliance with the procedural requirements of Family Court Act § 355.2, a motion under Family Court Act § 355.1 to stay, modify or terminate an order of probation based on change of circumstances would provide an alternate means of initiating proceedings to revoke probation, and whether detention would be authorized pending resolution of such a motion.

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

ENTERED: MAY 19, 2009



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Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

578-
578A In re Samuel R.,

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

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

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

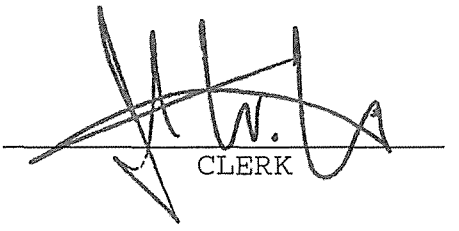
Orders, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about April 18, 2008 and April 28, 2008, which remanded appellant to a detention facility operated by the New York City Department of Juvenile Justice, unanimously reversed, on the law, without costs, and the order vacated.

For the reasons stated in *Matter of Jazmin A.* (__AD3d__ [decided herewith]), we conclude that appellant was unlawfully remanded to detention in the absence of a violation of probation petition. Since there was no compliance with the procedural requirements of Family Court Act § 355.2, we similarly decline to

decide the hypothetical questions presented concerning Family Court Act § 355.1.

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

ENTERED: MAY 19, 2009



Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

581 In re Dorse G. Broadus, Index 403592/06
Petitioner,

-against-

The City of New York Police
Department (License Division),
Respondent.

Ronai & Ronai, LLP, Port Chester (Holly Ostrov Ronai of counsel), for petitioner.

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

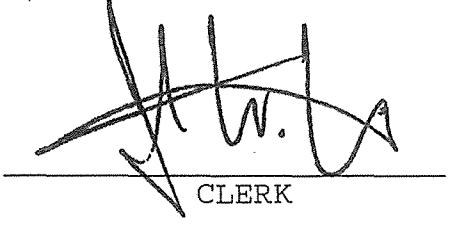
Determination of respondent Police Department (License Division), dated November 3, 2005, revoking petitioner's pistol license, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Paul G. Feinman, J.], entered June 20, 2008), dismissed, without costs.

The finding that petitioner lacks the good moral character required to possess a pistol license (Penal Law § 400.00[1][b]) is rationally supported by evidence of petitioner's arrest under Vehicle and Traffic Law § 1192 for driving while intoxicated, possession of a loaded firearm when arrested, refusal to take a breathalyzer test in violation of Vehicle and Traffic Law § 1194, subsequent conviction under Vehicle and Traffic Law § 1192(1) for driving while his ability to drive was impaired by alcohol,

failure to immediately notify respondent of his arrest in violation of 38 RCNY 5-30(a) and (d), and failure to immediately voucher his second firearm in violation of 38 RCNY 5-30(f) (*see Matter of Papaioannou v Kelly*, 14 AD3d 459 [2005]; *Matter of Olivera v Kelly*, 23 AD3d 216 [2005], *lv denied* 6 NY3d 709 [2006]). We note petitioner's testimony that the reason he failed to immediately voucher his second firearm in response to respondent's directive was because he never used the second firearm and had forgotten about it. Such explanation, in the face of petitioner's licence application and four bi-annual renewals listing the second firearm, rationally supports respondent's reliance on petitioner's violation of 38 RCNY 5-30(f), notwithstanding the Hearing Officer's characterization of the explanation as "lame but not necessarily inaccurate." We have considered petitioner's arguments based on the Hearing Officer's other findings of credibility and her recommended penalty of only a suspension, and find them unavailing (38 RCNY 15-28). The penalty of revocation does not shock our conscience.

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

ENTERED: MAY 19, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

582-
582A Deborah Anne Smith, Index 6677/04
Plaintiff-Respondent,

-against-

Clifford C. Vohrer, et al.,
Defendants-Appellants,

Daniel Sotomayor, et al.,
Defendants.

Costello, Shea & Gaffney LLP, New York (Steven E. Garry of counsel), for appellants.

Kim I. McHale & Associates, New York (John C. Naccarato of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered April 9, 2008, which, after a jury trial, denied the motion pursuant to CPLR 4404 of defendants Clifford C. Vohrer and Lease Plan USA to set aside the verdict and enter judgment notwithstanding the verdict, or, in the alternative, to grant a new trial, and order, same court and Justice, entered April 10, 2008, which, after a jury trial, denied the motion, pursuant to CPLR 4404 of defendants Sotomayor and La Manada Auto Corp. to set aside the verdict, unanimously affirmed, without costs.

Plaintiff provided sufficient evidence from her treating surgeon, which included evidence that she suffered a torn meniscus as a result of the accident, to sustain a claim of

serious injury under Insurance Law 5201(d) (*see Noriega v Sauerhaft*, 5 AD3d 121, 122 [2004]). Moreover, the surgeon's testimony that further treatment after the surgery was not necessary provided a sufficient explanation of the gap in treatment to send the case to the jury (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). Given the evidence that other cars in the intersection had to make way for defendant, and that the car he hit was pushed a block in the direction defendant was traveling, the jury reasonably concluded that defendant's speeding through a crowded intersection was the main cause of the accident (*Gomez v 192 E. 151st St. Assoc., L.P.*, 26 AD3d 276 [2006]).

Plaintiff's single passing reference to letters from insurance companies, adduced by defendant's counsel, did not require a mistrial (*see Siegfried v Siegfried*, 123 AD2d 621, 622 [1986]). While it would have been preferable for plaintiff to disclose the report of the final examination by her surgeon (who testified at trial), in light of the other discovery defendant had, it was not necessary to preclude the testimony, nor was defendant deprived of meaningful cross-examination (*see Mendola v Richmond Ob/Gyn Assocs.*, 191 Misc 2d 699, 701 [2002]). Nor did the surgeon's passing reference to possible future surgery require a new trial, as it was not intentionally elicited, and, in context, was a reference to the future functional limitations

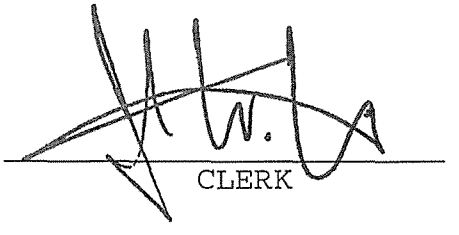
of the injury (*see Shehata v Sushiden Am., Inc.*, 190 AD2d 620 [1993]).

Defendant was not prejudiced by the charge on aggravation of existing injury, despite the fact that it was not submitted at the charging conference. The issue of aggravation was in the bill of particulars, and was argued by defendant's own expert. Moreover, defendant failed to ask for supplemental summations (*see Afghani v City of New York*, 227 AD2d 305 [1996]).

The award of $435,000 for multiple tears of the meniscus did not deviate from reasonable compensation (*see Feliciano v Ford Motor Credit Co.*, 28 AD3d 221 [2006]). Nor did the jury have to find on the evidence submitted that had plaintiff worn a seat belt, her injury would have been mitigated (*see Berk v Schenck*, 122 AD2d 823, 825 [1986]).

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

ENTERED: MAY 19, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

583 The People of the State of New York, Respondent, Ind. 1321/02

-against-

Andre Jeffries, Defendant-Appellant.

Estelle Jana Roond, Brooklyn, for appellant.

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Troy K. Webber, J. on suppression and speedy trial motions; Martin Marcus, J. at plea and sentence), rendered March 15, 2005, convicting defendant of assault in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 14 years to life, unanimously affirmed.

By pleading guilty, defendant forfeited his statutory speedy trial claim (*see People v O'Brien*, 56 NY2d 1009 [1982]). Defendant's constitutional speedy trial claim is improperly raised for the first time in his reply brief (*see People v Napolitano*, 282 AD2d 49, 53 [2001], *lv denied* 96 NY2d 866 [2001]) Furthermore, since defendant's speedy trial motion was based entirely on grounds set forth in CPL 30.30 and did not raise a constitutional issue, his constitutional claim is unpreserved and we decline to review it in the interest of justice. As an

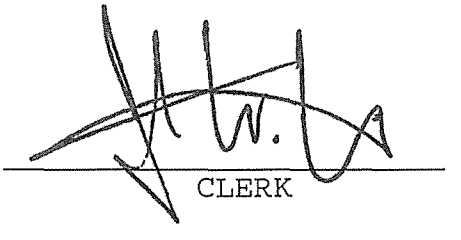
alternative holding, we also reject it on the merits (*see People v Taranovich*, 37 NY2d 442 [1975]).

The court properly denied defendant's motion to suppress a showup identification made at the scene of the crime. While the transcript of the hearing is apparently lost, we conclude, based on the hearing court's detailed findings, that the showup was not unduly suggestive. Defendant's sole argument is that the arresting officer "whispered" something to the victim prior to the identification. However, the hearing court's findings indicated that the officer merely asked the victim whether she could identify the person who assaulted her.

Defendant's procedural challenges to his persistent violent felony offender adjudication are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MAY 19, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

584-
584A

The People of the State of New York,
Respondent,

-against-

Steven Thomas,
Defendant-Appellant.

Ind. 3193/06
1131/07

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

Robert T. Johnson, District Attorney, Bronx (Alexis Pimentel of counsel), for respondent.

Judgments, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered March 4, 2008, convicting defendant, upon his pleas of guilty, of two counts of criminal sale of a controlled substance in the third degree, and sentencing him to concurrent terms of 1½ years, unanimously affirmed.

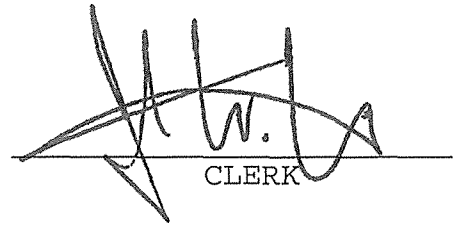
Defendant's argument that his plea was rendered involuntary by the court's failure to mention the mandatory surcharges and fees during the plea allocution is without merit (*see People v Hoti*, 12 NY3d 742 [2009]). Furthermore, the surcharges and fees were properly imposed (*see People v Guerrero*, 12 NY3d 45 [2009]).

Defendant's excessive sentence claim is foreclosed by his

valid waiver of his right to appeal. In any event, we perceive no basis to reduce the two-year term of post-release supervision.

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

ENTERED: MAY 19, 2009



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

586 Boris Kagan, et al., Index 106905/03
Plaintiffs-Appellants,

-against-

BFP One Liberty Plaza, et al.,
Defendants-Respondents.

[And a Third-Party Action]

Arnold E. DiJoseph, III, New York, for appellants.

Mendes & Mount, LLP, New York (Robert J. Brown of counsel), for respondents.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered April 14, 2008, inter alia, dismissing the complaint, unanimously affirmed, without costs.

Plaintiffs failed to raise an issue of fact whether defendants either created or caused the condition complained of or exercised supervision or control over the work performed by the injured plaintiff and had actual or constructive notice of the condition so as to sustain the Labor Law § 200 and common-law negligence claims (*see Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [2007], *lv denied* 10 NY3d 710 [2008]). The dust and debris that accumulated in the office building in which plaintiff performed fine cleaning resulted not from any act or omission of defendants but from the terrorist attacks that caused the Twin Towers of the World Trade Center to collapse. Nor, by

submitting an affidavit by plaintiff that contradicts his prior sworn testimony, did plaintiffs raise a genuine issue of fact whether defendants, rather than plaintiff's employer, third-party defendant Triangle Services, Inc., supervised or controlled his work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 [2002]). In any event, the fact that representatives of defendants gave general instructions as to what needed to be done and performed monitoring and oversight of the timing and quality of the work is insufficient to support these claims (*see Dalanna v City of New York*, 308 AD2d 400, 400 [2003]). As to the issue of notice, defendants' duty to reasonably inspect the air quality in the building was satisfied by their consultant's report that the samples analyzed for airborne toxins were all within acceptable levels. Plaintiffs' expert's conclusory opinion that the consultant's monitoring and testing were inadequate and that the indoor environment of the building was hazardous and unsafe is of no probative value since it is based entirely on his review of documents and fails to indicate that he conducted any testing during the relevant time period (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Machado v Clinton Hous. Dev. Co., Inc.*, 20 AD3d 307, 307-308 [2005]).

Plaintiffs' Labor Law § 241(6) claim fails because the injured plaintiff was not "engaged in duties connected to the

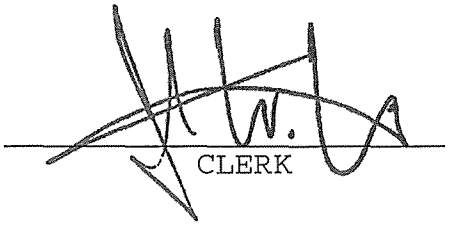
inherently hazardous work of construction, excavation or demolition" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 101 [2002]). Plaintiffs also failed to raise an issue of fact whether the injuries were proximately caused by a violation of an applicable Industrial Code or other regulation that sets forth a specific standard of conduct rather than a general statement of common-law principles (*see Padilla v Frances Schervier Hous. Dev. Fund Corp.*, 303 AD2d 194, 196 [2003]). Plaintiffs have conceded that the regulations they relied on in the motion court are either nonexistent or inapplicable. To the extent that they allege violations of arguably applicable Industrial Code violations for the first time on appeal, these provisions have no basis in the record and cannot be considered as predicates for the Labor Law § 241(6) cause of action (*compare Padilla*, 303 AD2d at 196 n 1 [considering violations first raised by plaintiff in opposition to motion to dismiss]). In any event, these provisions do not avail plaintiffs. Industrial Code (12 NYCRR) § 23-1.7(g) is inapplicable to the facts of this case since it expressly applies to work in any "unventilated *confined* area" (emphasis added), such as a sewer, pit, tank, or chimney, "where dangerous air contaminants may be present or where there may not be sufficient oxygen to support life," and the provisions of 12 NYCRR part 12, standing alone, are not sufficiently specific to support a cause

of action under Labor Law § 241(6) (*Nostrom v A.W. Chesterton Co.*, 59 AD3d 159 [2009]).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: MAY 19, 2009



Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

588 Rory Cutaia, etc., Index 604215/07
Plaintiff-Respondent

-against-

GVA Williams, LLC, et al.,
Defendants-Appellants,

GI Partners Fund II, L.P., et al.,
Defendants-Respondents.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Jamie B.W. Stecher of counsel), for appellants.

O'Shea Partners LLP, New York (Jonathan Altschuler of counsel), for Rory Cutaia, respondent.

Paul Hastings Janofsky & Walker LLP, New York (Gerald J. Fields of counsel), for GI Partners Fund II, L.P. and GI Partners Side Fund II, L.P., respondents.

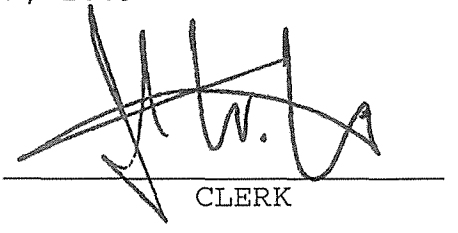
Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 4, 2008, dismissing the cross claim of defendants-appellants GVA Williams, LLC and Williams Real Estate Co., Inc. against defendants-respondents GI Partners Fund II, L.P. and GI Partners Side Fund, II, L.P. seeking a declaration that, inter alia, they are entitled to a brokers commission from respondents, pursuant to an order that granted respondents' motion to dismiss the cross claim, unanimously affirmed, without costs.

Dismissal of the cross claim was appropriate where the documentary evidence established that appellants' right to act as exclusive agent in connection with the subletting of the premises

or any assignment thereof was not triggered by the transaction in the merger agreement, and thus appellants were not entitled to a commission (*see Far Realty Assoc., Inc. v RKO Del. Corp.*, 34 AD3d 261 [2006]). Furthermore, contrary to appellants' contention, there was no basis for permitting discovery based on their conjecture as to the possibility that a third party performed brokerage services (*see e.g. Turbel v Societe Generale*, 276 AD2d 446 [2000]).

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

ENTERED: MAY 19, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 19, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
John W. Sweeny, Jr.
Eugene Nardelli
Helen E. Freedman, Justices.

The People of the State of New York, SCI 531/08
Respondent,

-against- 589-
590

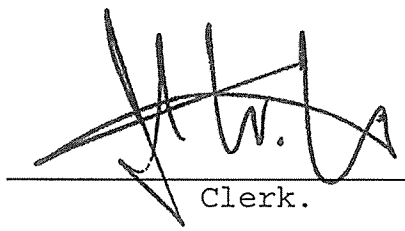
Woodrow McNeely,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about June 25, 2008, and judgment of resentence, same court and justice, rendered on or about August 19, 2008,

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

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

ENTER:



Clerk.

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

Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

591N-
591NA Youssef Tokko, Index 107918/04
Plaintiff-Appellant,

-against-

Consolidated Edison Co.,
Defendant-Respondent.

John F. McHugh, New York, for appellant.

Mary K. Schuette, New York (Richard A. Levin of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered October 26, 2007, which, to the extent appealed from, denied plaintiff's motion to restore the first, second and fifth causes of action asserted in the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered November 6, 2008, which, to the extent appealed from, denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, without costs.

Plaintiff, a general utility worker employed by defendant, asked certain questions about manhole safety that an instructor at defendant's Learning Center deemed suspicious and reported to his manager. Defendant's security official thereafter notified the police department, which in turn sent a report to a Joint Terrorist Task Force. The Task Force investigated the concerns

about plaintiff and found them unsubstantiated. Plaintiff claims that he suffers from post-traumatic stress disorder (PTSD) as a result of this incident and consequently has been unable to pass the practical examination required to advance to the next level, Mechanic B. He alleges that he was discriminated against on the basis of his race (Arab), national origin (Lebanese), and religion (Islam), in violation of the New York State Human Rights Law (Executive Law § 296) and Administrative Code of the City of New York § 8-107.

Plaintiff's motion to restore the action was properly denied since plaintiff failed to allege that the Mechanic B test had a disparate impact on a group of which he was a member (*see Becker v City of New York*, 249 AD2d 96, 98 [1998]); he does not contend otherwise on appeal. To the extent plaintiff predicates his claim on the fact that he was reported to the authorities by defendant's instructor, it does not avail him because that report is protected by the Freedom to Report Terrorism Act (Penal Law § 490.00 *et seq.*). Plaintiff pleads no facts indicating that the report was made maliciously (*see* Penal Law § 490.01[3]). In any event, he failed to offer adequate proof that the circumstances give rise to an inference of discriminatory intent. There is no evidence in the record that plaintiff was reported to the authorities because of his race, national origin or religion; the

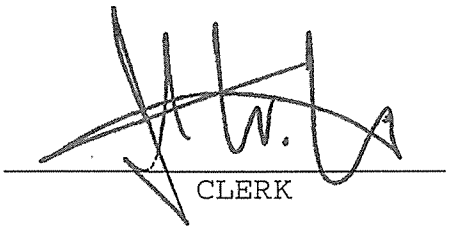
evidence shows that his questions were deemed suspicious because they were unusual, especially for a new, entry-level employee. Plaintiff's claim of hostile work environment fails because the instructor's report of suspicious behavior was a protected communication (*see* Penal Law § 490.01). While the report triggered the subsequent law enforcement investigation, no action whatsoever was taken thereafter with regard to plaintiff at his place of employment. Defendant's security officer closed the file upon being informed by law enforcement authorities that any concerns about plaintiff had not been substantiated and had not been found to be credible. Plaintiff was not subjected to harassing remarks or treated poorly in any other manner at his workplace.

Plaintiff's motion for leave to amend the complaint was properly denied to the extent he alleges intentional tort and discrimination and hostile work environment in violation of Administrative Code § 8-107. To the extent his claim is predicated on disability, however, his allegations that he suffers from PTSD and that he experiences panic attacks whenever he is required to go to the Learning Center adequately state a cause of action based on failure to accommodate his known disability (*see* Administrative Code § 8-107[15]). However, as the motion court noted, plaintiff has commenced another action in

Supreme Court in which he is pressing his disability claim, as well as other claims, which effectively renders the motion to amend academic.

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

ENTERED: MAY 19, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

592N Charles Christiano, et al., Index 8881/00
Plaintiffs-Respondents, 81997/00
83531/03

-against-

Solovieff Realty Co., L.L.C., et al.,
Defendants-Appellants.

Nastasi White, Inc.,
Defendant.

- - - - -

McClier Corporation,
Third-Party Plaintiff-Appellant,

-against-

Theodore Williams Construction Company,
Third Party Defendant-Appellant.

- - - - -

Solovieff Realty Co., L.L.C.,
Second Third-Party Plaintiff-Appellant,

-against-

Bank of America Corp.,
Second Third Party Defendant-Appellant.

Callan, Koster, Brady & Brennan, LLP, New York (Eric L. Shoikhetman of counsel), for appellants.

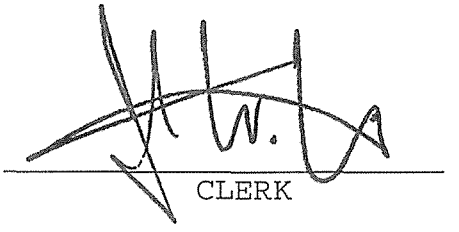
Jasper & Jasper, P.C., New York (Michael H. Zhu of counsel), for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered December 4, 2008, which granted plaintiffs' motion to restore the action to the trial calendar, unanimously reversed, on the law, without costs, the motion denied and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiffs failed to meet the criteria for vacating an automatic dismissal pursuant to CPLR 3404 (*see Aguilar v Djonvic*, 282 AD2d 366 [2001]). Their affidavit of merit was conclusory, they offered no reasonable explanation for their failure to proceed with discovery for nearly two years, they failed even to address the issue of prejudice to defendants, and their lack of activity between the time the case was struck from the calendar and their court-ordered motion to restore fails to rebut the presumption of abandonment.

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

ENTERED: MAY 19, 2009



CLERK

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

593 The People of the State of New York, Respondent, Ind. 90098/05

-against-

Rohan Campbell, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered March 14, 2007, convicting defendant, after a jury trial, of burglary in the first degree, and sentencing him to a term of 17 years, unanimously affirmed.

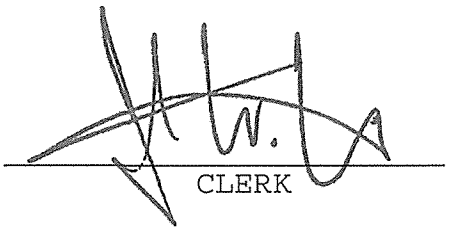
The court's *Sandoval* ruling, which permitted the People to elicit defendant's prior sex crime conviction without inquiring into any underlying facts, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Pavao*, 59 NY2d 282, 292 [1983]).

Defendant's Confrontation Clause claim, relating to DNA test documents, is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject

it on the merits (*see People v Freycinet*, 11 NY3d 38, 42 [2008]; *People v Rawlins*, 10 NY3d 136, 153-60 [2008]).

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

ENTERED: MAY 19, 2009



CLERK

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

595 In re Glenda G.,
Petitioner-Respondent,

-against-

Mariano M.,
Respondent-Appellant.

Dora M. Lassinger, East Rockaway, for appellant.

Julian A. Hertz, Larchmont, for respondent.

Andrew H. Rossmer, Bronx, Law Guardian.

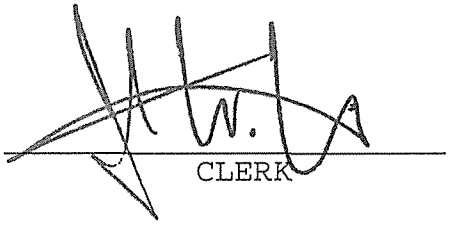
Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about August 1, 2007, which declared respondent to be the father of the subject child, unanimously affirmed, without costs.

The record demonstrates that respondent had a long standing sexual relationship with petitioner, including during the time of conception. Respondent acknowledged that the child, who is now 14 years old, calls him "Dad" and that he spoke to the child about his future. Respondent saw the child every few months and bought him clothing and he never attempted to dissuade the child from believing he was the father. Furthermore, the court interviewed the child, who informed the court that he knew respondent as his father and that he wished to have a closer relationship with him; there is no evidence or claim that any other person could be the father of the child.

Under these circumstances, where respondent assumed the role of a parent, albeit somewhat limited, and led the child to believe he was his father, the court properly concluded that the best interests of the child required that respondent be estopped from denying paternity (*see Matter of Sarah S. v James T.*, 299 AD2d 785 [2002]). Respondent's reason for demanding a DNA test, to remove his doubts as to whether he was the father, is not a sufficient basis for ordering a DNA test, almost 13 years after the child's birth (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 331-332 [2006]). While the court should have reduced its decision to writing at the time (Family Ct Act § 418[a]), its reasoning had to have been clear to respondent, who was present when the court made its fact-finding on the record (*see Matter of Tanesha H. v Phillip C.*, 57 AD3d 403 [2008]).

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

ENTERED: MAY 19, 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 19, 2009.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 987/07
Respondent,

-against- 596

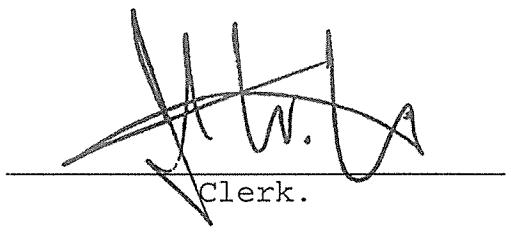
Lee Melendez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Dineen Ann Riviezzo, J.), rendered on or about July 8, 2008,

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

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

ENTER:



Clerk.

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

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

599 The People of the State of New York, Respondent, Ind. 5414/06

-against-

Antonio Bolar, Defendant-Appellant.

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

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

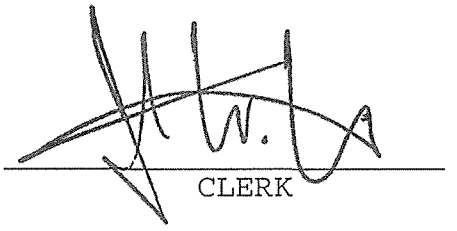
Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered April 16, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 6 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's application, made for the first time on the day the trial was to begin, for an adjournment for the purpose of retaining new counsel, and there was no violation of defendant's right to retain counsel of his own choosing. Defendant, who had been represented by assigned counsel for several months without any indication of a problem with the representation, did not establish compelling circumstances warranting a delay (*see People v Arroyave*, 49 NY2d 264, 270-271 [1980]). The day of trial was

the first occasion that defendant's family informed assigned counsel that it had decided to look for a private attorney. There is nothing in the record to indicate what efforts the family made to hire an attorney or whether they had the means to do so, and no evidence that any private attorney ever appeared or contacted the court (*see, People v O'Kane*, 55 AD3d 315 [2008], *lv denied* 11 NY3d 928 [2008]). We note that the following day, assigned counsel indicated that he and defendant had resolved any differences they might have had, and defendant concurred.

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

ENTERED: MAY 19, 2009



CLERK

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

600 Jose Feliciano, Index 24020/04
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corp., et al.,
Defendants-Respondents.

Ronemus & Vilensky, New York (Arlene E. Costanzo Ilg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondent.

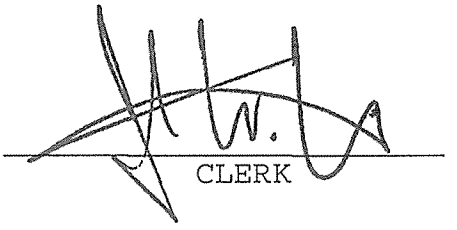
Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 11, 2008, which, in this medical malpractice action, inter alia, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly determined that in opposition to defendants' prima facie showing that they had not departed from good and accepted medical standards in their care and treatment of plaintiff's wrist injury, plaintiff did not offer any evidence to raise a triable question of fact as to defendants' possible negligence or the lack of informed consent. Although plaintiff contends that the supplemental affirmation of defendants' expert physician, submitted in reply to plaintiff's opposition, improperly introduced a new argument in support of summary judgment dismissal, the reply affirmation was appropriate since

"defendants' arguments could not have been submitted at an earlier juncture because of the indefiniteness of plaintiff's initial pleading" (*Held v Kaufman*, 91 NY2d 425, 430 [1998]; *see also Home Ins. Co. v Leprino Foods Co.*, 7 AD3d 471 [2004]). Indeed, not only did plaintiff's expert raise a new theory of medical malpractice in the opposing affirmation, but did so in disregard of clear medical evidence that plaintiff did not suffer from that condition (*see Moore v New York Med. Group, P.C.*, 44 AD3d 393, 395-396 [2007], *lv dismissed* 10 NY3d 740 [2008]).

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

ENTERED: MAY 19, 2009



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

602 Lidia Chimilio-Ramos, Index 25158/05
Plaintiff-Appellant, 85664/06

-against-

Maria H. Banguera doing business as
Mana Used Furniture, et al.,
Defendants,

Adonai Realty, LP,
Defendant-Respondent.

[And a Third-Party Action]

Law Offices of Daniel Chavez, Bronx (Denise O'Connor of counsel), for appellant.

Ryan & Conlon, LLP, New York (William F. Ryan of counsel), for respondent.

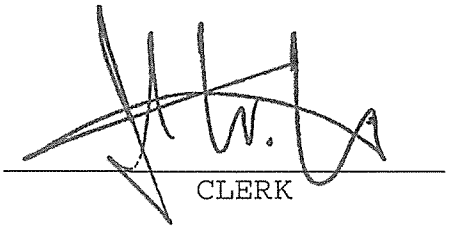
Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 7, 2008, which, in an action for personal injuries allegedly sustained when plaintiff fell through an open sidewalk vault in front of a building owned by defendant-respondent building owner (defendant), granted defendant's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion for summary judgment denied and the complaint reinstated as against defendant.

The motion court erred in granting defendant summary judgment on the ground that plaintiff "was unable to identify the cause of her accident." Despite plaintiff's inability to

remember the precise details of her fall, there is sufficient evidence to permit a reasonable inference, based on "the logic of common experience," that either defendant or the boiler contractor working for defendant was negligent in failing to guard, barricade or warn against the open vault, and that such negligence was a proximate cause of the accident (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744-745 [1986] [internal quotation marks omitted]; *see Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 827 [2009]).

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

ENTERED: MAY 19, 2009



CLERK

Tom, J.P., Catterson, Moskowitz, Renwick, JJ.

603 Renee McCrae, etc., et al., Index 108238/05
Plaintiffs-Respondents,

-against-

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

Kaplan, Inc.,
Defendant-Appellant.

Shafer Glazer, LLP, New York (Timothy M. Wenk of counsel), for appellant.

Peters Berger Koshel & Goldberg, P.C., Brooklyn (Marc A. Novick of counsel), for Renee McCrae, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for municipal respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 22, 2008, which, upon renewal of defendant Kaplan, Inc.'s motion to strike the answer of the municipal defendants (collectively the City) and the City's cross motion for summary judgment dismissing the complaint and all cross claims as against it, adhered to its original determination denying the motion and granting the cross motion, unanimously affirmed, without costs.

As we noted on Kaplan's prior appeal, the documentary evidence establishes prima facie that the City was under no duty

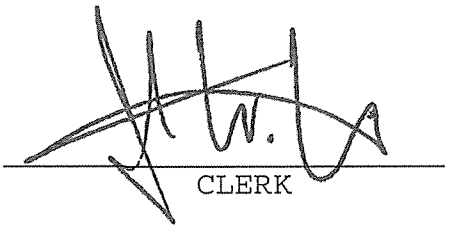
to provide security at the time and place of the incident (44 AD3d 370 [2007]). Kaplan's argument that the documentary evidence is ambiguous was improperly raised for the first time on its motion to renew, and we decline to consider it (*see Matter of Weinberg*, 132 AD2d 190, 210 [1987], *lv dismissed* 71 NY2d 994 [1988]). Were we to consider the argument, we would reject it. As we noted on the prior appeal, the Cost of Services provision of the Extended Use of Schools Procedure did not require the City to provide security personnel to be paid for by Kaplan but rather required Kaplan to reimburse the City for performing background security checks of security personnel hired by Kaplan. The new evidence Kaplan submitted on its motion to renew fails to show that the City made any promises or engaged in any actions that would raise an issue of fact whether it assumed a duty to provide security at the time and place of the incident (*see Cuffy v City of New York*, 69 NY2d 255, 260-261 [1987]).

Kaplan failed to establish that the City's noncompliance with discovery requests and four discovery orders was willful, contumacious or in bad faith (*see Guzetti v City of New York*, 32 AD3d 234 [2006]; *Simpson v Sinha*, 246 AD2d 361 [1998]). The City substantially complied with court-ordered discovery requirements. Nor are costs and sanctions warranted since the record does not

indicate that the City made false or meritless arguments or deliberately prolonged the action (*see Llantin v Doe*, 30 AD3d 292 [2006]).

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

ENTERED: MAY 19, 2009



CLERK

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

604-
604A

In re Georgiy Kozhar,
Petitioner,

Index 111270/07
103177/07

-against-

Raymond Kelly, as Police Commissioner of the City of New York, et al.,
Respondents.

Sidney Baumgarten, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

Determinations of respondent Police Department, dated November 7, 2006 and July 13, 2007, which respectively denied petitioner's application for a carry business pistol license, and revoked petitioner's premises residence handgun license, unanimously confirmed, and the petitions denied and the proceedings brought pursuant to CPLR article 78 (transferred to this Court by orders of the Supreme Court, New York County [Herman Cahn, J.], entered October 17, 2007) dismissed, without costs.

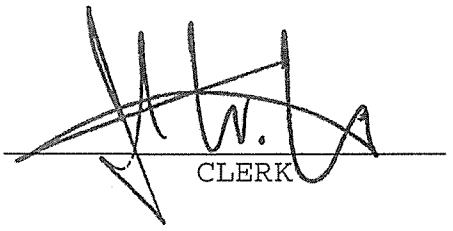
The revocation of petitioner's premises residence handgun license and the denial of his application for a carry business pistol license were supported by substantial evidence, which indicated a lack of moral character and fitness to possess a

firearm (*see Matter of Trimis v New York City Police Dept.*, 300 AD2d 162 [2002], *lv denied* 100 NY2d 503 [2003]; Penal Law § 400.00[1]; 38 RCNY 5-02). Petitioner failed to abide by his obligations to notify the License Division of a domestic incident report and the issuance of temporary orders of protection against him in September 2002 and November 2002 (*see* 38 RCNY 5-30). He also omitted the issuance of the temporary orders of protection on his applications to renew his premises residence license, and for a carry business license, notwithstanding that application questions specifically requested such information.

We have considered petitioner's remaining arguments, including that the hearing officer who presided over his license revocation hearing was biased against him, and find them unavailing.

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

ENTERED: MAY 19, 2009



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

605 The People of the State of New York, Ind. 236/04
Respondent,

-against-

Ignacio Castillo,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered August 2, 2007, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 12 years, unanimously affirmed.

Any error in failing to redact from the victim's medical records matters not relevant to diagnosis and treatment was harmless in light of the overwhelming evidence establishing defendant's guilt (*see People v Kello*, 96 NY2d 740, 744 [2001]).

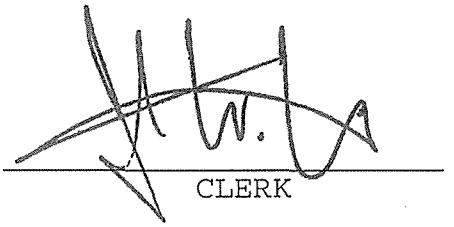
Defendant's claims that a detective's testimony concerning her investigation constituted improper bolstering and that the court improperly determined that a child was competent to be sworn as a witness are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we

also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 19, 2009



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

606 Edward Thompson, Index 108851/07
Plaintiff-Appellant,

-against-

Thomas Geniesse, et al.,
Defendants-Respondents.

Kujawski & Dellicarpini, Deer Park (Mark C. Kujawski of counsel), for appellant.

Paul F. McAloon, New York, for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 4, 2008, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

Plaintiff alleged that he was injured on December 15, 2005, when he fell from an icy scaffold while doing renovation work at a recently purchased weekend home of defendants. At issue here is the Labor Law §§ 240 and 241 homeowner exemption to the strict liability rule it imposes on owners, contractors and their agents to protect workers from building construction, demolition and repair-related dangers. The exemption covers "owners of one and two-family dwellings who contract for but do not direct or control the [contractor's] work." An owner who uses such a property solely for commercial purposes is not, however, entitled

to the statutory exemption (*Van Amerogen v Donnini*, 78 NY2d 880, 882-83 [1991]).

Defendants demonstrated their prima facie entitlement to judgment as a matter of law with evidence establishing that they fell within the exemption. Their evidence established that the certificate of occupancy for the house stated that it was a two-family dwelling, and that they intended to use it as a one-family dwelling, as did the prior owners. It also established that they did not direct or control the work. The fact that defendants hired an architect to draw plans for portions of the work and to periodically check to see if the quality of the work was reflective of her plans does not constitute personal direction and control by defendants (*see Boyd v Lepera & Ward P.C.*, 275 AD2d 562, 563-564 [2000]). Moreover, plaintiff confirmed that he never spoke with defendants until deposition. Plaintiff admittedly received his daily orders from his foreman and the general manager of the contractor, provided his own tools or received them from his employer, fell from a scaffold built by a coworker and was ordered by his foreman to mount the scaffold on the occasion of his injury.

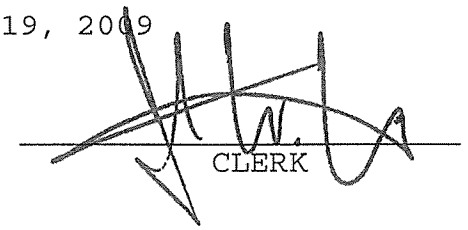
The burden thus shifted to plaintiff to demonstrate the existence of a triable issue of material fact. Plaintiff failed to discharge his burden, offering no cogent evidence in

opposition. Regarding the occupancy of the house, the fact that the prior owners were permitted to stay in the house for several months after closing was clearly an accommodation and served no commercial purpose. The number of kitchens in the house was also irrelevant, given the evidence of the prior owners' occupancy and defendants' intended occupancy (*see Stejskal v Simons*, 3 NY3d 628, 629 [2004]). While plaintiff argues that defendants insured the subject dwelling under a "renter's policy," that policy provided the coverage for defendants' primary residence, an apartment, and the subject dwelling was added under optional coverage. Plaintiff's contentions regarding direction and control of the work were equally unavailing. Although defendants consulted with the architect before the job began and kept abreast of the work through e-mails and photographs, they made only a few visits to the site, and their conferences with the general contractor were largely to gauge progress and discuss aesthetic details. Such activities do not constitute the type of active involvement that would remove defendants from the statutory exemption (*see Duda v Rouse Constr. Corp.*, 32 NY2d 405, 409 [1973]).

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 19, 2009



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

607N Paul Garcia, Index 106895/06
Plaintiff-Appellant,

-against-

Berns DeKajlo & Castro, et al.,
Defendants,

DeKajlo Law Offices, et al.,
Defendants-Respondents.

Schwartz & Ponterio, PLLC, New York (John Ponterio of counsel), for appellant.

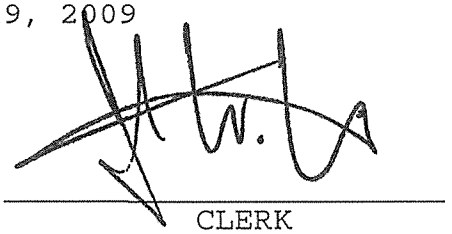
Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 18, 2008, which denied plaintiff's motion for a default judgment and inquest, unanimously affirmed, without costs.

Defendants demonstrated a reasonable excuse for their defaults.

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

ENTERED: MAY 19, 2009



CLERK

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

608N In re Application of the Public Administrator of the County of New York, etc., File 1597/07

Martin Lassoff,
Deceased.

- - - - -

Public Administrator, as Administrator d.b.n. of the Estate of Martin Lassoff, Deceased,
Petitioner-Respondent,

-against-

Max Cohen, Esq.,
Respondent-Appellant.

Max Cohen, appellant pro se.

Bekerman & Reddy, P.C., New York (John J. Reddy, Jr. of counsel), for respondent.

Order, Surrogate's Court, New York County (Renee R. Roth, S.), entered November 5, 2008, which directed respondent-appellant Max Cohen, Esq. to pay to the Public Administrator, on behalf of the estate of Martin Lassoff, $4,370.21 in disbursements and $99,186.74 in legal fees recovered in *Patalano & D'Alessandro v American President Lines, Inc.* and $407 and $210 in disbursements, respectively, and one-half of the net contingency fees ultimately obtained in *Hernandez & Reddick v Caring Communities Housing Development Fund Corp.* and *Polichetti v City of New York*, unanimously affirmed, with costs.

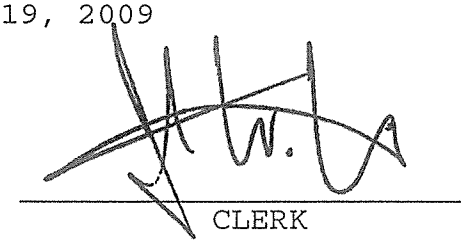
Cohen's defense that Lassoff was barred from recovering a portion of the contingency fees because he did not file retainer statements with the Office of Court Administration ("OCA") as required by 22 NYCRR § 603.7, was not raised in his answer or before the Surrogate when she granted the Public Administrator's application from the bench, and it is not preserved for our review. Further, Cohen argues only that he "has never been informed or advised" that Lassoff filed retainer agreements. In any event, given Lassoff's age and infirmities, his estate would likely be permitted to file the retainer agreements nunc pro tunc, to preserve its right to recover the fees *(see Matter of Estate of Abreu*, 168 Misc 2d 229, 234 [1996]; *compare Fishkin v Taras*, 54 AD3d 260 [2008]).

Cohen's claims that the estate's recovery should be based on quantum meruit due to Lassoff's death is not persuasive. The estate is not seeking to collect the contingency fee from the client. Rather, the estate is seeking to enforce its agreement with Cohen, under which it was to receive 50% of the net contingency fee. As noted above, Cohen did not raise the issue of the enforcement of that agreement before the Surrogate.

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

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

ENTERED: MAY 19, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 19, 2009.

Present - Hon. Peter Tom, Justice Presiding
David Friedman
James M. Catterson
Karla Moskowitz
Dianne T. Renwick, Justices.

In re Rodney R. Roberts,
Petitioner,

-against-

Hon. Harold Adler, etc.,
Respondent.

Index 340852/08

609
[M-1548]

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

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

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

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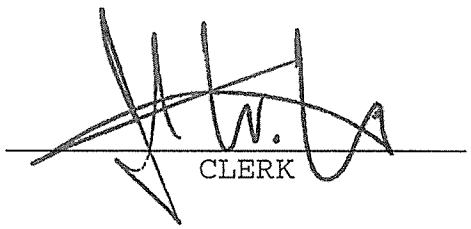

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, JJ.

4136-4137
Ind. 570593/06

Jemrock Realty Co. LLC,
Petitioner-Respondent,

-against-

Jay Krugman,
Respondent-Appellant.

Respondent appeals from the order of the Appellate Term, First Department, entered on or about December 4, 2007, which, in effect, modified the order of Civil Court, New York County (Jean T. Schneider, J.), entered on or about September 29, 2006, after a nonjury trial, directing judgment in respondent tenant's favor, to the extent of awarding possession of the apartment to petitioner landlord, declaring that landlord is entitled to a rent increase above the $2,000 luxury decontrol threshold for improvements and remanding the matter to Civil Court for a determination of the rent arrears owed by tenant to landlord.

Barry J. Yellen, New York, for appellant.

The Abramson Law Group, PLLC, New York (Jeff Bodoff of counsel), for respondent.

McGUIRE, J.

Jemrock Realty Co. LLC (landlord) owns an apartment building at 210 West 101st Street in Manhattan. On January 31, 2004, a long-time, rent-regulated tenant vacated apartment 16E of the building. Landlord, through its managing agent, retained a contractor to perform work in the apartment to prepare it for a new tenant. According to the managing agent's director of leasing, Higgins, who supervised all repairs in the building, the apartment was in "pretty bad condition" after the long-time tenant vacated it, and she prepared an extensive punch list delineating the work that she wanted the contractor to perform.

The punch list specified the following work:

- "very heavy wall prep" throughout the apartment
- plastering and painting of the entire apartment
- refinishing of all hardwood floors in the apartment
- replacing all wall and baseboard moldings, closet fittings, electrical outlets and switches, and lighting fixtures in the apartment
- installing new door frames, radiator covers, and air conditioner outlets throughout the apartment, and a circuit breaker panel
- rewiring of the entire apartment
- replumbing of the entire apartment
- removing all rubbish and debris from the apartment
- installing ceramic tile flooring, counter tops, drop ceiling, a sink, and new appliances (stove, refrigerator, microwave and dishwasher) in the kitchen
- removing and replacing all kitchen cabinets
- repairing kitchen underflooring
- removing and replacing all floor and wall tiles in both of the apartment's bathrooms
- installing a new sink and toilet in both bathrooms
- replacing all of the shower and sink fixtures (e.g., shower

heads, shower rods, towel bars)

The purchase order accompanying the punch list provided a budget for the work of $50,000. By a "check request/installment payment requisition" form, dated February 4, 2004, the managing agent paid the contractor a "deposit on renovation apt 16E" of $20,000; the form noted the "contract price" of the work was $50,000. Landlord paid the contractor the $30,000 balance in three, $10,000 installments with the last payment coming on March 23, 2004.[1] Each of the payments was made by check to the contractor from landlord.

After it received the initial $20,000 payment but before it received the first $10,000 installment, the contractor sent landlord an invoice detailing the work it would perform in the apartment. The work listed in the invoice essentially matched the work listed in the punch list. The invoice indicated that the work would be performed for $50,000 and that landlord had already paid $20,000. Between the beginning of February and the

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[1]The contractor frequently performed work at the building and a practice developed between Higgins and the contractor under which formal contracts were not used between the parties. Instead, when work needed to be performed at the building, Higgins would give the contractor a purchase order to proceed with the work that needed to be performed, which was reflected in a punch list, and a deposit check, i.e., an initial payment. Higgins then would provide the contractor with periodic payments as the work progressed, with a final payment made upon the completion of the work.

end of March 2004, the contractor renovated the apartment, performing the work called for in the punch list (and its invoice), and additional other work that was required in the course of the project. The contractor sent the managing agent invoices for the additional work, which were paid by landlord.

Landlord and respondent Jay Krugman (tenant) entered into a lease for apartment 16E that commenced on April 1, 2004. Attached to the lease was a certification calculating the rent based on increases permitted by the Rent Stabilization Law -- a vacancy increase, an increase for each year of the prior tenant's occupancy and an increase for the renovations the contractor performed (*see* Rent Stabilization Code [9 NYCRR] § 2522.4[a]). The monthly rent for the apartment, which was $920.12 for the former, long-time tenant, was listed as $3,600. Because the monthly rent exceeded $2,000, the apartment was no longer subject to regulation under the Rent Stabilization Law (*see* Rent Stabilization Law [Administrative Code of City of New York] § 26-504.2).

In October 2005 landlord commenced an action in Civil Court seeking rent arrears and possession of the apartment based on tenant's failure to pay rent. Tenant answered the action, asserting that the rent was illegal under the Rent Stabilization Law because the renovations made by landlord did not qualify as

"improvements" that would support a rent increase, and that landlord breached the warranty of habitability. Tenant claimed that he was entitled to a rent abatement for the breach of the warranty of habitability and treble damages for a willful rent overcharge.

At a nonjury trial, Higgins and an employee of the contractor testified, and the punch list, invoices and cancelled checks from landlord to the contractor were admitted into evidence. Civil Court concluded that while 9 NYCRR 2522.4(a) authorizes a rent increase of 1/40th of the cost of certain improvements that a landlord makes to an apartment, landlord failed to establish that it was entitled to that increase. Although "improvements" to the apartment, which are considered in calculating the amount, if any, of a rent increase, had been made, the contractor also performed repair work, which is not. Because landlord failed to offer evidence distinguishing costs incurred in making improvements from costs incurred in performing repair work, the court stated that it could not determine how much money landlord had spent on improvements. Accordingly, although the court found that the contractor had performed the work listed on the punch list and that these renovations were "extensive" and "substantial," the court ruled that landlord was not entitled to any rent increase based on improvements.

Subtracting from tenant's rent the portion founded on the improvements, the court determined that the rent fell below $2,000 and the unit thus was subject to the Rent Stabilization Law.[2] The court rejected tenant's claim for treble damages based on the rent overcharge, finding that the overcharge was not willful, but found that tenant was entitled to an abatement of 15% of the rent between June 2004 and September 2005 because landlord breached the warranty of habitability by permitting a persistent leak to occur in a bedroom. Adding the rent overcharged ($42,339.60) and the rent abatement ($2,994.40) and subtracting the rent arrears ($7,486.08), Civil Court entered a judgment in favor of tenant in the amount of $37,847.92.

Tenant appealed to Appellate Term from the judgment to the extent it denied his claim for treble damages, and landlord cross-appealed to the extent the judgment determined that landlord was not entitled to a rent increase for improvements and that it breached the warranty of habitability. The Appellate Term, over a dissent, modified the judgment,[3] determining both

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[2]As a result of the disallowance of the rent increase for improvements, Civil Court found that tenant's rent should have been $1,247.68 per month from the commencement of the lease.

[3]While Appellate Term stated that it was reversing the judgment, it did not disturb those portions of the judgment determining that landlord breached the warranty of habitability and awarding tenant a 15% rent abatement.

that landlord was entitled to a rent increase for improvements and that, as a result of that increase, the monthly rent exceeded $2,000; Appellate Term remanded the matter to Civil Court for a determination of the rent arrears due to landlord. The court wrote, in pertinent part, that:

> "Landlord established the amount spent on the apartment renovations here involved through the submission of the specification sheet, i.e. a punch list of the renovations needed in the apartment, a contractor's invoice, cancelled checks tendered contemporaneously with the work, and the contractor's trial testimony indicating that all the work delineated in the invoice was completed and paid in full. Where, as here, the work performed included removing and installing kitchen cabinets, installing new plumbing, rewiring the electrical lines, tearing down and rebuilding walls, renovating and replacing floors, and installing new appliances, it constituted improvements rather than repairs and maintenance. Therefore no breakdown of the costs was necessary to distinguish the cost of allowable improvements from the costs of repair or maintenance items" (18 Misc 3d 15, 17 [2007] [internal quotation marks, brackets, and citations omitted]).

The dissenting Justice noted that landlord bore the burden of proving its entitlement to an increase based on improvements and concluded that landlord's proof failed to satisfy that burden because it did not differentiate between costs incurred for repair work and costs incurred for making improvements (*id.* at 22). Tenant appeals to this Court by permission of Appellate

Term.[4]

The rent that may be charged with respect to the apartment is governed by the Rent Stabilization Law. Under 9 NYCRR 2522.4(a)(1), a landlord "is entitled to a rent increase where there has been a substantial increase ... of dwelling space or an increase ... of new equipment or *improvements*, or new furniture or furnishings" (emphasis added). When a landlord makes improvements to an apartment under § 2522.4(a)(1), it is entitled to an increase in rent for the apartment of 1/40th of the total cost of the improvements (§ 2522.4[a][4]).

As the Second Department has observed:

> "in evaluating the legitimacy of an [individual apartment improvement rent increase under § 2522.4(a)], the court is required to determine (1) whether the owner made the improvements to the apartment during the relevant time period, (2) whether those improvements constitute legitimate individual apartment improvements within the meaning of the regulations, (3) the total cost of the improvements, (4) one fortieth of that cost, and (5) the sum of one fortieth of the costs plus the monthly rent level after any other increases to which the owner may be entitled" (*Matter of Rockaway One Co., LLC v Wiggins*, 35 AD3d 36, 42 [2006]).

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[4]Landlord did not seek permission to cross-appeal from those portions of Appellate Term's order that are adverse to it -- the implicit affirmance of the determination that landlord breached the warranty of habitability and the award to tenant of a 15% rent abatement. Accordingly, landlord is precluded from seeking affirmative relief from those portions of Appellate Term's order (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151 n 3 [2002]; *see also Hecht v City of New York*, 60 NY2d 57, 61-62 [1983]).

Additionally, as stated in a policy statement of the Division of Housing and Community Renewal (DHCR), the agency charged with administering the Rent Stabilization Law:

> "[a]ny claimed ... individual apartment improvement cost must be supported by adequate documentation which should include at least one of the following:
> 1) Cancelled check(s) contemporaneous with the completion of the work;
> 2) Invoice receipt marked paid in full contemporaneous with the completion of the work;
> 3) Signed contract agreement;
> 4) Contractor's affidavit indicating that the installation was completed and paid in full"
> (DHCR, Office of Rent Administration, Policy Statement 90-10; *see Rockaway One Co., LLC, supra; Hanjorgiris v Lynch*, 298 AD2d 251, 252 [2002]).

As the trial court found, (1) the contractor performed the work listed on the punch list prior to tenant moving into the apartment, (2) some of the work constituted "improvements" and some repairs, and (3) landlord spent at least $50,000 on the renovations. Moreover, as Appellate Term found, adding one-fortieth of the cost of the renovations to the amount of rent to which landlord is entitled after other increases yields a rent in excess of $2,000,[5] which would remove the apartment from the Rent

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[5]Both the trial court and Appellate Term found that landlord spent at least $50,000 in renovating the apartment, without making any finding as to the specific amount of money spent in the course of the project. Regardless of whether landlord spent more than $50,000 on the project, that it spent at least $50,000 is sufficient to remove the apartment from the rent stabilization scheme (i.e., 1/40th of $50,000 = $1250 + $1247.68 [rent to which landlord is otherwise entitled] = $2497.68), provided landlord is

Stabilization Law. The issue of whether landlord is entitled to a rent increase based on the improvements turns on whether landlord was required to itemize the costs it incurred during the renovation, distinguishing between amounts spent on improvements, on the one hand, and repairs, on the other. Because landlord was not obligated to itemize the costs, we agree with Appellate Term that landlord is entitled to a rent increase based on the renovations.

DHCR's interpretation of the regulations implementing the Rent Stabilization Law are entitled to deference (*see Matter of 900 W. End Ave. Tenants Assn. v New York State Div. of Hous. & Community Renewal*, 53 AD3d 436, 438 [2008]; *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [2007], *affd* 11 NY3d 859 [2008]). DHCR has determined that a landlord is not required to "submit a breakdown of the cost of each item in ... *extensive* renovation work" if the landlord "submitted the required evidence to show that the claimed work was done" and "that it spent the claimed costs" (*Matter of Levene*, Admin. Rev. docket No. RI410003RK, at 2-3 [Dec. 15, 2003] [emphasis added]; *see Matter of Dorfman*, Admin. Rev. docket No. TE210001RT, at 2 [July 8,

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otherwise entitled to the increase. Indeed, expending slightly more than $30,000 would be sufficient.

2005] [landlord not required to break down costs to distinguish cost of improvements from cost of repairs where landlord removed and replaced kitchen cabinets, and installed new plumbing, new kitchen flooring and kitchen appliances]; *Matter of Executive Towers at Lido, LLC*, Adm. Rev. docket No. OD710043RO/OD710082RT, at 4 [Nov. 22, 2000] ["Although the tenants seek an item-by-item breakdown of the cost, the DHCR allows some flexibility on this requirement in cases where *extensive* renovations are performed by a single contractor and the contract amount is agreed upon by the parties without cost itemization"] [emphasis added]). This principle is consistent with another determination of DHCR -- work that would generally be characterized as maintenance or repair, when performed in connection with renovations that qualify as an improvement, will be characterized as part of the improvement (*Matter of Purdy*, Admin. Rev. docket No. QH410023RT, at 3 [May 16, 2003]).

Here, the renovations performed by the contractor unquestionably were extensive. Indeed, the trial court repeatedly characterized the renovations as "extensive." Moreover, we agree with the trial court's findings of fact regarding the scope of the renovations, that they were in fact performed and that they cost at least $50,000.

We disagree, however, with the trial court on a point of law. As discussed above, it is DHCR's view that when extensive renovation work is performed in an apartment, a landlord is not required to submit evidence differentiating between the cost of improvements and the cost of repairs. Rather, a landlord is entitled to a rent increase for improvements to an apartment based on extensive renovations if the landlord submits evidence establishing "that it spent the claimed costs" (*Matter of Levene, supra* at 3), and "there is no set standard of specificity for such evidence" (*Matter of Purdy, supra* at 3). As Appellate Term correctly concluded, "[l]andlord established the amount spent on the apartment renovations here involved through the submission of the ... punch list of the renovations needed in the apartment, a contractor's invoice, cancelled checks tendered contemporaneously with the work, and the contractor's trial testimony indicating that all the work delineated in the invoice was completed and paid in full," and that this evidence satisfied several of the criteria listed in Policy Statement 90-10 (18 Misc 3d at 17-18; *see Matter of Levene, supra* at 2-3; *Matter of Purdy, supra* at 1, 3; *Matter of Starosolska*, Admin. Rev. docket No. RC410009RT, at 2 [April 24, 2003]; *see also Matter of Executive Towers at Lido, LLC, supra* at 4).

The dissent errs in suggesting that we fail to give appropriate deference to the trial court's findings of fact. As is evident from the preceding discussion, we agree with and do not disturb the trial court's findings of fact with respect to the renovations. The trial court's misstep was in concluding that landlord was required to submit evidence differentiating between the cost of improvements and the cost of repairs -- a *legal* error.

The dissent asserts that the work did not entail a "total" or "gut" renovation of the apartment. This assertion is irrelevant. The controlling inquiry, as articulated by DHCR, the agency charged with enforcing the Rent Stabilization Law and possessed of particular expertise in that area of law, is whether the renovations were "extensive" (*Matter of Levene, supra* at 2; *see Matter of Dorfman, supra* at 2; *Matter of Executive Towers at Lido, LLC, supra* at 4). The dissent cites no authority that would support the proposition -- which is at odds with the ordinary meaning of the word "extensive" -- that only "total" or "gut" renovations are "extensive." Where, as here, the renovations are "extensive," the landlord is not required to provide a breakdown of the costs it incurred.

Matter of Charles Birdoff & Co. v New York State Div. of Hous. & Comm. Renewal (204 AD2d 630 [1994]), cited by the

dissent, does not compel a different conclusion. In that case, the Second Department stated that a landlord seeking a rent increase based on improvements to an apartment must "submit documentation proving each specific improvement" and that "[t]he documentation must be sufficiently specific to enable the DHCR to verify, by cost breakdown, whether some of the work claimed is merely repairs or decorating" (*id.* at 630-631). The only support offered for that statement is an unreported Supreme Court decision from 1984 that was affirmed without opinion by this Court (*Matter of Eberhart Bros. v New York City Conciliation & Appeals Bd.*, Sup Ct, NY County, Feb. 16, 1984, Edwards, J., *affd* 99 AD2d 930 [1984]). More critically, however, there is no indication that "extensive" renovations had been performed by the landlord in *Charles Birdoff & Co.* Accordingly, *Charles Birdoff & Co.* cannot reasonably be read to undercut the rule that where renovations are "extensive" the landlord is not required to provide a breakdown of the costs it incurred (*see Matter of Seelig v Koehler*, 76 NY2d 87, 92 [1990], *cert denied* 498 US 847 [1990] [distinguishing prior decisions and observing that "the identification and weighing of all the unique and particular facts of each case governs"]).

Even more fundamentally, *Charles Birdoff & Co.* was decided *before* the DHCR administrative determinations setting forth the

applicable rule when "extensive" renovations are performed. As is evident, our disposition of this appeal is not "in direct contravention of courts' pronouncements" regarding the proof required to support a rent increase based on improvements.[6] To the contrary, the dissent's position is contradicted by the governing law.

The dissent writes that "[w]hile the majority posits that an itemization is not necessary where ordinary repairs are done concomitantly with extensive renovations, it offers no valid policy reason for applying the same standard where significant repairs are done concomitantly with significant renovations." Apparently, the dissent would not require a landlord to itemize its costs in an "extensive" renovation project where repairs are performed in connection with the project that are "ordinary," but

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[6]*Matter of 425 3rd Ave. Realty Co. v New York State Div. of Hous. & Community Renewal* (29 AD3d 332 [2006]), *Matter of 201 E. 81st St. Assoc. v New York State Div. of Hous. & Community Renewal* (288 AD2d 89 [2001]), *Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal* (240 AD2d 158 [1997]) and *Matter of Linden v New York State Div. of Hous. & Community Renewal* (217 AD2d 407 [1995]), afford no support for the dissent's conclusion that landlord's evidence was insufficient to establish that it was entitled to a rent increase. *Matter of 425 3rd Ave. Realty Co.*, *Matter of Mayfair York Co.* and *Matter of Linden* support the unremarkable proposition that maintenance and repair work do not qualify as "improvements"; *Matter of 201 E. 81st St. Assoc.* held that the landlord had not performed certain work that it claimed it had, and that other work that was performed by the landlord was maintenance, not improvements.

would require the landlord to itemize its costs in an "extensive" renovation project where the repairs that are performed are "significant." Suffice it to say, the DHCR decisions discussed above holding that a landlord is not required to itemize its costs where the renovation work is "extensive" recognize no such distinction. In concluding that landlord was not required to itemize its costs we simply give effect to the rule adopted by DHCR when "extensive" renovations are performed.

Moreover, nothing supports the dissent's implicit conclusion that our obligation to give deference to the rule adopted by DHCR is conditioned upon a judicial determination that it is supported by a "valid policy." To the contrary, acceptance of the dissent's position would undermine the rationale for judicial deference to such agency determinations, a rationale that is itself grounded on public policy considerations: the special competence and expertise of the administrative agency (*see Matter of Paterno v Curiale*, 88 NY2d 328 [1996]). Accordingly, we need not be concerned with whether DHCR's rule in fact reflects a policy determination that where extensive improvements are made, requiring a landlord to itemize the costs of any and all repairs that also are done would impose an undue burden on the landlord and unduly complicate fact-finding proceedings. We note, however, that if the rule were otherwise, in this case the

apartment would remain subject to the Rent Stabilization Law only if repairs accounted for some $20,000 of the $50,000 expended on the apartment.

The dissent also writes that:

> "The disallowance of ... expense[s] [for repair and maintenance] is reasonable even when the work is done at the same time or in connection with an allowed expense or a substantial renovation. Significant repair and maintenance work keep an apartment in good condition and are not the kind of more permanent, long-lasting work, allowed as an improvement, such as running new electrical lines for air conditioning or installing a completely new floor, that improve and upgrade the apartment. Thus, substantial repair-type work gains no special significance when done in connection with or at the same time as other major work warranting an increase in rent. The need for an item-by-item cost breakdown of substantial repairs is essential, even when significant renovations are done, to ensure that owners receive no more of a permanent increase than they are entitled to and that the tenant is not overcharged for a rent increase that becomes a permanent part of the rent and remains in place after the owner recoups its cost of the improvements."

Whether the rule the dissent would embrace is more reasonable is irrelevant. Its rule is unsupported by any authority and is contrary to the decisions of the agency with expertise in and charged by law with responsibility for issues arising under the Rent Stabilization Law (*Matter of Levene*, *supra* at 2; *see Matter of Dorfman*, *supra* at 2; *Matter of Executive Towers at Lido, LLC*, *supra* at 4). Contrary to the dissent, its rule certainly is not "essential." Similarly, the dissent's assertion that "a

specificity requirement ... [is not] inconsistent with DHCR Policy Statement 90-10" is contrary to DHCR precedent (*Matter of Purdy, supra* at 3 ["there is no set standard of specificity for such evidence"]).

Accordingly, the order of the Appellate Term, First Department, entered on or about December 4, 2007, which, in effect, modified the order of Civil Court, New York County (Jean T. Schneider, J.), entered on or about September 29, 2006, after a nonjury trial, directing judgment in respondent tenant's favor in the amount of $37,847.92, to the extent of awarding possession of the apartment to petitioner landlord, declaring that landlord is entitled to a rent increase above the $2,000 luxury decontrol threshold for improvements and remanding the matter to Civil Court for a determination of the rent arrears owed by tenant to landlord, should be affirmed, without costs.

All concur except Renwick and Freedman, JJ.
who dissent in an Opinion by Renwick, J.

RENWICK, J. (dissenting)

I respectfully dissent. In my view, Civil Court properly found that the owner's proof lacked the specificity required to enable the court to distinguish the cost of significant improvements from the cost of significant repairs. The majority, however, now determines that no breakdown of cost is necessary to distinguish between the cost of allowable significant improvements and non allowable significant repairs where "'extensive renovations are performed by a single contractor and the contract amount is agreed upon by the parties without cost itemization.'" Like Appellate Term, the majority cites not a single case for this broad proposition that appears to be in direct contravention of courts' pronouncements that "the documentation must be sufficiently specific to enable the DHCR [or, as here, Civil Court] to verify, by cost breakdown, whether some of the work claimed is merely repairs or decorating, for which an increase is not authorized" (*Matter of Charles Birdoff & Co. v New York State Div. of Hous. & Community Renewal*, 204 AD2d 630, 630-631 [2nd Dept. 1994] citing *Matter of Eberhart Bros. v New York City Conciliation & Appeals Bd.*, Sup Ct NY County, Feb. 16, 1984, Edwards, J., affd 99 AD2d 930 [1984]).

Instead, the majority relies on DHCR's precedents under DHCR Policy Statement 90-10, holding such a breakdown unnecessary. However, what the majority overlooks is that in interpreting Policy Statement 90-10, DHCR has held that an itemization of cost is obviated only where ordinary repairs are performed along with significant repairs or a total renovation of the apartment. That is not the situation here, where there were both significant repairs and significant renovations. (*see e.g. Matter of Levene, DCHR Admin. Rev. Docket. No. RI410003RK* [Dec. 15, 2003] [claimed improvements were a total renovation and any repair items done in conjunction were properly included in allowable costs, and lack of breakdown of each item's cost did not bar rent increase since owner submitted required evidence to show the claimed work was done]).

We simply cannot overlook that Civil Court, as the factfinder, found that the work on the subject apartment was not a total or gut renovation. While Civil Court acknowledged that upgraded kitchen appliances, upgraded electrical lines and new plumbing comprised allowable improvements, Civil Court also explicitly found that:

> "[I]t is clear that a substantial portion of the work done was repair to severely damaged walls and woodwork in the apartment, to repair the kitchen underflooring, to refinish the wood floors, and to plaster and paint the

> entire apartment. There is no reliable contemporaneous evidence in this record that breaks down the cost of the work so that the court can distinguish between the cost of these extensive repairs and the cost of allowable improvements like upgraded kitchen appliances and cabinets, upgraded electrical lines for air conditioning, new plumbing, and the like."

The majority has not shown any factual (or legal) basis for disturbing Civil Court's findings that the work herein was not a total renovation as it involved both substantial repairs and substantial renovations. Indeed, an officer of the owner's management agent testified that, after the long-term tenant had vacated, she inspected the apartment and found it "in a very bad condition," as "it had not been touched in 25 years or more." She explained, "[E]verything was worn, outdated, outmoded, dirty and in general disrepair." There was also evidence of water leak damage throughout the apartment. After her walkthrough, she prepared a "punch list" of the work to be done in the apartment, set a budget of $50,000, and assigned the work to a contractor. The contractor's employee who supervised the work not only testified that the job was not a "gut renovation" but he provided a detailed account of the "very poor conditions" in which he found the apartment once the work started. He explained that existing masonry and cement of several walls had deteriorated due to neglected leaks and poor condition, and as a result, the

contractor had to rebuild a wall in the main bedroom and repair the masonry and cement walls in the living room, dining room, bedroom and bathroom. After repairing the walls, the contractor plastered and painted the whole apartment, and repaired the underflooring of the kitchen. The contractor also replaced the deteriorating woodwork around the radiators and windows in the living room, dining room and main bedroom, and refinished the wood floors.

Judicial deference is due to Civil Court, as the factfinder, in the same fashion as would be the case if the issue arose before DHCR (*see Matter of Oriental Blvd Co. v New York Conciliation & Appeals Bd.*, 92 AD2d 470, 470-471 [1983], affd 60 NY2d 633 [1983]). In a nonpayment action, the owner may establish the validity of an individual apartment increase in the same manner as in a DHCR proceeding, that is, by showing a likelihood of success were the matter before DHCR (*cf. Matter of Rockaway One Co., LLC v Wiggins*, 35 AD3d 36 [2006]). The Court of Appeals has noted that the courts should defer to DHCR in such matters as factual determinations (see *Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206 [1989]). Thus, since the uncontroverted evidence adduced at trial was that the subject apartment was in a substantial state of disrepair due to leaks and to the failure to

maintain it for many years, Civil Court's factual findings of the substantial repair work that was done in the apartment must be afforded great deference.

Moreover, it is consistent with the statutory scheme of the Rent Stabilization Code to conclude that a specificity requirement -- an item-by-item cost breakdown of the work done-- is not obviated where substantial repairs are done in connection with or contemporaneously with substantial renovations short of a total renovation. Repair and maintenance work, like painting, plastering, sanding and refinishing a floor, are not allowed because they are expected to be done in the normal course of apartment usage merely to maintain an apartment in good condition (*see e.g. Matter of 425 3rd Ave. Realty Co. v New York State Div. of Hous. & Community Renewal*, 29 AD3d 332 [2006] ["Invoices for painting, plastering and floor polishing, among other things, were correctly disallowed because they were for ordinary maintenance and repair, rather than for improvements"]; *Matter of 201 E. 81st St. Assoc. v New York State Div. of Hous. & Community Renewal*, 288 AD2d 89 [2001] [painting, plastering and demolition largely routine when done in conjunction with plumbing and rewiring]; *Matter of Linden v New York State Div. of Hous. & Community Renewal*, 217 AD2d 407 [1995] (deference due to DHCR's finding that invoices showed nothing more than normal

maintenance]; *Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d 158 [1997] ["disallowed work was for painting, skim coating, partial floor replacement and partial rewiring"]).

While the majority posits that an itemization is not necessary where ordinary repairs are done concomitantly with extensive renovations, it offers no valid policy reason for applying the same standard where significant repairs are done concomitantly with significant renovations. The disallowance of such expense is reasonable even when the work is done at the same time or in connection with an allowed expense or a substantial renovation. Significant repair and maintenance work keep an apartment in good condition and are not the kind of more permanent, long-lasting work, allowed as an improvement, such as running new electrical lines for air conditioning or installing a completely new floor, that improve and upgrade the apartment. Thus, substantial repair type work gains no special significance when done in connection with or at the same time as other major work warranting an increase in rent. The need for an item-by-item cost breakdown of substantial repairs is essential, even when significant renovations are done, to ensure that owners receive no more of a permanent increase than they are entitled to and the tenant is not overcharged for a rent increase that

becomes a permanent part of the rent and remains in place after the owner recoups its cost of the improvements. Otherwise, a landlord might be encouraged to ignore routine repairs in an apartment with a long-term tenant until the apartment becomes vacant.

Nor is a specificity requirement, within the particular circumstances of this case, inconsistent with DHCR Policy Statement 90-10, which sets forth the proof that should be submitted to confirm a claim for improvements. "Under the plain wording of the policy statement, submission of [the suggested] proof does not necessarily end DHCR's inquiry [or as here, the court's inquiry] and DHCR may conduct such inquiry as it deems appropriate to determine compliance with the law it enforces" (*Matter of 201 E. 81st St. Assoc*, 288 AD2d at 90 [2001] [even though landlord submitted evidence falling within all four categories of Policy Statement 90-10, DHCR could still conduct inquiry]). While Policy Statement 90-10 does not expressly require a cost breakdown in each instance, DHCR's authority to require a breakdown is implicit in its duty to verify whether some of the work claimed is merely repairs or maintenance. Thus, in view of the undisputed evidence that, following the vacancy, the apartment was found to be in great disrepair, such that it looked like "it had not been touched in 25 years," the

contractor's invoice that billed a lump sum of $50,000 was inadequate proof to enable the court to distinguish the cost of improvements from the cost of substantial repairs.

Nor did the owner remedy the deficiency in its proof via testimony from any of its witnesses. The managing agent unilaterally set forth the $50,000 alleged price of the improvements and repairs without receiving an estimate, invoice, or contract and made payment without having consulted the contractor. Moreover, the contractor never saw the apartment before the scope of the work and price were unilaterally set by the managing agent. Under the circumstances, Civil Court properly rejected the contractor's attempt to confirm the estimate as an after-the-fact itemization. More importantly, the contractor's attempt to itemize the work was itself insufficient since it itemized the cost into broad categories that failed to distinguish the cost of allowable improvements from the cost of substantial repairs.

For the foregoing reasons, the decision of Civil Court finding that the owner failed to meet its burden to be entitled to an individual apartment improvement rent increase is supported by the facts and the law. The owner was required to itemize costs in order to distinguish repairs from improvements once the record established that a substantial portion of the work

constituted repairs necessitated by long-term neglect in the maintenance of the apartment. Accordingly, the order and judgment of Civil Court should be affirmed.

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

ENTERED: MAY 19, 2009