SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 26, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, Moskowitz, Renwick, JJ.

77N Nomura Asset Capital Corporation, et al.,
Plaintiffs-Respondents,

-against-

Cadwalader, Wickersham & Taft LLP,
Defendant-Appellant.

Index 116147/06

Cravath, Swaine & Moore LLP, New York (David R. Marriott of counsel), for appellant.

Constantine Cannon LLP, New York (Amianna Stovall of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered August 21, 2008, which, in an action for legal malpractice, inter alia, denied defendant law firm's motion to compel plaintiff's production of certain privileged attorney-client communications, unanimously affirmed, without costs.

This legal malpractice action arises from defendant's allegedly negligent advice in regard to Nomura's formation of the so-called D5 Trust, a securitized pool of 156 mortgage loans totaling $1.8 billion which closed in October 1997. The transaction was to be compliant with the Internal Revenue Code's Real Estate Mortgage Investment Conduit (REMIC) regulations. In

November 2000, after several of the loans experienced difficulty, the trustee of the D5 Trust sued Nomura in federal court (the Doctor's Hospital Action), alleging that, contrary to defendant's advice and opinion rendered to Nomura, one of the mortgage loans to Doctor's Hospital of Hyde Park, Illinois did not comply with the REMIC regulations. Specifically, the trustee alleged breach of Nomura's warranties that such mortgage loan was REMIC qualified and that the borrower's real property had a fair market value of at least 80% of the principal amount of the mortgage loan.

Defending the position that the Doctor's Hospital loan was a qualified mortgage for REMIC purposes, Nomura successfully moved for summary judgment (*LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 2004 US Dist LEXIS 18599 [SDNY 2004]). However, on appeal, the Second Circuit reversed in part and remanded the matter to determine whether the loan was, in fact, 80% secured (424 F3d 195 [2005]). As a result, Nomura alleges that, because of defendant's erroneous advice that such mortgage loan was REMIC qualified, it was "left with no viable alternative but to settle the Doctor's Hospital Action for approximately $67.5 million prior to trial" and seeks to recover the amount of the settlement.

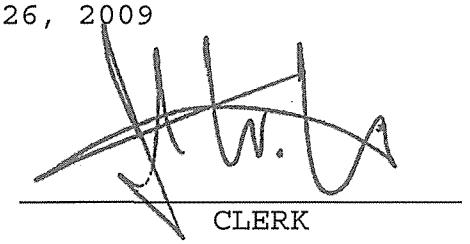
We find no merit to defendant's argument that privileged materials relating to and created after commencement of the

Doctor's Hospital Action have been put "in issue" by this litigation and are therefore discoverable. Such argument fails to recognize that nothing that plaintiff's attorneys could have said or done in the prior lawsuit could have possibly affected plaintiff's reliance on defendant's allegedly erroneous advice given years earlier in connection with the formation of the D5 Trust. "'At issue' waiver of [the attorney-client] privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information" (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63 [2007]). While any communications between plaintiff and its attorneys in the Doctor's Hospital Action that evaluated defendant's prior advice in the allegedly bungled D5 Trust transaction are certainly relevant to the issue of defendant's alleged malpractice, plaintiff disavows any intention to use such communications and defendant fails to show that any such communications are necessary to either plaintiff's claim or its defense (*see id.* at 64 [relevance alone insufficient to put privileged materials "at issue"; "if that were the case, a

privilege would have little effect"]; *see also Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 374 [2008]). Nor does the question of the reasonableness of the settlement amount that plaintiff seeks to recover, without more, put plaintiff's privileged communications with its attorneys concerning the settlement "in issue" (*Deutsche Bank*, 43 AD3d at 57). No reason appears why the reasonableness of the settlement cannot be determined with the copious materials that defendant has already received, including otherwise privileged communications, dating from before the commencement of the Doctor's Hospital Action. We have considered defendant's other arguments and find them unpersuasive.

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

ENTERED: MAY 26, 2009



CLERK

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

399 NAMA Holdings, LLC, etc., Index 601054/08
Plaintiff-Respondent,

-against-

Greenberg Traurig, LLP, etc., et al.,
Defendants-Appellants.

Pollack & Kaminsky, New York (Martin I. Kaminsky of counsel), and Leslie D. Corwin, New York, for appellants.

Berger & Webb, LLP, New York (Steven A. Berger of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered November 20, 2008, which denied defendants' motion to dismiss the complaint or stay the action pending arbitration, unanimously modified, on the facts, to stay the action pending the arbitral determination, and otherwise affirmed, without costs.

Plaintiff, a member of Alliance Network LLC (a limited liability company), had standing to bring this derivative action alleging that the law firm and one of its partners representing the LLC and its managers in other litigation had a conflict of interest as a result of the managers' involvement and the partner's hidden financial interest in a competing project. The motion court correctly discerned the plain meaning of the company's operating agreement and the unambiguous governing Nevada statute (Nev. Rev Stat Ann § 86.483), in finding that

plaintiff was not prohibited from bringing derivative claims (*see Jones v Bill*, 10 NY3d 550, 555 [2008]) and that resort to legislative history was unnecessary.

Plaintiff NAMA may also assert an individual claim against defendants as the attorneys for the LLC, because plaintiff has alleged, inter alia, that these defendants colluded with the managers of the LLC to drive NAMA from the underlying project (*see Aranki v Goldman & Assoc., LLP*, 34 AD3d 510, 511-512 [2006]; *cf. Berkowitz v Fischbein, Badillo, Wagner & Harding*, 7 AD3d 385, 387 [2004], *lv dismissed* 3 NY3d 767 [2004]).

The arbitration ruling denying disqualification of the attorneys at a preliminary stage of that proceeding does not preclude the disqualification claim. The doctrine of res judicata does not apply, absent a final adjudication on the merits (*see Clearwater Realty Co. v Hernandez*, 256 AD2d 100, 101 [1998]). Nor does the doctrine of collateral estoppel conclusively bar plaintiff's claim, because the scope of the arbitral ruling is not entirely clear (*see Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]). Moreover, the issue in this action is particularly fact-laden and its resolution should await further factual development. We note, however, that the burden is on plaintiff, as the opponent of collateral estoppel, to demonstrate the absence of a full and fair opportunity to be heard in the arbitration (*id.*), and plaintiff failed to carry this burden.

The allegations regarding defendants' obstruction of discovery also are not precluded because the claim in this action is not to obtain discovery, but to show how the attorneys allegedly committed misconduct in obstructing it.

However, the court should have granted a stay pursuant to CPLR 2201 in the interest of judicial economy. There are overlapping issues and common questions of fact, and the hearings in the arbitration, that began a year before the commencement of this action, are nearly complete (*see Belopolsky v Renew Data Corp.*, 41 AD3d 322 [2007]; *cf. American Intl. Group, Inc. v Greenberg*, 60 AD3d 483 [2009] [finding that resolution of related action would not dispose of or significantly limit issues before this Court or pose risk of inconsistent rulings]; *Metropolitan Steel Indus., Inc. v Tully Constr. Co., Inc.*, 55 AD3d 363, 364 [2008] [finding it unlikely that significant judicial economies would be served]).

THIS CONSTITUTES THE DECISION AND ORDER
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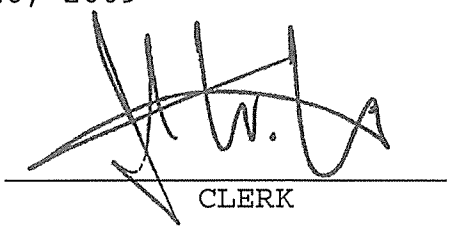

CLERK

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

535N Robert Krochta, Index 301273/07
Plaintiff-Appellant,

-against-

On Time Delivery Service, Inc., et al.,
Defendants-Respondents.

Alexander J. Wulwick, New York, for appellant.

Blane Magee, Rockville Centre, for On Time Delivery Service, Inc., respondent.

Gannon, Rosenfarb & Moskowitz, New York (Peter J. Gannon of counsel), for Ad Mfg. Corp., respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered on or about April 25, 2008, which, in an action for personal injuries arising from a trip and fall on a sidewalk in Nassau County, granted the motion of defendant Ad Mfg. Corp. (AMC) to change venue from Bronx to Nassau County, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, a Pennsylvania resident, was injured on premises owned and operated by AMC in Nassau County when he tripped and fell over packaging material used to wrap merchandise being delivered by defendant On Time Delivery Service, Inc. Plaintiff commenced this action in Supreme Court, Bronx County, basing venue on the residence of defendant AMC, as reflected in its certificate of incorporation filed January 22, 1970. Prior to answering, AMC served a demand to change venue to Nassau County

on the ground that the county designated by plaintiff was improper (CPLR 503[a]). AMC then moved to change venue (CPLR 510[1]; 511), submitting documentation from the Department of State indicating that the corporation did not reside in Bronx County at the time plaintiff commenced the action. In reply to plaintiff's opposing argument that venue was proper based on the certificate of incorporation, AMC submitted the affidavit of its vice president attesting that the corporation had been operating out of Nassau County for nearly 30 years. AMC's reply papers further contended that the convenience of material witnesses and the interest of justice also warranted the venue change.

Supreme Court properly denied the motion for change of venue as of right as untimely, having been interposed more than 15 days after service of AMC's antecedent demand (CPLR 511[b]). The court also correctly rejected AMC's application for a discretionary change of venue as having been improperly advanced for the first time in reply (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]), noting that, in any event, AMC had failed to demonstrate how the convenience of witnesses or the interest of justice would be served. The court nevertheless exercised its discretion to grant the change of venue "for reasons not enumerated by statute or in the interest of justice as enumerated by statute." The court concluded that the case has only a tenuous connection to Bronx County and, "all things being equal,

a transitory action should be venued in the county of occurrence." This was error.

As this Court stated in *Velasquez v Delaware Riv. Val. Lease Corp.* (18 AD3d 359, 360 [2005]):

> "We have long held that 'The designation of a county as the location of a corporation's principal office in a certificate of incorporation is controlling in determining corporate residence for the purposes of venue' (*Conway v Gateway Assoc.*, 166 AD2d 388, 389 [1990]). Since the certificate of incorporation here was never formally amended to change the principal place of business, the original designation governs" (citing *Nadle v L.O. Realty Corp.*, 286 AD2d 130, 132 [2001]).

While the situs of plaintiff's injury provides a basis to change venue to Nassau County (*see e.g. Young Hee Kim v Flushing Hosp. & Med. Ctr.*, 138 AD2d 252 [1988]), a discretionary change of venue (CPLR 510[3]) still must be supported by a statement detailing the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the designated venue (*see Leopold v Goldstein*, 283 AD2d 319 [2001]), requirements the court had correctly found to be unsatisfied.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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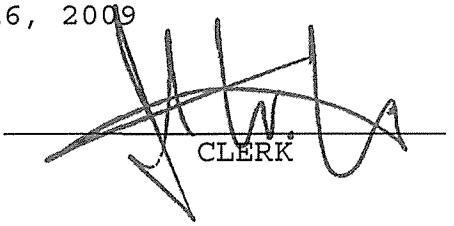

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 26, 2009.

Present - Hon. David Friedman, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, Justices.

1166 Junior Mezzanine Lender LLC, Index 601644/07
Plaintiff-Appellant,

-against- 4899

1166 GP Associates, LLC, et al.,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered on or about September 28, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 8, 2009,

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

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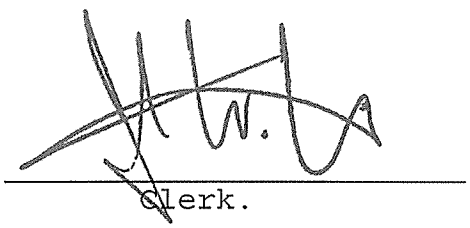


Clerk.

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 26, 2009.

Present - Hon. David Friedman, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, Justices.

1166 Junior Mezzanine Lender LLC, Index 601644/07
Plaintiff-Appellant,

-against- 4900

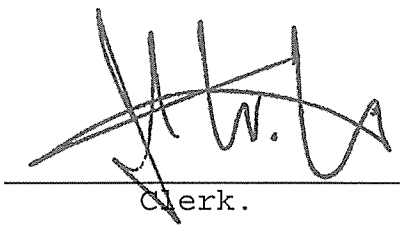
1166 GP Associates, LLC, et al.,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered on or about June 26, 2008, as amended July 16, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 8, 2009,

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

ENTER:



Clerk.

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

79 In re Hunts Point Triangle, Inc., Index 109357/08
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

Mehler & Buscemi, New York (Francis R. Buscemi of counsel), for petitioner.

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

Determination of respondent, dated July 2, 2008, which revoked petitioner's liquor license and directed forfeiture of its $1,000 bond, unanimously annulled, on the law, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Emily Jane Goodman, J.], entered on or about July 14, 2008), granted.

Petitioner was charged by the State Liquor Authority with allowing its premises, on two different occasions, to become disorderly, by suffering or permitting females "to solicit male patrons therein for immoral purposes in violation of subdivision 6 section 106 of the Alcohol Beverage Control Law." After a hearing, the charges were sustained, and petitioner's license revoked. We conclude that the Authority's determination is not supported by substantial evidence.

The Administrative Law Judge found substantial evidence that the petitioner "suffered or permitted the premises to become disorderly by failing to properly supervise the premises allowing solicitation of male patrons by its female dancers" in violation of section 106(6) of the Alcoholic Beverage Control Law. He also found that petitioner had violated section 106(6) of the ABC Law by failing to properly and meaningfully supervise the premises and stop solicitation from occurring therein, and that open and notorious sexual activity occurred at the premises, such that petitioner knew or should have known of its occurrence.

Contrary to the Authority's determination, the evidence adduced at the hearing does not support the conclusion that the management allowed the solicitation of sex, or even that the dancers at the premises solicited the undercover officers or any other customers.

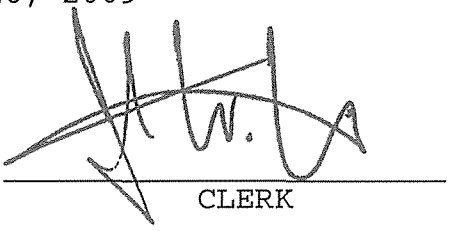
A fair reading of the record makes it evident that the solicitation was instigated by the officers. To the extent that the SLA may have shown other improper conduct occurred at the premises, petitioner was not put on notice of these charges.

Thus, it cannot be said that the evidence supports the conclusion that solicitation for prostitution, with the knowledge

of management, occurred at the premises, and the determination must be annulled.

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

ENTERED: MAY 26, 2009



CLERK

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

122 Ari Kramer, as Executor of the Estate of Virginia Casey Bush, etc., Plaintiff-Appellant, Index 101978/05

-against-

Ioannis Danalis, Defendant-Respondent.

Haynes and Boone, LLP, New York (Kenneth J. Rubinstein of counsel), for appellant.

Schillinger & Finsterwald, LLP, White Plains (Peter Schillinger of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 2, 2008, which granted defendant's motion for partial summary judgment dismissing the second amended complaint, except for the cause of action for an accounting, and on his first counterclaim declaring that a 2002 agreement between himself and Irving T. Bush is valid, and denied plaintiff's application for distributions, unanimously affirmed, without costs.

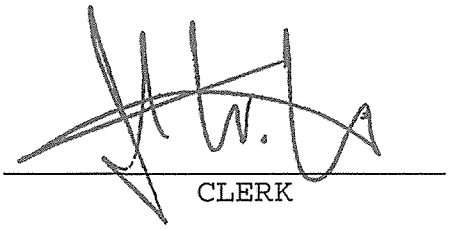
In opposition to defendant's showing that Bush, an elderly real estate investor and attorney, was competent and unaffected by undue influence when he and defendant executed the 2002 agreement, plaintiff failed to raise an issue of fact as to the existence of a fiduciary or confidential relationship between Bush and defendant and failed to carry his burden to demonstrate that the subject transaction was the product of undue influence

(*see Sepulveda v Aviles*, 308 AD2d 1, 7-8 [2003]). In the face of affidavits and testimony from lay observers regarding Bush's continued independence as late as 2003 and from the attorney who negotiated, drafted and witnessed the execution of the 2002 agreement, plaintiff failed to submit contrary evidence of Bush's condition at the time (*see Preshaz v Przyziazniuk*, 51 AD3d 752 [2008]; *Matter of Camac*, 300 AD2d 11 [2002]). In addition, plaintiff's purported medical evidence, unsworn and, in one instance, unsigned, and apparently reflecting no more than a request by Bush's wife that he be examined rather than a conclusion by a physician, was inadmissible and therefore insufficient to defeat summary judgment (*see Henkin v Fast Times Taxi*, 307 AD2d 814 [2003]). The other evidence submitted by plaintiff on this issue was insufficiently probative. Plaintiff's claimed need for discovery was "an ineffectual mere hope, insufficient to forestall summary judgment," particularly in light of his failure to seek the deposition testimony of the attorney-drafter of whose identity and role he had long been aware (*see Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [2005]).

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

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

ENTERED: MAY 26, 2009



CLERK

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

226 Sterling National Bank, Index 121916/03
Plaintiff-Respondent-Appellant,

-against-

Ernst & Young LLP, et al.,
Defendants-Appellants-Respondents.

Mayer Brown LLP, New York (Hector Gonzalez of counsel), for appellants-respondents.

Kaplan Landau LLP, New York (Mark Landau of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Herman Cahn, J.), entered December 5, 2008, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint and granted their motion to vacate a portion of the order, same court (John A.K. Bradley, J.H.O.), entered April 2, 2008, directing defendants to respond to certain discovery requests, unanimously affirmed, without costs.

Plaintiff submitted evidence sufficient to raise issues of fact as to whether defendants' allegedly fraudulent misrepresentations induced plaintiff to extend and renew a $6 million credit facility to nonparty Allied Deals, Inc., of which nine separate loans advanced pursuant to the facility have not been repaid, and whether the misrepresentations directly caused plaintiff's loss (*see Laub v Faessel*, 297 AD2d 28, 31 [2002]). As to transaction causation, the "Terms of Approval" documents

and related memoranda and the affidavit by plaintiff's former vice president indicate that "audited financial statements" were a condition of the extension and renewal of credit to Allied and that the subject loans would not have been advanced without a "clean opinion" as to Allied's 2000 financial statements. As to loss causation, defendants characterize the loans as mere "rollovers" and contend that plaintiff's financial position did not change as a result of any reliance on the 2000 financial statements and audit report. However, plaintiff's vice president stated that the loans were renewed after Allied had repaid them and that, unbeknownst to plaintiff - because the audit reports did not so inform it - the loans were repaid with funds received from other lenders involved in Allied's fraudulent scheme, rather than from legitimate business transactions.

The court's partial vacatur of plaintiff's second and fourth requests for documents was proper. These requests sought documents relevant only to the issue of punitive damages that is premature until plaintiff demonstrates "some factual basis for [its] punitive damage claim" (*Suozzi v Parente*, 161 AD2d 232, 232 [1990]).

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

ENTERED: MAY 26, 2009

CLERK

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

630-
630A The People of the State of New York, Ind. 3633/06
Respondent, 6046/06

-against-

John Nevarez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Frank Glaser of counsel), for respondent.

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 25, 2007, as amended August 14, 2008, and as further amended August 26, 2008, convicting defendant, upon his pleas of guilty, of grand larceny in the third degree and criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

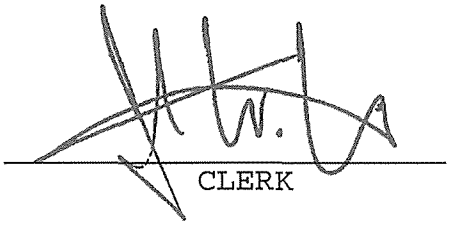
The court properly adjudicated defendant a second felony offender. Regardless of any state law issues presented by defendant's predicate felony conviction, that conviction was not "obtained in violation of defendant's rights under the applicable provisions of the constitution of the United States" (CPL 400.21[7][b]).

After sufficient inquiry (*see People v Frederick*, 45 NY2d 520 [1978]), the court properly denied defendant's motion to withdraw his guilty plea. The record establishes that the plea was voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). Defendant's claim that he manifested a confused mental state at the plea proceeding is contradicted by the record of the thorough plea allocution.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 26, 2009



CLERK

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

631 Amy Fabrikant, Index 350394/04
Plaintiff-Respondent,

-against-

Jay A. Fabrikant,
Defendant-Appellant.

Maloof, Lebowitz, Connahan & Oleske, New York (Charles J. Gayner of counsel), for appellant.

Bernard G. Post LLP, New York (William S. Hochenberg of counsel), for respondent.

Judgment of divorce, Supreme Court, New York County (Saralee Evans, J.), entered December 12, 2007, which, to the extent appealed from as limited by the briefs, confirmed the findings of the special referee imputing annual income of $750,000 to defendant, unanimously affirmed, without costs.

The court properly confirmed the special referee's report, where, as here, it was supported by the record (*see Merchants Bank v Dajoy Diamonds*, 5 AD3d 167 [2004]; *Poster v Poster*, 4 AD3d 145 [2004], *lv denied* 3 NY3d 605 [2004]). The special referee relied on the uncontested, substantial earnings history of defendant (*see Unger v Unger*, 256 AD2d 220 [1998]; *see also Nebons v Nebons*, 26 AD3d 478 [2006]). The special referee also properly relied on the compelling testimony of the independent forensic accountant, who found that numerous companies with which defendant was affiliated or of which he was the sole owner were

used to pay defendant's personal expenses or to "repay" "loans" allegedly made by him to the companies, for which there was no documentation. These companies, with cash flows that were not reflected on their income tax returns and having no apparent business purpose, reflected defendant's deliberate effort to reduce his apparent income thereby avoiding his obligations to plaintiff and his children (*see Cohen v Cohen*, 294 AD2d 184 [2002]; *Wildenstein v Wildenstein*, 251 AD2d 189 [1998]). The special referee also properly relied on the pattern of substantial gifts to defendant from his father to impute income to defendant (*see Rostropovich v Guerrand-Hermes*, 18 AD3d 211 [2005]; *Lapkin v Lapkin*, 208 AD2d 474 [1994]). While it is uncontested that defendant suffers from injuries incurred in a skiing accident, as well as other ailments, defendant's testimony that he was unable to work due to these injuries is unsupported by any medical evidence (*see Davis v Davis*, 175 AD2d 45, 47-48 [1991]; *see also Matter of Castillo v Castillo*, 23 AD3d 653, 654 [2005]), and is contradicted by defendant's own testimony about his traveling on business at a time when he was purportedly unable to travel or work and about his minimal requirements for work --- a lap top and a telephone. The special referee properly rejected the testimony of defendant and his father, both convicted felons, that nearly $3 million provided to defendant by his father, unsupported by documentation except a promissory note

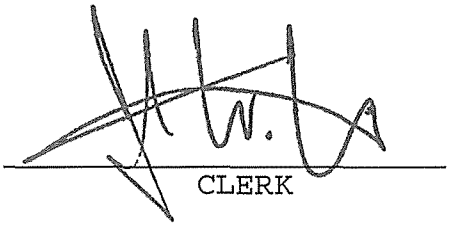
prepared two days before the commencement of the hearing, was loans and not gifts. Also, to the extent defendant attempts to argue that his felony conviction caused a reduction in his earning capacity, the reduction was self-imposed and did not warrant a reduction in defendant's obligations to his former wife and his children (*see Knights v Knights*, 71 NY2d 865, 866-867 [1988]; *Commissioner of Soc. Servs. v Darryl B.*, 306 AD2d 54 [2003]). Defendant's arguments regarding inconsistencies in the special referee's report are unpersuasive, and his assertions that the forensic accountant lacked sufficient documentation to make conclusions about defendant's various companies is belied by the record. Moreover, to the extent the accountant lacked such documentation it was due to defendant's failure to provide it, and his assertions to the contrary are not credible.

M-1668 ***Fabrikant v Fabrikant***

Motion seeking leave to dismiss appeal denied.

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

ENTERED: MAY 26, 2009



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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

632-
632A-
632B In re Toshea C.J., and Others,

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

Nicolie J., etc.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

John R. Eyerman, New York, for respondent.

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

Orders of disposition, Family Court, New York County (Jody Adams, J.), entered on or about March 6, 2007, which, inter alia, respectively found that respondent mother permanently neglected the subject children, unanimously affirmed, without costs.

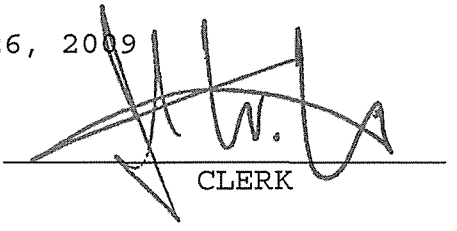
Respondent's argument that the agency's petitions were jurisdictionally defective for failing to specify the diligent efforts the agency made to encourage and strengthen the parental relationship (Family Court Act § 614[1][c]) was raised for the first time on appeal and is therefore unpreserved (*see Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). Were we to review this issue, we would find that the petitions sufficiently specified the agency's efforts, which included arranging for respondent to

visit with the children, referring respondent for individual and family counseling and training in parenting skills, and encouraging respondent "to become consistent with both her planning for and engaging in meaningful visits with" the children.

The court's finding that the agency fulfilled its statutory duty to make diligent efforts to encourage and strengthen the parental relationship was supported by clear and convincing evidence that the agency sought respondent's cooperation in developing a plan tailored to respondent's needs, and, inter alia, scheduled visitation, attempted to assist her in improving the quality of the visits, and referred her to parenting skills classes and counseling programs (*see* Social Services Law § 384-b[7][f]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). Respondent testified that the agency provided her with no referrals. However, her caseworker testified that the agency tried to make referrals and respondent refused to accept them. The court's determination that the caseworker's testimony was credible and respondent's incredible is entitled to deference (*see Matter of Amin Enrique M.*, 52 AD3d 316 [2008]).

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

ENTERED: MAY 26, 2009



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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

635 The People of the State of New York, Ind. 2283/05
Respondent,

-against-

Richard Veneziano,
Defendant-Appellant.

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

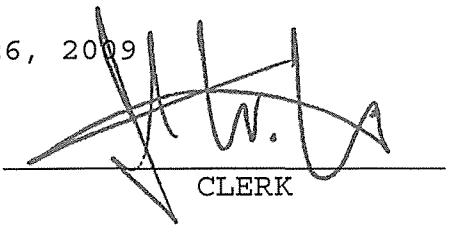
Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 14, 2006, convicting defendant, after a hearing, of violation of probation, and resentencing him to a term of 1⅓ to 4 years, unanimously affirmed.

The court was under no obligation to order a CPL article 730 examination sua sponte (*see People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]). The information before the court concerning defendant's mental condition did not suggest that he was unable to understand the proceedings or assist in his defense.

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

ENTERED: MAY 26, 2009



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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

636 Nicholas Georgiou, Index 8095/05
Plaintiff-Respondent, 85687/06

-against-

32-42 Broadway LLC, et al.,
Defendants,

Liberty Café,
Defendant-Appellant.

[And a Third-Party Action]

Camacho Mauro & Mulholland, LLP, New York (Suzanne M. Lodge of counsel), for appellant.

Richard J. Katz, LLP, New York (Jonathan A. Rapport of counsel), for respondent.

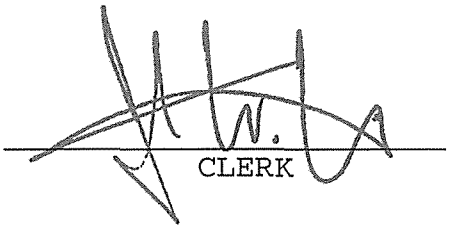
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 23, 2008, which, to the extent appealed from as limited by the brief, denied defendant Liberty Café's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant Liberty Café dismissing the complaint as against it.

Plaintiff in this slip-and-fall case failed to raise a triable issue of fact with respect to whether commercial tenant Liberty Café caused or created, or had constructive notice of, a

dangerous recurring condition (*see DeJesus v New York City Hous. Auth.*, 11 NY3d 889 [2008]; *Casado v OUB Houses Hous. Co. Inc.*, 59 AD3d 272 [2009]).

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

ENTERED: MAY 26, 2009



Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

637 In Juli P.,

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

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

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

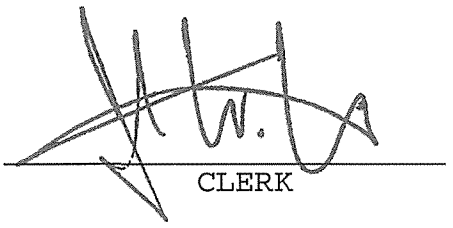
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 28, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously reversed, on the facts and in the exercise of discretion, without costs, the finding of juvenile delinquency and order of conditional discharge vacated and the matter remanded with the direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1).

Imposition of a juvenile delinquency adjudication was an improvident exercise of discretion, because it was not "the least restrictive available alternative" (Family Ct Act § 352.2

[2][a]). Rather, an ACD, with such counseling as Family Court deems appropriate, would adequately serve the needs of appellant and society in this case (*see e.g. Matter of Jeffrey C.*, 47 AD3d 433 [2008], *lv denied* 10 NY3d 707 [2008]). The court acknowledged that there was no need for protection of the community from appellant, that when appellant injured his friend he did so recklessly rather than intentionally, that this incident was an isolated outburst, and that appellant had expressed remorse. Furthermore, the record establishes that appellant had a good school record and home environment, and did not manifest any other behavior problems.

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

ENTERED: MAY 26, 2009



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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

640 Lari Konfidan, Index 20932/06
Plaintiff-Respondent,

-against-

FF Taxi, Inc., et al.,
Defendants-Appellants.

The Sullivan Law Firm, New York (Timothy M. Sullivan of counsel), for appellants.

Law Office of Todd A. Restivo, P.C., Garden City (Todd A. Restivo of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 22, 2008, which, to the extent appealed from, denied so much of defendants' motion for summary judgment as sought dismissal of plaintiff's claims of serious permanent injury to his right shoulder and of 90/180-day injury, unanimously modified, on the law, to grant the portion of the motion seeking dismissal of plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

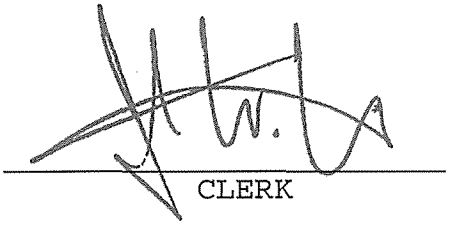
In opposition to defendants' prima facie showing, plaintiff submitted an orthopedic surgeon's arthroscopic report noting repairs made to tears of his labral and anterior labral right shoulder tendons and his treating physician's report, following a recent physical examination, quantifying restrictions in the range of motion of his right shoulder. This evidence constitutes sufficient objective medical proof of the degree of limitation

resulting from the injury to raise an issue of fact whether plaintiff sustained a serious permanent injury to his right shoulder (*see* Insurance Law § 5102[d]; *Toure v Avis Rent-A-Car System*, 98 NY2d 345 [2002]). Defendants failed to raise the issue of a treatment gap in their motion papers and we decline to reach their unpreserved argument.

Plaintiff submitted no medical evidence to substantiate his claim that his injuries precluded him from engaging in substantially all his customary daily activities for 90 of the first 180 days after the accident (*see Dembele v Cambisaca*, 59 AD3d 352, 353 [2009]).

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

ENTERED: MAY 26, 2009



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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

642 The People of the State of New York, Respondent, SCI 64348C/04

-against-

Daniel Pena,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (John Byrne, J. at plea and first sentence; Seth Marvin, J. at re-plea and re-sentence), rendered on or about July 21, 2006, unanimously affirmed.

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

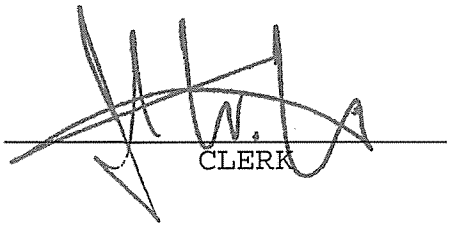
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: MAY 26, 2009



Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

643 Charles LoBianco, Index 114773/05
Plaintiff-Respondent,

-against-

Christopher Lake, et al.,
Defendants-Appellants,

Altec Capital Services, LLC,
Defendant.

Connors & Connors, P.C., Staten Island (Timothy M. O'Donovan of counsel), for appellants.

Diamond and Diamond, LLC, New York (Stuart Diamond of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 2, 2008, which, in an action for personal injuries arising out of a motor vehicle accident, denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing the complaint as against them.

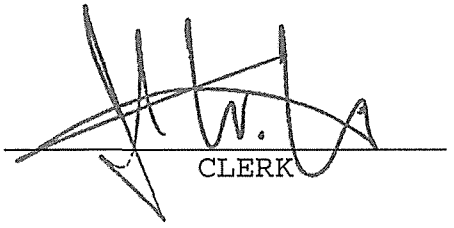
Defendants-appellants made a prima facie showing of entitlement to judgment as a matter law by demonstrating that they were not involved in plaintiff's accident. A nonparty eyewitness and defendant driver both testified that, after plaintiff rear-ended another vehicle, he was no longer on his motorcycle when the motorcycle alone slid across several lanes of

traffic before coming into contact with defendants' truck.

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendants' truck struck plaintiff's body, and plaintiff's speculation as to defendants' alleged negligence was insufficient to raise a triable issue of fact (*see Bernstein v City of New* York, 69 NY2d 1020, 1021-1022 [1987]). Indeed, plaintiff's own deposition testimony indicates that he did not see which vehicle allegedly struck him after his initial collision, and that he only saw defendants' truck parked on the side of the road after the accident. Furthermore, plaintiff's affidavit, in which he states that defendants' truck struck him after going through a red light, is insufficient to defeat defendants' motion, as it contradicts his deposition testimony and denotes an effort to avoid the consequences of his earlier testimony (*see e.g. Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

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

ENTERED: MAY 26, 2009



Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

644 Derrick Ray, et al., Index 102868/04
Plaintiffs-Respondents-Appellants,

-against-

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

[And a Third-Party Action]

Frank H. Wright & Associates, P.C., New York (Frank H. Wright of counsel), for appellants-respondents.

Antin, Ehrlich & Epstein, P.C., New York (Anthony V. Gentile of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered February 29, 2008, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1), and granted defendants' motion for summary judgment to the extent it sought to dismiss the section 200 claim and denied the motion to the extent it sought to dismiss the section 240(1) claim, unanimously modified, on the law, to grant plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1), and otherwise affirmed, without costs.

Plaintiff Derrick Ray was injured when he was struck by an 8,000-pound steel beam approximately 60 feet long and 2 to 3 feet thick as it was being lowered into place atop 2 25-foot-high steel towers. Various witnesses testified that the beam came

toward plaintiff at an angle and was moving up and down as well as side to side. The undisputed testimony was that the tag line men on plaintiff's side of the beam could not control the swing of the beam. The crane operator estimated that the beam moved up and down a foot or a foot and a half. The court correctly found that the accident involved an elevation-related risk within the meaning of Labor Law § 240(1) (*see Brown v VJB Constr. Corp.*, 50 AD3d 373, 376 [2008]; *see also Hawkins v City of New York*, 275 AD2d 634, 634-635 [2000]; *Moller v City of New York*, 43 AD3d 371 [2007]).

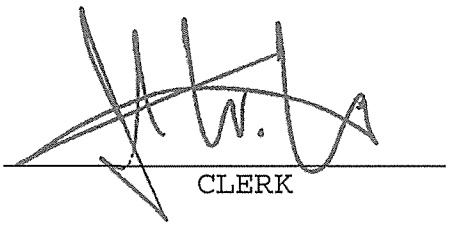
However, the court incorrectly found that summary judgment in plaintiffs' favor was precluded by an issue of fact as to how the accident occurred. Since plaintiff's injuries were attributable at least in part to defendants' failure to provide proper protection as mandated by the statute, his motion for summary judgment on the issue of liability thereunder should have been granted (*see Cammon v City of New York*, 21 AD3d 196, 201 [2005]). After the barge on which the crane and the beam were situated was struck by waves and caused to rock, the motion was transmitted to the beam, causing it to "jump around." Plaintiff's injuries resulted from the inability of the tag men on plaintiff's side to steady the beam as the crane operator tried to lower it onto the towers. In addition, the scaffold was defective insofar as plaintiff's foot became ensnared between the

wood planks of its platform. That it is unclear from the record whether plaintiff had a tie line or a lifeline does not preclude partial summary judgment in his favor, since his injury was at least partly attributable to the defects in the hoisting equipment and the scaffold.

The Labor Law § 200 and common-law negligence claims were properly dismissed since the evidence showed that neither the owner nor the construction manager exercised the requisite degree of supervision or control over the work giving rise to plaintiff's injury (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

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

ENTERED: MAY 26, 2009



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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

645N-
645NA In re Yolanda Strong, Index 406141/07
Petitioner-Respondent,

-against-

The New York City Department of Education,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellant.

Yolanda T. Strong, respondent pro se.

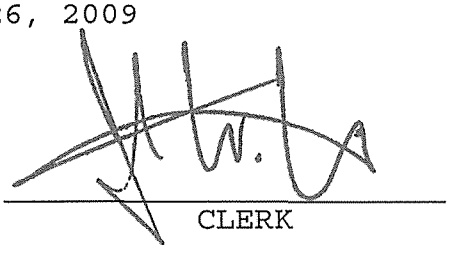
Order and judgment (one paper), Supreme Court, New York County (Leland G. DeGrasse, J.), entered August 19, 2008, which granted petitioner's application to annul the determination of respondent Department of Education terminating petitioner's probationary employment as a per diem substitute teacher, unanimously reversed, on the law, without costs, the application denied and the petition dismissed. Appeal from order, same court (Walter B. Tolub, J.), entered August 19, 2008, which, insofar as appealed from, denied respondent's motion to reargue, unanimously dismissed, without costs.

The proceeding is time-barred as it was commenced more than four months after respondent informed petitioner of its determination that she had violated its regulations by using force as a disciplinary technique, and that her name would "remain on the Ineligible Inquiry list, terminating [her]

services with [respondent]" (CPLR 217[1]). Petitioner's time to commence the proceeding was not extended by her administrative appeal of this determination (*Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 766-767 [1988]). In any event, respondent's finding that petitioner engaged in corporeal punishment is not arbitrary and capricious (*see Von Gizycki v Levy*, 3 AD3d 572, 574 [2004]), and the finding of the Unemployment Insurance Appeal Board that petitioner did not engage in corporeal punishment lacks preclusive effect (Labor Law § 623[2]; *Wooten v New York City Dept. of Gen. Servs.*, 207 AD2d 754, 754 [1994], *lv denied* 84 NY2d 813 [1995]).

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

ENTERED: MAY 26, 2009



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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

646N Martin Bernstein, et al., Index 106655/07
Plaintiffs-Appellants,

-against-

Beresford Apartments, Inc.,
Defendant,

Robert Weinstein,
Defendant-Respondent.

Horing, Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellants.

McGuireWoods LLP, New York (Marshall Beil of counsel), for respondent.

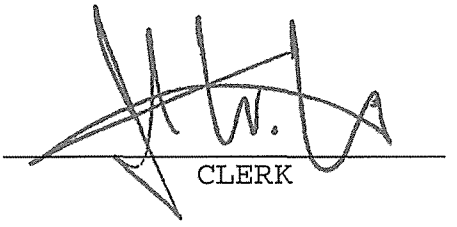
Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered August 1, 2008, which denied plaintiffs tenants' motion to compel defendant tenant's performance of a stipulation of settlement to soundproof portions of his apartment, with leave to plaintiffs to resume prosecution of this action for breach of the warranty of habitability and injunctive relief as if there were no stipulation, unanimously affirmed, without costs.

The motion was properly denied on the ground that defendant tenant's remaining performance obligations under the stipulation to soundproof portions of his apartment were expressly conditioned on an event that did not occur, namely, defendant coop's "rapid agreement" to other work he wanted to do in his apartment, and implicitly conditioned on plaintiffs' acceptance of defendant tenant's soundproofing plans, which was never given

(*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). We have considered plaintiffs' other arguments, including that defendant tenant's soundproofing plans did not include portions of his apartment covered by the stipulation, and find them unavailing.

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

ENTERED: MAY 26, 2009



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

647 In re Ronald S.,
Petitioner-Appellant,

-against-

Deirdre R.,
Respondent-Respondent.

Randall S. Carmel, Syosset, for appellant.

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

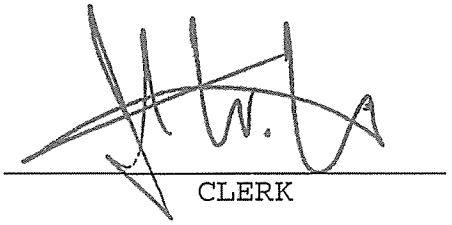
Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about December 20, 2007, which, in a proceeding pursuant to article 6 of the Family Court Act, dismissed without prejudice the petitions for modification of an order of visitation, unanimously affirmed, without costs.

The petitions for a modification of the order of visitation based on a change of circumstances were properly dismissed since petitioner has not alleged a material change of circumstances, but instead seeks to relitigate old allegations from prior proceedings (*see Matter of King v King,* 266 Ad2d 546, 547 [1999]). Petitioner was not automatically entitled to a hearing, as he failed to make an evidentiary showing sufficient to warrant it (*see e.g. Matter of Timson v Timson,* 5 AD3d 691 [2004]). Furthermore, contrary to petitioner's contention, the referee did not deny him visitation without ordering an evidentiary hearing.

Rather, she simply refused to modify the visitation order, which remains in effect, in petitioner's favor.

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

ENTERED: MAY 26, 2009



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

650-
650A-
650B-
650C The People of the State of New York,
Respondent,

-against-

Melic Bradford,
Defendant-Appellant.

Ind. 1324/07
2279/07
3092/07
3330/07

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

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgments, Supreme Court, New York County (Rena K. Uviller, J.), rendered December 13, 2007, convicting defendant, upon his pleas of guilty, of assault in the first degree, robbery in the first degree, criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of 18 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his guilty pleas to assault in the first degree and robbery in the first degree without assigning new counsel in connection with the motion, after sufficient inquiry wherein defendant was afforded a reasonable opportunity to present his contentions (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes that defendant knowingly,

intelligently, and voluntarily pleaded guilty (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). With regard to the pleas at issue, defendant stated, without elaboration, that his "lawyer insisted that I take it. I really didn't want to take it." Under these circumstances, and given that defendant concedes on appeal that counsel did not act improperly in any respect, the court was not required to assign new counsel. Counsel negotiated a plea whereby defendant received a favorable disposition involving four separate crimes that were increasingly serious, culminating in the shooting that left defendant's victim paralyzed.

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]).

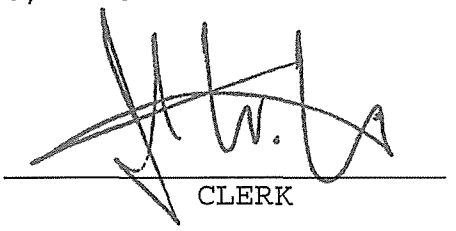
We perceive no basis for reducing the sentences.

M-1997 ***People v Melic Bradford***

Motion seeking leave to hold appeal in abeyance denied.

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

ENTERED: MAY 26, 2009



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

654 The People of the State of New York, Ind. 1437/07
Respondent,

-against-

Jimmy Hogans,
Defendant-Appellant.

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

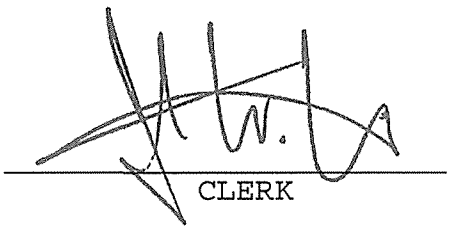
Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 12, 2008, convicting defendant, after a jury trial, of three counts of burglary in the third degree and three counts of petit larceny, and sentencing him to an aggregate term of 1 to 3 years, unanimously affirmed.

We need not determine whether the statements defendant made to a detective and to his employer should have been suppressed, as any error in receiving the statements was harmless.

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

ENTERED: MAY 26, 2009



CLERK

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

655 In re Evelyse Luz S.,

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

Jose S.,
Respondent-Appellant,

St. Dominic's Home,
Petitioner-Respondent.

Susan Jacobs, The Center for Family Representation, Inc., New York (Michele Cortese of counsel), for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose LLP, New York (Nathaniel M. Glasser of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about October 17, 2007, which, upon a finding that respondent father's consent was not required for the adoption of the subject child, committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously reversed, on the facts and as a matter of discretion, without costs, and the matter remanded for a new hearing in accordance herewith to be conducted as expeditiously as reasonably possible.

The evidence did not support a finding that it was in the child's best interests to be adopted by the foster mother, and

the matter should be remanded for a new hearing. The record shows that the child's paternal grandmother is 50 years old and lives in a stable home, which was certified as a suitable kinship foster home. The grandmother cared for the child shortly after birth and the only reason the child was taken from her was because of the agency's concern that she would be unable to care for the child while recuperating from hip surgery. During this time, the agency did not attempt to assist the grandmother, who was incapacitated and physically unable to go to the agency, nor did it take any action to strengthen the relationship.

The grandmother testified that she called the agency on a regular basis following her surgery but no one returned her calls. On the one occasion when she spoke to the supervisor assigned to the case, she was told to speak to the biological mother. The grandmother also testified that she had been led to believe that she would have in-home visits with the child during her period of recuperation, but the agency did not return her calls. Notably, Family Court made no findings with respect to the grandmother's testimony and we cannot conclude it should be disregarded. While the agency and law guardian fault the grandmother for not writing or personally coming to the agency, it was not unreasonable for the grandmother to believe that she only had to telephone the agency to reinstitute visits particularly since she could only walk with the assistance of a

home health care attendant. Once contact was re-established with the agency, the grandmother regularly visited with the child.

Furthermore, although it is understandable that following placement in foster care, the child, who is young, became bonded to the foster mother, who admittedly took good care of her and tended to her special needs, this does not undermine the fact that the child has biological relatives, who are capable of caring for her and have consistently expressed a desire that she remain in the grandmother's care.

In *Matter of Wesley R.* (307 AD2d 360 [2003]), on similar but not identical facts, the Second Department noted that "[t]he central problem . . . is determining whether this short-term trauma [of removing the child from foster care] would have a lasting impact, and whether it would be more than compensated for by the long-term advantages that the child would experience for the remainder of his life as the result of unification" with his biological relatives (*id.* at 361-362). The Court found that under the circumstances, and in light of the passage of time occasioned by the delay inherent in perfecting the appeal, and the pace of the psychological development of the child whose best interests were the primary concern, the record was not sufficient to determine the ultimate issues presented. Accordingly, it found that a new hearing was necessary, addressed to the ultimate question of what arrangement was best for the child in light of

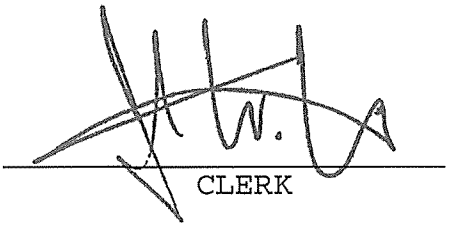
his current conditions (*id.* at 364).

As in *Wesley*, we conclude that Family Court should have considered whether any short-term "trauma" is outweighed by the potential long-term benefit of the child remaining with her grandmother, who asserts that she will ensure that the child maintains ties with her siblings, who reside with the maternal grandmother, and with her foster family. Because the record contained no independent expert testimony on this question, this matter is remanded for a new hearing. We express no opinion on the ultimate issue of the appropriate disposition and we do not limit the evidence to such expert testimony.

To the extent our ruling differs from the prior decision rendered on the mother's appeal from the same order of disposition (*see Matter of Evelyse Luz S.*, 57 AD3d 329 [2008]), we are not bound by that decision given that respondent father's appeal was not before us.

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

ENTERED: MAY 26, 2009



CLERK

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

656 Kisha Mickens, et al., Index 17260/06
Plaintiffs-Appellants,

-against-

Omar Khalid, et al.,
Defendants-Respondents.

Belovin & Franzbalu, LLP, Bronx (David A. Karlin of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 18, 2007, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury, and denied plaintiffs' cross motion for partial summary judgment on the issue of liability as moot, unanimously affirmed, without costs.

Defendants met their prima facie burden through the submission of affirmed reports of their neurologist, orthopedist and radiologist which showed that the injured plaintiff Mickens did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident (*see Franchini v Palmieri*, 1 NY3d 536 [2003]; *Dembele v Cambisaca*, 59 AD3d 352 [2009]; *Brown v Achy*, 9 AD3d 30,31 [2004]). In opposition, Mickens failed to raise a triable issue of fact.

While Mickens's treating orthopedist performed range of

motion tests 17 months after the accident and found that her left knee flexed only to 130 degrees, he did not compare that flexion to normal range. Nor did he explain the significance of his findings, or provide a sufficient description of the qualitative nature of the limitations based on the normal function and use of the knee (*see Gorden v Tibulcio*, 50 AD3d 460, 464 [2008]; *Otero v 971 Only U, Inc.*, 36 AD3d 430, 431 [2007]; *Vasquez v Reluzzo*, 28 AD3d 365, 366 [2006]).

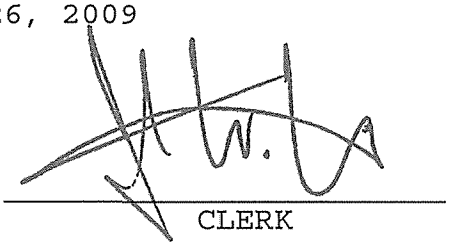
Furthermore, Dr. Kramer's opinion that Mickens sustained a torn meniscus, is not supported by objective medical evidence. He also did not explain the basis for his conclusion that Mickens's condition was causally related to the accident. His conclusory statement was not sufficient to establish the necessary causation (*see Migliaccio v Miruku*, 56 AD3d 393 [2008]; *Smith v Brito*, 23 AD3d 273 [2005]). Nor did Dr. Kramer rebut defendants' radiologists finding that plaintiff had a "[d]evelopmental abnormality of the patellofemoral compartment" (*see Reyes v Esquilin*, 54 AD3d 615 [2008]).

Plaintiffs' claim that Kisha Mickens was unable to perform her usual and customary activities during the 90/180 day period

is not supported by objective medical proof (*see Valentin v Pomilla*, 59 AD3d 184, 186-187 [2009]; *Taylor v Vasquez*, 58 AD3d 406, 407 [2009]; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]). Furthermore, their claim is at odds with that asserted in the bill of particulars.

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

ENTERED: MAY 26, 2009



CLERK

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

657 Carlos-Cesar Garcia, Index 108964/02
Plaintiff-Appellant,

-against-

Maria Puccio, etc., et al.,
Defendants-Respondents.

Thomas & Associates, Brooklyn (Irene Donna Thomas of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered May 5, 2008, granting defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On a prior appeal in this action (17 AD3d 199 [2005]), we found that plaintiff, a teacher, stated a cause of action for defamation where he alleged that defendant Puccio told a student's parent that plaintiff had been accused of corporal punishment before. We noted that defendants' claims of truth and qualified privilege were affirmative defenses to be raised in the answer and that "[d]efendants may then move for summary judgment on any such defense available to them and, upon their making a prima facie showing of truthfulness or qualified privilege, the burden would shift to plaintiff" (*id.* at 201).

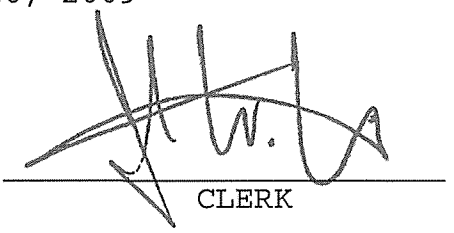
Defendants' summary judgment motion included Ms. Puccio's

unequivocal denial of making the subject statement, establishing a prima facie showing of a lack of the requisite publication of a defamatory statement (*see Parker v Cox*, 306 AD2d 55 [2003]; *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 298 [1999]). In opposition, plaintiff failed to establish a triable issue of fact as to whether the alleged statement was made and published (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Rather, plaintiff offered only hearsay, i.e., an out-of-court statement by the parent's mother that Ms. Puccio had made the alleged statement. The statement by the mother that Ms. Puccio made the statement was offered for its truth (i.e., that Ms. Puccio had made the statement). The only statement Ms. Puccio admitted making, that she told the parent that there were "problems" or "problemas" with plaintiff, was a true statement made in response to a direct question, without any elaboration, was not susceptible of a defamatory meaning and did not constitute defamation (*see Dillon v City of New York*, 261 AD2d 34, 38 [1999]). In any event, the statement would be protected by a qualified privilege, having been made by a high school

principal to a student's parent who had a common interest in the subject matter of the conversation (*see Garcia v Puccio*, 17 AD3d at 201; *Hoesten v Best*, 34 AD3d 143, 157-158 [2006]).

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

ENTERED: MAY 26, 2009



CLERK

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

658 The People of the State of New York, Respondent, Ind. 6459/03

-against-

John McCray, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Order, Supreme Court, New York County (Charles J. Tejada, J.), entered on or about March 4, 2008, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law article 6-C), unanimously affirmed, without costs.

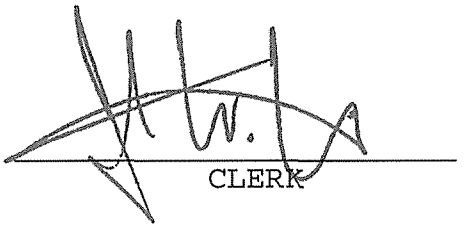
Defendant was properly assessed 20 points under the risk factor for continuing course of sexual misconduct, since, in his plea allocution, defendant admitted engaging in such conduct "on a number of occasions," during a six-month period, and "[f]acts . . . elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated" (Correction Law § 168-n[3]).

Defendant's claim relating to another risk factor is

improperly raised for the first time on appeal (*see* CPLR 4017, 5501[a][3]; Correction Law § 168-n [3]; *People v Hernandez*, 44 AD3d 565 [2007], *lv denied*, 10 NY3d 708 [2008]). In any event, the additional points at issue are not necessary for a finding that defendant is a level three sex offender.

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

ENTERED: MAY 26, 2009



CLERK

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

659 The People of the State of New York, Ind. 6099/03
Respondent,

-against-

Darryl Jones,
Defendant-Appellant.

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

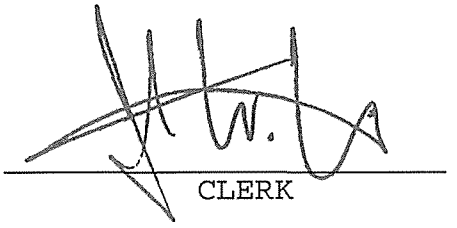
Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki A. Scherer, J. at plea; Edward J. McLaughlin, J. at sentence), entered July 19, 2005, convicting defendant of sodomy in the second degree, and sentencing him, as a persistent felony offender, to a term of 15 years to life, unanimously affirmed.

The sentencing court properly exercised its discretion in adjudicating defendant a persistent felony offender, and that adjudication was not unconstitutional (*see People v Quinones*, 12 NY3d 116 [2009]).

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

ENTERED: MAY 26, 2009



CLERK

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

660-
660A Alice Delacruz, Index 14302/01
Plaintiff-Appellant,

-against-

Port Authority of New York and
New Jersey, et al.,
Defendants-Respondents.

Franzblau Dratch, P.C., New York (Brian M. Dratch of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains (Helmut Beron of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered March 24, 2008, upon a jury verdict awarding plaintiff $11,148 for past lost wages and $25,000 for past pain and suffering, and nothing for future lost wages or pain and suffering, and defendants' stipulation to increase the award for past pain and suffering to $75,000, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 26, 2008, to the extent it denied in part plaintiff's post-trial motion with respect to the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The stipulated increase in damages for past pain and suffering, undertaken at the court's urging and as an alternative

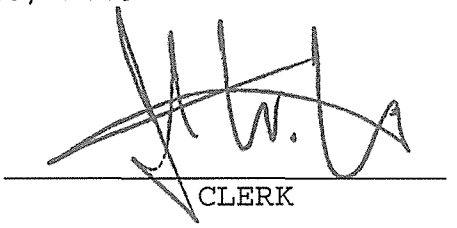
to a new trial, was warranted (*see Newman v Aiken*, 278 AD2d 115 [2000]). In reviewing plaintiff's motion to set aside the award of past pain and suffering, Supreme Court employed the "deviates materially from reasonable compensation" test specified by CPLR 5501(c). That statute provides the Appellate Division with the power to review a damages verdict under that standard; it does not expressly provide Supreme Court with similar review power. Whether Supreme Court was authorized to review the award for past pain and suffering under the standard provided by CPLR 5501(c) or was required to review the award under a more restricted standard, e.g. "shocks the conscience" (*compare Ashton v Bobruitsky*, 214 AD2d 630 [1994]; *Prunty v YMCA of Lockport, Inc.*, 206 AD2d 911 [1994] and *Cochetti v Gralow*, 192 AD2d 974 [1993], *with Lauria v New York City Dept. of Environmental Protection*, 152 Misc 2d 543 [1991]; *see Siegel, NY Practice* § 407 [4th ed]), is an issue we need not decide. Under our own review pursuant to CPLR 5501(c), we conclude that the jury's award for past pain and suffering of $25,000 deviates materially from reasonable compensation, and that, as Supreme Court found, $75,000 is reasonable compensation (*see generally Donatiello v City of New York*, 301 AD2d 436 [2003]).

The jury, after assessing the parties' competing expert medical testimony and viewing surveillance video of plaintiff, reasonably denied future damages, concluding that plaintiff's

present back and knee injuries were related to her weight and degenerative changes, and that she had seemingly made a full recovery from any injury suffered by reason of defendants' negligence (*see Mejia v JMM Audubon*, 1 AD3d 261, 262 [2003]). Furthermore, she was looking for work (*see O'Brien v Barretta*, 44 AD3d 731, 732 [2007]), and had resumed full daily activities.

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

ENTERED: MAY 26, 2009



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

661 Redeemed Christian Church of God Tabernacle of Restoration, Plaintiff-Appellant, Index 20616/06

-against-

Franciscan Green, et al., Defendants-Respondents.

Law Offices of Victor N. Okeke, P.C., Bronx (Victor N. Okeke of counsel), for appellant.

Goldberg, Scudieri, Lindenberg & Block, P.C., New York (David G. Scudieri of counsel), for respondents.

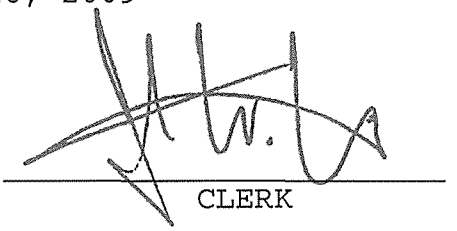
Appeal from order, Supreme Court, New York County (Norma Ruiz, J.), entered February 5, 2008, which, to the extent appealed from, in this action for specific performance of a contract for the sale of real property, denied plaintiff's motion pursuant to CPLR 3211(a)(4) to dismiss a related holdover proceeding in Civil Court or, in the alternative, to stay the holdover proceeding or to consolidate it with this action, and awarded defendants, sua sponte, use and occupancy, unanimously dismissed, without costs, as academic.

It is undisputed that on February 28, 2008, the Civil Court entered a default judgment against plaintiff in the related holdover proceeding. As such, that proceeding has concluded, thereby rendering moot the portion of this appeal addressing it. The appeal is also moot to the extent it addresses the motion court's sua sponte grant of use and occupancy to defendants.

Since defendants never settled an order on that decision, as directed by the motion court, it was abandoned and never took effect (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.48(b)]).

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

ENTERED: MAY 26, 2009



CLERK

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

662 Prospect Owners Corp., Index 604112/02
Plaintiff-Respondent,

-against-

Gloria Sandmeyer, et al.,
Defendants-Appellants.

John A. Stichter, New York, for appellants.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Cory L. Weiss of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered December 26, 2007, which, inter alia, after a nonjury trial, declared that defendants' use of the south side of the lower roof of the building in which they are tenants was pursuant to a revocable license, unanimously affirmed, without costs.

The trial court correctly found that defendants' right to the use of the roof space adjacent to the 22nd floor portion of their duplex apartment (the south roof) was not, as they contend, governed by their lease, which did not include the south roof in the demised premises, but was pursuant to a license. "Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor" (*American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1994]). The trial evidence established that defendants' use

of the south roof has not been exclusive. Plaintiff, through its agents, has had access to the south roof throughout the years to perform routine maintenance, make roof repairs, gain access to elevator shafts, clean drains, and repair, paint, and maintain the "Tudor City" sign located on the roof. Similarly, the restaurant located on the ground floor of the building has had regular access to the area of the south roof in which its machinery is stored. Both enter the south roof space without defendants' consent. While plaintiff indeed permitted defendants to use the space, its acquiescence did not create a right in them (*see Ancess v Trebuhs Realty Co.*, 18 AD2d 118, 199 [1963], *affd* 16 NY2d 1031 [1965]) but was revocable at will (*see Jossel v Filicori*, 235 AD2d 205, 206 [1997]; *American Jewish Theatre*, 203 AD2d at 156; *Matter of Realty Trade Corp. v City Rent & Rehabilitation Admin.*, 52 Misc 2d 318 [1966]).

Defendants contend that extrinsic evidence of a 48-year course of conduct, including their use of the south roof to the exclusion of all other tenants for a variety of uses continuously throughout that period, plaintiff's failure ever to expressly tell them not to use the space and its alleged acknowledgment and implicit approval of their use thereof, establishes that the parties intended that the demised premises include the south roof from the inception of the lease. However, since the lease and the renewal leases make no reference to defendants' right to use

that space, there is no ambiguity as to whether the space is included in the leased premises (*Matter of Davis v Dinkins*, 206 AD2d 365, 366-367 [1994], *lv denied* 85 NY2d 804 [1995]), and extrinsic evidence may not be considered (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]; *see also Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). In any event, given the evidence that the only direct access to the south roof from the apartment is through a window, while the upper terrace is accessible through a door and is undisputedly part of the leased premises, that the co-op conversion offering plan made no reference to the south roof in connection with defendants' apartment, while the upper terrace was expressly included in the shares allotted to that apartment, and that the corresponding roof area that abuts the apartment on the north end of the building is undisputedly a public area, the only reasonable conclusion is that the parties did not intend the south roof to be included in the leased premises.

The south roof is not an appurtenance to defendants' apartment that may be revoked only at the termination of the lease, since its use is neither essential nor reasonably necessary to defendants' full beneficial use and enjoyment of the apartment (*see Blenheim LLC v Il Posto LLC*, 14 Misc 3d 735, 740 [2006] [citing 1 Dolan, Rasch's Landlord & Tenant - Summary Proceedings § 7:5]). Defendants use the south roof primarily for

recreational and storage purposes, for which there exist alternative premises (*see id.* at 741; *Oberfest v 300 W. End Ave. Assoc.*, 34 Misc 2d 963, 965 [1962]; *Mammy's Inc. & Pappy's Inc. v All Continent Corp.*, 106 NYS 2d 635 [1951]).

Nor have defendants acquired the right to exclusive use of the south roof through adverse possession, since they have had an ongoing landlord-tenant relationship with plaintiff or its predecessors since 1952 (*see* RPAPL 531; CPLR 212[a]; *Ley v Innis*, 149 AD2d 366 [1989], *lv dismissed* 74 NY2d 841 [1989]). In any event, it was established that defendants' possession of the south roof has not been exclusive, and the evidence on which defendants rely to support their argument that plaintiff acquiesced in their use and possession of the south roof defeats any claim that their possession was hostile, adverse, or under a claim of right (*see Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996]; *10 E. 70th St. v Gimbel*, 309 AD2d 644, 645 [2003]).

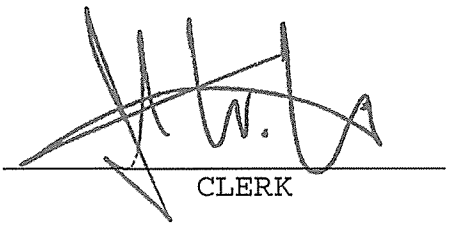
Finally, we note that, to the extent defendants seek to claim a rent reduction based on plaintiff's failure to maintain the south roof as a "required service" under their lease (*see* Rent Stabilization Code [9 NYCRR] § 2520.6[r][3]; §§ 2523.4[a][1], [e][19]), the proper forum for such a claim in the first instance is the Division of Housing and Community Renewal

(*see e.g. Meirowitz v New York State Div. of Hous. & Community Renewal*, 28 AD3d 350 [2006], *lv denied* 7 NY3d 718 [2006]; *Matter of Llorente v New York State Div. of Hous. & Community Renewal*, 16 AD3d 105 [2005]).

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

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

ENTERED: MAY 26, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
James M. McGuire
Karla Moskowitz
Leland G. DeGrasse
Helen E. Freedman, JJ.

4504
Index 603545/05

x

Security Mutual Life Insurance Company
of New York,
Plaintiff-Respondent,

-against-

Lucy Rodriguez, et al.,
Defendants-Appellants.

x

Defendants appeal from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered December 7, 2007, which denied their motion to dismiss the complaint.

Kramer Levin Naftalis & Frankel LLP, New York (Stephen M. Sinaiko, David S. Frankel and Erin E. Oshiro of counsel), for appellants.

Clifford Chance US LLP, New York (Anthony M. Candido and Valeria Calafiore of counsel), for respondent.

McGUIRE, J.

In October 2003 defendants Lucy Rodriguez and Esmail Mobarak, Rodriguez's son, purchased three life insurance policies with an aggregate benefit of $20 million from agents of plaintiff Security Mutual Life Insurance Company. The policies were issued on Rodriguez's life and Mobarak is the beneficiary under each policy. Each policy contains an incontestability clause that precludes plaintiff from challenging the policy "after it has been in force, during the Insured's lifetime, for two years from the earlier of its Policy Date or Issue Date." The parties agree that, the earlier of these dates, the Policy Date, is October 1, 2003.

In July 2004 the New York County District Attorney's Office commenced a civil forfeiture proceeding against the agents of Security from whom defendants purchased the policies. The District Attorney alleged that the agents had engaged in fraudulent conduct relating to the issuance of life insurance policies by another carrier, Prudential Financial Company. In September 2004 Security notified defendants that the agents were no longer authorized to conduct business on behalf of plaintiff or take any action concerning policies issued by plaintiff. The agents pleaded guilty in May 2005 to insurance fraud crimes with respect to the issuance of life insurance policies by Prudential.

On Monday October 3, 2005, plaintiff commenced this action against defendants seeking rescission of the policies and damages for fraud. Plaintiff alleged that defendants, in conjunction with the agents, fraudulently procured the policies by providing false and misleading financial and medical information about Rodriguez to plaintiff. Defendants moved to dismiss the complaint on the ground that the incontestability clause barred the action because the policies became incontestable after Saturday October 1, 2005 and the action was not commenced until two days later. Alternatively, defendants sought dismissal of the rescission claim on the ground that plaintiff waived its right to rescind the policies because it accepted premium payments after commencing the action, and dismissal of the fraud claims on the ground that plaintiff failed to plead the alleged fraud with sufficient detail. Plaintiff opposed the motion, arguing that because the date on which the policies became incontestable fell on a Saturday, the action was commenced in a timely fashion on the next business day; it did not waive its rescission claim by accepting premium payments; and its fraud claims were pled with sufficient detail. Supreme Court denied defendants' motion, and this appeal ensued.

Defendants argue that the policies became incontestable after October 1, 2005; the statutory provision dealing with

certain contractual deadlines falling on weekends and public holidays, General Construction Law § 25, does not apply so as to extend plaintiff's time to contest the policies; and plaintiff's action, commenced on October 3, thus is barred by the incontestability clause. Plaintiff counters that because Insurance Law § 3203(a)(3) requires the inclusion of the incontestability provision in the policies,[1] General Construction Law § 25-a, which governs statutory deadlines falling on weekends and public holidays, extended its time to contest the policies to Monday October 3. Alternatively, plaintiff argues that even if General Construction Law § 25-a does not apply, § 25 applies in

---

[1]Insurance Law § 3203 ("Individual life insurance policies; standard provisions as to contractual rights and responsibilities of policyholders and insurers") provides, in relevant part, that:

> "(a) All life insurance policies, except as otherwise stated herein, delivered or issued for delivery in this state, shall contain in substance the following provisions, or provisions which the superintendent deems to be more favorable to policyholders:
>
> (3) that the policy shall be incontestable after being in force during the life of the insured for a period of two years from its date of issue, and that, if a policy provides that the death benefit provided by the policy may be increased, or other policy provisions changed, upon the application of the policyholder and the production of evidence of insurability, the policy with respect to each such increase or change shall be incontestable after two years from the effective date of such increase or change, except in each case for nonpayment of premiums or violation of policy conditions relating to service in the armed forces."

any event.

General Construction Law § 25, entitled "Public holiday, Saturday or Sunday in contractual obligations; extension of time where performance of act authorized or required by contract is due on Saturday, Sunday or public holiday," states, in relevant part, that:

> "Where a contract by its terms authorizes or requires ... the performance of a condition on a Saturday, Sunday or a public holiday, or authorizes or requires ... the performance of a condition within or before or after a period of time computed from a certain day, and such period of time ends on a Saturday, Sunday or a public holiday, unless the contract expressly or impliedly indicates a different intent, such ... condition [may be] performed on the next succeeding business day ... with the same force and effect as if made or performed in accordance with the terms of the contract."[2]

General Construction Law § 25-a, entitled "Public holidays, Saturday or Sunday in statutes; extension of time where performance of act is due on Saturday, Sunday or public holiday," states that:

> "When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day ..., except that where a

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[2]The statute also applies to extend to the next succeeding business day a party's time to make a payment of money authorized or required by a contract. That provision is not relevant to this appeal.

> period of time specified by contract ends on a Saturday, Sunday or a public holiday, the extension of such period is governed by section twenty-five of this chapter."

At first blush, the statutes appear to be unproblematic and to govern two distinct situations. General Construction Law § 25-a extends to the next succeeding business day a party's time to perform any act authorized or required to be performed before a particular period of time where that period ends on a Saturday, Sunday or public holiday, unless the period of time is specified in a contract. Thus, § 25-a provides that "where a period of time specified by contract ends on a Saturday, Sunday or a public holiday, the extension of such period is governed by section twenty-five of this chapter." General Construction Law § 25,[3] in turn, extends to the next succeeding business day a party's time to perform a contractual "condition" when the period in which performance is due ends on a weekend or public holiday. Thus, § 25-a broadly allows for an extension of "any period of time ... within which or after which or before which an act is authorized

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[3]The statute does not apply where the contract expressly or impliedly indicates an intent that the condition must be performed by the end of the period of time regardless of whether that period ends on a Saturday, Sunday or public holiday (*see Jessar Realty Corp. v Friedman Realty Co.*, 253 NY 298 [1930]). Neither plaintiff nor defendants assert that this exception to the statute applies.

or required to be done" when that period ends on a weekend or a public holiday. By contrast, albeit implicitly, § 25 permits an extension of time *only* where the party seeking the extension was authorized or required to perform a "condition" of a contract and the last day of the period of time to perform that condition ends on a weekend or public holiday.[4]

Here, the relevant period of time is recited in the policies, so General Construction Law § 25 would seem to apply and an extension would be available only if the commencement of an action contesting the policies was a "condition" under the policies. But the incontestability clause in the policies is mandated by a statute, Insurance Law § 3203(a)(3); if plaintiff had omitted the clause from the policies it would be deemed part of the policies as though written into them (*see Trizzano v Allstate Ins. Co.*, 7 AD3d 783, 785 [2004], *lv denied in part and dismissed in part*, 3 NY3d 696 [2004]; 2 Couch on Insurance 3d § 19:1 ["Existing and valid statutory provisions enter into and form a part of all contracts of insurance to which they are applicable, and, together with settled judicial constructions

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[4]Reading the two statutes together, § 25 precludes an extension of time when a period of time specified in a contract ends on a Saturday, Sunday or public holiday but the contract does not authorize or require the performance of a "condition." After all, a contrary reading of § 25 would render it superfluous as it would perform no function not already performed by § 25-a.

thereof, become a part of the contract as much as if they were actually incorporated therein"] [internal footnotes omitted]). Thus, if General Construction Law § 25 governs, an anomalous result would follow: an insurer that complies with the law and includes in its life insurance policies the clause it is required by law to include will have a shorter period of time in which to contest the policies than it would have if it omitted the clause from the policies.

That anomaly is not required by the literal terms of § 25 or § 25-a. That is, neither statute purports to state the governing rule when a period of time within which an act is authorized or required is specified *both* in a statute *and* in a contract. Nor is this anomaly required by the case law. As we have held, "[w]hen a provision of an insurance policy mirrors statutory language ... the policy clause is subject to the same interpretation as the statute" (*Matter of Country Wide Ins. Co. [Russo]*, 201 AD2d 368, 370 [1994]). *Country Wide* is consistent with *Metropolitan Life Ins. Co. v Schmidt* (299 NY 428 [1949]), in which the Court determined that the incontestability clause of a policy must be interpreted in the same manner as the language of the statute requiring the clause (*id.* at 432 ["the language of the policy provision which was copied from the statute, is statutory language, and as such, is subject to the General

Construction Law, since there is nothing in the general object or context of the Insurance Law provision to indicate that a different meaning or application was intended from that required to be given by section 20 of the General Construction Law"]). Thus, General Construction Law § 25-a applies to the period of time plaintiff had to contest the policies and extended the end of that period to October 3, and plaintiff's action is not barred by the incontestability clause.[5]

With respect to defendants' contention that plaintiff waived the right to rescind the policies, "[w]here an insurer accepts

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[5]The parties vigorously dispute whether the commencement of an action contesting the policies is a "condition" within the meaning of General Construction Law § 25. Defendants maintain that the word "condition" should be given its technical meaning under contract law -- "'an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due'" (*Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 112 [1984], quoting Restatement, Contracts 2d § 224; *see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). According to defendants, the commencement of an action contesting the policies is not a "condition" under the policies because it is not an event that must occur before performance by defendants under the policies becomes due, and the extension afforded by § 25 is not available to plaintiff. Plaintiff asserts that the word "condition" should not be given that technical meaning (*see Harrison v Allstate Ins. Co.*, 1999 WL 638243 [SD NY 1999]). Thus, plaintiff contends that the word should be given a broad construction and that, under § 25, "contractual 'conditions' encompass contractual requirements -- such as the one at issue here -- that determine whether a party must make future performance (i.e., here, whether [plaintiff] must perform on a fraudulently induced policy)." Because General Construction Law § 25-a applies, however, we need not address this dispute.

premiums after learning of an event allowing for cancellation of the policy, the insurer has waived the right to cancel or rescind" (*Continental Ins. Co. v Helmsley Enters.*, 211 AD2d 589 [1995]; *see Bible v John Hancock Mut. Life Ins. Co.*, 256 NY 458 [Cardozo, Ch. J. 1931]; *see also Johnson v Mutual Benefit Health & Acc. Assn of Omaha, Neb.*, 5 AD2d 103, 107 [1957], *mod on other grounds* 5 NY2d 1031 [1959]).[6] The basis of this rule is that an insurer's claimed attempt to both accept premiums and reserve its right to rescind is unenforceable for lack of mutuality and timeliness (*Continental Ins. Co.*, 211 AD2d at 589, citing *McNaught v Equitable Life Assur. Socy.*, 136 App Div 774 [1910]). Here, plaintiff commenced this action in October 2005. Yet, between that month and June 2006, plaintiff collected nine $5,000 premium payments from Mobarak; the payments were debited monthly from Mobarak's checking account. Thus, after commencing this action, plaintiff collected approximately $40,000 in premiums from Mobarak, none of which have been refunded.

Plaintiff argues that it did not waive the right to rescind the policies because it accepted the premium payments *after* it

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[6]The use of the term "waiver" in this regard is somewhat imprecise. As Judge Cardozo noted in *Bible*, "the delivery of the policies by the insurer, and the keeping of the premiums with knowledge of a then existing breach of the conditions as to the health of the insured and her treatment in a hospital gave rise to a waiver or, more properly, an estoppel" (256 NY at 462).

commenced the action. According to plaintiff, the commencement of an action to rescind a policy is an unambiguous sign that the insurer is seeking to cancel, not enforce, a policy. Therefore, the argument goes, plaintiff did not manifest an intention to abandon its right to rescind the policies and its acceptance of premiums could not be construed as an intent to ratify the policies. Plaintiff's argument is contrary to the case law.

In *Continental Ins. Co.* (*supra*), the plaintiff issued to the defendant property owner several liability insurance policies.[7] Approximately six months after the policies were issued, the plaintiff discovered misrepresentations that the defendant made to the plaintiff, which permitted the defendant to obtain the coverage at reduced premiums. The plaintiff discovered the misrepresentations in February 1989 and within days of the discovery demanded that the defendant pay additional premiums; the plaintiff indicated to the defendant that the policies "would not and could not be permitted to stand as written." The parties then negotiated for several months in an effort to resolve the dispute until May 1989 when the plaintiff commenced an action against the defendant to rescind the policies. The defendant continued to make its monthly premium payments to the plaintiff

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[7]The facts underlying our decision in *Continental* are taken from the briefs of the parties in that action.

through June 1989.

Supreme Court granted the defendant's motion for summary judgment dismissing the rescission claim, finding that the plaintiff had waived its rescission claim by accepting the premium payments. The plaintiff appealed, arguing, among other things, that it did not waive the rescission claim by accepting the premiums following its discovery of the alleged fraud and after it commenced the action. We disagreed and affirmed the dismissal of the rescission claim, concluding that "[t]he IAS Court properly determined that plaintiff waived its right to seek rescission of the contract of insurance when it knowingly accepted premium payments for several months following discovery of the alleged misrepresentations upon which it claimed to have relied when it issued the policies" (211 AD2d at 589).

In *Scalia v Equitable Life Assur. Socy. of the U.S.* (251 AD2d 315 [1998]), the plaintiff purchased a disability income insurance policy from the defendant. The plaintiff sustained an injury that he claimed rendered him totally disabled and sought benefits under the policy (*Scalia*, defendant-appellant's brief, 1998 WL 35178856, *4-5). After paying the plaintiff benefits for several months, the defendant denied him further benefits on the ground that he was not totally disabled (*id.* at *5). The plaintiff commenced an action in April 1994 seeking further

benefits under the policy (*id.*). After its motion to dismiss the action was denied and it served its answer, the defendant moved in July 1995 to amend its answer to include a defense that the plaintiff's claim was barred because he made material misrepresentations in his application for the policy (*id.* at *5-6). The defendant also sought to amend its answer to include a counterclaim for rescission of the policy (*id.* at *6). Although Supreme Court granted the motion to amend, it subsequently dismissed the defense founded on the plaintiff's alleged misrepresentations and the related counterclaim (*id.* at *7). The court did so because the defendant had accepted premium payments from the plaintiff until September 1995, several months after asserting its defense and counterclaim based on the plaintiff's alleged misrepresentations (*id.* at *7-8). Thus, according to Supreme Court, the defendant had waived its right to rescind the policy (*id.*).

The Second Department affirmed. Citing, among other authorities, our decision in *Continental Ins. Co.*, the Court noted that "[i]t is well settled that the continued acceptance of premiums by the carrier after learning of facts which allow for rescission of the policy, constitutes a waiver of, or more properly an estoppel against, the right to rescind" (251 AD2d at 315). The Court determined that "[t]he record supports the

Supreme Court's determination that the defendant ... waived its right to rescind the disability income insurance policy, by continuing to accept premium payments after it gained sufficient knowledge of the alleged misrepresentations upon which it claims to have relied when issuing the policy" (*id.*; *see also Oglesby v Massachusetts Acc. Co.*, 230 App Div 361 [1930]).

Plaintiff's acceptance of premiums from Mobarak after learning of the alleged fraud allowing for cancellation of the policies constituted a waiver of (or more properly an estoppel against) its right to cancel or rescind the policies (*see Scalia, supra; Continental Ins. Co., supra*). We note, too, that plaintiff did not retain temporarily a payment (or a couple of payments) from Mobarak before refunding the payment (*cf. Travelers Ins. Co. v Pomerantz*, 246 NY 63, 70-71 [1927]; *Boyd v Allstate Life Ins. Co. of N.Y.*, 267 AD2d 1038, 1040 [1999]). Rather, as discussed above, plaintiff collected from Mobarak nine $5,000 premium payments over a nine-month period and plaintiff has not refunded any of those payments. The collection and retention of those payments compel the conclusion that plaintiff cannot now seek to rescind the policies (*see Scalia, supra* [insurer waived right to rescind policy where it accepted premium payments for several months after it asserted

counterclaim to rescind that policy]; *Continental Ins. Co., supra* [insurer waived right to rescind policy where it accepted premium payments for "several months" following discovery of alleged misrepresentations]; *Garbin v Mutual Life Ins. Co. of N.Y.*, 77 Misc 2d 689 [App Term, 1st Dept 1974] [insurer waived right to rescind policy where it accepted and retained four separate quarterly premium payments]). Accordingly, Supreme Court erred in denying that aspect of defendants' motion seeking dismissal of the cause of action for rescission.

To the extent that *Prudential Ins. Co. of Am. v BMC Indus.* (630 F Supp 1298 [SD NY 1986]), relied upon by plaintiff, is inconsistent with *Continental Ins. Co.* (*supra*) and *Scalia* (*supra*), we do not follow it. In *Prudential*, the plaintiffs entered into an agreement with defendants pursuant to which the plaintiffs purchased notes held by the defendants. The defendants were required to make periodic interest payments to the plaintiffs on the unpaid balance of the notes. The plaintiffs commenced an action against the defendants to rescind the agreement, alleging that the defendants failed to disclose material information and misrepresented material facts during the parties' negotiations. The defendants asserted that the plaintiffs ratified the agreement by accepting several interest payments after they commenced the action. The court granted the

plaintiffs' motion to strike the defendants' ratification defense, holding that "the acceptance of money during the pendency of th[e] action is not inconsistent with the Plaintiffs[']claim for rescission [because] it does not undermine the clear demand for rescission embodied by the act of filing the ... action" (*id.* at 1303). The court, however, was not addressing the situation where an insurer accepted premium payments from the insured after the insurer asserted a claim to rescind the policies. That situation, as discussed above, is controlled by New York case law, including our own precedent (*Continental Ins. Co., supra; see e.g. Scalia, supra*). Additionally, it should be noted that *Prudential* was decided before *Continental Ins. Co.* and *Scalia*.

Finally, Supreme Court properly determined that the complaint sufficiently alleged fraud with the requisite particularity (*see* CPLR 3016[b]; *Bernstein v Kelso & Co.*, 231 AD2d 314, 320 [1997]). Notably, the complaint specified not only the misstatement of Rodriguez's net worth, but also the falsity of the medical statements and the proffering of fictitious accountant and medical records.

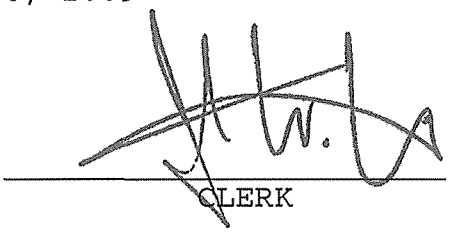
Accordingly, the order of Supreme Court, New York County (Charles E. Ramos, J.), entered December 7, 2007, which denied defendants' motion to dismiss the complaint, should be modified,

on the law, to grant that aspect of defendants' motion seeking dismissal of the rescission claim, and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 26, 2009



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