SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 10, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1027 Frank Masek, Index 102570/05
Plaintiff-Appellant,

-against-

Barbara Wichelman,
Defendant-Respondent,

205-69 Apartments, Inc.,
Defendant.

Francis J. Heneghan, Baldwin (Carole R. Moskowitz of counsel), for appellant.

Brief Carmen & Kleiman, LLP, New York (Richard E. Carmen of counsel), for respondent.

Interlocutory judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered June 25, 2008, to the extent appealed from, dismissing with prejudice plaintiff's separately denominated claim for reimbursement of maintenance and other charges and costs, unanimously reversed, on the law, without costs, the claim for reimbursement of maintenance reinstated, and the matter remanded to Supreme Court for further proceedings consistent herewith.

This proceeding arises out of an action for judicial

partition, pursuant to article 9 of the New York Real Property Actions and Proceedings Law, of two cooperative apartments located at 205 East 69th Street, New York County, owned by the individual parties as tenants in common. The plaintiff alleges that he made payments of the entire maintenance, carrying and other costs on the two apartments through his wholly owned corporation, and now seeks to recover one half of such payments from the defendant Barbara Wichelman. Wichelman disputes that she owes plaintiff any payment for maintenance costs because the payments for such costs were made by a corporate entity that was a nonparty to the proceeding.

The plaintiff and Wichelman own the proprietary lease and 74 shares of stock of cooperative apartment 3D, and the proprietary lease and 37 shares of cooperative apartment 3E, entitling them to a leasehold interest in the two units from May 11, 1998 to December 31, 2031. Defendant 205-69 Apartments, Inc. is the owner of the land and building.

It is also undisputed that the monthly maintenance charges for apartments 3D and 3E were paid up to the date of the nonjury trial, September 17, 2007. The record reflects that honored checks given in payment of the maintenance charges for the apartments were made payable to 205-69 Apartments, Inc., or its managing agent, drawn on the account of M&S Movers, Packers,

Storage, Inc. (M&S Movers), and signed by the plaintiff. M&S Movers is a subchapter S corporation wholly owned by the plaintiff, and has been treated as such for approximately 25 years.

The trial court granted the partition and directed that shares of both apartments be sold and that the proceeds of the sale be divided equally between the plaintiff and Wichelman. The trial court dismissed plaintiff's second cause of action for reimbursement, on the grounds that "the only credible evidence of such payment[s] established that a non-party to this proceeding, namely M&S Packers, Inc., made the charges." The trial court stated it "would have awarded credit to plaintiff for one-half the carrying charges that plaintiff allegedly paid." However, the court held that because it was not plaintiff, but rather a nonparty corporate entity that made the payments, Wichelman was not liable for reimbursement to plaintiff.

For the reasons set forth below, we unanimously reverse. The trial court correctly hypothesized that it should award credit to the plaintiff for one half of the carrying charges that he allegedly paid. However, the court's holding that, since the payments were made through checks of M&S Movers, they were made by a nonparty entity to the proceeding and thus would not be reimbursed to the plaintiff, was error. An "S" corporation does

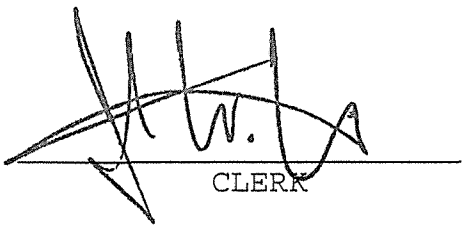
not pay taxes on a corporate entity level, but instead, requires each shareholder to report his proportionate share of the "S" corporation's income on his individual tax return (Internal Revenue Code § 1366). Both profits and losses of a corporate entity's income flow through to shareholders individually (Internal Revenue Code § 1367). At trial, the public accountant for both M&S Movers and the plaintiff, testified that checks of M&S Movers given in payment for the maintenance of units 3D and 3E were not reflected in the balance sheet of the "S" corporation. Moreover, the corporate tax return for M&S Movers did not reflect any deductions or write-offs taken for payments on the apartments. In fact, the payments to defendant 205-69 Apartments, Inc. were not aggregated expenses of the plaintiff's "S" corporation but instead treated as distributions to the plaintiff himself. Hence, any profits of the corporation used to pay the maintenance costs in question should have been considered profits, and thus property of the plaintiff.

When an individual is sole shareholder of a corporation, he or she is the equitable owner and, in the absence of an adverse effect upon the rights of creditors, may lawfully use the corporation's property in payment of or as security for his or her own personal debt, if so desired (*Pine v Hyed Realty Corp.*, 1 AD2d 952 [1956], *affg* 145 NYS2d 548 [1955]). Furthermore, a

corporation may authorize its president to use corporate checks to pay personal debt (*See Reif v Equitable Life Assur. Socy.*, 268 NY 269, 276 [1935]; *John William Bldg. Corp. v Union Trust Co. of Rochester*, 256 App Div 885 [1939]; *Ehrlich, Inc. v Levine*, 83 Misc 136, 138 [1913]). Indeed, the plaintiff was free to choose to dispose of his profits as he determined, and had authority to use his "S" corporation checks in doing so. Accordingly, the payments were not made by a nonparty entity, but were in fact, made by the plaintiff as permissible distributions of his corporation (see *Degliuomini v Degliuomini*, 45 AD3d 626 [2007]). Thus, the plaintiff properly asserted a cause of action for reimbursement of the defendant's one-half share of the sums he expended.

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

ENTERED: NOVEMBER 10, 2009



CLERK

Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1029 The People of the State of New York, Respondent,

-against-

Felix Shepard, Defendant-Appellant.

Ind. 5496/06

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered May 23, 2007, convicting defendant, after a nonjury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 6 years, unanimously affirmed.

Defendant argues that the trial court confused suppression and preclusion issues and that once the court suppressed the physical evidence on the ground that the police lacked probable cause to arrest defendant, it should also have suppressed the confirmatory identification as the fruit of an unlawful arrest (*see People v Gethers*, 86 NY2d 159 [1995]). Instead, the trial court ordered a hearing pursuant to *People v Wharton* (74 NY2d 921

[1989]) to determine the undercover's whereabouts and whether the identification was confirmatory and could be admitted without notice under CPL 710.30.

Even assuming, without deciding, that the trial court's probable cause ruling is not reviewable on this appeal by defendant (*see* CPL 470.15[1]; *People v LaFontaine*, 92 NY2d 470, 473-474 [1998]), the facts before us differ from those in *Gethers*. Here, the identifying witness testified at the pretrial *Wharton* hearing as to facts relevant to an independent source determination, allowing this Court to make its own finding based upon that testimony (*see People v Wilson*, 5 NY3d 778, 780 [2005]; *People v Dodt*, 61 NY2d 408, 417 [1984]; *People v Allah*, 57 AD3d 1115, 1117 [2008], *lv denied* 12 NY3d 780 [2009]).

The undercover testified that he saw a black man wearing a camouflage baseball cap and green sweatshirt and a black woman wearing a black jacket and blue scarf make a narcotics sale to another black man in a black jacket and blue jeans. He first observed the pair on the northeast corner of MacDougal and West 3rd Streets, then repositioned himself at the northwest corner, looking directly across from them. The undercover continued to move from corner to corner to blend in and get a better view of the pair inside a pizzeria. He then observed what he believed to be a narcotics transaction and made a transmission to that effect

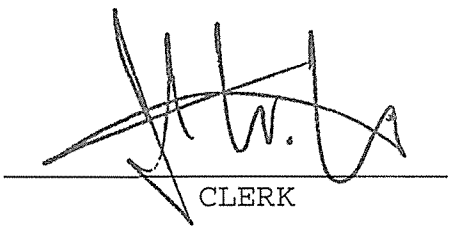
to the backup team. When the buyer left, the undercover remained in the vicinity of defendant and his companion, continuing to observe them. He could see the pair clearly through the pizzeria's window and did not lose sight of them from the time he first observed them to the time they were detained, except for brief periods when a car or pedestrian went by and blocked his view. After the detention, the undercover radioed that the arresting officer had detained the right people.

This testimony constituted clear and convincing evidence demonstrating that the undercover's observations before and during the alleged sale provided an independent source for his in-court identification of defendant at trial (*see People v Allah*, 57 AD3d at 1118; *People v Schiffer*, 13 AD3d 719, 720 [2004]).

We reject defendant's claim that the verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

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

ENTERED: NOVEMBER 10, 2009



CLERK

Mazzarelli, J.P., Andrias, Buckley, Catterson, McGuire, JJ.

9973 The People of the State of New York, Ind. 1634/02
Respondent,

-against-

Fatin Johnson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Renee A. White, J. at lineup application, jury trial and sentence), rendered May 18, 2004, convicting defendant of murder in the second degree and criminal possession of a weapon in the third degree, and sentencing him to concurrent terms of 25 years to life and 7 years, respectively, affirmed.

In resolving defendant's previous appeal to this Court (43 AD3d 288 [2007]), we did not expressly state that we rejected defendant's claim that the verdict convicting him of depraved indifference murder was against the weight of the evidence. For this reason, the Court of Appeals reversed and remanded the appeal to us for the purpose of making an assessment of defendant's weight of the evidence claim (10 NY3d 875, 878

[2008]). We now make explicit what was implicit in our prior opinion: the verdict was not against the weight of the evidence. A review of our prior opinion and its holdings helps explain this finding and our continuing disagreement with the dissent. Accordingly, we quote below the most relevant portions of the opinion:

> "Defendant's principal claim on this appeal is a two-fold challenge to the sufficiency and weight of the evidence supporting the verdict convicting him of depraved indifference murder. Specifically, defendant argues that his action could have supported a finding only of intentional, not reckless, murder and that, even if his conduct were reckless, the proof was deficient with regard to the 'uncommon brutality' essential to a conviction for depraved indifference murder. As defendant concedes, however, his challenges to the sufficiency of the evidence are not preserved for review. Indeed, defendant not only failed to move to dismiss on the specific grounds he raises on appeal, he failed to raise any specific objection to the sufficiency of the evidence in his motion to dismiss (*see People v Gray*, 86 NY2d 10, 19 [1995]; CPL 470.05[2]).
>
> "We decline to review in the interest of justice the untimely challenges to the sufficiency of the evidence that defendant now advances. Moreover, at the most, given defendant's failure to voice any objection to the court's charge on the elements of the crime of depraved indifference murder, any challenge to the sufficiency of the evidence that defendant may be entitled to raise must be evaluated according to the court's charge as given (*see People v Sala*, 95 NY2d 254, 260 [2000] [appellate review 'limited to whether there was legally sufficient evidence ... *based on the court's charge as given without exception*'] [emphasis in original]; *People v Dekle*, 56 NY2d 835, 837 [1982] [limiting appellate review to whether 'there is

evidence from which a rational trier of fact could find the essential facts of the crimes *as those elements were charged to the jury without exception* beyond a reasonable doubt'] [emphasis in original]).

"Measured against this standard, the evidence was plainly sufficient. For several reasons grounded in the evidence, the jury reasonably could have concluded that defendant had intended not to kill but to cause serious physical injury. In this regard, we note that, according to one of the two eyewitnesses, defendant was some 30 feet away when defendant fired the pistol. Thus, the jury had a basis for concluding that defendant may not have intended that the bullet strike the victim where it did. As Justice Sandler stated, 'with the possible exception of a contact wound ... it is a matter of common experience that people who fire handguns do not always hit precisely the intended target' (*People v Butler*, 86 AD2d 811, 815 [1982, Sandler, J., dissenting], *revd on dissenting mem*, 57 NY2d 664 [1982]). In addition, defendant fired only once and the jury heard no evidence that there had been a history of animosity between defendant and his brother or even that defendant had a motive to kill. For these very reasons, defense counsel urged in his summation that although the prosecution may have proven an intent to cause serious physical injury, there was no proof of an intent to kill.

"The instructions to the jury on the elements of depraved indifference murder were entirely unremarkable in light of the then-applicable law. Under those instructions, the jury reasonably could have concluded, after finding that defendant intended to cause serious physical injury, that defendant acted with the recklessness required for depraved indifference murder (*see People v Trappier*, 87 NY2d 55, 59 [1995] ['Defendant, for example, could have fired at Hutchinson with the intent to cause him only serious and protracted disfigurement and simultaneously consciously disregarded a substantial and unjustifiable risk that ... he would create a grave risk of ... Hutchinson's death']; *Fama v Commissioner of Correctional Servs.*, 235 F3d 804, 812 [2d Cir 2000] [the 'jury could have concluded that Fama intended to

cause bodily harm to Hawkins with a reckless disregard of the ultimate result of that harm']). To be sure, in *People v Suarez* (6 NY3d 202 [2005]), which was decided more than two years after defendant's trial, the Court of Appeals ruled otherwise, stating that 'one who acts with the conscious intent to cause serious injury, and who succeeds in doing so, is guilty only of manslaughter in the first degree' (6 NY3d at 211). Defendant's jury, however was not so instructed and this statement of the law in *Suarez* only underscores that defendant's challenges to the sufficiency of the evidence are unpreserved.

"Furthermore, under the instructions given to the jury, the jury also was entitled to conclude that the shooting had been committed '[u]nder circumstances evincing a depraved indifference to human life' (Penal Law § 125.25[2]). The evidence, of course, must be sustained as legally sufficient whenever there is 'any valid line of reasoning and permissible inferences [that] could lead a rational person to convict' (*People v Santi*, 3 NY3d 234, 246 [2004] [internal quotation marks and citation omitted]). Here, the jury was instructed that the People were required to prove that 'the circumstances surrounding the defendant's reckless conduct was [*sic*] so brutal, so call[o]us and extremely dangerous and inhumane as to demonstrate an attitude of total and utter disregard for the life of the endangered person, and, therefore, so blameworthy as to warrant the imposition of the same criminal liability as that which the law imposes on a person who intentionally causes the death of another.' As this element was charged to the jury, a rational juror could have concluded that the People had met this burden.

"Nor can defendant prevail, in the absence of review in the interest of justice, by contending that the verdict is against the weight of the evidence. Casting his argument in those terms does not relieve defendant of the consequences of his failure to object to the court's charge on the elements of depraved indifference murder (*see People v Noble*, 86 NY2d 814, 815 [1995] ['Contrary to defendant's contention, we hold that the Appellate Division is constrained to weigh the evidence in light of the elements of the

> crime as charged without objection by defendant']; *People v Cooper*, 88 NY2d 1056, 1058-1059 [1996] [same]). Indeed, a panel of this Court recently rejected the contention that in reviewing the weight of the evidence in a depraved indifference murder case the evidence should be appraised in light of the elements of that crime as definitively interpreted by the Court of Appeals as of the time of the appeal, rather than as the elements were charged to the jury as of the time of trial (*see People v Danielson*, 40 AD3d 174 [2007], *lv granted* 2007 NY Slip Op. 70483[u][2007]). Nor is defendant persuasive in arguing that '[a]pplication of the well-established principle that an appellate court must conduct its weight review in light of the charge as given does not bar relief ... because the court's charge was not inconsistent with [the charge to the jury in *People v Suarez*, 6 NY3d 202 (2005), *supra*].' However similar in certain respects the jury instructions may be, the sufficiency claims in *Suarez*, unlike the sufficiency claims here, were preserved for review" (43 AD3d at 289-292).

In its opinion, the Court of Appeals did not disturb our holding that the evidence was legally sufficient or our holdings that both the sufficiency and the weight of the evidence had to be evaluated in light of the elements of the crime of depraved indifference murder as the elements were charged to the jury without exception. That the Court did not disturb our holding that the weight of the evidence must be evaluated in that light is unsurprising. After we decided defendant's prior appeal, the Court squarely held that "[s]itting as the thirteenth juror ... the reviewing court *must* weigh the evidence *in light of the elements of the crime as charged to the other jurors, even when the law has changed between the time of trial and the time of*

appeal" (*People v Danielson,* 9 NY3d 342, 349 [2007] [emphasis added]).

Although "the differences between what the jury does and what the appellate court does in weighing evidence are delicately nuanced" (*People v Bleakley,* 69 NY2d 490, 495 [1987]), the fundamental precepts of weight of the evidence review are clear:

> "[W]eight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*People v Danielson,* 9 NY3d at 348).

Against this backdrop of the governing law, we turn to the relevant facts, limiting ourselves to those that are not disputed on appeal. Defendant and his brother, Amir, had a heated argument over money while both men were standing near a public telephone on the corner of 102nd Street and First Avenue. As Amir started to walk toward the FDR Drive, defendant called out, "Hey, look, remember you have to pay my money back." Amir responded, "I'm not going to pay you back" and came back toward defendant. When Amir was "coming on top" of defendant, as one of the eyewitnesses put it, defendant dropped the bicycle he was

holding and took out a revolver from the back of his waistband. With that, Amir began to run away from defendant, heading east on 102nd Street. Defendant stood on the sidewalk with his hands extended in front of him, holding the revolver with both hands. He pulled the trigger, shooting Amir once in the back; as noted above, Amir managed to run some 30 feet before defendant shot him. The bullet entered Amir's back on the left side of his "scapula region," perforated his left lung and his heart, and exited from the left front of his chest. Before collapsing, Amir pulled a knife and threw it to the ground. Other evidence is highly relevant to one of defendant's challenges to the weight of the evidence and is discussed below.

Although the principal defense at trial consisted of a challenge to the proof of defendant's identity as the shooter,[1] overwhelming evidence -- including the testimony of eyewitnesses who identified defendant and defendant's statement to a former girlfriend shortly after the shooting that "I might have killed

---

[1]Indeed, defendant testified in his own behalf and categorically denied even being near the scene of the homicide. In addition, defense counsel also argued in summation that the People had failed to prove that the shooter acted with intent to kill because, inter alia, a single shot was insufficient to establish that intent. With respect to the depraved indifference charge, counsel advanced only a perfunctory and conclusory argument that the People had failed to prove that "he acted ... under a reckless theory."

my brother" -- established that he was the shooter, and defendant does not now contest the weight of the evidence on that issue. Rather, with one exception, defendant's challenges to the weight of the evidence relate to the statutory element requiring proof that defendant caused his brother's death "[u]nder circumstances evincing a depraved indifference to human life" (Penal Law § 125.25[2]).

Thus, defendant's first claim is based on the contention that even though at the time of trial the law was clear that this element "focuses not on the subjective intent of the defendant, 'but rather upon an objective assessment of the degree of risk presented by defendant's reckless conduct'" (*People v Sanchez*, 98 NY2d 373, 379-380 [2002], quoting *People v Register*, 60 NY2d 270, 277 [1983], *cert denied* 466 US 953 [1984]), the trial court's instructions anticipated the holding of the Court of Appeals more than two years after the trial that "'depraved indifference to human life' is a culpable mental state" (*People v Feingold*, 7 NY3d 288, 296 [2006]). Accordingly, defendant argues that the court instructed the jury that this element requires proof of a culpable mental state and that the weight of the evidence does not support a finding that he had such a mental state. This argument can be disposed of readily for its premise is erroneous: the court did not charge the jury, inconsistently with the law at

the time of trial, that this element was a culpable mental state. To the contrary, the court's instructions made clear that it referred to the objective circumstances surrounding the defendant's reckless conduct. Notably, the dissenters expressly recognized precisely that when they referred to "the fact that the jury was charged in this case on the objective standard enunciated in *People v Register* (60 NY2d 270 [1983]) rather than the subjective standard later adopted in *People v Feingold*" (43 AD3d at 297 [Andrias, J., dissenting]). Nor do the same dissenters now disavow their prior conclusion and accept defendant's argument that the jury was instructed in accordance with *People v Feingold*.

Second, defendant advances the one claim that relates not to the element requiring proof that death was caused "[u]nder circumstances evincing a depraved indifference to human life," but to the required reckless mens rea. Specifically, he argues that "the 'substantial' risk of death resulting from discharging a single shot on a public street did not create the 'transcendent risk' of death, *People v Sanchez*, 98 NY2d at 380, or 'risk-creating conduct creating an almost certain risk of death,' that distinguishes depraved-indifference murder from the substantial risk of death at the heart of manslaughter prosecutions. *See Policano v Herbert*, 7 NY3d at 600, citing *Sanchez*, 98 NY2d at

378." This argument asks us to do what we may not do as a matter of law: engage in weight of the evidence review on the basis of the elements as defined by case law rather than as they were defined by the court's charge to the jury. At no point did the court instruct the jury that the risk of death had to be a "transcendent" one or that defendant's conduct had to "create[] an almost certain risk of death." Nor did defendant ever protest the absence of such instructions. Thus, this argument flies in the face of our previous decision that any review of the evidence, for weight as well as sufficiency, had to be based on the court's charge as given without objection. Defendant provides no basis for departing from the law of the case doctrine and the dissent does not contend we should.[2]

Third, defendant argues that under *People v Gonzalez* (1 NY3d 464 [2004]) and *People v Payne* (3 NY3d 266 [2004]), "[a]t the time of [his] trial ... a typical one-on-one shooting did not qualify as a depraved indifference murder." This argument suffers from the same fatal flaw as the last one. At no point did the court instruct the jury that a "one-on-one shooting,"

---

[2]The dissent, however, adopts a variant of this argument when it contends that "defendant's conduct manifested an intent to kill rather than depravity or indifference to human life." For the reasons just discussed, this contention is meritless. But there are additional reasons, discussed below, why it is untenable.

typical or otherwise, "did not qualify as a depraved indifference murder." Nor did defendant ever protest the absence of any such instruction. As the dissent essentially adopts this argument, we discuss it at greater length below.

Fourth, defendant argues that his brother's "own aggressive gesture during the brothers' loud, excited argument make [his] response appear to be other than 'callous' and 'inhumane' and more typical of the type of behavior that, regrettably, sometimes results as arguments escalate." This is unpersuasive. The jury expressly was instructed to make a judgment that in substantial part is a moral one in evaluating the evidence bearing on the requirement of proof that defendant acted "[u]nder circumstances evincing a depraved indifference to human life." Thus, the jury repeatedly was instructed that "[a] person acts with depraved indifference to human life when in the *judgment* of the jury his conduct, beyond being reckless, is so *wanton*, is so deficient in the *moral sense and* [sic] *concern*, so *devoid* of regard for life, the lives of others, and so *blameworthy* as to warrant the same criminal liability as that which the law imposes on a person who intentionally causes the death of another" (emphasis added) (*see People v Russell*, 91 NY2d 280, 287-288 [1998]).

Even assuming, arguendo, that a different judgment by the jury on this issue "would not have been unreasonable" (*People v*

Danielson, 9 NY3d at 348, *supra*) "the jury was justified in finding defendant guilty beyond a reasonable doubt" (*id.*). That defendant shot his own brother surely is a fact the jury reasonably could have viewed as highly significant in making the moral judgment it was instructed to make. That defendant did so after assuming a shooter's stance and taking aim at his fleeing brother -- who clearly presented no threat whatsoever to him at that juncture[3] -- also justifies the jury's judgment. That defendant fired the gun -- and, as discussed below, on a sidewalk on which children and others were present -- because his brother refused to repay a debt provides additional justification. Of course, moreover, as we held in our prior opinion, the evidence provided the jury with a substantial basis for concluding that defendant intended for the bullet to hit his brother and cause serious physical injury (43 AD3d at 290-291). Shooting someone, and shooting him or her in the back, can provide a powerful basis for a jury finding that the shooter thereby "create[d] a grave risk of death" (Penal Law § 125.25[2]) and was "aware" of and "consciously disregard[ed]" that risk and its "substantial and unjustifiable" nature (Penal Law § 15.05[3]).

Finally, defendant argues that although "there were

---

[3]For this reason, we are unpersuaded by defendant's reliance on Amir's previous "threatening gesture."

bystanders in the area, including two children ... there was no concrete evidence presented that any of them were 'actually endangered.' *See People v Suarez*, 6 NY3d at 213, fn. 7." Relatedly, defendant argues that "[t]he only testimony ... regarding the children, came from their father, who naturally was concerned for their safety. Even according to him, however, the single bullet passed over their heads, hitting the intended target and never significantly endangering the children." We reject this argument for numerous reasons. First, the jury was never instructed that there was any requirement that, apart from defendant's brother, any other person or persons had to be "actually" or "significantly" endangered, and defendant never objected to the absence of any such instruction. Thus, defendant once again incorrectly asks us to weigh the evidence in accordance not with the elements of the offense as they were charged without objection but as defendant now maintains they should have been charged.

Second, this argument erroneously assumes that in determining the relevant question -- i.e., whether, as the jury was charged, defendant's conduct was "so wanton, ... so deficient in the moral sense and concern, so devoid of regard for life, the lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes on a person who

intentionally causes the death of another person" -- the jury was required to consider the path the bullet actually happened to travel. As the jury was instructed, however, the focus properly was placed on his "*conduct*." The conduct he committed was firing a shot from a deadly weapon on a sidewalk in the direction of children and others. Justice Sandler's observation adopted by a unanimous Court of Appeals, again merits quotation: "it is a matter of common experience that people who fire handguns do not always hit precisely the intended target" (*People v Butler*, 86 AD2d at 815). The jury was entitled to judge defendant's conduct in light of this common-sense truth. Furthermore, the contention that the children were not "significantly endangered" is ipse dixit, as there was no testimony that the bullet passed over the heads of the children by some "significant" let alone "safe" margin.

Third, defendant's statement that the children's father "naturally was concerned for their safety" undermines his position. The evidence established that the father "got very scared" when defendant took out the revolver because his children were in the line of fire and he implored defendant, "Do not shoot, do not shoot, because my kids are there." Defendant ignored that plea. The point of course is that the jury was entitled to conclude that the fact that defendant was not

concerned for the safety of children was highly relevant to the judgment it was required to make about how "wanton, deficient in the moral sense and concern, devoid of regard for life, the lives of others" and blameworthy defendant's conduct was.

Fourth, defendant's current position that no others were significantly endangered stands in sharp contrast to his position at trial. The other eyewitness, Winston Nichols, was standing five or six feet from defendant and his brother when they were arguing and defendant's brother was between two and four feet from him when he fled past him after defendant drew the revolver. Defense counsel elicited the following testimony on cross-examination of Mr. Nichols:

> "Q: As a matter of fact, you were almost in the line of fire, right?
>
> "A: No, I wouldn't say in -- yeah, you could say that. Because, you know, five feet away [from defendant].
>
> "Q: Anything could happen, right?
>
> "A: Anything could happen."

Obviously, the jury reasonably could have decided that it was appropriate in making its judgment to consider the very point defense counsel took pains to make on cross-examination.[4]

---

[4]Relatedly, defendant unpersuasively argues that the facts of this case stand in sharp contrast to the facts of *People v Sanchez* (98 NY2d 373), where the Court of Appeals upheld a depraved indifference murder conviction, because the defendant in

As for the dissent, it asserts that "[t]his one-on-one shooting was not 'marked by uncommon brutality' (*People v Payne*, 3 NY3d 266, 271 [2004]), and did not evince the mental culpability required for depraved indifference (*Sanchez*, 98 NY2d at 380)." In relying on the one-on-one character of the shooting and in conclusorily claiming that the shooting was not "marked by uncommon brutality," the dissent impermissibly weighs the evidence in light of the elements as the dissent believes the jury should have been instructed, not as it actually was instructed. The jury was not instructed to consider, consistently with *People v Payne*, decided after defendant's trial, that the shooting was a "one-on-one" shooting or whether it was "marked by uncommon brutality." Accordingly, neither the one-on-one character of the shooting nor the dissent's belief that it was not "marked by uncommon brutality" can support the dissent's conclusion that the jury was not "justified in finding

---

Sanchez "fired blindly around a door into an area where children were playing." In fact, however, the Court's opinion states that the eyewitness "first observed defendant walking through the entrance doorway from the hallway where her two grandchildren were playing in the foyer, *away from* [the decedent], who was behind the partially opened door. Then she saw defendant abruptly turn around, fire a gun *pointed at [the decedent's] chest* and flee" (98 NY2d at 375-376 [emphasis added]). Moreover, the evidence established that "the gun was fired not more than 12-18 inches from [the decedent's] chest" (*id.* at 376). In short, the evidence that others were endangered is more compelling here than in *Sanchez*.

the defendant guilty beyond a reasonable doubt" (*People v Danielson*, 9 NY3d at 348, *supra*). Surely the jury would be astonished to learn that for these reasons its verdict was not justified.

The dissent fails in its effort to defend its disregard of the actual instructions to the jury on the elements of depraved indifference murder and defendant's failure to voice any objection to those instructions. The dissent reasons that "*People v Payne* (*supra*) and *People v Gonzalez* (1 NY3d 464 [2004]) ... do not hinge on the substance of the court's charge to the jury. Rather, those cases, as well as *People v Hafeez* (100 NY2d 253 [2003]), made clear that a one-on-one shooting or knifing (or similar killing) can never, with rare exception, qualify as depraved indifference murder." Because the Court of Appeals did not discuss in *Payne*, *Gonzalez* or *Hafeez* the trial court's instructions to the jury, it hardly follows that the instructions are irrelevant to an assessment of the weight of the evidence. Apart from this logical flaw, the dissent's attempt to defend its disregard of the instructions to the jury on the elements of depraved indifference is contradicted by the unequivocal holding in *People v Danielson* (*supra*). To repeat it, "sitting as the thirteenth juror ... the reviewing court *must* weigh the evidence in light of the elements of the crime as charged to the other

jurors, even when the law has changed between the time of trial and the time of appeal" (9 NY3d at 349 [emphasis added]). This mandate to the Appellate Divisions conclusively refutes the dissent's position.[5]

As for the dissent's assertion that the shooting "did not evince the mental culpability required for depraved indifference," the dissent explains it only to the extent it goes on to assert "that defendant's conduct manifested an intent to kill rather than depravity or indifference to human life, as that term is generally understood."[6] For several reasons, this

---

[5]*People v Dickerson* (42 AD3d 228 [2007], *lv denied* 9 NY3d 960 [2007]), does not provide a shred of support for the dissent's position. Nothing in *Dickerson* remotely suggests that the instructions to the jury on the elements of depraved indifference murder are not controlling in assessing the sufficiency or weight of the evidence. Indeed, the instructions to the jury, and whether the jury was charged in accordance with the holding of *People v Feingold* (7 NY3d 288, *supra*) that depraved indifference is a culpable mental state, are not discussed in *Dickerson*. If the jury was charged in accordance with *People v Feingold*, the panel in *Dickerson* would not have had any reason for discussing the instructions. Alternatively, the panel could have determined that regardless of whether the jury was properly instructed on the elements of depraved indifference murder, the verdict was supported by legally sufficient evidence and was not against the weight of the evidence. In any event, without citing to anything in *Dickerson*, the dissent simply assumes that it stands for the proposition, squarely contradicted by *People v Danielson*, that the weight of the evidence can be assessed on the basis of the elements as they should have been charged to the jury, not as the elements actually were charged to the jury without objection.

[6]Of course, how that term is "generally understood," whatever the dissent believes that understanding to be, is

assertion of a "manifest[] ... intent to kill" provides no rational reason to hold that the verdict is against the weight of the evidence.

As noted above with respect to the variant of this assertion pressed by defendant, at no point during its charge did the court instruct the jury that the risk had to be a "transcendent" one or that defendant's conduct had to "create[] an almost certain risk of death." Rather, as a majority of this Court expressly stated, under the instructions given to the jury it "reasonably could have concluded that defendant had intended not to kill but to cause serious physical injury" and, in disregard of a grave risk that death would result, "acted with the recklessness required for depraved indifference murder (43 AD3d at 290-291).

Under the rubric of weight of the evidence review the dissent would simply undo these conclusions, essential to our express holding -- which, to repeat, the Court of Appeals did not disturb -- that the verdict was supported by legally sufficient evidence. All of the dissent's arguments -- that defendant ostensibly "manifested an intent to kill," the argument relying on the one-on-one character of the shooting and the argument that

---

irrelevant. Under *People v Noble* and *People v Danielson*, only the jury's understanding of the term in light of the court's instructions is relevant, a subject the dissent fails to address.

the shooting was not "marked by uncommon brutality" -- apply with equal force -- or, more accurately, with an equal lack of force -- to our express holding that the verdict was supported by legally sufficient evidence. The dissent does not and cannot point to anything in the evidence -- not the fact that defendant assumed a shooter's stance or the fact that the bullet struck defendant's brother in the back -- that would provide the thirteenth juror with a basis for concluding that although the verdict was supported by legally sufficient evidence, it was against the weight of the evidence.

In support of its position that defendant's conduct "manifested an intent to kill rather than depravity or indifference to human life," the dissent relies on *People v Payne* (3 NY3d 266, *supra*), ignoring not only that *Payne* was decided after defendant's trial, but both that nothing in the court's instructions to the jury remotely suggested that one fatal shot could not support a verdict of depraved indifference murder, and that the change in the law after the trial is irrelevant (*see People v Danielson*, 9 NY3d at 349, *supra*). The dissent then claims that Justice Sandler's observation that people who fire handguns do not always hit the intended target (*People v Butler*, 86 AD2d at 815, *supra*) "does not negate defendant's clear intent, under any standard, to shoot his brother in the back and affords

no support for any argument that a jury could reasonably have found that defendant recklessly shot his brother under circumstances evincing a depraved indifference to human life" (emphasis added). Of course, however, we relied on exactly that observation in support of our conclusion that "the jury had a basis for concluding that defendant may not have intended that the bullet strike the victim where it did" (43 AD3d at 290). What is manifest, accordingly, is that the dissent's claim that Justice Sandler's observation provides "no support" for the jury's verdict is nothing more than an improper effort to use weight of the evidence review to overturn the conclusion reached by the majority on the prior appeal.

Moreover, although the dissent's position that defendant "manifested an intent to kill" is one that now benefits defendant, it is exactly the opposite of the position defense counsel argued on summation. After devoting the bulk of his summation to the argument that defendant was not the shooter, counsel argued to the jury that if it accepted the testimony of the prosecutor's witnesses,

> "the distance that the shot was fired, the fact that it was only one shot fired, does not amount to proof beyond a reasonable doubt that [defendant] intended to murder [his brother].
>
> "Now I submit to you that if you fire a gun you, at least, maybe have an intent to cause serious

> physical injury but to cause the death, there is no proof of that. Look at the diagram, look at ... People's Exhibit 5 ... Look at the location where the people say that they were, look at the distance between the individuals. There is no testimony that the person who shot [defendant's brother] shot over him or was standing very close to him. There is at least twenty, thirty more feet away, only one shot fired..."

In addition, counsel stressed the absence of testimony "of any animosity, any hatred, any ... 'motive' for [defendant] to be willing to intentionally murder his brother..." Nonetheless, sitting as the "thirteenth juror," the dissent concludes that defendant "manifested an intent to kill."

Finally, the dissent writes that "[t]his is simply not that rare exception alluded to by the Court of Appeals in *People v Payne* (3 NY3d at 272 n 2)." No juror listening to the court's instructions on the elements of depraved indifference murder, however, would have had the slightest reason to believe that there was any rule, let alone a rare exception to that rule, precluding a one-on-one shooting from qualifying as depraved indifference murder. The change in the law after defendant's trial, i.e., the promulgation of that rule in *Payne*, is

irrelevant (*People v Danielson*, 9 NY3d at 349, *supra*). So, too, is the change in the composition of the panel on this appeal.[7]

All concur except Mazzarelli, J.P. and Andrias, J. who dissent in a memorandum by Andrias, J. as follows:

---

[7]The dissent maintains that the prior panel did not implicitly reject defendant's argument that the verdict was against the weight of the evidence. The dissent, however, does not mention or come to grips with the fact that we expressly noted that defendant's "principal claim ... is a two-fold challenge to the sufficiency and *weight of the evidence* supporting the verdict convicting him of depraved indifference murder" (43 AD3d at 289 [emphasis added]), or the fact that we discussed the reasons why the weight of the evidence had to be assessed in light of the elements of the crime as they were charged to the jury (*id.* at 291-292). Nor does the dissent mention or come to grips with the fact that we prefaced that discussion with the following statement: "Nor can defendant prevail, in the absence of review in the interest of justice, by contending that the verdict is against the weight of the evidence" (*id.* at 291). Not surprisingly, the dissent in the prior appeal never asserted that the majority had committed the elementary mistake of failing to accord defendant his right to weight of the evidence review. Albeit implicitly, the same dissenters now assert exactly that.

ANDRIAS, J. (dissenting)

I respectfully dissent as I believe the conviction for depraved indifference murder, as viewed in light of the court's jury charge, which reflected the law that was in effect at the time of the crime (*see People v Sanchez*, 98 NY2d 373, 379-380 [2002], explaining *People v Register*, 60 NY2d 270, 276-277 [1983], *cert denied* 466 US 953 [1984]), is against the weight of the evidence (*see People v Noble*, 86 NY2d 814 [1995]).

Defendant fatally shot his brother once in the back during a dispute over money in the street. This one-on-one shooting was not "marked by uncommon brutality" (*People v Payne*, 3 NY3d 266, 271 [2004]), and did not evince the mental culpability required for depraved indifference (*Sanchez*, 98 NY2d at 380). However, the evidence, including testimony that defendant brandished a revolver during the dispute and fired it at the victim as others, including children, stood nearby, supported a finding that defendant acts were reckless, as the jury determined, but not depraved (*see People v George*, 11 NY3d 848 [2008]; *People v Jean-Baptiste*, 11 NY3d 539 [2008]; *People v Atkinson*, 7 NY3d 765 [2006]; *People v McMillon*, 31 AD3d 136 [2006], *lv denied* 7 NY3d 815 [2006]; *People v Dudley*, 31 AD3d 264 [2006], *lv denied* 7 NY3d 866 [2006]). Thus, I would reduce defendant's murder conviction to manslaughter in the second degree.

Despite the majority's statement that the majority in defendant's previous appeal to this Court (43 AD3d 288 [2007]) implicitly rejected defendant's weight of the evidence argument, such statement is not borne out by a plain reading of that decision, which essentially set forth the majority's reasons why the evidence was sufficient based on the court's charge as given without objection. Defendant argues that, even under the standard applicable at the time of his trial, a typical one-on-one shooting did not qualify as a depraved indifference murder. The majority rejects this argument because at no point did the trial court instruct the jury that a "one-on-one shooting", typical or not, did not qualify as a depraved indifference murder and defendant never protested the absence of any such instruction. However, *People v Payne* (*supra*) and *People v Gonzalez* (1 NY3d 464 [2004]), the cases relied on by defendant, do not hinge on the substance of the court's charge to the jury. Rather, those cases, as well as *People v Hafeez* (100 NY2d 253 [2003]), made clear that a one-on-one shooting or knifing (or similar killing) can never, with rare exception, qualify as depraved indifference murder.

Indeed, Justice Catterson writing for a unanimous Court in *People v Dickerson* (42 AD3d 228, 234 [2007] *lv denied* 9 NY3d 960 [2007]) recognized that a conviction of depraved indifference

murder may be found legally insufficient where the evidence demonstrates a "manifest intent to kill." He also recognized the very limited circumstances in which depraved indifference may be found in one-on-one killings, giving two examples not relevant here (abandoning a helpless and vulnerable victim in circumstances where the victim is highly likely to die, or where a defendant acts not to kill but to harm and engages in torture or a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim) (*id.*).

As found by the Court of Appeals, the original memorandum decision in this case did not indicate that the majority weighed the evidence in light of the elements of the crime as charged to the jury (10 NY3d 875 [2008]); however, the dissent clearly did, finding that "the verdict was against the weight of the evidence (*see generally People v Cahill*, 2 NY3d 14, 57-62 [2003]) with respect to the element of depraved indifference to human life, viewed in light of the court's charge to the jury on that element (*see People v Noble*, 86 NY2d 814 [1995])" (43 AD3d at 296 [2007]).

While this was not a point-blank shooting as was the case in *People v Sanchez*, 98 NY2d 373, that defendant's conduct manifested an intent to kill rather than depravity or indifference to human life, as that term is generally understood,

is evidenced by the majority's own description of the events, in which defendant took a "shooter's stance" and shot his brother once in the back as he ran ("Defendant stood on the sidewalk with his hands extended in front of him, holding the revolver with both hands. He pulled the trigger, shooting Amir once in the back.")

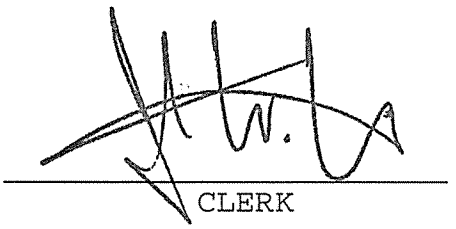
As the Court of Appeals has said: "[I]f a defendant fatally shoots the intended victim once, it could be murder, manslaughter in the first or second degree or criminal negligence (or self defense), but not depraved indifference murder" (*People v Payne*, 3 NY3d at 272.). That people, including trained police officers who fire handguns, do not always hit the intended target (*see People v Butler*, 86 AD2d 811, 815 [Sandler J., dissenting] [1982], *revd on dissenting mem*, 57 NY2d 664 [1982]), does not negate defendant's clear intent, under any standard, to shoot his brother in the back and affords no support for any argument that a jury could reasonably have found that defendant recklessly shot his brother under circumstances evincing a depraved indifference to human life. This is simply not that rare exception alluded to by the Court of Appeals in *People v Payne* (3 NY3d at 272 n2).

Accordingly, I would modify the judgment convicting defendant of murder in the second degree and criminal possession of a weapon in the third degree, on the facts, to the extent of

reducing the murder conviction to manslaughter in the second degree and remanding for resentencing on that conviction, and otherwise affirm.

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1090 Tamara Covington, Index 21650/03
Plaintiff-Respondent-Appellant,

-against-

Sanjeev Kumar, et al.,
Defendants-Respondents,

Jarrett A. McCalla, et al.,
Defendants-Appellants-Respondents.

Martin, Fallon & Mullé, Huntington (Stephen P. Burke of counsel), for appellants-respondents.

Stillman & Stillman, LLP, Bronx (W. Matthew Sakkas of counsel), for respondent-appellant.

Koors & Jednak, Bronx (Paul W. Koors of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered September 30, 2008, upon a jury verdict, awarding plaintiff damages and finding defendants McCalla and Thomas 100% liable, and no liability on the part of defendants Kumar and Lal, and bringing up for review the denial of the McCalla/Thomas defendants' motions for a directed verdict and to set aside the verdict, unanimously modified, on the facts, to vacate so much of the judgment as pertains to apportionment of fault, and the matter remanded for a new trial on that issue, and, except as thus modified, affirmed, without costs, unless all defendants stipulate, within 20 days of service of a copy of this

order with notice of entry, to apportion fault 60% against defendants McCalla and Thomas and 40% against defendants Kumar and Lal.

Plaintiff was injured while riding in the back passenger seat of a taxicab, which was driven by Kumar and owned by Lal. The taxicab made a left turn across an intersection and was struck by an approaching vehicle driven by McCalla and owned by Thomas. After trial, the jury apportioned 100% fault against defendants McCalla and Thomas. The parties stipulated that defendant McCalla had a green light in his favor as he entered the intersection. Yet, inexplicably, the jury apportioned 100% fault against defendants McCalla and Thomas, and 0% against Kumar and Lal. The Court denied both the motion to set aside the verdict and also the motion for a directed verdict. We vacate the judgment insofar as it apportioned fault.

CPLR 4404(a) permits a court to set aside a jury verdict and direct a new trial if the verdict is against the weight of the evidence. "[W]hether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors" *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1998].

Vehicle and Traffic Law § 1141 provides that:

"The driver of a vehicle intending to turn to

> the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard."

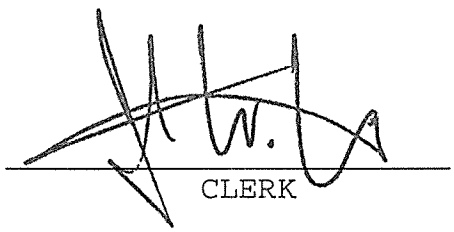
Kumar did not testify at trial, and his attorney acknowledged his liability. Indeed, counsel stated that Kumar was challenging only the claim that plaintiff suffered a serious injury. At a minimum, Kumar was negligent when he made a left hand turn without yielding the right of way, in violation of VTL 1141. Under such circumstances, the jury verdict finding no fault against Kumar is against the weight of the evidence.

We therefore remand for a new trial on the apportionment of damage, unless all defendants stipulate as indicated (*see McGorry v Madison Square Garden*, 4 AD3d 264 [2004]).

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

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1387 The People of the State of New York, Respondent, Ind. 5545/04

-against-

Michael Brunner, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 9, 2006, as amended June 2, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of 4½ years, unanimously affirmed.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Regardless of whether counsel should have made a speedy trial motion, defendant was not prejudiced by the lack of such a motion. Upon our review of the periods of delay at issue, we conclude that there was not enough includable time to require

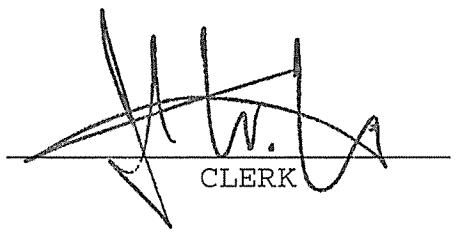
dismissal of the indictment.

The court properly denied defendant's request for missing witness charges as to several officers, since none of them would have provided material, non-cumulative testimony (*see generally People v Gonzalez*, 68 NY2d 424 [1986]). A supervising officer was not present during the drug sale, and his testimony about events that came after the sale would have been cumulative to that of an officer who testified (*see e.g. People v Epps*, 8 AD3d 85 [2004], *lv denied* 3 NY3d 673 [2004]). The record fails to support defendant's assertion that two other uncalled officers may have been in a position to observe the sale (*see People v Tavarez*, 288 AD2d 120 [2001], *lv denied* 97 NY2d 709 [2002]).

The court's *Sandoval* ruling, permitting only limited use of defendant's prior record, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]).

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1388-
1389 Index 603831/06

Graham Packaging Company, L.P.,
Plaintiff-Respondent,

-against-

Owens-Illinois, Inc., et al.,
Defendants-Appellants.

Latham & Watkins LLP, New York (Joseph M. Salama of counsel), for appellants.

Blank Rome LLP, Philadelphia, PA (Laurence S. Shtasel of counsel), for respondent.

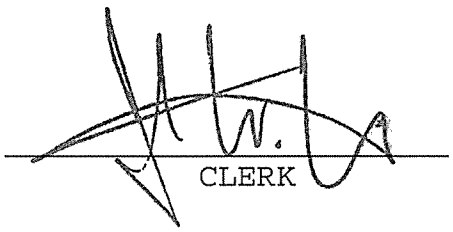
Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered February 20, 2008, dismissing defendants' counterclaim pursuant to an order, same court and Justice, entered October 25, 2007, which granted plaintiff's motion to dismiss the counterclaim, unanimously affirmed, with costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants' claim of fraudulent concealment was not viable, undermining their counterclaim for damages and rescission of the settlement agreement. Even if arguendo plaintiff was under a duty to disclose its own valuation of its anticipated claims against defendants, and even if defendants could not have learned of such information by the exercise of reasonable diligence,

defendants, sophisticated entities represented by counsel, should have at least inquired about such valuation or inserted a prophylactic provision in the settlement agreement to limit their exposure (*see Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352 [2005]). In view of the foregoing, we find it unnecessary to address the parties' remaining contentions.

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, DeGrasse, Richter, JJ.

1391 In re Eric J.,

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

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for presentment agency.

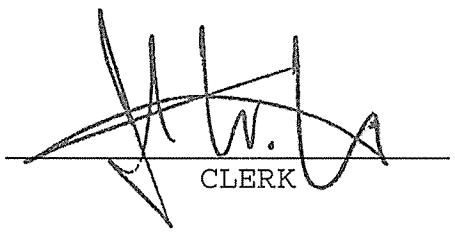
Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about April 2, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree (two counts) and grand larceny in the fourth degree, and placed him on probation for a period of 18 months, with community service and restitution, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. Appellant's intent to take part in a robbery can be inferred from the fact that he kicked the victim in the mouth immediately after

other participants took the victim's property and knocked him down. There is nothing in the record to support appellant's present suggestion that the incident was an "altercation" in which someone incidentally took property. "There was no evidence of any motive for appellant's unprovoked attack on the victim other than robbery" (*Matter of Eliazar G.*, 4 AD3d 157, 158 [2004]; *see also Matter of Horatio B.*, 240 AD2d 197 [1997]).

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1392 In re Amani Dominique H., and Another,

Children Under the Age of
Eighteen Years, etc.,

Andre H.,
Respondent-Appellant,

Cardinal McCloskey Services, et al.,
Petitioners-Respondents.

John J. Marafino, Mount Vernon, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondents.

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

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about June 27, 2008, to the extent it denied respondent father's motion to vacate a prior dispositional order, entered on or about March 13, 2007, which, upon respondent's default in appearing at the dispostional hearing, terminated his parental rights and transferred the custody and guardianship of the subject children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs. Appeal from so much of the June 27, 2008 order as denied respondent's motion to vacate a finding that he violated the terms and conditions of a

suspended judgment, unanimously dismissed, without costs.

Although respondent failed to appear at the fact-finding and dispositional hearings held on March 13, 2007, there was no default with respect to the fact-finding hearing because his attorney appeared and participated in that hearing (*see Matter of Vanessa M.*, 263 AD2d 542 [1999]; *see also Matter of Male J.*, 214 AD2d 417 [1995]). As the fact-finding portion of the order therefore was not entered upon a default, respondent's motion to vacate that portion of the order was improper, and the appeal from the denial of that motion is not properly before us.

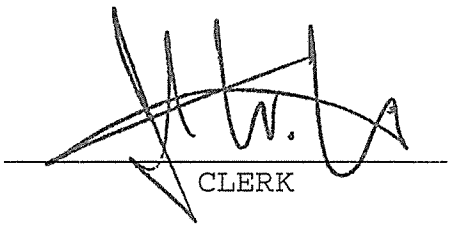
Were the denial of respondent's motion to vacate the fact-finding portion of the order properly before us, we would find that respondent failed to demonstrate either a reasonable excuse for his absence from the hearings or a meritorious defense to the allegation that he violated the suspended judgment. Although he claimed he was incarcerated and scheduled to appear in Criminal Court on that date, respondent offered no evidence that he had notified the court or his attorney of his inability to appear in Family Court (*see Matter of Dumaka Hershey Jones D.*, 7 AD3d 261 [2004]). Respondent offered only conclusory statements to the effect that he did not violate the suspended judgment (*see Matter of Jones*, 128 AD2d 403, 404 [1987]). The record demonstrates that he failed to protect his children during a period of trial

discharge, failed to comply with random drug tests, and deceived petitioner as to the children's biological mother's substance abuse and the fact that he was residing with her.

As to the dispositional portion of the order, respondent failed to demonstrate that a disposition other than the termination of his parental rights would serve the best interests of the children, who had lived with their foster mother for all but two months of their lives (*see Matter of Shaka Efion C.*, 207 AD2d 740 [1994]).

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1394 Abdulla Ahmed, Index 110049/08
Plaintiff-Appellant,

-against-

C.D. Kobsons, Inc.,
Defendant-Respondent.

Steven Landy & Associates, PLLC, Queens (Leon Brickman of counsel), for appellant.

Barry S. Schwartz, New York, for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about May 5, 2009, which, inter alia, denied plaintiff's motion for a preliminary injunction, unanimously affirmed, without costs.

Plaintiff failed to demonstrate that he would probably succeed on the merits and that the equities weighed in his favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). The subject lease afforded plaintiff a renewal option, provided that he was not delinquent in the payment of rent and was not in material default under any other provision of the lease (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 448 [1984]). Plaintiff was not only continuously late with the payment of rent but was also delinquent in the payment of water charges, sign fees and

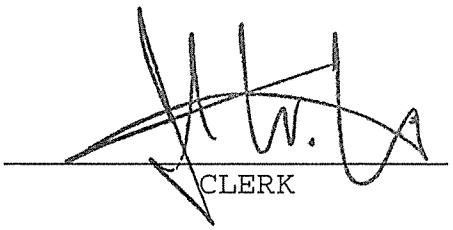
sanitation charges, thereby materially defaulting under other provisions of the lease.

The "no waiver" clause of the lease, which provides, in pertinent part, that defendant's acceptance of rent shall not be deemed a waiver of any breach by plaintiff, vitiates plaintiff's argument that defendant must renew the lease based on an established course of dealing. Nor, contrary to his contention, does the lease require defendant to serve a notice to cure a rent delinquency or other material default that would preclude renewal.

Plaintiff's remaining arguments are unavailing.

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1395 Joanne Gartmann,
Plaintiff-Respondent,

Index 105399/05
591013/05

-against-

City of New York, et al.,
Defendants,

A & A Sprint Enterprises, Inc.,
Defendant-Appellant.

[And A Third-Party Action]

Kral, Clerkin, Redmond, Ryan, Perry & Girvan, LLP, New York (Elizabeth Gelfand Kastner of counsel), for appellant.

Law Offices of Kenneth M. Mollins, P.C., Melville (Peter Citrin of counsel), for respondent.

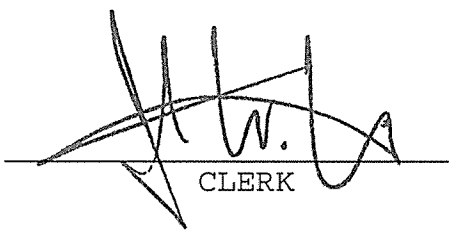
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 17, 2008, which, to the extent appealed from as limited by the brief, denied defendant A & A Sprint Enterprises, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant A & A Sprint Enterprises, Inc. dismissing the complaint as against it.

No issue of fact as to whether defendant snow removal contractor created or exacerbated the alleged dangerous condition that caused plaintiff's fall is raised by the evidence that after

the most recent snowfall defendant plowed the parking lot and spread calcium chloride on it (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002]). Nor, since the snow removal contract obligated defendant to plow only after the owner asked it to do so, did defendant "entirely absorb [the owner's] duty as a landowner to maintain the premises safely" (*id.* at 141; *see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007]). In addition, plaintiff does not allege detrimental reliance on defendant's continued performance of its contractual obligations (*see e.g. Espinal* at 140). Thus, the record demonstrates as a matter of law that defendant owed no duty of care to plaintiff and cannot be held liable in tort for her injuries (*see id.* at 138).

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1396-
1397 The People of the State of New York, Ind. 887/08
Respondent, 83/08

-against-

Jose Pinero-Baez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 9, 2008, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, and judgment, same court (Richard Carruthers, J.), rendered July 16, 2008, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a concurrent term of 10 years, unanimously affirmed.

The court properly exercised its discretion in permitting the People to introduce a threatening statement, containing the words "I shoot people," that defendant made to a court officer who was trying to escort him back to Department of Correction

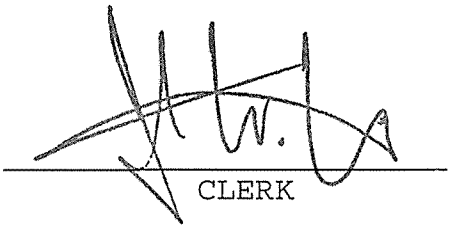
custody following a court appearance. This entire statement, including the quoted phrase, expressed a threat to use force against the officer, and was highly probative of defendant's intent to prevent the officer "from performing a lawful duty" (Penal Law § 120.05[3]). In any event, even if the phrase "I shoot people" should have been redacted, its admission was harmless.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence to support the element of physical injury (*see e.g. People v Wade*, 41 AD3d 288 [2007], *lv denied* 9 NY3d 883 [2007]). That element can be established through a victim's credible description of his or her injuries (*see People v Guidice*, 83 NY2d 630, 636 [1994]); in any event, the officer's testimony was corroborated by medical records.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1398-
1399 Index 401738/99

In re Liquidation of Union Indemnity Insurance Company of New York,

- - - - -

The Superintendent of Insurance of the State of New York, etc.,
Plaintiff-Respondent,

-against-

Robert A. Spira,
Defendant-Appellant.

Schrader & Schoenberg, LLP, New York (David A. Schrader of counsel), for appellant.

Mait, Wang & Simmons, New York (Michael C. Simmons of counsel), for respondent.

Judgment, Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered February 14, 2008, awarding plaintiff the sum of $257,858.62 against defendant, pursuant to an order, same court (Karla Moskowitz, J.), entered February 14, 2008, which granted plaintiff's motion to confirm the report and recommendation of a special referee, and directed entry of judgment in accordance with the recommendation, unanimously affirmed, without costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant's statute of limitations argument is barred by res

judicata. Originally dismissed by Justice Gammerman in an earlier decision in this matter, affirmed by this Court (289 AD2d 173 [2001], *lv denied* 98 NY2d 672 [2002]), this argument was raised again by defendant on an appeal in 2004, which was dismissed with prejudice by order of this Court entered August 18, 2005.

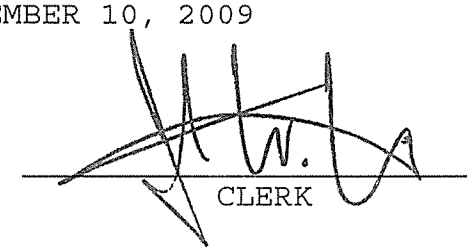
Defendant's argument that his right to offsets for the diminution in value of certain stocks which were subject to a restraining order is without merit as the order was made with the consent of the defendant. Moreover, it would be purely speculative to conclude that defendant would have sold the stock prior to some degree of diminution, since defendant never sought permission to sell any of the stock and does not offer any record support for his alleged losses. In any event, such decrease in value was not caused by the restraints on his stock, but by market forces (*see Miller v Ferry*, 50 Hun 256, 2 NYS 863 [1888]).

The reference to the special referee was properly made. The motion court correctly perceived that the only issue remaining as to any alleged improper conduct by the liquidator, which had not already been dismissed by Justice Gammerman (289 AD2d at 174), was whether the liquidator had unjustifiably prolonged the litigation, and the court properly limited defendant's discovery to that issue. Moreover, this referral was consistent with the

earlier referral by Justice Gammerman, in that both sought to have the special referee determine the reasonableness of interest and attorneys' fees associated with the collection of the underlying debt which defendant guaranteed. No issue relating to the failure to notify defendant or to accept defendant's proffered assistance remains because, even though the liquidator would then "proceed[ ] at his own risk," that risk is limited to the later necessity of proving, at the time of seeking reimbursement from the indemnitor (defendant), that the indemnitor would have been liable and that there was no good defense (*L. B. Kaye Assoc., Ltd. v Libov*, 139 AD2d 440, 440 [1988]). Those issues were established in the aforementioned proceedings before Justice Gammerman (*see* 289 AD2d 173). Defendant's challenge to the legality of the reference is waived, since he did not object to it and fully participated in the proceedings before the special referee (*see Nilda S. v Dawn K.*, 302 AD2d 237, 238 [2003], *lv denied* 100 NY2d 512 [2003]).

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ

1400 The People of the State of New York, Ind. 316/07
Respondent,

-against-

Antonio Hopkins,
Defendant-Appellant.

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Ropes & Gray LLP, New York (Svetlana Khvalina of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered November 19, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 4½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility.

The court properly denied defendant's request for new counsel, made during jury selection, since defendant, who received a reasonable opportunity to be heard, did not establish

good cause for a substitution (*see People v Linares*, 2 NY3d 507 [2004]; *People v Sides*, 75 NY2d 822 [1990]). The court permitted defendant to state the reasons for his request, and only addressed counsel after defendant was finished speaking. Defendant did not establish a "breakdown" in the attorney-client relationship, but only expressed disagreements about trial strategy and a generalized complaint about the quality of the representation. We have considered and rejected defendant's remaining arguments on this issue.

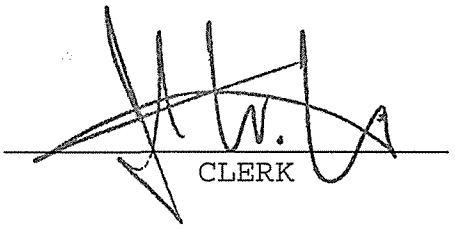
The court properly declined to instruct the jury that "mere presence" at the scene of a crime is insufficient to establish guilt. There was no factual basis for such an instruction (*see People v Slacks*, 90 NY2d 850 [1997]), which would have been unnecessary and potentially confusing. The People's sole theory was that defendant personally gave drugs to an undercover officer in return for money. There was no issue of accessorial liability, and defendant's defense was misidentification. In any

event, the court's charge, viewed as a whole, adequately conveyed the same concept.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1401 Phillip D'Avilar, Index 23171/05
Plaintiff-Appellant, 85092/06

-against-

Folks Electrical Inc., et al.,
Defendants,

Lee Spring Company, et al.,
Defendants/Third-Party
Plaintiffs-Respondents,

-against-

Warren Elevator Service Co., Inc.,
Third-Party Defendant-Respondent.

Shafran & Mosley, P.C., New York (Howard E. Shafran and Kevin L. Mosley of counsel), for appellant.

Eustace & Marquez, White Plains (Kenneth L. Gresham of counsel), for Lee Spring Company, Unispring Realty Co. and Albert P. Mangels, respondents.

Maroney O'Connor LLP, New York (Thomas J. Maroney of counsel), for Warren Elevator Service Co., Inc., respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 16, 2008, which, inter alia, granted the motion of defendants Lee Spring Company, Unispring Realty Co. and Albert P. Mangels (collectively Lee Spring) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff, a helper employed by an elevator maintenance

company, sustained significant injuries when his hand became caught while he was cleaning a wheel, chain and sprocket on an elevator at a time when the power was left on. Plaintiff testified that he began cleaning the machinery on the instructions of his supervisor who told him that the power was off. Where the evidence as to the cause of an accident that injured a plaintiff is undisputed, the question as to whether any act or omission of the defendant was the proximate cause of the accident is for the court and not the jury. "[T]he negligence complained of must have caused the occurrence of the accident from which the injuries flow" *(Rivera v City of New York,* 11 NY2d 856, 857 [1962]), and the law draws a distinction between a condition that merely sets the occasion for and facilitated an accident and an act that is a proximate cause of the accident *(see Lee v New York City Hous. Auth.,* 25 AD3d 214, 219 [2005], *lv denied* 6 NY3d 708 [2006]).

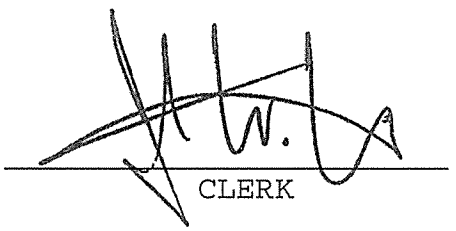
Here, Lee Spring demonstrated its entitlement to judgment as a matter of law by showing that the proximate cause of this workplace accident was the failure to turn off the power to the elevator before plaintiff commenced to clean the wheel, sprocket and chain and that it was not responsible to terminate the elevator's power when plaintiff's employer was servicing the elevator.

In opposition, plaintiff submitted, inter alia, an affidavit of an elevator expert who stated that there were code violations with respect to the subject elevator, including that it failed to have a guard on the sprocket and that Lee Spring failed to keep the machine room in a reasonably clean condition. However, this affidavit was insufficient to raise a triable issue of fact inasmuch as the expert failed to explain how the conditions he cited would have resulted in plaintiff's injury if the power to the elevator had been turned off before plaintiff began to clean the equipment. The absence of a guard and the allegedly dirty condition of the area, at most, may have facilitated the accident.

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

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1404 The People of the State of New York, Ind. 2968/03
Respondent,

-against-

Quan Hong Ye, also known as Ye Quan Hong,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (John A.K. Bradley, J.), rendered April 8, 2004, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second degree, three counts of criminal possession of a controlled substance in the third degree, and two counts of criminally using drug paraphernalia in the second degree, and sentencing him to an aggregate term of 4 years to life, unanimously affirmed.

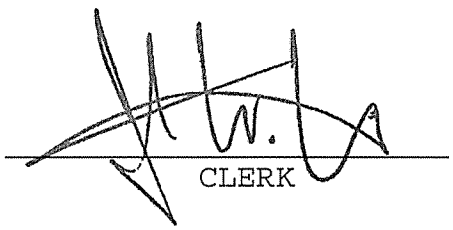
The court properly admitted the testimony of a police officer concerning defendant's admissions, which were translated to him by another officer acting as an interpreter. Since the record presents no motive for the translator to mislead, nor any reason to question the accuracy of his translations, the testimony was admissible under the agency exception to the

hearsay rule (*see People v Romero*, 78 NY2d 355, 362 [1991]). The agency exception applies even though the interpreter was a law enforcement officer primarily acting on behalf of the Police Department (*see United States v Da Silva*, 725 F2d 828, 831-832 [2d Cir 1983]). Although defendant did not choose the interpreter, he accepted him as his agent for the purpose of translating his words into English (*see People v Morel*, 8 Misc 3d 67, 69-70 [App Term 2d Dept 2005], *lv denied* 5 NY3d 808 [2005]).

Moreover, the interpreting officer testified as to the truthfulness and accuracy of his translation. Furthermore, this officer also testified as to the substance of defendant's admissions, and this testimony was essentially the same as that given by the interrogating officer.

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1405 In re Shady Al's Sports Bar Corp., Index 102160/09
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 February 11, 2009, which revoked petitioner's liquor license and directed forfeiture of its $1,000 bond, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Walter B. Tolub, J.], entered on or about March 16, 2009), dismissed, without costs.

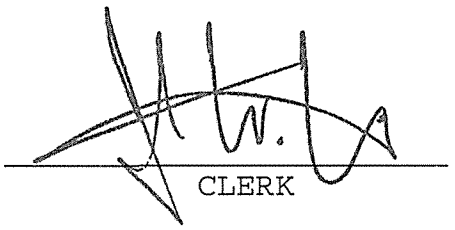
The determination sustaining the charges of suffering or permitting the premises to become disorderly, in violation of Alcoholic Beverage Control Law § 106(6), and failing to exercise adequate supervision, in violation of the Rules of the State Liquor Authority (9 NYCRR) § 48.2, was supported by substantial evidence. The record indicates that petitioner's management was aware, or should have been aware, that lewd and indecent acts and

prostitution were occurring on its premises (*see Matter of Go W. Entertainment, Inc. v New York State Liq. Auth.*, 54 AD3d 609 [2008]; *Matter of Aulcalf, Inc. v New York State Liq. Auth.*, 193 AD2d 415 [1993], *lv denied* 82 NY2d 653 [1993]).

The penalty imposed does not shock our sense of fairness (*see e.g. Go W. Entertainment, Inc.*, 54 AD3d at 609; *Matter of Couples at V.I.P. v New York State Liq. Auth.*, 272 AD2d 615 [2000]).

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1406 The People of the State of New York, Ind. 6369/05
Respondent,

-against-

Chrispulo Vanderpul,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered on or about October 17, 2006, unanimously affirmed.

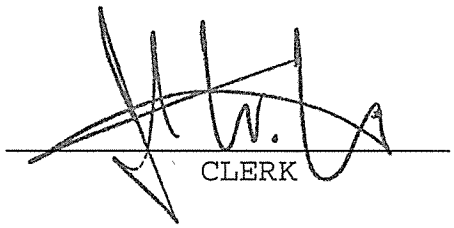
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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: NOVEMBER 10, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1407N In re Elizabeth A. Mason, etc., Index 115352/03
Petitioner-Respondent-Respondent,

-against-

The City of New York,
Respondent-Respondent,

Michael Strohbehn, etc.,
Respondent-Petitioner-Appellant.

Lagemann Law Offices, New York (Jonathan D. Berg of counsel), for appellant.

Elizabeth A. Mason, New York, respondent pro se.

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

Order, Supreme Court, New York County (Karen S. Smith, J.), entered on June 27, 2008, which, in a fee dispute between attorneys arising out of the settlement of an underlying action against respondent City, upon petitioner's application to compel the City to pay the full amount of the settlement to her as the underlying plaintiff's attorney, and respondent's cross petition to enforce a charging lien in the amount of $168,674.12, granted petitioner's application to the extent of directing the City to pay petitioner the full amount of the settlement less $5,250, and, insofar as appealed from, granted respondent's application only to the extent fixing his charging lien in the amount of

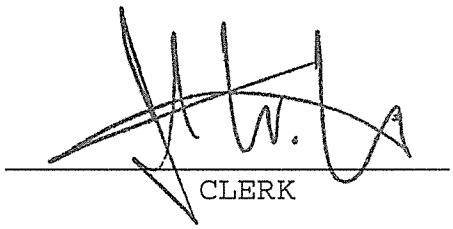
$5,250, unanimously reversed, on the law, without costs, and the matter remanded for a hearing to determine whether respondent is entitled to be paid for his services, and, if so, the reasonable value of his services and the amount of any reimbursable expenses.

Petitioner asserts that she retained respondent to act as "co-trial counsel" for the underlying child plaintiff in a sexual abuse case (*see Anonymous v High School for Envtl.* Studies, 32 AD3d 353), and does not dispute that in a trial on the issue of damages, respondent, among other things, conducted the voir dire, made the opening statement, conducted the direct examination of an important witness, and conducted a *Frye* hearing. Such activity made respondent an "attorney of record" prima facie entitled to a charging lien (*see Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 140 F3d 442, 450-451, 452 [2d Cir 1998]), even though he was discharged by petitioner after a mistrial was declared and was not an attorney of record at the time of the settlement (*see id.* at 451, citing *Klein v Eubank*, 87 NY2d 459, 462 [1996]). A hearing is required to determine if respondent was discharged for cause, and, if not, the amount of his fee on a quantum meruit basis (*see Teichner v W & J Holsteins*, 64 NY2d 977, 979 [1985]). We reject respondent's claim that the City remains liable for the full amount of any lien he may be awarded.

Unlike *Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York* (302 AD2d 183, 185, 189-190 [2002]), where the City released the settlement proceeds before a final determination of the validity and amount of the outgoing attorney's charging lien, here the City disbursed the settlement funds in accordance with the trial court's order fixing the amount of respondent's lien and directing release of the remaining money to petitioner.

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1408 The People of the State of New York, Ind. 3219/06
Respondent,

-against-

Jamarr Fowler,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered July 31, 2008, convicting defendant, after a jury trial, of rape in the second degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously modified, as a matter of law, to the extent of remanding for resentencing, to include the filing of a predicate felony statement, and otherwise affirmed.

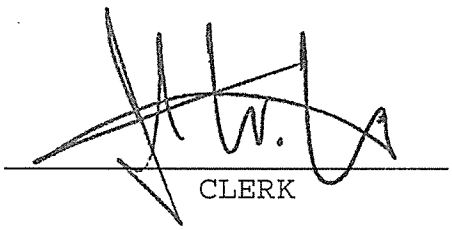
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The victim gave a plausible account of the incident that was corroborated by other evidence. Although, in performing weight of evidence review, we may consider the jury's verdict on other counts (*see People v*

Rayam, 94 NY2d 557, 563 n [2000]), we find that the jury's mixed verdict does not warrant a different conclusion.

As the People concede, defendant is entitled to be resentenced because there is no record of any predicate felony statement or any proceeding to adjudicate defendant a second felony offender.

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1409 In re Alasha M., and Others,

Children Under the Age of
Eighteen Years, etc.,

Lakilya M.,
Respondent-Appellant,

The Administration for Children's Services
Petitioner-Respondent.

Lisa H. Blitman, New York, for appellant.

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

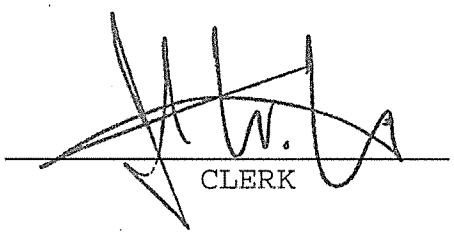
Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 21, 2006, which, upon a fact-finding determination that respondent mother neglected Nyasia M. and derivatively neglected Alasha M., Terrell M. and Victoria S., released the children to respondent's custody under the supervision of the Administration for Children's Services, unanimously affirmed, without costs.

The determination that respondent neglected Nyasia and derivatively neglected the three other children was supported by a preponderance of the evidence (Family Court Act § 1012[f][i]; § 1046[b][i]) showing that, although respondent should have known that Nyasia was in danger of being sexually abused by respondent's live-in boyfriend, respondent permitted the

boyfriend to remain in the family home unsupervised (*see Matter of Alexis C.*, 27 AD3d 646 [2006]; *Matter of Jasmin O.*, 222 AD2d 240 [1995]; *Matter of Vincent M.*, 193 AD2d 398, 403-404 [1993]), thereby demonstrating parental judgment so impaired as to create a substantial risk of harm for any child in her care (*see Matter of Joshua R.*, 47 AD3d 465 [2008], *lv denied* 11 NY3d 703 [2008]).

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1411 The People of the State of New York, Ind. 3459/06
Respondent,

-against-

Diane Marks,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

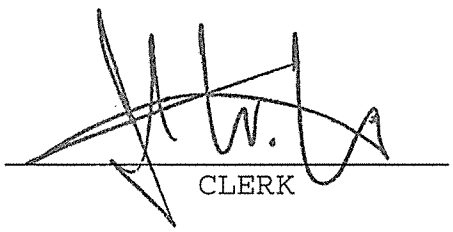
Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered May 2, 2007, convicting defendant, after a nonjury trial, of robbery in the third degree and grand larceny in the fourth degree, and sentencing her to concurrent terms of 6 months and 5 years' probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. Defendant's claim that intoxication negated her intent to steal the victim's cane was based primarily on her own testimony, which the trier of fact was entitled to discredit. That claim was undermined by prosecution testimony that defendant did not have an odor of alcohol on her breath shortly after the incident, that she walked

normally, that she attempted to exculpate herself by claiming the cane had been given to her, that she purposefully swung the cane to prevent one of the witnesses from taking it back and that she hid to avoid apprehension by the police (*see e.g. People v Sanchez*, 298 AD2d 130 [2002], *lv denied* 98 NY2d 771 [2002]). We find unpersuasive defendant's argument that she lacked any rational motive for stealing a cane.

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1412-
1412A In re Kayla Emily W.,

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

Atara W.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about March 14, 2008, which terminated respondent's parental rights and awarded custody and guardianship of the child to the Commissioner of Social Services and petitioner child care agency for the purpose of adoption, unanimously affirmed, without costs. Appeal from order of fact-finding (same court and Judge), entered on or about February 5, 2008, which, upon respondent's default, determined that she had permanently neglected her daughter, unanimously dismissed, without costs, as taken from a nonappealable order.

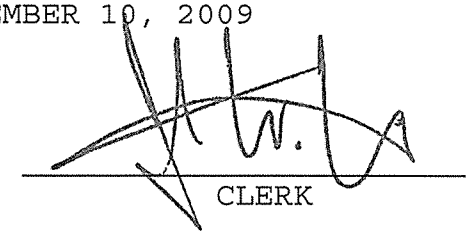
Respondent's argument, that the petition did not adequately

specify the agency's diligent efforts, is unpreserved, as she did not raise this argument below (*see Matter of Toshea C.J.*, 62 AD3d 587 [2009]; *Matter of Kimberly Vanessa J.*, 37 AD3d 185, 185 2007]). In any event, we find the petition sufficient and that any alleged deficiency was cured by the introduction into evidence at the fact-finding hearing of the agency's case progress notes, which provided detail into the agency's efforts to reunite the child with respondent (*see Matter of Gina Rachel L.*, 44 AD3d 367, 368 [2007]; *Kimberly Vanessa J.*, 37 AD3d at 185). The case notes likewise support Family Court's finding that respondent failed to plan for her daughter's future, in that she failed to utilize rehabilitative services and material resources made available to her (*see* Social Services Law § 384-b[7][c]; *Matter of Justina Rose D.*, 28 AD3d 659, 660 [2006]; *Matter of Tanya Alexis G.*, 273 AD2d 19, 19 [2000]). Family Court's finding that adoption was in the child's best interest is supported by a preponderance of the evidence (*see Matter of Elizabeth Amanda T.*, 44 AD3d 507, 508 [2007]).

The appeal from the fact-finding order must be dismissed as no appeal lies from an order entered on default (*see Matter of Kawari Claude C.*, 248 AD2d 158, 158 [1998]).

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1413 The People of the State of New York, Ind. 592N/08
Respondent,

-against-

Tyriek Mornix,
Defendant-Appellant.

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

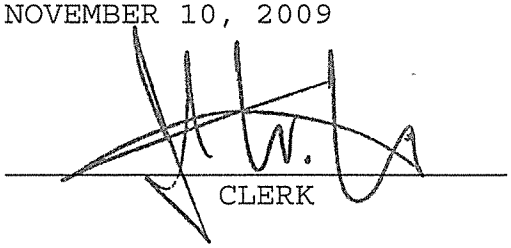
Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about October 8, 2008,

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

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

ENTERED: NOVEMBER 10, 2009



CLERK

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

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1414 In re Gene DeMartino, etc., Index 111788/08
Petitioner-Respondent,

-against-

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

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

Schwartz, Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for respondent.

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered February 19, 2009, confirming an arbitration award, unanimously affirmed, without costs.

By proceeding to arbitration without moving for a stay, respondents waived their current claims that petitioner failed to comply with the conditions precedent to arbitration, i.e., had no right to arbitrate (*see Matter of Commerce & Indus. Co. v Nester*, 90 NY2d 255, 261-262 [1997]), and that the arbitrator lacked jurisdiction to decide the dispute (*see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79, 83 [2003]). We note that respondents agreed to let the arbitrator frame the issue to be decided.

Respondents argued to the arbitrator that she should give preclusive effect to the prior determination of an administrative law judge (ALJ) that two 1998 stipulations involving an employee represented by petitioner's union did not have to be expunged; the arbitrator implicitly rejected this argument. The arbitrator's rejection of respondents' collateral estoppel argument was not irrational; the employee specifically declined to argue the merits of the expungement issue before the ALJ, told the ALJ that he was going to argue expungement in the arbitration, and asked the ALJ to postpone his hearing pending arbitration.

The arbitrator's determination that the 1998 proceedings constituted informal discipline within the meaning of Executive Order 16 was not irrational. Each of the 1998 stipulations clearly states that the employee "agrees to resolve this matter *without the necessity of formal disciplinary charges.*" Furthermore, consistent with section 6(b)(i) of Executive Order 16, the employee accepted a predetermined penalty.

Respondents' argument that the arbitrator misinterpreted the parties' agreement is unavailing. "'[I]t is not for the courts to interpret the substantive conditions of the contract ...' This is true 'even where "the apparent, or even the plain, meaning of the words" of the contract has been disregarded'"

(*United Fedn. of Teachers*, 1 NY3d at 82-83 [citations omitted]).

Contrary to respondents' claim, the arbitrator did not exceed her power. Section 5(e) of Executive Order 83 gives an arbitrator the power to interpret and apply rules and regulations. The arbitrator's determination that respondent New York City Department of Transportation (DOT) violated Executive Order 16 by not expunging the 1998 stipulations and test results was an interpretation of a rule or regulation. Similarly, her determination that DOT violated its Controlled Substance and Alcohol Abuse Policy for Holders of a Commercial Driver's License by terminating the employee (whom the arbitrator rationally deemed a first-time offender) instead of offering him the opportunity to participate in a substance abuse program was an interpretation of a rule or regulation. The arbitrator's order that DOT reinstate the employee and offer him the chance to participate in a substance abuse program was an application of a rule or regulation.

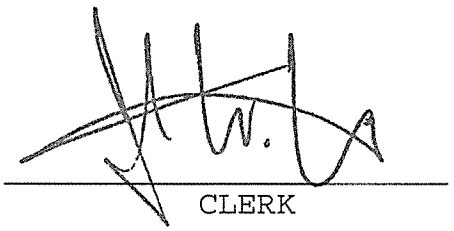
The arbitrator's order to reinstate the employee did not violate public policy (*see Matter of Local 333, United Mar. Div., Intl. Longshoreman's Assn., AFL-CIO v New York City Dept. of Transp.*, 35 AD3d 211 [2006], *lv denied* 9 NY3d 805 [2007]). "[T]he scope of the public policy exception to an arbitrator's power to resolve disputes is extremely narrow" (*United Fedn. of*

Teachers, 1 NY3d at 80). "Judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements" (*Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 7 [2002]).

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

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1415 Iris Garcia, Index 24039/05
Plaintiff-Respondent,

-against-

Best Value Discount Corp.,
Defendant-Appellant.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Norman H. Dachs and Jonathan A. Dachs of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered February 4, 2009, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

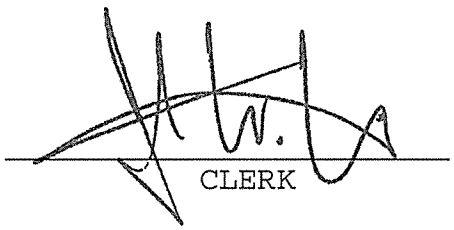
Defendant failed to establish its prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when she tripped and fell over a open box of fluorescent light bulbs that was on the floor of defendant's store. There are triable issues of fact concerning whether defendant violated its duty to maintain its premises in a reasonably safe condition *(see id.* at 72-76; *Caicedo v Cheven Keeley & Hatzis,* 59 AD3d 363 [2009]). Plaintiff testified that on the day of the accident, there were numerous boxes piled on top of one another in an area generally traversed by customers, which a jury might reasonably

find constituted an unsafe condition.

Because defendant failed to meet its prima facie burden on its motion, we need not address its argument that the court should not have considered plaintiff's opposition papers because they were untimely.

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1416 Jeffrey Sciara, Index 14646/06
Plaintiff-Respondent, 8861/07

-against-

Sheila Morey,
Defendant-Appellant,

Consolidated Edison Company of New York, Inc.,
Defendant.

[And A Third-Party Action]

Boeggeman, George & Corde, P.C., White Plains (Cynthia Dolan of counsel), for appellant.

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for respondent.

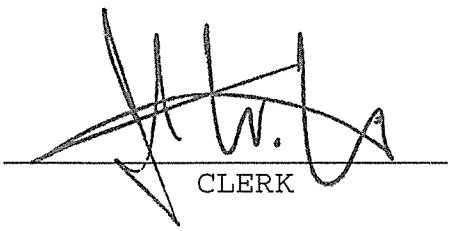
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 13, 2009, which, in an action for personal injuries sustained when plaintiff worker fell through a wooden storm cellar door on defendant homeowner's property while attempting to install a new electric meter, denied the homeowner's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

"A landowner owes a duty to exercise reasonable care in maintaining [her] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the

risk, and the foreseeability of a potential plaintiff's presence on the property" (*Karsdon v Barringer*, 298 AD2d 501, 501 [2002] [internal quotation marks and citations omitted]; *see Basso v Miller*, 40 NY2d 233, 241 [1976]). Here, inasmuch as the homeowner concedes that the subject door was in poor, "rotted" condition and that it was soon to be replaced by her son, the record presents triable issues of fact as to whether it was reasonably foreseeable that plaintiff would step on the door while performing his work (*compare Malloy v Delk Transmission*, 191 AD2d 303 [1993], *lv denied* 82 NY2d 657 [1993]). Contrary to the homeowner's contention that plaintiff's actions were the sole proximate cause of the accident, the stepping on the door by plaintiff is but a factor "to be considered by the jury in determining the issue of comparative fault" (*see Mizell v Bright Servs., Inc.*, 38 AD3d 267, 267 [2007]).

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1417 Honique Accessories, Ltd., Index 603155/05
Plaintiff-Respondent-Appellant,

-against-

S.J. Stile Associates, Ltd.,
Defendant-Appellant-Respondent,

Milton Heid,
Defendant-Respondent,

-against-

Norman Elowitz, et al.,
Additional Defendants on the Counterclaim.

Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York (William Balden Adams of counsel), for appellant-respondent and respondent.

Jaffe, Ross & Light, LLP, New York (Lawrence Fechner of counsel), for respondent-appellant and additional defendants on the counterclaim.

Order, Supreme Court, New York County (Richard J. Braun, J.), entered January 22, 2009, which, insofar as appealed from as limited by the briefs in this action for breach of contract and conversion arising out of defendant S.J. Stile Associates, Ltd.'s (Stile) enforcement of its warehouseman's lien, granted defendants' motion for summary judgment dismissing the complaint only to the extent of dismissing the complaint as against defendant Milton Heid, unanimously affirmed, with costs.

Dismissal of the complaint as against Stile was properly

denied since the record presents triable issues of fact as to whether the goods sold by Stile were held for Honique or for additional defendant on the counterclaim Honey Fashions. Questions of fact also exist concerning the sufficiency of the notice given to Honique prior to the sale, including, but not limited to, whether the amount quoted as due and owing to Stile properly reflected only Honique's obligations or improperly included the liabilities of Honique's related companies. Furthermore, although properly declining to dismiss the complaint as against Stile, the motion court inaccurately remarked that Honique has not demonstrated that Stile's failure to notify it of its rights under UCC 7-211 caused it any damage. Indeed, the record shows that Honique has consistently challenged the validity of the lien, including whether or not the lien properly reflected the amount Honique owed, as well as the commercial reasonableness of the sale of the goods (*see Shimamoto v S&F Warehouses*, 99 NY2d 165, 176 [2002]).

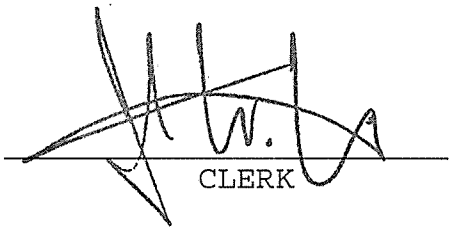
The specific arguments currently raised by Honique in support of its claim that dismissal of the complaint as against Heid was improper were not raised before the motion court, and accordingly, they will not be considered on appeal (*see e.g. Omansky v Whitacre*, 55 AD3d 373, 374 [2008]). Were we to consider these arguments, we would find that Honique has

presented no basis for holding Heid individually liable *(see e.g. Fitch v TMF Sys*, 272 AD2d 775, 778 [2000]).

We have considered the remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1420 Gretchen Rivera, etc., et al., Plaintiffs-Appellants, Index 20965/05

-against-

Paul G. Kleinman, M.D., et al., Defendants-Respondents.

The Pagan Law Firm, P.C., New York (Tania M. Pagan of counsel), for appellants.

McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of counsel), for Paul G. Kleinman, M.D. and Carl Wilson, M.D., respondents.

Garbarini & Scher, P.C., New York (Thomas M. Cooper of counsel), for Claire Bello, M.D., K. Curo, P.A. and St. Barnabas Hospital, respondents.

Judgment, Supreme Court, Bronx County (Alan Saks, J.), entered January 6, 2009, summarily dismissing the complaint, unanimously affirmed, without costs.

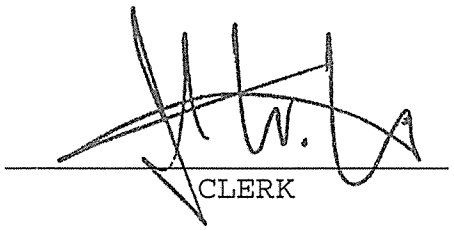
Plaintiffs' expert stated that the infant patient's injury and pain resulted from orthopedic hardware installed by defendants during hip surgery, which caused a protuberance that eventually punctured the skin. Defendants had advised plaintiff mother that the hardware should be removed between 18 and 24 months after surgery. There was no relevant pain prior to that time, but thereafter, the pin began to protrude, causing pain. Since plaintiffs failed to have the prescribed removal procedure

until 3½ years after the installation surgery, their inaction became the superseding cause of the injury (*see Merritt v Saratoga Hosp.*, 298 AD2d 802, 805 [2002]).

We have reviewed plaintiffs' remaining arguments and find them without merit.

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1421 The People of the State of New York, Ind. 2154/07
Respondent,

-against-

Robert Nestingen,
Defendant-Appellant.

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

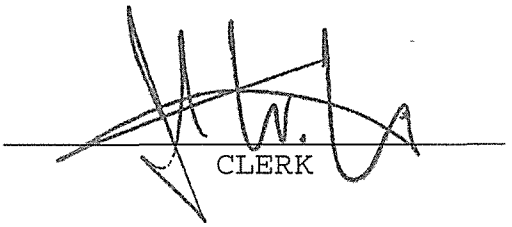
Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about March 6, 2008,

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

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

ENTERED: NOVEMBER 10, 2009



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

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1422 The People of the State of New York, Respondent, Ind. 1775/07 5496/07

-against-

James Chauncy, also known as Chauncy James, Defendant-Appellant.

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

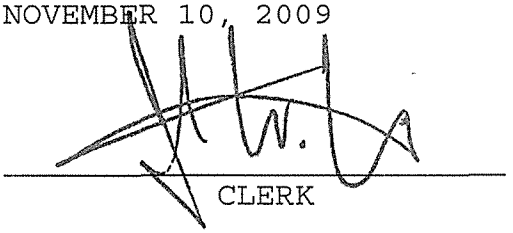
Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about June 19, 2008,

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

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

ENTERED: NOVEMBER 10, 2009



CLERK

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

Tom, J.P., Mazzarelli, Friedman, Richter, JJ.

1424 Avamer Associates, L.P., et al., Index 601430/08
Petitioners-Respondents-Respondents,

-against-

57 St. Associates, L.P.,
Respondent-Petitioner-Appellant.

Cravath, Swaine & Moore LLP, New York (Rachel Skaistis of counsel), for appellant.

Moses & Singer LLP, New York (Jay R. Fialkoff of counsel), for respondents.

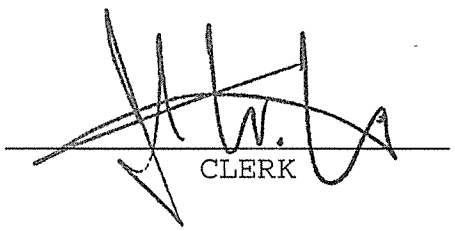
Order and judgment (one paper), Supreme Court, New York County (Eileen Bransten, J.), entered April 1, 2009, which, inter alia, granted petitioners' application to vacate the arbitrators' modification of their clarification of their "Final Award," unanimously affirmed, with costs.

As Supreme Court aptly stated, the arbitrators' acceptance of some of respondent's arguments in support of modification, and rejection of others, confirms that the arbitrators did not simply correct a miscalculation apparent on the face of the original award as clarified, but instead performed a later, separate analysis of the award's basis, i.e., of the actual figures used to calculate the total amount of damages. Further confirmation that the arbitrators were reconsidering their original award as clarified, not merely correcting a computational error, is

provided by the substantial difference between the amount requested by respondent and the amount awarded in the modification. Accordingly, there was no proper basis for the modification under CPLR 7509 (*see Matter of Israel Aircraft Indus. [DDY-Wing Aviation]*, 284 AD2d 281 [2001]; *Matter of Daly v Lehman Bros.*, 252 AD2d 357 [1998]; *see also Hough v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F Supp 283, 288 [SD NY 1991], *affd* 946 F2d 883 [2d Cir 1991] [CPLR 7511(c)(1) "construed literally" by courts to require that the miscalculation appear on the face of the award]; *Silber v Silber*, 204 AD2d 527, 529 [after award rendered, arbitrator lacks power to render a new award or to modify original, except as provided in CPLR 7509]).

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Friedman, Nardelli, Buckley Richter, JJ.

1425 The People of the State of New York, Ind. 1101/07
Respondent,

-against-

Myron Fulton,
Defendant-Appellant.

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

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

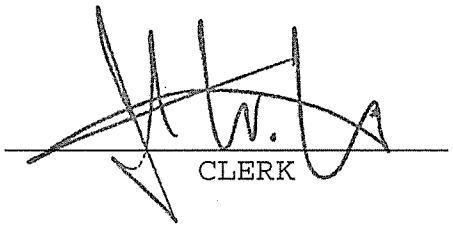
Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered July 24, 2008, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his plea (*see People v Frederick*, 45 NY2d 520 [1978]). Defendant's plea was knowingly, intelligently and voluntarily entered, and

his belated claim of innocence was contradicted by his plea allocution, which contained nothing to suggest an agency defense.

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

ENTERED: NOVEMBER 10, 2009



Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1426 Gina Gabriele, Index 7391/05
Plaintiff-Appellant,

-against-

Edgewater Park Owners
Cooperative Corp., Inc., et al.,
Defendants-Respondents,

Peter George Development Corp.,
Defendant.

[And A Third-Party Action]

Law Office of William A. Gallina, Bronx (Frank V. Kelly of counsel), for appellant.

Brian R. Hoch, White Plains, for Edgewater Park Owners Cooperative Corp., Inc., respondent.

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

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about July 29, 2008, which granted motions by the City defendants and Edgewater Park Owners Cooperative Corp. Inc. for summary judgment respectively dismissing the complaint as against each, unanimously modified, on the law, to deny Edgewater's motion, and otherwise affirmed, without costs.

Plaintiff asserts that as she was getting out of a vehicle, she was forced by construction work on the sidewalk to walk onto the roadway, and was injured when she stepped into a pothole

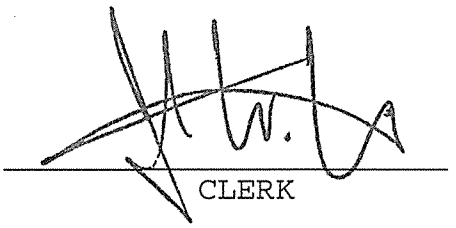
located one foot from the curb. Edgewater, whose property abutted the sidewalk, had a duty to keep the sidewalk in a reasonably safe condition (Administrative Code of City of NY § 7-210). As Edgewater did not proffer its declaration or by-laws, it does not avail it to argue that as a large, cooperative development consisting of 675 unattached, single-family homes, any liability rests solely with the shareholder whose unit abutted the portion of the sidewalk that was obstructed (*cf. Murphy v State of New York*, 14 AD3d 127 [2004]). Edgewater's evidence that it did not undertake or authorize the construction merely raises an issue of fact as to who might have done so. Plaintiff's failure to include certain of Edgewater's exhibits in the appellate record does not preclude meaningful review (*cf. Sebag v Narvaez*, 60 AD3d 485 [2009]).

Concerning the City, the complaint was properly dismissed in the absence of evidence rebutting the City's prima facie showing that it did not have notice of or create the pothole in question (Administrative Code § 7-201[c][2]; *cf. Kiernan v Thompson*, 73 NY2d 840, 841-842 [1988]). Permits issued by the City in the months prior to plaintiff's accident for water meter work in units close to the unit immediately abutting the obstructed area of the sidewalk do not indicate that the City was aware of the pothole in question "so as to constitute a 'written

acknowledgment' within the meaning of the Pothole Law, and the issuance of the work permits is insufficient to satisfy the prior written notice requirement of the statute" (*DeSilva v City of New York*, 15 AD3d 252, 253 [2005] [internal citations omitted]).

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

ENTERED: NOVEMBER 10, 2009



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1428 In re Jeffrey Francisco,
[M-4329] Petitioner,

-against-

Hon. Bruce Allen, JSC,
Respondent.

Jeffrey Francisco, petitioner pro se.

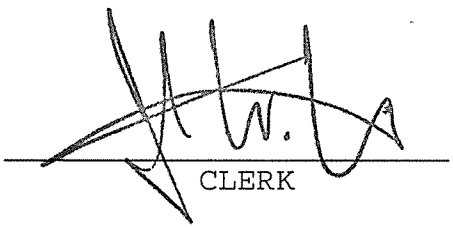
Andrew M. Cuomo, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

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

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

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

ENTERED: NOVEMBER 10, 2009



CLERK