SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 12, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Renwick, DeGrasse, JJ.

1184 In re Robert J. Troeller, etc., Petitioner-Appellant, Index 100311/08

-against-

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

Spivak Lipton LLP, New York (Eric R. Greene of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

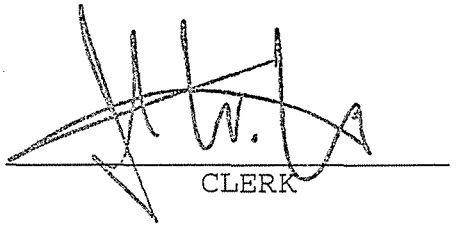
Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 16, 2008, which denied the petition to confirm an arbitration award and dismissed this proceeding, unanimously affirmed, without costs.

The parties negotiated a settlement before the special master issued a decision. The stipulation between the parties precluded petitioner from commencing this proceeding, except to enforce the stipulation. Its non-waiver provision relating to the parties' rights to pursue resolution of the jurisdictional issue, then pending before the special master, when read in the

context of the entire stipulation, was clearly meant to preserve their rights to make jurisdictional arguments in future proceedings.

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

ENTERED: NOVEMBER 12, 2009



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Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1429 The People of the State of New York, Respondent, Ind. 6512/07

-against-

Willie Nelson, Defendant-Appellant.

Law offices of Michael G. Berger, New York (Michael G. Berger of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Carol Berkman, J. at hearing; James A. Yates, J. at plea and sentence), rendered January 8, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of 6 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Police officers lawfully stopped a livery cab on the basis of traffic violations. This entitled them to order defendant, a passenger, out of the cab even without any particularized suspicion (*see Pennsylvania v Mimms*, 434 US 106, 111 [1977]; *People v Robinson*, 74 NY2d 773, 775 [1989], *cert denied* 493 US 966 [1989]). Moreover, the police had an objectively reasonable suspicion that defendant was trying to conceal a weapon. As the officers approached the stopped cab, they saw defendant, in the

middle of the back seat, frantically and erratically moving around, leaning several times to the left and moving his arms up and down in a manner that seemed to indicate that he was trying to tuck something under his arm. As the officers came closer, defendant then seemed to move over to the right side of the rear seat. This conduct went far beyond ordinary nervous behavior.

When defendant came out of the cab, he pressed his body against the area of the rear passenger door, facing the cab and pushing his waist area toward it. The officers never told defendant to stand against the cab; on the contrary, defendant refused the officers' directives to move away from it. The testimony clearly establishes that defendant was not simply complying in advance with an anticipated frisk, but was trying to hide something that was in his front waistband, away from the officers' view. In addition, defendant moved his hands downward, toward his waistband, a gesture strongly indicative of a threat to the officers' safety (*see People v Benjamin*, 51 NY2d 267, 271 [1980]). Regardless of at what point the officers first contemplated performing a patdown search, the record establishes that defendant was not seized until after he engaged in all of this suspicious behavior.

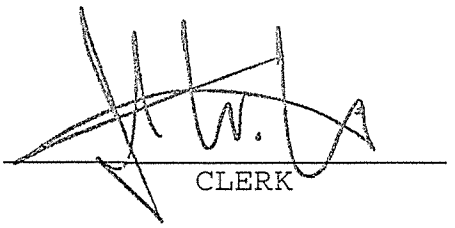
The totality of defendant's actions, both in and out of the cab, provided more than enough reasonable suspicion to warrant a frisk (*see People v Graham*, 41 AD3d 119 [2007], *lv denied* 9 NY3d

865 [2007]; *see also People v Allen*, 42 AD2d 331 [2007], *lv denied* 9 NY3d 971 [2007]; *People v Hensen*, 21 AD3d 172 [2005], *lv denied* 5 NY3d 828 [2005]). During the frisk, an officer felt a hard object that he believed, based on his experience, to be the butt of the sawed-off stock of a shoulder weapon, but which ultimately turned out to be a hard package of drugs. The officer never testified that he felt what he believed to be the entire weapon, and we reject defendant's argument that the size of the object described by the officer calls his testimony into question. Since the officer reasonably believed the object to be a firearm, he was entitled to remove it (*see e.g. People v Mims*, 32 AD3d 800 [2006).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1430 American Guarantee & Liability Insurance Company, etc., Plaintiff-Appellant, Index 107460/07

-against-

State National Insurance Company, Inc., et al., Defendants-Respondents.

Melito & Adolfsen, P.C., New York (Ignatius John Melito of counsel), for appellant.

Max W. Gershweir, New York, for respondents.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered December 18, 2008, summarily dismissing the complaint, unanimously affirmed, with costs.

Plaintiff, the excess insurance carrier, sought a declaration that the coverage disclaimer by defendant State National, the primary insurer, for reimbursement of funds advanced by the excess insurer on the insured's behalf to settle the underlying personal injury action, was untimely as a matter of law, and that the primary insurer's policy exclusion was inapplicable and ambiguous. The court properly found that the primary insurer's "construction" exclusion was unambiguous and applied to the activities being performed by the injured party at the time of his accident. The exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case (*see*

Continental Cas. Co. v Rapid-Am. Corp., 80 NY2d 640, 652 [1993]). The court also properly found that the protections of Insurance Law § 3420[d] were inapplicable to one insurer's claim for reimbursement from another insurer (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 91-92 [2005]).

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

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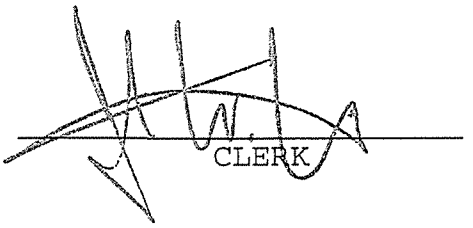

Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1431 In re Proceeding for
Custody/Visitation.

- - - - -

Susan B.,
Petitioner-Respondent,

-against-

Charles M.,
Respondent-Appellant.

Nancy Botwinik, New York, for appellant.

Amanda Norejko, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), Law Guardian.

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about April 24, 2008, which granted the mother's petition to modify a prior order governing respondent father's visitation of their child, unanimously affirmed, without costs.

The original order directed respondent not to consume alcohol while with the child. We defer to the more recent determination of the nisi prius court (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]), which was supported by the testimony of two police officers that respondent arrived at the designated location for exchange of the child in a state of intoxication. Such conduct constituted a change in circumstances warranting modification, in the child's best interests, to a more

restrictive visitation schedule (*see Matter of Kelley v VanDee*, 61 AD3d 1281 [2009]).

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

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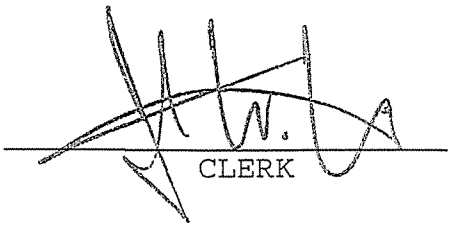


Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1434 Isaak Goldin, Index 17286/04
Plaintiff-Respondent, 85084/06

-against-

Riverbay Corporation,
Defendant-Appellant,

Iosis Razhanskiy,
Defendant.

[And a Third-Party Action]

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Scott J. Zlotolow, Sayville (Anthony Bilello of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered January 13, 2009, which denied defendant-appellant's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint and all cross claims and counterclaims as against Riverbay Corporation.

Plaintiff claims that he sustained personal injuries when he fell on a dangerously slippery hardwood floor in an apartment in Co-op City owned by his friend, defendant Razhanskiy. Defendant-appellant Riverbay, which does maintenance work in Co-op City, had done restoration work in the apartment about two weeks before Razhanskiy moved in and about three weeks before plaintiff's accident, consisting of, among other things, installing a new

hardwood floor and cleaning it with paste wax.

That a floor is slippery by reason of its smoothness or polish does not give rise to an inference of negligence; in addition, there must be proof of the negligent application of wax or polish (*Aguilar v Transworld Maintenance Servs.*, 267 AD2d 85 [1999], *lv denied* 94 NY2d 762 [2000]). Riverbay made a prima facie showing that it did not negligently apply wax or polish with the testimony of its supervisor of maintenance that the floor was waxed and buffed once in accordance with normal procedures before a new tenant moves in, that he never noticed wood floors like this one to be slippery after the application of paste wax, and that he never received any complaints from anyone concerning the slipperiness of the wood floors. Plaintiff's deposition testimony that he fell because "the floor was very smooth, like a mirror," but otherwise dry and free of debris, does not constitute evidence of the negligent application of floor wax (*see Purcell v York Bldg. Maintenance Corp.*, 57 AD3d 210 [2008]; *Kudrov v Laro Servs. Sys., Inc.*, 41 AD3d 315, 315 [2007]), and plaintiff's claim that the floor was slippery because too many layers of wax were applied is speculative. Plaintiff did not testify that after he fell his clothes were covered with wax, which would have been some evidence of an over-waxed or negligently-applied wax condition (*see Panagakos v Greek Archdiocese of N. & S. Am.*, 213 AD2d 336 [1995]).

Nor does the deposition testimony of former third-party defendants, the manufacturer and distributor of the subject wood floor tiles, or the manufacturer's floor care guide, tend to show that the floor was slippery due to the negligent application of wax. While third-party defendants' representatives agreed that there is no need to wax a floor that, like this one, has a urethane finish, neither testified that the application of wax would make the floor more slippery. And while the floor care guide lists waxed-based products as among those that should not be used on the floor, the reason it gives is that such products can pit and etch the finish of the floor, not that the use of wax makes the floor slippery.

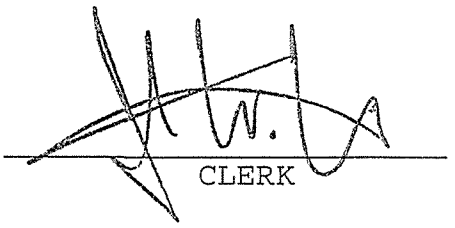
The affidavit of plaintiff's expert engineer lacks evidence in admissible form providing a foundational basis for the expert's opinion that the floor he inspected three months after the accident was in the same condition as it was on the day of the accident. The expert's reliance on Razhanskiy's oral statement to that effect was improper as such was hearsay, and the hearsay is not cured by Razhanskiy's affidavit that the floor had not been altered, as the affidavit speaks only to the six-day period between Razhanskiy's moving into the apartment and plaintiff's accident. The expert's affidavit is also speculative in claiming that a urethane floor is made more slippery by the addition of paste wax. In performing his co-efficient of

friction test, the expert did not undertake to determine the co-efficient of friction of a new non-waxed floor, and, thus lacking a benchmark, could not compare whether the application of wax affected the co-efficient of friction to any significant degree.

Plaintiff also failed to raise a triable issue of fact as to whether Riverbay had notice of the alleged danger. Razhanskiy testified that on one occasion after moving into the apartment and before plaintiff's accident, he telephoned Riverbay and inquired about how to fix the slippery condition of the floor. Such complaint, however, would not have provided Riverbay with notice of a slippery condition occasioned by the application of paste wax, and any general awareness by Riverbay that the floor was slippery would not avail plaintiff (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]; *Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 327 [2006]).

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1435 The People of the State of New York, Ind. 1104/07
Respondent,

-against-

Jose Sanchez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Dewey & LeBoeuf LLP, New York (Wendy A. Walker of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Andrew Seewald of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered September 10, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 6 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 3½ years, and otherwise affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). An undercover officer preparing to make a purchase observed a chain of interactions between defendant and an apprehended buyer. This pattern, viewed as a whole, had no reasonable interpretation except that the buyer paid in advance for drugs that defendant obtained from a nearby building. The officer saw defendant hand the buyer an

object, and the evidence warrants the conclusion that this object was the package of cocaine that the police recovered from the buyer (*see e.g. People v Bolden*, 6 AD3d 315 [2004], *lv denied* 3 NY3d 637 [2004]). Although the amount of drugs recovered from the buyer was small, the record fails to support defendant's assertion that it was only a "residue" that was too small to be marketable.

Although defendant opposed the People's generalized pretrial offer of expert testimony on the practices of drug sellers, his objections were insufficiently specific to obviate the need for further objection when the actual testimony was received, or to preserve the particular claims defendant raises on appeal. Likewise, although the court made a broad prospective ruling allowing such testimony, it never "expressly decided the question[s] raised on appeal" (CPL 470.05[2]). Then, during the trial, defendant made no objection or request for an instruction, except that when the prosecutor elicited expert testimony from more than one officer, defendant objected to this as cumulative. The court gave defendant a favorable ruling that the second witness's testimony could not duplicate that of the first, and defendant never alerted the court to his present claim that the witness's actual testimony violated that ruling. Accordingly, defendant's present claims are unpreserved and we decline to review them in the interest of justice. As an alternative

holding, we also reject them on the merits. Evidence warranting the inference that defendant did not act alone supplied a factual predicate for testimony about drug-selling teams (*see e.g. People v Flye*, 4 AD3d 251 [2004], *lv denied* 3 NY3d 658 [2004]), the expert testimony was not unduly prejudicial, the second witness's testimony was not cumulative, and the court's instructions were appropriate.

We find the sentence excessive to the extent indicated.

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

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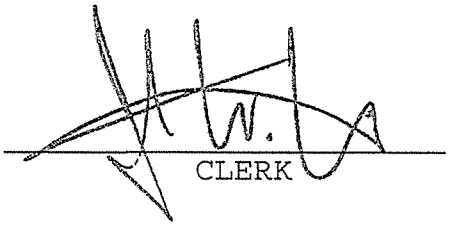


Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1437 The People of the State of New York, Ind. 4768/07
Respondent,

-against-

Makeber Sanders, etc.,
Defendant-Appellant.

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

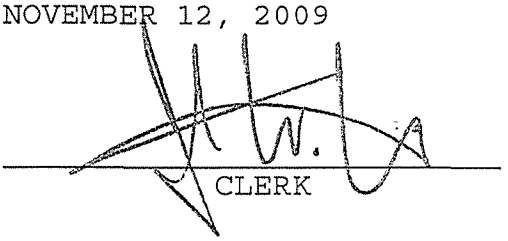
Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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 July 22, 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 12, 2009



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

Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1438 Bruce Harris, Index 103653/08
Petitioner-Appellant,

-against-

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

Steven A. Friedman, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for Department of Education of the City of New York, respondents.

Judgment, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered July 31, 2008, which denied the petition challenging respondents' determination terminating petitioner's employment as a New York City school teacher and seeking full reinstatement of petitioner's employment with back pay and benefits, granted respondents' cross motion to dismiss the petition and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

There is no ambiguity, patent or otherwise, in the decision issued by respondent Department of Education's (DOE) Hearing Officer. On the contrary, the mandate of the decision's language was clear in that petitioner, a tenured teacher, was to both serve his six-month suspension and complete the sexual harassment training before he could be reinstated to his position.

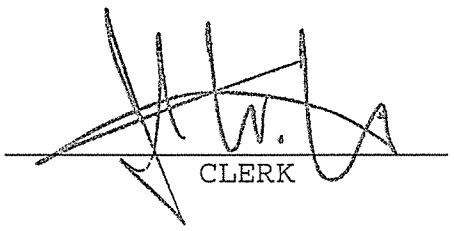
There exists no basis to find that petitioner's due process

rights were in any way violated, as the record shows that DOE held a full hearing pursuant to Education Law § 3020-a and presented testimony from the complainant and other witnesses; petitioner also presented evidence, including his own testimony. The Hearing Officer then issued a detailed decision based on the evidence, and the record provides ample support for the Hearing Officer's findings. Despite this process, petitioner still had not completed the directed sexual harassment training 10 months later.

Furthermore, there is no merit to petitioner's argument that a second hearing pursuant to Education Law § 3020-a was necessary before his employment was terminated, as petitioner raised no factual issue over the completion of the directed training (*see Matter of Smith v Andrews*, 122 AD2d 310 [1986], *lv denied* 69 NY2d 604 [1987]; *cf. Matter of Mirante v Board of Educ. of Utica City School Dist.*, 300 AD2d 1000 [2002]).

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1439 In re Estate of Grace T. Rella, Deceased. File 536 P-97

- - - - -

Gilbert R. Rella, et al., Petitioners-Appellants,

Vincent Rella, et al., Objectants-Respondents.

Louis Klieger, New York, for appellants.

Harry Amer, White Plains, for respondents.

Order, Surrogate's Court, Bronx County (Lee L. Holtzman, S.), entered on or about October 28, 2008, which denied petitioners' motion to dismiss respondents' amended objections to their accounting, deemed respondents' opposition to the motion an application for leave to file amended objections and granted the application, and granted respondents leave nunc pro tunc to file the amended objections already served and filed, unanimously affirmed, without costs.

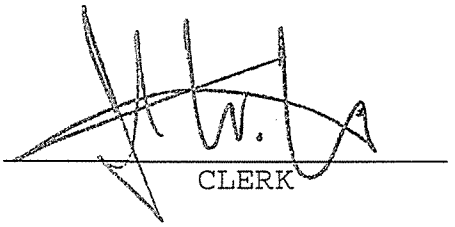
The determination to consider respondents' amended objections, despite their failure to move for leave to amend, was within the Surrogate's discretion (*see* 1 Warren's Heaton on Surrogate's Court Practice § 9.04[3] [7th ed]). Petitioners' contention that amended objection 2.C, which objects to the alleged failure to sell property at 2066 Yates Avenue in the Bronx, is time-barred is presented for the first time on appeal and will not be considered by this Court (*see e.g. Omansky v*

Whitacre, 55 AD3d 373, 374 [2008]). The Surrogate correctly found that none of the other amended objections referred to any transaction that had not been referred to in some manner in the original objections, or in the SCPA 2103 proceeding brought by respondent Anthony Rella.

Petitioners' remaining contentions are unavailing.

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

ENTERED: NOVEMBER 12, 2009



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Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1440 The People of the State of New York, Ind. 1471/07
Respondent,

-against-

Jose Rivera,
Defendant-Appellant.

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

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

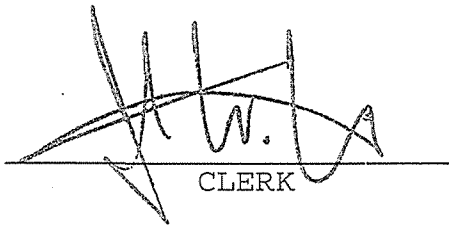
Judgment, Supreme Court, New York County (Renee A. White, J.), rendered July 11, 2007, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The court confirmed defendant's understanding that he was waiving the rights automatically forfeited upon a guilty plea, and then confirmed that he understood he was separately waiving his right to appeal, including an appeal of the suppression issue (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant also made a

valid written waiver. As an alternative holding, we also reject defendant's suppression claim on the merits.

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1442 In re Estate of Rita DeLorenzo, Deceased. File 1970/00

- - - - -

Joya Paterson, et al.,
Petitioners-Respondents,

-against-

Sun Life Insurance and Annuity Company of New York,
Respondent-Appellant.

Chorpenning, Good, Carlet & Garrison, New York (Michael J. Zaretsky of counsel), for appellant.

Novick & Associates, P.C., Huntington (Donald Novick of counsel), for respondents.

Order, Surrogate's Court, New York County (Renee Roth, S.), entered July 31, 2008, which, to the extent appealed from, denied Sun Life's motion for summary judgment, unanimously affirmed, without costs.

The estate's position on its attempt to void the annuity contract, which culminated in a settlement, did not judicially estop it from asserting its claim for the difference in the amount paid and the pre-decline value of decedent's investment since, among other reasons, it did not prevail in the earlier portion of the action (*see HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43, 48 [2006]). Nor was the claim barred by laches, since the estate was not guilty of undue delay and Sun Life's ability to present a defense was not hampered as a

result (*see Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD3d 128, 137-138 [2008]; *Santos v 500 C.S. Realty Corp.*, 48 AD3d 217 [2008]). Although the Surrogate did not address the accrual of interest, any determination of that issue would have been premature.

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

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

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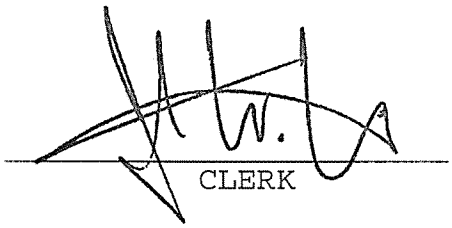


Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1443 In re Jazmyn R., and Another,

Children Under the Age
of Eighteen Years, etc.,

Luceita F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about February 3, 2009, which released the children to the custody of respondent mother without supervision, following a fact-finding determination on June 19, 2008, that the mother had neglected her daughter Kieasha by inflicting excessive corporal punishment and derivatively neglected her daughter Jazmyn, unanimously affirmed, without costs.

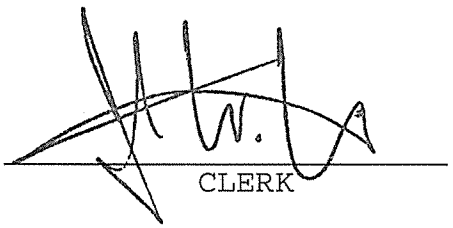
The finding of neglect is supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]) showing that respondent inflicted excessive corporal punishment (Family Ct Act § 1012[f][i][B], by beating her daughter Kieasha with two intertwined belts that left a buckle-shaped bruise and puncture

marks on her arm (*see e.g. Matter of Fred Darryl B.*, 41 AD3d 276 [2007]; *Matter of Maria Raquel L.*, 36 AD3d 425 [2007]. The out-of-court testimony of the child to the police detective was corroborated by the detective's observation of the bruise and puncture wounds (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]).

The mother's failure to testify at the fact-finding hearing permitted the court to draw the strongest inference against her (*see Matter of Dante M.*, 87 NY2d 73, 79 [1995]; *Matter of Maria Raquel L.* at 425).

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

ENTERED: NOVEMBER 12, 2009



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Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1444 Efrain Cruz, Index 21116/06
Plaintiff-Appellant,

-against-

Sandra Lugo, et al.,
Defendants-Respondents.

Mitchell Dranow, Mineola, for appellant.

Cheven, Keely & Hatzis, New York (Mayu Miyashita of counsel), for Sandra Lugo, respondent.

Richard T. Lau & Associates, Jericho (Keith E. Ford of counsel), for Pedro Martinez and Pentecostal Church Freed by Jesus Christ, respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 16, 2008, which granted defendants' motions for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants met their initial burden of establishing prima facie that plaintiff did not sustain a serious injury by submitting the reports of experts who, after examining plaintiff and reviewing MRI studies taken shortly after the accident, diagnosed resolved strain or sprain of the cervical and lumbar spine and resolved sprain of the left shoulder, with full range of motion in both areas. One of the experts reported that an MRI study of plaintiff's lumbar spine taken three months after the accident showed degenerative disc disease with mild disc

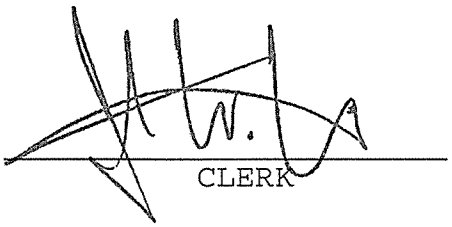
desiccation and mild posterior annual bulging unrelated to the accident.

In opposition, plaintiff submitted reports by a number of experts who opined that he suffered, inter alia, from lumbosacral and cervical sprain or strain, disc bulge, shallow central disc herniation and that he had limited ranges of motion in his cervical and lumbar spine and left shoulder. However, he failed to raise an issue of fact as to the cause of these injuries, since only one of his experts addressed the issue whether the disc bulging or herniation noted in the MRIs was the result of a degenerative condition, and he opined that plaintiff suffered from degenerative disc disease (*see Valentin v Pomilla*, 59 AD3d 184, 186 [2009]). Moreover, six months after the accident, plaintiff was discharged from the care of his treating doctor, who at that time found nothing wrong with plaintiff's neck or left shoulder and only a minimal to mild restriction of the range of motion of plaintiff's lower back. Plaintiff's reference to

"financial issues" is an inadequate explanation for the 15-month gap in his treatment in view of the fact that he remained employed (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1445 The People of the State of New York, Ind. 2002/06
Respondent,

-against-

Cleonard Hansford,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

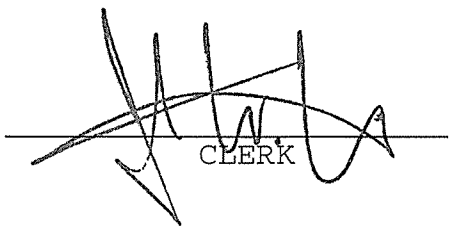
Order, Supreme Court, New York County (Bonnie Wittner, J.), entered October 7, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant did not establish special circumstances warranting a downward departure from his presumptive risk level (*see People v Guaman*, 8 AD3d 545 [2004]). The mitigating factors cited by defendant were taken into account by the risk assessment instrument, which could have assessed him as much as 30 points for those factors. Since "[d]efendant was given no points in any of these categories," he is not entitled to any "downward modification as he has already received the benefit of zero points for these factors" (*People v Douglas*, 18 AD3d 967, 968 [2005]; *lv denied* 5 NY3d 710 [2005]).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1446 William Bruce Tallant, et al., Index 100856/06
Plaintiffs-Appellants,

-against-

Grey Line New York Tours, Inc., et al.,
Defendants-Respondents.

Parker Waichman Alonso LLP, Great Neck (Ronni Robbins Kravatz of counsel), for appellants.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 16, 2008, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

It was raining on the afternoon of October 8, 2005, and all the passengers on the Gray Line double-decker bus were on the lower level. The injured plaintiff testified that he had been standing on the right passenger side, holding the guardrail, when the tour guide told him to step back from the doorway. There were no seats left. As he was talking to the guide, defendant driver slammed on the brakes and the bus, which had been moving about five miles per hour, stopped abruptly.

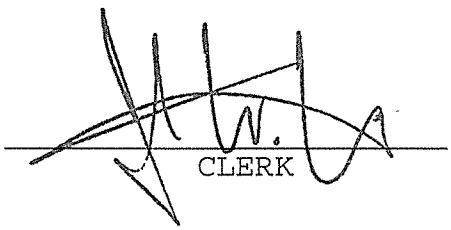
The driver testified that the bus was stopped at a red light at Madison Avenue and 52nd Street, and when the light turned green, he proceeded at five miles per hour, approximately two or

three feet, when a cab "jumped in front of" him. According to the driver, he applied the brakes with "medium" pressure.

Defendants invoked the emergency doctrine. In opposition, plaintiffs failed to adduce any evidence that the driver might have created the emergency or could have avoided a collision with the cab by taking some action other than applying his brakes (*see Brooks v New York City Tr. Auth.*, 19 AD3d 162 [2005]). Nor did plaintiffs demonstrate that the stop was unusual or violent, and different from the jerks and lurches normally associated with urban bus travel (*cf. Urquhart v New York City Tr. Auth.*, 85 NY2d 828 [1995]). Accordingly, there were no triable issues of fact as to defendants' alleged negligence.

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1447 The People of the State of New York, Respondent, Ind. 3728/07

-against-

Kenneth Stepter, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 7, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the second degree, and sentencing him, as a second felony drug offender, to concurrent terms of 8 years, unanimously affirmed.

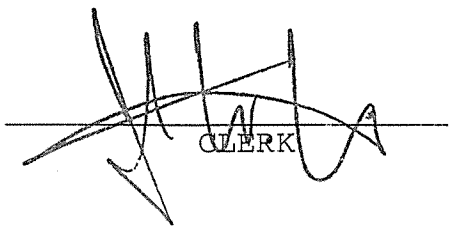
Defendant's challenge to his sentence is of a type that requires preservation (*see People v Samms*, 95 NY2d 52, 53-57 [2000]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that defendant's out of state conviction qualified as a predicate

felony conviction.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, JJ.

1448 Rolita James, Index 6926/04
Plaintiff-Respondent,

-against-

Robert G. Goodlett, et al.,
Defendants-Appellants.

Camacho Mauro & Mulholland, LLP, New York (Peter J. LoPalo of counsel), for appellants.

Pillinger Miller Tarallo, LLP, Elmsford (David Edward Hoffberg of counsel), for respondent.

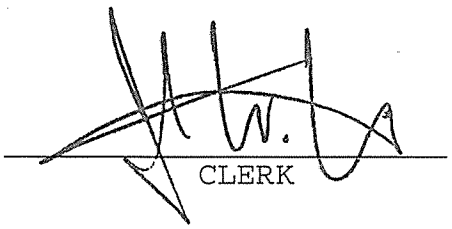
Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered May 1, 2009, which, in an action for personal injuries sustained in a car accident, after a trial solely on the issue of damages, granted plaintiff's motion to set aside the verdict finding that she did not suffer a serious injury and directed a new trial, unanimously reversed, on the facts, without costs, plaintiff's motion denied and the verdict reinstated.

The jury's verdict was reasonable under the circumstances. Indeed, plaintiff's treating physician testified that while he at first suspected that the locking condition that immediately necessitated plaintiff's October 2001 surgery was caused by a "loose body" of cartilage that had loosened from the "small bone bruise" caused by the accident and detected in the April 2001 MRI, the pathology report established, and plaintiff's physician conceded, that the loose body was "fibrous tissue with

degeneration" that was neither cartilage nor bone. Also consistent with an inference of preexisting degenerative disease was plaintiff's physician's testimony that when he first saw plaintiff two months after the accident, she had "a good functional [95%] range of motion . . . but not totally normal." Alternatively, based on plaintiff's physician's testimony that by October 2002 plaintiff was finishing up with therapy and had good range of motion with no complaints of discomfort, the jury could have fairly concluded (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206-207 [2004]) that any injury to the right knee had resolved (*see Gibbs v Wiggins*, 63 AD3d 559, 559 [2009]), and that the torn meniscus, first experienced in March 2003 while plaintiff was teaching dance, was unrelated to the accident.

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

ENTERED: NOVEMBER 12, 2009



Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1449N Rafael Rodriguez, Index 8480/04
Plaintiff-Respondent,

-against-

Jimmy Rodriguez,
Defendant-Appellant.

Koenig & Samberg, Mineola (Arnold Koenig of counsel), for appellant.

Rodriguez & Fuentes, P.C., Bronx (Savina P. Playter of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard Silver, J.), entered September 19, 2008, which, to the extent appealable, denied defendant's motion to renew his motion to vacate a default judgment and restore the case to the trial calendar, unanimously reversed, on the facts, without costs, renewal granted and, upon renewal, the motion to vacate the default granted and the matter remanded for trial.

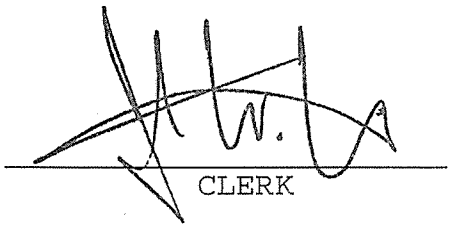
Defendant's attorney's representation that a former employee had been misdirecting or misplacing mail provides a reasonable excuse for his failure to present such evidence of law office failure on defendant's original motion to vacate the default judgment as well as his failure to appear in court on various

dates (*see Solowij v Otis Elev. Co.*, 260 AD2d 226 [1999]).

Defendant's affidavit shows a meritorious defense.

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

ENTERED: NOVEMBER 12, 2009



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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1118
1118A Michelle Esposito, Index 112510/06
Plaintiff-Appellant,

-against-

Altria Group, Inc., et al.,
Defendants-Respondents.

Andrew C. Risoli, Eastchester, for appellant.

Proskauer Rose LLP, New York (Howard L. Ganz of counsel), for respondents.

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered July 28, 2008, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 16, 2008, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment.

Although plaintiff claimed that Altria Group's human resources department controlled labor relations at all of the Altria companies, including Philip Morris Capital Corporation, which employed plaintiff, she failed to demonstrate that Altria exercised control over or made any employment decisions related to her, and therefore Altria may not be held liable for Philip Morris's alleged unlawful conduct towards her (*see Cook v Arrowsmith Shelburne, Inc.*, 69 F3d 1235, 1240-1241 [2d Cir 1995]).

Plaintiff's claims under the New York State Human Rights Law

(NYSHRL) and the New York City Human Rights Law (NYCHRL) were correctly dismissed. Even if she could establish that she is disabled within the broader meaning of these laws (*see Phillips v City of New York*, __ AD3d __, 884 NYS2d 369, 373 [2009]; Executive Law § 292[21]; Administrative Code of City of NY § 8-102[16]; *see also Loeffler v Staten Island Univ. Hosp.*, 582 F3d 268, 278 [2d Cir 2009]), plaintiff, a New York resident, has no right to bring a proceeding under these statutes against a foreign corporation for discrimination that allegedly occurred outside New York (*see Sorrentino v Citicorp*, 302 AD2d 240 [2003]; *Hoffman v Parade Publs.*, 65 AD3d 48 [2009]).

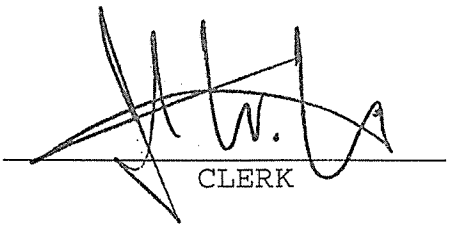
Plaintiff's claim under the Americans with Disabilities Act (ADA) was correctly dismissed because plaintiff failed to establish that she was denied reasonable accommodations. Her employer allowed her to leave work early for therapy appointments and granted her two short-term disability leaves. It was not required to grant her an indefinite leave of absence (*see Mitchell v Washingtonville Cent. School Dist.*, 190 F3d 1, 9 [2d Cir 1999]) or a transfer to a position in another department that was occupied by another employee (*see Micari v TWA, Inc.*, 1999 US App LEXIS 32742, *3-4, 1999 WL 1254518, *1 [2d Cir 1999]).

Under the ADA, the facts alleged by plaintiff do not give rise to a hostile work environment claim (*see Kodengada v International Bus. Machs. Corp.*, 88 F Supp 2d 236, 243 [SD NY

2000], *affd* 242 F3d 366 [2d Cir 2007]) or a retaliation claim (*see O'Dell v Trans World Entertainment Corp.*, 153 F Supp 2d 378, 392-394 [SD NY 2001], *affd* 40 Fed Appx 628 [2d Cir 2002]).

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

ENTERED: NOVEMBER 12, 2009



Andrias, J.P., Sweeny, Nardelli, Richter, Abdus-Salaam, JJ.

1192 Shirley Marino, etc.,
Plaintiff-Respondent,

Index 124178/02
590314/05

-against-

Parish of Trinity Church,
Defendant-Appellant,

The 435 Hudson Street Company, LLC,
Defendant.

[And a Third-Party Action]

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

Dell, Little, Trovato & Vecere, LLP, Uniondale (Keri A. Wehrheim of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered September 11, 2008, which denied the motion of defendant-appellant Parish of Trinity Church (Trinity) 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-appellant Trinity dismissing the complaint as against it.

Plaintiff allegedly tripped and fell on a metal protrusion, 1.5 to 4 inches high and approximately 3 inches in circumference, located on the sidewalk on Leroy Street abutting the north side of the premises owned by Trinity at 435 Hudson Street. Although Trinity had a loading dock nearby, plaintiff was unclear as to whether the sidewalk protrusion was right in front of the

driveway or just near the driveway that led to the loading dock.

Under the law in effect at the time of the accident, which predated Administrative Code of the City of NY § 7-210, liability on an abutting landowner will generally be imposed where the owner negligently constructed or repaired the sidewalk, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk and provides that a breach of that duty will result in liability (*see Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]).

Where a sidewalk is adjacent to but not part of the area used as a driveway, the plaintiff bears the burden of proof on a motion for summary judgment of showing that the special use of the sidewalk contributed to the defect (*see Adorno v Carty*, 23 AD3d 590 [2005]). Where the defect occurs in a part of the sidewalk which is used as a driveway, the abutting landowner, on a motion for summary judgment, bears the burden of establishing that he or she did "nothing to either create the defect or cause it through the special use of the sidewalk as a driveway" (*Torres v City of New York*, 32 AD3d 347, 348 [2006]).

Here, Trinity is entitled to summary judgment because there is no evidence that a curb cut existed in the sidewalk, that the sidewalk was constructed in a special manner for the benefit of

Trinity (see *Guadagno v City of Niagara Falls*, 38 AD3d 1310 [2007]), or that a causal connection exists between the alleged special use of the sidewalk and the alleged defect, i.e. the remains of a removed sign post (*see Moschillo v City Of New York*, 290 AD2d 260 [2002]).

Even assuming for the purpose of the motion that the accident occurred in the portion of sidewalk abutting a driveway, Trinity made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it did not make any changes to the sidewalk in question, that it did not install or direct anyone to install metal protrusions thereon, that it did not cut down any sign that would have left a protrusion behind, that the metal protrusion on which plaintiff allegedly tripped was not related to any functioning of the building at 435 Hudson Street or the loading dock, and that Trinity did not derive any special use from the metal protrusion (*see Torres* at 349).

In opposition to the motion, plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563, [1980]) as to whether the metal protrusion was related to Trinity's special use of the driveway, or if its defective condition was exacerbated by Trinity's special use thereof. Plaintiff's speculation that other evidence of repairs might exist did not satisfy her burden, since a motion for summary judgment may not be defeated by a response based on

"surmise, conjecture and suspicion" (*Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 63 [1959] [internal quotation marks and citation omitted]; *Grullon v City of New York*, 297 AD2d 261 [2002]).

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

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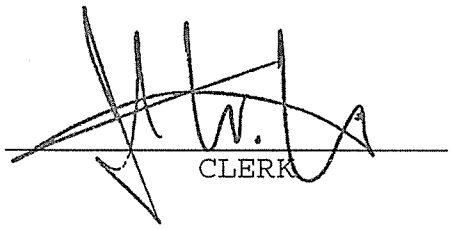

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1224 The People of the State of New York, Ind. 3127/07
Respondent,

-against-

Robert Bethea,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David P. Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at hearing; Arlene R. Silverman, J. at jury trial and sentence), rendered May 1, 2008, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously reversed, on the law, the motion to suppress granted, and the indictment dismissed.

At the hearing on the motion to suppress, Police Officer Tawee Theantong and Sergeant Frank O'Shea testified as follows: On June 20, 2007, they were assigned to the Housing Bureau Special Operations section and were on anticrime duty in plainclothes in an unmarked vehicle. At about 8:05 p.m., while they were stopped at a red light, Officer Theantong noticed defendant standing on the corner of 126th Street and Park Avenue, an area that the officer stated was known for prostitution and

drugs. When the light changed, Theantong kept his eye on defendant, who looked over in the direction of the officers and made eye contact with them. Theantong believed that defendant had recognized them as police because he had "abruptly changed direction." Theantong got out of the vehicle and approached defendant, displayed his badge, and said "[p]olice, don't move." Defendant walked away without acknowledging Theantong. Theantong told him to "hold on for a minute, I want to speak with you," and started running towards defendant. Before reaching defendant and placing a hand on him, Theantong noticed that defendant's back was hunched, "and he raised his right hand to his mouth, which indicated to me that he had placed something in his mouth." Theantong told defendant to turn around, and asked him what he had put into his mouth. Defendant replied, "[N]o, nothing. I have a toothache."

Sergeant O'Shea testified that while defendant was standing on the corner, he noticed that defendant had a small object in his hand, and that after they made eye contact, defendant turned, closed his hands and started walking away. After Theantong exited the vehicle, O'Shea started driving so he could get ahead of defendant. When O'Shea was almost even with defendant, he saw defendant put whatever he had in his hand into his mouth. The sergeant exited the vehicle, approached defendant and told him to open his mouth. Defendant did so, revealing a clear plastic bag.

The sergeant "plucked it out" of defendant's mouth and the bag fell into defendant's hands. A struggle ensued when defendant attempted to place the bag back into his mouth. Defendant was arrested, and the bag, which was recovered from a tire rim of a vehicle parked on the street, was found to contain narcotics.

Defendant's suppression motion should have been granted. In denying the motion, the court found that the officers' initial request to speak to defendant and to stop was proper, and that his response, namely, to walk away and to put something into his mouth so as to conceal it, gave them the right to continue with a "level 2" inquiry,[1] i.e., to ask him what was in his mouth and to direct him to open his mouth. However, even assuming, without deciding, that the police had an objective credible reason to initiate an encounter with defendant based on their observation of him as he stood on the corner of 126th Street and Park Avenue at 8 p.m. as well as their observations that he made eye contact with them when they approached in their van and that he was holding a small object in his hand and turned to walk away from

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[1] The court cited *People v De Bour* (40 NY2d 210, 223 [1976]), in which the Court of Appeals announced that "[t]he minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality." The next degree, or "level 2" as the trial court termed it, is "the common-law right to inquire, [which] is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure" (*id.* at 223).

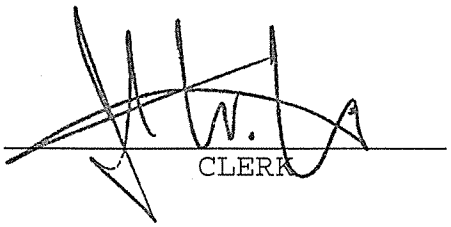
the van, defendant's reaction to the police request to stop and talk was not "sufficiently incriminating" to raise the police officers' level of suspicion enough to justify pursuit (*People v Mitchell*, 185 AD2d 163, 165 [1992], *appeal dismissed* 81 NY2d 819 [1993]). As we recognized in *Mitchell*, "[m]erely failing to cooperate and leaving the scene is not sufficiently indicative of criminality to enhance an objective credible reason to request information to reasonable suspicion" (*id.* at 635).

This is not a situation where the police had seen defendant engaging in suspicious activity indicative of illegal drug activity (*compare People v King*, 200 AD2d 487 [1993], *lv denied* 83 NY2d 873 [1994]) or were responding to a report of possible criminal activity in the area where defendant was spotted (*compare People v Becoate*, 59 AD3d 345 [2009], *lv denied* 12 NY3d 851 [2009]; *People v Stevenson*, 55 AD3d 486 [2008], *lv denied* 12 NY3d 788 [2009]). The trial court cited Sergeant O'Shea's testimony that he had observed defendant place something into his mouth. However, as defendant was not observed placing an object

into his mouth until *after* the police began to purse him, the fact that he put something into his mouth cannot justify the pursuit.

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

ENTERED: NOVEMBER 12, 2009



Friedman, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

1277-
1278 The People of the State of New York, Ind. 828/04
Respondent,

-against-

John Shute,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered July 27, 2005, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a persistent felony offender, to a term of 15 years to life, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial. Appeal from order, same court and Justice, entered October 4, 2007, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously dismissed as academic.

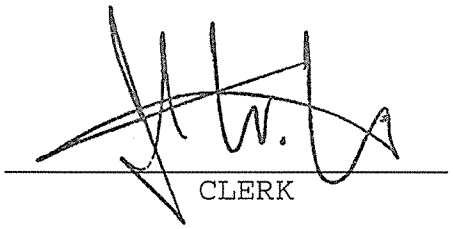
We need not determine whether the court's jury instruction was erroneous in light of our decision in *People v Williams* (10 AD3d 213 [2004], *affd* 5 NY3d 732 [2005]) because, on the particular facts of this case, we conclude that defendant was prejudiced when the court granted the People's application for such an instruction after both sides had delivered their

summations.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Since we are remanding for further proceedings, we find it unnecessary to reach any other issues.

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

ENTERED: NOVEMBER 12, 2009



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Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1450 The People of the State of New York, Ind. 2005/06
Respondent,

-against-

Douglas Boateng,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

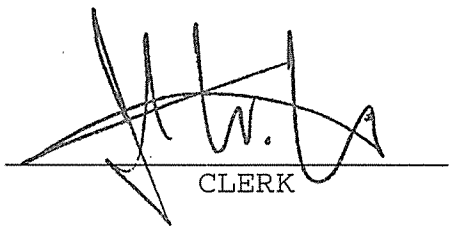
Judgment, Supreme Court, Bronx County (Darcel Clark, J.), rendered May 7, 2008, convicting defendant, after a nonjury trial, of violations of Agriculture and Markets Law §§ 353 and 353-a(1) and criminal mischief in the fourth degree, and sentencing him to an aggregate term of 1 year, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request for youthful offender treatment (*see People v Drayton*, 39 NY2d 580, 584-485 [1976]). Defendant committed acts of extreme brutality toward an animal. We note that "Agriculture and Markets Law § 353-a(1), 'Aggravated cruelty to animals,' represents the Legislature's recognition that man's inhumanity to man often begins with inhumanity to those creatures that have formed particularly close relationships with mankind" (*People v Garcia*, 29 AD3d 255, 257 [2006], *lv denied* 7 NY3d 789 [2006]).

Furthermore, defendant committed new crimes on several occasions while on bail pending sentencing, and failed to cooperate with the Department of Probation.

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

ENTERED: NOVEMBER 12, 2009



Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1451 Jon Avins, et al., Index 112031/08
Plaintiffs-Respondents,

-against-

Federation Employment and
Guidance Service, Inc., etc.,
Defendant-Appellant.

McAloon & Friedman, P.C., New York (Adam R. Goldsmith of counsel), for appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Jon Avins of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 6, 2009, which denied defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously reversed, on the law, without costs, and defendant's motion granted. The Clerk is directed to enter judgment dismissing the complaint.

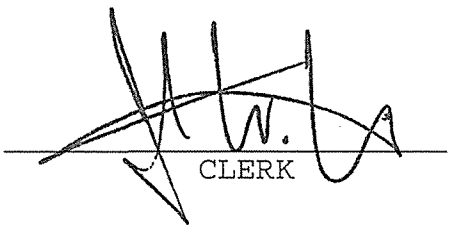
Plaintiffs seek to hold defendant (FEGS) liable for a vicious and motiveless knife attack committed by a third person, Derr, against their then 10-month old daughter. At the time of the attack, Derr, who had a history of mental illness, resided in an apartment near plaintiffs' home that was leased and operated by FEGS pursuant to a contract with the State to provide housing and support services to individuals with a history of mental illness. A prior complaint based on the same attack was

dismissed for failure to state a cause of action (*Avins v Federation Empl. & Guidance Serv., Inc.*, 52 AD3d 30 [2008], *appeal withdrawn* 10 NY3d 955 [2008]). In particular, the negligent supervision claim was dismissed because it lacked allegations that FEGS had authority to prevent Derr from leaving the facility or control his conduct while he was away from the facility, such allegations being necessary to show a duty on the part of FEGS to protect members of the general public, such as plaintiff's child, from harm caused by a potentially dangerous resident of its facility (*id.* at 35-36, citing *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 9 [1988], and *Rivera v New York City Health & Hosps. Corp.*, 191 F Supp 2d 412, 425 [SD NY 2002]). Since the prior complaint was dismissed for failure to state a cause of action without any indication that the dismissal was intended to be with prejudice or on the merits, the doctrine of res judicata does not bar the timely commencement of this action purporting to correct the identified pleading deficiency (*see Hodge v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 269 AD2d 330 [2000]). The present complaint newly alleges that FEGS knew that Derr had threatened to kill a roommate with a knife but did not investigate the threat and took no other action regarding it; that if FEGS had investigated, it would have learned that Derr stored "a number of non-household, attack-style knives" in his bedroom; and that FEGS did not report

Derr's threat to the police or his mental health providers. Like the prior complaint, however, the present complaint does not allege that FEGS had the ability to confine Derr to the facility or control his conduct while outside the facility, and thus fails to correct the prior pleading deficiency. While Derr's alleged conduct may have posed a foreseeable risk of harm to members of the general public, "[f]oreseeability, alone, does not define duty -- it merely determines the scope of the duty once it is determined to exist" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001], citing *Pulka v Edelman*, 40 NY2d 781, 785 [1976]). Assuming, arguendo, that FEGS owed a duty to other residents of its facility to protect them from foreseeable violent conduct of another resident, such duty would not extend to members of the community at large (*see Hamilton* at 233, citing *Waters v New York City Hous. Auth.*, 69 NY2d 225, 228-231 [1987]).

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

ENTERED: NOVEMBER 12, 2009



Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1452 Karen Hand, Index 23583/05
Plaintiff-Respondent,

-against-

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

Frank Bee Stores, Inc.,
Defendant-Appellant.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellant.

Michelle S. Russo, Port Washington, for respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered March 17, 2009, which denied the motion of defendant Frank Bee Stores, Inc. (FBS) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of FBS dismissing the complaint and all cross claims as against it.

Plaintiff was injured when she tripped and fell on a sidewalk in front of commercial property. The area of the sidewalk on which the accident occurred was used as a driveway that led into a parking lot.

The complaint as against FBS should have been dismissed. FBS showed that it did not make special use of the sidewalk as it demonstrated that two separate non-party corporations owned and

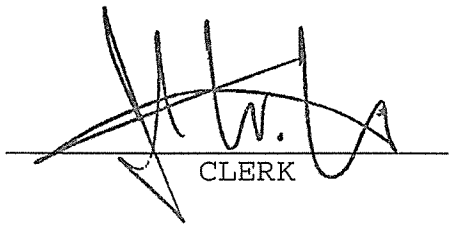
used the parking lot, and plaintiff did not raise a question of fact on this point. Nor should the corporate form of FBS be disregarded to find that it indeed made special use of the sidewalk. There is no evidence in the record to suggest that FBS dominated either the corporation that owns the parking lot or the corporation that uses it. Nor is there any showing that any such domination has been used to commit fraud. Finally, there is no evidence that either of the corporations is the alter ego of FBS (*see e.g. WorldCom, Inc. v Arya Intl. Communications Corp.*, 295 AD2d 101 [2002], *lv denied* 98 NY2d 614 [2002]).

FBS should not be equitably estopped from denying special use of the subject sidewalk area on the basis of a delay between the time that it was identified as a party defendant and the time its principal was deposed, revealing that a non-defendant corporation owns the lot. Plaintiff has not changed a position, a necessary element of equitable estoppel (*see Hay Group v Nadel*, 170 AD2d 398, 400 [1991]). Moreover, even assuming that it was implicitly represented that FBS owned or used the parking lot, plaintiff could not have reasonably relied on this, since the parking lot bore a large, plainly visible sign identifying the corporation that used it (*see e.g. Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509, 510 [2007]).

Plaintiff's arguments for affirmance on the basis of CPLR 3212(b) or General Business Law § 133 were not raised before the motion court, and in any event, are unavailing.

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

ENTERED: NOVEMBER 12, 2009



Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1453-
1453A In re Messiah N., and Another,

Children Under the Age
of Eighteen Years, etc.,

Shamone N.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for respondent.

Peggy Tarvin, Lawyers for Children, Inc., New York (Beverly A. Farrell of counsel), Law Guardian.

Orders of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about April 23, 2008, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The determination of permanent neglect is supported by clear and convincing evidence that respondent failed to plan for the children's future despite diligent efforts by the agency to encourage and strengthen the parental relationship (Social Services Law § 384-b[7][a]). The record demonstrates that the

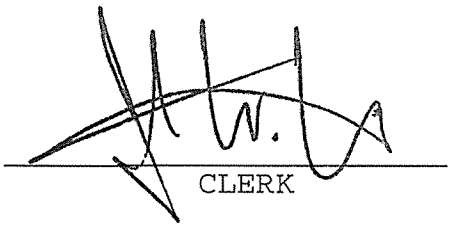
agency referred respondent to anger management classes, parenting skills programs and psychiatric examinations and attempted to implement visitation (*see Matter of Jowell Lateefra B.*, 271 AD2d 366 [2000], *lv denied* 95 NY2d 760 [2000]). Respondent, however, consistently rejected the agency's assistance, failed to attend or was excessively late to her scheduled visits with the children, and refused to have a psychiatric examination.

A preponderance of the evidence at the dispositional hearing supports the determination that it is in the children's best interests to terminate respondent's parental rights so as to facilitate their adoption by their foster mother, with whom they have bonded and who has tended to their special needs (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]).

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

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

ENTERED: NOVEMBER 12, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1457 The People of the State of New York, Ind. 4670/07
Respondent,

-against-

Samuel Pope,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin 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 (Maxwell Wiley, J.), rendered on or about September 17, 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 12, 2009

CLERK

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

Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1458 David Schoneboom, et al., Index 115632/06
Plaintiffs-Appellants,

-against-

B.B. King Blues Club & Grill,
Defendant-Respondent.

The Law Offices of Christopher P. DiGiulio, P.C., New York (William Thymius of counsel), for appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Steven H. Rosenfeld of counsel), for respondent.

Order, Supreme Court, New York County (Marcy Friedman, J.), entered on February 26, 2009, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

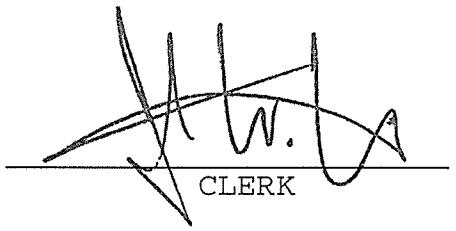
Plaintiffs are barred by the doctrine of primary assumption of the risk from seeking damages for the injuries plaintiff David Schoneboom suffered when an identified person in a group of slam dancers slammed into him. After observing the open and obvious slam dancing from a safe vantage point, and fully appreciating the risk of colliding with a slam dancer, plaintiff nonetheless elected to place himself in close proximity to that activity, thereby assuming the risk that resulted in his injuries (*see*

Morgan v State of New York, 90 NY2d 471, 484 [1997]; *Turcotte v Fell*, 68 NY2d 432, 437-439 [1986]; *Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 247-248 [2008], *affd* 10 NY3d 889 [2008]).

Plaintiff's remaining arguments are unavailing.

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

ENTERED: NOVEMBER 12, 2009



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1460 In re Sianne S., and Another,

Children Under the Age
of Eighteen Years, etc.,

LaRoyal S.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

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

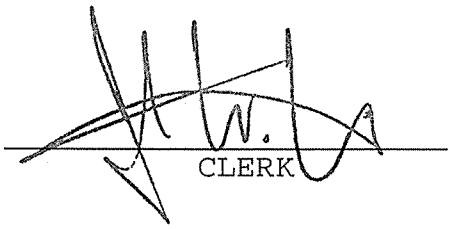
Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about October 14, 2008, which, after a traverse hearing, denied respondent father's motion to vacate his default at the fact-finding and dispositional hearings, resulting in the termination of his parental rights to the subject children, unanimously affirmed, without costs.

There is no basis for disturbing the court's finding that credited the testimony of petitioner's process server and

discredited that of respondent on the issue of whether service had been made (*see Matter of Tiffany E.*, 214 AD2d 469 [1995]).

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

ENTERED: NOVEMBER 12, 2009



Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1461 The People of the State of New York, Respondent, Ind. 348/07 372/07

-against-

Reynault Chevalier, Defendant-Appellant.

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

Reynault Chevalier, appellant pro se.

Judgment, Supreme Court, New York County (Michael Obus, J.), rendered on or about August 16, 2007, 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.

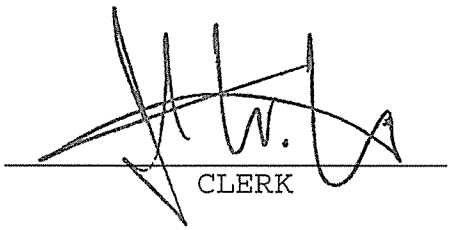
Denial of the application for permission to appeal by the

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

We have considered the contentions raised in defendant's pro se supplemental brief and find them to be without merit.

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

ENTERED: NOVEMBER 12, 2009



Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1462 Jerry Levine, et al., Index 110643/04
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

Arnold E. DiJoseph, New York, for appellants.

Steven S. Efron, New York, for respondent.

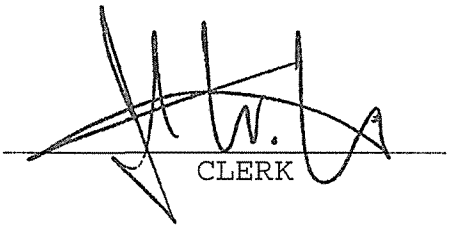
Order, Supreme Court, New York County (Martin Shulman, J.), entered May 27, 2008, which, in an action for personal injuries allegedly caused by malfunctioning elevator doors that closed too quickly as plaintiff was exiting the elevator, granted defendant premises owner's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Assuming defendant, the City of New York, had a nondelegable duty to maintain the elevators in this building, a courthouse, in a reasonably safe condition, even though it had ceded all responsibility for maintenance and repair of the elevators to an independent contractor, a showing that defendant had notice of the alleged malfunction would still be necessary (*see Camaj v East 52nd Partners*, 215 AD2d 150, 151 [1995]). No such showing was made by plaintiff in response to defendant's evidence that prior to the accident there had been no complaints that the subject elevator's doors were closing too quickly, and it does

not avail plaintiff that defendant did have notice that the elevator's doors were not opening and closing -- a different mechanical problem (*see Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]; *Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 338 [2008]; *Narvaez v New York City Hous. Auth.*, 62 AD3d 419 [2009]). Nor does the doctrine of res ipsa loquitur avail plaintiff where defendant had ceded all maintenance and repair responsibility to an independent contractor (*see Hodges v Royal Realty Corp.*, 42 AD3d 350, 351-352 [2007]).

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

ENTERED: NOVEMBER 12, 2009



Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1463 Jacqueline Rodriguez, Index 118181/04
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

Wallace D. Gossett, New York (Steve S. Efron of counsel), for appellants.

Simonson Hess & Leibowitz, P.C., New York (Steven L. Hess of counsel), for respondent.

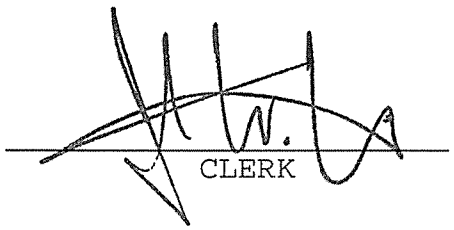
Order, Supreme Court, New York County (Marilyn Shafer, J.), entered June 24, 2008, which granted plaintiff's motion to set aside a jury verdict in defendants' favor, unanimously reversed, on the law, without costs, the motion denied, the verdict reinstated, and the complaint dismissed.

The jury found that the bus driver's negligence was not a proximate cause of plaintiff's injuries. Plaintiff's argument of irreconcilable inconsistency in this finding is unpreserved (*see Barry v Manglass*, 55 NY2d 803, 806 [1981]). Moreover, this case does not present a situation where the questions of negligence and proximate cause are inextricably interwoven. The jury's determination that defendant's negligence was not a substantial factor in causing plaintiff's injury was neither inconsistent nor against the weight of the evidence (*see Dwight v New York City Tr. Auth.*, 30 AD3d 270 [2006], *lv denied* 7 NY3d 711 [2006]).

Where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view (*Koopersmith v General Motors Corp.*, 63 AD2d 1013 [1978], *lv denied* 46 NY2d 705 [1978]).

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

ENTERED: NOVEMBER 12, 2009



Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1464 Fantazia International Corp., Index 602131/03
Plaintiff-Respondent-Appellant, 601578/05

-against-

CPL Furs New York, Inc.,
Defendant-Respondent,

Centropel Pelzhandel GmbH,
Defendant-Appellant-Respondent.

[And Another Action]

Barton Barton & Plotkin, LLP, New York (Randall L. Rasey of counsel), for appellant-respondent and respondent.

Joseph J. Haspel, Goshen, for respondent-appellant.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 23, 2008, which granted defendants' post-trial motion to set aside the jury verdict as against the weight of the evidence only to the extent of setting aside the finding that defendant CPL Furs was the alter ego of defendant Centropel and directed a new trial on this issue, unanimously modified, on the law, judgment granted to Centropel to the effect that it did not dominate and control CPL for the purpose of piercing the corporate veil, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Centropel.

In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and

control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity. No one factor is dispositive (*see Freeman v Complex Computing Co.*, 119 F3d 1044, 1053 [2d Cir 1997]).

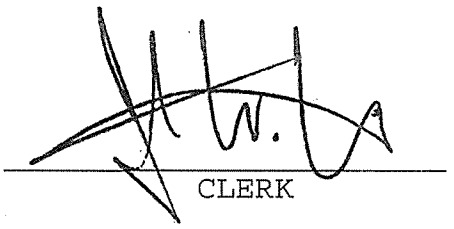
Initially, the court correctly determined that there was insufficient evidence of Centropel's domination and control of CPL. The corporations kept separate bank accounts, books and records, were incorporated at different times for legitimate business purposes, filed separate tax returns, there was substantial compliance with corporate formalities, transactions between the two companies were conducted at arm's length, and there was no evidence that CPL was undercapitalized. That the president of CPL was also a sub-board member and consultant to

Centropel is insufficient for finding such domination (*see Matter of Island Seafood Co. v Golub Corp.*, 303 AD2d 892, 895 [2003]). The evidence plaintiff points to in support of domination is unpersuasive. Thus, the trial court should have directed entry of judgment in Centropel's favor on this issue, as plaintiff has failed to offer any evidence that Centropel's alleged domination and control over CPL was used to commit a wrong that was the proximate cause of plaintiff's loss (*see Musman v Modern Deb*, 50 AD2d 761, 762 [1975]; *Lowendahl v Baltimore & Ohio R.R. Co.*, 247 App Div 144, 157 [1936], *affd* 272 NY 360 [1936]). Evidence at trial established that plaintiff's alleged loss was solely due to the failure of CPL to pay plaintiff certain commissions. Plaintiff failed to demonstrate that Centropel's alleged domination and control of CPL caused this loss. While it is true that one corporation's exercise of domination and control which left the subservient corporation nothing more than a judgment-proof empty shell would constitute a wrong against a creditor, plaintiff has offered no evidence whatsoever that CPL is either judgment-proof, or that it was put in that position by

Centropel's domination (*cf. Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 AD3d 317, 318 [2007]).

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

ENTERED: NOVEMBER 12, 2009



CLERK