SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 17, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, McGuire, DeGrasse, JJ.

5399N Frank Miraglia, Index 25228/00
Plaintiff-Respondent-Appellant,

-against-

H & L Holding Corp.,
Defendant/Third-Party Plaintiff,

-against-

Lane & Sons Construction Corp.,
Third-Party Defendant-
Appellant-Respondent.

Mauro Goldberg & Lilling LLP, Great Neck (Matthew W. Naparty of counsel), for appellant-respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered October 9, 2007, which, to the extent appealed from as limited by the briefs, denied third-party defendant's motion for an amended judgment providing recovery by plaintiff only from defendant, and amended judgment, same court and Justice, entered October 29, 2007, awarding plaintiff damages against both defendant and third-party defendant in the principal amount of

$18,097,112.15, affirmed, without costs.

Plaintiff was employed by third-party defendant contractor. As noted on prior appeals (306 AD2d 58 [2003]; 36 AD3d 456 [2007], *lv denied* 10 NY3d 703), he was working on a residential structure on land owned by defendant when he fell from planks used to span a trench and provide access to foundation walls, and was impaled by a steel bar from the scrotum to L2 on his spinal cord, resulting in paraplegia and associated complications. In a separate action, plaintiff recovered over $6 million from defendant's insurer, with defendant retaining the right to contractual indemnification.

After the 2007 appeal, third-party defendant asserted for the first time that since it was plaintiff's employer, the court could not enter a judgment in which plaintiff was granted a right to recover directly against it because the worker's compensation paid to plaintiff was his exclusive remedy. The first judgment, affirmed in the 2007 appeal except for future pain and suffering damages (for which plaintiff stipulated to a reduction), also provided plaintiff with a direct recovery against third-party defendant, which failed to raise any objection based on worker's compensation exclusivity at that time.

A defense of worker's compensation exclusivity is waived if the employer ignores the issue "to the point of final disposition

itself" (*Murray v City of New York*, 43 NY2d 400, 407 [1977]), especially where belated assertion of the defense will prejudice the party opposing the assertion (*see Shine v Duncan Petroleum Transp.*, 60 NY2d 22, 27-28 [1983]). Here, not only did third-party defendant fail to raise this objection to the judgment on the 2007 appeal (*see Harbas v Gilmore*, 214 AD2d 440 [1995], *lv dismissed* 87 NY2d 861 [1995]), but it assumed defense of the direct defendant at trial, after the latter had successfully moved in limine for contractual indemnification while instructing its accountant -- unbeknownst to plaintiff -- to file for dissolution. Plaintiff was thus denied the opportunity to object to third-party defendant's representation of the direct defendant while reserving its worker's compensation exclusivity defense, or to otherwise protect his position. This is unacceptable. Worker's compensation exclusivity is important as a matter of state public policy, but so is the finality of the result when a party charts its own course.

It does not avail third-party defendant to assert that it could not have waived this argument because it goes to jurisdiction. While lack of subject matter jurisdiction can be raised at any time, it is still within a New York court's power

"to entertain the case before it" (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]; *see also Matter of Rougeron*, 17 NY2d 264, 271 [1966], *cert denied* 385 US 899 [1966]). Here, third-party defendant is not arguing that Supreme Court "never had power to hear a particular type of proceeding in the first place" (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [2006], *appeal dismissed* 8 NY3d 837 [2007]). Waiver of an argument will be recognized where, as here, "the court had jurisdiction of the general subject matter but a contention is made after judgment that the court did not have power to act in the particular case or as to a particular question in the case" (*see Rougeron*, 17 NY2d at 271). Nor is third-party defendant persuasive in arguing -- for the first time on appeal -- that Supreme Court lacked personal jurisdiction over it because plaintiff never named it as a direct defendant. Supreme Court has always had the power to render an adjudication over third-party defendant (*see Security Pac. Natl. Bank*, 31 AD3d at 280), which surely would not have assumed the defense of the direct defendant at trial if it believed the court lacked personal jurisdiction over it. Moreover, by first actively participating in the litigation as if it were a direct defendant, and then by failing to raise the issue on appeal, third-party defendant

waived its right to rely on *Klinger v Dudley* (41 NY2d 362 [1977]), in which the Court of Appeals held that a plaintiff may not recover directly from a third-party defendant over which it has no direct claim (*see Harbas v Gilmore, supra*, 214 AD2d 440 [1995], *lv dismissed* 87 NY2d 861 [1995]).

Because we are not granting relief to third-party defendant on the main appeal, we need not address any of the arguments with respect to plaintiff's conditional cross appeal.

The Decision and Order of this Court entered herein on March 3, 2009 is hereby recalled and vacated (*see* M-1611 decided simultaneously herewith).

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

Lane & Sons Construction Corp. seeks leave to reargue its appeal. Alternatively, it seeks leave to appeal to the Court of Appeals. While I agree with the majority that reargument should be granted and leave to appeal should be denied, a brief discussion of both motions is warranted.

Plaintiff was injured while working on a construction project on property owned by defendant H&L Holding Corp. (306 AD2d 58 [2003]). Plaintiff commenced a personal injury action against H&L, which subsequently impleaded Lane, plaintiff's employer. H&L was granted summary judgment on its claim for indemnification against Lane, and Lane assumed defense of the main action.

After a jury trial, H&L was found liable for plaintiff's injuries and plaintiff was awarded damages. The judgment, however, permitted plaintiff to recover the damages from H&L (the defendant in the main action) *and* Lane (the defendant in the third-party action). On defendant Lane's appeal from the judgment, we modified the judgment to the extent of, inter alia, setting aside the award for future pain and suffering unless plaintiff stipulated to reduce the award (36 AD3d 456 [2007], *lv denied* 10 NY3d 703 [2008]). Lane did not argue on that appeal that it was not liable to plaintiff but only to H&L.

Plaintiff stipulated to reduce the awards and sought to settle the amended judgment. The proposed amended judgment, like the original judgment, allowed plaintiff to recover from both H&L and Lane. Lane objected to the proposed amended judgment and offered another amended judgment, one that permitted plaintiff to recover only from H&L. Lane then moved to amend the original judgment to reflect that plaintiff could only recover from H&L; plaintiff sought entry of the amended judgment that he had proposed. Supreme Court denied Lane's motion to amend the original judgment and signed plaintiff's proposed amended judgment.

We affirmed the order denying Lane's motion and permitting plaintiff to enter his amended judgment. We stated

> After the 2007 appeal, [Lane] asserted for the first time that since it was plaintiff's employer, the court could not enter a judgment in which plaintiff was granted a right to recover directly against it because the worker's compensation paid to plaintiff was his exclusive remedy. The first judgment, affirmed in the 2007 appeal except for future pain and suffering damages (for which plaintiff stipulated to a reduction), also provided plaintiff with a direct recovery against third-party defendant, which failed to raise any objection based on worker's compensation exclusivity at that time.
>
> A defense of worker's compensation exclusivity is waived if the employer ignores the issue to the point of final disposition

itself, especially where belated assertion of the defense will prejudice the party opposing the assertion. Here, not only did [Lane] fail to raise this objection to the judgment on the 2007 appeal, but it assumed defense of [H&L] at trial, after the latter had successfully moved in limine for contractual indemnification while instructing its accountant -- unbeknownst to plaintiff --to file for dissolution. Plaintiff was thus denied the opportunity to object to [Lane's] representation of [H&L] while reserving its worker's compensation exclusivity defense, or to otherwise protect his position. This is unacceptable. Worker's compensation exclusivity is important as a matter of state public policy, but so is the finality of the result when a party charts its own course.

It does not avail [Lane] to assert that it could not have waived this argument because it goes to jurisdiction. While lack of subject matter jurisdiction can be raised at any time, it is still within a New York court's power to entertain the case before it. Here, [Lane] is not arguing that Supreme Court never had power to hear a particular type of proceeding in the first place. Waiver of an argument will be recognized where, as here, the court had jurisdiction of the general subject matter but a contention is made after judgment that the court did not have power to act in the particular case or as to a particular question in the case. Nor is [Lane] persuasive in arguing -- for the first time on appeal -- that Supreme Court lacked personal jurisdiction over it. Supreme Court has always had the power to render an adjudication over [Lane], which surely would not have assumed the defense of [H&L] at trial if it believed the court lacked personal jurisdiction over it (60 AD3d 407, 407-408 [internal quotation marks and citations omitted]).

Lane now argues that we misapprehended the facts and the law in deciding its appeal because we focused on whether it had waived any argument that plaintiff could not recover against it because of the exclusivity provision of Workers' Compensation Law § 11. Lane asserts that its argument supporting amending the original judgment was that it could not be liable to plaintiff because it was never a defendant in the main action -- Lane was impleaded by H&L and was only a third-party defendant. Because it was never a defendant in the main action, Lane argues that no judgment could be entered in plaintiff's favor against it, and that it is liable only to H&L for indemnification.

I agree with Lane that we misapprehended the material issue on its appeal from the order denying its motion to amend the original judgment and permitting plaintiff to enter his amended judgment. We did indeed focus on the issue of whether Lane waived the defense afforded by Workers' Compensation Law § 11. We should have focused instead on whether Lane, a third-party defendant, could be held directly liable to plaintiff despite the fact that Lane was never a defendant in the main action. Even assuming we were correct in stating that plaintiff was prejudiced by being denied the opportunity to object to Lane's representation of H&L, we missed the mark in discussing the point.

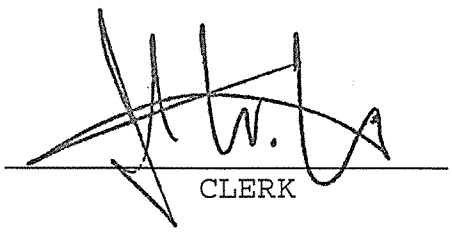
Lane's position finds support in *Klinger v Dudley* (41 NY2d 362 [1977]), where the Court of Appeals determined that the plaintiffs in the main actions could not recover from a third-party defendant against whom the plaintiffs did not assert any claims. The case before us is distinguishable from *Klinger*, however, because the third-party defendants in *Klinger* raised the argument that they were not liable to the plaintiffs on the appeals from the judgments. Here, Lane, on its appeal from the judgment, did not raise the argument that it is not liable to plaintiff because plaintiff asserted no claims against it. Rather, Lane raised that argument for the first time on a motion to amend the judgment after this Court had remanded for merely a reduction in the award for future pain and suffering or a trial solely on the issue of future pain and suffering. Thus, the order denying Lane's motion to amend the original judgment should be affirmed on the ground that Lane waived that argument by not raising it on the appeal from the judgment.

Whether the rule in *Klinger* should be expanded to permit a third-party defendant to raise the argument at any time and whether the defense afforded by *Klinger* is one that cannot be waived are issues that the Court of Appeals can address if it

wishes, as our order deciding this appeal is "final" under CPLR 5611 and thus the Court of Appeals can grant leave if it sees fit (*see* CPLR 5602[a][1][I]).

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

ENTERED: NOVEMBER 17, 2009



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Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1471-
1472-
1472A In re Jaynices D., and Others,

Children Under The Age of
Eighteen Years, etc.,

Yesenia Del V.,
Respondent-Appellant,

McMahon Services for Children, etc.,
Petitioner-Respondent.

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1473 In re Jose M., and Others,

Children Under The Age of
Eighteen Years, etc.,

Yesenia Del V.,
Respondent-Appellant,

McMahon Services for Children, etc.,
Petitioner-Respondent.

Randall S. Carmel, Syosset, for appellant.

Joseph T. Gatti, New York, for respondent.

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

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about May 19, 2008, which denied respondent's motion to vacate orders of disposition entered on or about January 17, 2008, terminating her parental rights to Jose, Christine, Cynthia and Yesenia, and transferring guardianship and

custody of the children to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs. Orders, same court and Judge, entered on or about May 23, 2008 and on or about July 29, 2008, which terminated respondent's parental rights to Myra and Shakira and to Jaynices, respectively, and transferred guardianship and custody of the children to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

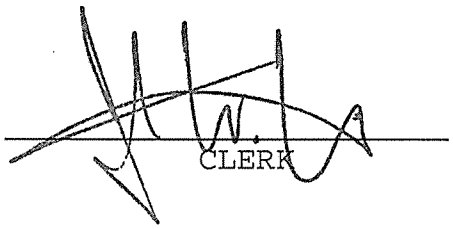
Respondent failed to demonstrate a reasonable excuse for her absence from the dispositional hearing that resulted in the termination of her parental rights to Jose, Christine, Cynthia and Yesenia and a meritorious defense to the proceeding (*see Matter of Jones*, 128 AD2d 403 [1987]). Her proffered excuse - that she was confused about the time of the hearing - was not reasonable, particularly in light of her history of failing to appear at scheduled proceedings. The defense that respondent stated she intended to offer was the very defense that had been rejected at the fully contested dispositional hearing regarding Myra, Shakira and Jaynices.

Family Court properly denied respondent's request for an adjournment of the dispositional hearing that resulted in the termination of her parental rights to Myra, Shakira and Jaynices,

since respondent's need for an adjournment arose from her own conduct (*see Matter of Steven B.*, 24 AD3d 384, 385 [2005], *affd* 6 NY3d 888 [2006]).

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

ENTERED: NOVEMBER 17, 2009



Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1474 The People of the State of New York, Ind. 6507/06
Respondent,

-against-

James Thompson,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Molly M. Lens of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered March 3, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second felony drug offender, to an aggregate term of 4 years, unanimously affirmed.

The court denied defendant's mistrial motion made after the prosecutor, without having obtained a ruling on the matter during the pretrial *Sandoval* hearing, asked defendant on cross-examination whether he had owed child support arrears at the time of the alleged sale of narcotics. Even assuming that the prosecutor's questions violated the *Sandoval* ruling, the court

properly exercised its discretion in denying the mistrial motion. The court provided a sufficient remedy when it promptly struck all questions and answers on the issue, and delivered curative instructions that the jury is presumed to have followed (*see People v Santiago*, 52 NY2d 865 [1981]; *People v Robles*, 28 AD3d 233 [2006], *lv denied* 7 NY3d 817 [2006]). In addition, the record supports an inference that the prosecutor did not act in bad faith, but believed that such a ruling was not required.

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 credibility. Regardless of whether the evidence established a complete chain of custody for the narcotics recovered from defendant and the buyer, the evidence provided "reasonable assurances of the identity and unchanged condition of the evidence" (*see People v Hawkins*, 11 NY3d 484, 494 [2008]), and in performing our weight of the evidence review we do not find that any gaps in the chain are significant enough to undermine the verdict.

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

ENTERED: NOVEMBER 17, 2009

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1476 The People of the State of New York, Ind. 3261/07
Respondent,

-against-

Raymound Sprinkler, etc.,
Defendant-Appellant.

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

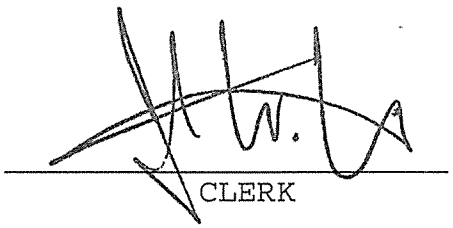
Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about June 4, 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 17, 2009



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

Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1477 The People of the State of New York, Ind. 5226/06
Respondent,

-against-

Rafelito Sanchez,
Defendant-Appellant.

Richard M. Greenberg, Office of The Appellate Defender, New York (Jennifer Eisenberg of counsel), for appellant.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about December 20, 2007, unanimously affirmed.

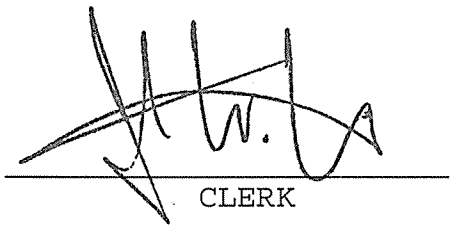
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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.

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

ENTERED: NOVEMBER 17, 2009



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Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1479 El-Ad 250 West LLC, Index 601983/08
Plaintiff-Respondent,

-against-

30 Hubert Street LLC,
Defendant-Appellant.

Morrison & Cohen, LLP, New York (Y. David Scharf of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Ronald S. Greenberg of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered February 26, 2009, declaring that defendant is in default under the parties' purchase and sale agreement and that plaintiff properly terminated the agreement and is entitled to receive the escrowed deposit, and dismissing defendant's first counterclaim, unanimously affirmed, with costs.

Under the circumstances, defendant's notice to cure, delivered to plaintiff one day before the time-of-the-essence closing date, was insufficient to place plaintiff in actionable default under the purchase and sale agreement, which provided the purchaser with a remedy for default by the seller where "such default shall continue for ten (10) days after notice to Seller" (section 15.2). Defendant's subsequent failure to appear at the scheduled closing, at which plaintiff appeared ready, willing and

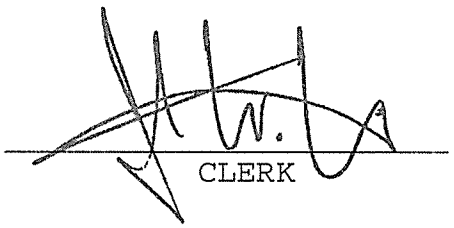
able to close, constituted "Purchaser Default," for which plaintiff's sole remedy "shall be to terminate this Agreement and, upon such termination, Seller shall be entitled to retain the Deposit (and any interest earned thereon) as liquidated damages" (section 15.1).

We note also that by continuing to perform under the agreement without giving plaintiff notice of alleged defaults, defendant could not thereafter elect to terminate the agreement "for a default which apparently it chose to disregard as a ground for termination of the contract" (*see Emigrant Indus. Sav. Bank v Willow Bldrs.*, 290 NY 133, 144 [1943]).

Defendant's defense based upon the implied covenant of good faith and fair dealing constitutes "an invalid substitute for its nonviable breach of contract claim" (*Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [2008]).

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

ENTERED: NOVEMBER 17, 2009



Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1480-
1481 The People of the State of New York, Ind. 11732/95
Respondent, 4996/00

-against-

Jose Lantigue,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Micki Scherer, J.), rendered September 9, 1996, as amended July 25, 2007 and August 3, 2007, convicting defendant, after a jury trial, of grand larceny in the third and fourth degrees and unauthorized use of a vehicle in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, and judgment, same court and Justice, rendered July 25, 2007, convicting defendant, upon his plea of guilty, of bail jumping in the second degree, and sentencing him, as a second felony offender, to a consecutive term of 1½ to 3 years, unanimously affirmed.

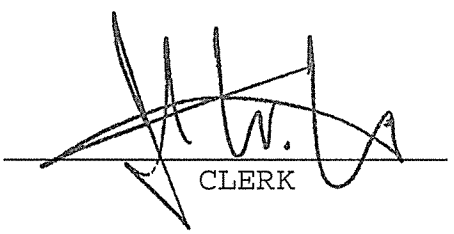
The court properly exercised its discretion in admitting expert testimony on a method that, in the witness's opinion, was

used to steal the car at issue (*see generally People v Cronin*, 60 NY2d 430, 433 [1983]). When the police recovered the car, the undamaged ignition contained a working key that did not belong to the owner, and defendant told the police the car belonged to his cousin. Regardless of whether there was any dispute at trial as to whether the car was stolen, these facts placed an issue before the jurors that may have invited speculation and unfair suspicion about the prosecution's case. Therefore, expert testimony about how a thief could have used a code to obtain a duplicate key was helpful to the jury. Defendant did not preserve his claims that this testimony suggested criminal propensity on his part and that the court should have instructed the jury not to draw such an inference, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentences.

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

ENTERED: NOVEMBER 17, 2009



Gonzalez, P.J., Saxe, McGuire, Acosta, JJ.

1482 In re Breslin Tenant Association, et al., Petitioners, Index 407188/07

-against-

Department of Housing Preservation and Development of the City of New York, et al., Respondents.

Manhattan Legal Services, New York (Susan M. Cohen of counsel), for petitioners.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for municipal respondents.

Belkin Burden Wenig & Goldman, LLP, New York (Kara I. Schechter-Rakowski of counsel), for Edward Haddad; Broadway Breslin Associates, LLC; 1186 Broadway, LLC; 1186 Broadway Tenant LLC and GFI Management Services, Inc., respondents.

Determination of respondent New York City Department of Housing Preservation and Development, dated August 20, 2007, granting respondent hotel owner's application for a certificate of no harassment (Administrative Code of City of NY § 28-107.4[3.1], former §§ 27-198[b][1][b]), unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 by petitioner tenant association, transferred to this Court by order of the Supreme Court, New York County [Walter B. Tolub, J.], entered June 2, 2008, dismissed, without costs.

The finding that respondent hotel did not engage in conduct

that harassed or was intended to harass any SRO tenant within the meaning of Administrative Code § 27-2093 is supported by substantial evidence showing, inter alia, that essential services were maintained on an ongoing basis, that the hotel's management took prompt steps to correct maintenance problems as they arose, and that the violations against the hotel were all recent, non-hazardous, and largely corrected by the time of the hearing. No basis exists to disturb the hearing officer's findings of credibility (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

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

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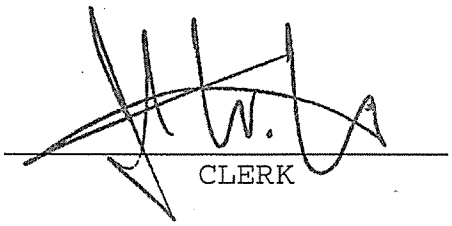


Gonzalez, P.J., Saxe, McGuire, Acosta, JJ.

1483 Willie Gordy, Index 7442/05
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for appellant.

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

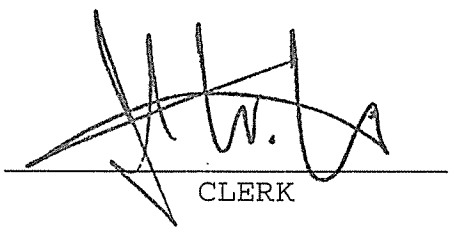
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 5, 2008, which, in an action for personal injuries sustained in a slip and fall on a patch of ice on a sidewalk, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the property that abutted the sidewalk where the accident occurred was a two-family dwelling owned by a corporate entity, and thus was not owner-occupied (Administrative Code of City of NY § 7-210; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiff's opposition did not raise a triable issue of fact as he failed to submit evidence regarding the

occupancy of the property (*see Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [2007]).

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

ENTERED: NOVEMBER 17, 2009



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Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1486 The People of the State of New York, Ind. 3986/06
Respondent,

-against-

Jamel Brown,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 7, 2008, convicting defendant, after a jury trial, of manslaughter in the first degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 22 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the manslaughter conviction from 22 years to 20 years, and on the law, to the extent of remanding for the purpose of clarifying whether the sentence actually pronounced on the weapon conviction was 10 years or 5 years, and otherwise 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

credibility, including its resolution of inconsistencies in testimony. Defendant's guilt was established by his companion's testimony, which was corroborated by other proof tending to verify his account of the incident, as well as by consciousness-of-guilt evidence. The evidence also fails to support defendant's assertion that a second gunman may have fired the fatal shot.

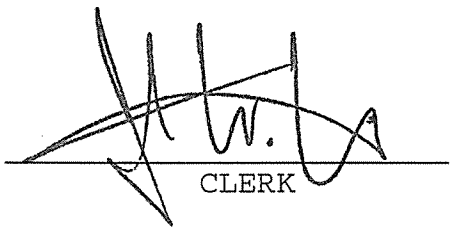
Defendant's challenges to the prosecutor's opening statement and summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that although certain of the prosecutor's remarks reflect a deplorable attempt to appeal to the emotions of the jury, they were not so egregious as to warrant reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We find the sentence on the manslaughter conviction excessive to the extent indicated. In addition, there is a disparity between the sentencing minutes, which reflect a 5-year term for the weapon conviction, and the commitment sheet, which reflects a 10-year term. Although the transcript would normally be controlling, the surrounding circumstances warrant an inference that it may be in error. We therefore remand for

further proceedings, for the sole purpose of clarifying what sentence the court actually pronounced, and correcting either the record or the commitment sheet.

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

ENTERED: NOVEMBER 17, 2009



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Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1487-
1487A Sev-Kon Tekstil Sanayi Ve Dis Ticaret Ltd., et al., Plaintiffs-Appellants, Index 103814/05

-against-

JBM International, LLC, Defendant-Respondent.

Zara Law Offices, New York (Robert M. Zara of counsel), for appellants.

Judgment, Supreme Court, New York County (Herman Cahn, J.), entered February 19, 2008, after a nonjury trial, in defendant's favor, dismissing the complaint pursuant to an order, same court and Justice, entered on or about February 7, 2008, unanimously affirmed, with costs. Appeal from the above order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

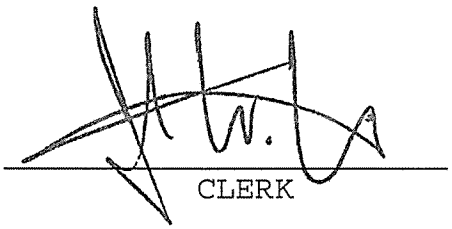
In this action for, inter alia, goods sold and delivered, the trial court's findings, which "rest[ed] in large measure on considerations relating to the credibility of the witnesses" (*Claridge Gardens v Menotti*, 160 AD2d 544, 545 [1990]), were based upon a fair interpretation of the evidence. Although defendant initially acknowledged an agency relationship in its answer (*see* CPLR 3018[a]), it denied during discovery that such a

relationship existed, explaining that the admission was taken out of context, and the evidence adduced at trial was insufficient to support plaintiff's agency claim. Furthermore, there was no evidence that defendant dealt directly with either plaintiff, nor were there contracts signed by defendant with respect to the subject sales.

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

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

ENTERED: NOVEMBER 17, 2009



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Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1490 Arya's Collection, Inc., Index 112127/07
Plaintiff-Appellant,

-against-

Brink's Global Services, USA, Inc.,
Defendant-Respondent.

Michael C. Marcus, Long Beach, for appellant.

White Fleischner & Fino, LLP, New York (Jonathan S. Chernow of counsel), for respondent.

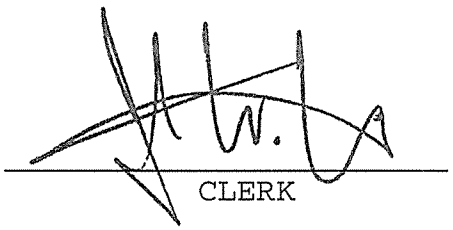
Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 15, 2008, which, in an action for breach of a contract to transport plaintiff's jewelry, granted defendant's motion to dismiss the complaint on the basis of a forum selection clause, unanimously affirmed, without costs.

The documentary evidence conclusively demonstrates that the show receipts claimed by defendant to constitute the parties' only agreement relating to the subject shipment contained a forum selection clause (*see Tatko Stone Prods., Inc. v Davis-Giovinzazzo Constr. Co., Inc.*, 65 AD3d 778, 779-780 [2009]). Defendant showed that the clause was reasonably communicated to plaintiff and mandatory for all claims arising from the shipment of the jewelry; in response, plaintiff failed to rebut the presumption of enforceability by showing that enforcement would

be unreasonable, unjust or invalid (*see Altvater Gessler-J.A. Baczewski Intl. [USA] Inc. v Sobieski Destylarnia S.A.*, 572 F3d 86, 89 [2d Cir 2009]), where plaintiff's employee who actually signed and accepted the show receipts offered no evidence bearing on his awareness of the forum selection clause on the back of the receipts. The document claimed by plaintiff to constitute a second agreement governing the return shipment is nothing more than an acknowledgment by plaintiff of the delivery of the outbound shipment.

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

ENTERED: NOVEMBER 17, 2009



CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1491-
1492 The People of the State of New York, Ind. 3311/04
Respondent,

-against-

Rasheem Salley,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

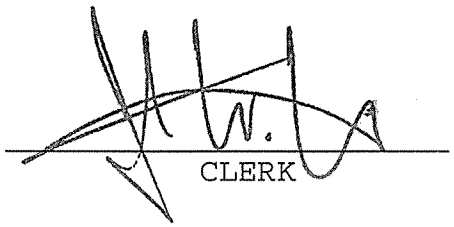
Order, Supreme Court, New York County (Maxwell Wiley, J.), entered on or about April 26, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs. Judgment of resentence for the underlying conviction, same court (Daniel P. FitzGerald, J.), rendered on or about July 2, 2008, resentencing defendant to a term of 3 years with 3 years' postrelease supervision, unanimously affirmed.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sex offender adjudication. The court properly assessed 20 points for sexual misconduct while confined. Although the sexual activity was allegedly consensual

and noncriminal, it warranted this assessment under the Risk Assessment Guidelines because it violated prison disciplinary rules. Furthermore, defendant's inability to refrain from forbidden sexual conduct on the occasion at issue was relevant to his potential for sexual recidivism. The court also properly assessed 15 points for refusing sex offender treatment, and defendant's arguments to the contrary are without merit.

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

ENTERED: NOVEMBER 17, 2009



Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1493N Admiral Insurance Company, et al., Index 114048/06
Plaintiffs-Appellants,

-against-

Marriott International, Inc., et al.,
Defendants-Respondents,

Eagle One Roofing Contractors, Inc., et al.,
Defendants.

Litchfield Cavo LLP, New York (Joseph E. Boury of counsel), for appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered August 18, 2008, which, insofar as appealed from, denied plaintiffs' motion for a default judgment against defendants-respondents, unanimously affirmed, with costs.

With respect to defendants Marriott International, Inc. and Executay Corporation, both purportedly served pursuant to Business Corporation Law § 306, plaintiffs' motion for a default judgment was properly denied for lack of proof of compliance with CPLR 3215(g)(4)(i) (*see Rafa Enters. v Pigand Mgt. Corp.*, 184 AD2d 329 [1st Dept 1992]; *accord Ocuto Blacktop & Paving Co. v Trataros Constr.*, 277 AD2d 919 [4th Dept 2000]; *Schilling v Maren Enters.*, 302 AD2d 375, 376 [2d Dept 2003]). With respect to

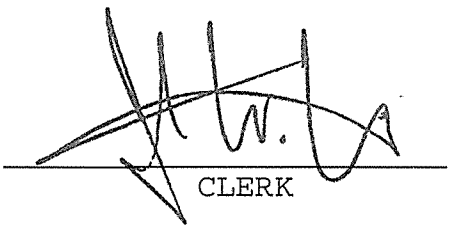
defendant Marriott Executay, purportedly served pursuant to Business Corporation Law § 307, plaintiff's motion for a default judgment was properly denied for lack of evidence rebutting defendants' assertion that Marriott Executay is not a legal entity capable of being sued but a trademark registered to Marriott International, Inc. (*cf. Stewart v Volkswagen of Am.*, 81 NY2d 203, 207 [1993] [once questioned, burden of proving jurisdiction is on plaintiff]). We have considered plaintiffs' other arguments and find them unavailing.

M-4693 - Admiral Insurance Company v Marriott

Motion seeking to consolidate appeals denied.

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

ENTERED: NOVEMBER 17, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5347 In re Daniel H.,

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

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

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

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about January 18, 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 burglary in the third degree, grand larceny in the fourth degree (two counts) and identity theft in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, affirmed, without costs.

The manner in which the 15-year-old appellant was taken into custody and initially questioned does not warrant suppression of the statement he provided after being read his *Miranda* rights.

The complainant, a children's librarian at the Hunts Point branch of the New York Public Library, had placed her purse

inside her office on a chair and left the office, locking the door. When she returned to her office, the glass window to her office had been shattered and items had been thrown around the room. Credit cards, gift cards worth $80, and approximately $25 in cash were missing from her purse. That same day, charges of $1,059 were made on her MasterCard and charges of $562 were made on her American Express Card. The purchases had been made on GameStop.com, and one of the shipping addresses was the apartment where appellant lived. When detectives came to his home, they were informed that he was at school, so they proceeded to find him there.

The investigating detective was unfamiliar with, and failed to follow, the special procedures provided by law for handling juvenile suspects (*see* Family Ct Act § 305.2[4][b]; 22 NYCRR § 205.20[c]). However, although the detective did not ask either appellant's mother or his grandmother to accompany him to the school, the assistant principal remained in the room during the interview with appellant. They first asked appellant whether he knew the purpose of the visit; he said he did not. When informed that they were police officers, appellant responded that he assumed they wanted to ask about an incident at school in which he had apparently stolen another student's book bag. When further informed that they were there because of "an incident

that happened on September 21, the burglary" in the public library, appellant made no response, at which time the investigating detective asked directly whether he had been involved in the burglary. Appellant then stated that he had thrown a bin of books into the window of an office so that he could enter the office, and then took some credit cards. At this point, appellant was placed was under arrest.

The fact that appellant was briefly held in an adult holding cell at the precinct -- without any adult prisoners -- and was questioned in a room other than a designated juvenile interview room, contrary to Family Court regulations regarding the handling of juveniles in police custody (*see* Family Ct Act § 305.2[4][b]; 22 NYCRR § 205.20[c]), does not warrant suppression of the statement he gave at the precinct. Notably, the office used for questioning appellant was substantially similar to the juvenile room and did not have a coercive atmosphere (*see Matter of Rafael S.*, 16 AD3d 246, 247 [2005]), and appellant was permitted to speak privately with his mother.

While there is no question that the court correctly suppressed the oral statement appellant made at his school based upon the failure to give him *Miranda* warnings, the law supports the hearing court's conclusion that the written inculpatory statement appellant gave at a police station was sufficiently

attenuated from the earlier statement (*see People v White*, 10 NY3d 286, 291 [2008], *cert denied* __ US __, 129 S Ct 221 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]).

The extent to which appellant was questioned in the assistant principal's office was minimal; in fact, he was really only asked one direct question as to whether he had been involved in the burglary, and there is no indication that anything further in the nature of interrogation took place prior to his being brought to the precinct. Not only was the initial exchange between appellant and the detective brief, but there was a change of location and a break of approximately one hour. The detective did not try to "isolat[e] [appellant] from his family or other supportive adults" (*see People v Hall*, 125 AD2d 698, 701 [1986]); appellant was able to confer with his mother at the police station before waiving his *Miranda* rights and giving a statement in her presence. At the precinct, the detective made no reference to the prior statement, but only to the underlying facts of the crime; there is no indication that appellant gave the written statement on constraint of the prior oral statement (*see People v Tanner*, 30 NY2d 102, 105-106 [1972]; *People v Rifkin*, 289 AD2d 262, 263 [2001], *lv denied* 97 NY2d 759 [2002]). Significantly, although the detective initially stated in his testimony that he informed appellant and his mother that he had

to give a statement, he thereafter corrected that testimony, stating that he explained to appellant and his mother that he could make a statement if he chose to. Appellant was not handcuffed or restrained while he was questioned in the sergeant's office, and he was free to use the bathroom.

Had appellant been an adult, these combined facts would easily constitute grounds to find the later statement attenuated from the initial questioning (*see e.g. People v Parker*, 50 AD3d 1607 [2008], *lv denied* 11 NY3d 792 [2008]; *People v Davis*, 287 AD2d 376 [2001], *lv denied* 97 NY2d 680 [2001]), and the issue of attenuation is not appreciably different for juveniles than for adults: in either case it is critical that there be a pronounced break in the interrogation (*People v Chapple*, 38 NY2d 112, 115 [1975]). In the cases involving juveniles upon which appellant relies, there was no break between the pre-*Miranda* and post-*Miranda* questioning (*see e.g. Matter of Robert P.*, 177 AD2d 857, 859 [1991]; *People v Gotte*, 150 AD2d 488 [1989], *lv denied* 74 NY2d 896 [1989]), or the juvenile, without informed adult guidance or oversight and without *Miranda* warnings, was subjected to extensive custodial interrogation, during which he made a full confession, after which he was told that he was required to go to

the police station and provide a written statement (*see People v DeGelleke*, 144 AD2d 978, 979-980 [1988, *lv denied* 73 NY2d 920 [1989]). We observe that on the attenuation issue, there is no relevance to the detective's failure to abide by Family Court regulations regarding the handling of juveniles in police custody.

We therefore conclude that the Family Court properly determined that the statement appellant gave at the precinct was voluntary and untainted by the statement he made at his school prior to receiving *Miranda* warnings, and that the dispositional order adjudicating appellant a juvenile delinquent and placing him with the Office of Children and Family Services for a period of 18 months must be affirmed.

All concur except Moskowitz and Acosta, JJ.
who dissent in a memorandum by Moskowitz, J.
as follows:

MOSKOWITZ, J. (dissenting)

I would remand for a new fact-finding hearing. The court should have suppressed appellant's written statement because the later statement was not attenuated from the initial interrogation. Therefore I dissent.

Fifteen year old Daniel H. allegedly shattered a window of a public library and stole credit cards, gift cards, a small amount of cash and other items from a purse he found on a chair in the library office. He then allegedly made purchases using two of the credit cards. He was charged with acts that, if an adult committed them, would constitute, inter alia, burglary in the third degree (Penal Law § 140.20), grand larceny in the fourth degree (Penal Law § 155.30[4]) and identity theft in the third degree (Penal Law § 190.78[1]).

The police interrogated Daniel at school without a parent or guardian at his side. The police did not administer *Miranda* warnings before Daniel provided an oral statement to the police. The police then handcuffed and transported Daniel to the precinct house, where they gave him *Miranda* warnings in the presence of his mother. Daniel then provided a written statement.

After a *Huntley* hearing (*People v Huntley*, 15 NY2d 72 [1965]), the court granted Daniel's motion to suppress the initial un-Mirandized oral statement, but denied the motion with

respect to the later written statement.

Huntley Hearing

Detective Chrisanto Comissiong was the sole witness at the hearing. He testified that on the morning of October 4, 2007, he and his partner went to Daniel's home and told his mother and grandmother that the police were looking for Daniel. His mother informed the police that Daniel was at his high school. The detective then said that he and his partner would be going to the school to arrest Daniel, but did not ask the mother or grandmother to accompany them.

Upon arriving at the school at approximately 8:30 a.m., the detectives asked for Daniel to come to the office of the assistant principal. When Daniel arrived 10 to 15 minutes later, Detective Comissiong and his partner stood with their backs to the office door while Daniel sat facing them. In the presence of the assistant principal and without first administering *Miranda* warnings, Detective Comissiong initiated the conversation with Daniel by asking whether he knew why the detective was there. When Daniel indicated that he thought it was because of an incident involving his taking another student's book bag, Detective Comissiong asked whether he remembered an incident in the public library on September 21 and whether he was involved in the burglary at that time. At that point, Daniel admitted that

he had thrown a box of books through the library window and then taken the credit cards.

After perhaps 10 minutes in the assistant principal's office, Detective Comissiong placed Daniel in handcuffs and told him he was under arrest. At about 9:30 a.m., the detectives took Daniel for the 20 to 30 minute ride to the precinct house; en route, Detective Comissiong called Daniel's mother.

At the precinct, Daniel was allowed to call his mother. The detective removed the handcuffs and put him in a barred holding cell used for adult prisoners; Daniel was the only one in it. The cell was in an area where several detectives worked. Daniel could see adult suspects being brought in and could be seen by everyone in the area.

In his direct testimony, the detective estimated that Daniel remained in the cell for 10 to 15 minutes until his mother arrived at the precinct. Under cross examination, the detective was certain it was 20 minutes. Daniel's mother saw Daniel in the cell and was "very upset" with him.

According to Detective Comissiong's hearing testimony, mother and son were given the opportunity to talk with each other when Daniel was removed from the cell and taken to the sergeant's office approximately five feet away. It is unclear from the record whether Daniel and his mother spoke to each other while in

a separate room or in the sergeant's office, or whether the detective was with them at the time. The sergeant's office was about five feet by five feet, well lit, with a window and a door and furnished with two chairs, a desk and a computer.

Although Detective Comissiong had been a police officer for 12 years during which he had conducted "at least one hundred" investigations, and during his succeeding five months as a detective had conducted "about one hundred" interviews of suspects, Daniel was the first juvenile he ever interviewed. The detective was aware of the procedure requiring the use of a juvenile room for these interviews. Despite this awareness and the availability of a juvenile room at the precinct with space and lighting conditions similar to those in the sergeant's office, the detective nevertheless used the sergeant's office to question Daniel. The detective conceded being at fault for not using the juvenile room and that he had not "accidentally" failed to follow the correct procedure.

Because Daniel's mother was so upset with Daniel, the Detective seated himself between them. Detective Comissiong testified that, because he expected Daniel to provide a written statement based on what he had said earlier at school, he told Daniel and his mother that Daniel "had to" make a written statement. Presentment agency counsel immediately took pains to

elicit that Daniel was not coerced into making the statement. The detective then clarified that Daniel "could" make a statement. Because further explanation seemed unnecessary, the detective did not say that Daniel did not have to make a statement. Shortly thereafter, when the detective read the *Miranda* right to remain silent, he similarly explained to Daniel that "at any time if he doesn't want to say anything, he doesn't have to."

For an estimated five minutes, the detective read Daniel and his mother the *Miranda* warnings. These he explained in layman's terms and not pursuant to any special training for giving simplified warnings to juveniles. Daniel initialed each of the warnings on the *Miranda* sheet that both he and his mother signed, indicating his understanding. Daniel then provided a written statement amounting to a confession of his participation in the incident at the library. The detective estimated that the questioning and the writing of the statement took another five or ten minutes. During the entire period, Daniel was free to use the bathroom, was provided with food and drink, and never indicated that he wanted an attorney, wanted the questioning to stop or wanted to leave.

By order dated November 16, 2007, Family Court found the detective's testimony credible, but suppressed the oral statement

Daniel gave at the school because Daniel was in custody at the time and had not received *Miranda* warnings.

The court denied suppression of the written statement Daniel gave at the precinct. The court found that Daniel was no longer under the influence of the illegal questioning because there had been a "pronounced break" between the initial oral statement and the later Mirandized written statement. Citing *People v Paulman* (5 NY3d 122 [2005]), the court referred to the change in location, the fresh administration of *Miranda* warnings, the offer of food and restroom breaks, contact with the mother and grandmother, the hour time lag and that the detective did not refer to or leverage the initial illegally-obtained statement.

Fact-Finding

At the fact-finding hearing, Daniel's written statement was admitted into evidence and was the only evidence connecting him to the allegations in the petition. The detective's testimony mirrored his testimony at the *Huntley* hearing, save for details involving the time it took for the ride from the school to the precinct (about another 10 or 15 minutes), the dimensions of the sergeant's office (about a foot wider), where the mother spoke to Daniel before the questioning at the precinct (through the holding cell bars and not in a separate room), and when Daniel was given food and drink (after he gave the written statement,

rather than before). In addition, although Detective Comissiong had specifically denied it at the *Huntley* hearing, this time he testified that Daniel had also given an oral statement at the precinct[1]. The complainant's testimony echoed her deposition in support of the presentment agency's petition.

Daniel did not present any evidence.

By a January 8, 2008 oral decision, Family Court found that Daniel had committed acts that, if an adult had committed them, would constitute the crimes of burglary in the third degree, grand larceny in the fourth degree and identity theft in the third degree. The January 18, 2008 final order of disposition adjudicated Daniel a juvenile delinquent and placed him in the custody of the Office of Family and Child Services for 18 months, less the period spent in detention pending the disposition.

Discussion

It is, of course, the presentment agency's burden to establish, beyond a reasonable doubt, that Daniel made his written statement voluntarily (*People v Witherspoon*, 66 NY2d 973, 974 [1985]).

To be effective, *Miranda* warnings must precede the

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[1]Of course, in determining the propriety of the suppression ruling we may not consider evidence later adduced at the fact-finding hearing (*see People v Gonzalez*, 55 NY2d 720, 721-722 [1981], *cert denied* 456 US 1010 [1982]).

questioning of a defendant, or, as in this case, a juvenile respondent. Where there is an initial *Miranda* violation and a subsequent post-*Miranda* statement, "[l]ater is too late, unless there is such a definite, pronounced break in the interrogation that the defendant [or respondent] may be said to have returned, in effect, to the status of one who is not under the influence of questioning" *(People v Chapple*, 38 NY2d 112, 115 [1975]). This determination does not require examination of an accused's state of mind and, thus, an assessment of his or her credibility, but may rely on an assessment of external events to ascertain whether he or she was subject to such a continuous interrogation that the *Miranda* warnings eventually administered were insufficient to protect the accused's rights (*id.*). Subsequently, the Court of Appeals adhered to the rule *Chapple* articulated as a matter of state constitutional law in *People v Bethea* (67 NY2d 364 [1986]).

People v Paulman (5 NY3d 122 [2005]) summarized the factors to consider in determining whether there is a "single continuous chain of events" under *Chapple*. This includes "the time differential between the *Miranda* violation and the subsequent admission; whether the same police personnel were present and involved in eliciting each statement; whether there was a change in the location or the nature of the interrogation; the circumstances surrounding the *Miranda* violation, such as the

extent of the improper questioning; and whether, prior to the *Miranda* violation, defendant had indicated a willingness to speak to police" (*id.* at 130-131). The Court of Appeals went on to note that "[n]o one factor is determinative and each case must be viewed on its unique facts" (*id.* at 131; *see also People v White*, 10 NY3d 286, 291 [2008], *cert denied* _US_, 129 S Ct 221 [2008]).

In applying the various *Paulman* factors and examining the circumstances surrounding the *Miranda* violations in this case, I cannot overlook that, unlike *Chapple*, *Paulman* and their progeny, this case involves a juvenile rather than an adult defendant. Thus, while *Chapple* stated that the court need not examine the accused's state of mind in determining whether the initial *Miranda* violation and the subsequent interrogation constitute a continuous chain of events, I do not understand this to preclude consideration of the accused's youth as a factor.

Here, there was a change in location between the initial *Miranda* violation and the subsequent written statement, and the police never attempted to leverage the earlier statement by mentioning it during the subsequent questioning. However, Daniel never indicated a willingness to speak to the police; the same detectives were present and elicited both the illegal and the Mirandized statement and there was no change in the type or nature of the questioning.

Although the detective testified at the suppression hearing that he was with Daniel for about 10 minutes in the assistant principal's office, and one must accord much weight to the hearing court's credibility determination (*see People v Prochilo*, 41 NY2d 759, 761 [1977]; *Matter of Cy R.*, 43 AD3d 267, 268 [2007], *lv denied* 9 NY3d 814 [2007], *cert denied* _US_, 128 S Ct 1891 [2008]), this time estimate of 10 minutes, standing alone, does not support the conclusion that the improper questioning was insignificant. Under stress, 10 minutes can be a long time.

Further, while it appears that the duration of events from the start of the questioning at the high school to the interrogation at the precinct took slightly more than an hour, the detective's estimates leave a gap of more than half an hour within that brief time frame. Detective Comissiong testified that he arrived at the assistant principal's office at approximately 8:30 a.m., Daniel was brought in 10 to 15 minutes later, and they were together in the office for perhaps 10 minutes when the detective handcuffed Daniel and arrested him. This would make the arrest at approximately 8:50 or 8:55 a.m. However, the detective also testified that they left the school headed for the precinct at about 9:30 a.m. This fails to account for the period between 8:55 and 9:30 that morning.

Thus, it may well be that even less than an hour separated

the interrogations, and during that entire period there was no interval when Daniel was not in the presence of the same police officers (*see People v Jordan*, 190 AD2d 990 [1993], *affd on other grounds* 83 NY2d 785 [1994]). Of course, one hour or even less, in combination with other factors, may constitute a pronounced break in the case of an adult accused (*see People v Neal*, 60 AD3d 1158 [2009] *lv denied* 12 NY3d 857 [2009]; *People v Parker*, 50 AD3d 1607, *lv denied* 11 NY3d 792 [2008]; (*People v Samuels*, 11 AD3d 372 [2004], *lv denied* 4 NY3d 802 [2005]). However, the factors from these cases have different bearing on the determination with regard to a juvenile.

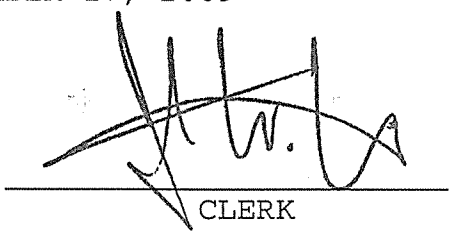
I further note that, while Detective Comissiong was a novice at juvenile interviews and may not have had experience coping with an angry parent, he certainly recognized that Daniel's mother was hardly in a position to provide calm parental guidance.

In view of the foregoing, it is unnecessary to address the impact of the unexplained failure to question Daniel in a designated juvenile room, although I note that there is no per se rule mandating suppression of an inculpatory statement for failure to follow the statutory procedure, and no claim here that the sergeant's office was not substantially similar to the designated

room (*see Matter of Luis N.*, 112 AD2d 86, 87 [1985]; *see also Matter of Rafael S.*, 16 AD3d 246 [2005]; *Matter of Emilio M*, 37 NY2d 173, 177 [1975]).

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

ENTERED: NOVEMBER 17, 2009



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Saxe, J.P., Nardelli, Buckley, Acosta, Friedman, JJ.

1150 Houston Whisenant, Index 105504/06
Plaintiff-Respondent,

-against-

Rafiul Farazi, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Robert D. Grace of counsel), for appellants.

Frekhtman & Associates, Brooklyn (Arkady Frekhtman of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered March 17, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants met their initial burden of establishing prima facie that plaintiff did not sustain a serious injury to his left ankle through their examining orthopedist's affirmed report, which showed quantified range-of-motion findings within normal limits, and plaintiff's deposition testimony which indicated little or no restriction of his daily activities due to the hospital-diagnosed ankle sprain. The burden having shifted, plaintiff's orthopedist's finding of range-of-motion limitations in plaintiff's left ankle was not sufficiently contemporaneous with

the accident to be probative of the claim (*see e.g. Valentin v Pomilla*, 59 AD3d 184, 185 [2009]; *Thompson v Abbasi*, 15 AD3d 95, 97-98 [2005]). Plaintiff's testimony as to physical therapy attendance was unsupported by any documentation, and references by plaintiff's orthopedist to such therapy in his affirmed report constituted impermissible hearsay (*see e.g. Toulson v Young Han Pae*, 13 AD3d 317, 319 [2004]). There were admitted gaps in treatment, and plaintiff's orthopedist's offer of an explanation regarding the gaps, grounded, in part, on plaintiff's lack of insurance and lack of financial means, was hearsay, and did not satisfactorily explain the cessation of treatment under the circumstances (*see generally Pommells v Perez*, 4 NY3d 566 [2005]). Plaintiff's MRI scan, which, according to the radiologist, evidenced partial tears to two ligaments in plaintiff's left ankle, was taken three years post-accident, too remote to be probative of plaintiff's accident-related claim, particularly since the radiologist offered no opinion as to a causal connection between the ligament tears and the accident (*see e.g. Dembele v Cambisaca*, 59 AD3d 352 [2009]). Plaintiff's orthopedist's opinion that the ligament tears were caused by the accident was not medically explained.

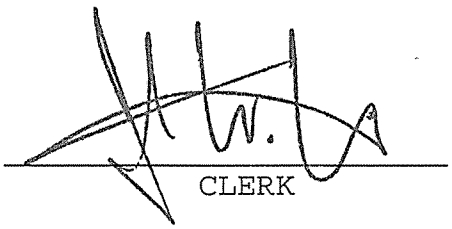
Plaintiff's serious injury claim predicated on an alleged inability to engage in substantially all his daily activities for

90 of the first 180 days post-accident was refuted by his own testimony. Plaintiff testified that he was confined to the house for two days, missed only three days of work and had some ankle pain when walking long distances, playing tennis and swimming. Further, plaintiff failed to offer the requisite competent medical proof to substantiate his serious injury under the 90/180 day category (*see DeSouza v Hamilton*, 55 AD3d 352 [2008]).

Plaintiff's belated claim of serious injury under the significant disfigurement category of Insurance Law § 5102(d) was not pled, and is therefore waived. In any event, the photographic evidence in the record, allegedly showing the abrasion scar, is unclear and of no probative value.

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

ENTERED: NOVEMBER 17, 2009



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

1204-
1205 In re Saragh Ann K.,
Petitioner-Respondent,

-against-

Armando Charles C.,
Respondent-Appellant.

Segal & Greenberg, LLP, New York (Philip C. Segal of counsel), for appellant.

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

Frederic P. Schneider, New York, Law Guardian.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about January 5, 2009, which implicitly denied respondent's objection to a final order of child support, same court (Support Magistrate Robert D. Mulroy), entered on or about November 6, 2008, and bringing up for review the aforesaid order of support and an order of filiation, same court (Myrna Martinez-Perez, J.), entered on or about April 1, 2008, unanimously affirmed.

Family Court correctly issued these orders following proceedings held before a support magistrate and a Family Court judge. The record shows that petitioner mother established respondent's paternity by clear and convincing evidence, including

respondent's testimony that he had a sexual relationship with peitioner during the relevant time period and genetic test results showing a 99.99% probability of paternity. These test results raised a rebuttable presumption of paternity (Family Court Act § 532[a]), which respondent failed to rebut. Notably, respondent did not challenge the accuracy of genetic testing in general or the accuracy of the instant test results.

Instead, respondent filed a motion requesting a hearing on the issue of equitable estoppel or alternatively a "best interests" hearing, arguing, inter alia, that it would be contrary to the child's best interests to allow the mother to assert paternity almost 10 years after the child was born and speculating that the child might have another father figure in his life. Respondent's request for a best interests hearing was redundant, as "[t]he paramount concern in applying equitable estoppel in paternity cases is the best interests of the child" *(Matter of Greg S. v Keri C.*, 38 AD3d 905 [2007], *e.g.*, *Richard B. v Sandra B.B.*, 209 AD2d 139, 143 [1995], *lv dismissed* 87 NY2d 861 [1995]). Respondent's moving papers did not set forth any facts indicating that a declaration of paternity would be against the child's best interests, but focused primarily on how a declaration of paternity would disrupt his own life as he had no prior relationship with

the child.[1] Respondent did not identify any specific witnesses he wished to call at a further hearing. Under the specific facts presented here, respondent was not entitled to further proceedings before the issuance of the order of filiation and the final order of support.

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

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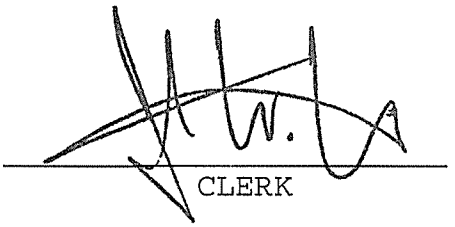


[1] The attorney for the child advised the court that the mother had told the child, when he was five years old, that respondent was his father. This information would suggest that, although there had been no contact, the child was well aware of respondent's parental status.

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

1271 Finkelstein Newman Ferrara LLP, etc., Plaintiff-Respondent, Index 101631/07

-against-

Leo Manning, Defendant-Appellant.

Leo Manning, New York, appellant pro se.

Finkelstein Newman Ferrara LLP, New York (Barry Gottlieb of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 11, 2008, which denied defendant's motion to dismiss the complaint, unanimously modified, on the law, that portion of the order denying dismissal for lack of personal jurisdiction vacated, the matter remanded for a traverse hearing, and otherwise affirmed, without costs.

Defendant's sworn, nonconclusory denial of service sufficiently controverted the veracity or content of the affidavit of service to require a traverse hearing *(NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [2004]). The affidavit of service established that the process server attempted to serve defendant at his place of residence on three separate occasions, namely, on February 2, 2007 at 4:30 P.M., February 5 at 9:05 A.M., and February 6 at 7:30 P.M., but after reasonable efforts was "unable

to find . . . defendant" or a person of suitable age and discretion willing to accept service on his behalf. On his third attempt, he purportedly effected service by affixing a copy of the summons and complaint to the door of defendant's last known residence. But this assertion was inconsistent with his affidavit submitted in opposition to the motion to dismiss, where he averred that on his third attempt, defendant came to the door and refused to open it when the process server identified himself and the purpose of his visit. The process server concluded, in this later affidavit, that defendant was intentionally avoiding service, and that further attempts would be futile. Accordingly, he affixed a copy of the summons and complaint to the door pursuant to CPLR 308(4).

Plaintiff also claims to have served defendant at work, pursuant to CPLR 308(2), by delivery of the summons and complaint to a person of suitable age and discretion at defendant's actual place of business.

Defendant, in turn, swore that he was home on both February 5 and 6, 2007, and that neither the telephone intercom nor the doorbell rang on either occasion. He further stated that the person who purported to accept service on his behalf at his place of business was not authorized to do so, and was in fact a "vendor/distribution" employee assigned to a car services entity

in the building where his office was located, but unrelated to defendant's business. Defendant's sworn denials raised an issue of fact requiring a traverse hearing (*NYCTL*, 7 AD3d at 460). In light of the sharp factual dispute as to the validity of service upon defendant, the motion court erred in failing to resolve this threshold issue of personal service with a traverse hearing. As defendant filed his answer only after the IAS court erroneously denied his motion to dismiss for lack of personal jurisdiction, defendant did not waive that defense by asserting unrelated counterclaims in his answer.

The motion court properly denied that portion of the motion to dismiss asserting failure to state a cause of action. Defendant argues that the complaint fails to adequately allege breach of contract. However, as the motion court found, the complaint, when read together with the affidavit of attorney Robert Finkelstein in opposition to the motion, sufficiently stated a cause of action for breach of an oral agreement between the parties. It is well settled that "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

Defendant's claim that the second cause of action (for account stated) fails to state a cause of action is likewise

without merit. In opposition to defendant's motion, plaintiff submitted itemized invoices rendered during the period from July 1, 2001 through April 1, 2003, specifying in detail the work performed for defendant, including the personnel who performed the work, the date the work was performed, the hours billed for the work, and the charges therefor.

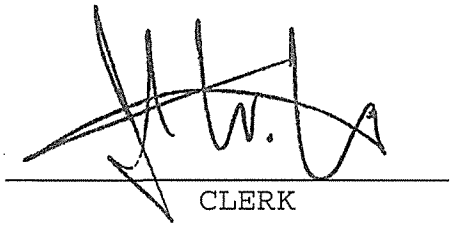
The motion court properly rejected defendant's argument that recovery was barred due to plaintiff's failure to comply with 22 NYCRR 1215.1. This statewide rule on letters of engagement does not apply where an attorney's representation began prior to its effective date (*see Ziskin Law Firm, LLP v Bi-County Elec. Corp.*, 43 AD3d 1158 [2007]).

Contrary to defendant's assertions, plaintiff did not wait eight years before seeking payment from defendant. Plaintiff sent monthly, itemized invoices to defendant during the entire course of the representation, from 2001 through July 2003. Thereafter, plaintiff sent demand letters beginning in March 2007, culminating in initiation of this action. The only delay attributable to plaintiff was a period of less than four years, from the time of the last invoice (July 2003) through its first demand letter (March 2007). In any event, defendant offers only conclusory

allegations as to how he was prejudiced by any alleged delay. Sanctions pursuant to 22 NYCRR 130-1.1 are not warranted under the circumstances.

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

ENTERED: NOVEMBER 17, 2009



CLERK

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

1283 Ruben Sanchez, an Infant by his Mother and Natural Guardian, Olga Corona, et al., Plaintiffs-Respondents, Index 106920/06

-against-

Nasim Ahmed, et al., Defendants-Appellants.

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck (Elizabeth M. Hecht of counsel), for appellants.

The Law Office of René Myatt, Hollis (René Myatt of counsel), for respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered March 9, 2009, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the claims that infant plaintiff sustained a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants did not meet their burden of establishing prima facie that infant plaintiff did not sustain permanent loss or permanent consequential or significant limitations as a result of being struck by defendants' vehicle as he was crossing the street.

Both the infant and his mother testified at their depositions on May 29, 2007, and reported to defendants' examining physician, that the child began having headaches three weeks after the accident for which his doctors prescribed 400 milligrams of ibuprofen, and that the headaches continued, particularly in the summertime. Thereafter, defendants referred the infant plaintiff to an orthopedic surgeon and a doctor specializing in plastic and reconstructive surgery for examination. Defendants submitted the doctors' letters opining that the infant had no disabilities from an orthopedic point of view or from the scarring on his forehead. However, defendants failed to submit an opinion from a neurologist who could have opined whether the infant's headaches and other symptoms were causally related to the accident.

It is thus irrelevant whether plaintiffs presented sufficient evidence in opposition.

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

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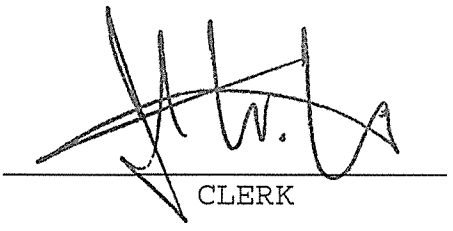

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Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1291 Natural Organics Inc., Index 601186/08
Plaintiff-Respondent,

-against-

Anderson Kill & Olick, P.C., et al.,
Defendants-Appellants.

Hinshaw & Culbertson LLP, New York (John Richard Supple of counsel), for appellant.

Ropers, Majeski, Kohn & Bentley, New York (Jung H. Park of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 24, 2009, which, to the extent appealed from, denied defendants' CPLR 3211 motion to dismiss the legal malpractice and breach of contract causes of action, and permitted plaintiff leave to replead its unfair business practice cause of action, unanimously modified, on the law, the motion granted to the extent of dismissing the legal malpractice cause of action with prejudice, dismissing the breach of contract cause of action in part as indicated herein, withdrawing permission to replead the unfair business practice cause of action, and otherwise affirmed without costs.

Plaintiff alleged that it retained defendant law firm to

bring an action against an insurance company. After several years of litigation, plaintiff agreed to settle the matter for $750,000, which was less than the $1.3 million claimed value of the lawsuit. Several years after the settlement, the law firm informed plaintiff that Brian Valery, who had held himself out as an attorney and worked on plaintiff's case, was in fact not licensed to practice law. Plaintiff then brought this action, alleging it would have obtained a more favorable result in the insurance litigation if the firm had exercised more care with regard to Valery's employment. The complaint sought damages for the difference between the purported $1.3 million value of plaintiff's insurance claim and the $750,000 settlement amount, as well as all of the legal fees billed by the law firm for the entire matter.

Allegations in support of a claim of legal malpractice must at least "permit the inference that, but for defendants' [alleged negligence], plaintiff would not have sustained actual, ascertainable damages" (*Pyne v Block & Assoc.*, 305 AD2d 213 [2003]). Since plaintiff failed to allege facts that "sufficiently demonstrate a causal relationship between purported conduct on the part of defendants and damages suffered by plaintiff" (*Gall v Summit, Rovins & Feldesman*, 222 AD2d 225, 226 [1995], *lv dismissed* 88 NY2d 919 [1996]), the malpractice claim is

dismissed. The dismissal is with prejudice, since repleading would be barred by the statute of limitations (*see* CPLR 214[6]; *Byron Chem. Co., Inc. v Groman*, 61 AD3d 909, 910 [2009]).

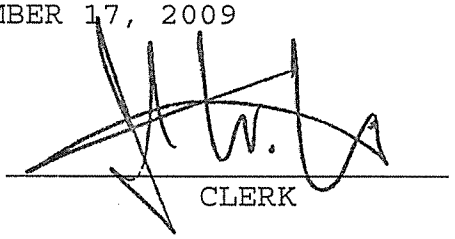
That part of the breach of contract cause of action alleging a breach of professional standards and seeking damages for the alleged shortfall from the settlement and all of plaintiff's legal fees is dismissed as duplicative of the malpractice claim (*see Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401 [2008]). However, to the extent that plaintiff's breach of contract claim rests on the fees it paid for Valery's services, plaintiff has pleaded sufficient facts to state a claim. The complaint alleges that the law firm continuously held out Valery as a licensed attorney and billed in excess of $70,000 for his services, even though it is undisputed that he was, in fact, not an attorney. At this early stage of the proceedings, it cannot be said that these particular damages are too speculative (*see Fielding v Kupferman*, 65 AD3d 437, 442 [2009]).

Plaintiff should not be permitted to replead its unfair business practice cause of action to assert a claim under General Business Law § 349 because it cannot show that defendants, by employing Valery, engaged in acts or practices having a broad

impact on consumers at large (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]).

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

ENTERED: NOVEMBER 17, 2009



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