SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 15, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1171 The People of the State of New York, Respondent, SCI 5564/06

-against-

Jose Feliz,
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 (Malancha Chanda of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura A. Ward, J. at plea; Patricia M. Nunez, J. at sentence), rendered January 29, 2007, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 2 years, unanimously reversed, on the law, defendant's waiver of indictment and guilty plea vacated, the superior court information dismissed, and the matter remanded for further proceedings.

Defendant's waiver of indictment was invalid because he was charged with a class A felony, even though this class A felony is no longer punishable by life imprisonment, because the statute in effect at the time of defendant's conviction prohibited waiver of

indictment for *any* class A felony. The fact that the Legislature subsequently amended the statute to allow waiver of indictment for class A felonies not involving life sentences does not permit a different result.

Article I, section 6 of the New York Constitution permits waiver of indictment except where the crime charged is punishable by either death or life imprisonment. However, the Legislature is free to enact statutory provisions governing waiver of indictment that are more restrictive than the limitations imposed by the Constitution, even though the statute itself derives from the Constitution and implements its provisions (*see People v Boston*, 75 NY2d 585, 588 [1990]). A violation of the statutory provisions governing waiver of indictment, like a violation of the corresponding constitutional provision, is a "mode of proceedings" error exempt from preservation requirements (*id.* at 589 n).

At the time of defendant's conviction, CPL 195.10(1)(b) did not mention life imprisonment; instead, it expressly prohibited waiver of indictment where the defendant had been charged with a class A felony. Until recently, the constitutional reference to crimes punishable by life imprisonment and the statutory reference to class A felonies matched, since all class A felonies were punishable by life imprisonment. However, the Drug Law Reform Act (L 2004, ch 738) eliminated life sentences for class

A-I and A-II drug felonies, but retained their designation as class A felonies. In 2008 the Legislature corrected the problem by amending CPL 195.10(1)(b) to preclude waiver of indictment only where the charge is a "class A felony punishable by death or life imprisonment" (L 2008, ch 401, § 1). Although the relevant events relating to defendant's case occurred after the effective date of the 2004 DRLA, they also occurred before the 2008 amendment to the CPL. Since defendant's original charge was the class A-II felony of criminal sale of a controlled substance in the second degree (Penal Law § 220.41), he simply could not waive indictment at the time in question.

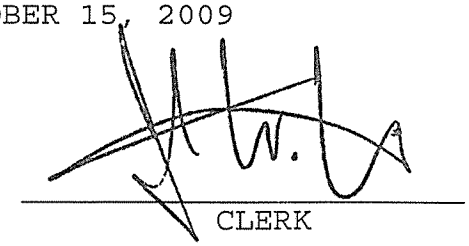
A departure from the safeguard of indictment by a grand jury is permitted "only within the express authorization of the governing constitutional and statutory exception" (*People v Trueluck*, 88 NY2d 546, 549 [1996]). Regardless of whether the Legislature should have amended CPL 195.10(1)(b) at the same time it revised the drug laws, and regardless of whether its delay in doing so was an oversight, "courts are not to legislate under the guise of interpretation" (*People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995]; *see also People v Tychanski*, 78 NY2d 909 [1991]).

M-4200 - People v Jose Feliz

Motion seeking leave to file supplemental brief denied.

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

ENTERED: OCTOBER 15, 2009



CLERK

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

1172 Dionne Emmitt, Index 7704/00
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

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

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

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 4, 2008, which granted plaintiff's motion to strike defendant's answer only to the extent of precluding it from offering any evidence with respect to certain Con Edison permits, unanimously modified, on the facts, to further provide that it shall be conclusively presumed at trial that defendant created or had notice of the condition that gave rise to plaintiff's accident, and otherwise affirmed, without costs.

Plaintiff allegedly tripped and fell in a construction trench. Defendant inexcusably failed to turn over to plaintiff certain sidewalk opening permits it had issued to Con Edison until the eve of trial. Defendant, pointing out its adherence to the parameters of later disclosure orders, claimed it only discovered the Con Edison permits after having later performed a broader search.

A party that disobeys court-ordered disclosure is subject to preclusion of relevant portions of its evidence (CPLR 3126). The nature of the sanction lies generally within the broad discretion of the court, and should not be disturbed absent an improvident exercise thereof (*Gross v Edmer Sanitary Supply Co.*, 201 AD2d 390 [1994]). In its answer, defendant raised as an affirmative defense that any and all hazards, defects and dangers were of such an open, obvious and apparent nature that they were or should have been known to plaintiff, thus rendering her injuries attributable to her own culpable conduct. There is no reason to bar defendant from pursuing that defense. However, it was not an improvident exercise of discretion to preclude defendant from offering evidence as to the Con Edison permits. We modify only to clarify that it will be conclusively presumed at trial that defendant created or had notice of the trench involved in the accident. This relief will ameliorate the prejudice plaintiff has suffered as a result of defendant's failure to timely

disclose the Con Ed permits. Defendant's ability to defend the suit by attributing the accident to plaintiff's own lack of due care is not impaired.

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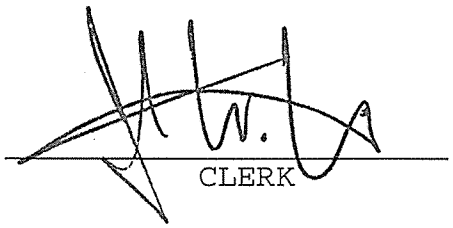
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 15, 2009



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

1173-
1173A-
1173B S&W Home Improvement Co., Index 23098/99
Plaintiff-Respondent-Appellant,

-against-

La Casita II H.D.F.C., et al.,
Defendants-Appellants-Respondents.

Neil B. Connelly, PLLC, White Plains (Neil B. Connelly of counsel), for appellants-respondents.

Talkin, Muccigrosso & Roberts, LLP, New York (Andrew G. Muccigrosso of counsel), for respondent-appellant.

Amended judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 11, 2008, after a nonjury trial in an action to foreclose a mechanic's lien, awarding plaintiff $37,528.37, inclusive of interest, costs and disbursements, unanimously affirmed, without costs. Appeals from original judgment, same court and Justice, entered on or about July 25, 2007, and from order, same court and Justice, entered January 8, 2008, which, inter alia, granted defendant's motion to vacate the original judgment to the extent of eliminating the award of prejudgment interest, unanimously dismissed, without costs, as subsumed in the appeal from the amended judgment.

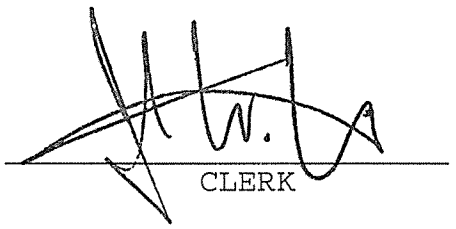
Although the expert named in the plaintiff's CPLR 3101(d) notice to testify as to the "measurements and quality of work completed" was not the expert who testified at trial, the latter

was properly permitted to testify where the notice advised that another representative of the named expert's construction company might be called, and defendants were on notice of the subject matter and substance of the expert's testimony well in advance of trial (*cf. Hernandez v Vavra*, 62 AD3d 616, 617 [2009]; *Aponte v City of New York*, 282 AD2d 372 [2001], *lv denied* 96 NY2d 720 [2001]). The expert's opinion, which was based on information provided by both plaintiff and defendants, his own inspection of the premises and a review of the floor plans, was not speculative (*see Concord Vil. Owners, Inc. v Trinity Communications Corp.*, 61 AD3d 410, 411 [2009]). The trial court's findings of fact, which, given a contract that was oral, are largely based on witness credibility, are sufficiently stated (CPLR 4213[b]) and supported by a fair interpretation of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]), including, in particular, the finding that plaintiff did not willfully exaggerate its mechanic's lien within the meaning of Lien Law § 39 (*cf. Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 393-394 [2006]). The trial court's decision, upon reconsideration, that it should not have awarded predecision interest was a proper exercise of discretion (CPLR 5001[a]; *see Salerno Painting & Coating Corp. v National Neurolabs, Inc.*, 43 AD3d 1140, 1141 [2007]), where the amount awarded was substantially less than the amount claimed and it does not appear

that defendant contributed to the delay in the resolution of this matter. So too was the court's decision, upon reconsideration, that there should be no award of interest for the five-month period between its decision and the entry of the original judgment, where plaintiff delayed four months in submitting a proposed judgment for settlement (*see* 22 NYCRR 202.48). We have considered the parties' other arguments and find them unavailing.

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

ENTERED: OCTOBER 15, 2009



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

1174	In re Kips Bays Towers Condominium, Petitioner-Appellant, -against- The Commissioner of Finance, et al., Respondents-Respondents.	Index 200483/97 201069/98 200841/99 203376/00 201073/01 202423/02 202599/03

Podell, Schwartz, Schechter & Banfield, LLP, New York (William E. Banfield of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Andrew G. Lipkin of counsel), for respondents.

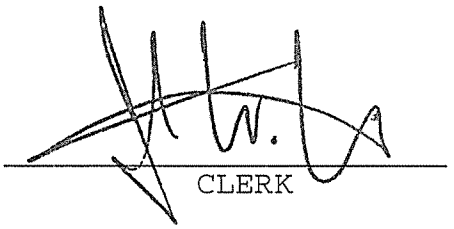
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 23, 2008, which, to the extent appealed from as limited by the brief, confirmed the assessed valuation of the subject property for the tax years 1997/98, 1998/99, 1999/2000, 2002/03 and 2003/04, unanimously affirmed, without costs.

The assessed valuations confirmed by the court were within the range of the trial evidence (*see Matter of Bass v Tax Commn. of City of N.Y.*, 179 AD2d 387, 388 [1992], *lv denied* 80 NY2d 751 [1992]). The court's determination that the actual rents for the unsold condominium apartments, which both parties' expert appraisers agreed were below market rents, were an inappropriate component of valuation of the property was not against the weight of the evidence or contrary to law (*see Matter of Merrick Holding Corp. v Board of Assessors of County of Nassau*, 45 NY2d 538, 543 [1978]). Nor is there any basis to disturb the court's factual

findings with respect to income, expenses and capitalization rates.

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

ENTERED: OCTOBER 15, 2009



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

1175 The People of the State of New York, Ind. 4633/07
Respondent,

-against-

Adebola Bamisile,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered March 26, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, in which it accepted the officer's version of the incident. The record fails to establish that defendant was subjected to, or directed to perform upon himself, a body cavity search or any other type of bodily examination for which there are additional requirements beyond the fact of a lawful arrest (*see People v Hall*, 10 NY3d 303, 311 [2008]). After lawfully arresting defendant, an officer patted defendant down and felt, through defendant's clothing, a hard object in defendant's

"buttocks area." The officer asked defendant to remove the object, and defendant complied by simply reaching into his pants and taking out a bag of cocaine without undressing or even opening his belt. The hearing evidence does not establish that the bag was concealed in or protruding from defendant's rectum, or that it was even between his buttocks cheeks. Contrary to defendant's argument, we find that a meaningful distinction can be drawn between an object in an arrestee's rectum or buttocks cheeks (*see People v Maye*, 12 NY3d 731 [2009]), and an object tucked into an arrestee's pants in the vicinity of the buttocks, which would be comparable to an object in a back pocket (*see People v Placek*, 58 AD3d 538 [2009], *lv denied* 12 NY3d 858 [2009]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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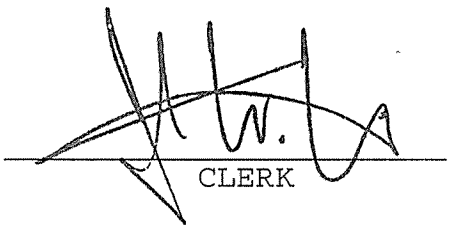

Gonzalez, P.J., Friedman, Moskowitz, Renwick, DeGrasse, JJ.

1176 Judith Solomon, Index 113701/07
Plaintiff-Respondent,

-against-

Andrew Langer,
Defendant-Appellant.

Jack L. Glasser, P.C., Jamaica (Patrick T. McGuire of counsel), for appellant.

Steven G. Legum, Mineola, for respondent.

Appeal from order, Supreme Court, New York County (Joan A. Madden, J.), entered June 17, 2008, which, in an action for monies allegedly due and owing under a promissory note, inter alia, granted plaintiff's motion for summary judgment in lieu of complaint, deemed an appeal from judgment, same court and Justice, entered July 29, 2008 (CPLR 5501[c]), awarding plaintiff the principal sum of $200,000 plus interest, and, so considered, said judgment unanimously affirmed, without costs.

Plaintiff established her entitlement to summary judgment in lieu of complaint on the promissory note made by defendant by establishing execution, delivery, demand and failure to pay (*see Israel Discount Bank of N.Y. v 500 Fifth Ave. Assoc.*, 167 AD2d 203 [1990]). Defendant failed to substantiate, in evidentiary form, his assertion that payments to plaintiff's mother, an alleged business acquaintance since deceased, discharged the note. Defendant sets forth no evidence of misleading conduct on

the part of plaintiff indicating that she gave her mother the authority to transact business on her behalf (*compare Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Furthermore, the note unequivocally stated that payment was to be made directly to plaintiff and the parol evidence rule bars consideration of defendant's purported oral agreement with plaintiff's mother regarding payment of the loan (*see Manufacturers Hanover Trust Co. v Margolis*, 115 AD2d 406 [1985]). Moreover, it is settled that "invocation of defenses based on facts extrinsic to an instrument for the payment of money only do not preclude CPLR 3213 consideration" (*Alard, L.L.C. v Weiss*, 1 AD3d 131,767 NYS2d 11, 2003 N.Y. Slip Op. 18173).

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

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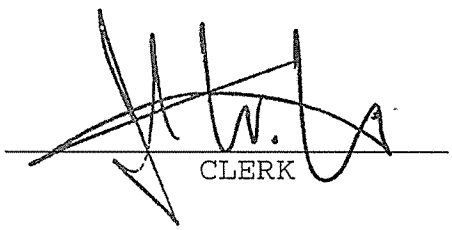

Gonzalez, P.J., Friedman, Moskowitz, Renwick, DeGrasse, JJ.

1177 Empire Purveyors, Inc., et al., Index 603282/06
Plaintiffs-Appellants,

-against-

Eileen Diane Weinberg,
Defendant-Respondent.

David J. Fischman, Jackson Heights, for appellants.

Lebensfeld Borker Sussman & Sharon LLP, New York (Stephen Sussman of counsel), for respondent.

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered August 20, 2008, after a nonjury trial in an action to collect on two promissory notes, in favor of defendant, and bringing up for review an order, same court and Justice, entered February 26, 2008, which granted defendant's motion for leave to amend the answer, unanimously affirmed, without costs.

The trial court's determination, that plaintiffs failed to demonstrate that the applicable six-year statute of limitations (CPLR 213[2]) was tolled on the basis that the inflated invoice payments defendant made were referable to the subject notes or that they amounted to a clearly demonstrated intention by defendant to pay the balance on the notes (*see Bernstein v Kaplan*, 67 AD2d 897, 898 [1979]), was supported by a fair interpretation of the evidence (*see e.g. Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Aryeh v Altman*, 36 AD3d 492, 493 [2007]).

We decline to consider plaintiffs' argument, raised for the first time on appeal, that granting leave to amend the answer eliminated an admission as to payment on the notes (*see Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554, 555 [2009]). Were we to consider the issue, we would find that the court properly granted leave to amend the answer, as the amendment did not prejudice plaintiffs since the allegations in the answer that were eliminated were made "on information and belief," which is not a judicial admission (*see Scolite Intl. Corp. v Vincent J. Smith, Inc.*, 68 AD2d 417, 421 [1979]). Furthermore, the affidavit of defendant's counsel in support of the motion was the appropriate supporting document given that the proposed amendment was not based upon "additional or subsequent transactions or occurrences" (CPLR 3025[b]; *see Arriaga v Laub Co.*, 233 AD2d 244 [1996]).

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

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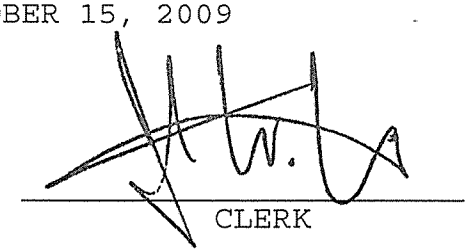

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Gonzalez, P.J., Friedman, Moskowitz, Renwick, DeGrasse, JJ.

1178 The People of the State of New York, Ind. 2417/06
Respondent,

-against-

Julio Tavera,
Defendant-Appellant.

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

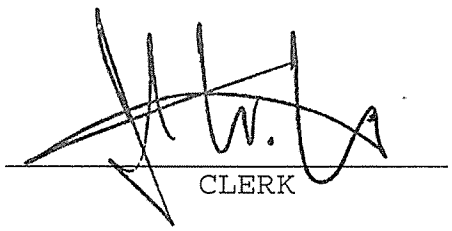
Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about September 11, 2007,

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: OCTOBER 15, 2009



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

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

1179 The People of the State of New York, Ind. 3595/07
Respondent,

-against-

Nelson Miranda,
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 (Peter M. Rienzi of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered February 20, 2008, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly declined to submit petit larceny as a lesser included offense. No reasonable view of the evidence, viewed most favorably to defendant, supported a finding that defendant had picked the victim's electronic translator up from the floor, rather than stealing it from her person by removing it from a pocket of her backpack. To the contrary, two police officers testified that they observed defendant remove the translator from the backpack pocket; the officers specifically denied seeing any items fall from the backpack. Moreover, even though there was evidence that the pocket was partially unzipped,

there was no evidence that the backpack was ever turned upside down or that anything else occurred that would cause an object to fall out without violating the law of gravity. In light of this record, any inference that the translator fell out of the complainant's backpack would have been both speculative and contrary to the evidence (*see People v Holloway*, 45 AD3d 477 [2007], *lv denied* 10 NY3d 766 [2009]).

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

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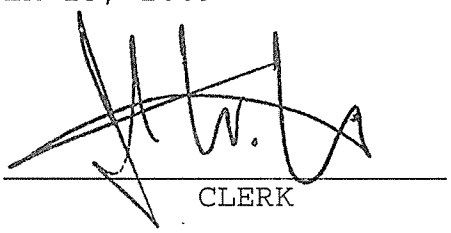

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Gonzalez, P.J., Friedman, Moskowitz, Renwick, DeGrasse, JJ.

1180 Maurice J. Benjamin, Index 602220/06
Plaintiff-Respondent,

-against-

Madison Medical Building Condominium
Board of Managers, et al.,
Defendants-Appellants.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for Madison Medical Building Condominium Board of Managers, appellant.

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Marc A. Lavaia of counsel), for Mitchell Essig, appellant.

Rottenberg Lipman Rich, P.C., New York (Robert A. Freilich of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gishe, J.), entered January 2, 2009, which, to the extent appealed from, granted plaintiff's motion for summary judgment as to his causes of action for specific performance and breach of contract, and denied defendant Board's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a dentist, seeks to enforce the express right of first refusal of Aline Realty LLC, of which he is the managing member, to purchase the basement unit of the 12-floor condominium at 161 Madison Avenue, which primarily houses medical practices. Defendant, a reproductive endocrinologist, maintains his practice in a unit on the 4th floor of the building.

Defendant Board of Managers is the governing body of the

condominium, and is charged with enforcement of its bylaws. Article XI, Section 1 of those bylaws spells out the right of first refusal in relevant part as follows:

> A unit owner has the right to sell or lease his Unit providing he gives notice of the bona fide terms of any proposed sale or lease to the immediately contiguous Unit Owners and to the Board of Managers and obtains their approval for sale or lease. . . . If an immediately contiguous Unit Owner(s) disapproves of the transaction, such Owner(s) must give the selling or leasing Unit Owner and the Board of Managers written notice thirty (30) days after notice of the proposed sale or lease, of his intention to purchase or lease the Unit on the same terms, or other terms more favorable to the Owner of the Unit proposed for sale or lease.

Article XI, Section 3 sets forth the required notice of the bona fide terms of a sale, to be given to a holder of a right of first refusal:

> A Unit Owner intending to make a transfer, sale or lease of the unit *or any part thereof*, or any interest therein, shall give notice to all immediately contiguous Unit Owners and to the Board of Managers of such intention. He shall furnish . . . (i) the name and address of the intended grantee or lessee; (ii) a statement of all of the terms of the transaction; (iii) financial and professional references of the transferee or lessee; (iv) the specific occupation of the transferee or lessee including any areas of specialization; (v) an executed copy of the proposed contract to sell or lease; and (vi) such other information as the immediately contiguous Unit Owners or the Board of Managers may reasonably require. [Emphasis added]

The basement space constituted a unit (*see e.g. Royal York Owners Corp. v Royal York Assoc., L.P.*, 43 AD3d 357, 358 [2007], *lv denied* 10 NY3d 791 [2008]), and we adopt the motion court's

reasoning that plaintiff's first-floor unit was "immediately contiguous" to the basement unit by reason of the common border, namely, the floor of plaintiff's unit and the ceiling of the basement. Plaintiff thus had a right of first refusal with respect to the sale of the basement space. Because the term "immediately contiguous" was plain and unambiguous, extrinsic evidence proffered by defendants could not be considered (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

"The right of first refusal, however, is contingent upon the existence of a valid, outstanding contract to a third party. If there is no such contract, then there is nothing to accept or refuse" (*Lin Broadcasting Corp. v Metromedia, Inc.*, 139 AD2d 124, 135 [1988], *affd* 74 NY2d 54 [1989]). Since plaintiff was not required to act until the Board executed a contract with the individual defendant, the Board's defenses -- notice, equitable estoppel, laches and unclean hands -- are unavailing (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). Nor did plaintiff "waive" his right of first refusal, as there is no evidence in the record that he ever told anyone he

had no plans to purchase the basement space (*Golfo v Kycia Assoc., Inc.*, 45 AD3d 531, 533 [2007], *lv denied* 10 NY3d 704 [2008]).

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

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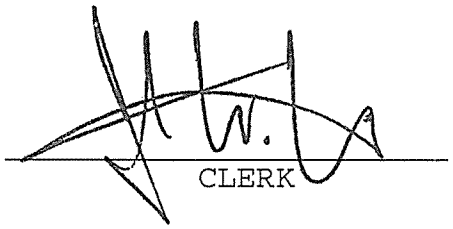


Gonzalez, P.J., Friedman, Moskowitz, Renwick, DeGrasse, JJ.

1181 The People of the State of New York, Respondent,

-against-

Luis Black, etc., Defendant-Appellant.

Ind. 2585/06

- - - -

1182 The People of the State of New York, Respondent,

-against-

William Butts, Defendant-Appellant.

Ind. 3121/06

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

Steven Banks, The Legal Aid Society, New York (Robert Budner of counsel), for William Butts appellant.

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 28, 2007, convicting defendant Luis Black, after a jury trial, of robbery in the first and second degrees, attempted robbery in the second degree and criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 35 years, and convicting defendant William Butts, after a jury trial, of robbery in the first degree (two counts), robbery in the second degree (four counts), attempted robbery in the second degree and criminal possession of a weapon

in the second and third degrees, and sentencing him to an aggregate term of 35 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that, as to each defendant, all sentences be served concurrently, resulting in new aggregate terms of 25 years, and otherwise affirmed.

We reject defendant Black's arguments concerning the weight and sufficiency of the evidence supporting his conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification. A victim made a reliable lineup identification, and her inability to identify Black at trial was satisfactorily explained.

The court properly denied defendant Butts's suppression motion. Neither of the lineups at issue was unduly suggestive, since in each lineup the participants were reasonably similar to defendant in appearance, and any differences, when viewed in light of the descriptions given by the witnesses, did not create a substantial likelihood that defendant would be singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]; *People v Santiago*, 2 AD3d 263, 264 [2003], *lv denied* 2 NY3d 765 [2004]).

Butts's claim that certain testimony violated the hearsay rule and the Confrontation Clause is unpreserved and we decline

to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

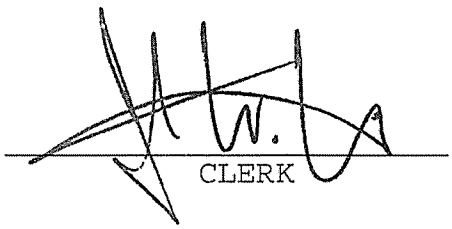
We reject Black's claim that the court unlawfully imposed consecutive sentences for robbery and weapon possession. The evidence established that Black, while acting in concert with other persons, possessed the weapon at a time other than during the robbery, and with a separate intent to use it unlawfully against other potential victims (*see People v Salcedo*, 92 NY2d 1019 [1998]; *People v Sell*, 283 AD2d 920, 922 [2001], *lv denied* 96 NY2d 867 [2001]; *compare People v Hamilton*, 4 NY3d 654 [2005]).

We decline to invoke our interest of justice jurisdiction to dismiss the noninclusory concurrent count of third-degree weapon possession (*see People v Spence*, 290 AD2d 223 [2002], *lv denied* 98 NY2d 641 [2002]; *People v Kulakov*, 278 AD2d 519 [2000], *lv denied* 96 NY2d 785 [2001]).

We find the sentences excessive to the extent indicated.

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

ENTERED: OCTOBER 15, 2009



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

1183 The People of the State of New York, Ind. 7190/90
Respondent,

-against-

Ruth Ramirez,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Leslie Crocker Synder, J. at plea; Charles L. Solomon, J., at sentence), rendered on or about May 9, 2006, unanimously affirmed.

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

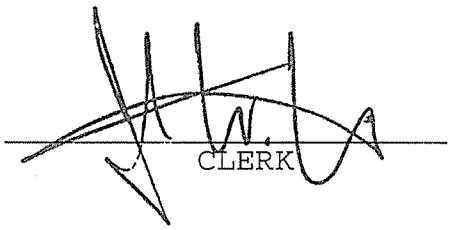
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: OCTOBER 15, 2009



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

1185 The People of the State of New York, Ind. 6273/06
Respondent,

-against-

Robert Smith,
Defendant-Appellant.

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

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

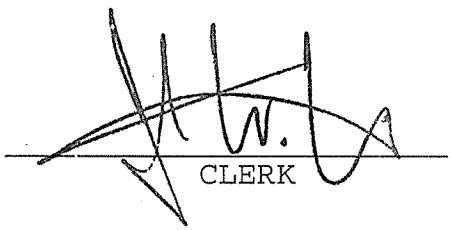
Judgment, Supreme Court, New York County (Maxwell Wiley, J. at suppression hearing; Ruth Pickholz, J. at plea and sentence), rendered May 28, 2008, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). After observing the driver commit a traffic infraction, the police lawfully stopped the vehicle in which defendant was riding and lawfully ordered the occupants out of the car. Furthermore, the officers smelled marijuana, which gave them probable cause to search the car and

its occupants (*see People v Badger*, 52 AD3d 231 [2008] *lv denied* 10 NY3d 955 [2008]). Regardless of whether the police had probable cause to arrest defendant at that point, they were justified in attempting to handcuff him when he resisted their efforts by trying to get back into the car and struggling with the officers (*see People v Youmans*, 228 AD2d 345 [1996]). During the struggle, defendant discarded a firearm, and this action was not the product of any unlawful police conduct.

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

ENTERED: OCTOBER 15, 2009



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

1187-
1188 Fidelity and Deposit Company of Maryland,
Plaintiff,

-against-

Levine, Levine & Meyrowitz, CPAs, P.C., et al.,
Defendants.

- - - - -

Levine, Levine & Meyrowitz, CPAs, P.C.,
Third-Party Plaintiff-Appellant,

-against-

Local 522 International Brotherhood of Teamsters, et al.,
Third-Party Defendants-Respondents,

Joseph R. Byers, et al.,
Third-Party Defendants.

Index 604210/05

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Peter J. Larkin of counsel), for Levine, Levine & Meyrowitz, CPAs, P.C., appellant.

Saiber LLC, New York (Agnes I. Rymer of counsel), for J.H. Cohn LLP, appellant.

Cary Kane LLP, New York (Joshua S.C. Parkhurst of counsel) for Local 522 International Brotherhood of Teamsters, respondent.

Furman Kornfeld & Brennan, LLP, New York (Andrew S. Kowlowitz of counsel), for Joel C. Glanstein, respondent.

Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered July 28, 2008, which granted, respectively, third-party defendant Joel C. Glanstein's motion to dismiss the third-party complaint as against him and, to the extent appealed from

as limited by the brief, third-party defendant Local 522 International Brotherhood of Teamsters' motion to dismiss the third-party claim for contribution as against it, and order, same court and Justice, entered December 15, 2008, which, inter alia, denied third-party plaintiff's motion for leave to amend the third-party complaint, unanimously affirmed, with costs. Appeal from the December 15, 2008 order, insofar as it granted third-party plaintiff's motion for reargument of the motions to dismiss and, upon reargument, adhered to the determinations on the original motions, unanimously dismissed, without costs, as academic.

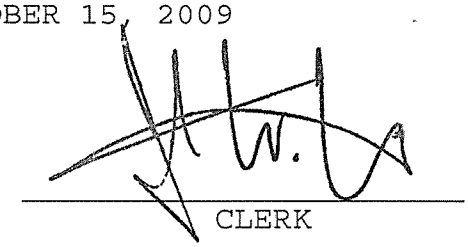
In the first-party action, plaintiff, the insurer of certain employee benefit funds established by Local 522, alleges causes of action for professional malpractice and breach of contract against defendant third-party plaintiff accountants Levine, Levine & Meyrowitz (LL&M), arising out of an alleged auditing blunder that resulted in the funds' issuing improper reimbursement payments to Local 522. As plaintiff seeks to recover against LL&M for actions and omissions explicitly covered in the scope of LL&M's retainer agreement with the funds, and indeed both causes of action seek the same measure of damages, i.e., a sum representing the economic loss that the funds sustained as a result of the accountants' improper approval of expenditures to Local 522 for expenses the funds did not incur,

LL&M may not seek contribution against Local 522 and Glanstein, the attorney retained by Local 522 and the funds, whether the causes of action are labeled breach of contract or malpractice (*Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323-324 [2009]; *Dormitory Auth. of State of N.Y. v Michael Baker Jr. of N.Y.*, 178 AD2d 249 [1991], *lv dismissed* 80 NY2d 826 [1992]). Leave to amend the third-party complaint was also properly denied because the proposed amended pleading sets forth a similarly precluded claim for contribution. Leave to amend a pleading is properly denied where a proposed amendment is devoid of merit an legally insufficient (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [2003]).

We have considered LL&M's remaining arguments and find them without merit.

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

ENTERED: OCTOBER 15, 2009



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

1189 Alex Cumming, Index 113381/06
Plaintiff-Appellant,

-against-

Sansoussy Camara, et al.,
Defendants-Respondents.

Thomas D. Wilson, Brooklyn, for appellant.

Brand, Glick & Brand, P.C., Garden City (Peter M. Khrinenko of counsel), for respondents.

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered September 15, 2008, upon a jury verdict in defendants' favor, unanimously affirmed, without costs.

Plaintiff was struck by a taxi, owned by defendant Dady and driven by defendant Camara, at 3:45 on a September morning in 2006, as he was crossing West End Avenue outside the crosswalk at West 76th Street in Manhattan. Plaintiff testified at trial that he was drunk at the time of the accident, saw the taxi in the distance as he started to cross the street, and was aware that the taxi had a green light in its favor. Plaintiff stated that he was wearing dark pants and shoes and carrying a dark bag. He challenges the verdict on the grounds, inter alia, that the court gave an erroneous charge concerning the failure to yield the right of way, and that it was against the weight of the evidence or was not supported by legally sufficient evidence.

Although the court improperly charged the jury on

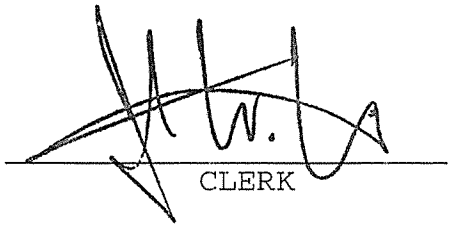
pedestrians crossing a roadway, under a provision of the Vehicle and Traffic Law that was superseded by the Rules of the City of New York (34 RCNY 4-04) pursuant to § 1642(a)(10) and (11) of that law, the error was harmless because it did not bear upon an issue reached by the jury (*Gilbert v Luvin*, 286 AD2d 600 [2001]). The improper charge related exclusively to plaintiff's duty of care in entering upon the roadway. The verdict was based on a finding that the driver was not negligent. Therefore, the jury never reached the question of plaintiff's negligence.

Viewing the evidence in the light most favorable to defendant as we must, the verdict was based on a fair interpretation of the evidence (*see Mazariegos v New York City Tr. Auth.*, 230 AD2d 608, 609-610 [1996]). Moreover, there were a valid line of reasoning and permissible inferences that could possibly lead a rational person to the conclusion reached by the jury on the basis of the evidence presented at trial (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

We have reviewed plaintiff's other claims and find them without merit.

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

ENTERED: OCTOBER 15, 2009



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

1191 The People of the State of New York, Ind. 2047/03
Respondent,

-against-

Bruce Ligon,
Defendant-Appellant.

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Bryan Cave LLP, New York (Martha E. Joerger of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered July 9, 2007, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree and false personation, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The police lawfully stopped defendant's car for a traffic violation, and lawfully arrested him for driving with a suspended license.

An officer's comment while taking pedigree information did not require *Miranda* warnings. When defendant gave what the officer suspected to be a false name, the officer warned him that

giving a false name would result in an additional charge. Such a warning is required under the false personation statute (Penal Law § 190.23). We find no basis for suppression of defendant's repetition of the false name, or his later post-*Miranda* statement. Ascertaining an arrestee's true name is a necessary part of the normal booking process, even if the response may have inculpatory connotations (*see People v McCloud*, 50 AD3d 379, 380 [2008], *lv denied* 11 NY3d 738 [2008]; *People v Alleyne*, 34 AD3d 367 [2006], *lv denied* 8 NY3d 918 [2007], *cert denied* 552 US__, 128 S Ct 192 [2007]). Furthermore, the warning was not reasonably likely to elicit an incriminating response. On the contrary, defendant had already incriminated himself by giving a false name, and the warning gave him an opportunity to retract his prior incriminating response (*see Matter of Travis S.*, 180 Misc 2d 234, 236-240 [Fam Ct Kings County 1999], *affd* 271 AD2d 611 [2000], *affd* 96 NY2d 818 [2001]).

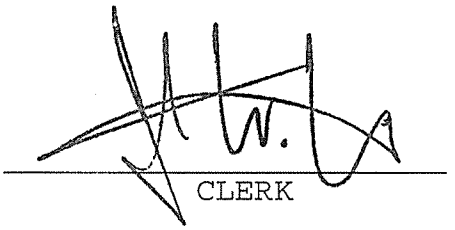
Defendant's claim that the People violated the disclosure requirements of *People v Rosario* (9 NY2d 289 [1961]) is unreviewable, because nothing in the record indicates that the undisclosed police documents at issue contained anything pertaining to a witness's testimony, and because defendant forfeited the opportunity to develop a factual basis for his

claim during trial (*see People v Pines*, 298 AD2d 179, 180 [2002] *lv denied* 99 NY2d 562 [2002]; *People v Lorenzo*, 272 AD2d 184 [2000], *lv denied* 95 NY2d 855 [2000]).

Although the People did not comply with the requirements of CPL 240.45(1)(b) regarding timely disclosure of a witness's criminal history, we find the error to be harmless (*see People v Pressley*, 91 NY2d 825 [1997]).

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

ENTERED: OCTOBER 15, 2009



CLERK

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

1193 Hamiltonian Corporation, Index 113395/06
Plaintiff-Respondent,

-against-

Trinity Centre LLC,
Defendant-Appellant.

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellant.

Cozen O'Connor, New York (Menachem J. Kastner of counsel), for respondent.

Judgment, Supreme Court, New York County (Louis B. York, J.), entered March 18, 2009, to the extent appealed from, declaring that plaintiff's alleged defaults were all cured in a timely fashion, and dismissing defendant's counterclaim for ejectment, unanimously reversed, on the law, with costs, the counterclaim reinstated, the declaration vacated, and the matter remanded for further proceedings.

The parties dispute whether plaintiff tenant's 2006 assignment of shares to a third-party investor violated the lease by transferring 50% or more of its holdings without defendant landlord's prior consent. Plaintiff demonstrated its prima facie entitlement to summary judgment; both its investor's affidavit and the Shareholders Agreement established that less than a 50% share of ownership in plaintiff had been transferred. The burden then shifted to defendant to offer admissible evidence to

establish the existence of material issues of fact requiring a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

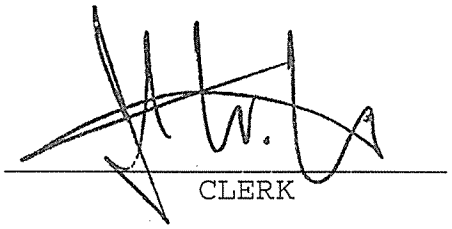
Defendant met its burden in opposition by submitting plaintiff's own corporate records, in the form of stock certificates and ledger entries, which created a triable issue of fact as to the percentage of ownership transferred to the third party (*see Von Richthofen v Family M. Found. Ltd.*, 44 AD3d 573 [2007]; *S.S. Sarna, Inc. v Sarna*, 282 AD2d 399 [2001]). Defendant's reliance on such evidence was not rendered speculative by its failure to include an affidavit of someone with personal knowledge of the transaction, since corporate books and records may constitute admissible evidence (CPLR 4518[a]), and stock certificates are "the written evidence of" the corporation's shares or their ownership (*United States Radiator Corp. v State of New York*, 208 NY 144, 149 [1913]; *see also Estate of Essig v 5670 58 St. Holding Corp.*, 50 AD3d 948 [2008]).

A logical reading of the stock certificates and ledger entries supports defendant's claim that more than 50% of the shares were transferred to the third party, with the same evidence failing to support plaintiff's claims as to the amount of shares transferred from the remaining shareholders to the new investor. Plaintiff fails to account for the discrepancy between its version of events and the corporate books and records. At

the very least, there is a question of fact as to the amount of shares and percentage of ownership transferred.

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

ENTERED: OCTOBER 15, 2009



CLERK

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

1194 The People of the State of New York, Ind. 3036/04
Respondent,

-against-

Abraham Pena,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered on or about April 21, 2006, unanimously affirmed.

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

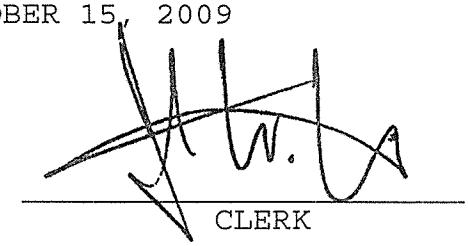
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: OCTOBER 15, 2009



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

1195-
1195A Tazewell Delaney, et al., Index 604249/05
Plaintiffs-Appellants,

-against-

John Weston, et al.,
Defendants-Respondents.

Cohen & Gresser LLP, New York (Elizabeth F. Bernhardt and Harvey B. Silikovitz of counsel), for appellants.

Paul E. Hughes, respondent pro se.

John Weston, respondent pro se.

Timothy Davis, respondent pro se.

Christopher Berlandier, respondent pro se.

Donald Peabody Ross, III, respondent pro se.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 30, 2006, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiffs' causes of action for breach of a joint venture agreement, breach of contract, breach of fiduciary duty and conspiracy to breach fiduciary duty, unanimously affirmed, without costs. Order, same court and J.H.O., entered April 11, 2008, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the causes of action for misappropriation of ideas and unjust enrichment, unanimously affirmed, without costs.

The pleadings and certain documents specifically referenced therein as tending to memorialize an alleged oral joint venture agreement, actually establish, as a matter of law, that the parties failed to agree upon the division of the parties' equity interests in the joint venture, leaving such term fatally indefinite and rendering the agreement unenforceable (*see e.g. Schnur v Marin*, 285 AD2d 639 [2001]; *Freedman v Pearlman*, 271 AD2d 301, 303 [2000]). Accordingly, the breach of contract and breach of fiduciary duty claims (allegedly founded upon duties owed under the contractual, joint venture relationship) were properly dismissed.

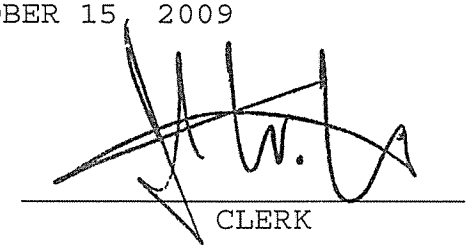
The court also properly granted summary judgment dismissing plaintiffs' claim for misappropriation of ideas inasmuch the proposal to develop a means to access music sales information in "real time" and to sell such information on a subscription basis was not novel or original (*see American Bus. Training Inc. v American Mgt. Assn.*, 50 AD3d 219, 222-225 [2008], *lv denied* 10 NY3d 713 [2008]). Plaintiffs' claim for unjust enrichment was properly dismissed in the absence of proof that the parties' joint venture plan, which defendants allegedly misappropriated for use in a competing business, bestowed a benefit on that competing business (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119-120 [1998]). Rather, the evidence established that defendants' competing business had net operating losses

approaching $1 million in its four years of business, and plaintiffs' separate efforts to market the same joint venture plan to others were unsuccessful.

We have considered plaintiffs' remaining contentions, including that the motion court improperly converted the initial motion to dismiss to one for summary judgment, and find them unavailing.

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

ENTERED: OCTOBER 15, 2009



CLERK

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

1196 The People of the State of New York, Ind. 3251/03
Respondent,

-against-

Rafael Quezada,
Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered May 1, 2006, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The People's witness consistently stated that defendant played a leading role in beating the victim to death, and the inconsistencies in his testimony were insignificant.

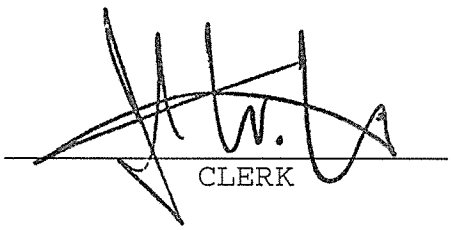
Of defendant's claims of prosecutorial misconduct, the only one that is arguably preserved relates to the prosecutor's brief summation remark that defendant and his codefendant "know" they are guilty. The court's curative instruction, which the jury is

presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]) was sufficient to prevent any prejudice, and the court properly exercised its discretion in declining to declare a mistrial or give an additional curative instruction. Defendant's remaining assertions of prosecutorial misconduct are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that none of the claimed misconduct deprived defendant of a fair trial.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 15, 2009



CLERK

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

1198 American Guaranty & Liability Insurance Co. as subrogee of Tom James Company doing business as Oxxford Clothes, Plaintiff-Appellant, -against- Federico's Salon, Inc., et al., Defendants-Respondents. Index 114127/04

Cozen O'Connor (William N. Clark, Jr. and Guy A. Bell of the Bar of the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Federico's Salon, Inc., respondent.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel),for Solil Management, L.L.C., respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 17, 2008, which, insofar as appealed from as limited by the briefs, granted the motion of defendant Federico's Salon Inc. (Federico's) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff, as subrogee of Oxxford Clothes, seeks to recover for property damage resulting when a toilet on the unoccupied fourth floor of the commercial building in which Oxxford was a tenant became clogged and overflowed, flooding Oxxford's store and destroying its inventory. At the time, Federico's leased the fifth floor of the building and was renovating its space.

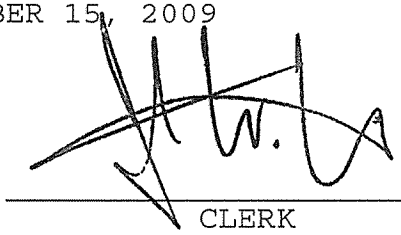
Federico's made a prima facie showing of entitlement to

judgment as a matter of law, as it demonstrated that no negligence on its part contributed to the leak. In opposition, plaintiff sought to rely on the doctrine of res ipsa loquitur, which the motion court correctly determined was inapplicable. Even assuming that the evidence was sufficient to support a finding that the toilet malfunction was of a type caused by negligence, plaintiff failed to present competent evidence that Federico's control of the fourth-floor bathroom was of "sufficient exclusivity to fairly rule out the chance that the defect. . . was caused by some agency other than [its] negligence" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 228 [1986]; *see Edmonds v City of Yonkers*, 294 AD2d 330 [2002], *lv denied* 98 NY2d 612 [2002]). Indeed, the evidence shows that Federico's did not control any portion of the fourth floor, but was occasionally allowed access when the elevator or emergency stairwell door was left unlocked. When the doors were unlocked, the building porter, real estate agents, and the independent contractors retained by Federico's had access to the fourth-floor bathroom. Furthermore, to the extent the evidence permits an inference that the contractors hired by Federico's negligently disposed of debris in the toilet, it is well established that "an employer who hires an independent contractor is not liable for

the independent contractor's negligent acts" (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]), and plaintiff provides no reason to depart from this general rule.

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

ENTERED: OCTOBER 15, 2009



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

1199 The People of the State of New York, Ind. 90118/05
Respondent,

-against-

Jamaine Charles Bryant,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John S. Moore, J.), rendered May 17, 2007, as amended May 21, 2007, convicting defendant, upon his plea of guilty, of two counts of rape in the first degree, and sentencing him to consecutive terms of 7½ to 15 years, unanimously modified, on the law, to the extent of vacating the sex offender registration fee, and otherwise affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his excessive sentence claim (*see People v Lopez*, 6 NY3d 248 [2006]). In any event, we perceive no basis for reducing the sentence.

As the People concede, since the crimes were committed prior to the effective date of the legislation providing for the imposition of a sex offender registration fee, that fee should not have been imposed.

The other surcharges and fees were properly imposed (*see People v Guerrero*, 12 NY3d 45 [2009]).

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

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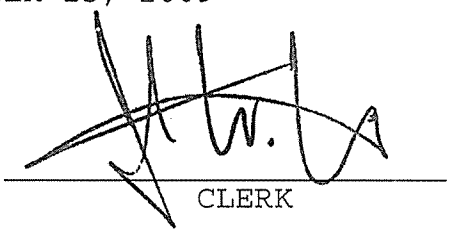


CLERK

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

1200 The People of the State of New York, Ind. 6821/05
Respondent,

-against-

Jamaine Charles Bryant,
Defendant-Appellant.

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

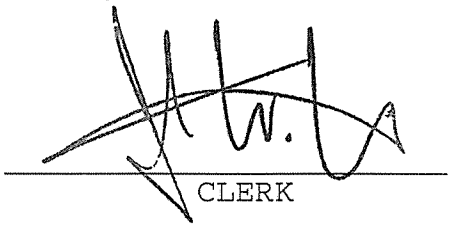
Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered January 30, 2007, convicting defendant, upon his plea of guilty, of rape in the first degree, and sentencing him to a term of 10 to 20 years, unanimously affirmed.

We perceive no basis for reducing the sentence. The surcharges and fees were properly imposed (*see People v Guerrero*, 12 NY3d 45 [2009]).

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

ENTERED: OCTOBER 15, 2009



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

1201 Johanna Barros, an Infant by her Mother and Natural Guardian, Janet Alvia, et al., Plaintiffs-Respondents, Index 13008/98

-against-

The City of New York, Defendant-Respondent,

Biltwel General Contractor Corp., Defendant-Appellant.

Law Office of Thomas K. Moore, White Plains (Bonnie L. Fisher of counsel), for appellant.

Timothy Bompart, Rego Park, for Johanna Barros and Janet Alvia, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for municipal respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 22, 2008, which denied defendant-appellant's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Appellant failed to make a prima facie showing eliminating all material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

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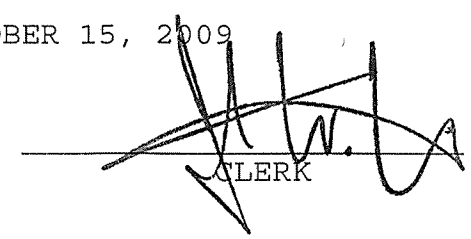


CLERK

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

1203 The People of the State of New York, Ind. 3466/07
Respondent,

-against-

Joseph Cochran, etc.,
Defendant-Appellant.

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

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

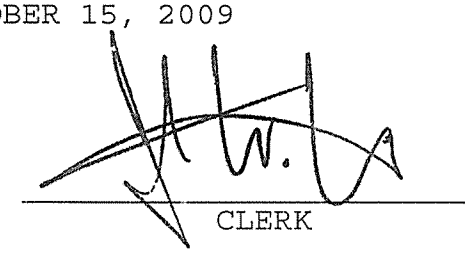
Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 6, 2008, convicting defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 6½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. Defendant's intent to sell the drugs he possessed

was established by, among other things, an officer's testimony that he observed defendant engaging in a drug transaction.

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

ENTERED: OCTOBER 15, 2009



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

1206 The People of the State of New York, Ind. 5288/04
Respondent,

-against-

Boris Teichman,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 26, 2006, convicting defendant, after a jury trial, of attempted criminal sexual act in the first degree and 22 counts of criminal contempt in the second degree, and sentencing him to an aggregate term of 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The discrepancy between a police report and the victim's testimony was readily explained by factors that included a language barrier.

The court properly discharged a sworn juror as being grossly unqualified to continue serving. Based on the totality of the juror's answers to the court's questions, the logical

implications of those answers, and the juror's demeanor, which the court placed on the record, the court properly determined that the juror could not remain impartial throughout deliberations if forced to remain on the jury. The court properly inferred that the juror would have been preoccupied with the serious disruption of her travel plans, which would have caused financial loss and difficulty with her and her fiancé's jobs (*see People v Buford*, 69 NY2d 290, 299 [1987]; *People v Jones*, 287 AD2d 339 [2001], *lv denied* 98 NY2d 638 [2002]).

Since defendant's arguments at trial were entirely different from those he asserts on appeal, his claim that the court improperly allowed impeachment use of a statement after the People had withdrawn their CPL 710.30 notice of intent to introduce it is unpreserved (*see People v Reed*, 4 AD3d 120, 121 [2004], *lv denied* 2 NY3d 805 [2004]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see id.* at 122).

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

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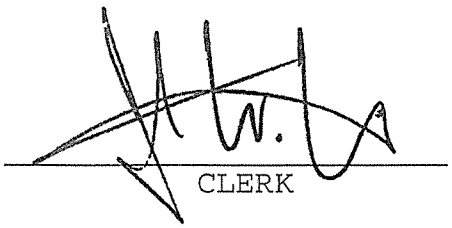

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Andrias, J.P., Sweeny, Nardelli, Richter, Abdus-Salaam, JJ.

1207 Marcela Alvarez, as Administratrix of the Estate of Aixa Maria Hernandez, Decedent, et al., Plaintiffs-Appellants, Index 16039/06

-against-

21st Century Renovations Ltd., Defendant,

Park Crest East Condominium Association, et al., Defendants-Respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellants.

Law Offices of Safranek, Cohen & Krolian, White Plains (Peter H. Cohen of counsel), for Park Crest Condominium Association, respondent.

Miranda Sambursky Slone Sklarin Verveniotis, LLP, Elmsford (Richard S. Sklarin of counsel), for 100 Caryl Avenue Realty, respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered November 17, 2008, which, to the extent appealed from, granted defendant 100 Caryl Avenue Realty's (Caryl) motion for partial summary judgment dismissing plaintiffs' claim for conscious pain and suffering, unanimously reversed, on the law, without costs, the motion denied and the claim reinstated.

Decedent perished in a five-alarm fire in her building in Yonkers, New York. When this action ensued, the superintendent of the building, decedent's friend, testified at a deposition

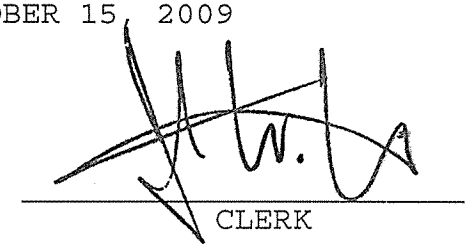
that at approximately 5:30-5:45 p.m., an hour before the fire broke out, he spoke to her on the telephone and told her to begin to prepare dinner. Caryl, the owner of most of the units in the building, subsequently moved, inter alia, for summary judgment dismissing plaintiffs' claim for conscious pain and suffering, arguing that there was no evidence concerning whether or not decedent was awake during the blaze. In response, plaintiffs submitted the affirmation of a pathologist and former medical examiner who opined within a reasonable degree of medical certainty that decedent would have been aware of the fire and it was within a reasonable degree of medical probability that she lived for at least ten minutes and experienced conscious pain and suffering.

To obtain summary judgment, it was incumbent on Caryl to rule out the possibility that decedent was conscious during the fire for some period of time before her demise. The evidence presented in support of the motion was silent on this issue. Caryl merely pointed to gaps in plaintiffs' proof, which is insufficient in the context of summary judgment (*see DeMilia v DeMico Bros.*, 294 AD2d 264 [2002]). Accordingly, the burden

never shifted to plaintiffs to raise a triable issue of fact, although their submission was sufficient to do so.

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

ENTERED: OCTOBER 15, 2009



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

1208 The People of the State of New York, Ind. 6627/04
Respondent,

-against-

Francisco Martinez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone 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 (Michael Ambrecht, J. at hearing, plea and sentence), rendered on or about March 22, 2007,

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.

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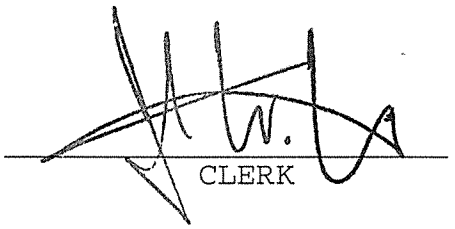


Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

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

1209 In re Doris Diaz, Index 400954/08
Petitioner,

-against-

Tino Hernandez, as Chairman of
The New York City Housing Authority,
Respondent.

Doris Diaz, petitioner pro se.

Sonya M. Kaloyanides, New York (Corina L. Leske of counsel), for respondent.

Determination of respondent New York City Housing Authority, dated March 5, 2008, terminating petitioner's tenancy on the grounds of nondesirability and breach of respondent's rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shirley Werner Kornreich, J.], entered November 17, 2008), dismissed, without costs.

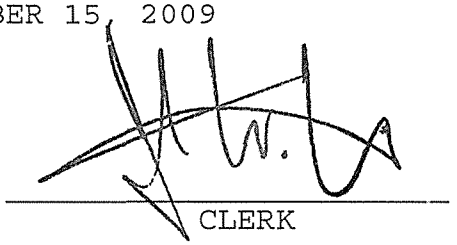
The determination was supported by substantial evidence, including that upon executing a search warrant of petitioner's apartment, police recovered 9 firearms and over 400 rounds of ammunition, which belonged to petitioner's boyfriend. Although petitioner maintained that she was unaware of the presence of the weapons and ammunition, the hearing officer's decision not to

credit her claims of ignorance is entitled to deference (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]; *Matter of Satterwhite v Hernandez*, 16 AD3d 131 [2005]). Furthermore, there was substantial evidence that petitioner violated the terms of her lease by allowing an unauthorized occupant (her boyfriend) to reside in the apartment.

The penalty imposed does not shock our sense of fairness (*see Matter of Featherstone v Franco*, 95 NY2d 550, 555 [2000]).

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

ENTERED: OCTOBER 15, 2009



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

1210N Michael Schachter, Index 601646/04
Plaintiff-Appellant,

-against-

Sofasa LLC doing business as Diamco Trading Co.,
Defendant-Respondent.

Michael Schachter, appellant pro se.

Law Offices of Mitchell J. Devack, PLLC, East Meadow (Nicholas P. Otis of counsel), for respondent.

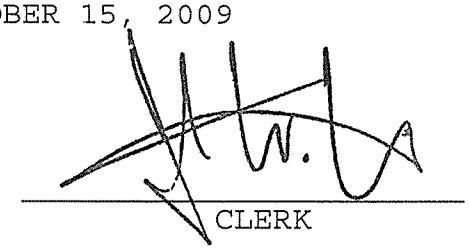
Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 30, 2008, which denied plaintiff's motion to stay enforcement of a judgment in defendant's favor entered on September 11, 2006, unanimously affirmed, without costs.

The IAS court properly denied plaintiff's motion to stay enforcement of the money judgment. Plaintiff and defendant were former owners of a joint venture, Diamco Trading Co. Plaintiff sought to stay execution of the judgment pending the IAS court's determination as to whether defendant complied with the judgment's requirement that it provide an accounting of Diamco's liquidation. Since plaintiff never appealed from the judgment nor posted an undertaking, the court had no basis for staying the money judgment (*see* CPLR 5519[a][2]). Moreover, since the parties had agreed to arbitrate disputes regarding the dissolution of Diamco, the court properly determined that plaintiff's remedy was not to stay enforcement of the judgment,

but to seek relief with respect to the accounting in the appropriate forum. The court also properly determined that plaintiff's obligation to pay the amount set forth in the money judgment was independent of and preceded defendant's obligation to provide a written accounting.

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

ENTERED: OCTOBER 15, 2009



CLERK

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

1211N Commerce Bank, N.A., Index 602275/08
Plaintiff-Respondent,

-against-

Executive Settlement Services 1 LLC, etc., et al.,
Defendants-Appellants.

Lerner & Kaplan, PLLC, Brooklyn (Alexander M. Kaplan of counsel), for appellants.

Zeichner Ellman & Krause LLP, New York (Nathan Schwed of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 24, 2009, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Executive Settlement Services (ESS) and Alexander Kaplan to vacate a default judgment, unanimously affirmed, without costs.

The unsworn affirmation of attorney Kaplan, a party in this action, was insufficient as a matter of law to rebut the affidavit of personal service on him (*see Matter of Nazarian v Monaco Imports*, 255 AD2d 265 [1998]; *see also LaRusso v Katz*, 30 AD3d 240, 243 [2006]), or to explain ESS's claimed non-receipt of process delivered to the Secretary of State. In any event, any discrepancies between the description of Mr. Kaplan in the affidavit of service and his actual appearance and age were

relatively insignificant (*cf. NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [2004]; *Haberman v Simon*, 303 AD2d 181 [2003]), and the proffered excuse for ESS's non-receipt of process from the Secretary of State was unsupported by either an affidavit from the employee who, it is claimed, mistakenly disposed of the process intended for it or from one with personal knowledge of that entity's regular mail-receipt procedures (*cf. Liriano v Eveready Ins. Co.*, 65 AD3d 524 [2009]). The affirmation was similarly insufficient to demonstrate a meritorious defense and reasonable excuse for the default.

We have considered defendants' other contentions, including that plaintiff failed to comply with the requirements of CPLR 3215(g), and find them unavailing.

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

ENTERED: OCTOBER 15, 2009