SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 29, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1304 The People of the State of New York, Ind. 3886/07
Respondent,

-against-

William Campbell,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky of counsel), and Davis Polk & Wardwell, New York (Katharine M. Zandy of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel Conviser, J.), rendered April 7, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's course of conduct, including his initiation of contact with the undercover officer and his interactions with the person who actually sold the drugs, warranted the conclusion that defendant participated in the sale

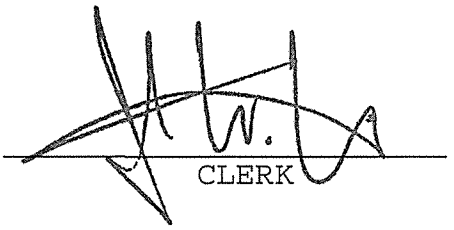
as a steerer and order taker, and did not merely give information as to where someone might purchase drugs (*see People v Eduardo*, 11 NY3d 484, 493 [2008]; *People v Itchier*, 304 AD2d 480 [2003], *lv denied* 100 NY2d 583 [2003]).

The court properly ruled that defendant's aunt and cousin would be excluded from the courtroom while the undercover officer testified. It is undisputed that the People made a proper showing under *Waller v Georgia* (467 US 39 [1984]) to justify exclusion of the general public. Moreover, as a panel of the Second Circuit has held, at least as a matter of federal constitutional law, "*Waller* does not demand a higher showing before excluding a defendant's friends and family" (*Rodriguez v Miller*, 537 F3d 102, 108-109 [2d Cir 2008]). In any event, the People made a sufficiently particularized showing to justify exclusion of these two relatives, thereby satisfying the requirements of New York case law (*see People v Nieves*, 90 NY2d 426 [1997]). The two relatives lived within the area of the undercover operations, and the officer reasonably feared that they might identify him during these operations, therefore posing a threat to his safety and effectiveness (*see e.g. People v Alvarez*, 51 AD3d 167, 175 [2008], *lv denied* 11 NY3d 785 [2008]; *People v Blake*, 284 AD2d 339 [2001], *lv denied* 96 NY2d 916 [2001]; *People v Feliciano*, 228 AD2d 519 [1996], *lv denied* 88 NY2d 1068 [1996]). The ruling was carefully limited to those of

defendant's relatives who both lived in the neighborhood at issue and as to whom the officer's reasonable fear of being exposed was greatest.

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

ENTERED: OCTOBER 29, 2009



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

1305 The People of the State of New York, ex rel. Quintel Gannaway,
Petitioner-Appellant,

-against-

Warden, Otis Bantum, Correctional Center, et al.,
Respondents-Respondents.

Index 250757/08

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

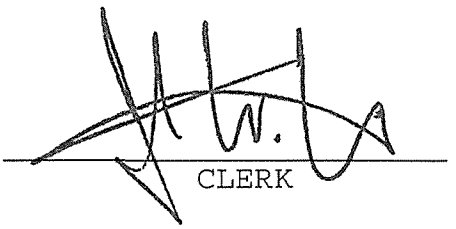
Andrew M. Cuomo, Attorney General, New York (Sasha Samberg-Champion of counsel), for respondents.

Appeal from order, Supreme Court, Bronx County (Ethan Greenberg, J.), entered June 20, 2008, which denied petitioner's application for a writ of habeas corpus, unanimously dismissed as moot, without costs.

Petitioner's appeal claiming errors in the hearing officer's findings at the preliminary parole revocation hearing was rendered moot by the final hearing determination against him (*see People ex rel. Benton v Farsi*, 1 AD3d 126 [2003]).

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

ENTERED: OCTOBER 29, 2009



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

1306 In re David A.,

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 (Fay Ng of counsel), for presentment agency.

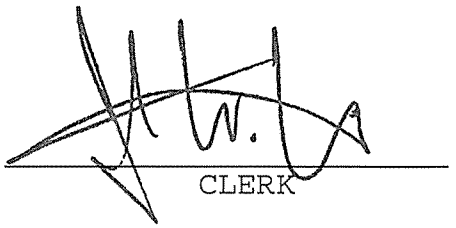
Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about July 21, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree and sexual abuse in the first degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a conditional discharge (*see e.g. Matter of Jonaivy Q.*, 286 AD2d 645 [2001]). In view of the seriousness of the underlying sexual conduct toward a very young child, and appellant's truancy issues at school, the court adopted the least restrictive dispositional alternative consistent with appellant's

needs and those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: OCTOBER 29, 2009



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

1307 The People of the State of New York, Ind. 2771/07
Respondent,

-against-

Isidro Ferreira,
Defendant-Appellant.

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

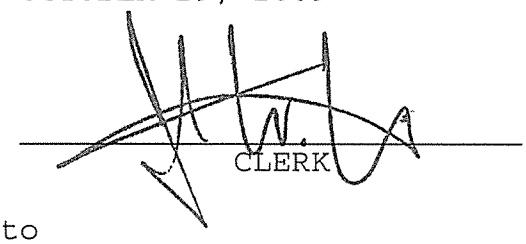
Robert T. Johnson, District Attorney, Bronx (Graham Van Epps of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Martin Marcus, J.), rendered on or about February 20, 2009,

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 29, 2009



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

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

1309 The People of the State of New York, Ind. 7180/03
Respondent

-against-

Raymond Larkin,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about February 9, 2005, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As the People concede, certain points were incorrectly assessed, and defendant's presumptive risk level should thus be level two. Nevertheless, the record supports the conclusion that an upward departure to level three is warranted. The hearing court denied, as unnecessary, the People's request for an upward departure. Accordingly, we are authorized, on this civil appeal, to affirm on this alternative basis (*see* CPLR 5501[a][1]; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-546 [1983]; *see also People v Hoffman*, 62 AD3d 976 [2009];

People v Middleton, 50 AD3d 1114 [2008], *affd* 12 NY3d 737 [2009]), and the record is sufficient for this Court to make its own findings of fact and conclusions of law on this issue (*see People v Ashby*, 56 AD3d 633 [2008]).

Clear and convincing evidence established aggravating factors that were not otherwise adequately taken into account by the risk assessment guidelines. Defendant's background includes a pattern of very serious criminal activity displaying a strong likelihood of sex-related recidivism (*see e.g. People v Balic*, 52 AD3d 201, *affd* 12 NY3d 563 [2009]).

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

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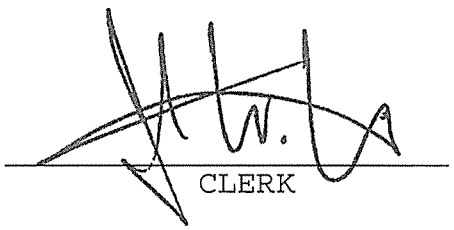


Gonzalez, P.J., Saxe, Catterson, McGuire, Acosta, JJ.

1310 QBE Insurance Corporation, Index 604393/06
Plaintiff-Respondent,

-against-

D. Gangi Contracting Corp.,
Defendant-Appellant,

Deno's Wonder Wheel Amusement Park, et al.,
Defendants.

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

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (James E. Kimmel of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 22, 2008, which, upon motions for summary judgment, insofar as appealed from, declared that plaintiff insurer (QBE) is not obligated to defend and indemnify defendant-appellant general contractor (Gangi) in an underlying action for personal injuries sustained by a worker (D'Ambrosi) on a construction site, unanimously affirmed, with costs.

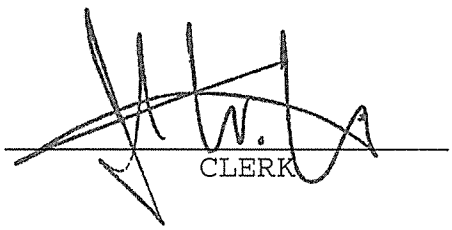
QBE properly disclaimed coverage on the ground of late notice of the underlying accident. The subject insurance policy required Gangi, the insured, to give QBE notice of an occurrence as soon as reasonably practicable, and provided that "Knowledge . . . by Your [i.e., Gangi's] agent, servant or employee shall not in itself constitute knowledge of you unless the Corporate Risk Manager of Your corporation shall have received notice of

such Occurrence." The claimed lack of knowledge of the accident on the part of Gangi's Corporate Risk Manager did not relieve Gangi of the obligation to provide QBE with notice within a reasonable period of time, where Mr. Gangichiodo, Gangi's president, vice-president, secretary and sole shareholder and officer, admitted contemporaneous knowledge of D'Ambrosi's accident and the severity of his injuries. As Gangichiodo was an "executive officer" as defined by the policy, and not merely an "agent, employee or servant" of Gangi, his knowledge was properly imputed to Gangi and triggered its duty to notify QBE of the accident. Nor was Gangi's failure to notify QBE of the accident until three years after its occurrence excusably based on a reasonable, good-faith belief of nonliability (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]), when Giangichiodo was aware that D'Ambrosi had sustained serious injuries and been removed from the scene by ambulance (*see SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 [1998]) and Gangi was subject to potential strict liability under the Labor Law (*see Zadrima v PSM Ins. Cos.*, 208 AD2d 529, 530 [1994], *lv denied* 85 NY2d 808 [1995]). QBE's disclaimer of coverage to Gangi, issued within two days of its discovery of the ground therefor, i.e., Gangi's contemporaneous knowledge of the accident, was given "as soon as [wa]s reasonably possible" (Insurance Law § 3420[d][2]). Indeed, much of the complained of

delay by QBE was attributable to Gangi's delay in responding to QBE's requests for information and the originally inaccurate information it gave QBE about when and how it first learned of the accident. Since QBE's disclaimer of coverage addressed to Gangi was copied to D'Ambrosi's counsel, it was effective as against D'Ambrosi even though no mention was made therein of D'Ambrosi's own failure to give QBE timely notice (*see Schlott v Transcontinental Ins. Co., Inc.*, 41 AD3d 339 [2007], *lv denied* 9 NY3d 817 [2008]). We have considered Gangi's other arguments and find them to be unavailing.

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

ENTERED: OCTOBER 29, 2009



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

1312 The People of the State of New York, Respondent, Ind. 6138/06

-against-

Shakim Brunson, 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 (Brian E. Rodkey of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), entered May 16, 2007, as amended July 25 and September 5, 2007, convicting defendant, after a jury trial, of burglary in the third degree (two counts) criminal possession of a forged instrument in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fourth and fifth degrees, and possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term of 5 to 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the forged instrument conviction and dismissing that count of the indictment, and otherwise affirmed.

The evidence was legally insufficient to establish that defendant had the intent to "defraud, deceive or injure another" (Penal Law § 170.25) required to establish second-degree criminal

possession of a forged instrument. We reach this unpreserved issue (*see People v Hawkins*, 11 NY3d 484, 492 [2008]) in the interest of justice.

While shoplifting in a store from which he had been barred by way of a trespass notice, defendant possessed a state identity card on which a letter in defendant's name and a digit in his identification number had been altered. Defendant did nothing with this card, which was taken from him when he was searched by store security guards.

In *People v Bailey* (13 NY3d 67 [2009]), the Court of Appeals held that a defendant's knowledge that the $10 bills he possessed were counterfeit, coupled with his attempt to steal property in a commercial district, did not provide legally sufficient evidence from which the jury could infer an intent to defraud, deceive or injure another by way of the bills. The Court of Appeals emphasized that knowledge and intent were two separate elements, and that a ruling that the evidence was sufficient "effectively stripped the element of intent from the statute and criminalized knowing possession" (*id.* at 72).

Here, as in *Bailey*, the evidence was not legally sufficient to support the verdict on the forged instrument count. Defendant's knowing possession of the forged card was not sufficient to prove intent, and he engaged in no conduct evincing an intent to use it (*id.*). We reject, as too speculative to

establish an element of a crime, the People's theory that defendant intended to use the card to misrepresent his identity in the event of his arrest and prevent store personnel from detecting his status as a person barred from the store. Accordingly, we dismiss this count.

The court properly denied defendant's CPL 330.30(2) motion to set aside the verdict on the ground of jury misconduct, based on a juror's telephone conversation with a court officer two days after the verdict, in which the juror stated that his "conscience was bothering him" and that the jurors had "unfairly coerced him to vote guilty verdicts." Proof of the "tenor of [jury] deliberations" or of belated misgivings on the part of jurors cannot be used to impeach a verdict (*see People v Brown*, 48 NY2d 388, 393 [1979]; *People v DeLucia*, 20 NY2d 275, 279 [1967]; *People v Goode*, 270 AD2d 144, 145 [2000], *lv denied* 95 NY2d 835 [2000]). Moreover, even when a defendant asserts a cognizable type of jury misconduct, a motion to set aside the verdict must be based on sworn allegations of fact (CPL 330.40[2][e][ii]). A motion is no substitute for an investigation to be made by counsel (*see People v Brown*, 57 AD3d 238, 239 [2008], *lv denied* 12 NY3d 781 [2009]) and a defendant is "not entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts" (*People v Johnson*, 54 AD3d 636, 636 [2008], *lv denied* 11 NY3d 898 [2008]). Here, defendant only submitted an

unsworn note from the court officer, which, in turn, contained the hearsay declarations of the juror.

Our dismissal of the second-degree criminal possession of a forged instrument count renders academic defendant's principal challenge to his sentence, and we perceive no basis for reducing the remaining sentences.

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

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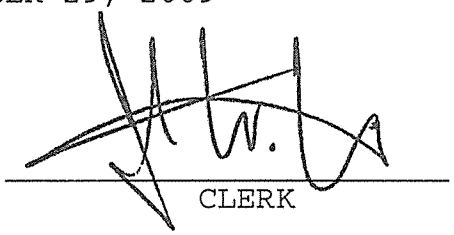

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Gonzalez, P.J., Saxe, Catterson, McGuire, Acosta, JJ.

1313 Thomas Bowman,
Plaintiff-Appellant,

Index 103824/03
590408/04

-against-

Beach Concerts, Inc.,
Defendant,

East-West Touring Company, et al.,
Defendants-Respondents.

[And a Third-Party Action]

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Carla Varriale of counsel), for respondents.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 7, 2008, which granted the motion of defendants-respondents East-West Touring Company and Cygnus Productions, LLC for summary judgment dismissing the common-law negligence and Labor Law Section 200 causes of action, unanimously affirmed, without costs.

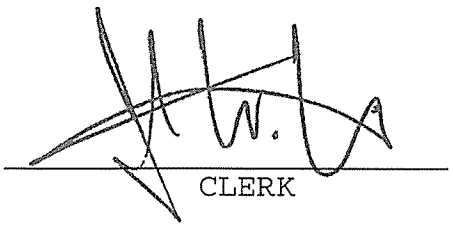
As plaintiff concedes, the showing of merit required on a motion to restore is less than that required to defend a motion for summary judgment (*see Kaufman v Bauer*, 36 AD3d 481, 482 [2007]). Indeed, this Court has previously held that a finding of merit sufficient to vacate a plaintiff's default does not preclude a subsequent granting of summary judgment to defendants

(*see Gamiel v Curtis & Reiss-Curtis, P.C.*, 60 AD3d 473, 474 [2009], *lv dismissed* __ NY3d __ [2009], 2009 NY LEXIS 3484; *see also Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380, 381 [2007]). Thus, plaintiff's argument that this Court's prior order was "law of the case" precluding summary judgment in respondents' favor, or an "implicit recognition" of the merits of his claims, is without merit.

The motion court correctly found that respondents were entitled to summary judgment dismissing plaintiff's Section 200 and common-law negligence claims. The record is devoid of evidence that respondents had the authority to supervise or control the work giving rise to plaintiff's injury (*see Mitchell v New York Univ.*, 12 AD3d 200, 200-201 [2004]), or that they created or had actual or constructive notice of any allegedly unsafe condition that caused plaintiff's accident (*see Canning v Barneys N.Y.*, 289 AD2d 32, 33 [2001]).

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

ENTERED: OCTOBER 29, 2009



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

1314 The People of the State of New York, Ind. 1127/07
Respondent,

-against-

Theodore B.,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about July 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.

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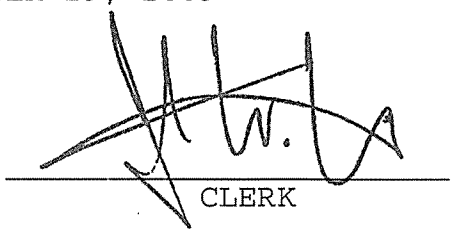

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Gonzalez, P.J., Saxe, Catterson, McGuire, Acosta, JJ.

1315 Gateway Demolition Corp., Index 602131/04
Plaintiff-Appellant,

-against-

Lumberman's Mutual Casualty Company, etc.,
Defendant-Respondent.

David Etkind, New York (Bruce Hesselbach of counsel), for appellant.

Dreifuss Bonacci & Parker, LLP, Florham Park, NJ (Bruce H. Dickstein of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered April 20, 2009, which, in an action to, inter alia, recover an unpaid contract balance and payment for extras, denied plaintiff's motion for partial summary judgment and granted defendant's cross motion for summary judgment to the extent of dismissing plaintiff's demand for extra payment for losses it sustained by being compelled to work on weekends, unanimously affirmed, without costs.

The New York City Department of Sanitation entered into a contract with nonparty Rapid Demolition Company, Inc. to demolish several structures. Defendant acted as surety on the project, assuring the project's completion. Rapid subsequently defaulted on the contract and defendant entered into a contract with plaintiff to complete the demolition work, which included the demolition of a large concrete overpass. Requests were made to

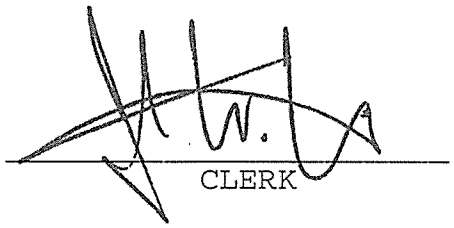
the New York City Department of Transportation (DOT) to close the subject street for a period of three weeks. DOT did not grant the closure of the street for the three weeks requested, but instead allowed the street to be closed only on weekends. The motion court properly found that plaintiff was not entitled to payment for extra costs it incurred as a result of the DOT's denial of its request to completely close the subject street for three weeks. The contract made no mention of the street closure, nor was plaintiff's timely completion of the demolition made conditional upon such closure. Furthermore, the grant of such closure was not implicit in the agreement (*cf. Anders v State of New York*, 42 Misc 2d 276, 282-284 [1964]), and the denial of same, with the resulting limitation on the hours in which work could take place, cannot be considered an unforeseeable circumstance (*see Peckham Rd. Co. v State of New York*, 32 AD2d 139 [1969], *affd* 28 NY2d 734 [1971]).

Finally, the contract balance retained in escrow is subject to disputed claims of backcharges that cannot be resolved on this appeal.

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

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

ENTERED: OCTOBER 29, 2009



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

1316 The People of the State of New York, Ind. 54238C/04
Respondent,

-against-

Angel Santiago,
Defendant-Appellant.

Andrea G. Hirsch, New York, for appellant.

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

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered January 19, 2007, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Although, in performing weight of evidence review, we may consider the jury's verdict on other counts (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), we find that defendant's acquittal of the gang assault charges does not warrant a different conclusion. Aside from the possibility that it chose to extend leniency, the jury could have reasonably found that, even if gang assault was not proven,

defendant unjustifiably and intentionally caused serious physical injury to the victim.

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

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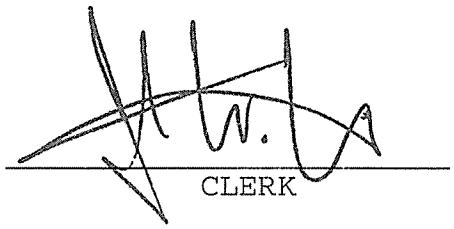

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Gonzalez, P.J., Saxe, Catterson, McGuire, Acosta, JJ.

1320 Pedro A. Flores, Index 405191/06
Plaintiff-Appellant,

-against-

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

Friedman, Levy, Goldfarb & Weiner, P.C., New York (Jeffrey I. Weiner of counsel), for appellant.

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

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered August 19, 2008, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, the motion granted and the matter remanded for further proceedings.

Plaintiff made a prima facie showing of negligence on the part of defendant Lang by submitting his affidavit indicating that the motor vehicle accident at issue occurred when Lang pulled out of a parking position and into a lane of moving traffic (*see* Vehicle and Traffic Law § 1128[a]; *Zummo v Holmes*, 57 AD3d 366 [2008]; *Calandra v Dishotsky*, 244 AD2d 376, 377 [1997]).

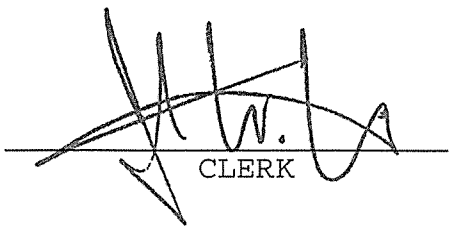
In opposition, defendants failed to raise an issue of fact. Defendant Lang never disputed in his affidavit that the accident

occurred when he pulled out of a parking spot into plaintiff's lane of traffic. In addition, while he asserted that he checked both his side view and rear view mirrors before going forward, he never indicated whether he observed plaintiff's vehicle or whether he ascertained that it was safe to proceed. Defendants also failed to raise an issue of fact as to comparative negligence on the part of plaintiff. Indeed, there was no indication that plaintiff was speeding prior to the accident or that he contributed in any way to the accident (*see Zummo v Holmes*, 57 AD3d 366 [2008]; *Neryaev v Solon*, 6 AD3d 510, 511 [2004]). Lang's assertion in his affidavit that plaintiff's vehicle struck his vehicle from behind on his driver's side wheel well, is not sufficient to raise a triable issue as to whether plaintiff was comparatively negligent. As plaintiff asserts, she had the right of way and "was entitled to anticipate that [defendant] would obey traffic laws which required [him] to yield" (*Ward v Cox*, 38 AD3d 313, 314 [2007], quoting *Jacino v Sugarman*, 10 AD3d 593, 595 [2004]). Defendant's argument that summary judgment is premature because the record is devoid of deposition testimony or "other documentation . . . that might further illuminate the issues raised by the parties' affidavits" is unavailing. The mere hope that evidence sufficient to defeat

a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion (*see Neryaev*, 6 AD3d at 510-511).

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

ENTERED: OCTOBER 29, 2009



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

1321N In re New York City Asbestos Litigation, Index 107574/08

- - - - -

Jamie Ames,
Plaintiff-Respondent,

-against-

Kentile Floors Inc.,
Defendant-Appellant.

McGivney & Kluger, P.C., New York (Joan M. Gasior, Kerryann M. Cook and Richard E. Leff of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondent.

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered June 24, 2009, which denied defendant's motion for a protective order and confirmed the December 3, 2008 ruling of the Special Master regarding production of certain materials associated with tests conducted by defendant's withdrawn expert in the matter entitled *Paul Oswald v A.O. Smith Water Products, et al.*, Index No. 111227/01, unanimously affirmed, with costs.

In this negligence and strict products liability action in the New York City Asbestos Litigation, the court did not abuse its discretion in ordering the production of certain tiles, boxes, videos and photographs (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 835 [2008]). Although the *Oswald* case had been settled, the appeal with respect thereto had been withdrawn and its expert had been

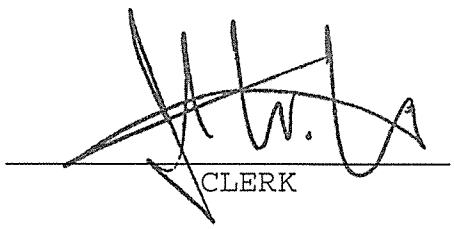
withdrawn, there remained other ongoing Kentile asbestos litigation. Thus, the motion court had full authority, under the controlling Case Management Order, to issue its discovery order pertaining to ongoing cases involving Kentile, including this case.

Furthermore, plaintiff demonstrated the "special circumstances" or "undue hardship" necessary to support an entitlement to expert disclosure beyond the statutorily required summary of the expert's opinions (*see* CPLR 3101(d)(1)(iii), (2); *cf. Martinez v KSM Holding*, 294 AD2d 111 ([2002]). The items at issue, tiles sold prior to 1986, the boxes in which they were stored, and photographs and videos thereof, could not be obtained on the open market, and the withdrawal of defendant's expert did not affect the disclosure requirement as the items were not work-product prepared in anticipation of litigation.

We have considered defendant's remaining arguments, including that the motion court ignored its motion for a protective order, and find them unavailing.

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

ENTERED: OCTOBER 29, 2009



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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1323 The People of the State of New York, Respondent, Ind. 3806/04

-against-

Kenneth Lewis, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Michael F. Savicki of counsel), for appellant.

Kenneth Lewis, appellant pro se.

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

Judgment, Supreme, Bronx County (Robert E. Torres, J.), rendered July 27, 2006, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 18 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, including its resolution of the minor inconsistencies in the testimony of the prosecution witnesses.

Defendant's objection to the admission of evidence of an alleged uncharged crime that occurred shortly before the altercation at issue is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also

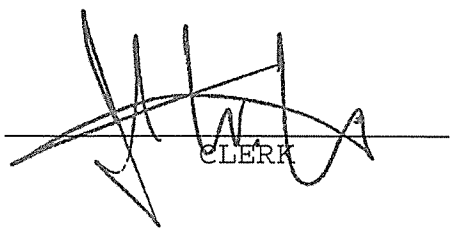
reject it on the merits. This evidence was proper background testimony and necessary to complete the narrative, as it explained the origin of the altercation in which defendant stabbed the victim (*see People v Till*, 87 NY2d 835 [1995]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of trial strategy outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant's remaining pro se contentions are unpreserved 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 sentence.

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

ENTERED: OCTOBER 29, 2009



Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1324-
1324A 1225 Realty Owner LLC, Index 600153/08
Plaintiff-Appellant,

-against-

Mocal Enterprises, Inc., et al.,
Defendants-Respondents.

Sukenik, Segal & Graff, P.C., New York (David C. Segal of counsel), for appellant.

Kaye Scholer LLP, New York (Richard Seltzer and Daniel Forchheimer of counsel), for respondents.

Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered August 14, 2008, dismissing the complaint, pursuant to an order, same court and Justice, entered August 11, 2008, which granted defendants' motion to dismiss, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that defendant Mocal fraudulently induced it to enter into a sale of two buildings at a purchase price of more than $92 million by inadequately disclosing the extensions of some of the tenants' leases. Although sent with an email containing some 120 pages of documents, the revised rent roll containing the lease information was provided as a separate attachment and itself covered only 10 pages. The revised rent roll was provided to plaintiff's counsel more than a month before

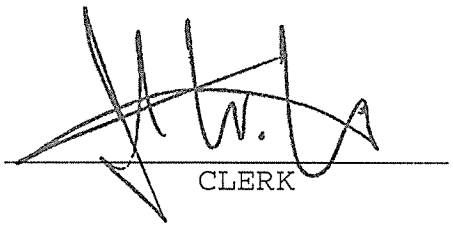
the signing of the contract and also was attached as a schedule to the contract that plaintiff executed. Both sides were sophisticated business entities, represented by counsel.

Accepting plaintiff's allegations as true and according plaintiff the benefit of every favorable inference (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), we find that Mocal satisfied its duty to disclose the lease extensions, thereby foreclosing plaintiff's claim of fraudulent concealment (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]).

Plaintiff's inability to demonstrate fraud is fatal to its claim for reformation based on unilateral mistake (*see Barclay Arms v Barclay Arms Assoc.*, 74 NY2d 644, 646 [1989]; *Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [2007]).

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

ENTERED: OCTOBER 29, 2009



CLERK

Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1325 Ruby Wilson, Index 112934/03
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

Andrew F. Plasse, New York, for appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondent.

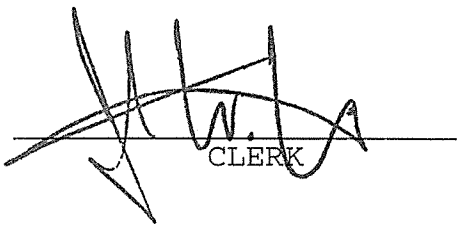
Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 9, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In opposition to defendant's prima facie showing of entitlement to judgment as a matter of law, plaintiff offered nothing more than belated speculation that her trip and fall was caused by overcrowded conditions on the stairway to the subway. Plaintiff, who repeatedly denied knowing the reason for her fall, failed to present any evidence that defendant's negligence had caused her injuries (*see Daniarov v New York City Tr. Auth.*, 62 AD3d 480 [2009]; *Rudner v New York Presbyt. Hosp.*, 42 AD3d 357 [2007]). The assertion that overcrowded conditions formed the basis of liability was not articulated in her notice of claim, thereby precluding her from raising this new theory in opposition

to the motion for summary judgment (*see Sutin v Manhattan & Bronx Surface Tr. Operating Auth.*, 54 AD3d 616 [2008]).

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

ENTERED: OCTOBER 29, 2009



Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1326 In re Eric A.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.

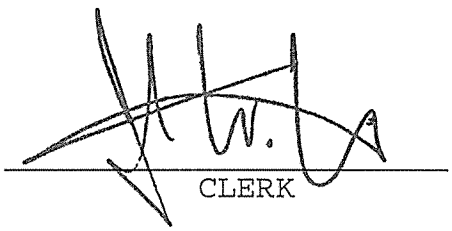
Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about November 22, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of obstructing governmental administration in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility, including its acceptance of the officer's testimony as to appellant's tumultuous behavior. After appellant caused a disturbance on a busy subway platform, he refused to comply with an officer's directives to quiet down and state what school he

attended, screamed, cursed, and struggled with the officer. The evidence established that, by attempting to restore order, the officer was performing an official function within the meaning of Penal Law § 195.05, and that appellant acted with the requisite intent under that statute (*see Matter of Ismaila M.*, 34 AD3d 373 [2006], *lv denied* 8 NY3d 808 [2007]; *Matter of Quaniqua W.*, 25 AD3d 380 [2006]).

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

ENTERED: OCTOBER 29, 2009



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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1327 Yuko Yamamoto, Index 114653/04
Plaintiff-Respondent-Appellant,

-against-

Carled Cab Corp., et al.,
Defendants-Appellants-Respondents.

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

Robert Dembia, New York, for respondent-appellant.

Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 8, 2008, after a jury trial, awarding plaintiff $5,000 for past medical expenses including chiropractic services, $50,000 for past pain and suffering, $120,000 for future chiropractic services, and nothing for future pain and suffering, which brings up for review order, same court (Deborah A. Kaplan, J.), entered on or about December 7, 2007, to the extent it denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

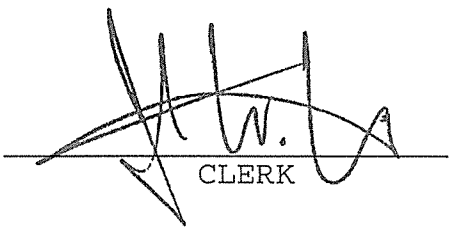
A verdict for the plaintiff should only be set aside, based on the weight of the evidence, where "the evidence so preponderates in favor of the defendant that it could not have been reached on any fair interpretation of the evidence" (*O'Boyle v Avis Rent-A-Car Sys.*, 78 AD2d 431, 439 [1981]). Here, plaintiff showed through objective measures that she suffered 20-to-40% loss of movement in the cervical spine, which was

sufficient to support her claim of serious injury (*see generally Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2002]). The jury award of damages for past pain and suffering and past and future medical costs does not deviate materially from what would be reasonable compensation. Defendants' motion for summary judgment, which considered much of the same proof as adduced at trial, was properly denied.

The jury's failure to award future pain and suffering is supported by the evidence showing that plaintiff had not altered her lifestyle, still worked the same job, cared for her child and participated in her daily activities. Moreover, given plaintiff's own testimony that chiropractic treatments have given her relief, albeit temporary, the jury could have concluded that funding regular chiropractic treatments would alleviate plaintiff's future pain.

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

ENTERED: OCTOBER 29, 2009



Sweeney, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1328 The People of the State of New York, Respondent, Ind. 562/05 2016/05

-against-

James Overton, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered November 26, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree (two counts), criminal possession of a controlled substance in the third and fifth degrees, criminal possession of a weapon in the fourth degree, and bail jumping, and sentencing him to an aggregate term of 9 years for the drug and weapon convictions, consecutive to a term of 1 to 3 years for the bail jumping conviction, unanimously affirmed.

Since defendant objected on different grounds from those he raises on appeal, he has not preserved his present challenge to the introduction into evidence of a letter found on his person that contained instructions for completing a particular drug transaction, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the

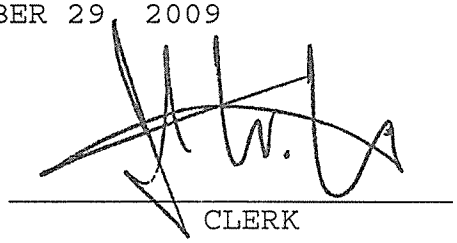
merits. The letter was not hearsay, since it was not received for the truth of its contents, but to demonstrate defendant's intent to sell the drugs he possessed. The letter was intended to convey instructions, not assertions of fact (*see People v Mixon*, 292 AD2d 177 [2002], *lv denied* 98 NY2d 678 [2002]).

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

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 29, 2009



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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1329 Patrick Monaghan, Index 106486/06
Plaintiff-Respondent,

-against-

540 Investment Land Company LLC, et al.,
Defendants-Appellants.

Thomas D. Hughes, New York (David D. Hess of counsel), for appellants.

Hach & Rose, LLP, New York (Philip S. Abate of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 9, 2009, which, to the extent appealed from as limited by the brief, denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

Plaintiff was engaged in routine maintenance when he fell from a ladder while attempting the limited task of removing a ballast from a fluorescent light fixture (*compare Piccione v 1165 Park Ave.*, 258 AD2d 357, 357 [1999] [the plaintiff's work "entailed much more than merely changing a lightbulb"], *lv dismissed* 93 NY2d 957 [1999], and *Caban v Maria Estela Houses I Assoc., L.P.*, 63 AD3d 639, 640 [2009] [same]). Plaintiff routinely replaced the ballasts to the light fixtures, drawing on

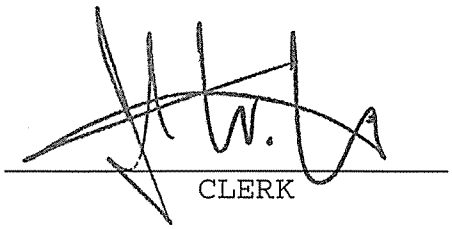
the building's supply of ballasts kept for that purpose.

M-4468 ***Monaghan v 540 Investment Land Co. LLC, et al.***

Motion seeking leave to strike portions of reply brief denied.

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

ENTERED: OCTOBER 29, 2009



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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1331 The People of the State of New York, Respondent,

Ind. 3751/00

-against-

Bladimil Castillo,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about July 18, 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.

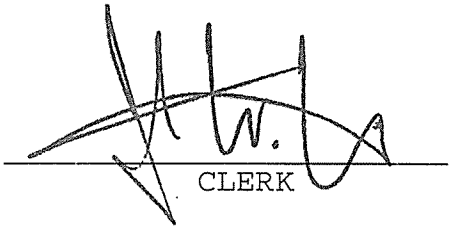
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: OCTOBER 29, 2009



Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1332 The People of the State of New York, Ind. 4693/07
Respondent,

-against-

John Colon,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Heather L. Holloway of counsel), for appellant.

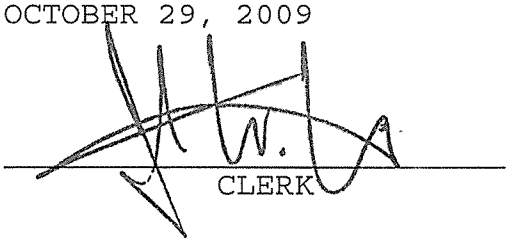
Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel P. Fitzpatrick, J.), rendered on or about March 31, 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: OCTOBER 29, 2009



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

Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1333 HSBC Bank USA, etc., Index 116318/06
Plaintiff-Appellant,

-against-

A&R Trucking Company, Inc.,
Defendant,

Valia Malamakis,
Defendant-Respondent.

Vlock & Associates, P.C., New York (Steven Giordano of counsel), for appellant.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered February 2, 2009, which granted defendant Mamalakis's motion to vacate a default judgment, directed plaintiff to restore any amounts taken from her checking account, and dismissed this action against her, unanimously affirmed, with costs.

In moving to vacate the judgment, Malamakis alleged that process was not properly served in accordance with the "nail and mail" provision of CPLR 308(4). After a traverse hearing, the court vacated the judgment and dismissed this action (*see NYCTL 2004-A Trust v Faysal*, 62 AD3d 409 [2009]) after determining that service had been attempted at an address where Malamakis did not reside.

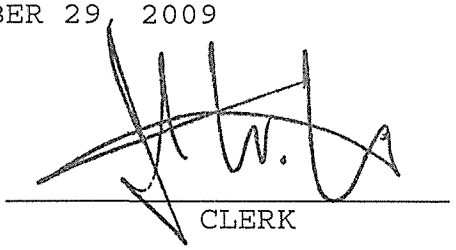
Plaintiff argues that in appropriate circumstances defendant may be deemed to have waived her jurisdictional objections, but

such circumstances are not present here. Plaintiff's reliance on *Calderock Joint Ventures, L.P. v Mitiku* (45 AD3d 452 [2007]) and *Lomando v Duncan* (257 AD2d 649 [1999]) is misplaced, as the defendants in those cases either explicitly or implicitly participated in the action, thus acknowledging the validity of the judgment, or demonstrated a lack of good faith or delay in asserting their rights.

Here, there is no suggestion that Malamakis ever acknowledged the validity of the judgment. She only learned of it when her bank account was levied upon. Some 7 to 10 months later, when she allegedly learned that plaintiff was seeking to make a further collection, Malamakis obtained counsel and moved to vacate the judgment. There is no indication in the record that she demonstrated a lack of good faith, or was otherwise dilatory in asserting her rights.

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

ENTERED: OCTOBER 29, 2009



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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1334 Julissa Delgado, et al., Petitioners-Appellants, Index 303139/08

-against-

New York City Housing Authority, Respondent-Respondent.

Broach & Stulberg, LLP, New York (Robert B. Stulberg of counsel), for appellants.

Sonya M. Kaloyanides, New York (Steven J. Rappaport of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Patricia Williams, J.), entered September 29, 2008, inter alia, denying declaratory and injunctive relief and dismissing an article 78 proceeding, unanimously modified, on the law, to declare that petitioners lack standing to bring this proceeding for enforcement of the Housing Maintenance Code (Administrative Code of the City of New York) § 27-2013 (a)(2) and (b)(2), and otherwise affirmed, without costs.

Petitioners, residents of public housing apartments owned and operated by respondent New York City Housing Authority (NYCHA) and a labor union representing apartment painters and painting supervisors employed by NYCHA, seek a judgment (1) enjoining NYCHA from carrying out a plan restructuring its procedures for painting tenant apartments that eliminates most of its paint supervisor positions, reassigns paint supervisors to

painter positions, and shifts responsibility for the supervision of contracted paint jobs from painting supervisors to housing development managers responsible for oversight of other contractors, and (2) granting declaratory relief and compelling NYCHA's compliance with the Housing Maintenance Code requirements that it repaint tenants' apartments every three years -- which NYCHA concedes it has failed to do -- and repaint or recover surfaces in the public areas of housing projects when required to keep them sanitary (Administrative Code of City of NY 27-2013[a][2],[b][2]). Only the Commissioner of the New York City Department of Housing Preservation and Development is authorized to seek such relief or other sanctions and remedies for violations of the Housing Maintenance Code (NY City Charter § 1802[1]; Administrative Code §§ 27-2120, 2121, 2122). Therefore, petitioners do not have a private right of action for the injunctive and declaratory relief sought. Nor may petitioners enforce the Housing Maintenance Code through 42 USC § 1983. Compliance with a housing code is not an unambiguously confirmed right secured by the force of federal law (*see generally Gonzaga Univ. v Doe*, 536 US 273, 283, 290 [2002]) or the United States Constitution (*see Lindsey v Normet*, 405 US 56, 74 [1972]), and the United States Housing Act of 1937 (42 USC) § 1437d(l)(3), which obligates public housing authorities to maintain projects "in a decent, safe, and sanitary condition,"

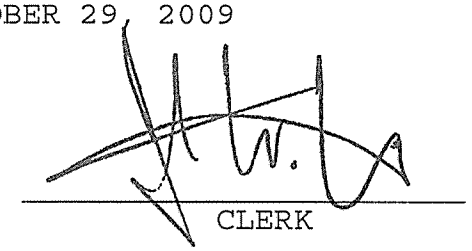
"does not create a right enforceable under § 1983 to proper maintenance of the housing project" (*Concerned Tenants Assn. of Father Panik Vil. v Pierce*, 685 F Supp 316, 322 [D Conn 1988]; *see also Thompson v Binghamton Hous. Auth.*, 546 F Supp 1158, 1183 [ND NY 1982]).

There is also no merit to petitioners' claim that NYCHA violated the prohibition in Civil Service Law § 61(2) against assigning civil servants to out-of-title work by assigning housing development management to supervise painting contractor work that had previously been supervised by NYCHA's painting supervisors. Such supervisory work clearly falls within the official statement of duties attending the positions of housing managers and building superintendents (*see Scarsdale Assn. of Educ. Secretaries v Board of Educ. of Scarsdale Union Free School Dist.*, 53 AD3d 572 [2008], *lv denied* 11 NY3d 710 [2008]). NYCHA's method of calculating employee seniority based on the date the employee actually reported for work on a permanent basis, and not, as petitioners urge, on the date the employee was given notice of having been hired, is a rational reading of Civil Service Law § 80[1],[2]). NYCHA demonstrates that the restructuring plan was motivated by economic and administrative concerns and was not otherwise arbitrary and capricious (*see Matter of Saur v Director of Creedmoor Psychiatric Ctr.*, 41 NY2d 1023 [1977]). We have considered petitioners' other arguments

and find them to be without merit. We modify solely to declare in NYCHA's favor (*Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: OCTOBER 29, 2009



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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1336 The People of the State of New York, Ind. 5089/02
Respondent,

-against-

German Dunlop,
Defendant-Appellant.

Victor Schurr, White Plains, for appellant.

Robert T. Johnson, District Attorney, Bronx (Frances Y. Wang of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered January 22, 2003, convicting defendant, after a jury trial, of rape in third degree and endangering the welfare of a child, and sentencing him to an aggregate term of 4 months, with 10 years' probation, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the evidence was legally sufficient. To the extent defendant is claiming the verdict was against the weight of the evidence, we also reject that argument (*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.

Those portions of the prosecutor's summation to which defendant objected as vouching were fair responses to defense

counsel's attacks on the victim's credibility (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]). In any event, nothing in the prosecutor's summation was so egregious as to deny defendant a fair trial.

An expert's general testimony about the reactions of adolescents to sexual abuse involving a family relationship did not bolster the victim's testimony or attempt to prove that the charged crimes occurred (*see People v Carroll*, 95 NY2d 375, 387 [2000]). Defendant's remaining contentions regarding the expert testimony and his related challenge to the court's charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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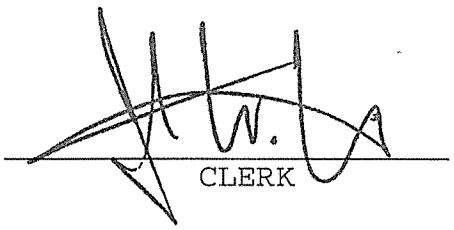

Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1337 Canal Carting, Inc., et al., Index 107454/07
Petitioners-Respondents,

-against-

City of New York Business
Integrity Commission,
Respondent-Appellant.

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

Hantman & Associates, New York (Robert J. Hantman of counsel), for respondents.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered April 4, 2008, which granted the petition to annul respondent's May 8, 2007 determination denying petitioners' applications for renewal of their licenses to operate as trade waste businesses, unanimously reversed, on the law, without costs, the petition denied, the proceeding dismissed, and the determination confirmed.

Respondent's denial of petitioners' applications was neither arbitrary and capricious nor an abuse of discretion. Administrative Code of City of NY § 16-509(a) provides: "The commission may . . . refuse to issue a license to an applicant who lacks good character, honesty and integrity." Subsection (b) adds: "The commission may refuse to issue a license . . . to an applicant . . . who has knowingly failed to provide the information and/or documentation required by the commission . . .

or who has otherwise failed to demonstrate eligibility for such license."

Respondent rationally found that petitioner Canal Sanitation failed to demonstrate eligibility for a license because the Environmental Control Board determined, after a hearing at which Sanitation's authorized representative appeared, that Sanitation and one of its principals had engaged in illegal dumping of putrescible waste. As respondent stated in its determination, "The illegal disposal of trade waste . . . reflect[s] poorly on the fitness of an applicant for a trade waste license." Sanitation's principal did submit a different version of events in an affidavit after respondent's staff had indicated it was going to deny the applications; however, this version of events should have been offered as testimony at the Board hearing.

Respondent had a rational basis for denying both petitioners' applications based, inter alia, on the reports of the monitor appointed for petitioners in 2002, their violations of respondent's rules, and their failure to keep their promises to pay various creditors.

It is true that the purpose of the enactment establishing the New York City Trade Waste Commission (Title 16-A of the Administrative Code) was to combat organized crime (*see* the Legislative findings in Local Law No. 42 [1996] of City of NY, § 1). However, § 16-509(a) of the Code lists many factors that

respondent may consider in denying a license, some of which have nothing to do with organized crime. If respondent were allowed to deny licenses only when the applicant had a tie to organized crime, some portions of § 16-509(a) would be rendered meaningless. "[A]ll parts of a statute are intended to be given effect and . . . a statutory construction which renders one part meaningless should be avoided" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515 [1991]).

Contrary to petitioners' claim, respondent's determination did not depart from prior precedent (*cf. Matter of Field Delivery Serv. [Roberts]*, 66 NY2d 516 [1985]).

THIS CONSTITUTES THE DECISION AND ORDER
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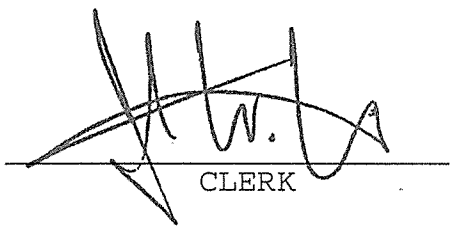
ENTERED: OCTOBER 29, 2009



Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1338 The People of the State of New York, Ind. 1686/07
Respondent,

-against-

Rosendo Lewis,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Kate S. Woodall of counsel), for respondent.

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered March 10, 2008, convicting defendant, after a jury trial, of assault in the second degree, attempted assault in the second degree, and tampering with a witness in the third degree, and sentencing him to an aggregate term of 7 years, unanimously affirmed.

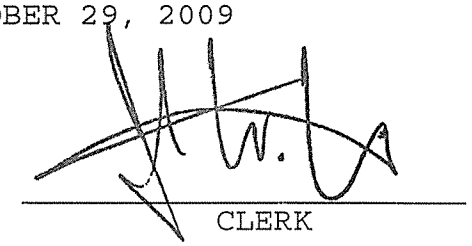
To the extent that defendant's eve-of-trial expression of dissatisfaction with his attorney can be viewed as a request for new counsel, we conclude that the court properly denied it after sufficient inquiry, since defendant did not establish good cause for a substitution (*see People v Linares*, 2 NY3d 507 [2004]; *see also People v Nelson*, 7 NY3d 883 [2006]). Rather than cutting defendant off, the court gave him a suitable opportunity to be heard. Defendant's only claim was that his counsel had never met

with him, an assertion the court knew to be unfounded.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 29, 2009



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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1339-
1339A-
1339B-
1339C Henson Group, Inc., Index 601290/07
Plaintiff-Respondent,

-against-

Mike Stacy,
Defendant-Appellant.

Himmel & Bernstein, LLP, New York (Andrew D. Himmel of counsel), for appellant.

Miller Mayer, LLP, Ithaca (Adam R. Schaye of counsel), for respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered May 4, 2009, after a nonjury trial, awarding plaintiff the principal sum of $33,000, unanimously affirmed, without costs. Appeals from orders, same court and J.H.O., entered April 20, 2009, which found in plaintiff's favor, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment. Appeal from order, same court and J.H.O., entered April 20, 2009, which referred the issue of the amount of plaintiff's reasonable attorneys' fees to a referee, unanimously dismissed, without costs, as abandoned.

Plaintiff was entitled to recover damages for defendant's breach of the restrictive covenant in his employment agreement. The evidence supported the finding that defendant's services were unique or irreplaceable in that, although the technical services

he performed could have been done by others, his special value was in his relationships with Microsoft personnel, cultivated partially through the use of his expense account while employed by plaintiff (*see generally BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]).

Defendant failed to preserve by specific objection at the time of trial his claim that a proper foundation was lacking for the admission of defendant's new employer's invoices to prove damages resulting from the diversion to the new employer of a project plaintiff would have been awarded had defendant still been in its employ (*see AJW Partners, LLC v Peak Entertainment Holdings, Inc.*, 51 AD3d 505 [2008]). In any event, we find that the foundation was proper.

The judicial hearing officer properly exercised his broad discretion in limiting discovery and in granting an adjournment of the trial so that plaintiff could obtain a witness thought to be necessary (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman and Dicker*, 1 AD3d 223 [2003]). Plaintiff adequately explained the need for the witness.

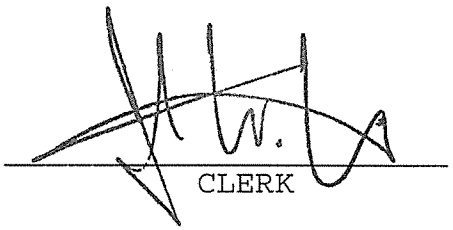
The determination of damages was proper (*see Pencom Sys. v Shapiro*, 193 AD2d 561 [1993]; *342 Holding Corp. v Carlyle Constr. Corp.*, 31 AD2d 605, 606 [1968]), based on a fair interpretation of the evidence and the resolution of conflicting testimony regarding the expenses that likely would have been incurred in

obtaining the revenue represented by the invoices (*see Thoreson v Penthouse Intl*, 80 NY2d 490, 495 [1992]).

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

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

ENTERED: OCTOBER 29, 2009



Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1340 Rosa E. Maldonado, Index 21294/05
Plaintiff,

-against-

South Bronx Development Corp.,
Defendant,

Food Bazaar,
Defendant-Respondent,

CP Associates,
Defendant-Appellant.

Hitchcock & Cummings LLP, New York (Christopher B. Hitchcock of counsel), for appellant.

Michael J. Mahon, Nyack, for respondent.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered June 30, 2008, which denied the motion of defendant CP Associates for summary judgment as against defendant Food Bazaar, unanimously modified, on the law, the motion granted to require Food Bazaar to undertake CP's contractual defense in the underlying action, and otherwise affirmed, without costs.

Summary relief is appropriate on a claim for contractual defense where, as here, the lease agreement is unambiguous and clearly sets forth the parties' intention that a lessee provide a defense to the lessor for injuries sustained (*see Brook Shopping Ctr. v Liberty Mut. Ins. Co.*, 80 AD2d 292 [1981]). While the duty to defend is clear, we note that issues of fact as to liability in the underlying personal injury action render

premature a finding that Food Bazaar has a duty to indemnify CP (*see e.g. DiFilippo v Parkchester N. Condominium*, __ AD3d __, 885 NYS2d 81 [2009]; *79th Realty Co. v X.L.O. Concrete Corp.*, 247 AD2d 256 [1998]). Absent a finding of liability on CP's part, it would also be premature to declare the contractual indemnification provisions between it and Food Bazaar void and unenforceable under General Obligations Law § 5-322.1 (*see Chunn v New York City Hous. Auth.*, 55 AD3d 437, 438 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
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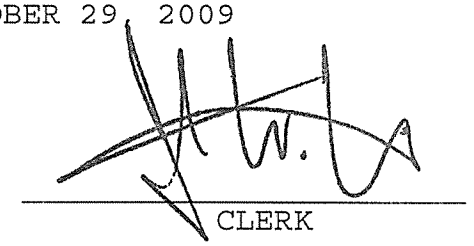

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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1341 The People of the State of New York, Ind. 187/07
Respondent,

-against-

Taurean Haywood,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about December 18, 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: OCTOBER 29, 2009

CLERK

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

Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1342N Susan D. Fine Enterprises, LLC, Index 101160/08
Plaintiff-Appellant,

-against-

Norman Steele, et al.,
Defendants-Respondents,

Margaret Polimeni, et al.,
Defendants.

Daniel A. Eigerman, New York, for appellant.

Cascone, Cole & Collyer, New York (Michael S. Cole of counsel), for respondents.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 28, 2009, which, in an action to recover a real estate brokerage commission, to the extent appealed from as limited by the briefs, directed plaintiff to provide defendants with (1) the identity of the customer for whom plaintiff was waiting in the lobby of the subject building on the day she showed the subject apartment to the buyer of the apartment, for attorneys' eyes only, (2) board packages prepared by plaintiff for the subject building with the names of the buyers redacted, for attorneys' eyes only, (3) the dates on which and names of persons to whom the subject apartment was shown by plaintiff, for attorneys' eyes only, and (4) the number of apartments sold by plaintiff in the subject building, unanimously affirmed, without costs.

Plaintiff failed to carry its burden of showing that the information ordered to be disclosed constitutes trade secrets protected from disclosure (*see Mann v Cooper Tire Co.*, 33 AD3d 24, 30 [2006], *lv denied* 7 NY3d 718 [2006]). For trade secret protection to apply, the information sought to be protected must not be known by others (*see id.* at 32). The names of the customers who were scheduled to see the subject apartment and those who had seen it as prospective buyers are not exclusively known by plaintiff; the owner/seller of the apartment could have known this. Also, the board packages are not by their very nature secret since they are prepared by brokers for use by members of the building's board of managers; moreover, the motion court took the precaution of directing that the buyers' names be redacted from the board packages. Finally, the number of apartments sold by plaintiff in the building should be a matter of public record. Significantly, defendants are not seeking nor is plaintiff being directed to disclose its customer lists. The disclosure order is very narrow in scope and requires production of only such evidence as is necessary to put the fundamental credibility of plaintiff's principal before the trier of fact on matters that plaintiff itself has put in issue. Such issues include whether the buyer of the apartment approached plaintiff's principal in the lobby of the building and asked her to take him to see the apartment, whether the seller of the apartment was

present during the viewing and told the buyer to deal with him through plaintiff, whether the buyer told plaintiff that he wanted to buy the apartment, and whether plaintiff prepared a board package for the buyer and gave it to the concierge. Since plaintiff did not carry its initial burden of showing that the information sought constitutes trade secrets, the burden never shifted to defendants to show that the information is indispensable and cannot be acquired in any other way (*see id.* at 30-31). We have considered plaintiff's other arguments and find them to be without merit.

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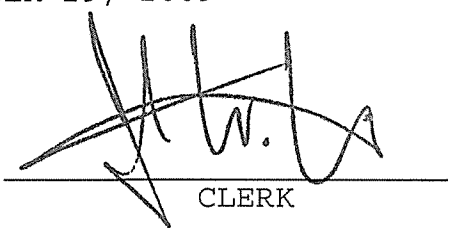

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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1343N-
1343NA Vladimir Gusinsky, etc., Index 603126/06
Plaintiff-Appellant,

-against-

Clarke H. Bailey, et al.,
Defendants-Respondents,

Glenayre Technologies, Inc.,
Nominal Defendant.

The Shapiro Firm, LLP, New York (Robert J. Shapiro of counsel), for appellant.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Douglas H. Flaum of counsel), for respondents.

Judgment, Supreme Court, New York County (Herman Cahn, J.), entered September 25, 2008, inter alia, denying plaintiff approval, in this stockholders' derivative action, of a stipulation of settlement insofar as it provided plaintiff attorneys' fees and expenses, unanimously reversed, on the law, without costs, the facts and in the exercise of discretion, to the extent appealed from, and the matter remanded to the Supreme Court, New York County, for further proceedings and findings of fact as to the reasonable value of plaintiff's counsel's services and expenses. Appeal from order, same court and Justice, entered September 24, 2008, which, inter alia, denied plaintiff's motion for approval of a stipulation of settlement insofar as it provided for payment of plaintiff's attorneys' fees and expenses,

unanimously dismissed, without costs, as subsumed in the judgment.

The settlement approved by the Supreme Court in this action confers "substantial benefits" on the company since it caused extensive improvements to the company's corporate governance and internal control policies, which provide material, lasting benefits to the company and its shareholders (*Seinfeld v Robinson*, 246 AD2d 291, 294 [1998]). Specifically, the reforms address the problems revealed in the company's stock option granting and accounting processes and deter future misconduct by management. The settlement requires that the company adopt procedures not previously in place, which could have prevented the backdating of options that occurred. Accordingly, we find that plaintiff's achievement of such results was sufficient to warrant an award of reasonable attorneys' fees and expenses under Business Corporation Law § 626(e).

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

ENTERED: OCTOBER 29, 2009