SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 20, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., DeGrasse, Manzanet-Daniels, Román, JJ.

2336N Nancy Keith, etc., Index 105272/05
Plaintiff-Respondent,

-against-

Forest Laboratories, Inc., et al.,
Defendants-Appellants.

Porzio, Bromberg & Newman, P.C., New York (Allan I. Young of counsel), for appellants.

Douglas & London, P.C., New York (Virginia E. Anello of counsel), for respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered May 13, 2008, which granted plaintiff's motion for a protective order precluding disclosure of plaintiff's mental health/social work records, unanimously affirmed, without costs.

Plaintiff Nancy Keith commenced this wrongful death action as administrator of the estate of her late husband Gary Keith, alleging negligence, strict liability and breach of warranty. Plaintiff also asserted an individual claim for loss of consortium. Following plaintiff's deposition, defendants sought the production of plaintiff's mental health records concerning treatment she received from a social worker prior to her husband's death. Upon receipt of defendants' demand for medical

authorization for the release of said records, plaintiff moved for a protective order arguing that the records requested were privileged since she had withdrawn her individual cause of action.

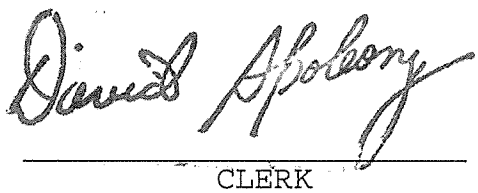
CPLR 3101(a) calls for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Evidence is material if sought "in good faith for possible use as evidence-in-chief or rebuttal or for cross-examination" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968] [internal quotation marks omitted]). However, privileged material, such as information obtained by a social worker, in a professional capacity, from a client (CPLR 4508[a]), is generally immune from discovery, much like information obtained by a medical doctor in connection with the treatment of a patient (CPLR 4504[1]; 3101[b]; *Dillenbeck v Hess*, 73 NY2d 278, 284 [1989]; *Kaplowitz v. Borden, Inc.*, 189 AD2d 90, 92 [1993]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70-71 [1992]). Thus, a litigant seeking discovery of such records is required to demonstrate that the party has waived the privilege by putting his or her condition in controversy (*id.*; *Velez v Daar*, 41 AD3d 164, 165 [2007]; *Avila v 106 Corona Realty Corp.*, 300 AD2d 266, 267 [2002]).

Here, plaintiff's application for a protective order was properly granted. After the withdrawal of her loss of consortium

claim, her only remaining claim, for wrongful death, is in a representative capacity, thereby precluding disclosure of her mental health/social work records (*see Napoli v Crovello*, 49 AD3d 699, 699-700 [2008]; *Scalone* at 73).

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

ENTERED: APRIL 20, 2010



CLERK

Tom, J.P., Sweeny, Catterson, Moskowitz, DeGrasse, JJ.

2363 Strickland Joseph, Index 100080/06
Plaintiff-Respondent-Appellant,

-against-

Verizon New York Inc., et al.,
Defendants-Appellants-Respondents.

Cross appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Carol Edmead, J.), entered on or about June 25, 2009,

And said cross appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 18, 2010,

It is unanimously ordered that said cross appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 20, 2010

CLERK

Tom, J.P., Sweeny, Catterson, Moskowitz, DeGrasse, JJ.

2365 Orbimed Advisors, LLC, etc., Index 650316/08
Plaintiff-Respondent,

-against-

QVT Fund LP,
Defendant-Appellant,

Winston & Strawn LLP,
Defendant.

Simpson Thacher & Bartlett LLP, New York (Barry R. Ostrager of counsel), for appellant.

Storch Amini & Munves, P.C., New York (Bijan Amini of counsel), for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered November 18, 2009, which denied defendant QVT Fund LP's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff Orbimed, on behalf of the former stockholders of Biosynexus, Inc., a closely held biopharmaceutical company, seeks a declaration that it is entitled to money in an escrow account pursuant to an agreement that merged Biosynexus into defendant QVT. The merger agreement contained an indemnification clause requiring the stockholders to indemnify QVT for damages relating to any breach of the warranties and representations contained in the merger agreement. The indemnity provision limited the stockholders' liability to the escrow amount and provided that indemnity was available only if damages exceeded $250,000.

However, to recover under the indemnity provision, QVT had to "deliver a Claim Notice to the Indemnifying Party," triggering the indemnifying party's requirement to deliver a response within 20 days, after which the parties would use a 30 day period within which to make good faith efforts to resolve the dispute. The indemnity provision expired one year from the closing date, but provided:

> If an Indemnified Party delivers to an Indemnifying Party, before expiration of a representation or warranty, either a Claim Notice based upon a breach of such representation or warranty, or an Expected Claim Notice based upon a breach of such representation or warranty, then the applicable representation or warranty shall survive . . .

The merger agreement defined "Claim Notice" as a:

> written notification which contains (i) a description of the Damages incurred or reasonably expected to be incurred . . . and the Claimed Amount of such Damages, to the extent then known, (ii) a statement that the Indemnified Party is entitled to indemnification under Article VI for such Damages and a reasonable explanation of the basis therefor, and (iii) a demand for payment in the amount of such Damages.

The merger agreement defined "Expected Claim Notice" as "a notice that, as a result of a legal proceeding instituted by or written claim made by a third party, an Indemnified Party reasonably expects to incur Damages for which it is entitled to indemnification under Article VI." Additionally, the merger agreement provided that "[a]ll notices . . . hereunder shall be

in writing." Finally, the merger agreement provided that "[t]his Agreement (including the documents referred to herein) constitutes the entire agreement among the Parties and supersedes any prior understandings, agreements or representations by or among the Parties."

Within one year, QVT delivered a letter to Orbimed advising that it was making an indemnification claim based on Biosynexus's false representations and breached warranties regarding a certain license it had with a third-party and the manufacturing costs, market potential and effectiveness of a certain drug Biosynexus had sought to develop.

Orbimed's complaint for declaratory relief alleges that QVT's letter is not compliant with the merger agreement's requirements of a Claim Notice or Expected Claim Notice and that QVT did not incur damages in excess of $250,000. QVT's motion, purportedly one to dismiss the complaint pursuant to CPLR 3211(a), but which "should be taken as a motion for a declaration in [QVT's] favor and treated accordingly" (Siegel, NY Prac § 440, at 745 [4th ed]), asserts to the contrary.

We cannot say as a matter of law that QVT's letter complies with the merger agreement's requirements that a Claim Notice contain a "description" of the damages incurred or expected to be incurred and a "reasonable explanation" of the basis for the claim. We can say that the letter does not identify the

warranties or representations made in the merger agreement, or any other document delivered pursuant to the merger agreement, that were breached; does not identify the section of or manner in which the license was breached; and does not identify any "legal proceeding" or "written claim" by a third party, terms that are part of the definition of an Expected Claim Notice. That Orbimed may at all relevant times have been aware of these particulars does not negate the contractual requirement of written notice (*cf. MRW Constr. Co. v City of New York*, 223 AD2d 473, 473 [1996], *lv denied* 88 NY2d 803 [1996]). That Biosynexus may have been in breach of the license at the time it entered into the merger agreement is irrelevant to whether QVT gave proper notice of that breach for purposes of indemnification under that agreement.

Moreover, even if QVT's letter were a proper Claim Notice or Expected Claim Notice, in order to recover under the indemnification clause, QVT must prove that it sustained damages of more than $250,000. In the present context, that would require conclusive documentary evidence of damages (CPLR 3211[a][1]), that QVT fails to submit. We reject QVT's argument that, with respect to the issue of damages, a "judicial admission" Orbimed made in its (now withdrawn) claim against Biosynexus's former attorneys, binds Orbimed. The $11 million in damages that Orbimed sought against the attorneys was based on

the amount that QVT is seeking and withholding by not allowing disbursement of the $11 million escrow fund. This was not an admission that QVT or Orbimed actually sustained these damages. Indeed, Orbimed's allegations against the attorneys -- "[i]f there was a breach of the representations and warranties in . . . the Merger Agreement . . ., [such] was due to the negligence and malpractice of [the attorneys]" -- were plainly cast as a hypothetical alternative (*see* CPLR 3014; 3017[a]), in much the manner of a third-party claim.

We have considered QVT's other arguments and find them unavailing.

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

ENTERED: APRIL 20, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2412 Penna, Inc., etc., Index 115847/08
Plaintiff-Appellant-Respondent,

-against-

Lenore Ruben, et al.,
Defendants-Respondents-Appellants.

Justin M. Sher, New York, for appellant-respondent.

Mitchell Silberberg & Knupp, LLP, New York (James E. Schwartz of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about September 25, 2009, which granted defendants' motion to dismiss the complaint to the extent of dismissing it as against defendant Lenore Ruben and denied it as to the remaining defendants, unanimously modified, on the law, the motion denied as to Ruben, and the complaint reinstated as against her, and otherwise affirmed, without costs.

Although the allegations in the complaint constitute a formal judicial admission that plaintiff engaged in construction and carpentry services for defendant Ruben, a homeowner (*see Bogoni v Friedlander*, 197 AD2d 281, 291-292 [1994], *lv denied* 84 NY2d 803 [1994]), the complaint nevertheless states a cause of action against Ruben, because it cannot be determined on the present record whether or not the construction and carpentry work were incidental or related to the painting that plaintiff

performed (*see Coggeshall Painting & Restoration Co. v Zetlin*, 282 AD2d 364 [2001]), which was "not incidental or related to home improvement work" (Administrative Code of City of NY § 20-386[2]) and for which plaintiff need not be a licensed home improvement contractor to recover (*see Raywood Assoc. v Seibel*, 172 AD2d 154 [1991]).

To the extent plaintiff has stated a valid cause of action against Ruben for foreclosure of its mechanic's lien, the remaining defendants were properly named, as necessary parties (*see* Lien Law § 44[1]).

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

ENTERED: APRIL 20, 2010

David Spokony

CLERK

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2551 The People of the State of New York, Ind. 4909/06
Respondent,

-against-

Owen Steward,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Christina M. McGill of counsel), for appellant.

Owen Steward, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered April 26, 2007, convicting defendant, after a jury trial, of robbery in the first degree (two counts) and robbery in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

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

The court properly allowed testimony by the victims identifying defendant as a person depicted in surveillance videos. This testimony was likely to aid the jurors in

determining whether defendant was in fact shown in the video, as there was evidence that defendant had changed his appearance after the crime by altering his hairstyle (*see People v Russell*, 79 NY2d 1024 [1992]; *People v Rivera*, 259 AD2d 316 [1999]). Defendant's related argument concerning a detective's testimony is without merit.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]).

The record refutes defendant's claim that he received inadequate time to question the panelists about his right not to testify at trial and the principle of accomplice liability. In this regard we note the court's own extensive preliminary examination covering these matters. Accordingly, the court did not abuse its discretion in imposing a time limit on initial voir dire questioning by the prosecutor and defense counsel (*see People v Jean*, 75 NY2d 744 [1989]; *People v Rodriguez*, 184 AD2d 317, 318-319 [1992], *lv denied* 80 NY2d 909 [1992]).

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

ENTERED: APRIL 20, 2010

CLERK

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2552 Belkis Acosta, Index 20917/05
Plaintiff-Respondent,

-against-

Riverdale Development, LLC, et al.,
Defendants-Appellants,

Prometheus Assisted Living, LLC, et al.,
Defendants.

Shay & Maguire LLP, East Meadow (Jaret SanPietro of counsel), for Riverdale Development, LLC, Kapson Riverdale Corp., Kapson Senior Quarters Corp., Henry Johnson Associates, Inc., Henry Hudson Parkway Building, Inc. and ARV Assisted Living, Inc., appellants.

Ahmuty, Demers & McManus, New York (Patrick J. Kenny of counsel), for Otis Elevator Company, appellant.

Louis Atilano, Bronx, for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 15, 2009, which granted plaintiff's motion to vacate a default judgment and restore this matter to the trial calendar, unanimously affirmed, without costs.

A compliance conference was held during the pendency of a stay of the action. Defendants appeared, but plaintiff, then pro se, did not. The conference was adjourned, and plaintiff was never notified of the adjournment date. Initially, we note that the action was improperly dismissed under § 202.27 of the Uniform Court Rules. Although plaintiff did not appear for the adjourned conference, she was wholly ignorant of the conference date through no fault of her own. Thus, § 202.27(b) is inapplicable.

We need not consider the merits of plaintiff's claim because the order entering the default under § 202.27 was improperly entered. Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits (*Telep v Republic El. Corp.*, 267 AD2d 57, 58-59 [1999]).

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

ENTERED: APRIL 20, 2010

CLERK

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2553 Carmen Rivera, as Administratrix of the Estate of Victor Ramos, Plaintiff-Appellant, Index 14189/06

-against-

GT Acquisition 1 Corp., et al., Defendants,

Meadowbrook Farms, Inc., et al., Defendants-Respondents.

John V. Decolator, Garden City, for appellant.

Camacho Mauro & Mulholland, LLP, New York (Andrea Sacco Camacho of counsel), for Meadowbrook Farms, Inc., respondent.

Velella & Basso, Bronx (Gary S. Basso of counsel), for Blickmeyer & Siebelits, Inc., respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 24, 2009, which, insofar as appealed from, granted the motion of defendant Blickmeyer & Siebelits, Inc. (B & S) and the cross motion of defendant Meadowbrook Farms, Inc. (Meadowbrook) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Plaintiff's decedent was struck and killed by a truck owned by defendant GT Acquisition 1 Corporation and driven by defendant Vives. Plaintiff commenced this action against, inter alia, B & S and Meadowbrook on the theory that the Meadowbrook truck was double parked on the road and caused an obstruction to Vives'

view thereby contributing to the accident.

B & S and Meadowbrook met their prima facie burden of establishing their entitlement to summary judgment by submitting Vives' deposition testimony that there was nothing obstructing his view prior to the accident. In opposition, plaintiff failed to raise a triable issue of fact. Although Vives initially testified that he could not recall if there was an obstruction to his right, in response to a more specific question, he clarified that his vision had not been blocked.

The motion court properly disregarded the uncertified police report and unauthenticated photographs as they constituted inadmissible hearsay (*see Coleman v Maclas*, 61 AD3d 569 [2009]). While hearsay statements may be used to oppose a summary judgment motion, such evidence is insufficient to warrant a denial of the motion where it is the only evidence submitted in opposition (*see Briggs v 2244 Morris L.P.*, 30 AD3d 216 [2006]). Here, the hearsay reports were the only evidence in support of the claim that Vives' vision was obstructed.

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

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

ENTERED: APRIL 20, 2010

CLERK

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2554 The People of the State of New York, Ind. 1754/05
Respondent,

-against-

Albert Jerido,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Robert Hayes, J.), rendered on or about December 1, 2005, 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.

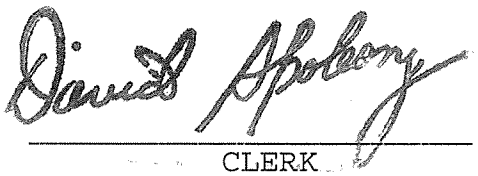
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: APRIL 20, 2010



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Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2556 The People of the State of New York, Ind. 4924/07
Respondent,

-against-

Ermal Qoshja,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lisa A. Packard of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patricia Curran 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 (William A. Wetzel, J.), rendered on or about September 8, 2008,

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

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

ENTERED: APRIL 20, 2010

CLERK

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

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2557 The People of the State of New York, Ind. 11913/93
Respondent,

-against-

Roberto Lisiel,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about November 3, 2005, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three adjudication. The court properly assessed 15 points under the factor for lack of supervised release (*see People v Lewis*, 37 AD3d 689, 690 [2007], *lv denied* 8 NY3d 814 [2007]), and there is no merit to defendant's argument that the SORA registration requirements themselves constitute a form of supervision. Since these points, when added to points that defendant does not contest, qualify him

as a level three offender, we need not reach defendant's other claims. In any event, we find those claims unavailing.

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

ENTERED: APRIL 20, 2010

CLERK

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2558 Andamion Murataj, Index No. 400095/06
Plaintiff-Appellant,

-against-

Dream Dragon Productions, Inc., et al.,
Defendants,

William (a/k/a "Bill") Kalatsky,
Defendant-Respondent.

White & Case LLP, New York ((John D. Rue of counsel), for appellant.

Sol Kodsi, New York, for respondent.

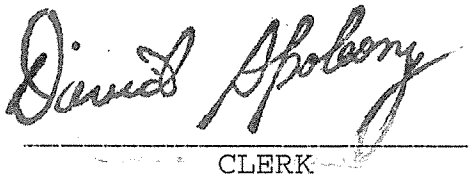
Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered January 28, 2009, which, to the extent appealed from as limited by the briefs, upon renewal, granted defendant Kalatsky's motion for summary judgment dismissing the cause of action for tortious interference with contract as against him, unanimously affirmed, with costs.

Since, as the record demonstrates, there was no breach of the contract between plaintiff and his crew, plaintiff's claim of tortious interference with contract fails as a matter of law (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Marks v Smith*, 65 AD3d 911, 916 [2009]).

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

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

ENTERED: APRIL 20, 2010



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Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2559 In re Pat Bland, Index 402384/07
Petitioner-Respondent-Appellant,

-against-

New York City Housing Authority,
Respondent-Appellant-Respondent.

Sonya M. Kaloyanides, New York (Nadja Schulz of counsel), for appellant-respondent.

MFY Legal Services, Inc., New York (Anamaria Segura of counsel), for respondent-appellant.

Order and judgment (one paper), Supreme Court, New York County (Paul Feinman, J.), entered October 23, 2008, granting the petition in this CPLR article 78 proceeding to the extent of remanding the determination of respondent New York City Housing Authority (NYCHA), dated February 21, 2007, which, after a hearing, terminated petitioner's public housing tenancy upon a finding, inter alia, of misrepresentation, for a de novo hearing before a different hearing officer on the issue of penalty, unanimously reversed, on the law, without costs, the petition denied, the judgment vacated, the determination confirmed and the proceeding dismissed.

Lease termination proceedings were commenced against petitioner after NYCHA learned that she had failed to report her employment income on occupancy affidavits for five successive years, resulting in a substantial underpayment of rent. The

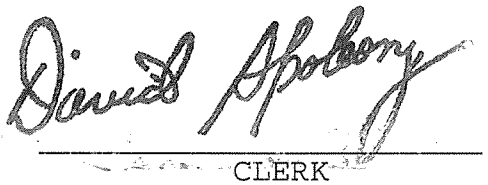
evidence that petitioner pled guilty to a misdemeanor charge arising out of that conduct established the administrative charges of willful misrepresentation of income and non-verifiable income, and petitioner admitted the factual basis for the charges at the hearing. Petitioner's contention that her conduct did not constitute non-desirability or breach of rules need not be resolved, since it is undisputed that her conduct supported the charges of misrepresentation and failure to provide income verification, which are grounds for lease termination.

The penalty was imposed following a hearing conducted in compliance with NYCHA's termination of tenancy procedures, at which the hearing officer explained the proceedings, and petitioner availed herself of the opportunity provided to present evidence in mitigation and to make a statement urging that probation would be an appropriate penalty (*see Matter of Jackson v Hernandez*, 63 AD3d 64, 69 [2009]). Notwithstanding the hardship to petitioner and her son resulting from termination, the penalty imposed for egregious misrepresentation over a five-year period does not shock the conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550 [2000]; *Matter of Smith v New York City Hous. Auth.*, 40 AD3d 235, 236 [2007], *lv denied* 9 NY3d 816 [2007]). Accordingly, the court lacked authority to annul

the penalty and remit for further consideration (*see Matter of Featherstone*, 95 NY2d at 554).

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

ENTERED: APRIL 20, 2010



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Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2562 In re Hebrew S.,

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 (Andrew Shapiro of counsel), for presentment agency.

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about June 16, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and placed him on probation for a period of 12 months, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the findings to petit larceny and criminal possession of stolen property in the fifth degree, respectively, and otherwise affirmed, without costs.

Except as indicated, the finding was based on legally sufficient evidence and was not against the weight of the evidence. The evidence supports the inferences that appellant took a laptop computer belonging to his school, and that he did

so with larcenous intent. However, we conclude that testimony that the laptop was purchased for $1349.40 one year before the theft was insufficient proof that it was still worth over $1000 (*see e.g. People v Gonzalez*, 221 AD2d 203, 204-205 [1995]). This was not a case in which value could be inferred from the circumstances (*compare e.g. People v Carter*, 19 NY2d 967 [1967] [value in excess of $500 established by proof that owner paid $3300 for car 10 months before theft]). Although this issue was unpreserved, we choose to review it in the interest of justice. In any event, the finding was also against the weight of the evidence with regard to the element of value.

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2563-
2564 Roger Jazilek, Index 110012/05
Plaintiff-Respondent,

-against-

Abart Holdings, LLC,
Defendant-Appellant.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for appellant.

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for respondent.

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered December 11, 2009, awarding plaintiff principal damages of $12,377.85, treble damages of $31,205.31, and legal fees of $30,545.86, unanimously affirmed, with costs. Appeal from amended order (same court and Justice), entered October 28, 2009, which granted plaintiff's motion and denied defendant's cross motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant owns the apartment building at 50 East Third Street in Manhattan. From about 1981 through March 2002, defendant leased apartment 1B to a prior tenant, under a rent-stabilized lease. The stabilized tenant then agreed to vacate the premises and surrender all of her rights. The apartment's registered legal rent on file with the State Division of Housing and Community Renewal at that time was $812.34 per month.

After the tenant of record vacated the premises, the landlord commenced a holdover proceeding in Housing Court against plaintiff herein, on the grounds that he was an illegal subtenant. On April 2, 2002, the parties executed a so-ordered settlement stipulation whereby the landlord offered plaintiff a two-year lease in his own name, at a monthly rent of $2,200, with a "preferential rent" of $1,800 per month during the two-year term.

On April 2, 2002, in accordance with the stipulation, the parties executed a two-year lease with a rider reciting that the apartment's "legal regulated rent" was $2,200 and providing for a "lower preferential rent" of $1,800 during the term of the lease. In March 2004, the parties executed a renewal lease with a similar rider reciting a "legal regulated rent" of $2,299 per month and a preferential rent of $1,881.

In July 2005, plaintiff commenced this action seeking a declaration that the stipulation was "void as against public policy" because it violated the Rent Stabilization Law (RSL) and Code (RSC), and that he was the apartment's "lawful rent-stabilized tenant," and also a declaration as to the apartment's maximum legal rent. Plaintiff also sought damages and treble damages for any rent overcharges, as well as attorneys' fees. On a prior appeal, the Court of Appeals held that the "stipulation violates the Rent Stabilization Code and is void as against

public policy" (10 NY3d 943, 944).

We reject defendant's contention that since the Court of Appeals held the stipulation to be void, the parties should be restored to the status quo ante the stipulation, thus permitting defendant to pursue its claims against plaintiff as a holdover from an illegal sublet. Review of the parties' lease reveals it was a freestanding agreement, not specifically tied to the stipulation. Rather than incorporating or otherwise referring to the stipulation, the lease instead contains a merger clause expressly reciting that "All promises made by the Landlord are in this lease. There are no others." Additionally, the stipulation did not in any way compel defendant to renew plaintiff's lease, which the landlord did in 2004. Hence, even assuming that the initial lease was, contrary to its own terms, inextricably bound to the voided stipulation, the renewal lease was completely independent of the stipulation.

Moreover, the holding of the Court of Appeals specifically voided only the stipulation, not the parties' lease agreement. The lease expressly provided that if any of its terms were found to be "illegal, the rest of this lease remains in full force." Hence, although the lease provision setting the rent at $2,200 and deregulating the apartment is violative of the RSL and thus void, the balance of the lease, and with it the parties'

landlord-tenant relationship, is unaffected (*see* RSC [9 NYCRR] § 2520.12 ["(t)he provisions of any lease . . . shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with . . . the RSL or this Code, and in such event such provisions shall be void and unenforceable"]).

In calculating the amount of the rent overcharges, the motion court correctly declined to apply any periodic or other rent increases, other than a vacancy increase of 20% (*see* RSC [9 NYCRR] § 2522.8[a][1]), which the parties agreed applied. A landlord's failure to file a "proper and timely" annual rent registration statement results in the rent being frozen at the level of the "legal regulated rent in effect on the date of the last preceding registration statement" (RSL § 26-517[e]; *see* RSC [9 NYCRR] § 2528.4[a]). The rent registration filed by the landlord in February 2004 was false, as it continued to list the prior tenant as tenant of record, and listed the prior rent of $812.34, instead of the actual paid "preferential" rent of $1,800. The rent registration filed in June 2004 was also defective, as it listed a legal rent of $2,200, vastly in excess of $974.81, the highest possible legal rent at that time. As such, both the February and the June 2004 rent registration statements were nullities (*Thornton v Baron*, 5 NY3d 175 [2005]), and no further registration statements were filed.

The court also correctly held treble damages to be

applicable. In support of its argument that the overcharge was not willful, defendant relies on the so-ordered stipulation containing the agreed-upon rental figure of $2,200. Although that document recites that the rent for the apartment shall be set at $2,200 per month, there is no representation that this number constitutes the apartment's legal regulated rent. In any event, a representation in a stipulation — even a so-ordered stipulation — "is not to be equated with a judicial finding" (*Urban Assoc. v Hettinger*, 177 AD2d 439 [1991], *lv denied* 79 NY2d 759 [1992]). Hence, it cannot be presumed that in so-ordering the stipulation, the Housing Court was making any finding that the stated monthly rent was the legal regulated rent.

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2565 In re Probate of the Will of Elsa K. Bryer, Deceased. File No. 583/94

- - - - -

Elliott K. Bryer,
Petitioner-Appellant,

-against-

The Bank of New York, et al.,
Respondents-Respondents.

Elliott K. Bryer, appellant pro se.

Greenfield Stein & Senior, LLP, New York (Jeffery H. Sheetz of counsel), for respondents.

Order, Surrogate's Court, New York County (Renee R. Roth, S.), entered on or about November 18, 2008, which granted respondents' motion for summary judgment dismissing petitioner's application to vacate a 1994 decree admitting his mother's will to probate, unanimously affirmed, without costs.

A party seeking to set aside a decree admitting a will to probate entered upon his or her consent bears the initial burden of articulating a claim of good cause to set aside the waiver based upon a showing that such consent was obtained by fraud or overreaching, was the product of misrepresentation or misconduct, or other sufficient cause that justifies the reopening of the decree (*see Matter of Frutiger*, 29 NY2d 143 [1971]; *Matter of Wright*, 271 AD2d 201 [2000], *Matter of Westberg*, 254 App Div 320 [1938], *appeal dismissed* 279 NY 316 [1938]).

Here, petitioner failed to make such a showing. His claim that his father used financial leverage over him to obtain the waiver and consent does not provide a sufficient basis to make out a claim of economic duress (*see e.g. 767 Third Ave. LLC v Orix Capital Mkts., LLC*, 26 AD3d 216, 218 [2006], *lv denied* 8 NY3d 803 [2007]; *Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249 [1989]). Nor does the affirmation of petitioner's former psychiatrist demonstrate that petitioner suffered from a cognizable mental disability at the time he signed the waiver and consent, and the evidence does not show that petitioner was otherwise incapable of safeguarding his legal rights at that time (*see Matter of Bobst*, 234 AD2d 7 [1996], *lv dismissed* 90 NY2d 844 [1997]).

Furthermore, absent a valid excuse for the 12-year delay in seeking to vacate the decree, and given the prejudice that would result from revoking the probate decree, petitioner was guilty of gross laches (*see Matter of Linker*, 23 AD3d 186, 189 [2005].

We have considered petitioner's remaining arguments, including his challenge to his mother's testamentary capacity, and find them unavailing.

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2566 The People of the State of New York, Ind. 4048/07
Respondent,

-against-

Davvon Hines,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip J. Morrow of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered September 4, 2008, as amended September 12, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal sale of a controlled substance in or near school grounds, and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 6 years, unanimously affirmed.

The court properly responded to a note from the deliberating jury. In this observation sale case, defendant contended he was the buyer instead of the seller. There was evidence that the person whom the People alleged to be the buyer possessed, among other things, a methadone pill, but there was no testimony describing methadone. The court responded affirmatively to a

note asking if jurors could take into account their knowledge of the purpose of methadone in deciding the case, and it appropriately cautioned the jury that such knowledge must be based on ordinary experience rather than special expertise (*see People v Arnold*, 96 NY2d 358, 364-368 [2001]; *People v Maragh*, 94 NY2d 569, 574-576 [2000]). We conclude that the note addressed a matter of common knowledge (*see* Prince, Richardson on Evidence, § 2-206 [Farrell 11th ed]), and that the court was not obligated to tell the jury not to consider the purpose of methadone. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Even assuming that the jury drew the inference that the alleged buyer was a drug addict, and also assuming that such an inference was unwarranted, this factor was of little value in determining which party was the seller, and it was unlikely to have affected the verdict.

We decline to invoke our interest of justice jurisdiction to dismiss the noninclusory concurrent count.

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2567-
2568 Pala Dawkins, Index 301635/09
Plaintiff-Respondent,

-against-

Rhoenna Campbell-Robinson, et al.,
Defendants-Appellants.

Littler Mendelson, P.C., New York (Eric D. Witkin of counsel), for appellants.

Sherwood Allen Salvan, New York, for respondent.

Orders, Supreme Court, Bronx County (Paul Victor, J.), entered on or about August 10, 2009 and November 18, 2009, respectively, which denied defendants' motions to dismiss the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff's claims of defamation, wrongful discharge and intentional infliction of emotional distress are preempted by section 301 of the federal Labor Management Relations Act, 1947 (29 USC § 185), because they require interpretation of a

collective bargaining agreement (*Griffiths v Triangle Servs., Inc.*, 59 AD3d 278 [2009]).

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2569 The People of the State of New York, Ind. 2443N/08
Respondent,

-against-

David Joseph,
Defendant-Appellant.

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

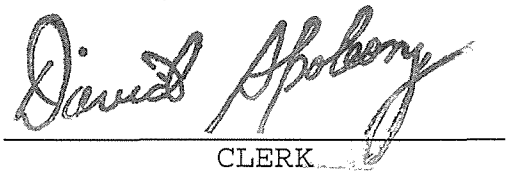
Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about July 22, 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: APRIL 20, 2010



CLERK

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

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2570 Condace Edwards, Index 24323/04
Plaintiff-Respondent,

-against-

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

Wallace D. Gossett, Brooklyn (Alexandra Vandoros of counsel), for appellants.

Quaranta & Associates, Mount Kisco (Beverly T. McGrath of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered February 2, 2009, which, in an action for personal injuries sustained when plaintiff slipped and fell on the rear exit steps of defendants' bus, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff's inability to identify the "hard" object on the steps that caused her to fall, along with the deposition testimony of defendants' bus driver that he inspected the steps both at the start of his shift and shortly after the accident and on both occasions observed them to be clear of debris, established defendants' prima facie entitlement to summary judgment (*see Goldfischer v Great Atl. & Pac. Tea Co., Inc.*, 63 AD3d 575 [2009]). Contrary to the motion court's conclusion,

plaintiff's testimony that she routinely rides this bus line and routinely finds the bus "filthy" with "food, bottles, cans and newspapers strewn about" does not raise an issue of fact as to whether defendants had constructive notice of the allegedly hazardous condition of the steps by reason of a dangerous recurring condition in the area of the steps that was routinely left unaddressed. A general awareness that debris may have been present on the bus is insufficient to raise an issue of fact as to whether defendants had notice of whatever it was on the steps that caused plaintiff to fall (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]; *Solazzo v New York City Tr. Auth.*, 6 NY3d 734 [2005], *affg* 21 AD3d 735, 736 [2005]; *Arrufat v City of New York*, 45 AD3d 710 [2007]).

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Mazanet-Daniels, JJ.

2571 Sophy P.-Q. Haynes, Index 67805/89
Plaintiff-Respondent,

-against-

Robert B. Haynes, etc.,
Defendant-Appellant.
- - - - - -
JPMorgan Chase, N.A., etc.,
Nonparty.

Moses & Singer LLP, New York (Joel David Sharrow of counsel), for appellant.

Bonnie P. Josephs, New York, for respondent.

Order, Supreme Court, New York County (Rosalyn H. Richter, J.), entered February 26, 2009, which, to the extent appealed from, held defendant responsible for paying two-thirds of tuition increases above a certain amount for the facility caring for the parties' son, granted plaintiff's application to sequester a trust to the extent of directing nonparty JPMorgan Chase to provide a certain sum from the trust on the first of each month, and denied defendant's motion for sanctions against plaintiff and her counsel, unanimously modified, on the law and the facts, that portion of the first decretal paragraph directing JP Morgan to provide defendant with certain sums on the first day of each month deleted and replaced with a provision requiring defendant to pay $10,000 annually and two-thirds of the increased tuition, minus any credits he is entitled to, and otherwise affirmed,

without costs.

Paragraph 2(d) of the parties' settlement stipulation, which obliges defendant to pay out of the trust two-thirds of tuition increases above $16,380, does not contain any plain language extinguishing defendant's obligation. Had defendant wanted to extinguish his obligation to pay the excess tuition, he could -- and should -- have done so explicitly (*see Ventricelli v DeGennaro*, 221 AD2d 231, 232 [1995], *lv denied* 87 NY2d 808 [1996]; *see generally Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Given the facts in the record, neither plaintiff's conduct nor that of her counsel was frivolous, warranting sanctions. Their actions were not without merit in law, were not undertaken primarily to delay or prolong the resolution of the litigation or to harass defendant, nor did they assert material factual statements that were false (22 NYCRR 130-1.1; *see Intercontinental Bank Ltd. v Micale & Rivera*, 300 AD2d 207 [2002]).

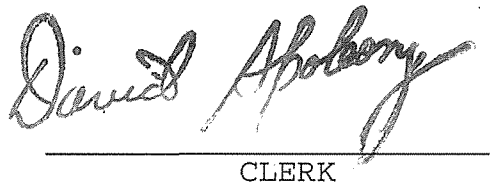
However, the court did err when in directed the co-trustee to make certain payments to defendant. Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith (*Matter of Preiskel*, 275 AD2d 171, 181 [2000]). The court does have the authority to exercise absolute discretion

in correcting abuses that are arbitrary or the result of bad faith (*see Matter of Gilbert*, 156 Misc 2d 379, 383 [1992]). However, the record contained no evidence of any abuse of discretion or bad faith by the trustee, nor, indeed, did plaintiff make an allegation to that effect. On the contrary, according to a representative of JP Morgan, for 16 years the bank chose to make those payments to enable defendant to pay the required tuition. Accordingly, the direction that JPMorgan should make such payments from the trust should be deleted.

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: APRIL 20, 2010



CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2572 The People of the State of New York, Ind. 349/08
Respondent,

-against-

Sharif Simmons,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered January 14, 2009, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of 5 years, unanimously affirmed.

Since defendant did not move to withdraw his guilty plea, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), his challenge to the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record establishes that defendant's plea was knowing, intelligent and voluntary, and there was nothing in the plea allocution that cast significant doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]). When, during the plea colloquy, defendant made statements that could be viewed as exculpatory, the court made careful inquiries

that established he was admitting his intentional participation in a robbery (*see People v McNair*, 13 NY3d 821 [2009]).

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2573 Kathleen Newman, Index 106161/07
Plaintiff-Respondent,

-against-

Ashutush Datta, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Sinel & Associates, PLLC, New York (Jessica Keeley of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered July 7, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Insofar as "a fracture" is one statutory definition of "serious injury" (Insurance Law § 5102[d]), we conclude that defendants failed to establish prima facie that plaintiff's dental injury did not constitute a serious injury within the meaning of the statute (*see Kennedy v Anthony*, 195 AD2d 942, 944 [1993]; *see also Sanchez v Romano*, 292 AD2d 202, 203 [2002]). Defendants' expert dentist, based on his examination of plaintiff, identified at least two fractured teeth about which he made no finding that the fractures antedated plaintiff's accident (*see Pommells v Perez*, 4 NY3d 566, 572 [2005]).

We would find, in any event, that plaintiff raised an issue

of fact through an affidavit by her oral surgeon, who stated that, based upon his examination of her and review of her dental records, it was his opinion that the accident caused fractures in two of plaintiff's teeth and that, as a result, plaintiff would be required to undergo extensive and ongoing dental treatment (*see Kennedy*, 195 AD2d at 944).

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2574 In re Lawrence Parker, Petitioner, Index 340863/08

-against-

Warden of George R. Vierno Correctional Facility, et al., Respondents.

Lawrence Parker, petitioner pro se.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondents.

Determination of respondent New York City Department of Correction, dated August 21, 2008, which, after a hearing, found that petitioner inmate violated the disciplinary rule prohibiting possession of contraband (tobacco), and directed that petitioner be detained for 90 days in punitive segregation, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, Bronx County [Robert E. Torres, J.], entered November 8, 2005), dismissed, without costs.

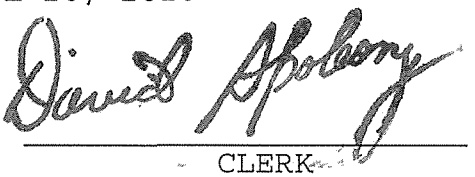
Contrary to petitioner's contention, his due process rights were not violated because his request for a hearing facilitator was denied and a witness testified outside of his presence. An inmate is entitled to a hearing facilitator only if he is non-English speaking or sensory-deprived (*see* 7 NYCRR 253.2). Petitioner has made no such showing and, as evidenced by his

papers and the hearing, was more than able to understand the charges and the proceedings. A witness is also allowed to testify outside of the petitioner's presence if doing so is necessary for institutional safety or correctional goals (7 NYCRR 253.5[b]). Here, the record indicates that the witness was unable to testify because he was needed elsewhere. Since the witness's testimony was recorded and made available to petitioner at the hearing, petitioner's due process rights were not violated (*see* 7 NYCRR 253.5[b]).

The record reveals that during a search of petitioner's cell, tobacco was discovered in his garbage can. Although the tobacco was discovered when the garbage can was emptied outside of petitioner's cell, a reasonable inference of possession arises from the fact that the contraband was discovered in his garbage can - an item within petitioner's control (*see Matter of Tavarez v New York City Dept. of Correction*, 50 AD3d 251, 251 [2008]). This inference, together with the report and notice of infraction and testimony adduced at the hearing, provides substantial evidence to support the determination (*id.*).

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

ENTERED: APRIL 20, 2010



CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2576 The People of the State of New York, Ind. 9586/96
Respondent,

-against-

Julio Santana,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about June 8, 2007, which adjudicated defendant a level three sex offender and sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Assuming, without deciding, that the state and federal standards for effective assistance at a criminal trial apply to a sex offender adjudication (*see People v Reid*, 59 AD3d 158 [2009], *lv denied* 12 NY3d 708 [2009]), we conclude that defendant received effective assistance at the classification hearing (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Given the seriousness of the aggravating factors, counsel could have reasonably concluded there was nothing more that could be done to

avoid an upward departure to level three (*see People v DeFreitas*, 213 AD2d 96, 101 [1995], *lv denied* 86 NY2d 872 [1995]). In any event, the alleged deficiencies in counsel's performance did not affect the outcome or deprive defendant of a fair hearing.

Defendant's argument that the People failed to provide him with notice of their intent to seek a risk level classification different from the Board's recommendation is improperly raised for the first time on appeal (*see People v Charache*, 9 NY3d 829 [2007]).

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2579 John McCarthy, et al.,
Plaintiffs,

Index 107959/05
590132/06
590371/06

-against-

Turner Construction, Inc.,
Defendant,

John Gallin & Son, Inc.,
Defendant-Respondent,

Boston Properties, Inc., et al.,
Defendants-Appellants.

[And Other Actions]

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for appellants.

Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 9, 2009, which denied the motion of defendants owners Boston Properties, Inc. and Times Square Tower Associates, LLC for summary judgment on their cross claim for contribution and common-law indemnification against defendant general contractor John Gallin & Son, Inc., and awarded Gallin summary judgment dismissing the cross claim, unanimously affirmed, without costs.

While the owners, whose liability for plaintiff's injuries was purely statutory, were entitled to contribution or indemnification from the party responsible for the injuries

(*Kelly v Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 NY2d 1 [1974]), Gallin neither was negligent nor directly supervised and controlled plaintiff's work (*see Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]).

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

ENTERED: APRIL 20, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
James M. Catterson
Leland G. DeGrasse
Nelson S. Román, JJ.

1568
Ind. 13721/06

Tetla Roques, etc.,
Plaintiff-Appellant,

-against-

David H. Noble, M.D., et al.,
Defendants-Respondents,

Our Lady of Mercy Medical Center,
Defendant.

Plaintiff appeals from an order of the Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered July 1, 2008, which granted defendants' motions to dismiss the wrongful death cause of action.

Thomas Torto, New York (Jason Levine of counsel), and David L. Taback, P.C., New York, for appellant.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for David H. Noble, M.D. and University Diagnostic Medical Imaging, respondents.

Martin Clearwater & Bell LLP, New York (Arjay G. Yao, Jeffrey A. Shor and Steven A. Lavietes of counsel), for Kamran Tabaddor, M.D. and New York Neuroscience Institute, P.C., respondents.

ROMÁN, J.

This action alleges medical malpractice, lack of informed consent and wrongful death. Defendants allegedly misdiagnosed decedent's condition and performed an unnecessary and contraindicated medical procedure, thereby injuring decedent and ultimately casing his death.

Defendants[1] moved for summary judgment solely on the cause of action for wrongful death, and the trial court granted defendants' motions finding that plaintiff failed to raise an issue of fact with respect to whether the malpractice alleged caused decedent's death. We now reverse.

In support of their motion, defendant Kamran Tabaddor, M.D. and New York Neuroscience Institute, P.C. submitted, among other things, an affirmation from Dr. Richard Stein, a board-certified physician in internal medicine and cardiovascular disease. Based on a review of decedent's medical records, evincing atherosclerosis, hypertension and diabetes, and decedent's autopsy report, listing the cause of death as atherosclerotic and hypertensive cardiovascular disease, Dr. Stein concludes that decedent's death was not caused by any of the procedures

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[1] With the exception of defendant Our Lady of Mercy Medical Center, against whom this action was discontinued, all defendants moved for summary judgment on the ground discussed.

performed upon him by the defendants. Rather, Dr. Stein concludes that decedent died of unrelated and preexisting cardiovascular disease.

In opposition to defendants' motions, plaintiff submitted, among other things, an affirmation from a physician board certified in internal medicine and cardiovascular disease. Based on a review of decedent's medical records and citing medical literature, plaintiff's medical expert concludes that decedent's death was in fact caused by the medical treatment rendered by the defendants. Specifically, plaintiff's expert alleges that insofar as stress can trigger a heart attack, decedent's death was hastened and precipitated by stress, directly resulting from defendants' malpractice.

In an action premised upon medical malpractice, a defendant doctor establishes prima facie entitlement to summary judgment when he/she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2008]; *Germaine v Yu*, 49 AD3d 685 [2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2004]). When medical malpractice forms the basis of a wrongful death action, in establishing that he/she

did not proximately cause the injuries alleged to have caused plaintiff's death, a defendant establishes prima facie entitlement to summary judgment as to the wrongful death action as well (*see Koeppel v Park*, 228 AD2d 288 [1996]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999 [2009], *supra*; *Myers v Ferrara*, 56 AD3d 78 [2008], *supra*).

With respect to opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Weingrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish prima facie entitlement to summary judgment as

a matter of law (*Cregan* at 108; *Wasserman* at 226).

Once the defendant meets his burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [2008]; (*Koeppel* at 289). In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston* at 1001; *Myers* at 84; *Rebozo* at 458).

Here, defendants established prima facie entitlement to summary judgment with regard to the cause of action for wrongful death. As previously noted, Dr. Stein's affirmation established that the malpractice, if any, was not the proximate cause of decedent's death. Instead, Dr. Stein concluded that decedent's

death was caused by preexisting cardiovascular disease. Dr. Stein's affirmation constituted competent evidence inasmuch as it is based on the record and addressed the pertinent allegations in the complaint.

In opposition, however, plaintiff's expert's opinion, based upon his review of the decedent's medical records, as well as pertinent medical literature, clinical studies and his own experience, raised factual issues as to whether defendants' treatment of the decedent caused or substantially contributed to his death. Specifically, plaintiff's expert concluded that defendants' malpractice stressed decedent and that the stress contributed to the hastening of his cardiovascular disease and thus to his death. Accordingly, questions of fact preclude summary judgment in defendants' favor.

Accordingly, the order of the Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered July 1, 2008, which granted defendants' motions to dismiss the wrongful death cause of action, should be reversed, on the law, without costs, the motions denied and the cause of action reinstated.

All concur except DeGrasse, J. who dissents in an Opinion.

DeGRASSE, J. (dissenting)

Plaintiff's decedent, Patrick Roques, Sr., died at the age of 59 on January 1, 2006. The autopsy report lists hypertensive and atherosclerotic cardiovascular disease as the cause of death and diabetes mellitus as a contributing condition. Plaintiff's wrongful death cause of action is based on allegations of medical malpractice by defendants Noble and Tabaddor, a radiologist and a neurosurgeon, respectively. Specifically, plaintiff alleges that on the basis of Noble's misinterpretation of a CT scan and an MRI film, Tabaddor performed two unnecessary and/or contraindicated procedures, a craniotomy and a cerebral stereotactic biopsy.

Tabaddor and the New York Neuroscience Institute, with which Tabaddor was associated, moved for summary judgment on the ground that there was no causal relationship between decedent's death and his treatment of the decedent. Noble and his medical group, defendant University Diagnostic Medical Imaging, similarly sought summary judgment on the ground that there is no causal connection between the decedent's death and Noble's conduct. Supreme Court granted both motions, finding the affirmation of plaintiff's medical expert insufficient to raise a triable issue of fact as to whether the decedent's death was caused by the wrongful act, neglect or default of Tabaddor or Noble. I dissent because I disagree with the majority's conclusion that the motions should

have been denied.

In order to establish a prima facie case of medical malpractice, a plaintiff must show that a defendant deviated from accepted medical practice and that the alleged deviation proximately caused injury (*see Koeppel v Park*, 228 AD2d 288, 289-290 [1996]. On a motion for summary judgment in a medical malpractice case, a defendant meets the initial burden by establishing that he or she did not deviate from accepted medical practice or proximately cause injury (*Mattis v Keen Zhao*, 54 AD3d 610, 611 [2008]). In support of their motions, defendants submitted the affirmation of Dr. Richard Stein, a physician board-certified in internal medicine and cardiovascular disease. Dr. Stein opined that the decedent's death was not proximately caused by the surgical procedures performed by Dr. Tabaddor eight months earlier. I agree with the majority's conclusion that Dr. Stein's affirmation established defendants' prima facie entitlement to summary judgment. Hence, the burden shifted to plaintiff to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*see Sisko v New York Hosp.*, 231 AD2d 420, 422 [1996], lv dismissed 89 NY2d 982 [1997]).

In a medical malpractice action, once a defendant has established the absence of any departure from good and accepted

medical practice or that the plaintiff was not injured thereby, a plaintiff, in opposition, "must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury" (*Keevan v Rifkin*, 41 AD3d 661, 662 [2007] [internal quotation marks and citation omitted]).

To meet her burden, plaintiff submitted the affirmation of a physician who opined that the operative procedures performed by Dr. Tabaddor and their sequelae caused and substantially contributed to the decedent's hypertension, atherosclerotic cardiovascular disease and ultimate demise. Even if sufficient to raise a factual issue as to whether the surgical procedures were causally related to the decedent's death, plaintiff's expert's affirmation falls short of the proof required under *Keevan* because it does not set forth any alleged departures from good and accepted medical practice. Therefore, I would affirm the order entered below.

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

ENTERED: APRIL 20, 2010

CLERK