SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 26, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Nardelli, Renwick, Freedman, Román, JJ.

1679 Annie Rodgers, Index 24306/06
Plaintiff-Appellant,

-against-

66 East Tremont Heights
Housing Development
Fund Corporation,
Defendant-Respondent.

Robert F. Himmelman, New York, for appellant.

Agins, Siegel, Reiner & Bouklas, LLP, New York (Richard H. Del Valle of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 17, 2008, which, inter alia, granted defendant's motion to vacate the default judgment entered against it, unanimously affirmed, without costs.

It is well settled that a defendant seeking to vacate a judgment entered upon its default in appearing and answering the complaint must demonstrate a reasonable excuse for the delay, as well as a meritorious defense to the action (*see* CPLR 5015(a)(1); *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court

(*see Grutman v Southgate At Bar Harbor Home Owners' Assn.*, 207 AD2d 526, 527 [1994]).

In the case at bar, defendant submitted affidavits wherein it denied ever being served with process. However, upon receipt of a letter from plaintiff's counsel which contained a copy of the pleadings, defendant immediately forwarded the correspondence and pleadings to its insurer. Thus, it was reasonable for defendant to believe that its insurer would take the appropriate action to appear and defend the action (*see Heskel's West 38th Street Corp. v Gotham Const. Co. LLC*, 14 AD3d 306 [2005]).

Defendant also demonstrated a meritorious defense to plaintiff's claims, asserting that upon receiving, in April 2006, plaintiff's first and only complaint regarding defective windows, which was unrelated to the defect at issue, defendant made the necessary repairs and received no further complaints thereafter. Hence, defendant demonstrated lack of notice of the claimed condition that, four months later, allegedly resulted in plaintiff's injuries (*Chelli v Kelly Group, P.C.*, 63 AD3d 632 [2009]).

In light of the strong public policy of this State to dispose of cases on their merits (*see Santora & Kay v Mazzella*, 211 AD2d 460, 463 [1995]), the motion court providently exercised

its discretion in granting defendants' motion to vacate the default order.

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

ENTERED: JANUARY 26, 2010

Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1908 The People of the State of New York, Ind. 5734/07
Respondent,

-against-

Damon Cypress,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Rena Uviller, J.), rendered on or about July 16, 2008, 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.

M-5752 People v Damon Cypress

Motion seeking leave to proceed pro se denied.

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

ENTERED: JANUARY 26, 2010

David Apolony

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Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1934N-
1935N-
1935NA Chedli Gassab,
Plaintiff-Appellant,

-against-

R.T.R.L.L.C.,
Defendant-Respondent.
- - - - - -
Flomenhaft & Cannata, LLP,
Nonparty-Appellant,

Steinberg, Fineo, Berger &
Fischoff, P.C., et al.,
Nonparty-Respondents.
- - - - -
R.T.R.L.L.C.,
Third-Party Plaintiff,

-against-

Price Thomas Studios, Inc.,
Third-Party Defendant-Respondent.
- - - - -
Price Thomas Studios, Inc.,
Fourth-Party Plaintiff,

-against-

Bronx Builders,
Fourth-Party Defendant-Respondent,

Gorton Associates Incorporated,
Fourth-Party Defendant.

[And a Second Third-Party Action]

Index 122439/99
590217/00
591300/00
590113/01

Jacoby & Meyers, LLP, New York (Michael Flomenhaft of counsel), for appellants.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for R.T.R.L.L.C., respondent.

Steinberg, Fineo, Berger & Fischoff, P.C., Woodbury (Jonathan Arzt of counsel), for Steinberg, Fineo, Berger & Fischoff, P.C., respondent.

L'Abbate, Balkan, Colavita & Contini, L.L.P, Garden City (William T. McCaffery of counsel), for Katz & Kriences, LLP, respondent.

Gallagher, Walker, Bianco & Plastaras, Mineola (Robert J. Walker of counsel), for Price Thomas Studios, Inc., respondent.

Kelly, Rode & Kelly, LLP, Mineola (John W. Hoefling of counsel), for Bronx Builders, respondent.

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered on or about July 7, 2008 and on March 11, 2009, respectively, which, to the extent appealable, denied plaintiff's motions to renew the order, same court and Justice, entered January 23, 2008, denying plaintiff's motion to vacate a 2002 verdict rendered in his favor in a personal injury action, and granted the opposing parties' cross motions for costs and sanctions pursuant to 22 NYCRR 130-1.1(a), unanimously affirmed, with costs in favor of defendant R.T.R.L.L.C. to be paid by plaintiff's appellate counsel. Appeals from so much of the same orders as denied plaintiff's motions to reargue the January 23, 2008 order, unanimously dismissed, without costs, as taken from nonappealable orders. Plaintiff's purported appeal from the January 23, 2008 order, unanimously dismissed, without costs, for failure to include a notice of appeal from that order in the record on appeal.

The motion court properly found that plaintiff failed to

demonstrate a reasonable justification for the failure to present the "new evidence" on the initial motion to renew (CPLR 2221[e]; *Crawford v Sorkin*, 41 AD3d 278 [2007]). Further, the motion court correctly concluded that the evidence would not change the prior determination since the conclusion of plaintiff's expert was reached years after the 2002 trial and was belied by plaintiff's behavior and abilities at trial, which the motion court had personally observed, and by the fact that plaintiff's expert, who testified at trial, raised no concerns regarding plaintiff's competence at that time.

Plaintiff's second motion for renewal was also properly denied since a complete affidavit from his expert would have made no difference to the outcome of the first motion for renewal. Indeed, the motion court did not deny the first renewal motion for failure to provide a complete affidavit. Rather, the court rejected the expert's opinion as not probative since it was not a conclusion reached at the time plaintiff allegedly suffered from the inadequacy. In addition, plaintiff again failed to demonstrate a reasonable justification for failing to present his new evidence previously.

The motion court providently exercised its discretion in imposing costs and sanctions after the second motion to renew (22 NYCRR 130-1.1[a]). Indeed, plaintiff had filed two meritless motions for reconsideration after having been warned by the

motion court that his motion to vacate barely escaped the imposition of costs and sanctions (*see Newman v Berkowitz*, 50 AD3d 479 [2008]; *East N.Y. Sav. Bank v Sun Beam Enters.*, 256 AD2d 78 [1998]).

To the extent plaintiff appeals from the denial of his motions to reargue, no appeal lies from those portions of the motion court's orders (*Stratakis v Ryjov*, 66 AD3d 411 [2009]). Plaintiff's purported appeal from the January 23, 2008 order is not properly before this Court since plaintiff failed to include a notice of appeal from that order in the record on appeal.

M-5502 ***Gassab v R.T.R.L.L.C., et al.***

Motion seeking imposition of sanctions and an award of costs and attorney's fees granted to the extent of awarding costs to defendant R.T.R.L.L.C., to be paid by plaintiff's appellate counsel as noted in the decretal paragraph.

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

ENTERED: JANUARY 26, 2010

DEPUTY CLERK
CLERK

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2034 The People of the State of New York, Ind. 6850/04
Respondent,

-against-

Hector Ferrer,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (James A. Yates, J.), entered on or about April 16, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

At the SORA classification hearing, defendant introduced expert testimony challenging the accuracy of the Risk Assessment Instrument (RAI) in predicting the risk of recidivism, and presenting other factors that the expert viewed as a better predictor of risk. The expert testified, among other things, that New York's RAI is unreliable and is not generally accepted in the scientific community. The expert cited a number of methodological defects in the RAI, emphasizing that it assigns a particular number of points for each risk factor without employing valid statistical data demonstrating the relationship

between that factor and actual recidivism among a population of sex offenders. According to the expert, an actuarial risk assessment instrument known as the STATIC-99 (*see Matter of State of New York v Rosado*, 25 Misc 3d 380, 388-394 [Sup Ct, Bronx County 2009] [extensive discussion of STATIC-99]) is based on valid empirical data and would be an appropriate tool of assessment, unlike the RAI. Defendant also presented testimony that, had he been evaluated under STATIC-99, he would have shown a relatively low risk of recidivism.

Defendant argues that the RAI is scientifically invalid, and that he was therefore deprived of due process by its use. Although, as discussed below, his point score makes him a level two offender, he seeks a reduction to level one, either as the default level on the basis of rejection of the RAI, or by affirmatively substituting his claimed STATIC-99 score to find a "low" risk of reoffense. Defendant has not cast his argument as a request for a discretionary downward departure; instead he argues that use of the RAI is erroneous as a matter of law.

Regardless of whether the RAI is the optimal tool of predicting recidivism, or whether another instrument might be better, defendant has not shown that the use of the RAI is unconstitutional. In imposing civil restrictions on liberty based on predictions of future dangerousness, governments have considerable latitude that does not necessarily "depend[] on the

research conducted by the psychiatric community" (*Jones v United States*, 463 US 354, 365 n 13 [1983]; *see also Kansas v Hendricks*, 521 US 346, 360 n 3 [1997]). Moreover, as defendant acknowledges in his reply brief, the risk level designated in the RAI is merely presumptive, and a court may depart from it as a matter of discretion (*People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 (2008). Here, the hearing court's decision indicates that it weighed the RAI against the defense evidence and arguments, and that it properly concluded that defendant had a moderate risk of reoffense, so that a level two assessment was appropriate.

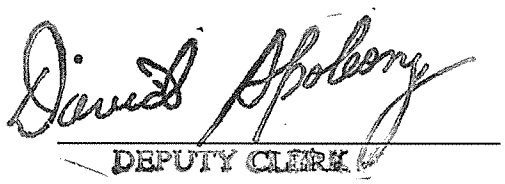
Defendant alternatively argues that even under the RAI there were insufficient points established to qualify him as a level two offender. Although our analysis differs somewhat from that of the hearing court (*see People v Larkin*, 66 AD3d 592 [2009]), we find that the People met their burden of establishing, by clear and convincing evidence, risk factors bearing a total score of 75 points, which supports a level two adjudication. The court should not have assessed 15 points for drug abuse, since defendant had been abstinent for an 18-year period and was not abusing drugs at the time of the offense. However, we find that the court should have assessed 10 points for defendant's failure to accept responsibility for his crime, notwithstanding his guilty plea, since both the pre-sentence report and the case

summary indicated that he denied committing the offense and declared that he had pleaded guilty as a matter of expediency. Defendant's argument concerning the sufficiency of the proof of the age of the victim at the time of the underlying sex crime is without merit (*see People v Mingo*, 12 NY3d at 573).

We have considered and rejected defendant's remaining claims.

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

ENTERED: JANUARY 26, 2010



Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2035 Chonda Maynard, Index 304120/09
Plaintiff-Appellant,

-against-

Patti Vandyke,
Defendant-Respondent.

The Sullivan Law Firm, New York (Timothy M. Sullivan of counsel), for appellant.

Law Offices of Thomas K. Moore, White Plains (Howard T. Code of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered September 1, 2009, which denied plaintiff's motion for summary judgment on the issue of liability, with leave to renew upon completion of depositions, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff's vehicle, while stopped at a traffic light, was struck in the rear by defendant's vehicle. In opposition to plaintiff's motion for summary judgment, defendant failed to raise a question of fact as to whether there was a nonnegligent reason for the collision (*see Mullen v Rigor*, 8 AD3d 104 [2004]). Since defendant herself would be the party with knowledge of any such nonnegligent reasons, it does not avail her that her counsel had not yet received plaintiff's bill of particulars setting

forth his claims in detail (*Soto-Maroquin v Mellet*, 63 AD3d 449 [2009]).

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2038 Michael Driscoll, Index 115969/08
Claimant-Appellant,

-against-

New York State Attorney General's
Office Litigation Unit,
Defendant-Respondent.

Michael Driscoll, appellant pro se.

Andrew M. Cuomo, Attorney General, Albany (Kathleen M. Treasure of counsel), for respondent.

Order of the Court of Claims of the State of New York (Alan C. Marin, J.), entered June 1, 2009, which denied claimant's motion for a default judgment, unanimously modified, on the law, to the extent of dismissing the underlying claim for lack of subject matter jurisdiction, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the claim.

The motion court correctly denied claimant's motion for a default judgment as contrary to Court of Claims Act § 12(1). Defendant, apparently receiving its first notice of this pro se matter on this appeal, also correctly asserts the lack of subject matter jurisdiction in the Court of Claims (*see Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]; *Ranz v Sposato*, 77 AD2d 408, 409-410 [1980]; *McConnell v Williams S.S. Co.*, 239 AD 393, 395 [1933], *affd no opinion* 265 NY 594 [1934]), since the

underlying claim, inter alia, does not comply with the pleading requirements of Court of Claims Act § 11[b] (*see Kolnacki v State of New York*, 8 NY3d 277, 280 [2007]; *Lepkowski v State of New York*, 1 NY3d 201, 206-207 [2003]) and seeks judicial review by the Court of Claims of claimant's divorce proceedings (*see* Court of Claims Act § 9[2]). Hence, such dismissal is warranted.

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2040 The People of the State of New York, Respondent, Ind. 1661/07

-against-

Saifuddin Abdus-Samad, Defendant-Respondent.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 30, 2007, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

Defendant's valid waiver of his right to appeal forecloses his claim that he was improperly deprived of a hearing as to the constitutionality of the predicate convictions upon which he was adjudicated a persistent violent felony offender (*see People v Moore*, 48 AD3d 222 [2008], *lv denied* 10 NY3d 867 [2008]). The record establishes that defendant discussed the waiver with counsel and understood it. Although by the terms of the waiver, as well as by operation of law, defendant retained the right to challenge the legality of his sentence on appeal, his present claim does not involve legality. Instead, "defendant's appellate

claim [is] addressed merely to the adequacy of the procedures the court used to arrive at its sentencing determination," and it is therefore foreclosed by the waiver (*People v Callahan*, 80 NY2d 273, 281 [1992]; *see also People v Samms*, 95 NY2d 52, 56-58 [2000]).

As an alternative holding, we reject, on the merits, defendant's contention that he was entitled to a hearing. Defendant was adjudicated a persistent violent felony offender at the plea proceeding. At that time, he expressly declined to challenge the constitutionality of his predicate convictions (*see* CPL 400.15[3]). Nevertheless, at sentencing, defendant told the court it had "just come to his attention" that he could make such a challenge. Although the court did nothing to prevent defendant from making a specific challenge, defendant made no attempt to do so. Instead, he merely stated he thought he would need to obtain minutes. Since defendant had already been adjudicated a persistent violent felony offender at the plea proceeding, this request was untimely under CPL 400.15(7)(b). Moreover, even if the request had been timely made, "Supreme Court was not required, as a matter of law, to grant defendant an adjournment to try to put together a more persuasive case" (*People v Diggins*, 11 NY3d 518, 525 [2008]). In addition, while the fact that defendant never appealed from either of his prior convictions did not preclude him from raising constitutional objections to their

use as predicate felony convictions (*see People v Johnson*, 196 AD2d 408 [1993], *lv denied* 82 NY2d 806 [1993]), this was still a relevant consideration with regard to the likelihood that affording defendant an opportunity to gather evidence might yield a meritorious issue.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2045 In re L&L Painting Co., Inc., Petitioner-Appellant, Index 107877/08

-against-

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

Duane Morris LLP, New York (Charles Fastenberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for the City of New York and The City of New York Department of Transportation, respondents.

Charles D. McFaul, New York, for The City of New York Contract Dispute Resolution Board, respondent.

Judgment (denominated an order), Supreme Court, New York County (Alice Schlesinger, J.), entered November 10, 2008, denying the petition to annul the determination of respondent Contract Dispute Resolution Board (CDRB), dated February 8, 2008, which denied petitioner's claim for additional compensation for work performed pursuant to a contract to repaint the Queensboro Bridge, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The CDRB correctly found that under the contract it is petitioner's absolute obligation to protect its work against, inter alia, fire damage and to replace or repair the work in the event of such damage. Therefore, its determination that the work performed by petitioner in the aftermath of the fire was not

extra work under the contract for which petitioner was entitled to be compensated was rationally based, was not arbitrary and capricious, and was not affected by an error of law (*see Matter of Weeks Mar. v City of New York*, 291 AD2d 277 [2002], *lv denied* 99 NY2d 652 [2003]).

Petitioner's contractual obligation is not affected by the issue of causation, which in any event was not within the jurisdiction of the CDRB and was not decided by the CDRB. Nor is there is evidence that the City frustrated petitioner's performance of the contract.

Petitioner's argument that General Obligations Law § 5-322.1 renders the above-cited "absolute obligation" clause unenforceable is without merit.

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2046 In re Jason E.,
Petitioner-Respondent,

-against-

Tania G.,
Respondent.

- - - -

Gregory W.,
Nonparty-Appellant.

Joseph V. Moliterno, Scarsdale, for appellant.

Julian A. Hertz, Larchmont, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), Law Guardian.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about December 12, 2008, which dismissed non-party appellant's motion to vacate an order of filiation, same court and Judge, entered January 30, 2008 upon his default, adjudicating petitioner the father of the subject child, unanimously modified, on the law, the motion denied instead of dismissed, and otherwise affirmed, without costs.

Contrary to the court's conclusion that appellant had no further interest in the outcome of petitioner's paternity proceeding after his own paternity petition was dismissed on default, as the husband of the child's mother at the time of the child's birth, appellant is presumed to be the child's father until the presumption is rebutted, and therefore was a necessary

party to petitioner's paternity proceeding (*see* Family Ct Act § 417; *Matter of Marilene S. v David H.*, 63 AD3d 949 [2009]; CPLR 1001[a]; *see Matter of Richard W. v Roberta Y.*, 212 AD2d 89, 91-92 [1995]; *see generally Albert C. v Joan C.*, 110 AD2d 803 [1985], *superseded on other grounds by rule as stated in New Medico Assoc. v Empire Blue Cross & Blue Shield*, 267 AD2d 757 [1999]). Although appellant was never formally named as a party, the record establishes that he was served with the petition; in addition, the court made clear that it intended to hear the competing petitions together. When appellant failed to appear for the January 30, 2008 hearing and his appointed counsel failed to participate in the proceeding on his behalf, appellant's petition was dismissed and petitioner's petition was granted on default (*compare Matter of Vanessa M.*, 263 AD2d 542 [1999], *with Matter of Amani Dominique H.*, 67 AD3d 466 [2009]). Appellant's only recourse was to move to vacate the orders entered on default (*see Matter of Edward QQ.*, 243 AD2d 748, 749 [1997]; *Matter of Geraldine Rose W.*, 196 AD2d 313, 316 [1994], *lv dismissed* 84 NY2d 967 [1994]).

Appellant's motion to vacate should have been denied in any event because he failed to demonstrate excusable neglect and a meritorious claim of paternity (CPLR 5015[a][1]); *see Matter of Jones*, 128 AD2d 403, 404 [1987]). Appellant's excuse that he did not have notice of the January 30, 2008 inquest is belied by the

record, which also shows that he made little or no effort to ascertain when he was expected to return to court (*see Matter of Jaynices D.*, 67 AD3d 518 [2009]; *Matter of Christian T.*, 12 AD3d 613 [2004]).

The presumption of legitimacy in appellant's favor is rebutted and invocation of the doctrine of equitable estoppel to bar him from challenging petitioner's paternity is justified by the evidence that the child's mother left appellant before or at about the time of the child's conception, that she led petitioner and the child to believe that petitioner was the father, that petitioner supported the child and raised her and her brother as his children from the time of the child's birth, and that petitioner and the child's mother attested in a signed and notarized statement that petitioner was the child's father (*see* Family Ct Act §§ 417; 418(a); *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]; *Matter of Kristin D. v Stephen D.*, 280 AD2d 717 [2001]; *Matter of Richard W. v Roberta Y.*, 240 AD2d 812 [1997], *lv denied* 90 NY2d 809 [1997]; *Michel DeL. v Martha P.*, 173 AD2d 308 [1991]; *Purificati v Paricos*, 154 AD2d 360 [1989]; *Matter of Ettore I. v Angela D.*, 127 AD2d 6 [1987]). Appellant failed to demonstrate that it would nevertheless be in the

child's best interests for the court to order a DNA test (*see Matter of Shondel J.*, 7 NY3d at 326; *Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564 [2006]; *Matter of Richard W.*, 240 AD2d at 815; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466, 469 [1983], *affd* 63 NY2d 859 [1984]). The record demonstrates that appellant has had virtually no contact with or responsibility for the child and that for the first 18 months of her life he took no action to assert his paternity or to establish any relationship with her, but instead permitted another man to take on the responsibilities of fatherhood.

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

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2047 American International Insurance Co., etc., Plaintiff-Respondent, Index 112391/06

-against-

MJM Quality Construction, Inc., Defendant-Appellant,

LJK Construction, Inc., et al., Defendants.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (John D. McKenna of counsel), for appellant.

Gwertzman Lefkowitz Burman Smith & Marcus, New York (Robert J. Finn of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered August 25, 2009, which denied the motion of defendant MJM Quality Construction, Inc. to vacate its default, unanimously reversed, on the facts, with costs to be paid by MJM, and the motion granted.

Plaintiff commenced this subrogation action against MJM and three of its subcontractors, alleging that their actions resulted in a fire in the home of plaintiff's insured. On January 8, 2009, plaintiff notified MJM, which was then without counsel, of a January 21 court conference. Although the return receipt was signed by an assistant project manager at MJM, the notice failed to reach MJM's president, who was solely responsible for the corporation's decisions. MJM did not appear at the conference,

whereupon the court struck its answer and directed an inquest on damages. In June 2009, MJM, which had obtained new counsel, moved to vacate its default, and included in its submissions was an affidavit from its president, blaming a nonparty not under its control for the fire.

MJM demonstrated a reasonable excuse for its failure to appear at the court conference, namely that its assistant project manager, upon receiving notice of the conference, failed to forward the notice to MJM's president (*see Triangle Transp., Inc. v Markel Ins.* Co., 18 AD3d 229 [2005]; *Wilson v Sherman Terrace Coop., Inc.*, 14 AD3d 367 [2005]). There is also no dispute that MJM has sufficiently alleged a meritorious defense (*see Bell v Toothsavers, Inc.*, 213 AD2d 199 [1995]). Furthermore, plaintiff was not unduly prejudiced by the delay between the default and the motion to vacate (*see Consortium Consulting Group v Chee Tsai*, 2 AD3d 177, 178 [2003]; *Koren-DiResta Constr. Co. v CNA Ins. Cos.*, 176 AD2d 567, 568 [1991]). Even if discovery proceeded in MJM's absence, the remaining defendants (MJM's subcontractors) have the same interest as MJM in blaming the

nonparty for the fire, so it is unlikely that discovery will have to be completely redone.

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2048 Garibaldi Masi, Index 107818/08
Plaintiff-Appellant,

-against-

Edward Sivin, Esq., et al.,
Defendants-Respondents.

The Law Offices of Neal Brickman, P.C., New York (Neal Brickman of counsel), for appellant.

Mound Cotton Wollan & Greengrass, New York (Mark S. Katz of counsel), for Edward Sivin and Sivin & Miller, LLP, respondents.

William C. House, New York, respondent pro se.

Jeffrey Lessoff, New York, respondent pro se.

Boundas, Skarzynski, Walsh & Black, LLC, New York (Evan Shapiro of counsel), for Robert D. Becker and Becker & D'Agostino, P.C., respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 10, 2008, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

The doctrine of collateral estoppel bars this malpractice action by plaintiff against the four attorneys who successively represented him in a federal diversity suit that was dismissed for plaintiff's continuous and willful failure to comply with discovery orders, the district court having rejected his attempt to shift responsibility for the noncompliance to his attorneys

(*see Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2001]).

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2049 The People of the State of New York, Ind. 4193/08
Respondent,

-against-

Prazel Washington,
Defendant-Appellant.

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

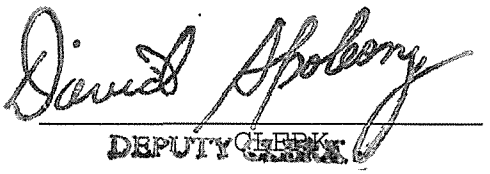
Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Arlene Goldberg, J.), rendered on or about October 16, 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: JANUARY 26, 2010



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

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2050-
2051-

Ivalisse Bustamante, etc., et al., Index 13908/99
Plaintiffs-Appellants,

-against-

Green Door Realty Corp., et al.,
Defendants-Respondents.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for appellants.

Silverson, Pareres & Lombardi LLP, New York (Rachel H. Poritz of counsel), for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered August 7, 2008, which, in an action for personal injuries sustained on defendants' premises, denied plaintiffs' motion to vacate an order, same court and Justice, entered on or about January 22, 2008, which had granted, upon default, defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered April 15, 2009, which denied plaintiffs' motion to renew their motion to vacate the January 22, 2008 order, unanimously reversed, on the facts, without costs, renewal granted, and, upon renewal, plaintiffs' motion to vacate the January 22, 2008 order granted, defendants' motion to dismiss the complaint denied, and the complaint reinstated.

With respect to the order of January 22, 2008, even if the

branch of defendants' motion to dismiss the complaint based on CPLR 3126 should have been denied, although unopposed, for lack of an affirmation of good faith as required by 22 NYCRR 202.7, the lack of opposition nevertheless warranted the granting of the branch of the motion based on the court-issued CPLR 3216 notice. Plaintiffs' motion to vacate that default on the ground that, inter alia, a court clerk had extended the CPLR 3216 notice was properly denied for lack of an affidavit of merit (*see Pennsylvania Bldg. Co. v Schaub*, 14 AD3d 365 [2005]), a defect that was not remedied by plaintiffs' submission of an affidavit of merit in their reply (*see Migdol v City of New York*, 291 AD2d 201 [2002]). Although, on renewal, plaintiffs failed to adequately explain this lapse in practice, they did show that the action is meritorious; that there were compelling reasons, having to do with their attorney's health and the health of his immediate family members, for their delay in providing the medical authorizations that defendants sought and for their failure to oppose the motion to dismiss; and that they had provided the authorizations sought to the extent possible. Furthermore, it does not appear that defendants have been prejudiced by the delays in obtaining the authorizations attributable to plaintiffs. Accordingly, in the interest of justice and substantive fairness (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [2001]), we grant

renewal, excuse plaintiffs' failure to oppose defendants' motion to dismiss, and reinstate the complaint (*see 219 E. 7th St. Hous. Dev. Fund Corp. v 324 E. 8th St. Hous. Dev. Fund Corp.*, 40 AD3d 293 [2007]; *Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 293 AD2d 324 [2002]).

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2052 In re Lakeisha Turner, Index 102227/08
Petitioner-Appellant,

-against-

Martin F. Horn, Correction Commissioner of the New York City Department of Correction, et al.,
Respondents-Respondents.

Robert Ligansky, New York, for appellant.

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

Order and judgment (one paper), Supreme Court, New York County (Emily Jane Goodman, J.), entered January 15, 2009, which denied the petition for a judgment annulling respondents' determination to terminate petitioner's probationary employment and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

A probationary employee may be discharged without a hearing or a statement of reasons, in the absence of a demonstration that her termination was made in bad faith, for a constitutionally impermissible purpose, or in violation of statutory or decisional law (*see Matter of York v McGuire*, 63 NY2d 760, 761 [1984]; *Matter of Cipolla v Kelly*, 26 AD3d 171 [2006]). Respondent terminated petitioner's probationary employment following an investigation which concluded, based on substantial evidence in the record, that she had failed to comply with departmental rules

and regulations pertaining to "undue familiarity" with current or former inmates (*see Matter of Medina v Sielaff*, 182 AD2d 424, 427-428 [1992]). In this proceeding, petitioner submitted evidence challenging the investigators' conclusion, but did not submit any evidence raising a substantial issue as to respondents' bad faith in investigating the alleged violation or in deciding to terminate her employment, which would require a hearing (*see Matter of Bradford v New York City Dept. of Correction*, 56 AD3d 290 [2008], *lv denied* 12 NY3d 711 [2009]). Accordingly, there is no basis to interfere with respondents' determination and no issue requiring a hearing.

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

ENTERED: JANUARY 26, 2010

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2053 Israel Deutsch, et al., Index 116105/03
Plaintiffs-Appellants,

-against-

City of New York, et al.,
Defendants,

The New York City Transit Authority,
Defendant-Respondent.

Sanford Solny, Brooklyn, for appellants.

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

Order, Supreme Court, New York County (Donna M. Mills, J.), entered July 10, 2008, which, in an action for personal injuries sustained in a fall on steps leading down to a subway station, insofar as appealable, denied plaintiff's motion to renew defendant-respondent Transit Authority's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Assuming the report of plaintiff's expert should have been considered by the motion court on plaintiff's motion to renew, the report, which was based on an inspection of the steps conducted almost six years after the accident, does not raise an issue of fact as to causation. Plaintiff testified that he does not know why he fell, and the expert's opinion that plaintiff fell because of dangerously uneven riser heights is speculative

in the absence of evidence tending to show the existence of the alleged uneven risers at the time plaintiff fell (*see Telfeyan v City of New York*, 40 AD3d 372, 373 [2007]; *Batista v New York City Tr. Auth.*, 66 AD3d 433 [2009]; *Kane v Estia Greek Rest.*, 4 AD3d 189 [2004]). Nor does plaintiff show how further disclosure might reveal evidence sufficient to raise an issue of fact as to whether he fell because of a defect in the steps (*see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163-164 [1980]).

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

ENTERED: JANUARY 26, 2010