SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**MARCH 4, 2010**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5191 The People of the State of New York, Ind. 42542C/06
Respondent,

-against-

Felix Cepeda,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

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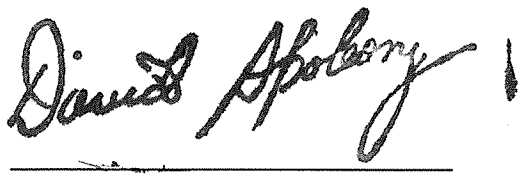
This matter is transferred to the Appellate Term, First Judicial District for consideration of defendant's appeal. Defendant was initially charged with, and subsequently convicted of, operating a motor vehicle while under the influence of alcohol or drugs in violation of Vehicle and Traffic Law § 1192(1), a traffic infraction. The case was tried in the

Criminal Court of the City of New York, Bronx County.

Accordingly, Appellate Term has the exclusive jurisdiction to hear this appeal (CPL 450.60[4]).

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

ENTERED: MARCH 4, 2010



CLERK

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

1670 Alayne Salvador, Index 18014/05
Plaintiff-Respondent,

-against-

The New York Botanical Garden,
Defendant,

Verizon New York, Inc.,
Defendant-Appellant.

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McAndrew, Conboy & Prisco, LLP, Woodbury (Mary C. Azzaretto of counsel), for appellant.

Marie R. Hodukavich, Bronx, for respondent.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered November 28, 2008, which denied defendant Verizon New York, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against said defendant. The Clerk is directed to enter judgment accordingly.

The instant action is for personal injuries stemming from the negligent maintenance of a premises. Plaintiff alleges that on February 5, 2005, while within premises owned and maintained by defendant New York Botanical Garden (Botanical Garden), she was injured when she collided with a telephone booth, housing a telephone installed by defendant Verizon New York, Inc. (Verizon). Plaintiff further alleges that the placement of the telephone booth, in combination with several other factors, such

as the lighting conditions at the time, constituted a dangerous condition and that defendants were negligent with respect to the maintenance of both the premises and the telephone booth.

The record reveals the following. On February 5, 2005, plaintiff along with her child, her friend, and her friend's child, was within the instant premises. While plaintiff stood in a brightly lit area, her friend's child darted towards a dark hallway. As plaintiff chased the child, following a handrail along a ramp in the hallway, she ran into an unmarked and dark telephone half booth. Although Verizon installed the telephone, there was uncontradicted testimony that Verizon did not provide or install the booth and would not normally install customer-provided equipment. The hallway within which the telephone booth was located was illuminated with florescent lights, maintained by Botanical Garden, which were checked daily prior to admitting the public into the premises.

Verizon moved for summary judgment, asserting, inter alia, that the phone booth was open and obvious and not inherently dangerous and that in any event, Verizon did not install or provide the booth. The Supreme Court denied the motion, holding that Verizon failed to establish that the telephone booth was both open and obvious and not an inherently dangerous condition.

In order to prevail in any action premised upon negligence, it must be established that defendant owed plaintiff a duty, that

defendant, by act or omission, breached such duty, that such breach was the proximate cause of plaintiff's injuries, and that plaintiff sustained damages (*Febesh v Elcejay Inn Corp.*, 157 AD2d 102 [1990], *lv denied* 77 NY2d 801 [1991]). Absent any evidence of causation, there can be no liability (*Laub v Faessel*, 297 AD2d 28, 31 [2002]).

Accordingly, inasmuch as the evidence indicates that Verizon neither installed the telephone booth nor maintained the premises and its lighting, there is no causal connection between plaintiff's injury and Verizon's conduct.

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

ENTERED: MARCH 4, 2010

David Gholson

CLERK

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

1674 Manuel Mata, Index 23055/03
Plaintiff-Appellant, 84118/04
84730/05

-against-

The Park Here Garage Corp., et al.,
Defendants-Respondents.

- - - - -

The Park Here Garage Corp.,
Third-Party Plaintiff-Respondent,

-against-

Jonathan & Gabrielle Parking Inc.,
Third-Party Defendant-Respondent.

[And a Second Third-Party Action]

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Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellant.

Law Offices of Cheng & Associates, PLLC, Long Island City (Pui Chi Cheng of counsel), for The Park Here Garage Corp., respondent.

Cascone & Kluepfel, LLP, Garden City (Leonard M. Cascone of counsel), for Jonathan & Gabrielle Parking, Inc., respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 23, 2008, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1) and granted defendants' cross motions for summary judgment dismissing the § 241(6) claim, modified, on the law, plaintiff's motion granted, the matter remanded for assessment of damages, and otherwise affirmed, without costs.

Plaintiff, an independent contractor, was engaged to repair an inoperative rolling garage gate permanently affixed to a structure used as a commercial parking facility (*see Izrailev v Ficarra Furniture of Long Is.*, 70 NY2d 813, 815 [1987]). The work required the removal of a 300-pound tube-and-spring assembly from brackets securing it to the top of the garage entranceway, more than 10 feet above the ground. Plaintiff improvised a pulley system consisting of a length of chain draped over an upper rung of his own extension ladder and attached to the assembly. As plaintiff and his coworker were lowering the assembly, one end struck the ground, causing the ladder to move. Plaintiff, who was standing on the ladder, lost his balance and fell to the sidewalk below, fracturing his wrist.

Plaintiff's injury is "the direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential," in which "the harm flows directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch.*, __ NY3d __, 2009 NY Slip Op 09310 [2009]; *cf. Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Here, it is undisputed that plaintiff's work entailed the removal of a 300-pound assemblage comprising part of a metal gate and secured above the entranceway of a building or structure. For this type of work, Labor Law § 240(1) requires that a worker be provided with appropriate safety

devices, as enumerated in that section, such as scaffolding or a hoist, hanger or pulley. The only safety device defendants made available was an A-frame ladder, and their failure to provide adequate safety devices under § 240(1) renders them liable for plaintiff's injuries as a matter of law (*Velasco v Green-Wood Cemetery*, 8 AD3d 88 [2004]). Defendants do not explain how an A-frame ladder would have provided adequate protection. That plaintiff's improvisational use of his own extension ladder might be viewed as inappropriate is not material since a worker's contributory negligence does not bar recovery under § 240(1) (*see Bland v Manocherian*, 66 NY2d 452, 459-460 [1985]; *Velasco*, 8 AD3d at 89; *Hernandez v 151 Sullivan Tenant Corp.*, 307 AD2d 207, 208 [2003]).

Labor Law § 241(6), however, is inapposite because plaintiff was not performing his work in the context of construction, demolition or excavation (*see Caban v Maria Estela Houses I Assoc., L.P.*, 63 AD3d 639, 640 [2009]).

All concur except Nardelli, J. who dissents in part in a memorandum as follows:

NARDELLI, J. (dissenting in part)

I agree with the majority that plaintiff's claim under Labor Law § 241(6) should be dismissed, but cannot agree that plaintiff should be granted summary judgment on the § 240(1) claim. There are, I respectfully submit, questions of fact as to whether there was even a violation of the statute, and, even more importantly, as to whether plaintiff's actions were the sole proximate cause of the accident. These questions must first be resolved before inquiry is made as to whether other safety devices could have prevented the accident.

On May 9, 2003, plaintiff arrived at a commercial parking facility owned by defendant The Park Here Garage Co., and leased by defendant Jonathan & Gabrielle Parking, to, in his words, "repair a roll-up metal gate that was attached along the entranceway." Plaintiff himself stated that he is "a self-employed construction worker who specializes in welding, installing and repairing roll-up gates." He is paid in cash. At the garage no one instructed him on how to do his work. He was only told what work needed to be done by the person who he believed was the garage manager. At the garage he was assisted only by his nephew, Ramon Martell, whom he hired, and paid.

At the time of the accident, plaintiff was removing a long tube and spring placed above the entranceway, an assemblage which was quite heavy. Plaintiff used his own aluminum extension

ladder while working, which he placed against the building's exterior in the middle of the entranceway. He had brought the ladder to the job location in his own van, which contained all the materials he intended to install or use in the repairs.

The ladder had rubber feet which set automatically and adjusted to the surface beneath them to protect against slippage. At the time of the accident, plaintiff claimed he had placed the ladder on level ground. Plaintiff had never experienced any problems with the ladder, and had used it previously on the day of the accident. There was, however, another ladder - an A-frame - at the premises, which plaintiff elected not to use while removing the assemblage. His nephew, Martell, had used the A-frame ladder earlier, while removing screws from the tubing by cutting them, without experiencing any problem with the ladder. After removing the brackets that held the tube assemblage in place, plaintiff and Martell used a chain, which he had also brought to the location, to devise a pulley system, with one end of the chain hooked to a rung near the top of the extension ladder, and the other end wrapped around the tube assemblage. Plaintiff stood on the ladder to make sure the chain did not become stuck, while Martell stood on the sidewalk below, pulling the chain to lower the tube. As the tube lowered, it tilted and one of its ends struck the ground, causing the ladder to move. Plaintiff lost his balance and fell to the ground, fracturing his

left wrist. The ladder did not topple, but remained upright, leaning against the building.

Monelys Alcantara, a nonparty witness who observed the incident from his automobile body shop across the street, testified at a deposition that the sidewalk outside the garage is inclined approximately five or six inches, which caused the ladder to tilt to the left as it leaned against the building. Alcantara yelled to the men that they should "tie that ladder very well" because it was leaning, but the men did not respond.

In reversing the motion court's denial of summary judgment, the majority agrees that the A-frame ladder was supplied, but concludes, without elaboration, that as a matter of law this was insufficient to meet defendants' obligations under the statute.

The Court of Appeals has made clear that "there can be no liability under section 240(1) when there is no violation and the worker's actions . . . are the 'sole proximate cause' of the accident, regardless of whether or not the injured worker is recalcitrant" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Moreover, not every ladder injury leads "ineluctably" to liability under § 240(1) (*id.* at 292).

In this case, as the majority observes, an A-frame ladder was available for plaintiff's use. The A-frame had been used by his assistant previously, without problems. There is testimony that the extension ladder plaintiff was using at the time of the

accident was placed on an uneven surface. Notwithstanding the availability of the A-frame, and the possibly hazardous footing on which the extension ladder was placed, plaintiff, a self-described specialist in installing and repairing roll-up gates, chose instead to use the extension ladder, and to affix a chain to one of its rungs as he lowered the assemblage. The accident occurred when the ladder was shaken as the tube was lowered.

Plaintiff, who had 23 years of experience in his trade at the time of the accident, and had been self-employed for six or seven years, made the decision to use the extension ladder rather than the A-frame defendants had made available, of his own volition. I submit that a question of fact is presented as to whether there was even a violation of the Labor Law, since the A-frame was available. I also suggest there is a question of fact as to whether the "sole proximate cause" of the accident was plaintiff's decision to use the extension ladder, and tie the chain to it for use as a pulley. The Court of Appeals has determined that a worker's use of an inadequate ladder when a better one is available, constitutes conduct which can be found to be the sole proximate cause of the accident, as a matter of law (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006]; *see also Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005]).

While I recognize that § 240(1) is to be liberally construed, it "'must not be strained' to accomplish what the

Legislature did not intend" (*Blake*, 1 NY2d at 292, *citing Martinez v City of New York*, 93 NY2d 322, 326 [1999]). Plaintiff, a self-proclaimed specialist, made the decision to proceed with the extension ladder. Moreover, this experienced "specialist" came to the job site without any of the equipment he now claims was essential to perform the work in compliance with the strictures of the Labor Law, and contends the garage should have supplied. The question is begged - why did he, an individual who employs others, not have this "essential" equipment.

The purpose of the statute is to place "ultimate responsibility for safety practices on owners and contractors, rather than on the workers, who as a practical matter lack the means of protecting themselves from accidents" (*Martinez*, 93 NY2d at 325). Plaintiff here, like the plaintiff in *Blake*, was self-employed, and thus able to make his own necessary decisions to use appropriate equipment to protect himself. The jury should decide whether his intentional actions, rather than the omissions of defendants, caused the accident. As this Court has made clear, "the strict liability benefit of Labor Law § 240(1) is not available to a worker whose own act in failing to use an otherwise adequate safety device properly is the sole proximate

cause of his injury" (*Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 160 [2003]).

I would affirm.

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

ENTERED: MARCH 4, 2010

CLERK

Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1838-
1838A Index 602276/07

Jane Gladstein,
Plaintiff-Appellant,

iStar FM Loan, LLC,
Plaintiff-Intervenor,

-against-

Christopher H. Martorella,
Defendant-Respondent.

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Markewich and Rosenstock, LLP, New York (Lawrence M. Rosenstock of counsel), for appellant.

Stewart Occhipinti, LLP, New York (Charles A. Stewart III of counsel), for respondent.

Drinker, Biddle & Reath, LLP, New York (Brian F. McDonough of counsel), for intervenor.

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Order, Supreme Court, New York County (Louis B. York, J.), entered January 8, 2009, which granted defendant's motion to reargue, and, upon reargument, vacated its prior order granting plaintiff's motion for summary judgment in the principal amount of $2,000,000, and severing her claim for attorneys' fees, denied plaintiff's motion for summary judgment, vacated the judgment, same court and Justice, entered April 29, 2008, and referred the matter to a special referee to hear and determine the meaning of the contractual phrase "shall have been contracted for" contained in the parties' settlement agreement, unanimously reversed, on the law, with costs, plaintiff's motion for summary judgment granted, the judgment entered April 29 reinstated, the issue of

attorneys' fees severed, and the matter remanded for further proceedings. Appeal from order, same court and Justice, entered May 20, 2009, which, inter alia, denied plaintiff's motion to reargue the January 8, 2009 order, unanimously dismissed, without costs, as academic in view of the foregoing.

The parties were partners in a real estate development company. In 2005, they decided to part ways. After extensive negotiations involving experienced counsel, they entered into a settlement agreement whereby defendant would purchase plaintiff's interest in the company. Pursuant to the agreement, half of the purchase price was payable at the closing and the balance was due in two equal installments. Pursuant to the agreement, the first installment was due on the earlier of the date when 75% of the units in a particular development were "contracted for" or the first anniversary of the agreement. The second installment was due on the later of the date when 75% of the units in two other projects were "contracted for" or the 18-month anniversary of the agreement.

Plaintiff commenced an action to obtain the first installment and was granted summary judgment. The decision of the court stated that the parties were requested to settle order after a hearing to determine the amount of attorneys' fees to which plaintiff was entitled pursuant to the agreement. Plaintiff entered a judgment before the hearing took place and

commenced collection efforts. In this action, defendant asserted a counterclaim alleging that this conduct constituted abuse of process.

In the instant action, plaintiff is seeking the second and final installment payment under the agreement, alleging that the 18-month anniversary had passed and 75% of the units in the stated projects were either sold or leased. Defendant argues that the term "contracted for" was intended to refer only to sale contracts, not leases, and 75% of the units have not yet been sold.

When parties set down their agreement in a clear, complete document, their writing should, as a rule, be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. Extrinsic and parol evidence are not admissible to create an ambiguity in a written agreement which is complete, clear and unambiguous on its face (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

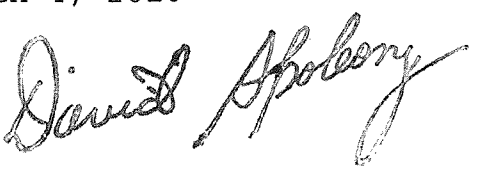
The agreement herein is unambiguous on its face. Both sale and lease contracts may be utilized in meeting the 75% requirement. "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks and citation omitted]). If the parties intended to exclude

lease contracts from consideration, they made a mistake in the agreement. "An omission or mistake in a contract does not constitute an ambiguity" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citation omitted]).

Accordingly, the court should have adhered to its original ruling granting summary judgment.

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

ENTERED: MARCH 4, 2010



CLERK

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

2041-
2042 Index 604403/05

Phyllis J. Sirico, et al.,
Plaintiffs-Appellants,

-against-

F.G.G. Productions, Inc.,
Defendant-Respondent.

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Baker & Hostetler LLP, New York (Oren J. Warshavsky of counsel), for appellants.

Christopher R. Whent, New York, for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 22, 2008, which, to the extent appealable, denied plaintiffs' motion to renew a prior order granting defendant partial summary judgment, unanimously reversed, on the law, without costs, and the motion granted. Order, same court (Karla Moskowitz, J.), entered January 4, 2008, which, to the extent appealed from, granted defendant's motion for summary dismissal of the complaint, unanimously modified, on the law, without costs, the motion denied with respect to the first and sixth causes of action, those claims reinstated, and otherwise affirmed.

This action concerns music recordings from the 1960s featuring performances by the vocal group known as the Angels, including their well-known 1963 recording, "My Boyfriend's Back," which over the years has sold more than a million units in

various formats. Defendant (FGG) produced the recordings. Plaintiffs commenced this action in 2005, alleging in the verified complaint and bill of particulars that in or about 1960, FGG entered into a written recording contract with the Angels, then composed of plaintiff Phyllis Allbut, suing here as Phyllis Sirico, her sister Barbara Allbut, and lead singer Linda Jansen.[1] In exchange for Sirico's performances on recordings that FGG produced and owned, plaintiffs allege that FGG agreed to pay her artist's royalties for sales of phonograph records and other products containing the recordings, and a share of FGG's income from licensing the use of the recordings by third parties. Plaintiffs state that they do not have a copy of the contract and do not know the specific method for calculating royalties.

In 1962, plaintiffs further allege, Jansen left the group, and plaintiff Peggy Davison, suing here as Peggy Davidson, replaced her as lead singer. Plaintiffs allege that Davidson never entered into a written or oral contract with FGG, but FGG's representatives told her she would be paid royalties, and provided her with a contract to that effect which was never executed.

Starting in 1963, plaintiffs performed for FGG as members of the Angels on "My Boyfriend's Back" and several other recordings. Their central allegation is that FGG has not paid them their full

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[1]The latter two persons are not parties to this action.

share of royalties and licensing income over the past 40-odd years. Davidson also claims that FGG exploited her image, voice and name to market the recordings without her consent.

The verified complaint purports to state the following causes of action: by Sirico, for breach of written contract; by Davidson, for breach of "implied contract"; and by Sirico and Davidson, for the equitable claims of unjust enrichment, an accounting, and, in the alternative, rescission. Finally, Davidson asserts a claim of violation of Civil Rights Law § 51. Defendant's answer counterclaimed against Sirico for costs arising from Davidson's claims, on the ground that Davidson performed at Sirico's behest.

Before discovery commenced, defendant moved for summary judgment dismissing the complaint and on its counterclaim. Defendant's principal, Richard Gottehrer, provided an affidavit that disputes most of plaintiffs' factual allegations. Gottehrer states that he formed FGG with his partners, Gerald Goldstein and Robert Feldman, in 1963, while they were working as staff songwriters for a music publisher. As aspiring record producers, the songwriters would, at their own expense, produce recordings of their songs performed by artists they had engaged, with the aim of selling the rights in the recordings to established record labels.

After composing "My Boyfriend's Back," Gottehrer and his partners asked the Angels to record it. According to Gottehrer, "'The Angels' were the Allbut sisters [Sirico and her sister Barbara], who might be joined by such other vocalists as they engaged." Gottehrer alleges that by 1961, the Allbuts were performing and recording as the Angels along with Linda Jansen, who they described as their "employee," and who was in 1962 replaced by Davidson.

Gottehrer further alleges that when "My Boyfriend's Back" was recorded in 1963, the Allbuts were already parties to a March 1963 recording contract with a production company called Sabina Records, and a separate personal management contract with one Gerald Granahan.[2] Under the recording contract, the Allbuts had agreed to record exclusively for Sabina for a two-year term ending March 23, 1965, and in exchange for their performances they would receive specified royalties based on record sales, to be paid semiannually. Gottehrer states that the partners did not learn of the Sabina contracts until after they had recorded "My Boyfriend's Back" "on spec" and found a record label, Smash Records, which wanted to buy the rights to the recording.

At that point, Gottehrer continues, FGG "bought out" the Allbuts from the Sabina contract and from their management

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[2]It can be inferred from the record that Granahan was a principal of Sabina Records.

contract. Gottehrer denies that FGG ever entered into a recording agreement with Davidson or purchased any agreement to which she was a party.

Gottehrer states that FGG had rendered royalty statements to the Allbuts until 1964, when they flatly refused to record any more for FGG. In or about January 1965, Gottehrer claims, FGG's attorney notified the Allbuts' attorney that it was suspending the recording contract. Gottehrer also alleges that by late 1964, the Allbuts and Davidson were recording for another label under a different name, and later signed a recording contract as the Angels with still another label. He contends that their actions breached the exclusivity provision of their agreement and forfeited their rights to royalties for the FGG recordings.

As documentary evidence on the summary judgment motion, defendant submitted an incomplete and partially illegible copy of the Allbuts' contract with Sabina Records. It also submitted a letter, dated April 10, 1963, by which the Allbuts consented to the assignment to FGG of the Sabina Records contract and the personal management contract. The letter indicates that the Allbuts agreed that payment of $2000 to Sabina and $1000 to Sabina's owner would be deducted from the first royalties payable to them as FGG artists. Finally, defendant submitted biographies about, discographies of, and interviews with the Angels, which were obtained from various internet Web sites.

In opposition to the motion for summary judgment, plaintiffs submitted only their counsel's affirmation and a memorandum of law. In the January 2008 order, Supreme Court granted defendant's motion and dismissed the complaint, finding defendant had made a prima facie showing that it was entitled to judgment to which plaintiffs had offered virtually no opposition, since neither the affirmation nor the memorandum of law had any evidentiary value. The court also denied summary judgment to defendant on its counterclaim against Sirico, severed it, and directed that it continue.

In May 2008, plaintiffs moved for renewal and reargument,[3] contending that the allegations in Gottehrer's affidavit were conclusory and unsupported by any proof, and noting that defendant had moved for summary judgment before plaintiffs had the opportunity to conduct discovery. For those reasons, plaintiffs argued, they believed their factual allegations in the complaint and bill of particulars should have withstood the motion for summary dismissal.

In connection with their motion to renew, plaintiffs submitted "affidavits" witnessed by out-of-state notaries that were questionable as to proper form. Davidson states that she understood from representations by FGG's owners, including

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[3]A prior motion for renewal and reargument had been denied in April. Plaintiffs have not appealed that order.

Gottehrer, that FGG would pay her the same royalties as the Allbuts for recording as a member of the Angels. According to Davidson, FGG had made one "negligible" royalty payment to each of the three women. Davidson adds that she never signed any agreement when joining the group and never signed any waiver or release of any of her rights, and claims that FGG used her voice, name and image to sell records. Davidson denied that the Angels ever refused to record for FGG.

In a similar affidavit, Sirico states that all three women believed that as a member of the Angels, Davidson was entitled to FGG's royalties, and in fact FGG gave each of the women one royalty check. She denies having breached her contract by refusing to perform for FGG, and states that she recorded for another label only after the exclusivity period of the contract had expired.

Defendant opposed plaintiffs' motion and cross-moved for sanctions, contending that renewal should be denied because plaintiffs' affidavits did not contain any newly discovered evidence that could not have been submitted previously. Defendant also claimed that the affidavits were improper because the out-of-state notaries' acknowledgments did not state that plaintiffs' statements were sworn to in their presence.

The court held that the motion for reargument was untimely, and plaintiffs' affidavits in support of the renewal were

deficient because they were unsworn, but in any event were insufficient to defeat defendant's prima facie showing. It noted that Davidson did not provide any details about the terms of her alleged contract with FGG, and held that plaintiffs had not justified their failure to submit admissible evidence to oppose the summary judgment motion, concluding that

> On this record - riddled with procedural mistakes and deficiencies - there is no reason for the Court to exercise its discretion and overlook plaintiffs' repeated oversights.

There is, of course, no appeal from denial of reargument. However, the denial of renewal is reversed. "Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (*see* CPLR 2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice" (*Mejia v Nanni*, 307 AD2d 870, 871 [2003]). While plaintiffs should have submitted admissible evidence to oppose the summary judgment motion, their failure is excusable. Defendant moved for summary judgment before plaintiffs had the opportunity to conduct discovery, and plaintiffs' counsel reasonably believed that defendant had failed to make a prima facie showing of entitlement to judgment.

FGG's claims that the Allbuts breached their contract are, at this stage, conclusory (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005] [a conclusory affidavit does

not establish the prima facie burden of a proponent for summary judgment]). Gottehrer's claim that the Allbuts breached the exclusivity provision before March 25, 1965, which is the only circumstance under which they would have forfeited royalties, is based in part on hearsay.

Contrary to the renewal court's ruling, plaintiffs' affidavits are admissible. Each contains the affiant's statement that she was duly sworn and believes the affidavit's contents to be true and correct, and the notary's statement that the affiant personally appeared, proved her identity, and "did further acknowledge that she executed the foregoing for the purposes therein contained" (*see Feldman v Feldman*, 280 AD2d 276, 277 [2001]; *Collins v AA Truck Renting Corp.*, 209 AD2d 363 [1994] [notary "is presumed to have acted within his or her jurisdiction and carried out his or her duties as required by law"]).

Having granted leave to renew, we turn to the merits of the summary judgment motion. As a threshold matter, we find that plaintiffs' claims are not automatically barred by laches. While defendant contended it was prejudiced by plaintiffs' delay, it has not yet shown that the delay hampered its ability to defend against their claims, (*see Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453 [2009]; *see also Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD3d 128, 137-138 [2008]).

Except for Sirico's claim for breach of contract and Davidson's claim for violation of the Civil Rights Law, all of the claims were properly dismissed on the grounds that they were time-barred, violated the statute of frauds, or failed to state a cause of action. Davidson's alleged implied contract for royalties would be unenforceable since any agreement to pay royalties extending beyond one year must be in writing to satisfy the statute of frauds (see *Melwani v Jain*, 281 AD2d 276 [2001]). Plaintiffs' unjust enrichment claims are time-barred by the six-year statute of limitations (*see* CPLR 213[1]) because they accrued in the 1960s, when plaintiffs made the recordings for which they seek compensation (*see Petracca v Petracca*, 305 AD2d 566, 567 [2003]). Plaintiffs lack the requisite fiduciary relationship with FGG that is a predicate to an equitable claim for an accounting (*see Brigham v McCabe*, 27 AD2d 100, 105 [1966], *affd* 20 NY2d 525 [1967]), although Sirico may be entitled to obtain accounting or royalty information through discovery. Finally, the equitable claim for rescission fails because plaintiffs have a complete and adequate remedy at law (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]).

However, plaintiffs' affidavits, when read together with the complaint and bill of particulars, raise questions of fact as to whether FGG breached Sirico's contractual rights to royalties and

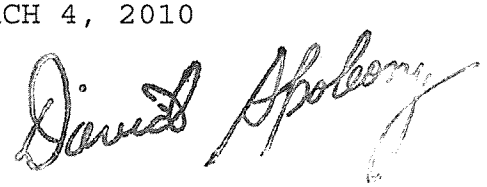
violated Davidson's statutory protection against invasion of privacy. While the statute of limitations bars much of Sirico's breach-of-contract cause of action, her claim for royalties, if any, earned during the six years before this action was commenced, is viable at this preliminary stage, as it accrued each time FGG allegedly breached its recurring obligation (*see Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 611 [1979]; *Beller v William Penn Life Ins. Co. of N.Y.*, 8 AD3d 310, 313-314 [2004]).

Davidson's claim under Civil Rights Law § 51 may also be viable, since the statute prohibits the use of a person's "name, portrait, picture or voice" for advertising or trade purposes without written consent, and it is undisputed that Davidson had no written contract of any kind with FGG (*see Harlock v Scott Kay, Inc.*, 14 AD3d 343, 344 [2005]). That claim survives only to the extent it concerns offending material published within one year of the date this action was filed (*see* CPLR 215(3); *Nussenzweig v diCorcia*, 9 NY3d 184 [2007]; *Costanza v Seinfeld*, 279 AD2d 255 [2001]). Although FGG argues that Davidson implicitly consented to the exploitation of her name and image by performing on the company's recordings, the requirement of a writing is explicit in the statute. FGG also alleges that it has never used Davidson's image and likeness since it assigned its

rights in the Angels recordings to Smash Records in 1963, but it fails to make a prima facie showing of that allegation.

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

ENTERED: MARCH 4, 2010



CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, JJ.

2139 The People of the State of New York, Ind. 3395/06
Respondent,

-against-

Derrick West,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

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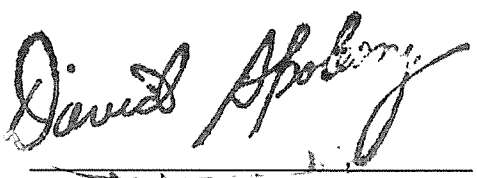
Judgment, Supreme Court, New York County (James A. Yates, J., at suppression hearing; Edwin Torres, J., at plea and sentence), rendered January 18, 2007, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, unanimously affirmed.

Defendant's suppression motion was properly denied. There is no reason to disturb the court's credibility determinations, which are supported by the record. The initial police questioning of defendant was based on a founded suspicion of criminality, created by defendant's presence in the lobby of a public housing apartment building known as a drug-prone location, and the officer's observations of defendant counting money and then immediately putting it in his pocket upon seeing the

officer. Suspicion of criminal activity was heightened by defendant's failure to respond meaningfully to the arresting officer's reasonable inquiry as to whether defendant was visiting a building resident and the movement of defendant's hands to his bulging pockets. Defendant ignored the officer's demand to keep his hands out of his pockets. Under these circumstances, the officer was justified in approaching defendant to frisk him (*see* CPL 140.50; *People v Benjamin*, 51 NY2d 267, 271 [1980]). Moreover, when defendant grabbed the officer's hand, reasonable suspicion of criminal activity was raised to the level of probable cause to arrest (*see People v Henriquez*, 128 AD2d 803 [1987]; *see also People v Flow*, 37 AD3d 303, 304 [2007], *lv denied* 9 NY3d 843 [2007] ["the police at least had reasonable suspicion for a stop and frisk, which escalated to probable cause when defendant put up a violent struggle, refusing to be frisked"]).

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

ENTERED: MARCH 4, 2010



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Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2287 The People of the State of New York, Ind. 3986/07
Respondent,

-against-

Francisco Rodriguez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

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Judgment, Supreme Court, New York County (Arlene Goldberg, J. at suppression hearing, Gregory Carro, J. at plea and sentence), rendered April 23, 2008, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 9 years, unanimously affirmed.

The court properly denied defendant's suppression motion. While conducting surveillance of a sixth floor apartment known to be a distribution point for drugs and firearms, the arresting officer observed defendant stealthily approach from the floor below, silently directing his companion's movements and carrying a latex glove. The officer knew such gloves had been used in home invasion

robberies, and believed the apartment under surveillance to be a potential target for a robbery. The officer observed that the right side of defendant's waistband appeared to be weighed down by a concealed object (*see People v Benjamin*, 51 NY2d 267, 271 [1980] ["it may almost be considered common knowledge, that a handgun is often carried in the waistband"]), and watched as defendant readjusted his pants several times. Upon seeing the officer, defendant turned sharply, positioned his body in an unmistakable effort to conceal the object in his waistband (*see People v Flores*, 226 AD2d 181 [1996], *lv denied* 88 NY2d 985 [1996] [effort to conceal bulge heightened suspicion]), and then retreated. Each of these circumstances, when viewed in isolation, might be considered innocuous, but when viewed in totality they provided reasonable suspicion of criminality that justified the officer's actions in detaining defendant and removing a revolver from his waistband (*see Benjamin*, 51 NY2d at 271). Finally, defendant's statement at the scene was not the product of custodial interrogation requiring *Miranda* warnings (*see People v Johnson*, 59 NY2d 1014 [1983]; *People v Huffman*, 41

NY2d 29, 33 [1976]; *see also People v Bennett*, 70 NY2d 891 [1987]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 4, 2010

CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2289 In re Fidel A.,
Petitioner-Appellant,

-against-

Sharon N.,
Respondent,

Wayne N.,
Respondent-Respondent.

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Lisa H. Blitman, New York, for appellant.

Steven N. Feinman, White Plains, for Wayne N., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 14, 2007, which granted the motion of respondent Wayne N. and dismissed the petition of Fidel A. for a declaration of paternity of the subject child on equitable estoppel grounds, unanimously affirmed, without costs.

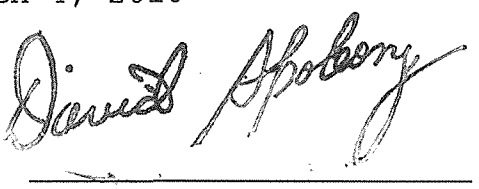
Despite the results of DNA tests establishing that petitioner is the subject child's biological father, the Family Court properly found, on the basis of equitable estoppel, that it was not in the best interests of the child

for petitioner to assert his paternity (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 327 [2006]; *Terrence M. v Gale C.*, 193 AD2d 437, 437 [1993], *lv denied* 82 NY2d 661 [1993]). The evidence showed that it would be detrimental to the child's interests to disrupt her close relationship with respondent Wayne N., whom she knows as her father and whose actions established a close parental relationship with her (*see e.g. Matter of Enrique G. v Lisbet E.*, 2 AD3d 288 [2003]).

We have considered petitioner's remaining contention and find it unavailing.

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

ENTERED: MARCH 4, 2010



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Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2291 Yvette Rivera, Index 120831/00
Plaintiff-Respondent,

-against-

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

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Jeffrey Samel & Partners, New York (Robert G. Spevack of counsel), for appellants.

Pazer, Epstein & Jaffe, P.C., New York (Perry Pazer of counsel), for respondent.

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Order, Supreme Court, New York County (Harold B. Beeler, J.), entered on or about March 16, 2009, which, insofar as appealed from, granted plaintiff's motion to strike defendants' answer for failure to comply with discovery demands only to the extent of directing defendants to produce HIPAA authorizations for the records of 20 doctors and medical facilities requested by plaintiff, unanimously reversed, on the facts, without costs, and the motion denied.

While defendant Batista waived the physician-patient privilege with respect to his physical condition by asserting the affirmative defense of unanticipated medical emergency (CPLR 3121[a]; CPLR 4504[a]; *Rivera v New York City Tr. Auth.*, 11 AD3d 333 [2004]; *Koump v Smith*, 25 NY2d 287, 294 [1969]), plaintiff failed to demonstrate the relevance of Batista's post-accident

medical records to the condition that allegedly caused the accident (CPLR 3101[a]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]).

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

ENTERED: MARCH 4, 2010

David Apolony

CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2292 In re James T. Williams, Index 402485/07
Petitioner-Appellant,

-against-

David A. Hansell, as Commissioner of the New York State Office of Temporary and Disability Assistance, et al.,
Respondents-Respondents.

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Housing Works, Inc., New York (Armen H. Merjian of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Sudarsana Srinivasan of counsel), for State respondent.

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

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Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered on or about October 14, 2008, denying the petition to vacate a fair hearing determination that directed respondent Human Resources Administration to recompute the amount of its deduction of interim benefits from petitioner's initial Supplemental Security Income payment, and dismissing the proceeding, unanimously affirmed, without costs.

Petitioner prevailed on the underlying dispute and thus lacks standing to appeal. Furthermore, the petition was rendered moot by petitioner's receipt of a full refund of the contested benefits, and, regardless of whether petitioner raises "significant or important questions not previously passed on," we are not persuaded that his claim is one that typically evades

review so as to satisfy the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; *Nussenzweig v diCorcia*, 38 AD3d 339, 340 [2007], *affd* 9 NY3d 184 [2007]; *Matter of Gates v Hernandez*, 26 AD3d 288 [2006]; *Orange County Publs., Div. of Ottaway Newspapers, Inc. v Metropolitan Transp. Auth.*, 22 AD3d 290 [2005]).

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

ENTERED: MARCH 4, 2010

CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2293 The People of the State of New York, Ind. 338/08
Respondent,

-against-

Ryehine Cintron,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about October 28, 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.

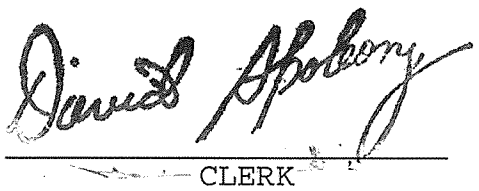
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

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

ENTERED: MARCH 4, 2010



CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2296 The People of the State of New York, Ind. 4625/06
Respondent,

-against-

Bruce Sweeper,
Defendant-Appellant.

---

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

Bruce Sweeper, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at hearing; William A. Wetzel, J. at jury trial and sentence), rendered August 4, 2008, convicting defendant of robbery in the first degree and petit larceny, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The credible evidence established that defendant displayed what appeared to be a firearm.

The court's excusal of a prospective juror was, in essence, a sua sponte excusal for cause. This determination was a proper

exercise of discretion that was supported by the panelist's responses, viewed as a whole (*see People v Velez*, 223 AD2d 414 [1996], *lv denied* 88 NY2d 855 [1996]).

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Since defendant did not produce evidence sufficient to permit the court to draw an inference of discrimination (*see Johnson v California*, 545 US 162, 170 [2005]), he did not establish a prima facie case. Even though a prima facie showing "may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination" (*People v Smocum*, 99 NY2d 418, 422 [2003]), and while the use of peremptories to exclude all or nearly all the members of a cognizable group normally raises such an inference (*see e.g. People v Hawthorne*, 80 NY2d 873 [1992]), here the numbers were too small, absent any other evidence, to infer discrimination rather than happenstance (*see e.g. People v McCloud*, 50 AD3d 379 [2008], *lv denied* 11 NY3d 738 [2008]; *People v Contreras*, 194 AD2d 685 [1993], *lv denied* 82 NY2d 716 [1993]; *compare Miller-El v Cockrell*, 537 US 322, 342 [2003]). Indeed, it was defense counsel who observed, "We have a very small pool of African-American females on the [panel], so I don't know if I can say there is a pattern. . ."

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters

outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We have considered and rejected defendant's pro se suppression claims.

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

ENTERED: MARCH 4, 2010

CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2297 In re Mathew Niko M., etc.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Catholic Guardian Society & Home Bureau, et al.,
Petitioners-Respondents,

Niko M.,
Respondent-Appellant.

---

Andrew J. Baer, New York, for appellant.

Magovern & Sclafani, New York (Mary Jane Sclafani of counsel), for respondents.

Proskauer Rose LLP, New York (Deidre A. Grossman of counsel), Law Guardian.

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about August 14, 2008, which, after a hearing, found that respondent was not a consent father as defined under Domestic Relations Law § 111(1)(d), unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that respondent did not meet the parental responsibility criteria set forth in Domestic Relations Law § 111(1)(d) (*see Matter of Jonathan Logan P.*, 309 AD2d 576 [2003]). The evidence shows that respondent was incarcerated for the majority of his son's life, that he failed to provide any financial support, and that he did not maintain regular contact and/or visit with his son (*see Matter of Aaron P.*, 61 AD3d 448 [2009]; *Matter of William R.C.*,

26 AD3d 229, 230 [2006], *lv denied* 7 NY3d 714 [2006]). The monies allegedly provided by the paternal grandmother as purported support for the child on respondent's behalf do not substitute for the legal support obligations owed by respondent (*see Matter of Michael E.J.*, 84 AD2d 816, 817 [1981]), nor are the contacts and communications by the paternal grandmother with the child imputed to respondent (*see e.g. Matter of Crawford*, 153 AD2d 108, 112 [1990]). To the extent respondent asserts that he was thwarted in his effort to maintain contact with his son because he perceived the maternal grandmother to be a difficult person, such contention ignores his other statement that, while incarcerated, he chose not maintain contact with his son because it would cause him stress. Furthermore, there is no evidence that respondent attempted to reach out to the agency for assistance in maintaining contact with his son.

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

ENTERED: MARCH 4, 2010

CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2298 The People of the State of New York, Ind. 5838/06
Respondent,

-against-

Jahudi Isaac,
Defendant-Appellant.

---

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

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 5, 2007, as amended April 12, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

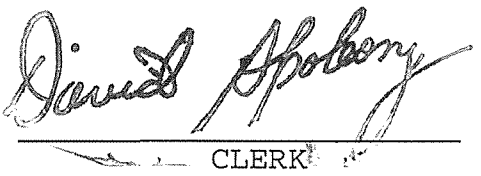
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant was found in possession of a dagger, and the evidence established that he possessed it with intent to use it unlawfully against another. In the first place, there was compelling circumstantial evidence warranting the conclusion that defendant was the same person who had actually used the dagger unlawfully, only moments

before the arrest, and we reject defendant's arguments to the contrary. Moreover, even without the evidence of actual unlawful use, the circumstances of possession, when viewed in light of the presumption contained in Penal Law § 265.15(4), also warranted a finding of unlawful intent.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 4, 2010



CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2301 In re Nehemiah Leckie, Index 401024/09
Petitioner-Appellant,

-against-

New York City Department for the Aging, NYC Senior Citizen Rent Increase Exemption SCRIE Program,
Respondent-Respondent.

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Nehemiah Leckie, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered August 12, 2009, which denied the petition seeking to annul the determination of respondent New York City Department for the Aging (DFTA), denying petitioner's application for Senior Citizen Rent Increase Exemption (SCRIE) benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Pursuant to RPTL 467-b and Administrative Code of City of NY § 26-509, an eligible New York City rent-stabilized tenant may apply to DFTA for SCRIE benefits. To qualify for said benefits at the time of the subject application in April 2008, the household head must have been at least 62 years old, the annual aggregate disposable income of all household members "for the income tax year immediately preceding the date of making application" must not have exceeded $27,000, and in cases where

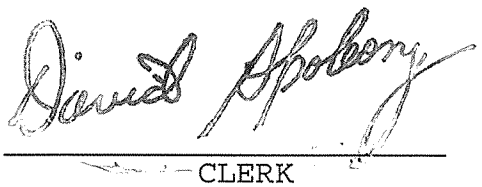
applicants are not receiving a monthly shelter allowance pursuant to the Social Services Law, the apartment rent must have exceeded one-third of the household income (RPTL 467-b[3][a]; Administrative Code § 26-509[b][2]).

The record shows that when petitioner applied for SCRIE benefits, one third of his monthly disposable income amounted to $334.75, which exceeded his monthly rent of $270.11. Thus, he did not meet the statutory requirements for eligibility for SCRIE benefits, and DFTA's decision denying his application was not arbitrary or capricious. Petitioner claims that the original renewal lease expired on September 30, 2008, before he received a final determination from DFTA denying his application, and that the increased rent on the subsequent renewal lease would have been enough to qualify him for benefits. However, there is no evidence that petitioner submitted this information to DFTA or during the administrative appeal, and thus, the lease may not be considered on appeal (*see e.g. Matter of Weill v New York City*

*Dept. of Educ.*, 61 AD3d 407, 409 [2009]). This determination, however, does not preclude petitioner from reapplying for the benefits sought upon a proper showing.

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

ENTERED: MARCH 4, 2010



CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2302N Wendy Touton, Index 350739/06
Plaintiff-Appellant,

-against-

Guillaume Touton,
Defendant.
- - - - -
Cohen Lans LLP,
Non-Party Respondent.

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Frankfurt Kurnit Klein & Selz P.C., New York (Ronald C. Minkoff of counsel), for appellant.

Cohen Lans LLP, New York (Deborah E. Lans of counsel), for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered July 22, 2009, which, insofar as appealed from, denied plaintiff's cross motion to discharge her attorneys for cause and require disgorgement of fees, unanimously affirmed, with costs.

The motion court correctly found that there was no conflict of interest during the period that plaintiff's attorneys had performed their services, since it was uncontradicted that they were unaware of plaintiff's connection with another action in which the firm subsequently appeared, and, absent any specific information or other reason for doing so, the firm had no duty to inquire about the possibility of any such connection. In any event, even if the firm's appearance in the other action were a conflict of interest, forfeiture of fees would not be warranted (*see Matter of Wingate, Russotti & Shapiro, LLP v Friedman*,

*Khafif & Assoc.*, 41 AD3d 367, 370 [2007], *lv denied* 10 NY3d 702 [2008]; *Decolator, Cohen & DiPrisco v Lysaght, Lysaght & Kramer*, 304 AD2d 86, 91 [2003]). In view of the foregoing, it is unnecessary to address plaintiff's other contentions.

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

ENTERED: MARCH 4, 2010

CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2303N Regina Carter, etc., Index 118304/04
Plaintiff-Respondent,

-against-

Isabella Geriatric Center, Inc.,
Defendant-Appellant.

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McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of counsel), for appellant.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about August 26, 2009, which, in an action by an estate against a nursing home arising out of defendant's care of plaintiff's decedent, granted plaintiff's motion to vacate a prior conference order precluding plaintiff's experts from testifying at trial and dismissing the action, unanimously reversed, on the law, without costs, and plaintiff's motion to vacate the prior order denied. The Clerk is directed to enter judgment dismissing the complaint.

The challenged expert disclosure statements do not "disclose in reasonable detail ... the substance of the facts and opinions on which each expert is expected to testify" (CPLR 3101[d][1][i]). As the pretrial conference court aptly put it in dismissing the complaint, the "sea of generalities" contained in these statements largely duplicate the similarly verbose

generalities contained in the complaint and bill of particulars and "essentially tell defendants nothing about what they are supposed to be defending," although they do reveal "that there was no real attempt to consult with an expert" (*see Chapman v State of New York*, 189 AD2d 1075, 1075 [1993]). No particular standards of care are particularly associated with any of the many acts of medical and nursing malpractice about which plaintiff's experts will supposedly testify (*see Pauling v Orentreich Med. Group*, 14 AD3d 357, 358 [2005], *lv denied* 4 NY3d 710 [2005]), which, best we can tell from plaintiff's pleadings and these statements, were continually committed by the many doctors, nurses and care-givers involved with the decedent's care over the course of her four-year residency in the nursing home. Nor do the many statutes and regulations serially cited in plaintiff's pleadings without reference to subsections provide any useful disclosure regarding standards of care and defendant's departures therefrom. Plaintiff has been given ample opportunity to provide useful expert disclosure, and her prolonged and repeated failure to do so permits an inference of willfulness warranting dismissal of her medical malpractice claims (*see id.*; *McCarthy v Handel*, 297 AD2d 444, 448 [2002]).

Nor did plaintiff make any attempt to particularize the facts that supposedly cast some of her claims in ordinary negligence rather than malpractice, as we suggested in dismissing

her appeal from the conference order (60 AD3d 520, 521 [2009]). Our own unaided review of plaintiff's claims, variously denominated as negligence, gross negligence, breach of contract, breach of warranty, inadequate hiring, failure to abide by mandatory rules, and failure to communicate significant medical findings, reveals that they all "bear[] a substantial relationship to the rendition of medical treatment" to plaintiff's decedent (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996] [internal quotation marks omitted]; *see Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145 [2005]). Accordingly, there appears to be no possibility that plaintiff can prove any part of her case without expert testimony, and the entire complaint must be dismissed.

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

ENTERED: MARCH 4, 2010

CLERK