SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 16, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Buckley, DeGrasse, Richter, JJ.

297-
297A Index 119221/03

M Entertainment, Inc., et al.,
Plaintiffs-Appellants,

-against-

Laurence Leydier, et al.,
Defendants-Respondents.

Bienstock & Michael, P.C., New York (Randall S.D. Jacobs of counsel), for appellants.

Satterlee, Stephens, Burke & Burke, LLP, New York (Christopher R. Belmonte of counsel), for Laurence Leydier, respondent.

Gogick, Byrne & O'Neill, LLP, New York (John M. Rondello, Jr. of counsel), for Wardrop Engineering Inc. and J.C. "Cam" Thompson, respondents.

Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered November 27, 2007, dismissing the complaint, and bringing up for review an amended order, same court and Justice, entered on or about October 17, 2007, which, after a nonjury trial, directed entry of the judgment, unanimously modified, on the law, plaintiffs granted judgment on the issue of liability on that portion of their claim for fraudulent inducement as against defendant Leydier based on the August 19, 2000 Memorandum of Understanding (MOU), the matter remanded for a hearing on the issue of damages with respect to that claim, plaintiffs' motion

to amend the pleadings to conform to the evidence granted to the extent of permitting reference to the Haptek/Character Entertainment Addendum, and otherwise affirmed, without costs. Appeal from the amended order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The Court of Appeals has ruled (13 NY3d 827 [2009]) that this Court has jurisdiction to entertain the appeal notwithstanding mail service of the notice of appeal on defendants' attorneys in contravention of CPLR 2103(f)(1), by depositing said notice in an official depository under the exclusive care and custody of the United States Postal Service *outside* the state. Leydier does not dispute that plaintiffs filed the notice with the County Clerk or that defense counsel received the notice well within the 30-day statutory time period set forth in CPLR 5513(a). Therefore, defendants have not been prejudiced as a result of the mailing from without the state, and we exercise our discretion to disregard the irregularity (CPLR 2001, 5520[a]; *see People ex rel. Di Leo v Edwards*, 247 App Div 331, 334 [1936]).

The record demonstrates that plaintiffs are entitled to judgment on the issue of liability on that portion of their claim of fraudulent inducement against Leydier based on the MOU. Clear and convincing evidence (*see e.g. Chopp v Wellbourne & Purdy Agency*, 135 AD2d 958, 959 [1987]) shows that Leydier

misrepresented or omitted a material fact in connection with the MOU when he represented to plaintiffs that he owned or possessed the exclusive, worldwide rights to the subject software when in fact he did not, that plaintiffs relied on that misrepresentation or omission to their detriment, and that plaintiffs were damaged as a result of paying Leydier $150,000 for the right to exercise an option to acquire rights that he did not own (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

However, plaintiffs failed to prove by clear and convincing evidence that Leydier fraudulently induced them to enter into the October 22, 2000 License Agreement because, by the time they entered into that agreement, plaintiffs had discovered that Leydier did not possess the full extent of the rights that he represented. Plaintiffs thus had "hints of falsity" in their business dealings with Leydier, imposing upon them a heightened degree of diligence (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [2006], *lv denied* 8 NY3d 804 [2007]). Furthermore, plaintiffs were advised by counsel not to go forward with the transaction without conducting further diligence, yet proceeded with the transaction without contacting Haptek, the third party from whom plaintiffs discovered Leydier had acquired the rights, to determine the nature and extent of those rights under the various agreements between them. Nor did plaintiffs insist on more protective language in the License Agreement to account for

the possibility that Leydier's representations concerning his interests in the subject technology might prove to be false (*see Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352 [2005]; *Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234 [1996]; *Rodas v Manitaras*, 159 AD2d 341, 343 [1990]).

The credible evidence supports the trial court's finding that defendants Wardrop Engineering and J.C. "Cam" Thompson did not fraudulently induce plaintiffs to enter into either the August 19, 2000 MOU or the October 22, 2000 License Agreement. These defendants were not parties to either agreement, nor did they receive any money in connection with the subject transaction. The record shows that their involvement was limited to the presence of Thompson and the CEO of Wardrop's affiliate at two meetings between plaintiffs and Leydier, at which Leydier demonstrated the subject technology; Leydier's use of Wardrop's board room for one of those meetings; and Thompson's presentation of his business cards to plaintiffs, identifying himself as a principal of the Wardrop affiliate. Contrary to plaintiffs' contentions, Wardrop did nothing to give rise to the appearance and belief that Leydier or Thompson possessed authority to enter into a transaction with plaintiffs on its behalf. In any event, to the extent that Leydier, Thompson, or both, made such representations, the words or conduct of a putative agent are insufficient to create apparent authority (*Ford v Unity Hosp.*, 32

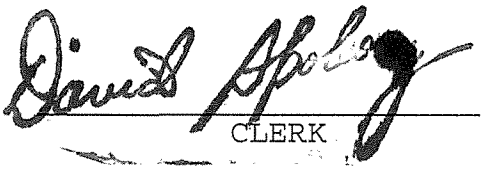
NY2d 464, 473 [1973]).

Plaintiffs' motion pursuant to CPLR 3025(c) to amend the pleadings to conform to the evidence is granted to the extent of permitting reference to the Haptek/Character Entertainment Addendum between Leydier and Haptek pursuant to which Haptek supposedly curtailed the nature and extent of Leydier's rights to the subject technology. The document was received into evidence by the trial court. It was considered by the court in rendering its decision and is part of the record on appeal. Therefore, there can be no prejudice to Leydier in permitting the amendment (*see Matter of Denton*, 6 AD3d 531, 532-533 [2004], *lv dismissed* 3 NY3d 656 [2004]). We decline to exercise our discretion, however, to permit an amendment with respect to the evidence purporting to show the full extent of Wardrop's negligence in allowing its name, offices, reputation and agents to be used by Leydier. Such an amendment is potentially prejudicial to Wardrop, and the application, as it pertains to the evidence against Wardrop, was improperly interposed for the first time on appeal (*see Matter of Ga Young Lee v Charl-Ho Park*, 16 AD3d 986, 988 [2005]).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: MARCH 16, 2010



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Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1701 Penava Mechanical Corp., Index 601431/07
Plaintiff,

-against-

Afgo Mechanical Services, Inc., et al.,
Defendants.

- - - - -

Absolute Electrical Contracting, Inc.,
Counterclaim-Plaintiff-Appellant,

-against-

Uniqlo USA Inc., et al.,
Counterclaim-Defendants-Respondents.

- - - - -

[And Another Action]

Agovino & Asselta, LLP, Mineola (Joseph P. Asselta of counsel), for appellant.

Morrison Cohen LLP, New York (Ethan R. Holtz of counsel), for Uniqlo USA Inc., respondent.

Mazur Carp Rubin & Schulman P.C., New York (Ira M. Schulman of counsel), for Richter & Ratner Contracting Corp., respondent.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered February 9, 2009, which granted the motions of counterclaim defendants Uniqlo USA Inc. (Uniqlo) and Richter & Ratner Contracting Corp. (R&R) for summary judgment dismissing the counterclaims asserted against them by Absolute Electrical Contractors, Inc. (Absolute), and denied Absolute's motion for summary judgment as to liability on such counterclaims, unanimously modified, on the law, to deny Uniqlo's and R&R's motions for summary judgment, and otherwise affirmed, without

costs.

Even assuming that the no-oral-modification clause of the prime contract between R&R as general contractor and Uniqlo as owner was incorporated into the subcontract between R&R and Absolute, and/or that the subcontract itself contains an effective no-oral-modification clause, "[u]nder New York law, oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorizations or notice of claims" (*Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 254 AD2d 211 [1998]). Here, R&R's representatives testified at their depositions that R&R directed Absolute to work overtime during the last three weeks of the project and had agreed to pay for this premium time over and above the contract price, as they had paid for other overtime throughout the project. R&R's project manager also testified that during this time R&R instructed Absolute not to bother with the "tickets" that were usually prepared by Absolute for such extra work and formed the basis for change orders issued by R&R, but to just get the work done. Given this testimony, R&R cannot argue, at least for present purposes, that it did not have to pay for this overtime because there were no written tickets or change orders covering the three-week period.

The no-waiver provision of the subcontract does not avail

R&R, as Absolute is not claiming R&R waived its right to enforce the no-oral-modification clause by making other payments. Rather, Absolute is claiming that R&R waived such right by directing it to perform overtime work and not to bother with the tickets. Nor may R&R rely on the no-damages-for-delay clause, as Absolute is not seeking to recover damages caused by delay but rather to be paid for the overtime that R&R directed and for which it agreed to pay. In fact, R&R admits that it substituted overtime payment in lieu of an extension of time to finish the work, an extension to which Absolute would otherwise have been entitled since the delay, and Absolute's resulting need for additional time to complete its work, was not Absolute's fault.

The documentation submitted by R&R does not conclusively establish that R&R fully paid Absolute for all of Absolute's legitimate overtime work during the three-week period, and an issue of fact is presented as to whether Absolute received the compensation it was promised. Nor does the last partial lien waiver establish that Absolute had waived any further claim for payment. R&R does not dispute that Absolute was required to sign these waivers whenever it received partial payment, and, as demonstrated by the fact that payments were made after waivers were given for work performed before the waivers, the parties treated the waivers as mere receipts of the amounts stated in the waivers, not as complete waivers of all claims to that point (*see*

West End Interiors v Aim Constr. & Contr. Corp., 286 AD2d 250, 251-252 [2001]; *Orange Steel Erectors v Newburgh Steel Prods.*, 225 AD2d 1010, 1012 [1996]). That this was the last waiver, executed after the project was complete and after Absolute had made a claim for additional payment that was rejected by R&R and Uniqlo, does not transform it into a waiver clearly meant to waive any further claim (*see West End*, 286 AD2d at 252 ["(t)he intent to waive a right must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act"]). The language of this last waiver is the same as the other waivers, and two other waivers were also executed after completion of the project and after Absolute had sought and been denied the additional payment it seeks. Thus, it is clear that R&R was not treating these waivers as final and complete waivers of any further claims.

The court also improperly shifted the burden of proof on Uniqlo's motion for summary judgment, finding that the claim against Uniqlo should be dismissed because Absolute failed to demonstrate that Uniqlo still owed money to R&R at the time of Absolute filed the lien (citing, inter alia, *Timothy Coffee Nursery/Landscape, Inc. v Gatz*, 304 AD2d 652, 653-654 [2003] ["the rights of a subcontractor are derivative of the rights of the general contractor and a lien must be satisfied out of funds due and owing from the owner to the general contractor at the

time the lien is filed," an issue on which subcontractor bears the burden [internal quotation marks omitted]). On a motion for summary judgment, however, it is the proponent who bears the initial burden of coming forward with evidence showing prima facie entitlement to judgment as a matter of law, and, unless that burden is met, the opponent need not come forward with any evidence at all (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, while defendants cite some 200 pages of the record, including certain payments, they do not attempt to explain how these documents demonstrate that *full payment* to R&R had been made by Uniqlo prior to the filing of the lien, or ever. Thus, defendants failed to meet their initial burden, and an issue of fact exists in this regard (*see Perma Pave Contr. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 552 [1989]; *Elbert v Van-Mar Developers*, 111 AD2d 495, 496 [1985]).

However, contrary to Absolute's assertion, it is not

entitled to summary judgment in its favor, as an issue of fact exists as to whether it was fully paid by R&R for the amount of actual overtime worked during the three-week period in question.

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, Acosta, DeGrasse, Abdus-Salaam, JJ.

2092 Frank Cupelli, et al., Index 8252/02
Plaintiffs-Appellants,

-against-

Lawrence Hospital, et al.,
Defendants-Respondents,

Joshua Weintraub, M.D.,
Defendant.

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellants.

Pilkington & Leggett, P.C., White Plains (Michael N. Romano of counsel), for respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 12, 2008, which, in an action for medical malpractice, inter alia, granted defendants-respondents' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleges that malpractice was committed in defendant Lawrence Hospital's emergency room by one of its ER physicians and by defendant Dr. Provenzano, who had been plaintiff's long-time primary care physician and who came to the ER in response to a call from the treating ER physician; plaintiff also alleges additional malpractice by Dr. Provenzano in a follow-up visit in his office three days later. The only reference in plaintiff's expert's affirmation to Dr. Provenzano states that "[a] note appears in the [hospital] records that [the

ER physician] discussed the case with Dr. Provenzano." As such affirmation simply does not address the medical evidence and opinion contained in Dr. Provenzano's expert's affirmation, the prima facie sufficiency of which is clear and indeed not challenged by plaintiff on appeal, no issues of fact are raised as to Dr. Provenzano's malpractice. Similarly, plaintiff's expert's affidavit simply does not address defendant's expert's opinion that the ER physician acted in accordance with accepted standards of emergency medicine by deferring to Dr. Provenzano, who conducted his own examination of plaintiff upon arriving at the ER and otherwise took over plaintiff's emergency care and treatment (*see Cregan v Sachs*, 65 AD3d 101, 110 [2009] [how long after procedure doctor's duty of care to patient continues is an issue of fact that turns on expert testimony]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2254-
2255-
2256 In re Vincent P.,

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

Seamen's Society for Children
and Families,
Petitioner-Respondent,

Andrew P.,
Respondent-Respondent,

Dorothy P.,
Respondent.

- - - - -

Tamara Steckler, Law Guardian,
Appellant.

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), appellant.

John R. Eyerman, New York, for Seamen's Society for Children and Families, respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Andrew P., respondent.

Order, Family Court, New York County (Susan Larabee, J.), entered on or about December 15, 2008, which denied petitioner agency's application to revoke a suspended judgment that had been entered following a finding of permanent neglect against respondent parent, deemed the suspended judgment satisfied, and referred the case back to the Referee for a permanency hearing and further consideration of the disposition that is in the subject child's best interests, unanimously affirmed, without

costs.

The record supports Family Court's findings that respondent substantially complied with all of the terms and conditions of the suspended judgment (*see Matter of Kaleb U.*, 280 AD2d 710, 712 [2001] [noncompliance must be demonstrated by a preponderance of the evidence; Family Court's factual findings to be accorded great deference]), including attending individual and couple's counseling, submitting to random drug testing and remaining free of illicit substances, cooperating with announced and unannounced home visits, and cooperating with all reasonable referrals for services made by the agency. The record also supports Family Court's finding that respondent addressed and ameliorated the problems that endangered the child and led to his removal from the home and the finding of permanent neglect (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *Matter of Nicole OO*, 262 AD2d 808, 810 [1999]). We have considered the agency's and the child's other contentions and find them unavailing.

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

ENTERED: MARCH 16, 2010

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Acosta, Renwick, JJ.

2342 Sklover & Donath, LLC, Index 602940/08
Plaintiff-Respondent,

-against-

Barbara Eber-Schmid, et al.,
Defendants-Appellants.

David J. Hoffman, New York, for appellants.

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered September 4, 2009, which granted plaintiff's motion to dismiss defendants' counterclaims, unanimously affirmed, without costs.

Plaintiff law firm represented defendants in a federal civil action and state criminal action arising out of defendants' misappropriation of funds from defendant wife's prior employer. During the course of the representation, these parties renegotiated a fee agreement under which defendants would pay plaintiff a flat rate of $7,500 per month and provide $4,000 in in-kind services. Despite making the monthly payments, defendants failed to pay off the outstanding balance and refused to grant plaintiff a lien on their real property. Plaintiff initiated this action to recover the fees, and withdrew as counsel in the federal action. Defendants asserted counterclaims for breach of

contract, legal malpractice, breach of fiduciary and fraud.

Defendants failed to allege a viable counterclaim for breach of contract, as they were unable to identify the terms of the agreement allegedly breached (*767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75 [2004]). Nothing in the modified agreement prohibited plaintiff from requesting a lien on real property, withdrawing as counsel, or commencing an action based on unpaid legal fees.

Nor did defendants properly allege a counterclaim for legal malpractice. The steps plaintiff took in litigating these cases were among many reasonable options (*see Rosner v Paley*, 65 NY2d 736, 738 [1985]). The allegations that plaintiff's decisions were unreasonable are based on hindsight, which is "an unreliable test for determining the past existence of legal malpractice" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000] [law review source omitted]).

As to breach of fiduciary duty, defendants' contention that plaintiff prolonged the litigation for purposes of "churning" the case to increase the legal fees is speculative and conclusory. Defendants failed to otherwise allege any facts showing that their attorney followed any inappropriate course of action.

There was no viable counterclaim for fraud, in the absence of facts alleging that plaintiff knew its estimate of legal fees

was false at the time it was made (*see Mergler v Crystal Props. Assoc.*, 179 AD2d 177, 181 [1992]).

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

ENTERED: MARCH 16, 2010

CLERK

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

2354 The People of the State of New York, Ind. 3773/06
Respondent,

-against-

Jimmy Alvarado,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Wachtell, Lipton, Rosen & Katz, New York (Evan K. Farber of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

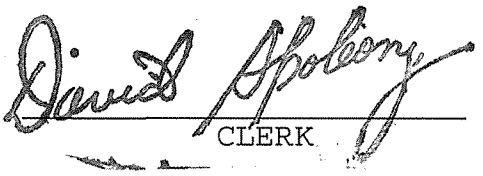
Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered February 14, 2008, convicting defendant, after a nonjury trial, of assault in the second degree, reckless endangerment in the first degree, criminal possession of stolen property in the fourth degree and aggravated unlicensed operation of a motor vehicle in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 5 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility and identification. Reliable evidence provided by police officers and a civilian witness established that defendant was the fleeing driver of a stolen car, and that he struck a police officer. The element of

physical injury was properly established by the officer's testimony as to the level of pain he felt (*see People v Guidice*, 83 NY2d 630, 636 [1994]). Defendant's pattern of egregious conduct in this lengthy car chase supported the conclusion that he acted with the culpable mental state of depraved indifference to human life (see *People v Feingold*, 7 NY3d 288 [2006]; *People v Mooney*, 62 AD3d 725 [2009]).

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

ENTERED: MARCH 16, 2010



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

2356 The People of the State of New York ex rel. Dennis Chesner, Petitioner-Appellant, Index 251600/08

-against-

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

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

Andrew M. Cuomo, Attorney General, New York (Diana R.H. Winters of counsel), for respondents.

Order, Supreme Court, Bronx County (Analisa Torres, J.), entered May 21, 2009, which denied petitioner's application for a writ of habeas corpus and dismissed the petition, unanimously affirmed, without costs.

Petitioner's preliminary parole revocation hearing was commenced within 15 days after execution of the warrant (Executive Law § 259-i[3][c][i]) and briefly adjourned, without objection, for legitimate reasons. Thus, there was no violation of the 15-day time limit (*see People ex rel. Morant v Warden, Rikers Is.*, 35 AD3d 208 [2006], *lv denied* 8 NY3d 809 [2007]; *Matter of Emmick v Enders*, 107 AD2d 1066 [1985], *appeal dismissed* 65 NY2d 1050 [1985]).

Further, petitioner waived his objection to the timeliness of the hearing by failing to object to the adjournment and

failing to show that he was prejudiced by it (*see People ex rel. Morant v Warden, Rikers Is.* 35 AD3d 208, lv denied 8 NY3d 809 [2007]).

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

ENTERED: MARCH 16, 2010

David Spolony
CLERK

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

2357 Tower Insurance Company of New York, Index 113447/06
Plaintiff-Appellant,

-against-

Christopher Court Housing Company,
Defendant-Respondent,

Carmen Melendez, et al.,
Defendants.

Law Offices of Max W. Gershweir, New York (Jennifer W. Kotlyarsky of counsel), for appellant.

Comerford & Dougherty, LLP, Garden City (Mary Guerin Comerford of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered October 24, 2008, which, in a declaratory judgment action involving whether plaintiff insurer has a duty to defend or indemnify defendant insured in an underlying action brought against defendant for personal injuries allegedly sustained in an assault on its premises, denied plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiff has no duty to defend or indemnify defendant.

A residential tenant in defendant's building was allegedly assaulted in the hallway outside her apartment. The incident report generated by the security guard on duty, which was submitted to defendant's employee, the building's property manager, reported that the tenant claimed she was "grabbed" by

the assailant, police and emergency medical personnel were called to the scene, and there was "no evidence" of the assailant. The police report, which the property manager did not obtain, reported that the tenant stated that an unknown assailant came out from the stairwell, grabbed her, pulled her hair, knocked off her glasses and that her arm was scratched; that the tenant was going through an "anxiety attack," was "very distraught," and was taken to the hospital by emergency medical personnel; and that the officers canvassed the premises but were unable to find the assailant. There is no dispute that plaintiff's first notice of the incident was its receipt of the tenant's summons and complaint against defendant some three months after the incident. The argument on appeal involves whether such delay was reasonably based on a good-faith belief in nonliability.

In order to excuse a failure to give timely notice, a good-faith belief in nonliability "must be reasonable under all circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972], *see White v City of New York*, 81 NY2d 955, 958 [1993]).

Defendant argues that its delay in giving notice was reasonable where there was no evidence that the tenant was

knocked down by the assailant, security staff told the property manager that a problematic rear door was closed at the time of the incident, and the property manager observed the tenant to be uninjured and was rebuffed by the tenant when she attempted to talk to her about the incident. Such circumstances, as a matter of law, do not show a reasonable inquiry. The property manager knew that the building's security staff did not speak to the tenant and had learned of the incident from the responding police officers. Had the property manger inquired whether a police report had been filed, as she should have, she would have learned of details that were not reported by the security staff, including that the tenant was in distress and had been taken from the building by ambulance. Coupled with her personal knowledge of a potentially hazardous condition -- a fire exit door that was sometimes found propped open or held open from the insider by tenants -- the police report would have alerted the property manager to the possibility of a claim (*see SSBSS Realty Corp. v Public Serv. Mut Ins. Co.*, 253 AD2d 583 [1998]).

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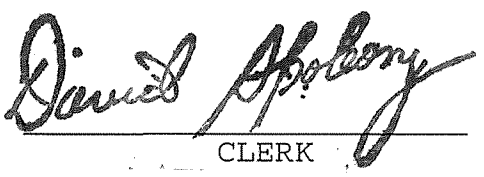


CLERK

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

2360 Linden Airport Management Corporation, et al., Petitioners-Appellants, -against- New York City Economic Development Corppration, et al., Respondents-Respondents. Index 114642/08

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

Michael A. Cardozo, Corporation Counsel, New York (Terri Feinstein Sasanow of counsel), for municipal respondents.

Wachtel & Masyr, LLP, New York (Karen Binder of counsel), for Firstflight, Inc., respondent.

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered April 22, 2009, which dismissed the petition brought pursuant to CPLR Article 78 seeking to vacate and annul the decision of respondent City of New York to award a concession to operate a City-owned Heliport to FirstFlight, Inc., a competing proposer, and denied petitioners' application to conduct discovery as moot, unanimously affirmed, without costs.

In reviewing the City's decision to award a concession, the standard is whether the decision "was arbitrary and capricious, lacked a rational basis, or was otherwise dishonest or unlawful" (*see Hunts Point Term. Produce Coop. Assn., Inc. v New York City Economic Dev. Corp.*, 36 AD3d 234, 244 [2006], *lv denied* 8 NY3d

827 [2007]; *see* CPLR 7803[3]). "Where the judgment of an agency involves factual evaluations in the area of that agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" (*Awl Indus., Inc. v Triborough Bridge and Tunnel Auth.*, 41 AD3d 141, 142 [2007]). The record establishes that the municipal respondents complied with the Rules of City of New York Franchise Concession Review Comm. (12 RCNY 1-01, *et seq.*) in issuing a request for proposals and evaluating the proposals received from five responders. The record before the Commissioner of the Department of Small Business Services, including the detailed rating sheets and the memoranda prepared by the Selection Committee composed of executives of the New York City Economic Development Corporation (hereinafter "EDC"), provides a rational basis for concluding that FirstFlight offered the best proposal, and that Linden's proposal was deficient in significant respects. In The EDC's view, FirstFlight made an excellent fee offer, had relevant experience, and presented a detailed plan for capital improvement of the heliport. Furthermore, the EDC determined that Linden failed to satisfy the Committee's concerns about the financial capacity of the entity that would be formed to operate the heliport or the composition of its operational team.

Petitioners' allegations that confidential information concerning the heliport was improperly provided to an executive

of FirstFlight before the request for proposals was issued were based only on hearsay, and are refuted by sworn affidavits and evidentiary proof (*see IMSG Sys., Inc. v City of New York*, 170 AD2d 261, 261 [1991]; CPLR 7804[h]). Thus they failed to meet their "burden to demonstrate 'actual' impropriety, unfair dealing or some other violation of statutory requirements" in the award of the concession (*see Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d 51, 55 [1997]).

Under the circumstances, including that petitioners already had sought extensive disclosure through freedom of information law requests, the court did not abuse its "considerable discretion" in denying the petitioners' application for discovery from parties and non-parties (*L & M Bus Corp. v New York City Dept. of Educ.*, _ AD3d _ , 892 NYS2d 60, 67 [2009]; *Stapleton Studios v City of New York*, 7 AD3d 273 [2004]).

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

ENTERED: MARCH 16, 2010

CLERK

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

2361 Alejo Garcia, Index 25486/04
Plaintiff-Respondent,

-against-

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

Lafayette-Morrison Housing Corporation,
Defendant-Appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (B. Jennifer Jaffee of counsel), for appellant.

Napoli Bern Ripka, LLP, New York (Denise A. Rubin of counsel), for respondent.

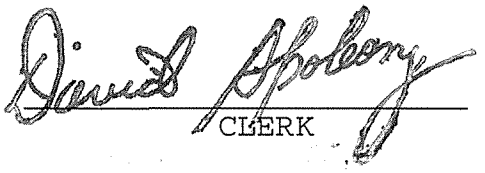
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 19, 2008, which, insofar as appealed from, in this action for personal injuries sustained in a trip and fall on a sidewalk, denied defendant Lafayette-Morrison Housing Corporation's cross motion pursuant to CPLR 3215(c) to dismiss the complaint as against it, unanimously affirmed, without costs.

The cross motion was properly denied as plaintiff took proceedings for the entry of judgment within one year after the default, thereby rendering CPLR 3215(c) inapplicable. The record shows that Lafayette was served with the summons and complaint via the Secretary of State on December 17, 2004 (*see* Business Corporation Law § 306), and thus, Lafayette's last day to answer was January 16, 2005 (CPLR 3012[c]). Plaintiff first moved for a default judgment against Lafayette by notice of motion dated

September 8, 2005, and continued to take such proceedings by notice of motion dated December 9, 2005, which was also within one year after the default (*compare Butindaro v Grinberg*, 57 AD3d 932 [2008]; *Kay Waterproofing Corp. v Ray Realty Fulton, Inc.*, 23 AD3d 624 [2005]). Plaintiff's repeated efforts to obtain a default judgment demonstrates that he had no intention of abandoning his claim.

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

ENTERED: MARCH 16, 2010



CLERK

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

2362 Parkchester South Condominium Inc., etc., Plaintiff, Index 24299/05

-against-

Edward Hernandez, Defendant-Respondent,

City of New York Environmental Control Board, et al., Defendants,

Gotham Asset Locators Fund, Inc., Intervenor-Appellant.

Law Offices of Jay S. Markowitz, Kew Gardens (Jay S. Markowitz of counsel), for appellant.

Gail Ricketts, Valley Cottage, for respondent.

Judgment, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered February 6, 2009, to the extent appealed from, invalidating the lien filed on behalf of intervenor Gotham Asset Locators Fund (GALF) on surplus monies, declaring the contract between GALF and defendant Hernandez unenforceable, and denying GALF's cross motion to enforce the agreement and obtain sanctions against Hernandez's counsel, unanimously affirmed, with costs.

While incarcerated, Hernandez was visited by a retired New York City detective representing GALF, who induced him to sign an agreement providing that GALF would receive 50% of any surplus obtained by Hernandez after the foreclosure sale of Hernandez's

apartment located in plaintiff's condominium, even if it performed no services for Hernandez. At the time, Hernandez already had counsel who was acting on his behalf. The agreement required that Hernandez consent to be represented by GALF's in-house counsel. Hernandez also signed a letter advising his counsel to cease all activity on his behalf.

Two days later, Hernandez wrote his counsel that he had signed the agreement because GALF's representative "bombarded" him with "doomsday scenarios," made false statements, and offered him cash and commissary packages. He stated that GALF was not authorized to act on his behalf. Hernandez moved to void the agreement and GALF cross-moved to enforce it and for sanctions against Hernandez's counsel for certain statements in her affirmation in support of the motion.

The contract is unenforceable since it was entered into under false pretenses (*see generally King v Fox*, 7 NY3d 181, 191 [2006]). It is also unconscionable in that it provides for the payment of a substantial sum of money to GALF even though GALF has provided no services to Hernandez.

There is no ground for an award of sanctions. There was no showing that the statements of Hernandez's attorney were completely without merit, were made primarily to harass or maliciously injure, or falsely asserted a material fact (*see* 22 NYCRR 130-1.1[c]). GALF's counsel admitted a close association

with his client, and even if this was overstated, intervenor has demonstrated no prejudice.

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

ENTERED: MARCH 16, 2010

CLERK

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

2364 The People of the State of New York, Ind. 6135/03
Respondent,

-against-

Gustavo Holguin,
Defendant-Appellant.

Gotlin & Jaffe, New York (Lawrence Fleischer of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered March 7, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the evidence was legally sufficient. To the extent defendant is claiming the verdict was against the weight of the evidence, we also reject that argument (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Even if the evidence of causation is viewed as circumstantial (*see generally People v Sanchez*, 61 NY2d 1022, 1024 [1984]), the conclusion is inescapable that a shot fired by defendant in an effort to kill a different person caused the victim's death, and defendant's arguments to the contrary are

without merit.

Defendant's claims, including his constitutional arguments, concerning the prosecutor's summation and the autopsy report are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MARCH 16, 2010

CLERK

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

2366-
2366A Index 107320/08

Marisol Capellan, et al.,
Plaintiffs-Appellants,

-against-

Alan Douglas Marsh,
Defendant-Respondent.

Warren L. Millman, New York, for appellants.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 15, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 24, 2009, which denied plaintiffs' motion to reargue the previous order, unanimously dismissed, without costs, as taken from a nonappealable paper.

The complaint failed to state a cause of action for negligent infliction of emotional distress because the allegations fell far short of the atrocious conduct required to sustain such a claim, and it never expressed danger to -- or fear for -- Marisol Capellan's physical safety (*see Sheila C. v Povich*, 11 AD3d 120, 130-131 [2004]). The allegations of sexual harassment did not fit under any cognizable legal theory.

Contrary to plaintiffs' assertion, no provision of the Executive Law -- in particular, § 296 -- applies to the situation set forth in the complaint.

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

ENTERED: MARCH 16, 2010

CLERK

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

2367 Travis Williams, Claims No. 107459
Claimant-Appellant,

-against-

The State of New York,
Defendant-Respondent.

Fellows, Hymowitz & Epstein, P.C., New City (Darren J. Epstein of counsel), for appellant.

Andrew M. Cuomo, Attorney General, Albany (Michael S. Buskus of counsel), for respondent.

Judgment, Court of Claims of the State of New York (Thomas H. Scuccimarra, J.), entered June 19, 2008, dismissing the claim after a nonjury trial, unanimously affirmed, without costs.

Claimant, an electrician apprentice employed by an electrical contractor, was injured when struck by a large spool of wire placed near the top of an exterior stairwell that he and his coworkers were using for access to their work area. The court's finding that claimant failed to prove alleged snowy or icy conditions around the stairwell landing had proximately caused the accident was not against the weight of the credible evidence (*see e.g. Watts v State of New York*, 25 AD3d 324 [2006]), which showed the accident resulting from where the coworkers had placed the spool of wire, without any mechanism to prevent it from rolling down the steps (*cf. D'Avilar v Folks Elec. Inc.*, 67 AD3d 472, 473 [2009]).

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

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

ENTERED: MARCH 16, 2010

CLERK

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

2368 The People of the State of New York, Respondent, Ind. 1432/02 759/06

-against-

Braulio Rodriguez, Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered on or about February 26, 2007, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: MARCH 16, 2010

CLERK

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

2370N Lewis Elias, Index 107664/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Gershbaum & Weisz, P.C., New York (Charles Gershbaum of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for respondent.

Order, Supreme Court, New York County (Salliann Scarpulla, J.), entered July 16, 2009, which granted plaintiff's motion for sanctions for failure to comply with discovery requests, but only to the extent of directing defendant to comply with yet outstanding discovery requests within 30 days, unanimously modified, on the law and the facts, defendant directed to comply fully with the outstanding requests and to pay plaintiff $7,500 as a penalty for the delay in complying, and otherwise affirmed, without costs.

While mere lack of diligence in furnishing some of the requested materials may not be grounds for striking a pleading, monetary sanctions are warranted by defendant's repeated delays and repeated failure to comply with discovery orders (*see Gradaille v City of New York*, 52 AD3d 279 [2008]; *Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1999]). Given its past delays

and failure to object to discovery at the last two compliance conferences, defendant must supply a full and complete response to both discovery demands.

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2371-		487/07
2371A-	The People of the State of New York,	1919/07
2371B	Respondent,	3771/07

-against-

Nikos Kontos, also known as John Doe,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgments, Supreme Court, New York County (Renee A. White, J. at dismissal motion; John Cataldo, J. at suppression hearing, plea and sentence), rendered August 13, 2008, convicting him of operating a motor vehicle while under the influence of alcohol (two counts), criminal possession of a forged instrument in the second degree and aggravated unlicensed operation of a motor vehicle in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The record supports the court's finding that the police properly stopped defendant's car because he was illegally driving after dark with only his parking lights on.

By pleading guilty, defendant forfeited his right to appellate review of the court's denial of his CPL 210.40 motion to dismiss the indictment in furtherance of justice (*see e.g. People v Arvelo*, 16 AD3d 128 [2005], *lv denied* 4 NY3d 883 [2005]). In any event, the motion was without merit, given the seriousness of both the present charges and defendant's prior record.

The court properly denied defendant's motion to withdraw his guilty plea after a suitable inquiry at which defendant received a sufficient opportunity to present his contentions (*see People v Frederick*, 45 NY2d 520 [1978]). The court properly relied on its recollection of the plea proceedings in rejecting defendant's claim that the voluntariness of his plea was impaired by physical or mental distress (*see People v Alexander*, 97 NY2d 482 [2002]).

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2372 John Davis, etc., Index 22690/01
Plaintiff-Appellant,

-against-

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

Wilfredo Batista,
Defendant.

Ginsberg & Broome, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

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

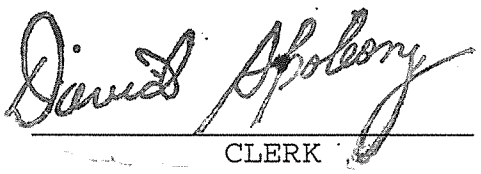
Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered November 25, 2008, after a jury trial, dismissing the complaint, unanimously affirmed, without costs.

Any error in charging Vehicle and Traffic Law § 1151 when the undisputed evidence was that the accident occurred at a cross walk with a pedestrian control signal (*see Rudolf v Kahn*, 4 AD3d 408, 409 [2004]) was not prejudicial in view of the lack of any evidence that the then-12½-year-old plaintiff had relied on the presence of a crossing guard on the day of his accident (*cf. Florence v Goldberg*, 44 NY2d 189, 197 [1978] ["the plaintiff infant's mother relied upon . . . continued performance" by municipality of special duty it assumed to provide a school crossing guard]). Plaintiff did not object to the court's charge that proof of reliance by plaintiff himself, as opposed to his

father, was necessary. Plaintiff's counsel was properly precluded from reading in rebuttal from plaintiff's deposition after the close of the evidence and after he had stated that he would not be eliciting rebuttal evidence, since his claimed failure to anticipate the need for such evidence was unjustified under the circumstances. The court's questions were designed to clarify the issues, and did not unduly interfere with counsel's presentation (*see Figueroa v Maternity Infant Care Family Planning Project*, 243 AD2d 424 [1997], *lv denied* 91 NY2d 807 [1998]). These comments from the bench did not demean counsel.

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

ENTERED: MARCH 16, 2010



CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2373 Metropolitan Taxicab Board of Trade, et al., Petitioners-Appellants, -against- The New York City Taxi & Limousine Commission ("TLC"), et al., Respondents-Respondents. Index 110594/09

Emery Celli Brinckerhoff & Abady LLP, New York (Richard D. Emery of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered November 30, 2009, which denied the petition brought pursuant to CPLR article 78 seeking to annul amendments to the New York City Taxi & Limousine Commission's (TLC) rules and granted respondents' motion to dismiss the petition, unanimously affirmed, without costs.

Respondent TLC is charged with establishing a public transportation policy governing the vehicle-for-hire industry as it relates to the overall public transportation network of the City of New York, and is vested with a broad grant of authority to promulgate and implement a regulatory program for the taxicab industry, including standards and conditions for service, safety, design, comfort, convenience, noise and air pollution control, and efficiency in the operation of vehicles (*see* New York City

Charter § 2300 *et seq.*; *Matter of New York City Comm. for Taxi Safety v New York City Taxi & Limousine Commn.*, 256 AD2d 136 [1998]). Under this broad grant of authority, the TLC was authorized to amend its rules to provide that the statutory cap imposed on the amount charged by taxicab fleet owners when leasing vehicles to taxi drivers may be altered on the basis of public policy considerations.

An administrative regulation should be upheld if it has a rational basis and is not unreasonable, arbitrary, capricious, or contrary to the statute under which it was promulgated (*see New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 166 [1991]). Under this standard, the TLC was authorized to amend its rules establishing the amount of vehicle lease caps by raising the lease amount for hybrid and fuel efficient vehicles and lowering the lease amount for non-fuel efficient vehicles. In addition to being authorized under the broad scope of the TLC's regulatory authority, the subject amendments are rationally related to the legitimate governmental goals of providing incentives for fleet owners to purchase fuel efficient vehicles which are designed to reduce harmful emissions, and to require fleet owners to bear some of the additional fuel costs associated with the operation of non-fuel efficient vehicles.

Petitioners, having not sought to show during the administrative review process that the amendments will have a

detrimental economic impact on fleet owners, may not challenge the amendments on those grounds before this Court (*see Matter of Miller v Kozakiewicz*, 300 AD2d 399, 400 [2002]).

Furthermore, the TLC was authorized to amend its rules to provide that taxicab lease amounts must be calculated so that sales and rental taxes owed by taxi drivers are included within the amount of the applicable statutory lease cap. The amendment is aimed at standardizing divergent practices regarding the payment of such taxes within the vehicle-for-hire industry, as demonstrated in the record. Contrary to petitioners' argument, the amendments do not conflict with applicable provisions of the Tax Law.

There being rational bases for the TLC's amendments at issue, we reject the claim that the amendments were enacted in retaliation for petitioners' commencement of Federal Court proceedings alleging preemption.

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2374 In re Matter of Ernestine L.,
Petitioner-Appellant,

-against-

New York City Administration for
Children's Services, et al.,
Respondents-Respondents.

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondents.

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about June 24, 2008, which dismissed petitioner's application for custody of the subject child, unanimously affirmed, without costs.

"It is well established that in reviewing . . . custody issues, deference is to be accorded to the determination rendered by the factfinder, unless it lacks a sound and substantial basis in the record" (*Yolanda R. v Eugene I.G.*, 38 AD3d 288, 289 [2007]). Here, the court properly considered the child's "best interests" (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]), in denying the application of petitioner, who is not related to the child, for custody. The record shows that petitioner did not file a petition for adoption, whereas the foster mother, who has provided a loving and stable environment for the child for the majority of his life, wishes to adopt the child (*see Matter of*

Michael B., 80 NY2d 299, 315 (1992). We note, too, that the law guardian for the child on this appeal advances cogent arguments in support of affirmance.

Petitioner's argument that to the extent Family Court relied on Social Services Law § 383 in making its determination such reliance was improper since the statute is unconstitutional as applied to her, is unpreserved (*see e.g. Matter of Amin Enrique M.*, 52 AD3d 316, 317 [2008], *lv dismissed* 12 NY3d 792 [2009]), and we decline to review it in the interest of justice.

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

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2375-
2375A John McCarthy, et al.,
Plaintiffs-Respondents,

Index 107959/05
590132/06
590371/06

-against-

Turner Construction, Inc.,
Defendant,

John Gallin & Son, Inc., et al.,
Defendants-Appellants.

- - - - -

John Gallin & Son, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Linear Technologies, Inc.,
Third-Party Defendant-Respondent.

- - - - -

Linear Technologies, Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

Samuels Datacom, LLC,
Second Third-Party Defendant-Respondent.

Malapero & Prisco, New York (Frank J. Lombardo of counsel), for John Gallin & Son, Inc., appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Boston Properties, Inc. and Times Square Tower Associates, LLC, appellants.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jerri A. DeCamp of counsel), for Linear Technologies, Inc., respondent.

Murphy & Higgins LLP, New Rochelle (Richard S. Kaye of counsel), for Samuels Datacom, LLC, respondent.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered January 22, 2009, dismissing the third-

party complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered May 24, 2007, which, inter alia, denied the motion of defendant Boston Properties and Times Square Tower Associates for summary judgment on their claim for indemnification against third-party defendant Linear Technologies, unanimously dismissed, without costs, as academic.

The trial court correctly denied John Gallin & Son's motion for a directed verdict, since it would not have been "utterly irrational" for the jury to conclude that second third-party defendant Samuels Datacom, plaintiff's employer, was not negligent in connection with plaintiff's fall from a ladder on a construction site (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Nor was the verdict that Samuels was not negligent against the weight of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]).

The argument that the court erred in failing to include on the verdict sheet an interrogatory whether plaintiff, as apart from his employer, was negligent was unpreserved. Were we to consider it, we would nonetheless reject it in light of the clear jury charge and the absence of any indication of jury confusion (*see Siagha v Salant-Jerome, Inc.*, 271 AD2d 274 [2000], *lv denied* 96 NY2d 714 [2001]; *Azzue v Galore Realty*, 172 AD2d 467 [1991], *lv denied* 78 NY2d 856 [1991]).

In light of the above finding, Boston and Times Square's appeal from the denial of indemnification against Linear is rendered academic.

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2376 Paul Kocourek, Index 602224/08
Plaintiff-Appellant,

-against-

Booz Allen Hamilton Inc., et al.,
Defendants-Respondents.

Outten & Golden LLP, New York (Laurence S. Moy of counsel), for appellant.

Latham & Watkins LLP, Washington, DC (Everett C. Johnson, Jr. of the Bar of the State of Maryland, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 2, 2009, which, to the extent appealed from, granted so much of defendants' motion to dismiss the first and second causes of action of the complaint, unanimously affirmed, without costs.

Plaintiff, an officer employed by the corporate defendants, alleged that the latter promised that the "shadow stock" he received would provide him with benefits equivalent to those provided by the common stock he also received as a corporate officer. According to plaintiff, defendants allegedly "forced" him to redeem the shadow stock shortly after his retirement, and he thereby was injured because he otherwise would have held the shadow stock and profited greatly when, 16 months after his

retirement, the company sold a portion of its business to the Carlyle Group for $2.54 billion. It is undisputed, however, that the common stock could not be redeemed for two years after retirement, and thus plaintiff necessarily is contending that defendants breached an agreement not to redeem his shadow stock until he had been retired for two years. That agreement, however, is one which by its very terms has no possibility of being performed within one year (*Huebener v Kenyon & Eckhardt*, 142 AD2d 185 [1988]). Accordingly, the absence of a writing violates the statute of frauds, rendering the alleged oral promise as to stock redemption unenforceable.

The unjust enrichment claim was also properly dismissed, as litigants may not use such a claim to evade New York's statute of frauds (*see J.E. Capital v Karp Family Assoc.*, 285 AD2d 361, 362 [2001]).

Plaintiff's request for leave to replead, made for the first time on appeal, is unsupported by facts that would correct deficiencies in the pleadings and thereby render his claims actionable (*see e.g. Ceres v Shearson Lehman Bros.*, 227 AD2d 222 [1996]) in light of the statute of frauds.

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

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2377 In re Robert Rodriguez, Index 110402/08
Petitioner-Appellant,

-against-

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

The Law Offices of Fausto E. Zapata, Jr., P.C., New York (Fausto E. Zapata, Jr. of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered January 29, 2009, which denied the petition to invalidate termination of employment and for immediate reinstatement, unanimously affirmed, without costs.

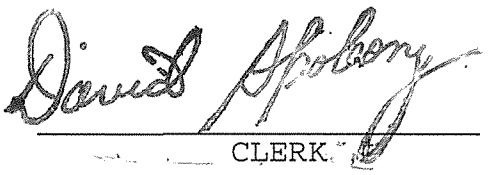
Judicial review of an administrative agency's penalty is limited to consideration of whether the measure or mode of discipline imposed constituted an abuse of discretion as a matter of law. The penalty must be upheld unless it is so disproportionate to the offense, in light of all of the circumstances, as to be shocking to one's sense of fairness (*Matter of Kelly v Safir*, 96 NY2d 32 [2001]).

Petitioner engaged in a pattern of falsifying medical notes relating to unexcused absences from work, and he failed to report his arrest on related charges. Notwithstanding his unblemished record over 26 years and his previous outstanding evaluations, we

cannot say that the penalty imposed was disproportionate to the offense (*see Matter of Pell v Board of Educ.*, 34 NY2d 222 [1974]). The Commissioner's letter sufficiently cited the egregious nature of the offense as a ground for the termination.

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

ENTERED: MARCH 16, 2010



CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2380 The People of the State of New York, Ind. 4021/06
Respondent,

-against-

Pernell Leibert,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 9, 2007, convicting defendant, after a jury trial, of criminal possession of stolen property in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification evidence. After a jeweler had already identified defendant, from a store surveillance videotape, as the person who had sold him a distinctive necklace, detectives returned to the store to continue the investigation. During a conversation among the detectives, a detective took out photographs of defendant and his twin brother. The jeweler unexpectedly came up from behind and spontaneously identified defendant's photograph. Regardless of whether this event can be viewed as the equivalent of a single-photo showup, or an inadequate photo array, we find no

basis for suppression of any identification evidence. The accidental viewing was not a police-arranged procedure (*see People v Clark*, 85 NY2d 886, 888-889 [1995]; *People v Curry*, 287 AD2d 252, 253 [2000], *lv denied* 97 NY2d 680 [2001], 98 NY2d 636 [2002]; *People v Powell*, 269 AD2d 178 [2000], *lv denied* 94 NY2d 951 [2000]). To the extent that a completely unintended viewing may still be subject to constitutional scrutiny (*cf. Raheem v Kelly*, 257 F3d 122, 137 [2d Cir 2001], *cert denied* 534 US 1118 [2002] [unintentionally suggestive procedure]), the identification was sufficiently reliable despite any suggestiveness in the viewing. Aside from having identified defendant from the videotape before viewing his photo, the jeweler also identified defendant at a lineup six weeks later, which was sufficient time to attenuate any taint from the viewing of the photo (*see People v Thompson*, 17 AD3d 138 [2005], *lv denied* 5 NY3d 795 [2005]), especially since there were significant changes in defendant's appearance by the time of the lineup (*see People v Rodriguez*, 64 NY2d 738, 741 [1984]). Contrary to defendant's argument, the circumstances did not require the police to include defendant's brother in the lineup. Finally, any error in the receipt of identification evidence was harmless in view of the overwhelming evidence establishing defendant's identity as the person who sold the necklace.

Defendant's challenges to the sufficiency of the evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the evidence was legally sufficient. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Since defendant sold the stolen property within 15 hours from the time it was taken in a robbery, the jury was entitled to infer from defendant's recent, exclusive and unexplained possession that he knew it was stolen (*see e.g. People v Rogers*, 186 AD2d 438, 439 [1992], *lv denied* 81 NY2d 765 [1992]). In addition, defendant (who was acquainted with the victim's girlfriend) saw the victim wearing the unique necklace and medallion two hours before the robbery, defendant avoided giving the jeweler his identification after the sale, and there was evidence permitting a rational inference that defendant knew the robbers. There was ample evidence, including the credible testimony of the victim and the jeweler, to warrant the conclusion that the value of the property exceeded the statutory threshold.

Defendant's challenges to the admissibility of certain evidence are without merit. Each of these items provided circumstantial evidence of defendant's guilt, particularly with regard to the element of knowledge, and defendant's arguments go

to the weight to be accorded the evidence, not its admissibility (*see generally People v Mirenda*, 23 NY2d 439, 452-454 [1969]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2381 The People of the State of New York, Ind. 1630/99
Respondent,

-against-

Jose Manuel, also known as Franklin Infante,
Defendant-Appellant.

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

Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about October 9, 2007, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2382 In re Graham Court Owners Corp., Index 103432/08
Petitioner-Appellant,

-against-

Division of Housing and Community Renewal,
Respondent-Respondent,

Kyle Taylor,
Respondent-Intervenor-Respondent.

Kucker & Bruh, LLP, New York (Robert H. Berman of counsel), for appellant.

Gary R. Connor, New York (Patrice Huss of counsel), for respondent.

Bierman & Palitz LLP, New York (Mark H. Bierman of counsel), for intervenor-respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), entered November 24, 2008, denying the petition and dismissing the proceeding, unanimously affirmed, without costs.

Respondent DHCR's determination of rent overcharge was properly upheld based on its rejection of petitioner owner's documentation for the claimed improvements (*see Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d 158 [1997]), some of which, such as painting, plastering and floor maintenance, did not in any event constitute improvements (*see id.*), and the owner's resulting failure to carry its burden of establishing entitlement to a major capital improvement increase (*see* Rent Stabilization Code [9 NYCRR] § 2522.4[a][1];

Matter of 985 Fifth Ave. v State Div. of Hous. & Community Renewal, 171 AD2d 572, 574-575 [1991], *lv denied* 78 NY2d 861 [1991]). DHCR's discrediting of the owners' documentation for some of the claimed improvements permissibly tainted its view of others (*see Matter of Lucot, Inc. v Gabel*, 20 AD2d 94, 97 [1963], *affd* 15 NY2d 774 [1965]).

Treble damages were properly imposed because the owner failed to establish that its overcharges were not willful (*see Matter of 425 3rd Ave. Realty Co. v New York State Div. of Hous. & Community Renewal*, 29 AD3d 332, 333 [2006]).

We have considered the owner's other contentions and find them unavailing.

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

ENTERED: MARCH 16, 2010

David Spokony
CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2383 Berta Poberesky, Index 350506/05
Plaintiff-Appellant,

-against-

Lev Poberesky,
Defendant-Respondent.

Mallow, Konstam & Nisonoff, P.C., New York (Mirra Khavulya of counsel), for appellant.

Judgment, Supreme Court, New York County (Marilyn B. Dershowitz, Special Referee), entered May 23, 2008, to the extent appealed from as limited by the brief, awarding plaintiff $3,700 per month in spousal maintenance taxable to her, directing that defendant be credited for pendente lite maintenance overpayments, and omitting any reference to the issue of plaintiff's health insurance coverage, unanimously modified, on the law and the facts, to increase plaintiff's maintenance award to $4,200, and otherwise affirmed, without costs.

In concluding that "[t]here is no life style that must be maintained here," the Special Referee focused disproportionately on the parties' standard of living during the first eight years following their immigration to this country from the Soviet Union and failed to give due consideration to their standard of living during the seven years before the commencement of this action

(*see* Domestic Relations Law § 236[B][6]; *Hartog v Hartog*, 85 NY2d 36, 50-51 [1995]).

We agree with Supreme Court that the defendant should be reimbursed for any excess temporary maintenance payments from the sums awarded to the plaintiff in equitable distribution (*Johnson v Chapin*, 49 AD3d 348, 350 [2008] ["equity requires that the husband be awarded a distributive credit for . . . the amount that his pendente lite support payments exceeded what he would have been required to pay consistent with the final maintenance award"]).

In determining defendant's maintenance obligations, the Special Referee properly considered his primary salary only, crediting defendant's testimony that he had worked overtime and taken on additional jobs to enable his daughter to graduate from private college without debt and thereafter continued to support her for a time, that he had planned to reduce his workload but was under financial pressure supporting two families, and that he was 60 years old. However, we find the monthly maintenance award of $3,700 inadequate and increase the award as indicated.

Plaintiff, who is now eligible for Medicare, failed to identify any special medical needs requiring an additional award for medical expenses or health insurance coverage.

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

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

ENTERED: MARCH 16, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2384 Ramon Mejia-Ortiz, Index 6049/07
Plaintiff-Appellant,

-against-

Gavin R. Inoa, et al.,
Defendants-Respondents.

Calcagno & Associates, Staten Island (Craig A. Borgen of counsel), for appellant.

Barnett & Walter, LLP, Garden City (Jay M. Weinstein of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered September 30, 2009, which denied plaintiff's CPLR 3215 motion for a default judgment as against defendant Santos Brown-Grey and dismissed the complaint with prejudice, unanimously affirmed, without costs.

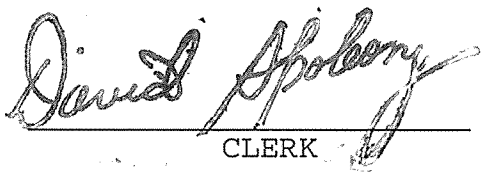
Plaintiff failed to take proceedings for the entry of judgment within one year after the default. Defendant Brown-Grey was purportedly served with the summons and complaint via the Secretary of State on January 23, 2007 (*see* VTL 253). Accordingly, defendant's last day to answer was February 22, 2007 (*see* CPLR 3012 [c]) and the default occurred the following day, February 23, 2007. Plaintiff moved for a default judgment against defendant Brown-Grey by notice of motion dated July 13, 2009. Thus, by moving almost 2½ years after the default, plaintiff failed to take proceedings for the entry of judgment

within one year after the default (*see Butindaro v Grinberg*, 57 AD3d 932, 932-933 [2008]; *Kay Waterproofing Corp. v Ray Realty Fulton, Inc.*, 23 AD3d 624, 625 [2005]; *Skeete v Bell*, 292 AD2d 371 [2002]).

We find that the motion court did not improvidently exercise its discretion in finding that plaintiff failed to demonstrate a reasonable excuse for his delay (*see Opia v Chukwu*, 278 AD2d 394 [2000]). Counsel's explanation for the delay in moving for the default is that his office staff failed to track the case properly. In addition, there was no submission of a personal affidavit of merit or verification of the complaint by plaintiff (*see* CPLR 3215 [f]; *Beltre v Babu*, 32 AD3d 722 [2006]; *Feffer v Malpero*, 210 AD2d 60 [1998]).

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

ENTERED: MARCH 16, 2010



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