SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

April 21, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3844 Tower Insurance Company of New York, Index 110967/08
Plaintiff-Appellant,

-against-

Babylon Fish & Clam, Inc,
Defendant-Respondent,

Sandra Menken, etc.,
Defendant.

_____

Law Office of Steven G. Fauth, LLC, New York (Suma Samuel Thomas of counsel), for appellant.

Kujawski & Dellicarpini, Deer Park (Mark Kujawski of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered June 9, 2010, which denied plaintiff insurer's motion for summary judgment declaring that the insurer is not obligated to defend or indemnify its insured in the underlying action, reversed, on the law, without costs, the motion granted, and it is so declared.

This is an insurance coverage dispute concerning whether

plaintiff Tower must defend and indemnify its insured, defendant Babylon Fish & Clam, Inc. (Babylon), under an occurrence-based commercial general liability insurance policy. The underlying lawsuit is a wrongful death action brought by defendant Sandra Menken, individually and as executor of the estate of Michael J. Menken, arising out of an alleged food-poisoning incident at Babylon's restaurant on July 16, 2007. Tower alleges that Babylon forfeited its right to coverage under the policy by waiting nearly a year before reporting the incident to Tower, in violation of the policy condition that the insured give notice of a claim "as soon as is practicable." On or about June 26, 2008, almost one year after the incident, Babylon, through its broker, notified Tower of the incident by forwarding the underlying summons and complaint and a notice form. Tower disclaimed coverage by letter dated July 23, 2008, alleging that Babylon failed to give timely notice of the claim. Tower alleged that Babylon was aware of the occurrence giving rise to the underlying action on or about August 12, 2007, yet failed to notify Tower until June 27, 2008.

We agree with Tower that notice of the occurrence was untimely as a matter of law. Tower established that its insured, Babylon, failed to report the incident for nearly one year. In

response, Babylon failed to demonstrate that a reasonably prudent person, upon learning of the incident, would have a good faith, objective basis for believing that litigation would not be commenced (*see Ferreira v Mereda Realty Corp.*, 61 AD3d 463 [2009]). Having failed to do so, the insurer was entitled to summary judgment in its favor declaring that it had no duty to defend or indemnify Babylon.

Further, the record evidence shows that Babylon should have reasonably anticipated that a claim would be asserted. Mrs. Menken notified Babylon less than one month after the incident that her husband had become sick due to food he ate at the restaurant. This statement, whether or not true, should have reasonably alerted the insured that a claim was possible. On the following day, according to Melissa Laroque, Babylon's president, an inspector from the Suffolk County Department of Health Services came to inspect the restaurant based on a report that a patron had become ill as a result of eating clams. Laroque further admitted that the health inspector returned two days later, on August 15, 2007, at which time he informed her that the sick patron was the decedent, Michael Menken, and advised her of "some deficiencies" uncovered by his inspection.

The insured claims that it reasonably believed, based on the

health inspector's alleged statements about the decedent's prior health condition and favorable inspection of the restaurant, that it bore no liability for the decedent's injuries and death. However, the relevant legal standard is "not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him" (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1998]).

All concur except Gonzalez, P.J., who concurs in a separate memorandum as follows:

GONZALEZ, P.J. (concurring)

I concur with the majority's result, granting plaintiff's motion for summary judgment declaring that it is not obligated to defend its insured, defendant Babylon, in the underlying litigation.

However, I would find that it was Babylon's failure to conduct any inquiry into the details of the alleged food poisoning after having been made aware of the patron's illness that requires this result. In *Great Canal Realty Corp. v Seneca Ins. Co., Inc.* (5 NY3d 742, 743-744 [2005]), the Court of Appeals stated that, while an insured's reasonable "good-faith belief of nonliability" may excuse a failure to give timely notice, "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" (internal quotation marks and citations omitted). The Court found that the insured in that case had "failed to raise a triable issue of fact as to whether its delay in giving notice was reasonably founded upon a good-faith belief of nonliability" (*id.* at 744).

In this case, in the week after Babylon received an oral complaint from the wife of a patron who alleged that her husband suffered food poisoning from a meal at its restaurant, the

Suffolk County Department of Health Services conducted two inspections of the premises. Yet Babylon did not notify its insurer of the incident until approximately a year later, after it was sued by the wife of the patron, who had died four days after allegedly eating at the restaurant. Although it was incumbent upon Babylon to follow up on the patron's complaint to determine whether it could face liability for the patron's alleged food poisoning, it undertook no independent investigation in this regard. Thus, like the plaintiff in *Great Canal Realty Corp.*, Babylon failed to raise an issue of fact as to the reasonableness of its claimed belief of nonliability.

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

ENTERED: APRIL 21, 2011.

CLERK

Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4376 In re Skyler S. M.,

A Dependent Child Under 18 Years of Age, etc.,

S. LaToya J.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

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Dora M. Lassinger, East Rockaway, for appellant.

Rosin Steinhagen Mendel, The Children's Aid Society, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about April 8, 2009, which, upon a fact-finding determination of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, with respect to the disposition, and the appeal therefrom otherwise dismissed, without costs.

No appeal lies from the fact-finding part of the order, as it was entered upon the mother's default (*see* CPLR 5511; *Matter*

of Elijah Jose S. [Jose Angel S.], 79 AD3d 533, 533 [2010]). We reject the mother's contention that counsel was ineffective for failing to move to vacate her default. The mother provides no explanation as to why she was unable to appear on the day of the fact-finding hearing, or why she did not notify the court or her counsel that she was unable to appear (*see Matter of Nikeerah S. [Barbara S.]*, 69 AD3d 421, 422 [2010]).

In any event the finding of permanent neglect was supported by clear and convincing evidence of the mother's failure to plan for the child's future, notwithstanding the agency's diligent efforts (*see* Social Services Law § 384-b[7][a] and [f]). The mother admittedly tested positive for cocaine, failed to complete drug treatment and anger management programs, and did not obtain suitable housing.

A preponderance of the evidence established that termination of the mother's parental rights to facilitate adoption was in the child's best interests (*see Matter of Star Leslie W.*, 63 NY2d, 136, 147-148 [1984]). The foster mother, with whom the child has lived since placement, wishes to adopt the child and has attended to the child's medical and psychological needs (*see Matter of Carol Anne Marie L. [Melissa L.]*, 74 AD3d 643, 644 [2010]).

Since the child's placement, the mother has tested positive for drugs and has refused to address the problems that led to placement.

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

ENTERED: APRIL 21, 2011.

CLERK

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

2385N Lucy Mimran, Index 308754/07
Plaintiff-Respondent,

-against-

David Mimran,
Defendant-Appellant.

_____

Clair, Greifer LLP, New York (Bernard E. Clair of counsel), for appellant.

William S. Beslow, New York, for respondent.

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Order, Supreme Court, New York County (Saralee Evans, J.), entered February 4, 2009, which, insofar as appealed from, directed defendant to pay plaintiff $200,000 as interim counsel fees, and, as part of defendant's temporary child support obligation, $10,000 per month for housekeeping staff and $10,000 per month for vacations and other recreational expenses, unanimously modified, on the law and the facts, to the extent of vacating the award to plaintiff of $200,000 in interim counsel fees without prejudice to a renewal of the application, and otherwise affirmed.

Based on this record, we cannot conclude that the pendente lite awards for housekeeping staff, vacations and other recreational expenses for the children are disguised temporary

maintenance awards in excess of the maintenance provided for in the parties' prenuptial agreement. To be sure, the motion court stated that the award for vacations and recreational expenses was "*for plaintiff* and the children" (emphasis added). However, the children reside with plaintiff, so we construe the italicized phrase to permit portions of the award to be spent on plaintiff to the extent reasonably necessary in connection with vacations and recreational expenses for the children. Moreover, under all the circumstances and, in particular, the extraordinarily high standard of living to which the children are accustomed (*see Baker v Baker*, 120 AD2d 374, 375 [1986]), we cannot find that the award was inappropriate.

Regardless of whether plaintiff otherwise made a sufficient showing to support an award of interim counsel fees (*see Charpie v Charpie*, 271 AD2d 169, 173 [2000]), defendant is correct that neither plaintiff nor her counsel provided adequate documentation of the amount of fees already paid, the amount required for experts, the dates and nature of the services previously rendered, or the number of hours of work to be performed (*Wolf v Wolf*, 146 AD2d 527 [1989]; *Covington v Covington*, 249 AD2d 735, 735 [1998]; *Hughes v Hughes*, 208 AD2d 502, 502 [1994]; 22 NYCRR 202.16[k][3]). Thus, there is insufficient evidence to support

an award for outstanding fees already incurred and no basis upon which an appropriate prospective fee award can be determined.

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

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

ENTERED: APRIL 21, 2011.

CLERK

Andrias, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

2861 Francisco DaSilva, et al., Index 402691/05
Plaintiffs-Respondents, 591241/05

-against-

C & E Ventures, Inc., et al.,
Defendants,

Port Authority of New York & New Jersey,
Defendant-Appellant.

[And a Third-Party Action]

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Timothy R. Capowski of counsel), for appellant.

Law Offices of Lawrence Perry Biondi, Garden City (Lisa M. Comeau of counsel), for Francisco DaSilva, Maria DaSilva, Robert DaSilva, Silvia DaSilva, Marciano Debas, Daniel Martins, Graciela Tsoliakis and Stefano Tsoliakis, respondents.

Carol R. Finocchio, New York, for Mark Liard, respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 30, 2008, which, to the extent appealed from as limited by the briefs, denied the motion by defendant Port Authority (PA) for summary judgment dismissing the complaint against it in its entirety, or for a declaration that the law of New Jersey rather than New York governs, and granted plaintiff Liard's cross motion for leave to supplement his bill of particulars, unanimously affirmed, without costs.

In this action for personal injuries arising from plaintiffs' exposure to lead during lead paint abatement they performed on the George Washington Bridge, defendant PA argues, inter alia, that plaintiffs' injuries occurred while they were performing work on the portion of the bridge that is located in New Jersey and that applicable New Jersey law requires dismissal of plaintiffs' claims. The PA also argues that plaintiff Liard, the only plaintiff who did not initially assert an injury in New York as well as in New Jersey, should not be permitted to amend his bill of particulars to add such a claim.

Contrary to the PA's argument, Liard's Notice of Intention to Make Claim satisfied specific requirements regarding time and content (McKinney's Unconsolidated Laws of NY § 7107 and § 7108), and along with his timely filing of a complaint, vested Supreme Court with subject matter jurisdiction. The court did not abuse its discretion in granting Liard leave to serve a supplemental bill of particulars for the purpose of amplifying and clarifying allegations based on additional factors uncovered during discovery (*see* CPLR 3025[b], [c]; *Scherrer v Time Equities, Inc.*, 27 AD3d 208 [2006]). Despite Liard's delay in seeking leave to supplement, the PA cannot claim prejudice, as the supplement set forth claims identical to those previously asserted in the

complaint and bill of particulars filed by Liard's coplaintiffs (*see Scarangello v State of New York*, 111 AD2d 798 [1985]).

The issue of which state's law applies is dispositive. Under New Jersey's general negligence law, an owner is not responsible for harm which occurs to a contractor's employee as a result of the very work the contractor was hired to perform (*Burger v Sunoco, Inc. [R&M]*, 2009 WL 4895207, *1, 2009 US Dist LEXIS 115474, *3 [DNJ 2009]; *Accardi v Enviro-Pak Systems Co., Inc.*, 317 NJ Super 457, 463, 722 A2d 578, 580 [1999], *cert denied* 158 NJ 685, 731 A2d 45 [1999]). In contrast, New York's Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors "to provide reasonable and adequate protection and safety to the persons employed" at construction, excavation, and demolition sites. The PA argues that New Jersey law must be applied because plaintiffs' deposition testimony establishes that their injuries occurred only in New Jersey, and to the extent plaintiffs' affidavits, submitted in opposition to its motion for summary judgment, assert injury in New York, the affidavits' identical content, and the fact that they were inconsistent with plaintiffs' deposition testimony, demonstrate that these statements were fabricated for the purpose of avoiding dismissal. It therefore maintains that there is no real issue of fact

regarding whether plaintiffs were injured in New York.

Plaintiffs' affidavits and the uncontroverted affidavit of their expert demonstrate exposure to lead-based paint contaminant during work performed on portions of the George Washington Bridge located in both New York and New Jersey. There are no fatal inconsistencies between the deposition testimony and the affidavits. In addition, particularly because plaintiffs worked together, performed similar tasks, and shared the same experience, the affidavits should not be rejected due to their identical nature.

In contrast, the PA failed to establish that plaintiffs were not injured in New York. Indeed, it neither submitted any expert testimony to controvert plaintiffs' expert's conclusion that plaintiffs were injured in both New York and New Jersey nor argued before the motion court that disputed issues of material fact require a framed-issue hearing before any determination on choice of law can be made. To the contrary, the PA maintained that there were no issues of fact and that it was entitled to both a declaration that New Jersey law applies and summary judgment based on the applicable New Jersey law. Having failed to raised this issue below, its current claim that a hearing is necessary is not preserved for our review (*see William Kaufman*

Org. v Graham & James, 269 AD2d 171, 174 [2000]).

Because plaintiffs' uncontroverted evidence establishes that they were injured in both New York and New Jersey and there is a conflict between the laws of the jurisdictions, we must perform a choice of law analysis. "Under New York's choice of law rules, if the plaintiff and the defendant are domiciled in different states, the law of the situs of the injury generally applies. On the other hand, where the parties share a common state of domicile, an analysis will determine which state's law (that of the common domicile or that of the situs) has the predominant interest" (*Aviles v Port Auth. of N.Y. & N.J.*, 202 AD2d 45, 46 [1994] [internal citations omitted]). The PA has a dual domicile in both New York and New Jersey. Most of the plaintiffs are New York domiciliaries but at least two of them are domiciliaries of New Jersey. Thus, assuming different domiciliaries, the law of the situs of the injury applies and plaintiffs have established that they suffered injuries in New York.

In the alternative, assuming the same domicile, if we conduct a choice of law analysis, New York's interest in this litigation is sufficient to warrant the application of New York law. "New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having

its law applied in the litigation" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]). This analysis requires two separate inquiries: "(1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss" (*id.*). With regard to the latter, the courts of this State have held that although the Labor Law provisions "embody both conduct-regulating and loss-allocating functions requiring worksites be made safe (conduct-regulating) and failure to do so results in strict and vicarious liability of the owner of the property or the general contractor," they "are primarily conduct-regulating rules, requiring that adequate safety measures be instituted at the worksite" (*id.* at 522-523). With regard to the former, "[j]ustice, fairness and the best practical result may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation" (*Babcock v Jackson*, 12 NY2d 473, 481 [1963] [internal quotation marks and citations omitted]).

New York has a paramount interest in ensuring the safety of workers within our state. The situation presented here is far

different from one where the injury occurs solely in another state (*see e.g., Padula* at 522-523 [finding that Massachusetts law was properly applied where plaintiff New York resident fell off scaffold in Massachusetts on property owned by defendant New York corporation]; *Huston v Hayden Bldg Maintenance Corp.*, 205 AD2d 68 [1994] [finding that New Jersey law applies in action brought by New York resident employed by New York corporation for injuries sustained while working in New Jersey on property owned by New Jersey corporation]). Given the uncontroverted evidence of injuries suffered in New York, the fact that plaintiffs were employed by a New York company while performing work for the PA, a domiciliary of NY (as well as NJ), the motion court properly concluded that New York law applies.

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

ENTERED: APRIL 21, 2011.

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4189 Goldberg, Weprin & Ustin, LLP, Index 105015/08
Plaintiff-Respondent-Appellant,

-against-

Leonard D. Pearlman,
Defendant-Appellant-Respondent.

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Ballon Stoll Bader & Nadler, P.C., New York (Irving Bizar of counsel), for appellant-respondent.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 3, 2010, which, in an action for legal fees, denied defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on its causes of action for an account stated or, in the alternative, for quantum meruit, unanimously affirmed.

Plaintiff alleges that it is entitled to legal fees based on the legal services it provided to defendant regarding the sale of an apartment complex owned by Kingsbridge Associates, in which defendant was a principal, and regarding other real estate transactions involving a variety of defendant's corporate entities. In January 2005, plaintiff sent defendant a letter of engagement at his home address outlining the attorney hourly

rates for the apartment complex transaction. Although this letter went unsigned, plaintiff proceeded to complete work on the transaction, and there were conversations between the parties during this time. In February 2005, plaintiff sent defendant a second letter of engagement at his home address referencing a conversation the parties had regarding defendant's concern over the amount of fees that had accumulated. The letter also apprised defendant that by signing and returning it, he would be obligated to make full payment of all amounts due. Both letters of engagement were addressed to defendant, individually, and defendant did not sign either letter.

In November 2006, when the sale of the apartment complex was complete, the escrow funds from plaintiff's account were returned to Kingsbridge Associates. Thereafter, plaintiff continued to provide additional legal services regarding various real estate transactions in an effort to ensure that defendant received substantial tax benefits from the original apartment complex transaction. The record shows that plaintiff received three payments from two of defendant's corporate entities that were involved in these additional real estate transactions. Plaintiff commenced this suit against defendant, individually, for legal fees, arguing entitlement under a theory of account stated and,

in the alternative, quantum meruit. Both parties subsequently moved for, and were denied, summary judgment.

The motion court properly determined that neither party was entitled to summary judgment. Although the record demonstrates that plaintiff provided legal services, it is unclear to whom these services were provided. The record shows that plaintiff addressed and mailed all correspondence and invoices to defendant, individually, at his home address. However, the record also establishes that plaintiff received partial payment from two of defendant's entities, not from the defendant himself, and that plaintiff transferred the remaining escrow funds from the apartment complex transaction to Kingsbridge Associates, not to defendant individually (*compare Miller v Nadler*, 60 AD3d 499 [2009]). Moreover, the invoices themselves are ambiguous and do not conclusively establish for whom the work was completed.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4854 The People of the State of New York, Ind. 1757/04
Respondent,

-against-

Orlando Correa,
Defendant-Appellant.

_____

Chadbourne & Parke, LLP, New York (Andrea Voelker of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about April 7, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The resentencing court providently exercised its discretion (*see People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]) in determining that substantial justice required the denial of defendant's motion. Defendant has a very extensive criminal record, including crimes of violence, and has frequently committed new crimes after being released on parole or while awaiting trial on other charges. The court properly concluded

that defendant's chronic inability to control his behavior while at liberty outweighed his recent evidence of rehabilitation while incarcerated.

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4855-4856 Source Enterprises, Inc., et al., Plaintiffs-Appellants, Index 110684/09

-against-

Windels Marx Lane & Mittendorf, LLP, Defendant-Respondent.

_____

Moses & Singer, LLP, New York (David Rabinowitz of counsel), for appellants.

Patterson Belknap Webb & Tyler, LLP, New York (Frederick B. Warder III of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ira Gammerman, JHO), entered July 15, 2010, which, to the extent appealed from, dismissed the complaint, pursuant to an order, same court and JHO, entered July 15, 2010, which granted defendant law firm's motion to dismiss the complaint, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court properly determined that this action, alleging, among other things, legal malpractice in connection with defendant's representation of plaintiffs in bankruptcy court, is barred by res judicata (*compare D.A. Elia Constr. Corp. v Damon & Morey LLP*, 389 BR 314, 318-20 [WD NY 2008], *affd* 394

Fed Appx 769 [2d Cir 2010], *with Penthouse Media Group v Pachulski Stang Ziehl & Jones*, 406 BR 453, 458-463 [SD NY 2009]). Contrary to plaintiffs' contention, it makes no difference whether counterclaims for malpractice and related malfeasance, which plaintiffs could have raised in the bankruptcy fee application proceeding, were "permissive" or "compulsory" within the meaning of the Bankruptcy Rules (*see In Re Image Innovations Holdings, Inc.*, 391 BR 255, 261 [Bankr SD NY 2008]; *In re Intelogic Trace, Inc.*, 226 BR 382, 383-84 [WD Tex 1998], *affd* 200 F3d 382 [5th Cir 2000]). Had plaintiffs asserted affirmative malpractice claims in bankruptcy court, the matter could have been converted into an adversarial proceeding (*see* Fed Rules Bankr Pro rule 3007; *Grausz v Englander*, 321 F3d 467, 474 [4th Cir 2003]).

We have reviewed plaintiffs' other contentions and find them unavailing.

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, JJ.

4857-
4858 In re 108 Realty LLC, Index 113982/09
Petitioner-Appellant,

-against-

Department of Housing Preservation and Development of the City of New York, et al.,
Respondents-Respondents.

_____

Goldberg Weprin Finkel Goldstein, LLP, New York (Matthew Hearle of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Andrea M. Chan of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered January 12, 2010, dismissing the petition to annul the determination of respondent Department of Housing Preservation and Development (HPD), dated June 5, 2009, which denied petitioner's application for tax benefits under the J-51 tax incentive program, unanimously affirmed, without costs.

Initially, we note that Supreme Court properly entertained respondents' motion to dismiss, which was based solely on a point of law and did not dispute any of the facts alleged by petitioner (*see* CPLR 7804[f]; *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d

100 [1984]). Furthermore, contrary to petitioner's contention, its allegation that the "sole basis" for HPD's determination was that the premises at issue were "converted from a Class B SRO [single room occupancy] into a Class A Multiple Dwelling by private funding" need not be credited on this motion to dismiss because it is a legal conclusion (*see Kliebert v McKoan*, 228 AD2d 232 [1996], *lv denied* 89 NY2d 802 [1996]).

Real Property Tax Law (RPTL) § 489, the J-51 enabling statute, provides, in pertinent part, that J-51 benefits "shall not apply to any conversion of or alteration or improvement to *any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy*, ... unless such conversion, alteration or improvement is carried out with ... substantial assistance from any [government] agency or instrumentality" (subd [13] [emphasis added]; *see* 28 RCNY 5-04[a][4]; *see also* 28 RCNY 5-03[a][1]). Petitioner concedes that the conversion of its building from a class B multiple dwelling to a class A multiple dwelling was "entirely privately funded." It argues that HPD's determination is arbitrary and capricious because the building never was an SRO. Thus, the issue before us is whether the phrase "used in whole or in part for single room occupancy" in RPTL 489(13) modifies "class A multiple dwelling"

only or "class B multiple dwelling" as well. We conclude that the phrase modifies "class A multiple dwelling" only.

Administrative Code of City of NY § 11-243 (formerly § J-51) incorporates the definition of "multiple dwellings" set forth in the Multiple Dwelling Law (MDL) (*see* § 11-243[a][5]). The MDL divides multiple dwellings into two classes: class A and class B (§ 4[7]). A class A multiple dwelling is defined as "a multiple dwelling which is occupied, as a rule, for permanent residence purposes" (MDL § 4[8][a]). By contrast, a "class B multiple dwelling is defined as "a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals" (MDL § 4[9]). Single room occupancy is defined as "occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment" (MDL § 16). Notably, while the statute provides that a class A multiple dwelling "used wholly or in part for single room occupancy ... remains a class A multiple dwelling" (*id.*), it makes no such provision for a class B multiple dwelling, which is, by

definition, "transient" housing such as SROs are commonly understood to provide.

Although there are only two classes of multiple dwellings, the statute does not provide that J-51 benefits are inapplicable to "any multiple dwelling used in whole or in part for single room occupancy"; it names both classes, in the disjunctive, and adds a qualifying phrase after the second: "any class B multiple dwelling or class A multiple dwelling used ... for [SRO]." Thus, we conclude that the Legislature intended to distinguish between any class B multiple dwelling whatsoever and any class A multiple dwelling used for SRO. Indeed, in its determination, HPD stated that its review of Building Department records indicated that petitioner's "was a Class B multiple dwelling prior to the privately-financed conversion into a Class A multiple dwelling." It did not find that petitioner's building was a class B multiple dwelling used for SRO.

We note that the foregoing interpretation comports with the principle that tax exemption statutes should be strictly construed (*see Matter of Colt Indus. v New York City Dept. of Fin.*, 66 NY2d 466, 471 [1985]; *Matter of City of Lackawanna v State Bd. of Equalization & Assessment of State of N.Y.*, 16 NY2d 222, 230 [1965]).

We reject petitioner's argument that *Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.* (70 NY2d 451 [1987], *appeal dismissed* 485 US 950 [1988]) compels a different outcome. The issue before the *Replan* Court was the constitutionality of the retroactive application of amendments to former RPTL § 489 that were enacted to "eliminat[e] the tax incentive to convert SRO's" to non-SRO class A housing (70 NY2d at 455). The Court did not hold, as petitioner suggests, that conversions of non-SRO class B multiple dwellings automatically qualified for J-51 tax treatment. Indeed, *Replan*'s retroactive denial of J-51 benefits to a conversion of a class B SRO to a non-SRO class A dwelling is not inconsistent with respondents' interpretation of RPTL § 489 in the instant case. In that case, no reference was made to the "government assistance" clause of RPTL § 489(13) that is critical to the determination in this case.

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4859 In re Abeola C.,

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

_____

Frederic P. Schneider, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Avshalom Yotam of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about February 9, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute robbery in the second degree, grand larceny in the fourth degree (two counts) and criminal possession of stolen property in the fourth and fifth degrees, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied defendant's motion to suppress identification testimony. The showup, conducted in very close temporal and spatial proximity to the crime, was part of an unbroken chain of fast-paced events. Both the use of a showup

and the manner in which it was conducted were justified by the exigencies of the case and the interest of prompt identification (*see People v Duuvon*, 77 NY2d 541 [1991]; *People v Love*, 57 NY2d 1023, 1024 [1982]). There is no evidence that the identification was influenced by the fact that multiple witnesses arrived at the showup in the same police car (*see People v Wilburn*, 40 AD3d 508, 509 [2007], *lv denied* 9 NY3d 883 [2007]). The overall effect of the allegedly suggestive circumstances cited by defendant was not significantly greater than what is inherent in any showup (*see People v Gatling*, 38 AD3d 239, 240 [2007], lv denied 9 NY3d 865 [2007]).

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4861 Julie Colyer, Index 64835/92
Plaintiff-Appellant,

-against-

John Colyer,
Defendant-Respondent.

_____

Larry M. Carlin, New York, for appellant.

Benjamin J. Golub, New York, for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered on or about July 2, 2010, which, to the extent appealed from as limited by the briefs, upon granting plaintiff's motion for an order compelling defendant to pay college and medical expenses of the parties' daughter, awarded plaintiff $20,000 in attorneys' fees, unanimously modified, on the law and the facts, to increase the award of attorneys' fees to $54,467.50 and otherwise affirmed, without costs.

Plaintiff's entitlement to attorneys' fees in connection with the instant proceeding arises not from the provisions of the Domestic Relations Law (DRL), which accords the court discretion in setting fees, but from the parties' separation agreement, which provided for defendant's full indemnification of fees if he defaulted on his obligation to pay the daughter's college

expenses and certain medical expenses and it became necessary for plaintiff to bring proceedings to enforce his obligations. Thus, plaintiff is entitled to collect the full amount of her attorneys' fees in connection with the successful enforcement proceeding (*see Millard v Millard*, 246 AD2d 349 [1998]). Although defendant complained generally about the reasonableness of the total amount of attorneys' fees sought, he did not contend that any amounts should be excluded as unrelated to the successful portion of the application. Thus, there was no basis for reducing the total amount, which is $45,270.

Plaintiff also seeks attorneys' fees incurred, during the period after a prior award of child support arrears was issued and before the commencement of the instant enforcement proceeding, in connection with negotiations undertaken in an effort to resolve all matters. As the court found, the separation agreement only provides for attorneys' fees incurred in the bringing of an enforcement proceeding (*see Nichols v Nichols*, 306 NY 490, 496 [1954]; *Bianco v Bianco*, 36 AD3d 490, 491 [2007]). This was correctly decided.

We agree with the court's denial of plaintiff's request for an award of fees incurred in connection with other applications

dating back to 2001, since plaintiff offered no adequate explanation for failing to seek those fees earlier (*compare Holloway v Holloway*, 307 AD2d 405 [2003]).

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4862 William Kamen, et al., Index 603530/09
Plaintiffs-Respondents,

-against-

Keith Weithorn,
Defendant-Appellant.

_____

Sunshine & Feinstein, LLP, Garden City, (Paula Schwartz Frome of counsel), for appellant.

Quirk and Bakalor, P.C., New York (Carter A. Reich of counsel), for respondents.

_____

Appeal from judgment, Supreme Court, New York County (Ira S. Gammerman, J.H.O.), entered March 18, 2010, which, upon defendant's default, granted plaintiffs' motion for summary judgment in lieu of complaint, unanimously dismissed, with costs, as taken from a nonappealable judgment.

Since the judgment appealed from was granted on default, no appeal lies therefrom. Defendant's remedy is an application to the rendering court to vacate the judgment, if not otherwise time

barred (*see* CPLR 5511, 5015; *Armin A. Meizlik Co. Inc. v L&K Jewelry Inc.*, 68 AD3d 530 [2009]).

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4863 The People of the State of New York, Ind. 484/09
Respondent,

-against-

John Backman,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about September 17, 2009,

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

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

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

ENTERED: APRIL 21, 2011.

CLERK

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

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4864 The People of the State of New York, Ind. 2380/90
Respondent,

-against-

Darrick Ward,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (John Cataldo, J.), entered on or about December 1, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant defendant a downward departure from his presumptive risk level (*see People v Mingo* , 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 2008]). The mitigating factors he cites are unpersuasive, and were in any event outweighed by the

seriousness of the underlying sex crime against a very young child (*see e.g. People v Mantilla*, 70 AD3d 477, 478 [2010], *lv denied* 15 NY3d 706 [2010]; *People v Rodriguez*, 67 AD3d 596, 597 [2009], *lv denied* 14 NY3d 706 [2010]).

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, JJ.

4866 177 Christie, Inc., etc., et al., Index 109536/08
Petitioners-Appellants,

- against -

Environmental Control Board
of the City of New York, et al.,
Respondents-Respondents.

_____

Ravi Ivan Sharma, New York, for appellants.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.) entered January 12, 2010, which denied the petition seeking, inter alia, to vacate two determinations of respondent Environmental Control Board (ECB) that petitioners had violated former section 24-220(b) of the Administrative Code of the City of New York, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Given that petitioners provided no reason why the doors to their respective establishments were open while music played inside, ECB's conclusion that the reason was to entice others to patronize the eateries had a rational basis (*cf. Matter of GH*

Ville v New York City Envtl. Control Bd., 194 Misc 2d 503 [2002]). Since the music played was for advertising purposes, drew potential customers to a specific establishment, and was economically motivated, it was commercial speech, which is subject to greater regulation than other speech (*see Bolger v Youngs Drug Prods. Corp.*, 463 US 60 [1983]). Here, because the subject regulation merely required that such establishments as those operated by petitioners keep the doors closed when music is played, it was narrowly tailored to the important governmental interest of protecting the peace and quiet of the public (*see Central Hudson Gas & Elec. Corp. v Public Serv. Commn. of N.Y.*, 447 US 557, 564 [1980]).

In view of the foregoing, petitioners cannot be considered an appropriate representative of a proposed class under CPLR article 9.

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4867 The People of the State of New York, Ind. 1523/07
Respondent,

-against-

Terry Miles,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Moore, J.), rendered on or about December 22, 2008

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

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

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

ENTERED: APRIL 21, 2011.

CLERK

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

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4869 Jin-Rong Yu, Index 111032/06
Plaintiff,

-against-

2030 Embassy LLC, et al.,
Defendants,

-and-

Starlight E.R., Inc., et al.,
Defendants.

2030 Embassy LLC, et al., Index 590097/07
Third-Party Plaintiffs-Appellants-Respondents,

-and-

Starlight E.R., Inc.,
Third-Party Plaintiff,

-against-

Taft Electric Company, Inc.,
Third-Party Defendant-Respondent-Appellant,

-and-

M.G. Consulting Services, Inc., et al.,
Third-Party Defendants.

_____

Laurel A. Wedinger, New York, for appellants-respondents.

Milber Markris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Saliann Scarpulla,

J.), entered October 7, 2010, which, insofar as appealed from, denied defendants/third-party plaintiffs 2030 Embassy LLC and Carnegie Hill Management Corporation's motion for summary judgment on their claim for contractual indemnification against third-party defendant Taft Electric Company, Inc., and denied Taft's motion to compel a complete inspection of 2030 Embassy's computer system, unanimously modified, on the law, to grant 2030 Embassy and Carnegie Hill's motion, and otherwise affirmed, without costs.

In support of their motion, 2030 Embassy and Carnegie Hill submitted, inter alia, a copy of a contract or estimate executed by 2030 Embassy and Taft that contains an indemnification provision and the transcript of the deposition testimony of Joseph Tuzzolo, Taft's president and owner. Tuzzolo testified unequivocally that, before plaintiff's accident, he signed a contract with 2030 Embassy for the subject electrical work that contained an indemnification provision. While Tuzzolo claimed not to have read the contract at the time of its execution, he did not explain his failure to read it and is bound by its terms (*see Collins v E-Magine*, 291 AD2d 350, 351 [2002], *lv denied* 98 NY2d 605 [2002]). In opposition to the motion, Tuzzolo submitted an affidavit claiming that the contract was actually executed

after the accident. This affidavit is insufficient to raise a triable issue of fact because it contradicts, and appears to have been tailored to avoid the consequences of, Tuzzolo's earlier testimony (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [2008]; *Telfeyan v City of New York*, 40 AD3d 372 [2007]).

The court properly declined to award Taft further post-note of issue discovery (*see* 22 NYCRR 202.21[d]).

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4871 Fabio Torres, Index 17157/07
Plaintiff-Appellant,

-against-

Triboro Services, Inc.,
Defendant-Respondent.

_____

Mark B. Rubin, Bronx (Sandra D. Janin of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 24, 2010, which, inter alia, in this action for personal injuries sustained in a motor vehicle accident, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff did not suffer a "permanent consequential limitation of use of a body organ or function" or a "significant limitation of use of a body function or system" (Insurance Law § 5102[d]). Defendant submitted the affirmed reports of a radiologist, who reviewed the MRI films and found degenerative changes in the cervical and lumbar spines and left knee, and of an orthopedist, who concluded

that the degenerative changes were consistent with plaintiff's age, occupation and obesity, and found full ranges of motion and negative straight-leg and McMurray tests based on his examination of plaintiff (*see DeJesus v Paulino*, 61 AD3d 605 [2009]).

In opposition, plaintiff presented the affirmation of his treating physician, who found limited ranges of motion, and positive straight-leg raising test and McMurray test, when he first treated plaintiff on the day of the accident. Upon examining plaintiff 2½ years later, and finding that he still exhibited limited ranges of motion and a positive McMurray sign, the physician concluded that the injuries were permanent in nature. Although plaintiff's medical evidence was sufficient to raise triable issues of fact as to whether plaintiff's claimed injuries were serious (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [2010]), it failed to raise a triable issue of fact as to causation, given that plaintiff's physician failed to address the non-conclusory opinions of defendant's expert that the new conditions revealed in the 2007 MRI's were degenerative in nature (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Valentin v Pomilla*, 59 AD3d 184 [2009]).

The motion court also correctly granted defendant's motion for summary judgment with respect to the 90/180-day claim.

Defendant met its prima facie burden by submitting plaintiff's verified bill of particulars stating that he was not confined to his bed or home in connection with the accident and that he was able to continue working from the date of the accident (*see Lopez v Abdul-Wahab*, 67 AD3d 598 [2009]; *Ortiz v Ash Leasing, Inc.* 63 AD3d 556 [2009]). The statement in the affirmation of plaintiff's physician, that plaintiff was unable to perform most of his normal daily activities for more than 90 of the 180 days following the accident, was based on plaintiff's unsubstantiated claim that he could no longer perform the "heavy physical labor" associated with his job, and is insufficient to raise a triable issue of fact (*see Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669 [2007]).

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4872 Conrad Shih, Index 106413/08
Petitioner-Appellant,

-against-

The Waterfront Commission of New York,
Respondent-Respondent.

_____

Noah A. Kinigstein, New York, for appellant.

Phoebe S. Sorial, New York, for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered October 7, 2009, which denied the petition seeking reinstatement with back pay, benefits, costs, and attorney's fees, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioner's position as an auditor was not within the definition of "permanent employee" under section IV(A)(1)(a) of the Employees' Manual, and that he was therefore not entitled to the due process protections of a pretermination hearing, was not arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). An agency has broad power to construe and

interpret its own rules, and its interpretation must be upheld where, as here, it is rational (*see Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]).

Petitioner's termination did not violate Executive Law § 296 (15) and (16). Disorderly conduct, a violation, to which petitioner pleaded guilty, does not constitute a "criminal offense" within the meaning of subdivision 15, and his arrest did not result in the termination of the criminal action in his favor, as required by subdivision 16.

As a nontenured employee, petitioner was not entitled to a full adversarial hearing concerning the reasons for his termination; he has failed to show that his termination was for an improper reason or in bad faith (*see Matter of Beneky v Waterfront Commn. of N.Y. Harbor*, 42 NY2d 920, 921 [1977], *cert denied* 434 US 940 [1977]).

Given petitioner's attempt to steal a DVD from a music store and failure to report his arrest on related charges, we cannot say that the penalty imposed was so disproportionate to the

offense as to shock one's sense of fairness (*see Rodriguez v City of New York*, 71 AD3d 512, 513 [2010]).

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4873 Milagros Otero, Index 307575/08
Plaintiff-Respondent,

-against-

Qubilah Davis,
Defendant-Appellant.

_____

Sweetbaum & Sweetbaum, Lake Success, (Marshall D. Sweetbaum of counsel), for appellant.

Tomkiel & Tomkiel, P.C., Scarsdale, (Matthew Tomkiel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about November 10, 2010, which denied defendant's motion to dismiss the complaint on the ground of forum non conveniens, unanimously affirmed, without costs.

Defendant failed to meet her burden to establish that New York is an inconvenient forum for this action (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]; *Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [2006]). There is nothing

in the record to suggest that the court did not properly consider the relevant factors (*see Pahlavi* at 479).

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

ENTERED: APRIL 21, 2011.

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4874-
4875N Melissa Mann, Index 21524/06
Plaintiff-Respondent,

-against-

Janyear Trading Corp., et al.,
Defendants-Appellants.

_____

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for appellants.

Asher & Associates, P.C., New York (Robert J. Poblete of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about February 22, 2010, which, in an action for personal injuries sustained when plaintiff pedestrian was struck by defendants' vehicle, denied defendants' motion to change venue from Bronx County to Kings County, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered July 14, 2010, which, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic.

The untimeliness of defendants' demand for a change of venue and the subsequent motion is excusable because the summons, complaint, and bill of particulars misleadingly indicated that plaintiff resided in Bronx County (*see Philogene v Fuller Auto*

Leasing, 167 AD2d 178 [1990]). Furthermore, the record shows that defendants promptly moved only days after ascertaining that the statements made by plaintiff were misleading (*see id.*).

Regarding the merits, the motion, which was based on plaintiff's designation of an improper county (CPLR 510[1]), should have been granted and venue changed to Kings County (defendants' residence). Plaintiff's assertion that she resided in Bronx County is untenable in light of her deposition testimony. When asked if she ever resided at her parents' residence in the Bronx "at any time during 2006," which was when the accident occurred and the action was commenced, plaintiff replied "no" and that she had lived in New York County during the relevant time (*see Santulli v Santulli*, 228 AD2d 247, 248 [1996]).

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

ENTERED: APRIL 21, 2011.

CLERK

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3390 The People of the State of New York Ind. 3080/04
Respondent,

-against-

Ralph Hall,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered October 7, 2005, affirmed.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
James M. Catterson
Karla Moskowitz
Rosalyn H. Richter, JJ.

3390
Indictment 3080/04

_____x

The People of the State of New York,
Respondent,

-against-

Ralph Hall,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Charles J. Tejada, J.), rendered October 7, 2005, convicting him, after a jury trial, of murder in the first and second degrees, attempted murder in the first degree, attempted assault in the first degree, robbery in the first degree (two counts), robbery in the second degree and criminal possession of a weapon in the second and third degrees, and imposing sentence.

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

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

RICHTER, J.

In this appeal from a first degree murder conviction, defendant asserts that under *Melendez-Diaz v Massachusetts* (557 US ___, 129 S Ct 2527 [2009]), the admission of an unredacted autopsy report violated his rights under the Confrontation Clause. However, under *People v Freycinet* (11 NY3d 38 [2008]), which is binding upon us, the factual part of the autopsy report is nontestimonial and admissible, and, in this case, *Melendez-Diaz* does not mandate a contrary result.

At trial, Dr. Lara Goldfedder, a medical examiner with the Office of Chief Medical Examiner (OCME), testified for the prosecution about the cause of the victim's death. The autopsy was performed by Dr. John Matthew Lacy, a medical examiner who had moved out of state. Dr. Goldfedder explained that she had reviewed Dr. Lacy's autopsy report as well as several photographs taken during the autopsy. Based on her familiarity with OCME's practices and procedures, Dr. Goldfedder laid the foundation for admission of the report and photographs as business records. Based on her own review of these materials, Dr. Goldfedder offered her expert opinion that the cause of the victim's death was a gunshot wound to his head. Although during her testimony, Dr. Goldfedder made some references to facts contained in the autopsy report, she emphasized that all of the conclusions she

reached were her own.

The Sixth Amendment grants an accused the right to confront the witnesses against him or her – that is, "those who bear testimony" (*Crawford v Washington*, 541 US 36, 51 [2004] [internal quotation marks and citation omitted]). In *Crawford*, the Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits the prosecution from introducing "testimonial" statements of a nontestifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination (541 US at 68). While not exhaustively defining "testimonial," the *Crawford* court noted that testimonial statements typically involve "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact" (*id.* at 51 [internal quotation marks and citation omitted]).

In *Freycinet*, the Court of Appeals, applying *Crawford*, held that the factual portions of the autopsy report in that case were "clearly not testimonial" (11 NY3d at 42). Acknowledging that there is no "absolute rule that documents within the business records exception to the hearsay rule are never testimonial" (*id.* at 41 [internal quotation marks and citation omitted]), and recognizing that "a report of a doctor's findings at an autopsy may reflect more exercise of judgment than the report of a DNA

technician" (*id.* at 42), the Court nevertheless held that the introduction of the redacted autopsy report into evidence as a business record did not violate the Confrontation Clause.

In rejecting the defendant's argument, the Court of Appeals in *Freycinet* focused on "various indicia of testimoniality" that it had previously identified in *People v Rawlins* (10 NY3d 136, 151 [2008]). These indicia include:

> "the extent to which the entity conducting the procedure is an arm of law enforcement; whether the contents of the report are a contemporaneous record of objective facts, or reflect the exercise of fallible human judgment; . . . whether a pro-law-enforcement bias is likely to influence the contents of the report; and whether the report's contents are directly accusatory in the sense that they explicitly link the defendant to the crime" (*Freycinet*, 11 NY3d at 41 [internal quotation marks and citations omitted]).

Applying these criteria, the Court found that the admission of the factual part of the autopsy report did not run afoul of the Confrontation Clause.

Although we are bound by decisions of the United States Supreme Court on federal constitutional matters (*see People v Kin Kan*, 78 NY2d 54, 59 [1991]), *Melendez-Diaz* did not explicitly hold that autopsy reports are testimonial. The issue in *Melendez-Diaz* – the admissibility of sworn drug analysis certificates where no live witness was available for cross-examination - is different from the issue before us. As such,

the Court of Appeals' decision in *Freycinet* is directly on point and applicable to this case. Indeed, in *People v Holguin* (71 AD3d 504 [2010], *lv denied* 15 NY3d 774 [2010]), a post-*Melendez-Diaz* decision, this Court decided the precise issue presented here and found no basis to reverse the judgment.

Melendez-Diaz neither explicitly overruled *Freycinet* nor made its holding untenable. Justice Thomas, although joining the majority in *Melendez-Diaz*, also wrote separately to stress that the drug analysis certificates were "quite plainly affidavits" (557 US at ___, 129 S Ct at 2543 [Thomas, J., concurring]). He emphasized that he continued to adhere to his position that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" (*id.* [internal quotation marks and citation omitted]). Thus, any holding in *Melendez-Diaz*, at least insofar as scientific forensic reports are concerned, is arguably limited to the "formalized testimonial materials" to which Justice Thomas referred (*see Marks v United States*, 430 US 188, 193 [1977]; *State v Mitchell*, 2010 ME 73, ¶43, ¶47, 4 A3d 478, 489, 490 [2010]). Here, the autopsy report, which was unsworn, cannot fairly be viewed as "formalized testimonial material[]."

In *Melendez-Diaz*, the "*sole purpose*" of the sworn affidavits

under Massachusetts law was to provide prima facie evidence of the composition and weight of the controlled substance (557 US at ___, 129 S Ct at 2532). The *Melendez-Diaz* Court noted that the analysts were unquestionably aware of the affidavits' evidentiary purpose, since that purpose was reprinted on the affidavits themselves (*id.*). Thus, the *Melendez-Diaz* Court found that the analysts' affidavits were "prepared specifically for use at petitioner's trial," and were testimony subject to the Confrontation Clause (*id.* at ___, 129 S Ct at 2540).

In contrast, the mandate of the OCME is "to provide an impartial determination of the cause of death" (*People v Washington*, 86 NY2d 189, 193 [1995]). As the Court in *Freycinet* noted, the OCME is not "a law enforcement agency" and is "by law, independent of and not subject to the control of" the prosecutor (11 NY3d at 42 [internal quotation marks and citation omitted]). Although OCME performs autopsies where the cause of death is suspected to be criminal, its powers and duties also extend to deaths arising, inter alia, "by accident, by suicide, suddenly when in apparent health, [or] when unattended by a physician" (New York City Charter § 557[f][1]). While it is true that some autopsy reports may later be used in litigation, that does not mean that such reports are "prepared specifically for use at . . . trial," as were the affidavits in *Melendez-Diaz* (557 US at ___,

129 S Ct at 2540; *see also United States v Feliz*, 467 F3d 227, 234-235 [2d Cir 2006]).

Furthermore, *Melendez-Diaz* did not address the situation here, where a second expert testified and was fully subject to cross-examination. In *Melendez-Diaz*, no live testimony was offered on the composition and weight of the seized substances. In this case, there was in-court testimony by Dr. Goldfedder, a medical examiner from the same office as the medical examiner who had performed the autopsy. Dr. Goldfedder first testified about her own training and experience in determining the cause and manner of death and the procedures that OCME uses for documenting autopsies. Upon admission of the autopsy report as a business record, Dr. Goldfedder testified as to the date the autopsy was performed, the recorded height and weight of the victim, and the clothes he was wearing. She testified about the two injuries on the victim's body, a gunshot wound in the right temple in which the bullet passed through the brain and lodged in the opposite side of the skull, and a second gunshot wound in which the bullet grazed the victim's shoulder and lodged against the spinal column. Dr. Goldfedder then offered her own expert opinion as to what caused the victim's death. Thus, as in *Freycinet*, the testifying medical examiner relied upon factual portions of the autopsy report consisting primarily of contemporaneous

observations and measurements, but reached conclusions that were entirely her own.

Dr. Goldfedder was thoroughly cross-examined by defense counsel about both the facts contained in the autopsy report as well as the conclusions she reached based on those facts. Defense counsel also elicited testimony from Dr. Goldfedder establishing that the "remains" of the victim provided no information about the shooter such as his identity, height or weight, or whether the shooter was standing or sitting. Defense counsel established that there was no determination as to whether one or two guns were used, or whether there were one or two shooters. Therefore, as in *Freycinet*, the factual portions of the autopsy report in this case, which recorded only what happened to the victim, did not directly link defendant to the crime (*see* 11 NY3d at 42). In any event, defense counsel virtually stipulated to the cause of death in his opening statement by referring to the victim's "execut[ion]" by "guns [with] silencers."

In *People v Brown* (13 NY3d 332 [2009]), a case decided after *Melendez-Diaz*, the Court of Appeals addressed whether a DNA report containing a profile of a specimen taken from the victim's rape kit was admissible in the absence of testimony from the technicians who prepared the report. In finding there was no

Confrontation Clause violation, the Court reasoned that, unlike *Melendez-Diaz*, the People had called the forensic biologist who had conducted the analysis linking defendant's DNA to the profile found in the rape kit. The Court noted that the testifying witness - and not the DNA report, which consisted only of "machine-generated graphs, charts and numerical data" - had made "the critical determination linking [the] defendant to [the] crime" (*Brown*, 13 NY3d at 340). Likewise, here, the factual portions of the autopsy report do not link defendant to the crime or contain subjective analysis. Furthermore, the People produced Dr. Goldfedder who testified, and was cross-examined, about her own conclusions as to the cause of death. We need not decide whether admission of an autopsy report that directly links the defendant to the crime would violate the Confrontation Clause or whether an autopsy report could be admitted without a testifying witness because that is not what occurred here.

It bears mentioning that the blanket prohibition on the admission of autopsy reports urged by defendant could result in practical difficulties for murder prosecutions. If, for example, the medical examiner who performed the autopsy passes away before a perpetrator is apprehended and tried, barring the use in evidence of the autopsy report could, in some situations, effectively amount to a statute of limitations on murder, where

none otherwise exists (*see e.g. Melendez-Diaz*, 557 US at ___, 129 S Ct at 2546 [Kennedy, J., dissenting]).

Defendant failed to preserve the specific argument that the trial court should have redacted those portions of the autopsy report that reflected Dr. Lacy's expert opinion, and we decline to review it in the interest of justice. As an alternative holding, we find that any error in admitting the autopsy report was harmless. The evidence of the cause of the victim's death by shooting and defendant's guilt was overwhelming (*see People v Crimmins*, 36 NY2d 230, 242 [1975]). At trial, ample evidence was presented in addition to the autopsy report, including eyewitness testimony, the testimony of police and emergency medical personnel, and photographic and other corroborating evidence.

The court properly denied defendant's motion to suppress identification testimony. The lineup photographs establish that the lineup was not suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Although a child witness had described defendant as "old," and defendant was older than the other lineup participants, he did not stand out from the others, who looked much older than their ages. The disparity between the actual ages of a defendant and other lineup participants "has little relevance unless such disparity is reflected in their physical appearances" (*People v Amuso*, 39 AD3d

425, 425 [2007], *lv denied* 9 NY3d 862 [2007]). This is exemplified by the hearing court's observation, after viewing the lineup photographs, that one participant looked older than defendant even though he was actually 14 years younger. Defendant's other challenges to the composition of the lineup are without merit.

The court properly exercised its discretion in excluding defendant's girlfriend from the courtroom on the ground that she was a potential witness, and its ruling did not violate defendant's right to a public trial (*see People v Baker*, 14 NY3d 266, 274 [2010]). The People established a good faith basis for their assertion that they might need to call the girlfriend, especially in light of defense counsel's conflicting statements as to whether he might raise certain issues about which the girlfriend would have been a knowledgeable witness.

We have considered defendant's remaining claims, including those in his supplemental pro se brief, and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Charles J. Tejada, J.), rendered October 7, 2005, convicting defendant, after a jury trial, of murder in the first and second degrees, attempted murder in the first degree, attempted assault in the first degree, robbery in the first degree (two counts), robbery in the second degree and criminal

possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 80 years to life, should be affirmed.

All concur.

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

ENTERED: April 21, 2011.

CLERK