SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 10, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3863N Alberto Torres, et al., Index 308266/08
Plaintiffs-Appellants,

-against-

1148 Bryant Ave., Inc., et al.,
Defendants-Respondents.

_____

RAS Associates, PLLC, White Plains (Luis F. Ras of counsel), for appellants.

Gannon, Rosenfarb & Moskowitz, New York (Lisa L. Gokhulsingh of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about November 1, 2009, which, inter alia, granted defendant 1148 Bryant Ave.'s motion to vacate the default judgment against it, unanimously affirmed, without costs.

The motion court's grant of the motion to vacate the default judgment against defendant 1148 Bryant Ave. constituted a provident exercise of its discretion (*see Evolution Impressions, Inc. v Lewandowski*, 59 AD3d 1039 [2009]) that should not be disturbed. The court correctly concluded that defendant's

submissions established excusable neglect. Defendant also demonstrated the existence of a sufficiently meritorious defense to the action (*see Eugene Di Lorenzo, Inc. v AC Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). We reject plaintiffs' contention that defendant failed to demonstrate a meritorious defense as to the claim brought pursuant to Labor Law § 240(1). In the present context, where the moving defendant was not yet in possession of the facts concerning the working conditions at the premises, and knew only those facts that were alleged in the complaint, the assertions contained in the affidavit of merit pointing out the existence of the potentially viable defenses of recalcitrant worker (*see Cherry v Time Warner, Inc.*, 66 AD3d 233 [2009]) or sole proximate cause (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550 [2006]) were sufficient, notwithstanding the relative rarity of those defenses' success.

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

ENTERED: FEBRUARY 10, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3960-
3960A
M-6206 Morrison Cohen LLP,
Plaintiff-Respondent,

-against-

David Fink,
Defendant-Appellant.

_____

David Fink, Wainscott, appellant pro se.

Morrison Cohen LLP, New York (Jerome Tarnoff of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 12, 2010, awarding plaintiff the total sum of $254,023.70 against defendant, and bringing up for review an order, same court and Justice, entered January 7, 2010, which granted plaintiff's motion for a default judgment and denied defendant's cross motion to dismiss the complaint, inter alia, for failure to effect proper service, unanimously affirmed. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

To successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense. As a party to the action,

although an attorney by profession, defendant was required to submit an affidavit in opposition to plaintiff's motion for a default judgment. His submission of an affirmation instead of an affidavit was improper, "and its contents [were correctly] disregarded by the Supreme Court, thereby rendering the opposing papers insufficient to defeat the plaintiff's motion" (*Pisacreta v Minniti*, 265 AD2d 540 [1999]). Defendant's papers were deficient for the additional reason that the affidavit of the postal service worker on which he relied to demonstrate the inadequacy of "nail and mail" service pursuant to CPLR 308(4) was notarized by defendant himself, a party to the action.

Defendant is not entitled to relief, in the alternative, under CPLR 317 since he has failed to demonstrate that he "did not personally receive notice of the summons in time to defend"

(*id.*; *see Majestic Clothing Inc. v East Coast Stor., LLC*, 18 AD3d 516, 517 [2005]).

M-6206 ***Morrison Cohen LLP v David Fink***

Motion seeking to withdraw appeal denied.

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4231-
4231A The People of the State of New York,
Respondent,

-against-

Sean Del,
Defendant-Appellant.

Ind. 1906/07

_____

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

Cyrus R. Vance, Jr., District Attorney, New York County (Susan Gliner of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered February 22, 2008, as amended March 4, 2008, convicting defendant of criminal sexual act in the first degree (two counts) and robbery in the first degree, and sentencing him to an aggregate term of 5 years, and order, same court and Justice, entered on or about October 6, 2009, which denied, defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim's version of the incident was strongly supported by the

physical evidence found in defendant's car immediately after the crime, including condom and lubricant wrappers, a box cutter in a fully opened position, and the victim's purse, which was on the front seat of defendant's car, but which defendant testified he had not seen.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668). The motion court correctly concluded that trial counsel pursued a reasonable strategy, in which he made selective use of some of the victim's prior inconsistent statements. At the same time, counsel avoided confronting the victim with other inconsistencies that would likely have elicited only a denial or a plausible explanation. Counsel could have reasonably concluded that use of the additional inconsistencies now cited by defendant would have been futile or counterproductive. Furthermore, counsel's use of impeachment material that also contained some prior consistent statements by the victim was reasonable. There is no merit to defendant's complaint about his counsel's unsuccessful efforts to introduce defendant's own prior consistent statement, since, under the circumstances of the case, it was inadmissible under any theory.

Accordingly, we conclude that the acts or omissions of counsel that defendant challenges met an "objective standard of reasonableness" (*Strickland*, 466 US at 688). In any event, we also conclude that none of these acts or omissions, viewed individually or collectively, had a reasonable probability of affecting the outcome or depriving defendant of a fair trial (*id.* at 694).

The court properly exercised its discretion (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]) in denying the CPL 440.10 motion without holding a hearing. The trial record and the parties' submissions were sufficient to decide the motion, and there was no factual dispute requiring a hearing (*see People v Satterfield*, 66 NY2d 796, 799-800 [1985]).

Finally, defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The challenged comments were generally permissible, and to the extent that any comments might be viewed as inappropriate, they did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). We reject that portion of

defendant's ineffective assistance claim that cites counsel's failure to object to the summation remarks at issue on appeal. We conclude that counsel's failure to make these objections did not deprive defendant of a fair trial, affect the outcome of the case, or cause defendant any prejudice.

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4232 In re Georgina Diaz, Index 107689/09
Petitioner-Appellant,

-against-

Ricardo Elias Morales, as Chairman
of the New York City Housing Authority,
Respondent-Respondent.

_____

Goldberg, Scudieri & Lindenberg, P.C., New York (Robert H. Goldberg of counsel), for appellant.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered February 2, 2010, which denied the petition seeking to annul respondent New York City Housing Authority's determination terminating petitioner's tenancy, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously vacated, the petition treated as one transferred to this Court for de novo review, and upon such review, the challenged determination confirmed, the petition denied and the proceeding dismissed, without costs.

The subject petition raised an issue of substantial evidence and the proceeding should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we will "treat the

substantial evidence issue[] de novo and decide all issues as if the proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1992]; *see Matter of Featherstone v Franco*, 269 AD2d 109, 110 [2000], *affd* 95 NY2d 550 [2000]).

The submission of an affidavit of service of the notice of review of the first Hearing Officer's decision was sufficient to establish service upon petitioner, without an evidentiary hearing, where petitioner offered only her own conclusory denial of receipt of the notice (*see American Sav. & Loan Assn. v Twin Eagles Bruce,* 208 AD2d 446, 447 [1994], *lv dismissed* 85 NY2d 1032 [1995]). Moreover, the second hearing did not violate petitioner's right to due process. Although the notice of charges stated that the conduct complained of had begun in "about 2007" and evidence was adduced relating to events that took place in late 2006, petitioner was clearly on notice of the alleged conduct (*see Mathews v Eldridge,* 424 US 319, 333 [1976]; *Matter of Franco v Walker*, 275 AD2d 627, 628 [2000], *affd* 96 NY2d 891 [2001]).

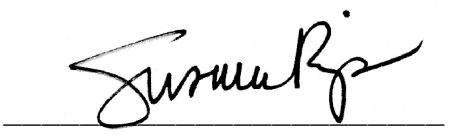
The determination that petitioner was unlawfully renting out rooms in her government-provided housing was supported by substantial evidence. The testimony of the building manager, as well as documentary evidence from a company that matches boarders

and renters, established petitioner's unlawful arrangements. There exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]; *Matter of Lohmann v Members of Bd. of N.Y. City Hous. Auth.*, 291 AD2d 288 [2002]).

The penalty imposed does not shock one's sense of fairness given the wanton nature of the conduct, the evidence that petitioner was engaged in substantial profiteering and the need to discourage such conduct (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222, 233 [1974]).

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

ENTERED: FEBRUARY 10, 2011



CLERK

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

4233 In re Humberto R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

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Order of disposition, Family Court, Bronx County (George J. Silver, J. at fact-finding determination; Robert R. Reed, J. at disposition), entered on or about January 5, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute unauthorized use of a vehicle in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

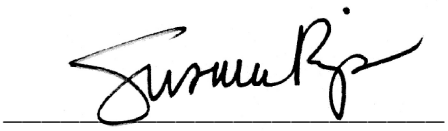
Appellant did not preserve his claim that his mother's allocution was defective and we decline to review it in the interest of justice. As an alternative holding, we find that the court sufficiently complied with the parental allocution requirement of Family Court Act § 321.3(1) when, after conducting

a thorough colloquy with appellant, it incorporated that colloquy by reference in addressing appellant's mother, and ascertained that she understood everything it contained.

The placement was a proper exercise of the court's discretion that constituted the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The underlying offense was a violent taking of a motorbike, and appellant exhibited a pattern of bad behavior.

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

ENTERED: FEBRUARY 10, 2011



CLERK

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

4234 LePatner & Associates, LLP, Index 104962/08
Plaintiff-Respondent,

-against-

Harvey Horowitz, et al.,
Defendants-Appellants.

_____

Arnold W. Blatt, New City, for appellants.

Aronauer, Re & Yudell, LLP, New York (Joseph A. Aronauer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 19, 2010, which, insofar as appealed from as limited by the briefs, in this action seeking unpaid legal fees, denied defendants' motion to vacate the default judgment entered against them, or, in the alternative, for leave to file a late answer, unanimously affirmed, with costs.

The motion was properly denied as defendants failed to proffer a reasonable excuse for the default or a meritorious defense to plaintiff's claim for an account stated (*see* CPLR 5015). Contrary to defendants' contention, the default judgment entered against them was not a nullity on the basis that plaintiff did not comply with CPLR 3215(g)(3). Although the affidavit of additional mailing referred to the mailing of a

summons and verified complaint and the complaint itself was not verified, the motion court's determination to disregard this mistake was well within its discretion (*see Matter of United Servs. Auto. Assn. v Kungel*, 72 AD3d 517 [2010]; *M Entertainment, Inc. v Leydier*, 71 AD3d 517, 518 [2010]; CPLR 2001). There is no indication that defendants were prejudiced by the clerical error in the affidavit of additional mailing (*see e.g. Matter of Nole v New York City Dept. of Hous. Preserv. & Dev.*, 26 AD3d 163, 164 [2006], *lv dismissed* 6 NY3d 890 [2006]).

Regarding a meritorious defense, defendants' generally phrased objections to plaintiff law firms' billings do not constitute the specified, contemporaneous objections to bills required to defeat an account stated cause of action (*see Zanani v Schvimmer*, 50 AD3d 445 [2008]). Furthermore, the record establishes that defendants made partial payments against the subject invoices *(see Kramer Levin Naftalis & Frankel LLP v Canal Jean Co., Inc.*, 73 AD3d 604 [2010]; *Zanani*, 50 AD3d at 446).

Defendants' reference to a possible counterclaim which they assert will result in greater damages than sought herein by plaintiff, does not, under the circumstances, constitute a meritorious defense. The counterclaim appears to be wholly

unrelated to plaintiff's claim (*see Stevens v Phlo Corp.*, 288 AD2d 56 [2001]; *compare A.I. Smith Elec. Contrs. v City of New York*, 211 AD2d 485, 486-487 [1995]).

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4236 In re Angel Bautista, etc., Index 111576/09
Petitioner,

-against-

The City of New York, et al.
Respondents.

_____

Gregory J. Gallo, Long Island City, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

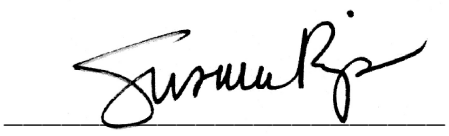
Determination of respondent New York City Taxi and Limousine Commission, dated June 19, 2009, which revoked petitioner's for-hire vehicle driver's license and imposed fines totaling $1,350 upon findings that petitioner engaged in sexually inappropriate conduct while operating a for-hire vehicle, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of Supreme Court, New York County [Joan B. Lobis, J.], entered February 4, 2010), dismissed, without costs.

Substantial evidence, namely the testimony of the complainant who was a passenger in petitioner's vehicle, supported the findings that petitioner exposed himself to the complainant and engaged in lewd behavior as he was driving and

that these actions constituted violations of 35 RCNY 6-18(d)(2) and (I). There exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Petitioner's argument that revocation of his license was improper because both violations were predicated upon the same findings of fact is unavailing, as either violation, standing alone, warranted the penalty imposed.

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

ENTERED: FEBRUARY 10, 2011



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

4237-
4238 The People of the State of New York, Ind. 19690C/05
Respondent,

-against-

Michael Stradford,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew I. Fleischman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. at speedy trial proceedings; Barbara F. Newman, J. at jury trial and sentence), rendered December 13, 2007, as amended January 22, 2008, convicting defendant of robbery in the first degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 8 years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. The court properly charged the People with only seven days of the period from January 27 to March 2, 2006, since that was the period of delay the People requested after they had filed a statement of readiness (*see People v Cajigas*, 224 AD2d 370, 371

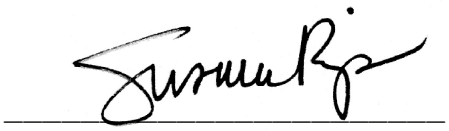
[1996], *lv denied* 88 NY2d 845 [1996]). There is no basis on which to find that the People's assertion of readiness was illusory.

This determination is dispositive of the speedy trial issue, because the remaining period at issue, even if charged to the People and added to undisputedly includable time, would not establish a speedy trial violation. In any event, the period from August 3 to September 19, 2006 was properly excluded as a postreadiness delay primarily attributable to defense counsel's impending vacation (*see generally People v Anderson*, 66 NY2d 529, 536 [1985]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 10, 2011



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

4239- Index 101141/06
4239A MCC Development Corporation,
Plaintiff-Appellant,

-against-

Daniel Perla, et al.,
Defendants-Respondents.

_____

William A. Thomas, New York, for appellant.

Higgins & Trippett LLP, New York (Thomas P. Higgins of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 12, 2009 and June 15, 2009, which granted defendants' motion to dismiss the complaint and to discharge a mechanic's lien and cancel a notice of pendency, unanimously affirmed, with costs.

Pursuant to paragraph 4.4 of the contract, "[c]laims . . . shall be referred initially to the Architect for decision" and the "initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner." Pursuant to paragraph 4.5.1, "[a]ny Claim arising out of or related to the Contract . . . shall, after initial decision by the Architect . .

. be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings."

Plaintiff's causes of action for foreclosure of a mechanic's lien, breach of contract, and unjust enrichment "arise out of the [c]ontract." Accordingly, Supreme Court correctly dismissed the complaint, discharged the mechanic's lien and cancelled the notice of pendency on the ground that plaintiff failed to satisfy the contract's conditions precedent to commencing litigation. These provisions were not waived by defendant 71-75 Avenue D, LLC's commencement of a proceeding against MMM Construction Corp. to discharge the mechanic's lien or by nonparty Daniel Perla Associates, L.P.'s commencement of a foreclosure proceeding against 101 Kent Assoc. in Kings County because neither proceeding involved "issues arising under" the alternate dispute resolution provisions set forth above (*see Denihan v Denihan*, 34 NY2d 307, 310 [1974]).

Defendants' "foray[s] into the courthouse" were not "inconsistent with [their] later claim that only the arbitral forum [was] satisfactory" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 67 [2007] [internal quotation marks and citations omitted]). Defendants' interposition of an answer with affirmative defenses and defendant Faldan Realty Co.'s assertion

of a counterclaim are fairly characterized as necessary protective measures, not acts that are "clearly inconsistent" with defendants' contractual rights to arbitration (*see Matter of Zimmerman [Cohen]*, 236 NY 15, 19 [1923]). Nor was there "unreasonable delay" in defendants' assertion of those rights (*see De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]).

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

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4240 385 Third Avenue Associates, L.P., et al., Plaintiffs-Respondents-Appellants, Index 105708/08

-against-

Metropolitan Metals Corp., Defendant-Appellant-Respondent,

The Burlington Insurance Company, Defendant-Respondent.

_____

Bee Ready Fishbein Hatter & Donovan, LLP., Mineola (Patrick K. Foster of counsel), for appellant-respondent.

Quirk and Bakalor, P.C., New York (Richard H. Bakalor of counsel), for respondents-appellants.

Ford Marrin Esposito Witmeyer & Glesser, L.L.P., New York (James M. Adrian), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered July 24, 2009, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment (1) declaring that defendant Burlington Insurance Company is obligated to provide insurance coverage to defendant Metropolitan Metals Corp. in connection with plaintiffs' contractual indemnification claims against Metropolitan arising out of the underlying personal injury action and (2) as to liability on their contractual indemnification

claims against Metropolitan, and granted their motion for summary judgment as to liability on their breach of contract claim against Metropolitan for failure to procure insurance; denied Metropolitan's motion for summary judgment declaring that Burlington is obligated to defend and indemnify it in connection with plaintiffs' contractual indemnification claims against it; and granted Burlington's motion for summary judgment declaring that it has no obligation to defend or indemnify plaintiffs or Metropolitan in connection with the underlying action, and so declared, unanimously modified, on the law, to grant plaintiffs' motion for summary judgment as to liability on their contractual indemnification claims against Metropolitan, and otherwise affirmed, without costs.

The cross liability exclusion in the Burlington policy, set forth in a separate endorsement, unambiguously excludes from coverage any actual or alleged bodily injury to any present, former, future, or prospective employee of any insured. As the injured party was an employee of an insured (Metropolitan) and was working within the scope of his employment at the time of his injury, the cross liability exclusion bars coverage for his injuries (*see DRK, LLC v Burlington Ins. Co.*, 74 AD3d 693, 694-95 [2010]; *Tardy v Morgan Guar. Trust Co. of N.Y.*, 213 AD2d 296

[1995]; *Consolidated Edison Co. of N.Y. v United Coastal Ins. Co.*, 216 AD2d 137 [1995], *lv denied* 87 NY2d 808 [1996]). It is immaterial whether the policy proceeds are sought by way of direct claims by the injured party or by way of plaintiffs' contractual indemnification claims against Metropolitan (*see Guachichulca v Laszlo N. Tauber & Assoc., LLC*, 37 AD3d 760, 762 [2007]).

Contrary to plaintiffs' and Metropolitan's contention, the separate and distinct employer's liability exclusion contained within the insuring agreement does not render the policy ambiguous so as to require that it be construed in the insured's favor (*see Guardian Life Ins. Co. of Am. v Schaefer*, 70 NY2d 888, 890 [1987]; *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). "[E]xclusions in policies of insurance must be read *seriatim*, not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another" (*Monteleone v Crow Constr. Co.*, 242 AD2d 135, 140-141 [1998], *lv denied* 92 NY2d 818 [1998] [internal quotation marks and citation omitted]). Moreover, the cross liability exclusion is contained in the policy endorsement, which clearly states that it changes the policy.

As to their contractual indemnification claims against

Metropolitan, plaintiffs established prima facie that Metropolitan was negligent in connection with the accident and that plaintiff's were completely free from negligence. The evidence demonstrated that Metropolitan exercised exclusive supervisory control over the injured employee and directed the means and methods of his work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Carino v Webster Place Assoc., LP*, 45 AD3d 351 [2007]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [2006], *affd* 7 NY3d 805 [2006]). Metropolitan failed to oppose this aspect of plaintiffs' motion, and the evidence it adduces on appeal merely demonstrates that plaintiffs had general supervisory authority over the project and notice of the allegedly unsafe manner in which the work was being conducted, which is insufficient to withstand summary judgment (*see Comes*, 82 NY2d at 878; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 380-82 [2007]; *O'Sullivan*, 28 AD3d at 226-227).

Contrary to Metropolitan's contention, the indemnification provision passes muster under General Obligations Law § 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 523 [2010]).

Plaintiffs made a prima facie showing that, while Metropolitan obtained insurance coverage and had them named as

additional insureds, it failed to procure the coverage required by the subcontract that would protect them in the event of a claim made by an injured employee of one of the other named insureds; Metropolitan failed to rebut this showing (*see Lima v NAB Constr. Corp.*, 59 AD3d 395, 397 [2009]). We decline to reach Metropolitan's argument, raised for the first time in reply on appeal, that plaintiffs' damages are limited to their out-of-pocket expenses in obtaining and maintaining a separate policy of insurance.

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4241 The People of the State of New York, Ind. 349/08
Respondent,

-against-

Hector Cruz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Richard Carruthers, J.), rendered on or about December 3, 2008,

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

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

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

4243 Dennis Coles, Index 602345/05
Plaintiff-Respondent,

-against-

Wu-Tang Productions, Inc. etc., et al.,
Defendants-Appellants.

_____

Anthony Motta, New York, for appellants.

Cinque & Cinque, P.C., New York (James P. Cinque of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 1, 2009, after a nonjury trial, in plaintiff's favor, unanimously modified, on the law, to reduce the award to plaintiff by 25% of the net royalty payments received by defendant Wu-Tang Productions, and otherwise affirmed, without costs, and the matter remanded for recalculation of the award.

In this action for the payment of royalties for musical compositions co-written by plaintiff, the documentary evidence established that Wu-Tang was entitled to retain 25% of the net royalty payments it received from Careers-BMG Music Publishing, Inc. (BMG) before paying plaintiff his share. Pursuant to the agreement between plaintiff and Wu-Tang, plaintiff conveyed an

undivided 50% percent interest in the copyrights in those compositions to Wu-Tang, and, with plaintiff's consent, Wu-Tang transferred 50% percent of its interest in the copyrights to BMG. Thus, Wu-Tang retained a 25% interest in the copyrights.

The record supports the trial court's determination that plaintiff, as a lyricist of the compositions, and defendant Diggs, as a producer of the music, regarded themselves as joint authors sharing equally in the ownership of a joint work (*see Childress v Taylor*, 945 F2d 500, 508 [2d Cir 1991]). The court properly granted plaintiff leave to conform the complaint to the evidence presented at trial by adding a claim against Diggs for his unauthorized receipt of a 50% producer's fee (*see* CPLR 3025[c]; *Gonfiantini v Zino*, 184 AD2d 368, 369-370 [1992]).

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4244 The People of the State of New York, Ind. 2307/07
Respondent,

-against-

Rance Dreher,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes 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 February 2, 2009,

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

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

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

4245 Success, LLC, et al., Index 117138/06
Plaintiffs-Respondents,

—against—

Stonehenge Capital Company, LLC, et al.,
Defendants-Appellants,

Alan Brown, et al.,
Defendants.

_____

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for Stonehenge Capital Company, LLC, appellant.

McCarter & English, LLP, New York (Gregory J. Hindy of counsel), for W. Stephen Keller, appellant.

Goldman & Weintraub, P.C., Pine Plains (Robert E. Goldman of counsel), for Success, LLC, R&D Films, Inc., and Ethan Goldman, respondents.

Raskin Ritter, LLP, Culver City (Christopher I. Ritter of counsel), for Bad Company Films and Aldo Lapietra, respondents.

_____

Order, Supreme Court, New York County (Martin Shulman J.), entered February 23, 2010, which, to the extent appealed from, denied defendants-appellants' motions for summary judgment dismissing the fraud-based causes of action as against them and granted plaintiffs' cross motion for summary judgment solely to the extent that defendant Stonehenge is liable for the misrepresentations of defendant Keller, unanimously affirmed, with costs.

The fraud-based causes of action, which were stated with sufficient particularity (*see* CPLR 3016[b]), were properly allowed to proceed. Unlike the breach of contract claims that the motion court dismissed, the fraud claims are not based upon misrepresentations about the funding of plaintiffs' film project. Rather, the fraud claims are based a misrepresentation of then-present facts, e.g., that the budget for the film had actually been approved and that all conditions precedent had been met. Such misrepresentations are collateral to the contract, as they involve a breach of duty separate from a breach of contract (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1999]).

The court's misstatement of fact in its order, namely, that a particular memorandum entitled "Success Film Financing Package" had been circulated to defendant Stonehenge, does not affect our determination.

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

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4246 In re Patrick J. Connors, Index 260162/09
Petitioner-Appellant,

-against-

New York State Department of Motor Vehicles,
Respondent-Respondent.

_____

Jones Hirsch Connors & Bull, P.C., New York (Kerry J. Kaltenbach of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Patrick J. Walsh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered October 19, 2009, which dismissed the petition brought pursuant to CPLR article 78 seeking, inter alia, to vacate respondent's determination that petitioner was guilty of driving at an excessive rate of speed, unanimously affirmed, without costs.

Petitioner is not entitled to dismissal of the subject charges on the basis that the New York City Police Department (NYPD) failed to fully comply with a subpoena. It is well established that the CPLR and CPL are not binding on respondent and the procedures set forth therein do not apply to proceedings conducted by it unless specifically authorized (*see* 15 NYCRR 123.1). In any event, the NYPD produced the relevant "speed

detection device" petitioner sought, namely, the trained and qualified officer who physically observed petitioner traveling nearly 100 miles per hour in a 50-miles-per-hour zone. The NYPD also produced a certified copy of the document showing that the speedometer in the officer's vehicle, which he used to pace petitioner's speed, was properly calibrated and functioning properly (*see People v Olsen*, 22 NY2d 230, 232 [1968]; *Matter of Stamos v Appeals Bd. of N.Y. State Dept. of Motor Vehs.*, 309 AD2d 572 [2003], *lv denied* 1 NY3d 505 [2003]).

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4247 Michael P. O'Sullivan,
Petitioner-Appellant,

-against-

Beth Judy Katz
Respondent-Respondent.

_____

Michael P. O'Sullivan, appellant pro se.

Beth Judy Katz, respondent pro se.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about July 23, 2010, which granted respondent's objection to the support magistrate's March 12, 2010 order terminating petitioner's support obligation, and reinstated the order of support, unanimously affirmed, without costs.

The evidence in the record sufficiently supports the Family Court's finding that the father failed to meet his burden to show that the child was constructively emancipated (*see Schneider v Schneider*, 116 AD2d 714 [1986]; *Radin v Radin*, 209 AD2d 396 [1994]).

The child's failure to return the father's telephone calls or contact him "merely indicates that there was a reluctance on the [child]'s part to contact him" and not that the child abandoned the relationship with the father (*Radin*, 209 AD2d at

396). Further, the child did not completely refuse to have a relationship with the father (*compare Labanowski v Labanowski*, 4 AD3d 690 [2004]; *Chamberlin v Chamberlin*, 240 AD2d 908 [1997]; *Matter of Commissioner of Social Servs. v Jones-Gamble*, 227 AD2d 618 [1996]).

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

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4248-
4248A-
4248B

Walter Adams,
Plaintiff-Appellant,

Index 116382/00

-against-

Genie Industries, Inc., et al.,
Defendants-Respondents.

_____

Gentile & Associates, New York (Laura Gentile of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 21, 2010, following a jury trial, insofar as appealed from as limited by the briefs, issuing a collateral source offset reducing the jury's award of $1,427,386 for lost future earnings by $608,559.08 for future Social Security disability benefits and reducing plaintiff's lost earnings award by $24,000 for Social Security benefits received by plaintiff's daughter pursuant to orders, same court (Marilyn Shafer, J.), entered January 22, 2009 and April 23, 2009, which, upon defendants' motion pursuant to CPLR 2221 to stay execution of plaintiff's proposed judgment, inter alia, directed plaintiff to serve an amended proposed judgment providing for appropriate offsets from the date of the accident and into the future,

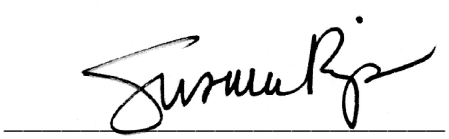
unanimously reversed, on the law, without costs, the collateral source offset vacated, the jury's award for future lost earnings reinstated, the amount deducted for Social Security benefits received by plaintiff's daughter reinstated, and the matter remanded for a recalculation of the judgment. Appeal from the aforesaid orders unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants failed to establish, "with reasonable certainty," that plaintiff would continue to receive Social Security disability benefits (*see* CPLR 4545; *Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995]). Indeed, the jury's award of future lost earnings reflected a clear rejection of plaintiff's claim at trial that as a result of his injuries, he would be unable to return to work. Furthermore, plaintiff's daughter's Social Security benefits were improperly deducted from the lost

earnings award (*see Young v Knickerbocker Arena*, 281 AD2d 761, 764-765 [2001]).

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

ENTERED: FEBRUARY 10, 2011



CLERK

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

4249 The People of the State of New York, Ind. 2680/01
Respondent,

-against-

Wilfredo Martinez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Michael Ambrecht, J.), rendered on or about August 13, 2008,

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

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

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

4250N- Index 602221/09
4250NA Icdas Celik Enerji Tersane
Ve Ulasim Sanayi A.S.,
Petitioner-Respondent,

-against-

Travelers Ins. Co., etc.,
Respondent-Appellant.

_____

Marshall, Dennehey, Warner, Coleman & Goggin, New York (Edward C. Radzik of counsel), for appellant.

Kestenbaum, Dannenberg & Klein, LLP, New York (Michael H. Klein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered January 12, 2010, permanently staying arbitration, and bringing up for review an order, same court and Justice, entered December 30, 2009, which granted petitioner's motion for a permanent stay of arbitration, unanimously reversed, on the law, without costs, the stay vacated, and the petition denied. Appeal from the aforesaid order unanimously dismissed without costs, as subsumed in the appeal from the judgment.

Petitioner entered into a contract to purchase scrap metal from nonparty U.S. Ferrous Trading Division, Tube City Division, Tube City IMS (Tube City). Tube City was to ship the scrap metal to a designated port in Turkey pursuant to a charter party

agreement with a cargo-vessel owner it had nominated (nonparty Sangamon Transport Group). The scrap purchase agreement provided, inter alia, that "[a]ll disputes arising in connection with this contract shall exclusively be settled through arbitration by the American Arbitration Association [AAA] in New York/U.S.A. in accordance with their rules."

At the same time, Tube City entered into a separate agreement with respondent Fairless Iron & Metals pursuant to which Fairless would supply Tube City with the scrap metal to be shipped to petitioner. While it apparently was Tube City that nominated Sangamon, it was Fairless that executed the charter party agreement with Sangamon.

When the shipment arrived in Turkey, petitioner rejected the scrap metal and arranged for the Turkish authorities to detain the vessel. Sangamon demanded arbitration against Fairless, pursuant to the charter party agreement, alleging losses due to the detention of the vessel, stevedore damage and other expenses incurred. On the ground, inter alia, that the stevedores were hired by petitioner, Fairless demanded that petitioner defend it in the arbitration proceeding. It also placed Sangamon on notice that it was "vouching in" petitioner to that proceeding. Thereafter, Tube City assigned to Fairless "in full, all rights

and claims it ha[d] against [petitioner], under [the scrap purchase agreement], including, but not limited to, the right to arbitration."

We note initially that, given the arbitration clause's specific incorporation by reference of AAA rules, the question of arbitrability, which includes the existence, scope and validity of the arbitration agreement, is for the arbitrator to determine (*see Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [2009], *affd* 14 NY3d 850 [2010]). The petition to permanently stay arbitration should have been denied upon this ground alone.

In any event, as the broad arbitration clause in the scrap purchase agreement does not expressly preclude an assignee of a signatory to the agreement from seeking arbitration, Tube City's assignment to Fairless of its rights against petitioner under the agreement gave Fairless the right to demand that petitioner submit to arbitration (*see Matter of Vann v Kreindler, Relkin & Goldberg*, 78 AD2d 255, 259 [1980], *affd* 54 NY2d 936 [1981]).

Fairless was assigned Tube City's rights under the scrap purchase agreement to enable it to seek indemnification from petitioner in the event it became obligated to Sangamon for damages associated with the detention of the cargo vessel. The

assignment does not violate Judiciary Law § 489, because Fairless was not assigned an existing collectible claim "with the intent and for the purpose of bringing an action or proceeding thereon."

The scrap purchase agreement incorporates the terms of the charter party agreement regarding loading and unloading the vessel, including specifically that the "Charterers [Fairless] [were] to be ultimately responsible for any damage caused to the vessel by Stevedores." Under the agreement, petitioner was responsible for hiring the stevedores. Thus, Fairless's claim for common-law indemnification against petitioner in connection with the alleged negligence of the stevedores, while collateral to the scrap purchase agreement, is encompassed in the agreement's broad arbitration clause.

Having determined that the dispute is within the scope of the arbitration clause, we do "not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute" (*Matter of Gershen v Hess*, 163 AD2d 17, 18 [1990]). Fairless's claim for indemnification depends upon the outcome of pending proceedings brought against it by Sangamon and is therefore viable. Petitioner may, if so advised, assert its argument that the demand for arbitration was premature as a defense in the

arbitration (*see e.g. Cementos Andinos Dominicanos, S.A. v East Bulk Shipping S.A.*, 2006 WL 1206475, *1, 2006 US Dist Lexis 25888, *3 [SD NY 2006]).

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

ENTERED: FEBRUARY 10, 2011

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3536 The People of the State of New York, Ind. 5260/06
Respondent,

-against-

Denard Butler,
Defendant-Appellant.

_____

Darren S. Fields, Brooklyn, for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing and speedy trial motion; Ruth Pickholz, J. at jury trial and sentence), rendered June 16, 2009, convicting defendant of two counts each of robbery in the first and second degrees and two counts each of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 12 years, affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Although the robbery victims did not see defendant's face, there was a chain of circumstantial

evidence, including defendant's possession of jewelry taken in the robbery very shortly after it occurred, that had no reasonable explanation except that defendant was one of the robbers.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The rapidly unfolding sequence of events justified every aspect of the police conduct, even though officers detained and frisked defendant before they became aware that he was implicated in a robbery. Initially, the police had, at least, reasonable suspicion that all the persons who fled from a crashed vehicle were involved in criminal activity (*see People v Pines*, 99 NY2d 525 [2002]). The vehicle had spontaneously led the police on a high speed chase that was unlawful and went beyond mere traffic infractions, and the police also had some information that it may have been stolen. Almost immediately after the crash, other officers saw defendant and a codefendant running, and these officers reasonably suspected that the two men were among the suspects described in a radio communication as having fled from the crashed vehicle. The men met a general description of the suspects and were running in the suspects' direction of travel on a nearly deserted street in extremely

close spatial and temporal proximity to the crash. After the officers briefly lost sight of the men, they saw two cabs stopped at a red light on the block onto which the men had turned. The first cab driver gestured toward the second cab, and the second cab driver flashed his high beams, clearly seeking police intervention (*see People v Blakely*, 46 NY2d 1026 [1979]). In the back seat of the second cab, the officers saw defendant and the codefendant, who appeared to be the men they had seen running, and who were sweating profusely and breathing heavily. Based on all this information, the officers had, at least, reasonable suspicion that these were the men who had fled from the crashed vehicle (*see e.g. People v Lineberger*, 282 AD2d 369, 370 [2001], *affd* 98 NY2d 662 [2002]), and they were entitled to frisk them to ensure their own safety (*see generally People v Batista*, 88 NY2d 650, 653-654 [1996]). We have considered and rejected defendant's remaining suppression arguments.

There is no merit to defendant's arguments concerning the court's refusal to impose a sanction for the loss of documents alleged by defendant to contain *Rosario* material, the court's charge on the inference that may be drawn from recent, exclusive and unexplained possession of the fruits of a crime, and the alleged unfairness of the trial.

Finally, while the court properly denied defendant's speedy trial motion, it erred by not charging the People, in addition to the 125 days that the court assessed, with an additional period of 28 days that ran from June 11, 2007, when the case was on for pretrial hearings. When the court called the case at 10:40 A.M., defendant's attorney, Darren Fields, was not present, but the codefendant's counsel informed the court that Mr. Fields was "on route." Upon the People's request for an adjournment until July 9 or 10 to accommodate the vacation schedule of several police officers, the court adjourned the pretrial hearing to July 9. At 10:45 A.M., Mr. Fields appeared, whereupon the court recalled the case and informed counsel of the adjournment.

The court did not charge the People with the 28-day period between June 11 and July 9 on the ground that, although the People were not ready on June 11, the period was excludable because defendant's counsel was not present when the case was called (*see People v Mannino*, 306 AD2d 157, 158 [2003], *lv denied* 100 NY2d 643 [2003]). Under the circumstances, where the People were not ready, requested an adjournment, and were accommodated by the court, and Mr. Fields appeared within minutes of the calendar call, the 28 days should have been charged to the prosecution. The situation is distinguishable from that found in

such cases as *Mannino*, *People v Lassiter* (240 AD2d 293, 294 [1997]), and *People v Brown* (195 AD2d 310, 311 [1993], *lv denied* 82 NY2d 891 [1993]), in that here the court knew that counsel was en route but still granted the adjournment to the People before counsel arrived immediately thereafter.

Since the increase of 28 days is still less than the 182 allowed under CPL 30.30, the judgment stands.

This decision does not dispose of any issues raised on the People's appeal from the sentence (Appeal No. 3537).

All concur except Tom, J.P., who concurs in result only, and McGuire, J., who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

I agree with the majority's disposition of this appeal and with its analysis, except with respect to aspects of its discussion of defendant's speedy trial motion. In denying defendant's speedy trial motion, Supreme Court ruled that 125 days of delay were chargeable to the People. On appeal, defendant disputes 11 other periods of delay, accounting for an additional 281 days of delay, arguing that they should be charged to the People. The majority implicitly holds that Supreme Court correctly excluded all but 28 of these 281 days, for it identifies Supreme Court's sole error as not charging these 28 days to the People. With respect to 10 of the 11 disputed periods (accounting for 253 of the 281 days), the majority makes no mention of any of defendant's arguments, presumably because it regards all of them (correctly, in my view) as so lacking in merit as to warrant no discussion. I would reject defendant's arguments with respect to all 11 periods of delay. Thus, my ultimate conclusion that the speedy trial motion properly was denied is dependent on 11 sub-conclusions, each of which is as necessary to my ultimate conclusion as any other (although no single sub-conclusion, viewed in isolation, is essential to the ultimate conclusion). I discuss 1 of the 11 disputed periods

only because the majority discusses it and erroneously concludes that this period is chargeable to the People.

With respect to this period, the delay from June 11, 2007 to July 9, 2007, there is no dispute that defendant's counsel was not present in court when the case was called at 10:40 A.M. on June 11. Nor is there any dispute that the call of the calendar began at 9:30 A.M. Indeed, the court noted that very fact when the case was called and defendant's counsel was absent. Thus, when the case was called, defendant's counsel was 1 hour and 10 minutes late. When the case was called, counsel for one of the two co-defendants told the court only that defendant's attorney had reported he was "on route." Of course, however, that statement was uninformative with respect to where defendant's attorney was and when he would be appearing. For all the court knew, counsel could have been an hour or two hours away. Moreover, co-counsel provided nothing to the court by way of a factual basis for that statement. The prosecutor informed the court that the People were not ready for trial and requested an adjournment to July 9 or 10 to accommodate the vacation schedules of several police officers. The court then adjourned the case to July 9. Five minutes later, counsel appeared and the case was recalled. Counsel did not offer any explanation at all for his

lateness, did not suggest that the attorneys for the co-defendants might still be available and did not protest the adjournment to July 9.

This period of delay is excludable for an abecedarian reason: defendant was without counsel through no fault of the court when the case was called (*see People v Mannino*, 306 AD2d 157, 158 [2003], lv denied 100 NY2d 643 [2003] [excluding period of delay occasioned by absence of defense counsel when case was called because CPL 30.30(4)(f) specifically excludes any period of time when "the defendant is without counsel through no fault of the court"]).

The majority's express conclusion that this period of delay should have been charged to the People is nothing short of astonishing, especially because it entails the unspoken conclusion that defendant was without counsel due to some fault of the court. The majority's entire explanation consists of the following: "Under the circumstances, where the People were not ready, requested an adjournment, and were accommodated by the court," co-counsel indicated that [defendant's attorney' was on his way, "and [defendant's attorney] appeared within minutes of the calendar call, the 28 days should have been charged to the prosecution." The first two components of the majority's

explanation are obviously irrelevant; if the People had announced their readiness (and for that reason, of course, did not seek an adjournment) the delay would be excludable for an independent reason. The irrelevance of the third component – that co-counsel indicated that defendant's attorney was on his way -- is just as obvious. Counsel already was more than one hour late when the case was called. It may be that the court nonetheless would have tolerated that lateness and waited if the court knew that counsel would be appearing in 5 or 10 minutes or if the court had been told that counsel was in the hallway, in the building or a block away. But the court certainly did not know and was not told anything of the sort. As noted above, the majority does not and cannot dispute the point, the sole statement made to the court -- that counsel was "on route" -- is utterly uninformative.

Even putting aside that counsel was more than an hour late when the case first was called, the irrelevance of the fourth component is no less clear. Because the court did not know and could not have known when counsel would be appearing, it is folly to make the excludability of the delay dependent on the unforeseeable fact that counsel did appear five minutes later. Moreover, the majority should explain both whether the adjournment would be chargeable to the People if counsel had not

appeared for another 30, 60 or 90 minutes and why trial courts must wait for attorneys who are reportedly "on route." A rule requiring our busy trial courts to wait for tardy lawyers is not a salutary one. Trial judges should be free to insist on, and be given broad discretion to enforce, punctuality. A rule requiring trial judges to tolerate lateness would only undermine their authority and engender more lateness. The majority's position is all the more untenable because counsel failed to provide any explanation for his tardiness when he finally did appear, more than an hour and 10 minutes late. The majority's disregard of that failure is startling. For all the majority knows, counsel had a particularly leisurely breakfast, stopped to chat for a spell with an old friend or otherwise acted irresponsibly. If counsel had anything like a good explanation, one would think he would have provided it. So, too, if the majority has a good explanation for its position, one would think it would provide it.

Happily, the majority's conclusion that this period of delay should be charged to the People is pure dictum that trial courts are free to disregard. After all, given the majority's holding that the speedy trial motion properly was denied, its conclusion that this period should have been charged to the People is

necessarily gratuitous. Notably, the majority does not explain why it nonetheless chooses to opine on this period. By unnecessarily opining on this period, the majority engages in adventurism that is inconsistent with the judicial function (*cf. Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980] ["fundamental principle of our jurisprudence" "forbids courts to pass on academic, hypothetical, moot or otherwise abstract questions"]).

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

ENTERED: FEBRUARY 10, 2011

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3801 The People of the State of New York, Ind. 3092/04
Respondent,

-against-

Eli Rios,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered August 8, 2006, convicting defendant, after a jury trial, of murder in the second degree, criminal possession of a weapon in the second degree and escape in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 25 years to life, unanimously modified, on the law, to the extent of reducing the escape conviction to third-degree escape and reducing the sentence, on the escape conviction only, to time served, and otherwise affirmed.

The People failed to prove an element of the crime of escape in the first degree (Penal Law 205.15) - - that defendant had been arrested for, charged with or convicted of a class A or class B felony - - and the trial court's charge to the jury was

not a proper substitute for this proof. "It is well settled that all the elements of an indicted crime which are not conceded by defendant or defendant's counsel must be charged" (*People v Flynn*, 79 NY2d 879, 881 [1992]; *see also People v Knowles*, 42 AD3d 662, 664 [2007]).

The court properly denied defendant's motion to suppress the lineup identifications. At the pretrial hearing, during which defendant did not testify, a detective testified that after the police took defendant into custody, defendant was advised of his *Miranda* rights. Defendant stated that he did not wish to speak to the detective and that he had an attorney. When asked whether defendant told him the name of his attorney or had the attorney's card, the detective replied, "Not that I remember." The detective testified that there was a phone outside the cell where defendant was held in custody and that he did not recall whether defendant asked to use the phone to call his attorney. While defendant was in custody, but before he was arrested, three lineups were conducted at which two witnesses identified defendant as the shooter. Approximately three hours after the last lineup, defendant was arrested.

Although there is no "automatic entitlement to counsel at pre-accusatory investigatory lineups . . . the right to counsel

at an investigatory lineup will attach . . . when counsel has actually entered the matter under investigation . . . [or] when a defendant in custody, already represented by counsel on an unrelated case, invokes the right by requesting his or her attorney" (*People v Mitchell*, 2 NY3d 272, 274 [2004]; *People v Coates*, 74 NY2d 244 [1989]). "Once the right to counsel has been triggered, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording the lawyer a reasonable opportunity to appear" (*Mitchell*, 2 NY3d at 274-275).

Notwithstanding that the trial court did not state its reasons for denying the pretrial motion, we credit the officer's testimony and agree with the court's conclusion. There is no proof in the record that counsel had actually entered the matter under investigation *(see People v Manuel*, 39 AD3d 1185 [2007], *lv denied* 9 NY3d 878 [2007]; *People v Frieson*, 36 AD3d 542 [2007], *lv denied* 9 NY3d 865 [2007]) or that defendant was already represented by counsel in an unrelated case and had invoked his right to counsel by requesting his attorney. "[A] notification that counsel exists . . . will not suffice" (*People v Mitchell*, 2 NY3d at 276). Nor did defendant's statement that he would not speak with the detective and that he had an attorney trigger his

right to counsel at the pre-accusatory investigatory lineups, as defendant argues. The Court of Appeals noted in *People v Hawkins* (55 NY2d 474 [1982], *cert denied* 459 US 846 [1982]), when addressing the relatively limited role that counsel plays at investigatory lineups as contrasted with counsel's role at interrogations, that while a defendant has a constitutional right to refuse to answer questions, he or she has no constitutional right to refuse to stand in a lineup (at 486 n 5). Thus, the right to counsel at an investigatory lineup has been limited in New York to specific circumstances, none of which are shown to have existed here.

Finally, defendant has not demonstrated that the prosecutor suborned perjury, and the verdict with respect to murder in the second degree and criminal possession of a weapon in the second degree was based on legally sufficient evidence and was not against the weight of the evidence.

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

ENTERED: FEBRUARY 10, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4078 Anthony Trabanco, Index 107469/06
Plaintiff-Appellant,

-against-

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

_____

Edelman, Krasin & Jaye, PLLC, Carle Place (William T. Jaye of counsel), for appellant.

Steve S. Efron, New York, for respondents.

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Order, Supreme Court, New York County (Harold B. Beeler, J.), entered October 19, 2009, which denied plaintiff's motion to strike defendants' answer pursuant to CPLR 3126, unanimously affirmed, without costs.

In this personal injury action, plaintiff appeals from an order denying his motion for an order making a conditional discovery order absolute. We conclude that the motion was properly denied because the underlying conditional order did not provide a concrete directive capable of enforcement.

In June 2007, plaintiff served defendants with a 20-day supplemental notice for discovery and inspection. By dint of two conference orders, defendants were directed to respond to the supplemental notice. Having received no response, plaintiff

moved the court in November 2007 for an order pursuant to CPLR 3126 and 3124 alternatively striking defendants' answer or compelling them to respond to the supplemental notice (the first motion). With their answering papers, defendants submitted an 89-page response to plaintiff's notice. By letter dated December 17, 2007, plaintiff rejected defendants' response, calling it "late and incomplete," but provided no elaboration for his claim. The sufficiency of defendants' response was also not addressed in the reply affirmation plaintiff submitted in support of the motion.

By decision and order dated April 15, 2008 (the predicate order), Justice Mills denied the first motion with the proviso that defendants pay plaintiff's counsel fees and "submit the appropriate material in response to plaintiff's Supplemental Notice" within 20 days of service of a copy of the court's order. The predicate order did not address the sufficiency of defendants' response to plaintiff's supplemental notice. On the 19th day following service, defendants furnished plaintiff with the same previously rejected materials (except for one document that plaintiff had retained). Nine days later, plaintiff again rejected defendants' proffer stating that he would make a motion to "dismiss" and seek a ruling on the relevancy of his demands.

By the instant motion, plaintiff sought an order making the predicate order absolute and striking defendants' answer on the basis of their failure to provide required discovery. In support of the motion, plaintiff asserted that he had not been provided with an "adequate response" to his discovery demand. Plaintiff, however, provided no support for his contention that defendants' response was inadequate. Nor did he request any ruling on the propriety of the supplemental notice. Noting that plaintiff never provided any specificity for his claim that defendants' responses were inadequate, Justice Beeler denied the motion. Notwithstanding defendants' delay in responding to plaintiff's notice, we affirm because the predicate order does not suffice as a basis for relief under CPLR 3126.

By its terms, CPLR 3126 permits a court to impose a range of sanctions upon a party's wilful failure to comply with a disclosure order. The subject order, however, must be specific.

> "If a party is commanded by an order to do or refrain from doing an act, the order must be sufficiently specific to enable the party clearly to understand the duty owed, so that he or she may escape punishment by contempt or otherwise for failing to obey the order" (2 Carmody Wait 2d 8:108 [2010]).

Indeed, in the context of a contempt proceeding, "[t]o sustain a finding of either civil or criminal contempt based on an alleged

violation of a court order it is necessary to establish that a lawful order of the court *clearly expressing an unequivocal mandate* was in effect" (*Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987] [emphasis added]). The predicate order is insufficient because it leaves the interpretation of the phrase "appropriate material" open to debate. This is particularly so because specific objections to defendants' voluminous response were neither raised by plaintiff nor addressed by the court. Plaintiff correctly cites *Rampersad v New York City Dept. of Educ.* (30 AD3d 218 [2006]) for the proposition that a conditional order becomes absolute upon a party's failure to comply with its provisions. Nevertheless, a conditional order, like any other, must be sufficiently specific to be enforceable. By contrast, the order in *Rampersad* involved a specific directive to produce a witness for a deposition (*id.* at 218-219). Similarly, the conditional order in *Gibbs v St. Barnabas Hosp.* (__ NY3d __, 2010 NY Slip Op 09198 [2010])

gave a concrete directive to serve a supplemental bill of particulars.

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

ENTERED: FEBRUARY 10, 2011

CLERK

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

4162 In re MGN, LLC, Index 107948/10
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

_____

Mehler & Buscemi, New York (Francis R. Buscemi of counsel), for petitioner.

Jean Marie Cho, New York State Liquor Authority, New York (Donald T. Martin of counsel), for respondent.

_____

Determination of respondent, dated June 15, 2010, which canceled petitioner's liquor license, imposed a $25,000 civil penalty and directed forfeiture of its $1,000 bond, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Joan A. Madden, J.], entered on or about July 19, 2010) dismissed, without costs.

After petitioner controverted the findings of the first Administrative Law Judge (ALJ) with respect to 4 charges he sustained against it, the members of respondent, who took issue with the ALJ's conclusions as to certain of 17 dismissed charges, did not abuse their authority in remitting the matter to

a second ALJ for findings as to all charges (see 9 NYCRR 54.4[g]; *see also Matter of KT's Junc., Inc. v New York State Div. of Human Rights*, 74 AD3d 1910 [2010]). "Although the findings of an Administrative Law Judge, particularly those concerning the resolution of issues of credibility, are entitled to considerable weight, they are nevertheless not conclusive and may be overruled by the official or body with the power to mete out the discipline, if that action is supported by substantial evidence" (*Matter of Fabulous Steak House v New York State Liq. Auth.*, 186 AD2d 566, 567 [1992], *lv denied* 80 NY2d 761 [1992]; *Matter of 1442 Third Ave. Rest. Corp. v New York State Liq. Auth.*, 225 AD2d 412 [1996]).

On the record before us, respondent's final determination was supported by substantial evidence, including evidence that petitioner employed an unlicensed security guard in violation of 9 NYCRR 48.3 (*see* General Business Law § 89-g); that its employees committed several assaults on or about the premises (*see* Alcoholic Beverage Control Law § 106[6]); that it permitted overcrowding on the premises (*see* 9 NYCRR 48.3); that there was a continuing pattern of disorder and misconduct around the premises adversely affecting the community (*see* Alcoholic Beverage Control

Law § 118 [1], [3]); and that it failed to exercise adequate supervision over the conduct of its licensed business in violation of 9 NYCRR 48.2. It is further noted that respondent did not adopt all the conclusions of the second ALJ; it sustained only 8 of the 15 charges that he proposed be sustained.

There is no support for petitioner's contention that respondent's members should have recused themselves from voting to cancel petitioner's license on the basis that they had prejudged the matter (*see Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 197 [1981], *cert denied* 454 US 1125 [1981]; *compare Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158 [1990]).

The penalty imposed does not shock our sense of fairness. The record shows that the instant offenses were part of a continuing pattern of disorderly conduct occurring over an extended period of time (*see e.g. Matter of Monessar v New York State Liq. Auth.*, 266 AD2d 123 [1999]; *Matter of La Trieste Rest. & Cabaret v New York State Liq. Auth.*, 249 AD2d 156 [1998], *lv denied* 92 NY2d 809 [1998]).

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

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

ENTERED: FEBRUARY 10, 2011

CLERK