SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 15, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4256 Turk Eximbank-Export Credit Bank of Turkey, etc., Plaintiff-Respondent, Index 603570/07

-against-

Ilham Bicakcioglu, et al., Defendants-Appellants,

Dolores Shuttle, et al., Defendants.

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Feder Kaszovitz LLP, New York (Alvin M. Feder of counsel), for appellants.

Zara Law Offices, New York (Robert M. Zara of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 16, 2010, awarding plaintiff the total sum of $76,951.92 as against defendants-appellants, and bringing up for review an order, same court and J.H.O., entered January 14, 2010, which, inter alia, granted plaintiff's motion to strike appellants' answer for failure to comply with discovery, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in striking appellants' answer and entering judgment in plaintiff's

favor. Appellants' repeated failure to offer a reasonable excuse for their noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warranted the striking of the answer (*see Figiel v Met Food*, 48 AD3d 330 [2008]; CPLR 3126[3]). Contrary to appellants' contention, the court did not err when it advised appellants that their answer would be stricken if their discovery responses were found by the Special Referee to be noncompliant with plaintiff's requests (*compare Corner Realty 30/7 v Bernstein Mgt. Corp.*, 249 AD2d 191, 194 [1998]).

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

ENTERED: FEBRUARY 15, 2011

CLERK

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4251 The People of the State of New York, Ind. 238/09
Respondent,

-against-

Juan Bello,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Ruth Pickholz, J.), rendered on or about November 19, 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 15, 2011

CLERK

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

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4257 The People of the State of New York, Ind. 2279/09
Respondent,

-against-

Leshan Cambell,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about December 21, 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 15, 2011

CLERK

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

Gonzalez, P.J., Friedman, Catterson, Abdus-Salaam, JJ.

4258 Lawrence Fowler, Claim No. 115609
Claimant-Respondent,

-against-

The State of New York,
Defendant-Appellant.

_____

Andrew M. Cuomo, Attorney General, Albany (Frank K. Walsh of counsel), for appellant.

Pamela D. Hayes, New York, for respondent.

_____

Order of the Court of Claims of the State of New York (Alan C. Marin, J.), entered January 5, 2010, which denied defendant's motion for summary judgment dismissing the claim, unanimously affirmed, without costs.

Claimant was convicted of murder in the second degree in 1998 and sentenced to 25 years to life. After his conviction was vacated in 2006 on the grounds of newly discovered evidence (*see* CPL 440.10[1][g]) and section 8-b of the Court of Claims Act, claimant filed this claim in July 2008 alleging unjust conviction and imprisonment.

Defendant's motion for summary judgment was properly denied. The court's order vacating claimant's conviction on the grounds of newly discovered evidence fulfilled the documentary evidence pleading requirements of section 8-b(3) (*see Smith v State of New York*, 55 AD3d 430 [2008]; *Coakley v State of New York*, 225 AD2d 477, 478 [1996]). Claimant's earlier submission of various

documents, including his attorney's affidavit, the court's order vacating his conviction, and other correspondence contained sufficient facts to satisfy the requirements of Court of Claims Act § 8-b(4). Indeed, the testimony of the alibi witnesses adduced at trial, the consent of the District Attorney's Office in vacating the conviction, and the newly discovered evidence exonerating claimant as the shooter were all factual allegations that would lead to the conclusion that claimant is "likely to succeed at trial in proving that (a) he did not commit any of the acts charged in the accusatory instrument . . . and (b) he did not by his own conduct cause or bring about his conviction" (Court of Claims Act § 8-b[4]).

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

ENTERED: FEBRUARY 15, 2011

CLERK

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4261 Naomi Ikeda, Index 106470/08
Plaintiff-Respondent,

-against-

Azad Hussain, et al.,
Defendants-Appellants,

Christine Brooks, et al.,
Defendants.

_____

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

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered January 26, 2010, which, insofar as appealed from, as limited by the briefs, denied defendants-appellants' motion for summary judgment as to plaintiff's claims for permanent consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted, the complaint dismissed as against defendants-appellants, and, upon a search of the record, as against co-defendants as well. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

The affirmed report of defendants' expert neurologist, wherein he concluded that his examination of plaintiff's lumbar spine revealed that she suffered from only a minor deficit in her

range of motion, was sufficient to shift the burden of proof to plaintiff to demonstrate the existence of a triable issue of fact as to whether she had suffered a "serious" injury within the meaning of Insurance Law § 5102(d) (*see Rosa-Diaz v Maria Auto Corp.*, 2010 NY Slip Op 08995 [2010]; *Sone v Qamar*, 68 AD3d 566 [2009], *Style v Joseph*, 32 AD3d 212 [2006]).

Plaintiff failed to satisfy her burden. Her expert's quantitative assessment of the range of motion of her lumbar spine, conducted more than three years after the accident, failed to compare the limitation observed with any contemporaneous quantitative assessment based on objective testing at the time of the alleged injury (*see Rossi v Alhassan*, 48 AD3d 270, 271 [2008]). Thus, the expert's assessment as to plaintiff's range of motion limitation in her lumbar spine was too remote in time to warrant the inference that such limitation was caused by the accident (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 663 [2010]).

Plaintiff's other medical reports are unsworn, and therefore insufficient to raise an issue of fact (*see Alicea v Troy Trans, Inc.*, 60 AD3d 521 [2009]).

Although co-defendants Christine Brooks and Samantha Brooks s/h/a John Doe, did not file a notice of appeal from the partial denial of their cross motion for summary judgment, we find that summary judgment should nonetheless be granted in their "favor as

well because, obviously, if plaintiff cannot meet the threshold for serious injury against one defendant, [she] cannot meet it against [others]" (*Taylor v Vasquez*, 58 AD3d 406, 408 [2009] [internal quotation marks omitted]).

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

ENTERED: FEBRUARY 15, 2011

CLERK

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4265 The People of the State of New York, Ind. 4484/07
Respondent,

-against-

Oscarlito Cruz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli 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 (Renee A. White, J.), rendered on or about July 8, 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 15, 2011

CLERK

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

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4266 Paula Gerard, et al., Index 101150/10
Plaintiffs-Appellants,

-against-

Clermont York Associates, LLC,
Defendant-Respondent.

_____

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (William J. Gribben of counsel), for appellants.

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 5, 2010, which, in this putative class action commenced by plaintiffs on behalf of themselves and others similarly situated alleging wrongful deregulation of certain rent-stabilized apartments by defendant owner and its predecessors in interest who have been receiving J-51 tax benefits since July 1997, granted defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The court abused its discretion in dismissing the complaint under the doctrine of primary jurisdiction. This action presents legal issues left open after the Court of Appeals' decision in *Roberts v Tishman Speyer Props, L.P.* (13 NY3d 270 [2009]), including whether that decision is to be applied retroactively or

prospectively. It is the courts, not the Division of Housing and Community Renewal, that should address these issues in the first instance.

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

ENTERED: FEBRUARY 15, 2011

CLERK

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4269N John M. Brown, Index 601239/07
Plaintiff-Respondent,

-against-

Teresa A. Andreoli,
Defendant-Appellant.

_____

Fixler & LaGattuta, LLP, New York (Jason L. Fixler of counsel), for appellant.

Jeffrey Lessoff, New York, for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered June 9, 2010, which, in an action for personal injuries arising out of a motor vehicle accident, granted plaintiff's motion for a default judgment to the extent that if defendant did not file her answer within 45 days of service of the order with notice of entry, a default judgment would be entered against her, unanimously reversed, on the law, without costs, the motion denied, and the complaint dismissed as abandoned. The Clerk is directed to enter judgment accordingly.

Plaintiff failed to demonstrate a reasonable excuse for failing to move for a default judgment until more than one year after defendant's time to answer had expired (*see* CPLR 3215[c]; *Mejia-Ortiz v Inoa*, 71 AD3d 517 [2010]). Counsel's proffered explanation for the delay in moving for a default judgment, namely health problems, did not constitute a reasonable excuse since those health problems occurred outside the one-year period

in which plaintiff had to move (*see Mattera v Capric*, 54 AD3d 827 [2008]).

The motion court, after determining that no reasonable excuse had been established, should have dismissed the complaint as abandoned (*see* CPLR 3215[c]; *Perricone v City of New York*, 62 NY2d 661, 663 [1984]; *Opia v Chukwu*, 278 AD2d 394 [2000]).

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

ENTERED: FEBRUARY 15, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Román, JJ.

3343N Mt. McKinley Insurance Company, etc., et al., Plaintiffs, Index 602454/02

-against-

Corning Incorporated, Defendant-Appellant,

AIU Insurance Company, et al., Defendants,

Century Indemnity Company, etc., et al., Defendants-Respondents.

_____

Dickstein Shapiro LLP, New York (Edward Tessler of counsel), for appellant.

O'Melveny & Myers LLP, New York (Tancred V. Schiavoni of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 4, 2009, which, to the extent appealed from, granted the cross motion of respondents Century Indemnity Company *et al.* to compel discovery and denied appellant Corning Incorporated's assertion of the "common interest" privilege for certain communications with asbestos claimants made in connection with strategy and preparation for Bankruptcy Plan confirmation hearings, unanimously affirmed, with costs.

In this action seeking a declaratory judgment establishing entitlement to insurance coverage for defense and/or indemnification, the IAS court did not abuse its discretion in

ordering the subject documents produced (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [2003]). The motion court properly held that Corning failed to establish that the subject documents were protected by the common interest privilege. While Corning asserted that the documents were "generated in furtherance of a common legal interest" between itself and the committees in the bankruptcy action and that the documents included communications evincing strategy and preparation for an upcoming confirmation hearing, it submitted no evidence in support of these assertions. Moreover, Corning never stated, let alone established, that it or the committees had a reasonable expectation of confidentiality with respect to these communications. Accordingly, Corning failed to establish that the relevant communications with the committees were in furtherance of a common legal interest and that with respect to these communications, Corning and the committees had a reasonable expectation of confidentiality (*see United States v Schwimmer*, 892 F2d 237, 243-244 [2d Cir 1989]; *In re Quigley Company, Inc.*, 2009 Bankr LEXIS 1352, 8-9 [Bankr SD NY 2009]).

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

> The Decision and Order of this Court entered herein on October 12, 2010 is hereby recalled and vacated (*see* M—5785 decided simultaneously herewith).

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

ENTERED: FEBRUARY 15, 2011

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3826 The People of the State of New York, Respondent, Ind. 5633/07

-against-

Steven Brown, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered February 27, 2009, convicting defendant, after a nonjury trial, of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, unanimously affirmed.

Defendant's claim that his waiver of a jury trial was invalid because he allegedly did not sign it in open court (*see* CPL 320.10[2]) is a claim requiring preservation (*see People v Johnson*, 51 NY2d 986 [1980]; *People v Magnano*, 158 AD2d 979 [1990], *affd* 77 NY2d 941 [1991], *cert denied* 502 US 864 [1991]; *see also People v McDaniel*, 161 AD2d 1125 [1990], *lv denied* 76 NY2d 861 [1990]), and we decline to review this unpreserved claim in the interest of justice. "Moreover, quite apart from the lack of preservation, there is nothing on this record to afford a basis for determination of the question now raised for the first

time" (*Johnson* at 987). Defendant did not meet his burden of presenting this Court with a factual record sufficient to permit review of this issue (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]). We note that there was an extensive colloquy about defendant's waiver of his right to a jury trial, and that the waiver form, signed by defendant and his counsel, expressly states that the waiver was made in open court.

Defendant did not preserve his legal sufficiency claims, including his argument that he established the affirmative defense to first-degree robbery set forth in Penal Law § 160.15(4) as a matter of law, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Furthermore, in the exercise of our factual review power, we find that the court's verdict, including its rejection of the affirmative defense, was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established the element of displaying what appeared to be a firearm (*see People v Lopez*, 73 NY2d 214 [1989]; *People v Garcia*, 278 AD2d 147 [2000], *lv denied* 96 NY2d 759 [2001]), and it failed to establish the affirmative defense, particularly since defendant had an opportunity to discard a weapon before the police arrested him.

Defendant's constitutional challenge to the procedure under which he was sentenced as a persistent violent felony offender is

unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Bell*, __ NY3d __, 2010 NY Slip Op 09158 [2010]).

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

ENTERED: FEBRUARY 15, 2011

CLERK

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

3929 American Bank Note Corporation, et al., Plaintiffs-Appellants, Index 115446/05

-against-

Hernan Daniel Daniele, et al., Defendants-Respondents.

_____

Andrews Kurth LLP, New York (Cassandra L. Porsch of counsel), for appellants.

Bernard D'Orazio & Associates, P.C., New York (Bernard D'Orazio of counsel), for respondents.

_____

Order, Supreme Court, New York County (Steven E. Liebman, Special Referee), entered July 1, 2009, which, in an action for breach of fiduciary duty, granted defendants' motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

The Special Referee properly dismissed the complaint on the ground that plaintiffs failed to meet their burden of showing the existence of long-arm jurisdiction (CPLR 302[a]) over defendants, citizens and residents of Argentina (*see Stewart v Vokeswagen of Am.*, 81 NY2d 203, 207 [1993]). There is no evidence that any of the allegedly diverted funds were deposited into any bank account in New York in which defendants had an interest. Rather, it appears that the deposits were all made in Argentine branches of New York banks (*see generally Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *cf. Pramer S.C.A. v Abaplus Intl. Corp.*, 76

AD3d 89, 96 [2010]). Further, the bank records in the record on appeal strongly tend to refute that deposits into the accounts in question were the product of a fraudulent scheme.

Finally, there was no error in permitting defendants to testify at the hearing by means of a live video conference link from Argentina. First, the court quashed the subpoena plaintiffs had originally served on defendants and plaintiffs did not challenge this ruling on appeal. Thus, defendants' appearance via video conference was voluntary. Further, plaintiffs fully participated in that hearing.

Pursuant to CPLR 3103(a), the court may regulate "any disclosure device" in order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice. . . " The decision to allow a party or witness to testify via video conference link is left to a trial court's discretion (*People v Wrotten*, 14 NY3d 33, 37-38 [2009] *cert denied* __ US __, 130 S Ct 2520 [2010]).

Here, defendant Daniele had not made travel arrangements to come to the United States. There was also a question of whether he could lawfully leave Argentina because of charges plaintiffs filed against him in that country. Thus, coming to New York to testify was "not feasible as a practical matter" (*Matter of Singh*, 22 Misc 3d 288, 290 (Sup Ct, Bronx County 2008), and would have resulted in hardship (*Rogovin v Rogovin*, 3 AD3d 352, 353

[2004]). Accordingly it was proper to allow defendants to testify from Argentina via video conferencing.

We have considered plaintiffs' other arguments and find them unavailing.

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

ENTERED: FEBRUARY 15, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4204 Barbara J. Ford, Index 301747/09
Plaintiff-Respondent,

-against-

Rector, Church-Wardens, Vestrymen of Trinity Church in the City of New York, et al.,
Defendants-Appellants.

_____

Epstein Becker & Green, P.C., New York (Carrie Corcoran of counsel), for appellants.

Bonnaig & Associates, New York (Mahima Joishy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered March 18, 2010, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel production of plaintiff's home and mobile telephone records for the period January 1, 2003 to the present, unanimously modified, on the facts, to direct plaintiff to serve a response to item 15 of defendants' second request for the production of documents insofar as it pertains to telephone calls made by plaintiff to persons known by the names of Charles Reed a/k/a Charlie Reed and Earline Reed during the period January 1, 2008 to January 31, 2009, and otherwise affirmed, without costs.

While defendants' discovery request for all plaintiff's home and cellular telephone records dating from six years before the

sending of the anonymous faxes that purportedly led to her termination was overly broad and unnecessarily burdensome, the denial of the request in its entirety was inappropriate, given defendants' showing of the need for the discovery. Defendants allege that plaintiff was terminated not in retaliation for commencing a discrimination suit but because of her involvement in the sending of certain anonymous faxes and her dishonesty during the investigation into the sending of the faxes. Plaintiff asserts that she does not know the person who allegedly caused the faxes to be sent. However, there is documentary evidence suggesting that he is her brother-in-law. Thus, we conclude that plaintiff's telephone records, as circumscribed above, for the year preceding the sending of the faxes are "material and necessary" to the defense of this action (CPLR 3101[a]; *see Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358 [2006]).

Contrary to defendants' contention, production of the remainder of the information requested should not be compelled,

despite plaintiff's untimely objection to the request (*Lea v New York City Tr. Auth.*, 57 AD3d 269 [2008]; *Haller v North Riverside Partners*, 189 AD2d 615, 616 [1993]).

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

ENTERED: FEBRUARY 15, 2011

CLERK