SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 29, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1454-
1455-
1456 Diplomat Properties, L.P., Index 603603/07
Plaintiff-Respondent,

-against-

Komar Five Associates, LLC,
Defendant-Appellant,

First American Title Insurance Company, etc.,
Defendant.

Herrick, Feinstein LLP, New York (Christopher J. Sullivan of counsel), for appellant.

Proskauer Rose LLP, New York (Herman L. Goldsmith of counsel), for respondent.

Orders, Supreme Court, New York County (Herman Cahn, J.), entered August 6, 2008, December 12, 2008, and February 27, 2009, which, respectively, granted plaintiff's motion to dismiss defendant Komar Five Associates, LLC's affirmative defenses and counterclaims; to the extent appealed from as limited by the brief, denied defendant's motion for renewal; and granted plaintiff's motion for summary judgment declaring that it was

entitled to retain defendant's contract deposit and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

On May 3, 2007, plaintiff and defendant Komar Five Associates, LLC executed an agreement for the purchase and sale of the Diplomat Hotel and Convention Center and related facilities in Hollywood and Hallandale Beach, Florida, for $690,000,000. Upon execution of the Purchase and Sale Agreement (the contract), defendant delivered a $20 million deposit to defendant escrow agent, First American Title Insurance Company. The contract provided that the closing would occur on August 1, 2007, but that upon notice from defendant and an additional $10 million deposit, defendant purchaser had the right to extend the closing date for up to 60 days.

Defendant subsequently requested an extension of the closing date. In connection therewith, the parties executed a first amendment to the contract, dated July 26, 2007, in which defendant acknowledged that (1) its due diligence period had ended on June 4, 2007; (2) it had had a sufficient opportunity to conduct due diligence and waived any objections it had raised or could have raised under Section 6.12;[1] (3) it would not terminate

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[1]Section 6.12 sets forth a limited right to terminate during the due diligence period if, as a result of defendant's due

the contract under Section 6.12 and, therefore, would not be entitled to a return of the deposit under Section 6.12; (4) it was satisfied with and accepted the property; and (5) it was proceeding with the purchase of the property in its "as-is, where-is" state and condition, subject to the terms and conditions set forth in the contract. Defendant agreed to waive, release, rescind and terminate any and all allegations, assertions, claims and demands that it was not afforded sufficient access to and/or did not receive adequate information to conduct its due diligence investigations of the property. A new closing date was set for October 31, 2007.

As the closing approached, plaintiff asserts that it contacted defendant numerous times to prepare for the closing. Plaintiff received no response. Defendant concedes that it did not respond, but maintained that no response was required since plaintiff was in breach of the contract.

By letter dated October 30, 2007, defendant informed plaintiff that it would not appear on the scheduled closing date "because of the numerous breaches of [plaintiff] under the [contract]," including an agreement plaintiff allegedly had entered into with the City of Hallandale specifying that future

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diligence investigation, it was determined in accordance with the contract procedures that a "Major Property Condition" existed.

development of the property be phased-in over a 10-year period, in violation of Section 3.8 of the contract.[2] Defendant stated that it still desired to acquire the property, but demanded an "abatement and an offset from the purchase price equal to the damages sustained by [it]." The letter concluded,

> "In the event that you do not immediately notify us of your acknowledgment of your obligation to grant such an abatement, and the adjournment of the closing until such abatement is agreed upon, we shall pursue all of our rights to enforce the Agreement and the law of the State of New York and acquire title to the Property pursuant to the Agreement with an abatement and offset as permitted pursuant to the law of the State of New York."

On October 31, 2007, plaintiff appeared at the closing, ready, willing and able to close. Defendant failed to appear and failed to wire the balance of the purchase price to plaintiff, and plaintiff commenced this action on or about the same date.

Defendant purchaser is bound by the exclusive remedy

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[2]Section 3.8(a) provides that except as set forth on an annexed schedule, "there are no management, service, supply, or maintenance or other contracts or agreements that are Material Agreements in effect with respect to the Property other than the Operating Agreements, the Occupancy Agreements, and agreements disclosed in the Title Commitment." "Material Agreement" is defined as any contract or agreement if the aggregate amount payable during any calendar year equaled or exceeded $100,000, or the term of such contract expired after the first anniversary of the closing date, provided that no such contract was deemed "material" if terminable on 60 days or fewer days' notice.

provisions set forth in the parties' contract, having failed to adduce any facts from which a trier of fact could find that plaintiff seller engaged in misconduct "smack[ing] of intentional wrongdoing" (*Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 244 [2007] [internal quotation marks and citation omitted]). The City of Hallandale confirmed twice that, notwithstanding any discussions that may have taken place as to the way the development of the property that was the subject of the contract might proceed, there was no actual or proposed agreement concerning any development restriction between the City or its agencies and plaintiff, at any time preceding defendant's default under the contract. Thus, there was no breach of plaintiff's obligation, pursuant to section 3.8(a) of the contract, to disclose the existence of a "Material Agreement[]." Further, due diligence materials furnished to defendant referred to development of the property as proceeding in "phases." This $690 million project was not scheduled to be completed and ready for occupancy until 2017. As defendant, in the first amendment to the contract, expressly warranted that it had had a sufficient opportunity to conduct due diligence and that it waived any objections it had raised or could have raised, it will not now be heard to complain.

Similarly unavailing is defendant's argument that plaintiff

misrepresented its ability to obtain the necessary approvals for the addition of 1,388 residential units on the golf course and that this constitutes a "material deviation" from the predevelopment work described in section 6.6 of the contract. We note first, that, as the motion court pointed out, section 6.6 defines the predevelopment work in terms of an "approximately 349 unit hotel" and "a mix of uses at the existing golf course," and the number 1,388 does not appear there or anywhere else in the contract. In any event, defendant did not identify this alleged "breach" in the October 30, 2007 letter that it asserts constituted the requisite notice and demand to cure under section 9.1 of the contract. Defendant raised the argument for the first time in February 2008, long after the closing. Moreover, plaintiff sought approval from the City, but there was no guarantee that it would receive it. Indeed, witnesses testified that a land use planning amendment (LUPA) was only a partial, first-level entitlement, and that without City approval of the LUPA, the zoning, the site plan, and the design, "you've got nothing." Finally, since, as the record shows, it was not until November 2007, i.e., after the scheduled closing date, that plaintiff learned that the City was considering approving 900 rather than 1,388 units, the alleged "breach" cannot constitute a lawful excuse for defendant's failure to close.

Defendant argues that its request for specific performance should have been construed as a demand for the return of its deposit under section 9.1(a) of the contract. However, its October 30, 2007 letter did not comply with the requirements of section 9.1(b). That section provides that in the event plaintiff failed to comply with its closing obligations as set forth in section 7.2 or 7.4, defendant could seek performance if certain conditions were met. Defendant, which did not appear at the closing, did not allege any breach of plaintiff's closing obligations under section 7.2 or section 7.4. It alleged a violation of section 3.8(a) and other provisions. Thus, it was not entitled to seek specific performance under section 9.1(b).

The breach of fiduciary duty and tortious interference counterclaims were insufficiently pleaded (*see SNS Bank v Citibank*, 7 AD3d 352, 354 [2004]; *V. Ponte & Sons v American Fibers Intl.*, 222 AD2d 271, 272 [1995]), as was the counterclaim for tortious interference with prospective business relations (*see Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1999]).

None of the new "evidence" proffered by defendant in support of its motion to renew established that plaintiff acted in bad faith or that it breached the contract by entering into an agreement with the City to restrict development of the property

or by misrepresenting the number of residential units to be built on the golf course.

As plaintiff established that it was ready, willing and able to close on the closing date, and defendant failed to demonstrate a lawful excuse for its failure to close, plaintiff was entitled to retain the contract deposit (*Rivera v Konkol*, 48 AD3d 347 [2008]). Defendant's argument that plaintiff improperly terminated the contract by instituting this action on October 31, 2007 is without merit.

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

ENTERED: APRIL 29, 2010

CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1805 Robert Henry, Index 13200/07
Plaintiff-Respondent,

-against-

Pedro L. Peguero, et al.,
Defendants-Appellants.

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

Mitchell Dranow, Mineola, for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about June 1, 2009, which, upon plaintiff's motion to renew and reargue a prior order, same court and Justice, entered November 10, 2008, granting summary dismissal of the complaint, granted defendants' motion for summary judgment only to the extent of dismissing plaintiff's claims under the 90/180-day test, reversed, on the law, without costs, the motion denied and the order dismissing the entire complaint reinstated. The Clerk is directed to enter judgment accordingly.

Plaintiff alleged that he was injured on September 27, 2006 when a Lincoln Town Car, owned and operated by defendants, struck the passenger side of his Honda Accord. Plaintiff did not seek immediate medical treatment but flew to Florida to visit a friend, initially consulting Dr. Bhupinder S. Sawhney on October

11, 2006, following his return. The doctor's November 20, 2006 report of an MRI of the lumbar spine notes a degenerative condition ("Facet arthropathy from L4 through S1 is evident bilaterally"), and a subsequent report by Dr. Shahid Mian states, "MRI scan of the cervical spine dated 10/12/06 report [*sic*] diffuse disc dessication." On the prior motion, defendants sought dismissal on the ground that plaintiff had failed to demonstrate that he sustained a serious injury (Insurance Law § 5102[d]). Defendants tendered the report of a physician, Dr. Gregory Montalbano, who observed that the November 20, 2006 MRI, consistent with one performed on March 23, 2007, showed "degenerative changes which occur over time." Noting that "[s]ingle level acute disc herniations typically cause incapacitation for two or more weeks and require marked activity modification, bed rest and strong prescription pain medications," Dr. Montalbano concluded that plaintiff "suffers from a pre-existing condition of degenerative disc disease involving the lumbar spine at multiple levels which is reported for both scans."

In opposition, plaintiff submitted an affirmation by Dr. Mian stating that "Mr. Henry's injuries are causally related to the motor vehicle accident of 9/27/06." However, in the order from which renewal was sought, Supreme Court agreed with

defendants that plaintiff's "injuries and his subsequent surgery were due to a pre-existing degenerative condition," further finding that plaintiff had "failed to provide an adequate explanation for the gap in treatment."

On his motion for renewal, plaintiff offered an addendum from Dr. Mian, which concluded that the "disc herniation of L4-5 and L5-S1 of the lumbar spine are causally related to the accident, and not from a pre-existing condition or long standing degenerative process." The addendum adds that "the impact from the subject accident plainly made the disc pathologies symptomatic."

It is apparent that the supplemental medical statement was submitted in the attempt to remedy a weakness in plaintiff's opposition to defendants' original motion, endeavoring to relate the degenerative changes in plaintiff's spine to the motor vehicle accident. As this Court has emphasized, "Renewal is granted sparingly . . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Beiny*, 132 AD2d 190, 210 [1987], *lv dismissed* 71 NY2d 994 [1988]). It is statutorily decreed that a renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and that the application "shall

contain reasonable justification for the failure to present such facts on the prior motion" (2221[e][3]). While the statutory prescription to present new evidence "need not be applied to defeat substantive fairness" (*Lambert v Williams*, 218 AD2d 618, 621 [1995]), such treatment is available only in a "rare case" (*Pinto v Pinto*, 120 AD2d 337, 338 [1986]), such as where liberality is warranted as a matter of judicial policy (*see Wattson v TMC Holdings Corp.*, 135 AD2d 375 [1987] [leave to amend complaint]), and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [2001]).

This construction is consistent with this Court's view that motion practice in connection with summary judgment should be confined to the limits imposed by CPLR 2214(b). As we have stated, "We perceive no reason to protract a procedure designed 'to expedite the disposition of civil cases where no issue of material fact is presented to justify a trial' (*Di Sabato v Soffes*, 9 AD2d 297, 299) by encouraging submission of yet another set of papers, an unnecessary and unauthorized elaboration of motion practice" (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]). Thus, a deficiency of proof in moving papers cannot be cured by submitting evidentiary material in reply (*see Migdol v*

City of New York, 291 AD2d 201 [2002]), the function of which is "to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1992]). Nor can a deficiency in opposing a motion be cured by resorting to a surreply (*see e.g. Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [2009]).

Supreme Court's grant of renewal in this matter contravenes this Court's policy of confining motion practice to the limits imposed by the CPLR. Neither of the statutory requirements for renewal was satisfied by plaintiff. Dr. Mian's addendum was not the result of any additional examination or medical testing; rather, the doctor's conclusion was based on the medical information previously available to him and could have been included in his original affidavit (*see Cillo v Schioppo*, 250 AD2d 416 [1998]). While, in appropriate circumstances, renewal may be predicated on previously known facts, it is settled that "[t]he movant must offer a reasonable excuse for failure to submit the additional evidence on the original motion" (*Segall v Heyer*, 161 AD2d 471, 473 [1990]), which plaintiff neglected to do.

Even if this Court were to accept the proffered addendum, it is insufficient to rebut the finding of defendants' physician

that plaintiff's affliction is degenerative in nature rather than the consequence of a serious injury causally related to the accident (*see Lopez v American United Transp., Inc.*, 66 AD3d 407 [2009]; *Eichinger v Jone Cab Corp.*, 55 AD3d 364 [2008]). While Dr. Mian's addendum states that the accident caused plaintiff's underlying pathology to become manifest, it utterly fails to explain the two-week gap between the accident and the commencement of treatment, which "interrupt[s] the chain of causation between the accident and claimed injury" (*Pommells v Perez*, 4 NY3d 566, 572 [2005]). Thus, we conclude that defendants submitted "evidence of a preexisting degenerative disc condition causing plaintiff's alleged injuries, and plaintiff failed to rebut that evidence sufficiently to raise an issue of fact" (*id.* at 579).

All concur except Saxe and Manzanet-Daniels, JJ. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

The motion court properly entertained plaintiff's motion to renew, based on the addendum report of Dr. Mian, and upon renewal, properly denied defendants' motion to the extent it sought dismissal of plaintiff's claims alleging a significant limitation of use of bodily function or system and a permanent consequential limitation of use of a body organ and/or member. This case, like the recent case of *Linton v Nawaz*, 62 AD3d 434 [2009], presents the vexing question of the quantum of proof necessary to raise a triable issue of fact concerning causation where defendant alleges the existence of a pre-existing, degenerative condition. Defendants failed to present persuasive proof of a pre-existing degenerative condition, as described in *Pommells v Perez* (4 NY3d 566 [2005]), and plaintiff's submissions sufficiently raised a triable issue of fact as to whether his injuries were attributable to the accident as opposed to a pre-existing, degenerative condition. I would accordingly affirm the order of the motion court in all respects.

Plaintiff, born December 28, 1958, commenced this action to recover damages for personal injuries allegedly sustained in an automobile accident on September 27, 2006. In his bill of particulars, plaintiff identified various injuries including (1) tears of the annulus fibrosis at L4-L5 and L5-S1, (2) disc

herniations at L1-L2, L4-L5 and L5-S1, and (3) disc bulges at L3-L4 and L4-L5. In his supplemental bill of particulars, plaintiff noted that he had undergone a percutaneous discectomy at L4-L5 and L5-S1 levels with the Stryker Dekompressor System.

Defendants filed a motion for summary judgment dismissing the complaint on the ground that plaintiff failed to establish the existence of a "serious injury" (Insurance Law § 5102[d]). In support, defendants submitted, inter alia, an affirmation from Dr. Gregory Montalbano, who performed an orthopedic examination of plaintiff on March 14, 2008.

Dr. Montalbano indicated that he had reviewed plaintiff's medical records and had conducted an independent medical examination, including range of motion tests. He concluded that at the time of this examination, plaintiff had normal range of motion in his cervical and lumbar spine, which Dr. Montalbano quantified and compared to the norm, with no orthopedic disability. The medical records reviewed by Dr. Montalbano included a November 20, 2006 MRI report (but not the films themselves) of plaintiff's lumbar spine, as interpreted by plaintiff's radiologist, Dr. Alan Greenfield. The MRI report found evidence of midline tears in the annulus fibrosis with central disc herniation at L4-L5 and L5-S1, along with disc dessication, and bilateral facet arthropathy from L4 through S1.

Dr. Montalbano also reviewed a March 23, 2007 MRI report of the lumbar spine interpreted by Dr. Richard Heiden, which found right sided herniation at L1-L2, bulges at L3-L4 and left-sided herniation at L5-S1.

Dr. Montalbano opined that plaintiff had not sustained an injury to the lower back as a result of the accident. Dr. Montalbano based this conclusion on two factors. First, he noted that immediately after the accident, plaintiff flew to Florida for a week, which was "extremely unusual behavior" for anyone traumatically sustaining not one but two disc herniations. Dr. Montalbano stated that single level acute disc herniations typically caused incapacitation for two or more weeks, and required marked activity modification, bed rest and strong prescription pain medication. Second, Dr. Montalbano opined that the degenerative changes shown in both MRIs, i.e., multiple level disc bulges and herniations and facet arthropathy from L4 through S1, were the type that would occur over time and not over a two-month period.[1] These degenerative changes were consistent with plaintiff's age and occupation as a boiler fireman. Dr. Montalbano further opined that the discectomy surgery was

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[1]Dr. Montalbano noted that the November 20, 2006 MRI of the lumbar spine showed midline tears of the annulus fibrosis; however, he did not specifically opine that this was a degenerative change.

performed for the purpose of correcting plaintiff's pre-existing lumbar condition.

In opposition to the motion, plaintiff relied on Dr. Greenfield's MRI report of plaintiff's lumbar spine on November 20, 2006; the March 20, 2007 affirmed medical report of his surgeon, Dr. Mian, who opined that plaintiff's injuries were causally related to the accident; the June 3, 2008 affirmed report of neurologist Paul Lerner, who found deficits in lumbar range of motion and opined that plaintiff's injuries were causally related to the accident; and the affirmed report of Dr. Mitchell Kaphan, an orthopedist who examined plaintiff on December 21, 2006 and found range-of-motion limitations in the cervical and lumbar spine, and opined that plaintiff's injuries were causally related to the accident.

By order entered November 10, 2008, the court granted defendants' motion for summary judgment dismissing the complaint in its entirety, finding that defendants had established, prima facie, that plaintiff had not sustained a "serious injury." The court relied, inter alia, upon Dr. Montalbano's opinion, based on his examination of plaintiff and his review of the medical records, that plaintiff did not sustain cervical or spinal injury as a result of the accident, and that the MRI of plaintiff's lumbar spine demonstrated he suffered from pre-existing

degenerative disc disease. The court found, in turn, that plaintiff had failed to raise a triable issue of fact as to whether he had sustained a serious injury within the meaning of the statute. The court noted that "not one of the records or reports" of plaintiff's treating physicians "addresses the pre-existing degenerative disc disease reported by Dr. Greenfield and described in Dr. Montalbano's affirmed report," or "give[s] any objective basis for concluding that plaintiff's alleged limitations result" from the accident rather than his pre-existing degenerative condition, rendering causality conclusions speculative and insufficient to defeat the summary judgment motion.

Plaintiff moved, by order to show cause, for renewal of the order pursuant to CPLR 2221(e), based on the December 11, 2008 "addendum" report of Dr. Mian. Counsel asserted that plaintiff had not submitted the addendum report in his original opposition papers because both counsel and Dr. Mian were under the belief that the doctor's determination that plaintiff's injuries were causally related to the subject accident - which was based upon his review of the MRI films, the MRI report, his examination of plaintiff and observation of the injured discs during the operation he performed on plaintiff - had been sufficient to rebut Dr. Montalbano's findings of degeneration, which were based

solely on the latter's review of the MRI report and not review of the actual MRI films.

In his addendum report, Dr. Mian opined, based on his review of the MRI films, his examination of plaintiff, plaintiff's lack of any prior neck or back injury, and complaints relating to his neck and lower back since the accident, that plaintiff's lumbar disc herniations were causally related to the accident and not a pre-existing condition or long-standing degenerative process. Dr. Mian further opined that "even if the disc pathologies reflected in [plaintiff's] MRI scans were pre-existing or degenerative in nature, given [plaintiff's] complaints relating to his back since the accident and his lack of any prior injury to those parts of his body, the impact from the subject accident plainly made the disc pathologies symptomatic."

By order entered June 1, 2009, the court granted renewal, vacated the prior order, restored the case to the calendar, and granted defendants' motion for summary judgment only to the extent of dismissing the 90/180-day claims. The court noted that although renewal was not generally available when the newly submitted material was available at the time of the original motion, a court had "broad discretion" to grant renewal, and under the appropriate circumstances could do so even upon facts known to the movant at the time of the original motion. The

court stated that although it had originally decided that plaintiff's evidence in opposition to the motion was insufficient to raise a triable issue of fact because it failed to address Dr. Montalbano's opinion that plaintiff's injuries were pre-existing and not causally related to the accident, "upon reflection," and "in light of" our recent holding in *Linton*, the court found that the opinions of Drs. Mian and Kaphan with respect to causality were "no more conclusory" that those of Dr. Montalbano, particularly in light of Dr. Mian's addendum report.

I would hold that the lower court properly granted the motion to renew, and thereupon properly denied defendants' motion to dismiss the complaint to the extent indicated above. It was within the court's discretion to grant leave to renew upon facts known to the moving party at the time of the original motion. Plaintiff provided a reasonable justification for the failure to include information provided in the addendum of his medical witness, citing counsel's belief that the medical submissions in opposition to defendants' summary judgment motion were sufficient to rebut defendants' expert's finding that the injuries claimed by plaintiff were degenerative (*see Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460 [2007] [court, in its discretion, may grant renewal, in the interest of justice, upon facts known to

the movant at the time of the original motion]; *Nutting v Associates in Obstetrics & Gynecology*, 130 AD2d 870 [1987] [court properly granted motion to renew based on affidavit of medical doctor where defendants reasonably believed plaintiffs' failure to provide an affidavit of merit from a medical expert would preclude plaintiffs from successfully vacating default]).

Indeed, the reports of plaintiff's experts, who had examined him and opined that his injuries were causally related to the accident, were more than sufficient to raise a triable issue of fact (*see Norfleet v Deme Enter., Inc.*, 58 AD3d 499 [2009]). Their conclusions that plaintiff's symptoms were related to the accident were not speculative or conclusory, but rather, based on physical examinations of plaintiff made shortly after the onset of his complaints of pain and other symptoms, which he claimed arose after his involvement in the motor vehicle accident. By attributing plaintiff's injuries to a different, yet equally plausible cause (i.e., the accident), the affirmations of plaintiff's experts raised an issue of triable fact, and a jury was entitled to determine which medical opinion was entitled to greater weight (*see Linton v Nawaz*, 62 AD3d 434, *supra*).

In this case there is no "persuasive" evidence of a pre-existing injury of the type described in *Pommells v Perez* (4 NY3d 566, *supra*). Dr. Montalbano, who examined plaintiff 1 ½ years

after the accident, merely opined that the type of injuries revealed by plaintiff's MRI (i.e., multi-level disc bulges and herniations and facet arthropathy) were degenerative changes consistent with plaintiff's age and occupation. Significantly, he did not examine the MRI films themselves, more specifically describe the nature of plaintiff's injuries or explain why he had conclusively determined that plaintiff's injuries were degenerative in origin.[2]

In any event, the addendum provided sufficient evidence to rebut defendants' expert's finding that disc pathologies were degenerative in nature rather than a serious injury causally related to the accident. Dr. Mian opined that the disc pathologies observed by Dr. Montalbano were causally related to the accident, based on his examination of plaintiff, his review of the MRI films, plaintiff's lack of prior neck or back injury, and the onset of plaintiff's symptoms following the accident. Dr. Mian further opined that even if disc pathologies were pre-

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[2]Indeed, given the conclusory nature of Dr. Montalbano's opinions regarding causation, it is questionable whether defendants made a prima facie case. However, it is not necessary to determine this question since plaintiff, in moving for renewal, accepted the motion court's rationale that defendants' submissions sufficed to establish a prima facie case, and rather (assuming that a prima facie case had been made), contended that Dr. Mian's submissions were sufficient to raise a triable issue of fact.

existing in nature, the accident served to aggravate them. This was more than sufficient, at this stage, to raise a triable issue of fact regarding causation (*see e.g. Hammett v Diaz-Frias*, 49 AD3d 285 [2008] [report of plaintiff's doctor that her symptoms were caused by accident, and that her condition was permanent in nature and in part an "exacerbation of underlying degenerative joint disease and prior injuries," sufficient to raise a triable issue of fact]).

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

ENTERED: APRIL 29, 2010

David Apolony

CLERK

Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1960 Lisa Harris, Index 100776/07
Plaintiff-Appellant,

-against-

IG Greenpoint Corp.,
Defendant-Appellant,

The China Club Late Night Management, Inc., et al.,
Defendants-Respondents.

Arnold Di Joseph III, New York, for Lisa Harris, appellant.

The Law Offices of Jeffrey S. Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for IG Greenpoint Corp., appellant.

Zaremba Brownell & Brown PLLC, New York (Daniel T. Gluck of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 20, 2008, which granted the motion by defendants The China Club Late Night Management, Inc. and Nightlife Enterprises, L.P. (collectively, China Club) to dismiss the complaint and cross claims as against them, unanimously reversed, on the law, without costs, the motion denied, and the complaint and cross claims reinstated.

Plaintiff alleges that on February 26, 2006, she tripped and fell on a "defect and/or tripping hazard" in the sidewalk approximately 15-18 inches from the curb line outside the

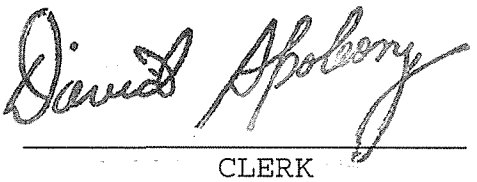
entrance to the nightclub owned and managed by China Club. China Club leases the premises from defendant IG Greenpoint Corp. Plaintiff further asserts, based on personal knowledge, that China Club used the sidewalk for entrance, egress and the congregation of patrons and that it cordoned off a portion of the sidewalk using heavy metal stanchions. Plaintiff argues that the hazardous and defective cracks in issue emanated from the exact locations on the sidewalk where the stanchions were set out each night by China Club and that it was the nightly dragging and dropping of the stanchions that caused the damage to the sidewalk.

When reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the factual allegations of the complaint must be deemed to be true, and the court must afford the plaintiff the benefit of all favorable inferences that can be drawn from the complaint (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]; *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]; *Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 284 [2003]). The motion must be denied where the complaint adequately alleges, for pleading survival purposes, viable causes of action. The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations

are discerned which taken together manifest any cognizable action at law, a motion for dismissal will fail (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1997]). Here, assuming the plaintiff's allegations to be true that China Club created the subject hazardous condition on its sidewalk and/or had a special use of the portion of the sidewalk where the accident occurred, the plaintiff's complaint has clearly stated a prima facie cause of action against China Club.

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

ENTERED: APRIL 29, 2010



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

2131 Brian Luongo, Index 6969/04
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondent.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered March 17, 2009, which granted plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff was injured while bracing a hydraulic jack that was being used to lift a steel girder beneath an elevated subway line. He braced the base of the jack because it kept falling over, partly, according to plaintiff, because of the uneven surface and because the girder was simply too heavy for the type of jack that was being used. In order to give the jack more height, steel shim plates were placed on top of it as "spacers." Plaintiff held the spacers by hand because they too kept falling off. The procedure was described during plaintiff's EBT as holding the jack in place while another employee jacked it up and

made contact with a "C channel [which bent under pressure]" that was positioned under the steel girder. Defendant's counsel then asked "was it the intention then to have the jack . . . elevate the C channel and the girder, right?" Before plaintiff answered, his counsel asked him, "Is that correct, did you then lift the girder?," to which plaintiff responded, "Yes, that's correct." Later on, when asked how high he was told to raise the girder, plaintiff responded, "I think it needed to be another inch, but I'm not sure." Plaintiff was injured when the jack "jumped and then the steel fell down," causing the spacers to either shift or fall, injuring plaintiff's left hand. According to plaintiff, the "unleveled" surface combined with the spacers and the twisted C channel made the jack "get off contact."

Plaintiff's repair-related activity (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]) and injury fell within the ambit of Labor Law § 240(1) inasmuch as the enormous weight of the steel girder caused the jack and plates to fall or shift "while being . . . secured, *because* of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]; *Outar v City of New York*, 286 AD2d 671, 672 [2001], *affd* 5 NY3d 731 [2005] [Labor Law § 240(1) liability found where unsecured dolly fell from a "bench wall" that was merely 5 1/2

feet high]). Significantly, unlike *Narducci*, where there was no § 240(1) liability because the object that fell (a window) was part of the "pre-existing building structure as it appeared before work began" and was "not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" (*Narducci* at 268), here the opposite is true. Both the jack and the 12 by 12¾ inch thick metal plates that came into contact with plaintiff's hand were not part of the "pre-existing structure" and clearly needed to be secured. Rather than having plaintiff use a securing device of the kind contemplated by the statute, however, the jack and the spacers were secured by plaintiff himself. Indeed, the spacers were not even tacked or welded together as required by the Transit Authority's written specifications.

The fact that the girder, jack and the spacers were not positioned significantly above plaintiff's head is of no moment (*id.*). As the Court noted in *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), "'Labor Law § 240(1) was designed to prevent those types of accidents in which the . . . protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person'*" (*id.* at 264 *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see also Outar v City*

of New York, 5 NY3d 731 [2005]). Thus, Labor Law § 240(1) liability was found in *Runner* where the injury was caused by the force of an object that was positioned at a lower elevation than the employee; the employee was pulled forward by the heavy reel of wire he was lowering down a flight of stairs. Here, plaintiff was injured as a direct result of the gravitational force of the improperly secured girder, jack and spacers and the absence of a securing device. Rather than using plaintiff as the securing device contemplated by the statute, he should have been provided with one instead. The situation was particularly egregious here because prior to the accident the jack had failed several times. Supreme Court, therefore, properly granted plaintiff summary judgment on his Labor Law § 240(1) claim.

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

ENTERED: APRIL 29, 2010

CLERK

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

2142-
2143 The City of New York, Index 401765/08
Plaintiff-Appellant,

-against-

393 Rest on Eighth Inc.,
Defendant-Respondent,

The New York State Liquor Authority, et al.,
Defendants.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for appellant.

David A. Kaminsky & Associates, P.C., New York (David A. Kaminsky of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered December 4, 2008, which, in a nuisance abatement action brought by plaintiff City against defendant bar operators (the bar), granted the bar's motion to reopen its premises, which were closed by the police for a violation of the parties' stipulation of settlement, on condition that the bar pay the City a fine of $2,500 in lieu of the stipulated penalty of three-months closure, unanimously reversed, on the law, without costs, the motion to reopen denied, the fine vacated, and the stipulated penalty reimposed. Order, same court (John E. H. Stackhouse, J.), entered December 22, 2008, which granted the bar's subsequent motion to reopen its premises, which were closed by

the police for a subsequent violation of the stipulation, unanimously reversed, on the law, without costs, the motion to reopen denied, and the stipulated penalty of one-month closure reimposed.

The subject so-ordered stipulation, inter alia, permanently enjoins the bar from operating the premises in violation of the Alcoholic Beverage Control Law; requires the bar to employ at least three licensed security guards at its premises every Thursday, Friday, Saturday and Sunday night it is open for business; and requires the bar to utilize at all times it is open for business an electronic age-verification recording system when admitting patrons. The stipulation further calls for a three-month closure of the premises in the event of a violation of the Alcoholic Beverage Control Law; a one-month closure in the event of a violation of the security guard and age-verification provisions of the stipulation; and an expedited hearing in the event the bar believes it was improperly closed.

Concerning the first order on appeal, an underage auxiliary police officer was admitted to the bar and served a beer in violation of Alcoholic Beverage Control Law § 65(1), and the bar was closed. The bar moved to reopen its business, claiming that it had substantially complied with the age-verification requirements of the stipulation, in that its security guard had

scanned the credit card that the officer gave him at the door with a stipulation-compliant scanner, but the scanner incorrectly showed her age to be 25. Supreme Court found that the bar violated section 65 but had made a good faith effort to comply with the age-verification requirements of the stipulation, and, sua sponte, imposed a $2,500 fine in lieu of the three-month stipulated penalty. This was error. The stipulation contains no good-faith exception, and there was no basis for Supreme Court to do anything other than strictly enforce the stipulation according to its terms. Moreover, the bar's claims of substantial compliance and good faith are undermined by Alcoholic Beverage Control Law § 65-b(2)(b), which does not include, and therefore prohibits, acceptance of credit cards as a form of identification.

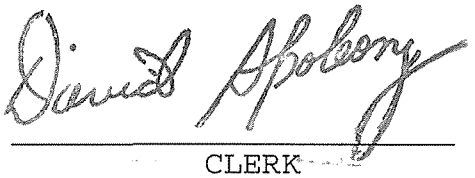
Concerning the second order on appeal, it appears that the bar was once again closed, this time because one of its security guards was not licensed. Supreme Court granted the bar's motion to reopen on the ground that the stipulation was "void for vagueness" in that it failed to "state times, days and the requirement for New York State license." This was error. The term "licensed" is not rendered vague or ambiguous by the absence of specification as to the type of license required, and while the bar claims that it believed that the security guard's

credentials as a former correction officer satisfied the license requirement, no reasonable reading of the stipulation supports such a belief. The term "night" is not ambiguous under the circumstances. Here, all of the alleged violations occurred between the hours of 8:00 p.m. and 2:00 a.m. In the world of bars and nightclubs, 2:00 a.m. constitutes "night." In any event, it can hardly be questioned that in drafting the stipulation the parties meant to ensure no underage drinking at all times that people are likely to desire alcoholic beverages; i.e., from late evening through closing time in the early morning.

The decision and order of this Court entered herein on February 11, 2010 (70 AD3d 472 [2010]) is hereby recalled and vacated (*see* M-1285 decided simultaneously herewith).

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

ENTERED: APRIL 29, 2010



CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2408 Rosa Green, Index 100457/06
Plaintiff-Appellant,

-against-

Fairway Operating Corp., et al.,
Defendants-Respondents,

Fairway Food Corp., etc., et al.,
Defendants.

Steven M. Weinstein, Plainview, for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered January 14, 2009, which, in an action for personal injuries sustained in a slip and fall in defendants-respondents' (defendants) supermarket, denied plaintiff's motion to vacate a prior order that had granted defendants' motion for summary judgment upon plaintiff's default, unanimously affirmed, without costs.

Plaintiff fails to show a meritorious cause of action (*see Kalisch v Maple Trade Fin. Corp.*, 35 AD3d 291 [2006]). In order to establish a meritorious cause of action, the affidavit of her nonparty witness who accompanied her to the supermarket, was essential. The affidavit of plaintiff's witness, purportedly sworn to in the Dominican Republic, lacks the certificate of

conformity (Real Property Law § 301-a) required by CPLR 2309(c), and therefore is not properly before the Court (*see Matter of Elizabeth R.E. v Doundley A.E.*, 44 AD3d 332 [2007]).

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

ENTERED: APRIL 29, 2010

CLERK

Tom, J.P., Andrias, Sweeny, Nardelli, Renwick, JJ.

2417-
2417A Mariusz Labecki, Index 114347/06
Plaintiff-Appellant,

-against-

West Side Equities, LLC, et al.,
Defendants-Respondents.

Samuel J. Lurie, New York (Robert R. Mac Donnell of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for respondents.

Judgment, Supreme Court, New York County (Marilyn Shafer, J.), entered June 1, 2009, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 11, 2009, which granted defendants' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff commenced this action seeking damages for injuries sustained when he was doing cement work on the basement floor of a building owned by defendant West Equities and managed by defendant Garfield Development. Defendant Alan Garfield was the president and sole shareholder of Garfield Development, as well as the sole member of West Equities. Supreme Court dismissed the action as barred by Workers' Compensation Law.

On appeal, plaintiff essentially argues that Supreme Court erred in granting summary judgment dismissal because there is a factual dispute as to which entity (the owner or the managing agent) employed the super when the latter hired plaintiff, presumably on behalf of his employer. The employer issue is relevant to Workers' Compensation Law § 11, to the extent it precludes a plaintiff from bringing an action against his or her employer for job-related injuries. This purported dispute, however, is irrelevant in this case because the action is barred under the exclusivity provision for co-employees of Workers Compensation Law § 29(6), which makes compensation the exclusive remedy of an employee injured by the negligence or wrong of another in the same employ.

Regardless of whether the super was employed by the owner or the managing agent, the undisputed fact remains that Alan Garfield is a co-employee with the super. Thus, regardless of any duty defendants had to maintain the premises in a safe condition, the action is barred by the exclusivity provision for

co-employees in Workers' Compensation Law § 29(6) (*Heritage v Van Patten*, 59 NY2d 1017 [1983]; *Negron v Rodriquez & Rodriquez Stor. & Warehouse*, Inc., 23 AD3d 159 [2005]; *Medrano v Pritchard Indus.*, 298 AD2d 271 [2002]; *Concepcion v Diamond*, 224 AD2d 189 [1996]).

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

ENTERED: APRIL 29, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2593 Bleze Harrison, et al., Index 16046/04
Plaintiff-Respondents,

-against-

New York City Housing Authority,
Defendant-Appellant,

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

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about May 7, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 20, 2010,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 29, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2660 The People of the State of New York, Ind. 2183/07
Respondent,

-against-

Bienvenido Collado,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Wachtell, Lipton, Rosen & Katz, New York (Adam P. Schleifer of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; James A. Yates, J. at suppression decision; William A. Wetzel, J. at plea; Ronald A. Zweibel, J. at trial and sentence), rendered July 31, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fourth degree, and also convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of 5½ years and 6½ years, respectively, unanimously affirmed.

The court properly denied defendant's suppression motion. Police officers noticed that defendant physically resembled a sketch of a person who had committed a rape two days before, and

that he was near a subway station where someone had been using the rape victim's MetroCard. An officer specifically testified that, from his vantage point, defendant actually looked like the person in the sketch (*see People v Joseph*, 10 AD3d 580 [2004], *lv denied* 3 NY3d 740 [2004]). Having viewed the sketch and defendant's arrest photo, we perceive no basis to discredit the officer's testimony. We need not determine whether the police had reasonable suspicion to stop and frisk defendant (*see People v Baker*, 264 AD2d 692, 692 [1999], *lv denied* 94 NY2d 901 [2000]). Even if the police were only authorized to conduct a common-law inquiry at that point, their level of suspicion was elevated to reasonable suspicion for a stop and frisk when defendant "actively fled from the police" (*People v Moore*, 6 NY3d 496, 500-501 [2006]). Defendant, who had been in the process of entering a cab, made eye contact with one of the officers and, instead of departing in the cab, immediately ran into a store. On appeal, defendant argues that his flight was equivocal because the officers were in plainclothes and in an unmarked car, and he could have been fleeing because mysterious strangers were staring at him. However, the circumstances permitted the officers to reasonably conclude that the most likely explanation for defendant's behavior was that he had recognized them as the police (*see e.g. People v Byrd*, 304 AD2d 490 [2003], *lv denied*

100 NY2d 579 [2003]; *People v Pines*, 281 AD2d 311, 311-312 [2001], *affd* 99 NY2d 525 [2002]; *People v Randolph*, 278 AD2d 52 [2000], *lv denied* 96 NY2d 762 [2001]; *People v Ward*, 201 AD2d 292 [1994], *lv denied* 84 NY2d 834 [1994]). Given the violent nature of the crime the officers reasonably suspected defendant had committed, they were authorized to frisk defendant to ensure their safety (*see People v Mack*, 26 NY2d 311, 317 [1970], *cert denied* 400 US 960 [1970]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 29, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2662 The People of the State of New York, Ind. 635/07
Respondent,

-against-

Joel Vasquez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered on or about July 1, 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: APRIL 29, 2010

CLERK

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

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2663 In re Paula Ann Hallman, File 4467/03
Petitioner-Appellant,

-against-

Mark Bosswick, et al.,
Respondents-Respondents,

Seymour Cohn,
Deceased.

Spizz & Cooper, LLP, Mineola (Harvey W. Spizz of counsel), for appellant.

Katten Muchin Rosenman LLP, New York (Jay W. Freiberg of counsel), for Mark Bosswick, respondent.

Schlesinger Gannon & Lazetera LLP, New York (Sanford J. Schlesinger of counsel), for Charles Goldenberg, respondent.

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about March 4, 2009, which, in a construction proceeding, ruled that the will's in terrorem clause would apply to a proposed proceeding to revoke the letters testamentary and letters of trusteeship issued to respondents, unanimously affirmed, with costs.

The decedent's two children, along with the two respondents, who were the decedent's legal, financial and business advisors, were named coexecutors and cotrustees in the will, and letters testamentary and letters of trusteeship were issued to all four named fiduciaries. The in terrorem clause disinherits

beneficiaries who commence proceedings "to void, nullify or set aside all or any part" of the will. Petitioner in the instant construction proceeding, one of the children, inquires whether the in terrorem clause would apply to a proceeding pursuant to SCPA 711 to revoke the letters issued to respondents based on their failure "to have divulged to the Decedent the benefits that they would receive by virtue of acting as executors and trustees." As the proposed proceeding does not fall within the safe harbor provisions of EPTL 3-3.5(b), the applicability of the in terrorem clause is a matter of the decedent's intent (*see Matter of Singer*, 13 NY3d 447, 451 [2009]). We reject petitioner's argument that because the decedent bequeathed his estate only to his children and grandchildren, and gave nothing to respondents, he must have intended to limit the scope of the in terrorem clause to challenges against his family members. The decision of decedent not to leave his estate outright to his children and grandchildren, but set up lifetime trusts for their benefit, is consistent with an intent that they not have unfettered control over his fortune. Such an intention would be furthered by the nomination of two nonfamily members as coexecutors and cotrustees, preventing the children from having a majority vote.

Petitioner also contends that even if the testator intended

the in terrorem clause to operate with respect to the proposed proceeding, public policy considerations dictate that it not be enforced. This argument assumes that the safe harbor provisions of Estates, Powers and Trusts Law § 3-3.5(b) are not exhaustive. Although a recent decision of the Court of Appeals expressly so states (*Matter of Singer*, 13 NY3d 447, 449, 452 [2009]), that statement appears to be dictum as the Court held that the testator did not intend the clause to operate on account of the conduct of his son (*id.* at 452-453). In any event, we reject petitioner's additional argument on the ground that a judicial expansion of the safe harbor provisions specified by the Legislature should originate with the Court of Appeals rather than with the trial or intermediate appellate courts. We have considered petitioner's other arguments and find them to be unavailing.

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

ENTERED: APRIL 29, 2010

David Spolony

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2664 In re Mark G. Bosswick, et al., File 4467/03
Estate of Seymour Cohn, etc.,
Deceased.
- - - - -
Mark G. Bosswick, et al.,
Petitioners-Respondents,

-against-

Paula Ann Hallman,
Respondent-Appellant.

Spizz & Cooper, Mineola (Harvey W. Spizz of counsel), for appellant.

Victor & Bernstein, P.C., New York (Donald M. Bernstein of counsel), for respondents.

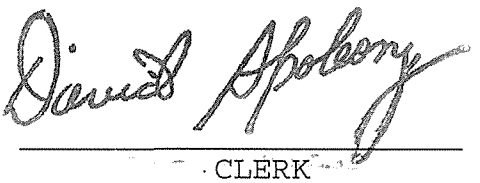
Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered April 30, 2009, which, in a turnover proceeding seeking collection of promissory notes given by respondent Paula Ann Hallman to the decedent, granted petitioners' motion for summary judgment and denied respondent's motion for summary judgment, unanimously affirmed, with costs.

The tax returns and Surrogate's Court documents executed by respondent as an estate fiduciary conclusively establish her ratification of the subject notes, precluding her claims that the notes were the product of duress exerted by one of her coexecutors and that the transfers recited in the notes were

actually gifts, not loans (*see Joseph F. Egan, Inc. v City of New York*, 17 NY2d 90, 98 [1966]; *Morad v Morad*, 27 AD3d 626, 627-628 [2006]). In any event, as the Surrogate also held, respondent fails to raise issues of fact as to donative intent. We have considered respondent's other arguments and find them to be without merit.

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

ENTERED: APRIL 29, 2010



CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2665 The People of the State of New York, Ind. 2011/05
Respondent,

-against-

Roscoe Glinton,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered November 21, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant made a valid waiver of his right to conflict-free counsel, and the retained counsel of his choice provided effective assistance. The court conducted a thorough inquiry pursuant to *People v Gomberg* (38 NY2d 307 [1975]) concerning the nature and extent of any potential conflict arising from counsel and his firm's prior representation, in employee disciplinary matters, of potential witnesses, and his firm's ongoing retention by a municipal labor union whose members included defendant and many of the prosecution's witnesses. Defendant then made an

informed determination to proceed with this attorney, thereby waiving any claim of prejudice resulting from the claimed conflicts (*id.* at 315-16).

We reject defendant's claim that the conflict was unwaivable. A defendant capable of retaining counsel generally has the right to counsel of his or her own choosing (*id.* at 312), and the decision whether to waive the right to conflict-free counsel is normally for the defendant to make (*see People v Salcedo*, 68 NY2d 130, 135 [1986]). A court's "discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review" (*People v Tineo*, 64 NY2d 531, 536 [1985]).

There was nothing about counsel's past or potential future civil representation of prosecution witnesses, or his relationship with their union, that presented such a serious conflict that the court was obligated to reject a *Gomberg* waiver and disqualify counsel. The question whether the court would have been *permitted* to do so (*see People v Carncross*, __ NY3d __, 2010 NY Slip Op 02435 [Mar 25 2010]) is not before us. Conflicts relating to representation of potential witnesses are clearly

waivable (*see e.g. United States v Perez*, 325 F3d 115, 127 [2d Cir 2003]). Although counsel had a financial interest in maintaining his relationship with the union, defendant's assertion that this created a conflict, let alone an unwaivable conflict, is not persuasive. Unlike the unusual situation presented in *United States v Schwarz* (283 F3d 76 [2d Cir 2002]), the union was neither an actual or potential litigant in any matter relating to defendant's trial, had no stake in the outcome, and had no interest that could be viewed as divergent from defendant's.

"Where an actual or potential conflict has been validly waived, the waiver cannot be defeated simply because the conflict subsequently affects counsel's performance; such a result would eviscerate the very purpose of obtaining the waiver" (*Schwarz*, 283 F3d at 95). In any event, the existing record is insufficient to show that the conduct of the defense was in fact affected by the operation of the conflict of interest (*see People v Konstantinides*, 14 NY3d 1, 10-13 [2009]; *People v Longtin*, 92 NY2d 640, 644-645 [1998]).

Defendant's challenges to the court's circumstantial evidence charge are unpreserved because counsel's statements at the charge conference, viewed in light of the lack of any exception after the court charged the jury, were inadequate to

articulate the position defendant takes on appeal (*see People v Lewis*, 5 NY3d 546, 551 [2005]; *People v Whalen*, 59 NY2d 273, 280 [1983]). We decline to review defendant's claims in the interest of justice. As an alternative holding, we find that the charge conveyed the proper standard to be applied by the jury in assessing circumstantial evidence (*People v Sanchez*, 61 NY2d 1022, 1024 [1984]).

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

ENTERED: APRIL 29, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2668 Sarah Rosen, etc., et al., Index 350080/09
Plaintiffs-Appellants,

-against-

Uptown General Contracting, Inc.,
Defendant-Respondent.

Alpert & Kaufman, LLP, New York (Morton Alpert of counsel), for appellants.

Brill & Associates, New York (Corey M. Reichardt of counsel), for respondent.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about October 5, 2009, which, in an action for personal injuries, granted plaintiff's motion to reargue an order, same court and Justice, entered on or about August 10, 2009, granting defendant's motion to change venue from Bronx County to Westchester County, and, upon reargument, adhered to the prior decision, unanimously modified, on the facts, to deny the motion to change venue, and otherwise affirmed, without costs.

Plaintiff properly placed venue in Bronx County based upon defendant's designation of that county as its corporate residence on the certificate of incorporation it filed with the Secretary of State (*see Job v Subaru Leasing Corp.*, 30 AD3d 159 [2006]).

Although a transitory action should generally be brought in

the county where the cause of action arose, it is well settled that a motion for a change of venue under CPLR 510(3) "must be supported by a statement detailing the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the designated venue" (*Krochta v On Time Delivery Serv., Inc.*, 62 AD3d 579, 581 [2009]). Here, defendant failed to make the necessary showing despite two opportunities, and accordingly the conclusion that Bronx County was inconvenient for the witnesses was speculative (*see Brown v Dawson*, 65 AD3d 980 [2009]; *Rodriguez-Lebron v Sunoco, Inc.*, 18 AD3d 275 [2005]).

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

ENTERED: APRIL 29, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2669 National Union Fire Insurance Company of Pittsburgh, PA., Claimant-Appellant, -against- State of New York, Defendant-Respondent. Claim No. 106936

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for appellant.

Herzfeld & Rubin P.C., New York (David B. Hamm of counsel), for respondent.

Order of the Court of Claims of the State of New York (Melvin L. Schweitzer, J.), entered December 9, 2008, which denied claimant's motion for summary judgment and granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Contrary to claimant's contention, this is an action under Insurance Law § 3420. In both its motion for leave to file a late notice of claim and its amended claim, claimant relied on Insurance Law § 3420(a)(2). Furthermore, "the subrogee possesses only such rights as the subrogor possessed, with no enlargement or diminution" (*Allstate Ins. Co. v Stein*, 1 NY3d 416, 421 [2004] [internal quotation marks and citation omitted]). Under the common law, the subrogors (Chase Manhattan Bank and Morse Diesel

International) would have been able to sue Red Ball Interior Demolition Corp. (the alleged wrongdoer), but they would not have been able to sue the State Insurance Fund (Red Ball's insurer), with whom they had no contractual relationship (*see Lang v Hanover Ins. Co.*, 3 NY3d 350, 353 [2004]). Like claimant, Chase and Morse Diesel would have had to use Insurance Law § 3420 to sue the State Insurance Fund. However, "the State Insurance Fund is exempt from the requirements of Insurance Law § 3420(a) and (b)" due to Insurance Law § 1108(c) (*see Kenmore-Tonawanda School Dist. v State of New York*, 38 AD3d 203, 203 [2007], *lv denied* 10 NY3d 702 [2008]), and we decline to depart from this precedent, which the Court of Appeals chose not to review.

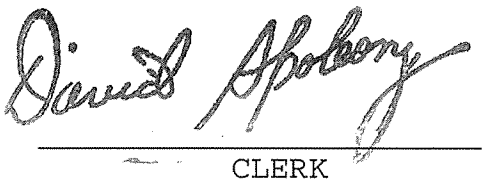
Even if, arguendo, Insurance Law § 3420 applied to the State Insurance Fund, Chase and Morse Diesel did not obtain a judgment against Red Ball, which is a condition precedent to a direct suit against Red Ball's insurer (*see Lang*, 3 NY3d at 352, 354). Contrary to claimant's contention, *Lang* is applicable even though the claim was filed before *Lang* was decided (*see Weierheiser v Hermitage Ins. Co.*, 17 AD3d 1133, 1134 [2005]; *see also Geissler v Liberty Mut. Ins. Co.*, 23 AD3d 432, 433 [2005]). Furthermore, we decline to consider claimant's argument, made for the first time in its reply brief on appeal, that we should hold this appeal in abeyance while it attempts to obtain a money judgment.

Although orders are sometimes treated as judgments (*see Matter of New York State Crime Victims Bd. v Gordon*, 66 AD3d 1213, 1214 [2009]), the kind of order that *Gordon* permitted to be treated as a judgment was one directing the payment of money (*id.* at 1214-1215). By contrast, the order obtained by Chase and Morse Diesel set the matter down for an inquest, which never occurred.

In view of the foregoing, it is not necessary to reach claimant's remaining arguments.

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

ENTERED: APRIL 29, 2010



CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2670 The People of the State of New York, Ind. 610/08
Respondent,

-against-

Kammau Dean,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about October 14,2008, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: APRIL 29, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2674 O P Solutions, Inc., Index 603746/08
Plaintiff-Appellant,

-against-

Crowell & Moring, LLP,
Defendant-Respondent.

Collier & Basil, P.C., New York (Robert J. Basil of counsel), for appellant.

Foley & Lardner LLP, New York (Peter N. Wang and Yonaton Aronoff of counsel), for respondent.

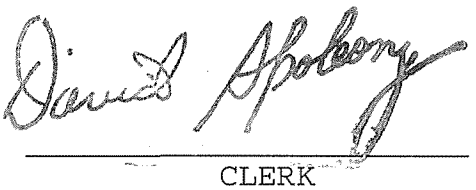
Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 27, 2009, which, insofar as appealed from, in an action alleging breach of a licensing agreement, granted defendant's motion to dismiss the third and fourth causes of action alleging fraud and negligent misrepresentation, unanimously affirmed, with costs.

It is well settled that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]). Here, in addition to the fraud cause of action not being pleaded with sufficient detail (CPLR 3016[b]), plaintiff's causes of action for fraud and negligent misrepresentation are not separate and

apart from its claim for breach of contract. The claims are predicated upon precisely the same purported wrongful conduct as is the claim for breach of contract inasmuch as they all involve defendant's disclosure of plaintiff's purported proprietary and confidential information to a consultant (*see Greenman-Pedersen, Inc. v Levine*, 37 AD3d 250 [2007]). The claim for negligent misrepresentation is also defective in the absence of a special relationship of confidence and trust between the parties (*cf. Fresh Direct v Blue Martini Software*, 7 AD3d 487, 489 [2004]).

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

ENTERED: APRIL 29, 2010



CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2675 In re Yudelka A. M.,
Petitioner-Appellant,

-against-

Jose A. R.,
Respondent-Respondent.

Joseph V. Moliterno, Scarsdale, for appellant.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about May 7, 2009, which dismissed a family offense petition seeking an order of protection against respondent, unanimously affirmed, without costs.

Although petitioner contends that the court erred in dismissing the petition without first making a factual determination as to whether the allegations of the petition were supported by a preponderance of the evidence, petitioner never objected on this ground when the court issued its ruling. Accordingly, petitioner's contention is not preserved for review (*see* Family Ct Act § 1118; CPLR 5501[a][3]; *see also Matter of Michael A.M., Jr.*, 31 AD3d 1183, 1184 [2006]).

The court did not abuse its discretion by disallowing

petitioner's proffered rebuttal testimony, which was cumulative in part, and could have been presented as part of petitioner's case-in-chief (*see People v Harris*, 98 NY2d 452, 490 [2002]).

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

ENTERED: APRIL 29, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2676-
2677N Cory Rosenbaum, etc., Index 601766/06
Plaintiff-Respondent,

-against-

Beth J. Schlossman, etc., et al.,
Defendants-Appellants.

David Feinsilver, appellant pro se.

Stuart Pobereskin, New York, for appellants.

Kudman Trachten Aloe, LLP, New York (Michelle S. Babbitt of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 30, 2009, which denied defendants' motion to vacate the note of issue, unanimously affirmed, without costs. Order, same court, Justice and entry date, which denied defendants' motion to stay a scheduled nonjury trial of this matter and compel the Clerk to accept a jury demand, unanimously modified, on the facts, to direct the Clerk to accept the jury demand nunc pro tunc, and, in view of the interim stay of trial previously ordered by this Court, the remainder of the appeal from said order unanimously dismissed as academic, without costs.

Defendants should be permitted to serve and file a late jury demand given that the lateness, by only five days, was due in part to the late filing of the note of issue, and also given no

intention by defendants to waive a jury trial, a prompt motion by defendants to be relieved of their default in timely filing a jury demand, and no prejudice to plaintiff caused by the late jury demand (*see A.S.L. Enters. v Venus Labs.*, 264 AD2d 372, 373 [1999]). Defendants' motion to vacate the note of issue was properly denied where defendants had received copies of plaintiff's letter to the court requesting the court's issuance of a written order memorializing a prior oral order extending the time to file a note of issue, but did not object to the requested relief or inform the court, at that time, of their view that disclosure was incomplete (22 NYCRR 202.21[d]). We have considered and rejected defendants' remaining contention.

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

ENTERED: APRIL 29, 2010

CLERK

APR 29 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
James M. Catterson
Leland G. DeGrasse
Sheila Abdus-Salaam, JJ.

966-
966A
Index 16507/97

x

Carmen Valdez, Individually and as Mother and Natural Guardian of Ceasar Marti, et al.,
Plaintiffs-Respondents,

-against-

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

x

Defendants appeal from a judgment of the Supreme Court, Bronx County (Lucy Billings, J., and a jury), entered September 18, 2008, insofar as appealed from, awarding plaintiff damages for past and future pain and suffering, and awarding plaintiff's two infant children damages for past pain and suffering, and bringing up for review an order, same court and Justice, entered March 14, 2008, which denied defendants' motion to set aside the verdict.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman, Larry A. Sonnenshein and Lavanya Pisupati of counsel), for appellants.

Sivin & Miller, LLP, New York (Edward Sivin of counsel), for respondents.

CATTERSON, J.

In this action, plaintiff Carmen Valdez is seeking damages for injuries she sustained after her former boyfriend shot and seriously wounded her outside her apartment. The shooting followed a telephone call in which the boyfriend, Felix Perez, threatened to kill the plaintiff. It is undisputed that the assault occurred approximately 24 hours after a police officer, who knew that the plaintiff had an order of protection against Perez, told her that the police would arrest him immediately.

The plaintiff asserts a "special relationship" exception to the general rule that a municipality cannot be held liable for injuries resulting from the failure to provide adequate police protection. See Cuffy v. City of New York, 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 374, 505 N.E.2d 937, 939 (1987). We examine her claim in the light of the most recent Court of Appeals rulings, specifically focusing on the element of justifiable reliance, an element we find lacking in this case.

As a threshold matter, we reject the notion that McLean v. City of New York (12 N.Y.3d 194, 878 N.Y.S.2d 238, 905 N.E.2d 1167 (2009)), and the Court's follow-up decision in Dinardo v.City of New York (13 N.Y.3d 872, 893 N.Y.S.2d 818, 921 N.E.2d 585 (2009)), constrain our decision in this case. We recognize that in McLean, the Court held that a special duty exception to

governmental immunity applies only to ministerial actions, and not discretionary ones; and further, in Dinardo, Chief Judge Lippman, in concurrence, observed that since provision of police protection is necessarily discretionary in nature, then under the rule announced in McLean, the special duty exception is essentially eliminated, and a plaintiff will never be able to recover for a failure to provide adequate police protection. Dinardo, 13 N.Y.3d at 876, 893 N.Y.S.2d at 821.

However, we find the resolution lies in accepting that the Court did not intend to eliminate the special duty exception, but rather specifically recognized that its precedent established a subset of police action or nonaction that can provide a basis for liability. Indeed, the focus by the McLean Court on the decision in Cuffy (69 N.Y.2d 255, 513 N.Y.S.2d 372) appears to reinforce the well-established rule that a governmental agency's liability for negligent performance depends in the first instance on whether a special relationship existed with the injured person. The Court specifically lists the special duty exception established in Cuffy as one of the three ways a special relationship can form and thus sustain liability against a municipality. The Court highlights the four elements that establish such a special duty exception, and then finds that such elements were not present in the McLean case. McLean, 12 N.Y.3d

at 201, 878 N.Y.S.2d at 243.

It is inconceivable then, that the Court intended to eliminate the special duty exception upon which liability in police cases can be found without explicitly reversing the position it appears to solidly reiterate by citing Cuffy at length in the decision. On the contrary, both McLean and Dinardo support the position that the starting point of any analysis as to governmental liability is whether a special relationship existed; and not whether the governmental action is ministerial or discretionary. See McLean 12 N.Y.3d at 203, 878 N.Y.S.2d at 245 ("[i]n [Pelaez and Kovit] we found no special relationship or special duty. Thus there could be no liability, whether the actions at issue were characterized as ministerial or discretionary."); see also Dinardo, 13 N.Y.3d at 874, 893 N.Y.S.2d at 819 (the Court had no occasion to decide that question of whether action is discretionary or ministerial since there is no rational process by which a jury could have reached a finding that plaintiff justifiably relied on assurances).

In this case, therefore, we do not need to reach the issue of whether the action was discretionary or ministerial since the plaintiff ultimately fails to establish the element of justifiable reliance for a special duty exception. In asserting a special relationship exception to the general rule that a

municipality cannot be held liable for injuries resulting from the failure to provide adequate police protection, the plaintiff has the burden of establishing such a relationship by showing that (1) the municipality assumed an affirmative duty, through promises or actions, to act on behalf of the injured party; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's undertaking. Cuffy, 69 N.Y.2d at 260, 513 N.Y.S.2d at 375.

In this case, the first three elements are not at issue. However, the defendants assert that the trial court erred in its finding that the plaintiff established justifiable reliance on the City's undertaking. For the reasons set forth below, we agree with the defendants, and reverse the trial court.

Specifically, Cuffy and its progeny stand for the proposition that the justifiable reliance element cannot be satisfied by evidence of a plaintiff's belief in, or expectation of adequate police protection. See also Badillo v. City of New York, 35 A.D.3d 307, 308, 827 N.Y.S.2d 133, 134 (1st Dept. 2006) (decedents' alleged reasonable expectation that help was on the way after 911 cell phone call not enough to establish justifiable reliance), citing Grieshaber v. City of Albany, 279 A.D.2d 232,

235-236, 720 N.Y.S.2d 214, 216 (3rd Dept. 2001), lv. denied, 96 N.Y.2d 719, 733 N.Y.S.2d 371, 759 N.E.2d 370 (2001); Clark v. Town of Ticonderoga, 291 A.D.2d 597, 737 N.Y.S.2d 412 (3rd Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278, 773 N.E.2d 1016 (2002),(reliance element cannot be satisfied by evidence of plaintiff's hope or even belief); see also Finch v. County of Saratoga, 305 A.D.2d 771, 773, 758 N.Y.S.2d 220, 223 (3rd Dept. 2003).

Unfortunately for her case, the plaintiff does not argue more. In her appellate brief, the plaintiff reiterates her testimony to assert that "when she opened her apartment door she *believed* [the police] had acted on [their] promise [...]to arrest Perez immediately" (emphasis added). Nor does her actual testimony indicate that her reliance was based on anything more than mere belief.

The plaintiff, who renewed an order of protection against Perez, testified that on July 19, 1996, Perez called her and threatened to kill her. She decided to leave her apartment but, on her way to her grandmother's house, she called the police precinct. Officer Torres told her: "[D]on't worry, don't worry, we're going to arrest him. Go to your home and don't worry anymore."

The plaintiff then returned to her apartment with her

children. The plaintiff explained that she thought the arrest was going to be "immediately" because Torres "told me to go back immediately to my house."

The plaintiff further testified that she was expecting Torres to call her to tell her about Perez's arrest because the police had called her on a prior occasion to confirm they had served the order of protection on him. She testified that she remained in her apartment with her sons until about 24 hours after the telephone conversation with Officer Torres. She then left her apartment to take out the garbage. At that time, Perez accosted her in the hallway and repeatedly shot her.

The plaintiff conceded that at the time she stepped out of her apartment on July 20, 1996, she had not received a call from Torres, or any other police officer. Nor did she call the police precinct at any time to ascertain that Perez had been arrested.

The defendants correctly assert that the instant case is factually indistinguishable from Cuffy. In that case, the Court of Appeals determined that a verbal assurance, without more, did not constitute a sufficient basis for the plaintiff's justifiable reliance. Cuffy, 69 N.Y.2d at 263, 513 N.Y.S.2d at 376. There, the plaintiff sought police protection for himself and his family because of a tenant's abusive conduct. He told the police that, unless he was given police protection, he was going to leave his

apartment. The police told the plaintiff that he should not worry and that the police would do something about the situation "first thing in the morning." Id., at 259, 513 N.Y.S.2d at 374. The police did not act on the promise and the plaintiff's wife and son suffered injuries in an altercation with the tenant on the following evening.

The Court determined that the plaintiff's reliance on the police officer's promise was not justified because by midday the family had not seen any police activity outside its home, and the plaintiff was aware that the police had done nothing to restrain the tenant. In other words, whatever reliance Cuffy may have legitimately placed on the police officer's promise was not valid once it was no longer "first thing in the morning." Similarly, in this case, even if some justifiable reliance could be found on the plaintiff's behalf, it was certainly no longer valid by the end of the first day when the plaintiff had not received the expected phone call about Perez's "immediate" arrest.

In the few cases where courts have found justifiable reliance, and thus a special relationship exception, a verbal assurance invariably has been followed by visible police protection of the plaintiff. See Mastroianni v. County of Suffolk, 91 N.Y.2d 198, 668 N.Y.S.2d 542, 691 N.E.2d 613 (1997) (police patrol car was initially dispatched and stationed outside

plaintiff's house); Zibbon v. Town of Cheektowaga, 51 A.D.2d 448, 452, 382 N.Y.S.2d 152, 155 (4th Dept. 1976), appeal dismissed, 39 N.Y.2d 1056, 387 N.Y.S.2d 428, 355 N.E.2d 388 (1976) (victim told relatives prior to shooting: "there are police cars all over the place"). Conversely, where the undertaking is based on a verbal assurance of protection but there is no visible police action thereafter, courts have followed Cuffy, and found that no special relationship exists. See Finch v. County of Saratoga, 305 A.D.2d at 772, 758 N.Y.S.2d at 222 (plaintiff told by police: "deputy would be there within the hour"); Clark v. Town of Ticonderoga, 291 A.D.2d at 598, 737 N.Y.S.2d at 414 (plaintiff told by police: "will keep an eye on you"), Litchauer v. Town of Yorktown, 134 A.D.2d 575, 521 N.Y.S.2d 476 (2nd Dept. 1987) (no evidence of any police conduct).

In this case, there was no visible police conduct or action of any type after Torres assured the plaintiff that he was going to arrest Perez. There was no police patrol or police officer dispatched (or even promised) to the plaintiff for her protection pending the arrest. The plaintiff did not witness the police taking Perez into custody; nor was she informed by the police - either by telephone or in person - that Perez had been arrested. By process of elimination, therefore, the plaintiff's reliance was not based on anything other than belief or expectation.

It is also significant that, even though the plaintiff testified that she understood "immediately" to mean "right away," nevertheless her testimony does not support the inference that the use of the adverb was anything more than hyperbole. The plaintiff acknowledged in her testimony that she did not call the police on the evening of July 19th to check on Perez's arrest "because I thought [Torres] would be out there in the street looking for Felix."

Hence, by the plaintiff's own admission, any reliance at that point would not have been justified since she understood the police needed time to locate Perez in order to arrest him. The plaintiff, nevertheless, urges this Court to accept the proposition that the simple passage of time deemed her reliance justified. In other words, her reliance was justified 24 hours later because, solely in her estimation, by the time she stepped out of her apartment the police had sufficient time to locate and arrest Perez. Such assertion places plaintiff's proposition directly in conflict with the holding of Cuffy where passage of time without any evidence of the promised police action rendered the plaintiff's reliance unjustified.

In any event, not only did the plaintiff fail to establish that she justifiably relied on Torres' assurance, she failed to demonstrate that she relied on it at all. The plaintiff failed

to meet her burden of showing that the assurance "lulled [her] into a false sense of security, and ... thereby induced [her] either to relax [her] own vigilance or to forego other available avenues of protection." Cuffy, 69 N.Y.2d at 261, 513 N.Y.S.2d at 375. On the contrary, her testimony indicated that she spent the entire 24-hour period (during a weekend) with her sons inside her apartment leaving only to take out the garbage - something she was obliged to do on a daily basis because of a problem with rats. Moreover, she did not offer any testimony or evidence that her grandmother's house would have provided any better protection against Perez once she decided to step outside it and into a public area.

We are not persuaded by our dissenting colleague's reliance on Sorichetti v. City of New York (65 N.Y.2d 461, 492 N.Y.S.2d 591, 482 N.E.2d 70 (1985)), a case he describes as involving "less compelling" circumstances than the instant case. In Sorichetti, the salient facts involved a "distraught and helpless" mother, a violent abusive husband against whom she had an order of protection, and a child who had visitation with the husband on the day that the mother pleaded with police to arrest her husband after he made threats against her. The police, knowing about the order of protection as well as the history of violence between the couple, refused to respond immediately but

told the plaintiff that they would "send a radio car out" if the father "didn't drop [the child] off in a reasonable time" (65 N.Y.2d at 466, 492 N.Y.S.2d at 594). The mother eventually left the police precinct. The police did not send a car at all, but the father's sister entered his apartment later that evening and found the child with injuries severe enough to leave her permanently disabled. 65 N.Y.2d at 467, 492 N.Y.S.2d at 595.

Sorichetti should not be used as precedent for any analysis of an injured party's justifiable reliance. First, Sorichetti was decided in 1985, two years before the Court fully formulated or enunciated precisely what it meant by justifiable reliance in Cuffy. Moreover, even though in Cuffy, the Court cited to Sorichetti for the element of justifiable reliance, the phrase was never used in that case. See Sorichetti, 65 N.Y.2d at 469, 492 N.Y.S.2d at 596. More puzzling still is the Court's finding of special duty in the absence of any factors that would establish reliance in Sorichetti, much less justifiable reliance.

As the Court explained in Cuffy, the rationale for including reliance as an element of special duty is that "the injured party's reliance is as critical in establishing the existence of a 'special relationship' as is the municipality's voluntary affirmative undertaking of a duty to act." Cuffy, 69 N.Y.2d at 261, 513 N.Y.S.2d at 375. This is because of "the unfairness the

courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him either to relax his own vigilance or to forego other available avenues of protection." Id. The Court found such reliance in De Long v. County of Erie (60 N.Y.2d 296, 469 N.Y.S.2d 611, 457 N.E.2d 717 (1983)), where the victim called 911 and police officers went to the wrong address. In that case, because the victim was not yet at the mercy of the intruder, the Court found that it could not be said "that th[e] assurance [that the police were on their way] played no part in her decision to remain in her home." Id., at 305, 469 N.Y.S.2d at 616. Hence, the Court found that there was a special duty.

In, Sorichetti, the Court did not attempt any such similar analysis. The Court did not look at other avenues of protection the mother could have taken. On the contrary, the Court simply observed that, "in her helpless and distraught state [the mother] *had no alternative* but to seek the assistance of the police." 65 N.Y.2d at 471, 492 N.Y.S.2d at 597 (emphasis added). Hence, it would appear that the Court found a special duty *in spite of* the fact that the police assurance had nothing to do with lulling her into a false sense of security or influencing her choice of other avenues of protection.

Accordingly, the judgment of the Supreme Court, Bronx County (Lucy Billings, J., and a jury), entered September 18, 2008, insofar as appealed from, awarding plaintiff damages for past and future pain and suffering, and awarding plaintiff's two infant children damages for past pain and suffering, and bringing up for review an order, same court and Justice, entered March 14, 2008, which denied defendants' motion to set aside the verdict, reversed, on the law, the verdict vacated and the complaint dismissed. Appeal from the aforesaid order should be dismissed as subsumed in the appeal from the judgment.

All concur except Abdus-Salaam, J. who concurs in a separate Opinion, and Mazzarelli, J.P. and DeGrasse J. who dissent in part in an Opinion by DeGrasse, J.

ABDUS-SALAAM, J. (concurring)

I concur with the conclusion that plaintiff has failed to establish the element of justifiable reliance necessary for the special duty exception.

Notably, in *McLean v City of New York* (12 NY3d 194 [2009]), the Court of Appeals pronounced, notwithstanding indications to the contrary in earlier decisions (*see Kovit v Estate of Hallums*, 4 NY3d 499 [2005]; *Pelaez v Seide*, 2 NY3d 186 [2004]; *Cuffy v City of New York*, 69 NY2d 255 [1987]), that "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (12 NY3d at 203). In *Dinardo v City of New York* (13 NY3d 872 [2009]), Chief Judge Lippman notes his disagreement with the *McLean* analysis, which limits liability in special duty cases to ministerial acts, and observes that because the provision of police protection is a discretionary act, "under the rule announced in *McLean*, a plaintiff will never be able to recover for the failure to provide adequate police protection, even when the police voluntarily and affirmatively promised to act on that specific plaintiff's behalf and he or she justifiably relied on that promise to his or her detriment" (*id.* at 877 [Lippman, Ch. J., concurring]).

Under *McLean*, had plaintiff proven justifiable reliance, there could still be no liability in this case unless the failure of the police to take any action to arrest Perez was the failure to perform a ministerial act. Here, even were we to conclude that the arrest of an individual who has violated a protective order is ministerial -- an act that "envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevich*, 61 NY2d 34, 41 [1983]), and not discretionary -- "the exercise of reasoned judgment which could typically produce different acceptable results" (*id.*), the judgment must be reversed because the justifiable reliance element of the special relationship exception has not been established.

DeGRASSE, J. (dissenting in part)

Plaintiff's former live-in boyfriend, Felix Perez, shot and seriously wounded her before fatally shooting himself. These acts were committed in the immediate presence of plaintiff's then five-year-old twin sons. Plaintiff had been subjected to Perez's ongoing threats and harassment. Accordingly, at plaintiff's instance, a police officer served Perez with an order of protection nine days before the incident. Perez continued to call and harass plaintiff nevertheless. Plaintiff testified that she reported these calls to Police Officer Torres of the 48th Precinct's Domestic Violence Unit. One day before the shooting, Perez called plaintiff again, this time threatening to kill her. Frightened, plaintiff left her apartment with her sons and headed for her grandmother's home. While en route, plaintiff called Torres and told him about Perez's death threat. Plaintiff testified that Torres told her not to worry and instructed her to return to her home because the police were going to arrest Perez. Assured by Torres's words, plaintiff returned to her home thinking that Perez would be arrested for violating the active order of protection. It was plaintiff's expectation that Torres would call and inform her when Perez was arrested. The deadly encounter occurred when plaintiff found Perez at her doorway as she was putting out her garbage.

Absent a special relationship, a municipality is not subject to tort liability for its failure to furnish police protection to an individual citizen (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). The elements of this special relationship are: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*id.*). Defendants and the plurality writing posit that there was insufficient evidence to support a finding of justifiable reliance on part of plaintiff.

The issue of justifiable reliance was resolved in plaintiff's favor by the jury's answer to the following question on the verdict sheet:

> "After Carmen Valdez's telephone call to the Police Department 48th Precinct, did Carmen Valdez justifiably rely on the Police Department's statements when she stayed at her home with her children July 19, 1996, and when she opened her door to dispose of garbage the following evening, July 20, 1996?"

With regard to reliance, the *Cuffy* Court noted that "at the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a

municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced [her] either to relax her own vigilance or to forego other available avenues of protection" (*Cuffy* at 261). In this case, the evidence before the jury was sufficient to support the jury's finding that plaintiff was induced to do both. In the first instance, she forewent going to a safe haven at her grandmother's home and instead returned to her apartment as instructed by Police Officer Torres. She also relaxed her vigilance by opening the door as she was about to put the garbage out.

The plurality writing and defendants correctly cite *Cuffy* for the general proposition that a verbal assurance, without more, does not constitute a sufficient basis for the requisite justifiable reliance. I disagree, however, with their conclusion that this case is factually indistinguishable from *Cuffy*. On the contrary, the existence of a special duty is dependent upon the particular facts of each case (*see e.g. Betancur v City of New York*, 11 AD3d 266, 267 [2004], *lv denied* 4 NY3d 707 [2005]; *Jones v New York City Tr. Auth.*, 183 AD2d 658, 660 [1992]).

In the *Cuffy* case, Joseph Cuffy spoke with a police lieutenant about his violent downstairs tenants and stated that he would move his family out of their apartment if an arrest was not made. Cuffy was told by the lieutenant that he should not

worry and that an arrest would be made or something else would be done "first thing in the morning" (*Cuffy* at 259). Hours after morning came and went, Cuffy's wife, Eleanor, and their sons were assaulted at their home by the tenants. The *Cuffy* Court found that the injuries could not be deemed to have resulted from justifiable reliance on the assurances of police protection that Cuffy had received (*id.* at 263). The Court reasoned that although Ms. Cuffy and one son "knew or should have known by midday that the promised police action would not be forthcoming, they remained in the house hours after any further reliance on those assurances could reasonably be deemed justified" (*id.*). In its reasoning, the Court noted that Eleanor Cuffy had reason to know danger still existed because she looked out of her window periodically throughout the day without seeing any police cars pull up in front of her house (*id.*).

Unlike Ms. Cuffy, plaintiff in this case could not have looked out her window or taken any other similar measure to ascertain that Torres had not arrested Perez. Moreover, the Cuffy family, unlike plaintiff, did not forego an option to go to what they thought would be an alternative safe place *at the direction* of a police officer. Accordingly, the facts of *Cuffy* are distinguishable for purposes of a justifiable reliance analysis. I disagree with the plurality writing's premise that a

special duty generally does not exist without "visible police conduct or action" at the victim's home or some similar site. Indeed, there was no such police conduct or action in *Sorichetti v City of New York* (65 NY2d 461 [1985]), a case in which the Court of Appeals found a special relationship where a mother sought the help of the police to protect her child from her assaultive husband who had taken the child to his home. In fact, a police lieutenant declined to send a patrol car to the husband's home and told the mother "to leave her phone number and to go home, and that he would call her if [the husband] showed up" (*id.* at 467). The husband assaulted and seriously injured the child. There, the Court of Appeals did not find the element of justifiable reliance to be lacking. In fact, I submit that the facts upon which the *Sorichetti* Court found justifiable reliance are less compelling than those set forth in this record.

I take this position based on the Court of Appeals's own analysis of *Sorichetti*. Specifically, in one of its ten citations to *Sorichetti*, the *Cuffy* Court said the following:

> "In a line of cases culminating in *Sorichetti v City of New York* (65 NY2d 461), we recognized a narrow right to recover from a municipality for its negligent failure to provide police protection where a promise of protection was made to a particular citizen and, as a consequence, a 'special duty' to that citizen arose. Essential to recovery is proof that the plaintiff relied on the reliance and that his promise was causally related to the harm he suffered" (*Cuffy*, 69

NY2d at 257 [remaining citation omitted]).

As later reaffirmed by the Court, a special relationship in *Sorichetti* arose out of (1) the order of protection, (2) the City's knowledge of a specific danger, (3) the City's instructions to the mother plus (4) her reasonable expectation of police protection (*Lauer v City of New York*, 95 NY2d 95, 104 n 2 [2000]). To reiterate, "justifiable reliance" is an element of a special relationship (*Cuffy*, 69 NY2d at 260). It is clear that *Cuffy* refines but does not supplant the holding of *Sorichetti*. Therefore, contrary to the plurality writing's view, *Sorichetti* stands as precedent for a special relationship analysis which includes the element of justifiable reliance.

"Evidence is legally insufficient to support a verdict if there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Lang v Newman*, 12 NY3d 868, 870 [2009] [internal quotation marks and citation omitted]). It follows, of course, that evidence is sufficient if supported by such a valid line of reasoning. I respectfully submit that the facts of this case, measured against the four *Sorichetti* factors, enumerated above, provide a valid line of reasoning sufficient to support the jury's conclusion that there was a special relationship

between plaintiff and the City of New York.

The concurring writing cites *McClean v City of New York* (12 NY3d 194 [2009]) for the proposition that even if plaintiff has established justifiable reliance there can be no liability "unless the failure of the police to take any action to arrest Perez was the failure to perform a ministerial act." Under *McClean*, the discretionary acts of a municipality may never be a basis for tort liability, while ministerial acts may support liability only where a special duty is found (*id.* at 202). On this point, I would disagree with any view that the provision of police protection is ipso facto a discretionary act. As noted above, a triggering event in this case was Perez's violation of the order of protection. When the police are made aware of a possible violation of an order of protection "they are obligated to respond and investigate, and their actions will be subject to a 'reasonableness' review in a negligence action" (*Sorichetti*, 65 NY2d at 470). It follows that the Court's application of this reasonableness standard in *Sorichetti* belies any argument that police conduct is discretionary in situations involving responses to reported violations of orders of protection.

Moreover, the *McClean* Court did not chart a new course in noting the distinct legal consequences of discretionary and ministerial municipal conduct. The Court articulated the

discretionary/ministerial dichotomy in *Tango v Tulevich* (61 NY2d 34 [1983]) 18 months before it decided *Sorichetti*. Also, the concurring writing places seemingly undue emphasis on dicta in the concurring opinion of Chief Judge Lippman in *Dinardo v City of New York* (13 NY3d 872 [2009]). In the *Dinardo* concurrence the Chief Judge stated that "[u]nfortunately, under the rule announced in *McClean*, a plaintiff will never be able to recover for the failure to provide adequate police protection, even when the police voluntarily and affirmatively promised to act on that specific plaintiff's behalf and he or she justifiably relied on that promise to his or her detriment" (*id.* at 877). I say the quoted language is dicta because neither *DiNardo* nor *McClean* involves police protection. For these reasons, I submit that *McClean* does not abrogate municipal liability based on a special relationship in a case involving police protection.

As set forth on the verdict sheet, the jury determined that after receiving plaintiff's telephone call on July 19, 1996, "the Police Department act[ed] with reckless disregard for the safety of others in not taking action on July 19 or July 20, 1996 to protect" plaintiffs. The jury was charged that one acts with reckless disregard for the safety of others when he or she, with gross indifference to the rights or safety of others, engages in conduct that makes it probable that injury will occur. According

to Torres's testimony, no telephone call from plaintiff was received on the July 19, 1996 date. No other police officer testified about receipt of the call. Hence, the record contains no evidence as to how the information about Perez was handled once received from plaintiff. Absent speculation, the jury was left with no basis for a determination as to whether defendants failed to arrest Perez out of gross indifference to the rights or safety of plaintiffs or simple negligence. Therefore, viewing the evidence in the light most favorable to plaintiffs and drawing every reasonable inference in their favor, there is no valid line of reasoning from which the jury could have rationally determined that defendants acted with reckless disregard for the safety of others.

Therefore, I would modify the judgment entered below only to the extent of vacating the jury's determination that defendants acted with reckless disregard for the safety of others and reducing the awards for non-economic damages accordingly and affirm the judgment as so modified.

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

ENTERED: APRIL 29, 2010

CLERK