SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 11, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

1301N-
1302N-
1302NA

Index 601890/09

Cargill Financial Services International, Inc.,
Plaintiff-Appellant,

-against-

Bank Finance and Credit Limited
also known as OJSC Bank Finance and Credit,
Defendant-Respondent.

Dorsey & Whitney LLP, New York (Jonathan M. Herman of counsel), for appellant.

Leader & Berkon, LLP, New York (Michael J. Tiffany of counsel), for respondent.

Three orders, Supreme Court, New York County (Charles E. Ramos, J.), entered July 7, 2009, which, as corrected and memorialized in an order entered August 5, 2009, denied plaintiff's application for an order of attachment of all funds contained in defendant's correspondent accounts located in New York and vacated a TRO previously granted by the court, unanimously affirmed, with costs. The June 18, 2009 temporary restraining order, which was extended by order of this Court entered September 8, 2009, is vacated.

Contrary to the motion court's conclusion, plaintiff's evidence established a basis for quasi in rem jurisdiction, in that defendant, a Ukranian bank, utilized its New York correspondent accounts to receive funds and make interest payments pursuant to the terms of the parties' loan agreements and associated letters of credit (*see generally Banco Ambrosiano v Artoc Bank & Trust*, 62 NY2d 65 [1984]). Even if plaintiff established a statutory basis for attachment of the accounts, given the nature of correspondent banking and its importance in international transactions, the court did not abuse its discretion by denying plaintiff's broad request to restrain all funds in the accounts. The evidence showed that a substantial part of the funds therein was held for the benefit of third-party clients of defendant who used the accounts to transact foreign business in U.S. currency. Thus, the wholesale attachment of all funds in the accounts would have interfered with innocent third parties' access to their money. As such, it was within the court's discretion to deny plaintiff's attachment application (*see Morgenthau v Avion Resources Ltd.*, 49 AD3d 50 [2007], *mod on other grounds*, 11 NY3d 383 [2008]; *J.V.W. Inv. Ltd. v Kelleher*, 41 AD3d 233 [2007]).

The Decision and Order of this Court entered herein on October 27, 2009 is hereby recalled and vacated (*see* M-5116 decided simultaneously herewith).

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

ENTERED: FEBRUARY 11, 2010

CLERK

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

1693 Ruth Legon, Index 104095/08
Plaintiff-Appellant,

-against-

Petaks,
Defendant-Respondent.

Smiley & Smiley, LLP, Garden City (John V. Decolator of counsel), for appellant.

Farber Brocks & Zane L.L.P., Mineola (Braden H. Farber of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered May 13, 2009, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Defendant failed to establish its prima facie entitlement to judgment as a matter of law. Plaintiff sustained injuries when, while looking at a food display counter, her foot became caught in the space between the floor and a metal stand holding wire shopping baskets, which was elevated several inches above the floor, causing her to trip and fall. Plaintiff testified that although she noticed the stack of shopping baskets next to the display counter, she never saw the stand upon which they rested. Under the circumstances, it cannot be determined as a matter of law whether the basket stand, which was covered and concealed by

the shopping baskets, was an inherently dangerous condition, or was a readily observable hazard, given its location next to the display case (*see Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [2004]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71-72 [2004])

All concur except Andrias, J.P. and Sweeny, J. who dissent in a memorandum by Sweeny, J. as follows:

SWEENY, J. (dissenting)

Plaintiff alleges she sustained injuries when she tripped over a rack that held wire shopping baskets. According to plaintiff's deposition, she entered defendant gourmet grocery store and was looking at a glass display case of prepared food. Wire shopping baskets were stacked on a metal stand positioned immediately adjacent to the end of the food display case. The bottom basket in the stand was approximately two inches above the floor.

As she was attempting to look at some food items in the display case, the stack of baskets allegedly prevented her from getting close enough to see the food. She was aware of the stack of baskets on the floor, but did not notice the metal stand on which they stood. Plaintiff stated that the baskets were stacked about two to three feet high and went to the bottom of the display case. As she walked around the baskets to get a better look at the items in the display case, her left foot became caught on the bottom of the stand, causing her to fall and sustain injuries.

Defendant's general manager, Mary Lynch, testified at her deposition that in the two years she worked at the store prior to the accident, the baskets had always been stacked in the same location within the store. She was unaware of any prior

accidents or complaints concerning the location of the baskets. Ms. Lynch described the stand for the wire baskets as " a metal stand, not cumbersome, and only comes about three or four inches off the floor just for the bottom basket to sit in as a brace, and there's no side and there's nothing coming out of the side." When the bottom basket is in the stand, the space between the floor and the bottom basket is approximately two inches. She also testified that the rack held 20 baskets and all of them were present at the time plaintiff fell. According to Ms. Lynch, the total height of the baskets came to approximately plaintiff's mid-thigh.

Defendant moved for summary judgment, contending that the baskets were open and obvious, were seen by plaintiff, and did not create an inherently dangerous condition. Plaintiff opposed the motion, arguing that she did not trip over the baskets, but that her foot got caught under the stand, which she did not see, and that as a result, the stand created an unexpected trap. In support of her affidavit in opposition, plaintiff submitted an affidavit from an engineer to the effect that the stand was in fact a trap, and that defendant's failure to place guards or rails around the stack of baskets or otherwise alert customers to the tripping hazard created a dangerous condition.

The court granted defendant's motion, finding that since

plaintiff admitted she was aware of the baskets, and the stand was not protruding beyond the stack of baskets, their location in the store was irrelevant because their presence was open and obvious. The court further held that "the absence of an expert affidavit attesting to the negligent design of the stand is dispositive." Additionally, the risk that a customer would move one of her feet under the stand and then trip when attempting to remove it was not foreseeable as a matter of law.

For a condition to be open and obvious, it must be one that could not be overlooked by a person reasonably using his or her ordinary senses (*Tagle v Jakob*, 97 NY2d 165, 169-170 [2001]), holding that a landowner has no duty to warn of such a hazard. On the other hand, a latent hazard may give rise to a duty to protect others from such a danger (*Sadler v Town of Hurley*, 280 AD2d 805, 806 [2001]). While the issue of whether a hazard is latent or is open and obvious usually turns on specific facts, a court may determine the condition to be open and obvious as a matter of law "when the established facts compel that conclusion" (*Tagle*, 97 NY2d at 169). "Whether an asserted hazzard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary" depending on the circumstances of each case

(*Mauriello v Port Auth. of N.Y. and N.J.*, 8 AD3d 200 [2004], citation omitted).

Here, the baskets and their location were open to all observers. Indeed, plaintiff admits that she saw the baskets since they prevented her from viewing the items in the display case.

Nor does plaintiff's expert create a triable issue of fact. Although plaintiff's expert opined that the stand created an extreme tripping hazzard, he made no reference to the space between the metal stand and the floor and did not account for the fact that no other tripping incidents involving the baskets or the stand into which they were placed had occurred in the store prior to this incident. There is no claim that the rack upon which the baskets were placed protruded in any way beyond the sides of the basket. While the expert opined that the placement of the baskets and the failure to warn customers of the dangerous condition they created was a trap for the unwary, he makes only a passing reference to the metal stand which, according to plaintiff, caught her foot and caused her to fall. His opinion is irrelevant and does not create an issue of fact, as plaintiff testified that she saw the baskets and knew they were there. Hence, the hazard that plaintiff and her expert claim caused her injuries was open and obvious and required no additional

warnings.

Nor can it be said that there is an issue of fact as to whether defendant met its duty to maintain the premises in a reasonably safe condition. A business proprietor has a duty only to maintain the premises in a "reasonably safe" condition (*Basso v Miller*, 40 NY2d 233, 241 [1976]). This duty is, however, not limitless. "It is an elementary tenet of New York law that '[t]he risk reasonably to be perceived defines the duty to be obeyed'" (*DePonzio v Riordan*, 89 NY2d 578, 583 [1997], quoting *Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344 [1928]). The scope of this duty is one for determination by the court (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584-585 [1994]). In arriving at its determination, a court must look to "whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm and whether the accident was within the reasonably foreseeable risks (*DePonzio v Riordan, supra*, at 583 [citations omitted]). Moreover, "the risk of injury as a result of defendant's conduct must not be merely possible, it must be natural or probable" (*Pinero v Rite Aid of N.Y., Inc.*, 294 AD2d 251, 252 [2002], *affd* 99 NY2d 541 [2002]).

Here, the uncontroverted facts reveal that the baskets and metal stand in question were placed in the same open location for

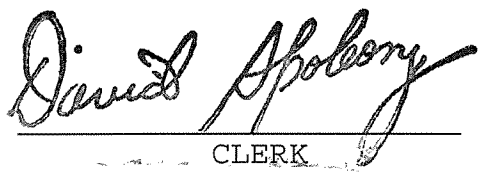
at least the two years prior to this incident. No reports of accidents involving the baskets or stand were reported during that time and no complaints were received from other customers regarding the location of the baskets. No reports of anyone catching his or foot under the stand were made to defendant's employees.

There was, therefore, no "natural or probable" reason for defendant to foresee that the placement of these baskets and stand in that location would cause injury to plaintiff.

I would thus grant the motion and dismiss the complaint.

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

ENTERED: FEBRUARY 11, 2010



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Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1833 In re James J. Seiferheld, Index 114351/07
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

Seelig & Ungaro, LLP, New York (Philip H. Seelig of counsel), for appellant.

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

Order and judgment (one paper), Supreme Court, New York County (Lottie E. Wilkins, J.), entered October 31, 2008, denying the petition to annul respondent Police Commissioner's determination which revoked petitioner's accident disability retirement benefits and *inter alia*, to restore said benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the proceeding reinstated, the petition granted to the extent of annulling the determination, and the matter remanded to respondent Board of Trustees for further proceedings consistent herewith.

Petitioner, a 12-year veteran of the NYPD, was awarded accident disability retirement benefits in May 2004 based on an injury to his right shoulder and neck pain that radiated down to his right hand. In June 2004, the NYPD Medical Division, Absence

Control and Investigations Unit, opened an investigation of petitioner in response to a complaint received by the NYPD Internal Affairs Bureau that petitioner was performing construction work. Petitioner was placed under surveillance and the results were reported to the Board of Trustees, which reconsidered petitioner's application under Administrative Code of City of NY § 13-254 (Safeguards on disability retirement) and remanded the matter to the Medical Board. The Medical Board's reevaluation of petitioner in May 2005 included review of the surveillance videotape (which showed petitioner lifting and carrying heavy objects and hammering siding materials above his head), review of petitioner's medical records, and an interview and physical examination of petitioner. The Medical Board concluded that petitioner had "improved dramatically" since his last Medical Board exam and that he was capable of full duty as a police officer. The Board of Trustees considered the Medical Board's recommendation to rescind its prior decision awarding petitioner accident disability retirement benefits and eventually remanded the matter to the Medical Board.

In February 2006, the Medical Board once again considered petitioner's application and reviewed new medical evidence, interviewed petitioner and performed a physical examination. The Medical Board reaffirmed its previous recommendation that

petitioner's application for ADR be denied. In April 2006, the investigation and surveillance of petitioner were resumed. The investigating officer's report included an interview with Dr. Peter Galvin, an NYPD surgeon, who told the investigator that petitioner had replaced the roofing and siding on his office building and that he did not believe that petitioner was disabled since he had no difficulty performing the work. The investigator also reported observing petitioner loading scaffolding onto a truck, assisting a truck driver to remove a large bay window from a delivery truck, and installing a frame on the front windows of the second floor of a residence while standing on a roof.

The Board of Trustees reconsidered the Medical Board's recommendation to rescind its previous decision and remanded the matter to the Medical Board in July 2006. The Medical Board re-interviewed petitioner, performed a physical examination, and considered new medical evidence submitted by petitioner. It concluded that petitioner had shown "no significant objective changes since being previously examined" and that he seemed "to have made a remarkable recovery from his injury." The Medical Board reaffirmed its previous recommendations.

Once again, the Board of Trustees considered the Medical Board's recommendation and tabled the matter for several months. In April 2007, the Board of Trustees voted to rescind the ADR

benefits and to put the officer back to work. Petitioner was placed on a "Departmental Special Preferred List" for a title position of police officer pursuant to Administrative Code § 13-254. However, he was subsequently notified that he had been found to be "not qualified" for the position due to a positive drug test showing the presence of cocaine in a hair sample. He was not offered any other position in "city-service" as contemplated by Administrative Code § 13-254(a). In July 2007, the chief of the New York City Law Department's Pensions Division sent a memorandum to the Police Pension Fund's executive director advising that petitioner's disability pension should be suspended because he was no longer deemed disabled. Thereafter, petitioner was notified by the Fund's director of Pension Payroll that pursuant to the Safeguards provisions of the Administrative Code his benefit was suspended "because the Medical Board determined on May 24, 2005 that you are not disabled from performing the duties of a NYC Police Officer."

We reject petitioner's challenge to the Medical Board's determination that he is no longer disabled, since that determination is supported by "some credible evidence" and was not arbitrary and capricious (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]). The courts may not "substitute their own judgment for that of the

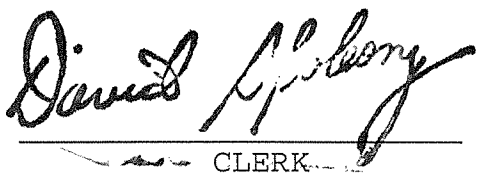
Medical Board" (*Borenstein* at 761 [internal quotation marks and citations omitted).

However, the "suspension" or revocation of petitioner's disability benefits by the Police Pension Fund was without statutory authority, because it was not directed by the Board of Trustees. The "Safeguards on disability retirement" provision specifically empowers the Board of Trustees to determine whether a pensioner is able to engage in a gainful occupation and, upon determining that he is so able, to certify the name of such pensioner to the Civil Service Commission for placement as a "preferred eligible" on a list of candidates for positions for which he is qualified. It sets forth the Board's authority to reduce the amount of a disability pension in the case of a pensioner who is gainfully employed and the formula to be used in such a reduction (Administrative Code § 13-254(a)). Administrative Code § 13-254(b) provides the mechanism for revocation of a disability pension by the Board of Trustees on one ground only, that the pensioner refuses for one year to submit to a medical examination by a physician designated by the Medical Board, a situation not present here. Even assuming, without deciding, that there is a statutory basis for the Board of Trustees to revoke petitioner's disability pension and medical benefits while at the same time not offering him a position in

city-service and that such an action would not be arbitrary and capricious under the circumstances presented here, the Board of Trustees did not take that action. Indeed, the Board never considered whether that action should be taken. The last determination issued by the Board in this matter was that petitioner was not disabled and should be returned to work as a police officer.

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

ENTERED: FEBRUARY 11, 2010



CLERK

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

1920 John McCann, Index 109078/06
Plaintiff-Respondent,

-against-

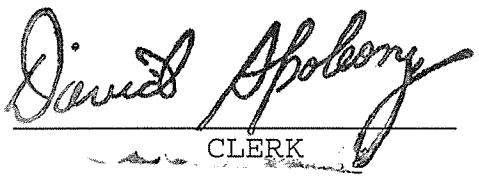
Weatherly 39th Street, LLC,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Doris Ling-Cohan, J.), entered on or about March 31, 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 January 25, 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: FEBRUARY 11, 2010



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

1966 Robert McHale, et al., Index 113340/01
Plaintiffs-Respondents,

-against-

Michael K. Anthony, et al.,
Defendants,

Ryder TRS, Inc., etc., sued herein as
Ryder Truck Rental, Inc.,
Defendant-Appellant.

- - - - -

Ryder Truck Rental, Inc.,
Proposed Intervenor-Appellant.

Morrison Mahoney LLP, New York (Arthur J. Liederman of counsel), for Ryder TRS, Inc., appellant.

Goldberg Segalla, LLP, Princeton, NJ (Robert M. Hanlon, Jr. of counsel), for Ryder Truck Rental, Inc., appellant.

Nicoletti Gonson Spinner & Owen LLP, New York (Joseph J. Gulino of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 29, 2009, which, insofar as appealed from, denied that branch of proposed intervenor Ryder Truck Rental, Inc.'s cross motion that sought to dismiss the complaint and directed it to file an answer, and denied the cross motion of defendant Ryder TRS, Inc. (incorrectly sued as Ryder Truck Rental, Inc.), for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, proposed intervenor Ryder Truck Rental, Inc.'s cross motion

granted to the extent of permitting it to intervene for purposes of these motions, and the complaint dismissed as against it, and the cross motion of Ryder-TRS, Inc., incorrectly sued as Ryder Truck Rental, Inc., granted. The Clerk is directed to enter judgment dismissing the complaint as against proposed intervenor Ryder Truck Rental, Inc. and defendant Ryder-TRS, Inc., incorrectly sued here as Ryder Truck Rental, Inc.

Plaintiff Robert McHale was driving a motor vehicle on the Gowanus Expressway on July 12, 1999 when it was struck by a truck driven by defendant Michael K. Anthony. It is not disputed that the truck had been rented by defendant Empire Beef Company from Ryder Truck Rental, Inc., located at 329 Jefferson Road in Rochester, New York. The corporate headquarters of Ryder Truck Rental, Inc., is in Florida, and it has a New York agent for service of process registered with the New York Department of State.

Although the police accident report listed the owner of the offending truck as Ryder Truck Rental, Inc. with an address in Rochester, New York, and although the corporation's listing with the Department of State of its registered agent for service of process gave an address in Albany, New York, the pleadings state the address of Ryder Truck Rental, Inc. as 111 Eighth Avenue, New York, New York, and service was made on an agent at 307 East 11th

Street in Manhattan. The corporation known as Ryder Truck Rental, Inc. did not have a facility at that address. Rather, that was the location of Ryder TRS, Inc., which company had purchased the Consumer Truck Rental division of Ryder Truck Rental, Inc., in 1996. It is this separate Ryder entity that was served with the pleadings in this action and on whose behalf the complaint was answered. However, the October 4, 2001 answer contained no indication that the Ryder defendant had been named incorrectly in the action; instead, the complaint was answered in the name of Ryder Truck Rental, Inc. Only in an amended answer dated November 29, 2005, did the served Ryder entity first point out the misnomer by referring to itself in its opening paragraph as "Defendant, Ryder TRS f/a/k/a Ryder Truck Rental incorrectly sued herein as Ryder Truck Rental, Inc."

While service of process in this manner was capable of conferring jurisdiction over the served Ryder truck rental entity, it could not have conferred jurisdiction over the unrelated Ryder Truck corporation that actually owned the offending truck. The absence of any jurisdictional defense in the served answer is irrelevant; there was no basis to interpose an affirmative defense of improper service, since the served Ryder entity was properly served, albeit by a name slightly different from its own, while the Ryder corporation that actually

owned the truck had no need to claim improper service, having never been served at all.

Plaintiffs' motion for a default judgment against Ryder Truck Rental, Inc., was therefore properly denied, because Ryder Truck Rental, Inc. was not in default, the pleadings having never been served on it.

The failure of the law firm that prepared and served an answer on behalf of the served Ryder entity to point out the difference between its client's actual name and the name set forth in the complaint probably contributed to plaintiffs' failure to recognize that they had not served the correct party defendant. However, service of an answer purporting to be on behalf of the named defendant cannot establish personal jurisdiction over the named defendant, when the named defendant is entirely separate from the served entity, conducts an entirely separate business, and is located in an entirely different place.

Neither the failure to serve the complaint properly nor the served defendant's failure to point out the misnomer is the fault of Ryder Truck Rental, Inc. Had Ryder Truck Rental, Inc. taken any affirmative steps to mislead plaintiffs, dismissal of the complaint as against it would not be appropriate at this juncture. Indeed, if there were any indication that Ryder Truck Rental, Inc. had even received actual notice of the action from

the served Ryder entity, fairness and equity might preclude dismissal at this point. However, there is no indication that the true corporate truck owner received any notice of the action before it moved to dismiss or intervene. That intervening party is therefore entitled to a final determination that jurisdiction was not obtained over it; to the extent the complaint names it as a party defendant, the complaint must be dismissed as against it.

Finally, the motion by the served Ryder defendant, now denominated Ryder-TRS, Inc., for summary judgment in its favor on the ground that the offending truck has been established to be owned by a separate entity, should have been granted. There is no evidence that it either owned, leased or operated the offending truck, and the equities do not justify keeping it in the case. Its business was renting trucks; it was sued on the ground that a truck it owned had been in an accident. It therefore appropriately answered the complaint with a denial of knowledge as to whether it owned the offending truck.

Neither the error by defense counsel in failing to note or correct the misnomer, nor the substance of the answer, establishes grounds to estop the served Ryder entity from asserting a defense to the action. As troubling as this situation is, the confusion grows primarily out of plaintiffs' decision to serve Ryder Truck Rental, Inc. without reference to

the readily available information as to its correct location. The problem was merely exacerbated when counsel for the served Ryder entity served its answer without correcting the misnomer. Neither counsel's failure to point out the misnomer, nor the failure to definitively deny ownership of the offending truck in the initial answer, is comparable to a purposeful, strategic silence intended to mislead plaintiffs as to the proper defendant, which would justify using a theory of estoppel to hold it liable for a truck it did not own (*see e.g. Hitzfield v Wilmorite, Inc.*, 237 AD2d 879 [1997]). To the extent counsel's conduct caused plaintiffs to incorrectly assume that the proper entity had been served and had appeared, the fault lies predominantly with plaintiffs' decision as to how to serve Ryder.

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

ENTERED: FEBRUARY 11, 2010

David Apolony

CLERK

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

1967 Robert McHale, et al., Index 113340/01
Plaintiffs-Respondents,

-against-

Michael K. Anthony, et al.,
Defendants-Appellants,

Ryder Truck Rental, Inc.,
Defendant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Emeka Nwokoro of counsel), for appellants.

Nicoletti, Gonson, Spinner & Owen, LLP, New York (Jamie T. Packer of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 26, 2009, which, in an action for personal injuries sustained in an accident between plaintiffs the McHale's vehicle and a truck operated by defendant Anthony and leased to Anthony's employer, defendant Empire Beef Co. (collectively Empire), and allegedly owned by defendant Ryder Truck Rental, Inc., granted Empire's motion to dismiss the complaint and all cross claims as against it only to the extent of limiting any recovery by plaintiff Liberty Mutual Insurance Company on its subrogation claim to $725,000, unanimously affirmed, without costs.

We reject Empire's argument that the McHales' election of

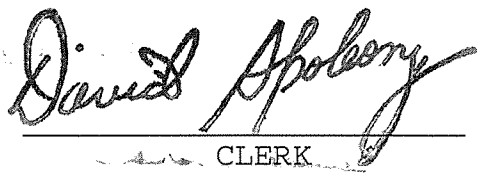
arbitration to resolve their claim for uninsured motorist benefits as against their insurer, Liberty, and the ultimate settlement of that claim, preclude their maintenance of this action against the alleged tortfeasors. *Roggio v Nationwide Mut. Ins. Co.* (66 NY2d 260 [1985]), relied on by Empire, held only that the denial of medical benefits in an arbitration award precluded the claimant from litigating in the courts his right to reimbursement for later medical bills arising out of the same accident. Furthermore, the settlement agreement shows that the McHales and Liberty intended that any future recovery by the McHales in a subsequent action against a third party would be assigned to Liberty in an amount up to $725,000. The agreement contains no restrictions on future litigation against third parties or the amount of a future award, and it does not address issues of liability (*see Brink v Killeen*, 48 AD2d 823 [1975]).

Empire's claim that plaintiffs lack standing to maintain the action by virtue of the settlement with Liberty was not raised in their answer and therefore was waived (CPLR 3211[e]; *see Wells*

Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239, 242-243 [2007]); its claim of judicial estoppel is also unpreserved and without merit.

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

ENTERED: FEBRUARY 11, 2010



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

2129 The People of the State of New York, Ind. 2668/05
Respondent,

-against-

Heriberto Torres,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

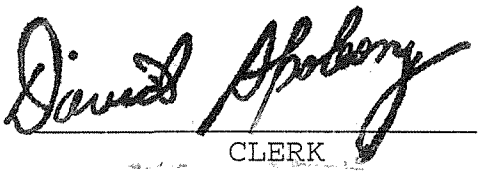
Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about October 31, 2008, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 (2008). The mitigating factors cited

by defendant were outweighed by the seriousness of the underlying crime and defendant's sex-related misconduct in prison.

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

ENTERED: FEBRUARY 11, 2010



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

2130 In re Aurelius Capital Management, LP, Petitioner-Appellant, Index 108462/08

-against-

Eric R. Dinallo, Superintendent of the State of New York Insurance Department, Respondent-Respondent,

MBIA Inc., Intervenor-Respondent.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jeffrey T. Golenbock of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Steven C. Wu of counsel), for State respondent.

Debevoise & Plimpton LLP, New York (Jeremy Feigelson of counsel), for MBIA Inc., respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered January 16, 2009, denying the petition to annul respondent's determination that denied petitioner's Freedom of Information Law (FOIL) application to compel respondent New York State Insurance Department to disclose certain information submitted to it by intervenor-respondent MBIA Inc., and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court correctly determined that disclosure of the additional information sought would likely result in substantial

competitive injury to MBIA (*see Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410 [1995]).

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

ENTERED: FEBRUARY 11, 2010

CLERK

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

2132 Seward Park Housing Corporation, Index 600059/01
Plaintiff-Respondent,

-against-

Greater New York Mutual Insurance Company,
Defendant-Appellant.

Thomas D. Hughes, New York, for appellant.

Anderson & Ochs, LLP, New York (Mitchel H. Ochs of counsel), for respondent.

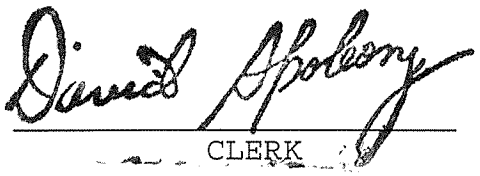
Appeal from order, Supreme Court, New York County (Louis B. York, J.), entered July 27, 2009, to the extent it granted plaintiff's motion to preclude the testimony of defendant's proposed expert witness concerning the reasonableness of plaintiff's reconstruction delays and how long the project should have taken to complete, unanimously dismissed, with costs.

An evidentiary ruling made before trial is generally reviewable only in connection with an appeal from a judgment rendered after trial; there is no discrete appeal from the order granting plaintiff's motion to preclude portions of the proposed expert's testimony (*see Santos v Nicolas*, 65 AD3d 941 [2009]). The proposed testimony does not clearly involve the merits of the controversy or a substantial right (*cf. Matter of City of New York v Mobil Oil Corp.*, 12 AD3d 77, 80-81 [2004]).

Were we to reach the merits, we would affirm. No special skill, training or expertise is required to assess whether or not plaintiff acted with "reasonable" speed to rebuild the garage. Defendant's expert may testify concerning the procedures and phases in reconstructing a multimillion-dollar garage, and his experience, including as to timing, to the extent it involved a comparable project. The reasonableness of the delays here is an issue for the jury, after instruction from the court regarding the applicable law.

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

ENTERED: FEBRUARY 11, 2010



CLERK

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

2133-
2134 In re Sonia C., and Another,

Children under the Age
Of Eighteen Years, etc.,

Juana F., et al.,
Respondents-Respondents,

New York City Administration
for Children's Services,
Petitioner-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for appellant.

Cozen O'Connor, New York (Jill L. Mandell and Kenneth G. Roberts of counsel), Law Guardian for Felicia D.

Tamara A. Steckler, The Legal Aid Society, New York (Louise Feld of counsel), Law Guardian for Sonia C.

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about July 1, 2009, which denied the petition and dismissed the allegations of sexual abuse and neglect against respondents, unanimously affirmed, without costs.

Although a trial court's findings on credibility should rarely be disturbed, they must still be supported by the record (*Matter of Melissa P.*, 261 AD2d 141, 142 [1999], *lv denied* 95 NY2d 762 [2000]; *Matter of Dora F.*, 239 AD2d 228, 230 [1997], *lv denied* 92 NY2d 805 [1998]). Here, the record supports the court's conclusion that sexual abuse was not established in

accordance with Family Court Act § 1012(e) by a preponderance of credible evidence (§ 1046[b][i]), since the child's testimony was inconsistent, vague and lacking in specific details, and the testimony of other witnesses did not independently corroborate her allegations. On the other hand, respondent mother's testimony, viewed as a whole, is consistent with that of the other witnesses. Because the court's determination of her credibility was based on observations of her demeanor, which we do not have the benefit of evaluating, we will accord it "the greatest respect" (*Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

Although the court should not have dismissed the neglect allegations without stating on the record the grounds for the dismissal (Family Court Act § 1051[c]), these allegations simply were not supported by credible evidence, and nothing in the record shows that respondents otherwise failed to provide a minimum degree of care (§ 1012[f][i]) or that the children suffered harm as a result thereof.

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

ENTERED: FEBRUARY 11, 2010

CLERK

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

2135 In re HLP Properties, LLC, et al., Index 115969/07
Petitioners-Respondents,

-against-

New York State Department of
Environmental Conservation,
Respondent-Appellant.

Andrew M. Cuomo, Attorney General, New York (Norman Spiegel of counsel), for appellant.

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Walter B. Tolub, J.), entered September 24, 2008, annulling respondent agency's denial of petitioners' application for admission into the Brownfield Cleanup Program, and directing acceptance of petitioners' property into the program, unanimously affirmed, without costs.

Recent precedent of this Court compels the conclusion that respondent improperly departed from statutory criteria in finding that the subject property is not a brownfield site (*Matter of*

East Riv. Realty Co., LLC v New York State Dept. of Envtl. Conservation, __ AD3d __, 2009 NY Slip Op 09381 [decided Dec. 17, 2009], citing, inter alia, Justice Tolub's opinion herein, 21 Misc 3d 658, 669 [2008]). A remand for a new determination is unnecessary (*see id.* at *1-2).

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

ENTERED: FEBRUARY 11, 2010

CLERK

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

2140 Alfonso Bethea, Index 18052/05
Plaintiff-Appellant, 84933/05

-against-

The Weston House Housing Development Fund Company, Inc., et al.,
Defendants-Respondents.

[And a Third-Party Action]

Kenneth J. Gorman, New York, for appellant.

Garcia & Stallone, Deer Park (Joseph T. Garcia of counsel), for The Weston House Housing Development Fund Company, Inc., respondent.

Faust Goetz Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for Arco Elevator, Inc., respondent.

White, Fleischner & Fino, LLP, New York (Jason Steinberg of counsel), for Case Construction Co., Inc., respondent.

Schoenfeld & Moreland, P.C., New York (Jeff R. Thomas of counsel), for Igor Construction Corp., respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered October 22, 2008, which, in an action for personal injuries allegedly sustained in a slip and fall down several stairs, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges in his complaint and testified at his deposition that he was injured when, while ascending a staircase and transporting 30 to 40 pounds of canned goods on a hand truck,

he slipped and fell down several stairs because the lighting was poor, the handrail was loose and there was dust everywhere because of the installation of a new elevator in the building. However, the record shows that on the day after the accident, plaintiff signed an incident report stating that he was injured when, while pulling the hand truck up the stairs, he felt a "snap" and a sharp pain in his lower back. Furthermore, in the months following the accident, plaintiff reported this same account of the accident to his medical providers. Under these circumstances, dismissal of the complaint was warranted (*see e.g. Garfinkel v Manhattan & Bronx Surface Tr. Operating Auth.*, 8 AD3d 118 [2004]).

Even considering the merits, dismissal of the complaint as against defendant landlord was proper. Although "the reservation of a right to reenter, inspect and make repairs...may subject a landlord to liability in commercial premises covered by the Administrative Code of the City of New York" (*Manning v New York Tel. Co.*, 157 AD2d 264, 269 [1990]), the dust and inadequate lighting, as alleged in this case, do not constitute structural or design defects (*see id.* at 270; *Peck v 2-J, LLC*, 56 AD3d 277 [2008]), and the contention that a loose handrail may have stopped plaintiff's fall, or that the step contributed to the fall, is speculative (*see Jefferson v Temco Servs. Indus.*, 272

AD2d 196 [2000]).

Furthermore, plaintiff's argument that the work completed by defendant contractors and subcontractors several days prior to the accident could have resulted in the accumulation of dust that caused him to slip and fall several days later, is unsupported by the evidence (*see Teplitskaya v 3096 Owners Corp*, 289 AD2d 477 [2001]). Nor does plaintiff show that defendants had actual or constructive notice of the allegedly defective condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

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

ENTERED: FEBRUARY 11, 2010

CLERK

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

2141 Dudley Cato, etc., Index 15404/95
Plaintiff-Appellant,

-against-

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

Yalkut & Israel, Bronx (Arlen S. Yalkut of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 21, 2008, which denied plaintiff's motion to vacate dismissal of the action and restore the matter to the calendar, unanimously affirmed, without costs.

Whether the action was dismissed for want of prosecution (CPLR 3216) as indicated in the computerized court records, of which we take judicial notice (see *Perez v New York City Hous. Auth.*, 47 AD3d 505 [2008]), or for failure to appear (22 NYCRR 202.27), plaintiff, in seeking to vacate the dismissal, was required to demonstrate both a satisfactory excuse for his default in appearing at a scheduled conference and a meritorious

cause of action (*see* CPLR 5015[a]; *Saunders v Riverbay Corp.*, 17 AD3d 137 [2005]). Plaintiff's counsel's perfunctory and conclusory assertion that it appeared the firm had not received notice of the date was inadequate, particularly in the context of the pattern of repeated, extended and unexplained delays in prosecuting the action over the course of a decade (*see Perez*, 47 AD3d 505, *supra*; *Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785 [2003]; *compare Donnelly v Treeline Cos.*, 66 AD3d 563 [2009]). The pattern of near complete disregard of the action continued for the next three years following the dismissal, during which plaintiff took no steps to complete discovery or file a note of issue, although it appears from the computerized court files that a conference order requiring such actions had been issued more than 90 days prior to the dismissal (*Vinikour v Jamaica Hosp.*, 2 AD3d 518 [2003]).

Although plaintiff was not required to show an absence of prejudice to defendants in order to have the case restored, it is evident that witnesses' memories will have faded in the more than

fourteen years since plaintiff's alleged wrongful arrest and three-hour detention (*see Krantz v Scholtz*, 201 AD2d 784, 785 [1994], *lv dismissed* 83 NY2d 902 [1994]).

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

ENTERED: FEBRUARY 11, 2010

David Spolony

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,

Aller Enterprises, Inc., 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 (Ron Kaplan 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 $2500 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 was 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. That the term "night" was not defined in the stipulation is immaterial since the closure was based on the failure to have a license.

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

ENTERED: FEBRUARY 11, 2010

CLERK

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

2144 The People of the State of New York, Ind. 5994/07
Appellant,

-against-

Russell Clough,
Defendant-Respondent.

Robert M. Morgenthau, District Attorney, New York (Hillary Rosenberg of counsel), for appellant.

Alice L. Fontier, New York, for respondent.

Order, Supreme Court, New York County (Charles J. Tejada, J.), entered on or about June 9, 2008, which, to the extent appealed from, granted defendant's motion to suppress that portion of the physical evidence seized following his arrest, and dismissed the corresponding counts of the indictment, unanimously affirmed.

Although the People seek to justify the search at issue under the automobile exception to the warrant requirement, the only evidence that such a search actually occurred was expressly discredited by the hearing court.

"The hearing court plainly had doubts about the credibility of the police witness[], and we will not substitute our own findings on credibility unless the fact findings under review are plainly unjustified or clearly erroneous" (*People v Corbin*, 201

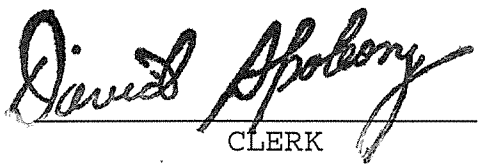
AD2d 359 [1994] [internal quotation marks omitted]). "[M]uch weight must be accorded the determination of the suppression court with its peculiar advantages of having seen and heard the witnesses" (*People v Prochilo*, 41 NY2d 759, 761 [1977]).

While a defendant who challenges a search and seizure has the ultimate burden of proving illegality, the People have the burden of going forward to show the legality of the police conduct in the first instance (*People v Berrios*, 28 NY2d 361, 367 [1971]), and that burden cannot be met by testimony that the hearing court finds incredible (*id.* at 369). Accordingly, the People failed to satisfy their initial burden.

We have considered and rejected the People's remaining arguments.

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

ENTERED: FEBRUARY 11, 2010



CLERK

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

2145 Leslie A. Shapiro, Index 105294/07
Plaintiff-Appellant,

-against-

Boulevard Housing Corp.,
Defendant-Respondent.

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for appellant.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 17, 2009, which granted defendant's motion for summary judgment and denied plaintiff's cross motion to strike the answer, unanimously modified, on the law, defendant's motion denied, the complaint reinstated, and otherwise affirmed, without costs.

Summary judgment must be denied if evidentiary materials offered in opposition create a disputed issue of material fact (CPLR 3212[b]). Here, the evidentiary materials presented create issues of fact as to causation. On a motion for summary judgment, issue-finding, rather than issue-determination, is key (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [2008]). Issues of credibility in particular are to be resolved at trial, not by summary judgment (*S.J. Capelin Assoc. v*

Globe Mfg. Corp., 34 NY2d 338, 341 [1974]).

Plaintiff testified at deposition that on February 25, 2007, she fractured her arm after slipping and falling on a rainy weather mat maintained by defendant at its premises. Plaintiff stated, inter alia, that her foot came in contact with a curl in the first overlapping mat, causing her to fall; afterward, she noticed the mat was curled over, approximately two inches high.

Defendant does not dispute that immediately after the accident, (1) its employee made an entry in the concierge's logbook and prepared an accident report stating, inter alia, "bodily injury" and "woman claims her arm is broken"; (2) shortly thereafter, defendant's building superintendent copied surveillance footage onto a DVD of the accident site, from several seconds before until several seconds after plaintiff's fall; and (3) at an unspecified time and for no specified reason, sometime between February 25 and April 24, 2007 (the date defendant was served by plaintiff), defendant disposed of the mat in question and replaced it with a new one. After being advised by defendant that the mat was no longer available for inspection, plaintiff moved to strike defendant's answer on the ground of spoliation of evidence. Plaintiff later stipulated to withdraw that motion, and after she was deposed, defendant provided her with a copy of its DVD, in compliance with CPLR 3101(i).

Our review of the DVD, together with the still photos in the record, indicates that the angle, distance and quality of the DVD are insufficient to establish indisputably that the edge of the mat was flat and in a safe condition at the time of the accident. To the contrary, they appear to show the mat rising up at the moment plaintiff's foot came in contact; it is thus a question of fact whether defendant maintained an allegedly dangerous mat that was unsafely placed (*see Lyons v 40 Broad Del.*, 307 AD2d 868 [2003]). Whether this defect was too trivial to serve as a basis for liability should be left to the jury to determine (*see Nin v Bernard*, 257 AD2d 417 [1999]).

Plaintiff testified that she noticed a curl in the mat following the accident. Her fiancé stated in his affidavit that he also noticed the curl after the accident, unsuccessfully tried to flatten it, and admonished defendant's employees as to the safety hazard it presented (*see Lyons*, 307 AD2d at 869). While self-serving, this affidavit does not contradict or undercut plaintiff's prior testimony, so its evidentiary value in defeating summary judgment should not be disregarded (*cf. Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270 [2009]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

Even though defendant disposed of the mats shortly after the accident, the court did not abuse its discretion in denying

plaintiff's cross motion to strike the answer on spoliation grounds. Plaintiff has not been deprived of the means to prove her case and to place all factual matters before a jury (*see Thomas v City of New York*, 9 AD3d 277 [2004]; *Iannucci v Rose*, 8 AD3d 437 [2004]).

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

ENTERED: FEBRUARY 11, 2010

CLERK

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

2147N-
2147NA Index 600985/08

Phoenix Life Insurance Company,
Plaintiff-Appellant-Respondent,

-against-

The Irwin Levinson Insurance
Trust II, et al.,
Defendants-Respondents-Respondents,

Life Product Clearing, LLC,
Non-Party Respondent-Respondent-Appellant,

Steven Lockwood, et al.,
Non-Party Respondents.

Dorsey & Whitney LLP, New York (Patrick J. Feeley and Christopher G. Karagheuzoff of counsel), for appellant-respondent.

Susman Godfrey L.L.P, New York (Rebecca S. Tinio of counsel), for Life Product Clearing LLC, respondent-appellant, and The Irwin Levinson Insurance Trust II and Jonathan S. Berck, respondents-respondents.

Rosenfeld & Kaplan, LLP, New York (Tab K. Rosenfeld of counsel), for Lockwood respondents.

Order, Supreme Court, New York County (Carol Edmead, J.), entered June 1, 2009, which granted motions by the nonparty witnesses to quash certain subpoenas served by plaintiff, and order, same court and Justice, entered August 24, 2009, which denied without prejudice plaintiff's motion for leave to amend the pleadings, unanimously affirmed, without costs.

Plaintiff seeks rescission of a life insurance policy on the

ground, inter alia, that the policy, which was procured by the insured Irwin Levinson, was immediately transferred into an irrevocable trust, and then, within days and prior to the payment of any premium by the insured, was transferred to unidentified third parties in exchange for payment of a substantial sum, was procured for the benefit of a "stranger investor" pursuant to a STOLI (stranger originated life insurance) arrangement, and was thus void for lack of an insurable interest under Insurance Law § 3205. Plaintiff sought documents from the nonparty witnesses with information on similarly structured transactions in which the STOLI participants had participated; the relationship among the STOLI participants; the STOLI participants' understanding, marketing and mutual correspondence with respect to STOLI policies and insurable interest requirements; financing, revenues and costs with respect to STOLI transactions; investigations and terminations that involved some insurable interest or STOLI concern; and the ownership, management, structure, creation and general business purpose of nonparty Life Product Clearing.

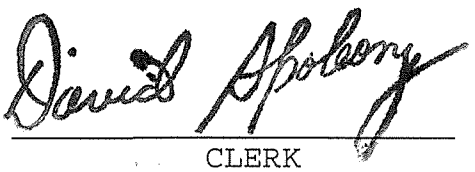
The court properly quashed the subpoenas as they related to the relationship among the alleged STOLI participants and a pattern of procuring policies pursuant to similar arrangements, inasmuch as such information would not prove whether the insured here intended to participate in a STOLI scheme, and there is no

indication that documents pertaining to policies other than the policy at issue here would be relevant to establish the insured's intent (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [2006]; *Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 342 [1997]). Even were there evidence of fraudulent intent in those documents, that evidence would relate to the intent of the unknown third parties, and not the intent of the insured.

The court did not abuse its discretion in denying plaintiff's motion to amend the complaint to add claims of fraud and conspiracy to commit fraud against the Lockwood and Life Product nonparties, in order to support the broad discovery previously denied, particularly since it did so without prejudice to renewal after discovery, given that the proposed amendment would entail extensive discovery into other policies that would further delay and unnecessarily complicate the case (*see Long Is. Light. Co. v Century Indem. Co.*, 52 AD3d 383, 384 [2008]).

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

ENTERED: FEBRUARY 11, 2010



CLERK

THE FOLLOWING ORDER WAS RELEASED ON FEBRUARY 25, 2010

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

2137-
2138 James Brady, et al., Index 603741/07
Plaintiffs-Appellants,

-against-

450 West 31st Owners Corp.,
Defendant-Respondent,

Extell Development Company, et al.,
Defendants.

Louis A. Badolato, Roslyn Harbor, for appellants.

Kaufman Friedman Plotnicki & Grun, LLP, New York (Stanley M. Kaufman of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered March 26, 2009, to the extent appealed from as limited by the briefs, declaring that defendant 450 West 31st Owners Corp. is the owner of the transferable development rights granted or permitted to the parcel of land on which the cooperatively owned building is located, and that paragraph 7 of the second amendment to the offering plan does not convey or reserve those rights to plaintiffs, and that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law,

unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 7, 2008, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint, unanimously dismissed as academic, without costs.

Paragraph 7 of the second amendment to the offering plan contains no express language giving plaintiffs ownership of or veto power over the building's development rights or air rights (*compare Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 Ad3d 407, 408 [2007] ["roof rights reserved for (plaintiff) in the 1986 offering plan"]). It reserves for plaintiffs the right, as permitted by the relevant laws, to construct or extend structures on the roof that may be built without the use of the building's development rights.

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

ENTERED: FEBRUARY 11, 2010

David Apolony

CLERK