SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 22, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1713-
1714

Brin McCagg,
Plaintiff-Respondent,

Index 601566/04

-against-

Schulte Roth & Zabel LLP, et al.,
Defendants-Appellants,

Alan Clingman,
Defendant.

- - - -

Brin McCagg, etc., et al.,
Plaintiffs-Appellants,

-against-

Schulte Roth & Zabel LLP, et al.,
Defendants-Respondents.

Dewey & LeBoeuf LLP, New York (Jonathan D. Siegfried of counsel), for Schulte Roth & Zabel LLP and Marc Weingarten appellants/respondents.

McLaughlin & Stern, LLP, New York (Steven J. Hyman of counsel), for Brin McCagg respondent/appellant.

Farber Pappalardo & Carbonari, White Plains (Eugene I. Farber of counsel), for Alan Clingman respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered August 4, 2008, which, insofar as appealed from as limited by the briefs, granted plaintiff's cross motion to add a dissolved Delaware corporation as an additional party plaintiff on his seventh cause of action against defendants Schulte Roth & Zabel LLP and Marc Weingarten (the SRZ defendants) for aiding and abetting an alleged breach of fiduciary duty, and denied the SRZ defendants' motion to dismiss the seventh cause of action to the extent that cause of action was brought on behalf of the dissolved corporation, unanimously reversed, on the law, with costs, plaintiff's cross motion denied, and the SRZ defendants' motion to dismiss the seventh cause of action granted. Order, same court and Justice, entered January 26, 2009, which granted motions by defendant Alan Clingman and the SRZ defendants to dismiss the amended complaint with prejudice, unanimously modified, on the law and the facts, and in the exercise of discretion (1) to dismiss the action with prejudice unless, within 30 days after service of a copy of this order with notice of entry, plaintiff serves a new amended complaint that comports with the court's prior orders entered September 26, 2005 and August 4, 2008 but asserts only the claims remaining against defendant Clingman, and (2) to direct that plaintiff pay

defendants the reasonable attorneys' fees and other reasonable expenses they incurred in connection with the filing of the amended complaint, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the action as against the defendants Schulte Roth & Zabel LLP and Marc Weingarten.

In 2000 and 2001, defendant Clingman and others formed a company called Marquis Jet Partners, Inc. Marquis is one of a handful of fractional jet ownership companies that maintain fleets of aircraft and sell the rights to travel on those planes for fixed periods of time to frequent users of jet travel. In August 2002, Marquis terminated Clingman. Clingman retained 12% of Marquis common stock, and refused an offer to sell back his shares and sign a non-compete agreement.

In November of the same year, Clingman invited plaintiff McCagg to attend a meeting in Florida with the senior management of Flexjet/Bombardier, a Canadian jet manufacturer. The purpose of the meeting was to discuss creating a company to compete with Marquis. Clingman allegedly thought the new company could have a competitive advantage over Marquis by offering the sale of airplane usage in smaller blocks of time.

McCagg and Clingman decided to pursue the venture. On December 17, 2002, the law firm of Schulte Roth & Zabel (SRZ),

handled the incorporation of the corporation, which was called Clearjets, in the State of Delaware. SRZ had done legal work for Clingman, and he recommended it to McCagg to handle the incorporation.

Two days later, on December 19, 2002, Marquis's counsel demanded that Clingman abandon any plans to engage in any venture that would compete with his former firm. The letter threatened that if Clingman did not accede, Marquis would take necessary legal action to protect its rights. SRZ responded by letter dated December 24, 2002. The correspondence stated, among other things, that Clingman had been terminated by Marquis, that he was not given any severance when he was terminated, that he had not executed a non-competition agreement, and that he was not otherwise bound to suspend involvement in any competing venture in the industry.

Next, on January 1, 2003, McCagg and Clingman both signed a one page "Letter of Agreement" outlining their mutual duties as "Partners" in the venture. The letter states:

> "1. The Partners agree to contribute the fractional private jet business into a mutually owned LLC (the LLC).
>
> "2. Both Partners will work full time for the LLC and use their best efforts to develop the contributed business.
>
> "3. Clingman will assume the title and role of Chairman and CEO, and McCagg will assume the title and role of President. The Partners agree to confer on all major

decision[s] regarding the operation of the businesses.

"4. LLC equity will be split 60% for Clingman and 40% for McCagg. Any shares issued for any purpose (e.g. raising capital, ESOPS, etc.) will dilute each Partner pro rata.

"5. All legitimate and reasonable expenses, which are mutually agreed upon in advance, will be paid based upon the Partners' 60-40 equity split.

"6. Both Partners agree not to sell their stock without notifying the other Partner and allowing, but not requiring, the other Partner to participate in the sale event on a pro rata basis."

The record contains correspondence between Clingman and Marquis, all dated mid-January 2003, indicating that Clingman was contemplating selling back his Marquis stock and entering into a "non-competition" agreement with his former employer. Around the same time, and for disputed reasons, McCagg and Clingman were not able to enter into a contract with Bombardier. Clingman states that by March 2003 he realized that Clearjets was not viable, and he found out that Bombardier was negotiating a similar deal with Delta Air Lines, which was ultimately executed. Clingman also states that he did not want to continue working with McCagg because they had continuing personal disputes.

Clingman contends that on April 9, 2003, as a result of his realizations and Bombardier's unavailability, he sold stock back to Marquis, executed a non compete-agreement with it, and quit

the fractional jet travel business. McCagg, by contrast, contends that Clingman had used the Clearjets venture to obtain leverage against his former employer, and then sabotaged the Clearjets venture to enhance the value of Marquis in the fractional jet industry. McCagg also alleges that Clingman received a multi-million dollar windfall from Marquis, in return for signing the non-compete agreement.

On May 5, 2003, SRZ filed a Certificate of Dissolution of Clearjets with the Secretary of State of Delaware. McCagg claims that he did not consent to the dissolution of the corporation.

By complaint dated May 19, 2004, McCagg brought this action against the SRZ defendants and Clingman (the *SRZ* litigation). Clearjets was not a named plaintiff. The complaint contained eight causes of action. The first five were asserted against Clingman. They alleged: (1) breach of contract; (2) breach of fiduciary duty; (3) common-law fraud; (4) misappropriation of corporate opportunity and unjust enrichment; and (5) a claim for an accounting and constructive trust. The sixth through eighth causes of action were asserted against the SRZ defendants and certain SRZ partners. These claims were for: (6) breach of fiduciary duty; (7) aiding and abetting breach of fiduciary duty and fraud; and (8) legal malpractice.

Clingman then moved pursuant to CPLR 3211(a)(5) for an order dismissing the first five causes of action on the ground that they were barred by the statute of frauds, because there was no signed writing prohibiting Clingman from selling back his Marquis stock or entering into a non competition agreement with his former employer. By order entered September 26, 2005, the motion court granted Clingman's motion only to the extent of dismissing the first cause of action (*McCagg v Schulte, Roth & Zabel*, 2005 NY Slip Op 30357[u] [2005]). On appeal, we affirmed this determination (36 AD3d 424 [2007]).

On March 13, 2006, McCagg brought a federal antitrust action against Marquis (the Marquis litigation), with pendant derivative claims on behalf of Clearjets, a named plaintiff in that action. The District Court dismissed the federal claims and declined to assert pendant jurisdiction over remaining state law claims (*McCagg v Marquis*, 2007 WL 2454192, 2007 US Dist LEXIS 61020 [2007]). McCagg moved for reconsideration, which was denied, (2007 WL 2161786, 2007 US Dist LEXIS 54516 [2007]). McCagg and Clearjets then refiled the pendant claims in the Marquis litigation in state court. The dismissal of those claims is not challenged on these appeals.

On August 31, 2007, after extensive discovery, the SRZ defendants moved for summary judgment dismissing the sixth

through eighth causes of action in the *SRZ* litigation. Plaintiff cross-moved for leave to amend the caption to add Clearjets as a plaintiff and add another SRZ partner as a defendant.

In the first of the two orders appealed, entered August 4, 2008, the court granted plaintiff's cross motion to the extent of allowing McCagg to add Clearjets as a plaintiff. The court reasoned that because the derivative claims were asserted in the federal Marquis litigation, which was brought within three years of the dissolution of Clearjets (see 8 Del Code § 278), the doctrine of relation back, codified at CPLR 203(f), permitted Clearjets to be added as a plaintiff in this action.

The court also granted the SRZ defendants' motion to the extent of directing dismissal of the sixth and eighth causes of action. It reasoned that McCagg did not have a basis for these individual causes of action against SRZ because he was not a client of the firm. The court sustained the seventh cause of action, but only to the extent asserted as a derivative claim on behalf of Clearjets. With respect to so much of the seventh cause of action asserting that the SRZ defendants aided and abetted a breach of fiduciary duty owed by Clingman (either as an alleged joint venturer or as a majority shareholder) to McCagg, the court ruled that the facts did not support either theory of liability. However, the court found that the SRZ defendants had

a duty to Clearjets, and it concluded:

> "[W]here the primary purpose for the creation of Clearjets was to compete with Marquis, I cannot say as a matter of law that Clingman's negotiation and execution of a non-competition agreement with Marquis, while still chairman and CEO of Clearjets, was not a breach of his fiduciary duty owed to Clearjets. Nor can I say, as a matter of law, based on the parties' submissions - including redacted and incomplete billing statements - that [the SRZ defendants] did not aid and abet Clingman in the alleged breach. As noted above, the statements show that [SRZ] advised Clingman on "all aspects of Marquis relationship including . . . non-competition and release agreements.
>
> "Because there are material issues of fact whether the [SRZ] defendants knowingly rendered substantial assistance to Clingman in negotiating and executing the non-competition agreement, while he was chairman and CEO of Clearjets, the seventh cause of action is not dismissed (*see State of New York v Grecco*, 43 AD3d 397 [2nd Dept 2007])."

Plaintiff did not appeal from the court's dismissal of the claims brought against the SRZ defendants in the seventh cause of action, premised on a breach of fiduciary duty that Clingman allegedly owed to him.

Plaintiff then filed an amended complaint, dated September 2, 2008, which added Clearjets as a plaintiff, removed one of the SRZ partners as a defendant, and asserted five causes of action (purportedly eliminating the first, sixth, and eighth causes of action). However, this amended complaint added new facts and claims, omitted information that was set forth in the prior complaint, and expanded the basis for some of the individual claims against Clingman.

On October 8, 2008, Clingman moved to dismiss the amended complaint on three grounds: (1) New York's Business Corporation Law § 1312 precluded Clearjets from maintaining an action in New York; (2) the amended complaint combined new derivative claims within the former individual causes of action; and (3) the amended pleading did not conform to the terms of the order granting leave to amend. The SRZ defendants made a companion motion joining the first and third of Clingman's arguments. On January 23, 2009, the court heard oral argument on the motion. After a short recess, it dismissed the proposed amended complaint, with prejudice, for failure to comply with the express authorization of its earlier order. Plaintiff moved for reconsideration, which was denied, and an order was entered January 26, 2009 dismissing the action with prejudice.

The SRZ defendants and defendant Clingman both appeal from the August 4, 2008 order, to the extent that it allowed plaintiff to amend the complaint to add Clearjets as a plaintiff. The SRZ defendants also seek dismissal of the claim for aiding and abetting breach of fiduciary duties. Plaintiff appeals from the January 26, 2009 order dismissing the amended complaint with prejudice.

We reverse the August 4, 2008 order, to the extent appealed from, and deny plaintiff's cross motion to add Clearjets as a

party plaintiff. Further, given our conclusion that Clearjets does not have capacity to bring claims in this lawsuit, we grant the SRZ defendants' motion to dismiss the seventh cause of action. As our order rejects the only remaining theory for a claim against the SRZ defendants, we grant judgment directing dismissal of the action against them.

With respect to the January 26, 2009 order, we direct a conditional dismissal of the action with prejudice unless, within 30 days after service of a copy of this order with notice of entry, plaintiff serves a new amended complaint that comports with the court's prior orders entered September 26, 2005 and August 4, 2008, but asserts only the direct claims remaining against defendant Clingman.

At common law, the dissolution of a corporation ended its existence, thus annulling all pending actions by and against it and terminating its capacity thereafter to sue or be sued (*see Oklahoma Natural Gas Co. v Oklahoma*, 273 US 257 [1927]). However, legislation can be enacted to prolong the life of a corporation past its date of dissolution for designated purposes (*id.* at 259). Such statutes balance the important interest of ensuring that claimants have adequate time to bring claims against the corporation against the equally important concern for allowing the corporation's directors, officers, and stockholders

to wind up the corporate affairs and be free from claims relating to the dissolved corporation after sufficient time has passed (*In re Dow Chem. Intl. Inc.*, 2008 WL 4603580, *2, 2008 Del. Ch. LEXIS 147, *4-5 [Del. Ch. 2008]).

8 Del Code § 278, applicable here, provides:

> "All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution . . . for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them . . . **With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution,** the action shall not abate by reason of the dissolution of the corporation; the corporation shall, **solely for the purpose of *such* action, suit or proceeding,** be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery (emphasis added).

In addition, the issue of the dissolved corporation's joinder as a party plaintiff is one of capacity, not timeliness (*see In re Citadel Indus., Inc.*, 423 A2d 500 [Del Ch 1980]). Clearjets was dissolved on May 5, 2003. It had capacity to bring the claims asserted in the *Marquis* litigation, because the derivative claims in that litigation were commenced in federal court on March 13, 2006 (within three years of the corporation's dissolution). However, the derivative claims in this litigation were not sought to be raised, and plaintiff did not seek to add Clearjets as a

plaintiff until 2008, more than three years after the corporation's 2003 dissolution.

The *Marquis* action and this *SRZ* litigation are separate lawsuits, and, under the express language of 8 Del Code § 278, Clearjets no longer existed when, more than three years after its dissolution, plaintiff moved to add it as a party in this action (*see Marsh v Rosenbloom*, 499 F3d 165, 172-73, 175 [2d Cir 2007]; *In re Citadel Indus.*, 423 A2d at 502-503; *Smith-Johnson S.S. Corp. v United States*, 231 F Supp 184 [D Del 1964];). Finally, the motion court incorrectly concluded that because the derivative claims sought to be raised in this litigation related back to the commencement of the *Marquis* litigation (*see* CPLR 203[f]), they were not barred by 8 Del Code § 278. In view of these conclusions, we need not reach the SRZ defendants' contentions relating to the merits of a proposed seventh cause of action sought to be asserted derivatively by McCagg on behalf of Clearjets.

In the second order appealed, the motion court correctly ruled that plaintiff acted improperly in filing, without its permission, an amended complaint that differed substantially from the proposed amended complaint that the court had granted plaintiff leave to file in its August 4, 2008 order (*see* CPLR 3025[b]; *cf.* CPLR 2001]). Indeed, plaintiff's attorney conceded

at the oral argument before the motion court that he should have obtained further permission to file the amended complaint. However, in view of this concession, our preference for resolving controversies on the merits (*see Spira v New York City Tr. Auth.*, 49 AD3d 478 [2008]), and the absence of a pattern of willful or contumacious conduct by plaintiff (*see Kaplan v KCK Studios*, 238 AD2d 264 [1997]), it was an improvident exercise of discretion for the motion court to dismiss the amended complaint with prejudice (*see Grant v Rattoballi*, 57 AD3d 272, 273 [2008]; *Kaplan*, 238 AD2d at 264-265; *cf. Corsini v U-Haul Intl.*, 212 AD2d 288, 291 [1995], *lv dismissed in part and denied in part* 87 NY2d 964 [1996]).

Instead, we award the reasonable attorneys' fees and other expenses incurred by defendants in the motion practice involving the amended complaint (CPLR 3025[b]). As the amended complaint is not susceptible to pruning, we direct plaintiff to serve a new amended complaint that comports with this order as well as the motion court's prior orders.

Given our conclusion that Clearjets lacks capacity to sue, we need not reach the SRZ defendants' allegation that Business Corporation Law § 1312 precludes Clearjets from bringing an

action in New York. We have considered the parties' remaining contentions and find that we either need not reach them or that they are without merit.

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

ENTERED: JUNE 22, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2279 Kram Knarf, LLC, et al., Index 20347/08
Plaintiffs-Respondents,

-against-

Valentin Djonovic, et al.,
Defendants-Appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellants.

Schwartz & Ponterio, PLLC, New York (Matthew F. Schwartz of counsel), for respondents.

Order, Supreme Court, Bronx County (Nelson S. Román, J.), entered on or about November 28, 2008, which denied defendants' motion to dismiss the complaint, affirmed, without costs.

Accepting the facts alleged in the complaint as true and according plaintiffs the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we agree that the allegations that defendant attorneys negligently gave their plaintiff clients an incorrect explanation of the contents of legal documents in connection with a property acquisition sufficiently states a legal malpractice claim against them (*see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300 [2001]; *cf. Bishop v Maurer*, 33 AD3d 497, 499-500 [2006], *affd* 9 NY3d 910 [2007]).

The documents do not conclusively establish that defendants' explanation was correct, and thus do not constitute a defense based on "documentary evidence" (CPLR 3211[a][1]).

Bishop v Maurer (9 NY3d 910, *supra*), relied on by the dissent, does not dictate a different result. There, the client had given informed consent, confirmed in writing, to the attorneys' dual representation of him and his wife. The client's malpractice complaint was silent as to how the attorneys misled him, what they failed to explain to him concerning the estate planning documents he executed, and which of his instructions those documents did not reflect (*id.* at 498-499).

Here, in contrast, plaintiffs' complaint alleges with particularity that their interests were not protected by the contract in accordance with their instructions, and that defendants advised plaintiffs incorrectly as to the contract's import. For instance, it is alleged that defendants failed to perform due diligence in order to ascertain the extent of the contamination and that the levels of contamination exceeded the levels represented to plaintiff by the owner. Thus, while the contract disclosed certain liabilities, without the proper due

diligence and adequate legal counsel, plaintiffs were unaware of the full extent of the liabilities they faced.

All concur except McGuire, J. who dissents in a memorandum as follows:

McGUIRE, J. (dissenting)

This case is controlled by *Bishop v Maurer* (9 NY3d 910 [2007]). The issue is not whether the transaction documents "conclusively establish that defendants' legal advice was *correct*" (emphasis added). In *Bishop v Maurer*, the claim of legal malpractice was entirely inconsistent with the estate planning documents prepared by the attorney that the elderly decedent signed and is presumed to have read. Here, too, the claim of legal malpractice is entirely inconsistent with the transaction documents prepared by attorneys that sophisticated clients signed and are presumed to have read. Here, as in *Bishop v Maurer*, "plaintiffs' complaint is devoid of any nonconclusory allegation that incorrect advice was given" as to the contents of the documents (*id.* at 911). If plaintiffs' vague allegations of incorrect advice are sufficient to state a claim for legal malpractice, unsettling consequences are all but certain to follow. For example, legal malpractice actions could be commenced based on a bare claim that the client was told he was getting more money to settle an action than is provided in settlement documents signed by the client. Notably, this is not a case in which the client, because of an error by the attorney, has "a valid excuse for having failed to read [the subject

document]" (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 304 [2001]). For these reasons, the motion to dismiss should have been granted.

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

ENTERED: JUNE 22, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3090 The People of the State of New York, Ind. 1020/07
Respondent,

-against-

Christian Melendez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered May 21, 2008, convicting defendant, after a jury trial, of burglary in the first degree (two counts), robbery in the first and second degrees and burglary in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 18 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court properly permitted the People to cross-examine defendant about uncharged robberies, since they showed defendant's willingness to place his interests above those of society, and their probative value on the issue of defendant's credibility, had he testified, outweighed their prejudicial

effect (*see e.g. People v White*, 297 AD2d 258 [2002], *lv denied* 98 NY2d 772 [2002]). The People demonstrated a good faith basis for this line of inquiry by revealing that the source of the information was a fellow inmate to whom defendant admitted these robberies (*see People v Alamo*, 23 NY2d 630, 634 [1969], *cert denied* 396 US 879 [1969]; *People v Sealy*, 167 AD2d 362 [1990], *lv denied* 77 NY2d 843 [1990]). Moreover, the People not only revealed the informant's identity, but called him as a witness on their direct case on the subject of defendant's admission that he committed the present crime. Any error in permitting the People to cross-examine defendant about his gang membership was harmless (*see People v Grant*, 7 NY3d 421 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 22, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3091 Joan M. Kenney, et al., Index 811/02
Plaintiffs-Appellants,

-against-

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

Dynatech Industries,
Defendant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for The City of New York, respondent.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for Excel Industries, respondent.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered February 11, 2009, which, in an action for personal injuries sustained in a trip and fall on stairs, granted the motions of defendants Excel Industries and the City of New York to renew their prior motions for summary judgment dismissing the complaint and all cross claims as against them, previously denied by order, same court and Justice, entered May 24, 2004, and, upon renewal, dismissed the complaint, unanimously affirmed, without costs.

In a previous appeal by codefendant Dynatech Industries (30 AD3d 261 [2006]), we concluded, as an alternative holding, that

"[e]ven were Dynatech connected to Excel Industries, which was the basis of the IAS court's denial of Dynatech's dismissal motion, the motion should have been granted, because plaintiff's access to the courthouse step handrails was not blocked. She testified that she walked diagonally up the steps but she could have chosen to walk on the outside of the blocked handrails, where the walkway was unobstructed" (*id.* at 262).

"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose reexamination of [the] question absent a showing of subsequent evidence or change of law" (*J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809, 809 [2007] [internal quotation marks and citations omitted]; *see Martin v City of Cohoes*, 37 NY2d 162 [1975]). Accordingly, based upon our prior determination, the motion court properly dismissed the complaint as against Excel and the City.

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

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

ENTERED: JUNE 22, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels JJ.

3092 In re Miguel R.,
Petitioner-Respondent,

-against-

Wilda C.,
Respondent-Appellant.

Steven N. Feinman, White Plains, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy C. Hausknecht of counsel, Law Guardian.

Appeal from order, Family Court, New York County (Jody Adams, J.), entered on or about March 23, 2009, which awarded petitioner father custody of the parties' child, unanimously dismissed, without costs.

As the order was entered on respondent mother's default, it is not appealable (CPLR 5511; *Matter of Anita L. v Damon N.*, 54 AD3d 630 [2008]; *Matter of Jessica Lee D.*, 44 AD3d 347 [2007]).

Were we to consider the appeal, we would affirm the order. The record of the neglect proceeding against the mother demonstrates that it was in the child's best interest for petitioner to have custody of her (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Given the records made at the fact-

finding and dispositional hearings, no further hearing was required on the custody petition (*see Matter of David T.*, 268 AD2d 309 [2000]).

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

ENTERED: JUNE 22, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3093 The People of the State of New York, Ind. 4046/06
Respondent,

-against-

Allen Jones,
Defendant-Appellant.

Gary Sunden, New York for appellant.

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered on or about July 19, 2007, 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.

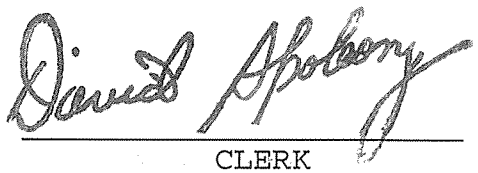
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: JUNE 22, 2010



CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3094 In re New York Civil Liberties Union, Petitioner-Respondent, Index 110557/08

-against-

New York City Police Department, et al., Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for appellants.

New York Civil Liberties Union Foundation, New York (Christopher T. Dunn of counsel), for respondent.

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered December 28, 2009, granting the petition and directing respondents to produce data requested under the Freedom of Information Law (FOIL), unanimously affirmed, without costs.

Petitioners seek information identifying the race of persons shot at but not hit by NYPD officers between 1997 and 2006, either in the form of redacted individual reports, or -- as respondents have already disclosed with respect to persons shot at and hit -- in tabular form. By already having voluntarily and deliberately disclosed one category of information relating to persons shot, respondents affirmatively waived their right to claim FOIL exemptions in the requested data (*see Matter of Molloy v New York City Police Dept.*, 50 AD3d 98, 100 [2008]). Even were we to find that there was no waiver, the record nonetheless

demonstrates that the reports can be redacted to adequately protect their confidential nature (*see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007]; *Daily Gazette Co. V City of Schenectady*, 93 NY2d 145 [1999]).

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

ENTERED: JUNE 22, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3095 In re Mercedes Casado, et al., Index 402267/08
Petitioners-Respondents,

-against-

Marvin Markus, as Chair of the New York City Rent Guidelines Board, et al.,
Respondents-Appellants.

- - - -

Rent Stabilization Association of NYC, Inc., Community Housing Improvement Program, Inc., and The Council of the City of New York,
Amici Curiae.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for appellants.

Steven Banks, The Legal Aid Society, New York (Ellen Davidson of counsel), for respondents.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for Rent Stabilization Association of NYC, Inc. and Community Housing Improvement Program, Inc., Amici Curiae.

Elizabeth R. Fine, New York (Lauren G. Alexrod of counsel), for The Council of the City of New York, Amicus Curiae.

Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered February 2, 2010, in an article 78 proceeding, vacating Rent Guidelines Board Orders Nos. 40 of 2008 and 41 of 2009 insofar as they provided for minimum dollar rent increases for rent stabilized apartments renting for less than $1,000 that had not been subject to vacancy increases for the preceding six years, unanimously affirmed, without costs.

Under the Emergency Tenant Protection Act of 1974

(McKinney's Unconsolidated Laws of NY § 8621 *et seq.*), the Council of the City of New York is empowered to regulate the rents of housing accommodations subject to the New York City Rent Stabilization Law (Administrative Code of City of NY § 26-501 *et seq.*). The New York City Rent Guidelines Board was created pursuant to that statutory authority and, under Rent Stabilization Law § 26-510(b) (tracking ETPA § 8624[b]), is authorized to annually adjust the "maximum rate or rates of rent" for rent stabilized units. In so doing, the Rent Guidelines Board is necessarily subordinate to the City Council, which is vested by the State with the exclusive power to promulgate local rent regulations. Although the City Council has the power to establish classifications of housing accommodations, and, if deemed necessary, to thereby allow for differentiations of rental treatment, it has not done so. It does not follow, however, that the Rent Guidelines Board may, in effect, step into the breach, without express statutory authority or delegation by the City Council. By imposing minimum dollar rent adjustments based on tenant longevity and rental amount, the Rent Guidelines Board not only went beyond its authority to set maximum rent *rates*, but also impermissibly created a new class of rental accommodation, a policy determination exclusively reserved to the City Council

(*see* EPTL 8623[a]; *Matter of New York State Tenants & Neighbors Coalition, Inc. v Nassau County Rent Guidelines Bd.*, 53 AD3d 550 [2d Dept 2008]).

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

ENTERED: JUNE 22, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3096 In re Gekia Hafeesah Amore M.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Paris W.,
Respondent-Appellant,

Harlem Dowling-Westside Center for
Children and Family Services,
Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), Law Guardian.

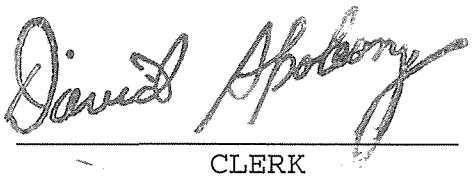
Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about January 6, 2009, which, insofar as appealed from, determined that respondent father's consent was not required for the subject child's adoption, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Assuming in respondent's favor that the court committed prejudicial error in preventing him from offering an explanation for his admitted failure to ever pay any child support (Domestic Relations Law § 111[1][d][i]), and assuming further in

respondent's favor that the court's denials of his requests for visitation prevented him visiting the child at least monthly (Domestic Relations Law § 111[1][d][ii]), respondent still could have communicated regularly with the agency but failed to do so (Domestic Relations Law § 111[1][d][iii]). Respondent's testimony at best shows only half-hearted attempts, largely by his mother, to reach the agency by phone, that fell short of the regular efforts at communication contemplated by the statute (*see Matter of Aaron P.*, 61 AD3d 448 [2009]; *Matter of Jonathan Logan P.*, 309 AD2d 576 [2003]). The court's best interests determination is supported by a preponderance of the evidence (*see Matter of Chandel B.*, 58 AD3d 547, 548 [2009]; *Matter of Jenee Chantel R.*, 295 AD2d 291, 292 [2002]). We have considered and rejected respondent's other arguments.

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

ENTERED: JUNE 22, 2010



CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3097 Mildred Branch, et al., Index 402560/08
Plaintiffs-Petitioners-Appellants,

-against-

Riverside Park Community LLC, et al.,
Defendants-Respondents-Respondents.

Patterson Belknap Webb & Tyler, LLP, New York (Christopher Y. Miller of counsel), for appellants.

Baker & Hostetler LLP, New York (John Siegal of counsel), for Riverside Park Community LLC, Riverside Park Community II LLC and Urban American Management LLC, respondents.

Anderson Kill & Olick, P.C., New York (John M. O'Connor of counsel), for New York City Educational Construction Fund, respondent.

Order, Supreme Court, New York County (James A. Yates, J.), entered July 15, 2009, which granted defendants-respondents' motions to dismiss the combined complaint and petition seeking damages for breach of lease and for declaratory and injunctive relief, unanimously affirmed, without costs.

Plaintiffs failed to establish they qualified as third-party beneficiaries of the ground lease by showing the lease was intended for their benefit (*see State of California Pub. Empls.' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]). Accordingly, they lacked standing to challenge the amendment to the ground lease deleting the requirement that the building was to be used only for residential purposes for persons

and families of low or moderate income (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783 [2006]). Even if standing were found, plaintiffs' challenge is unavailing because they could not point to language mandating that publicly assisted housing be provided for the entire 75-year term of the ground lease (*see Concerned Cooper Gramercy Tenants' Assn. v New York City Educ. Constr. Fund*, 13 AD3d 61 [2004]).

The alleged harassment, reduced maintenance and evictions were not caused by the amendment to the ground lease. Those allegations present individual issues of fact to be addressed in Housing Court.

The article 78 challenge to the decision of the Educational Construction Fund (ECF) to amend the ground lease without undertaking an environmental review, in violation of the New York State Environmental Quality Review Act (SEQRA), was time-barred. The notice that commenced the running of the statute of limitations was provided at the June 16, 2006 public hearing, where ECF adopted a resolution that the developer was no longer required to operate its housing under the affordable housing guidelines for the remainder of the lease term, indicating that ECF's decision-making process was complete and that ECF had

committed itself to a definite course of future decisions (*see Matter of Young v Board of Trustees of Vil. of Blasdell*, 89 NY2d 846, 848 [1996]; *Matter of Sanitation Garage Brooklyn Dists. 3 & 3A*, 32 AD3d 1031 [2006], *lv denied* 7 NY3d 921 [2006]; *Matter of Concerned Port Residents Comm. v Incorporated Vil. of Sands Point*, 291 AD2d 494 [2002]). In any event, ECF's decision to deem the lease amendment a "Type II" action, not requiring any environmental review under SEQRA, was not arbitrary or capricious or in derogation of SEQRA regulations.

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

ENTERED: JUNE 22, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3098 Pueng Fung,
Plaintiff-Respondent,

Index 100468/04
591045/04
591054/06

-against-

20 West 37th Street Owners, LLC, et al.,
Defendants,

Centennial Elevator Industries, Inc.,
Defendant-Respondent,

Winoker Realty Company, Inc.,
Defendant-Appellant.

[And Other Actions]

Pillinger Miller Tarallo, LLP, Elmsford (Jeffrey D. Schulman of counsel), for appellant.

Law Offices of Michael J. Asta, New York (Eliot S. Bickoff of counsel), for Pueng Fung, respondent.

Litchfield Cavo LLP, New York (Joseph E. Boury for counsel), for Centennial Elevator Industries, Inc., respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered November 13, 2009, which, insofar as appealed from, denied defendant Winoker Realty Company, Inc.'s motion for summary judgment dismissing plaintiff's complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against Winoker. The Clerk is directed to enter judgment accordingly.

Since Winoker's first motion for summary judgment was directed to co-defendant 20 West 37th Street Owners, LLC, the

owner of the building, for defense and indemnification, its second motion for summary judgment was the first one directed to plaintiff's complaint, and, as such, was not an impermissible multiple motion (*see Olszewski v Park Terrace Gardens, Inc.*, 18 AD3d 349 [2005]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:21, at 30).

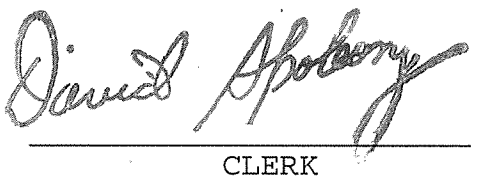
Addressing the merits, plaintiff alleges that on February 24, 2003, after he used the key to open one of the service elevators in the building where he worked, he stepped into the elevator shaft and fell 15 feet, landing in the elevator pit. He alleges that the safety lock, known as the "parking device," which keeps the doors closed when the elevator car is not at the floor, failed to function, causing his injuries.

Assuming defendant Winoker, the managing agent, had exclusive custody and control of the subject premises, a showing that defendant had notice of the alleged malfunction would still be necessary (*see Levine v City of New York*, 67 AD3d 510 [2009]). Winoker met its burden of showing that it neither created nor had actual or constructive notice of the alleged defect in the door's parking device, and plaintiff failed to raise an issue of fact in opposition (*see Narvaez v New York City Hous. Auth.*, 62 AD3d 419 [2009]; *lv denied* 13 NY3d 703 [2009]; *Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]).

Contractual indemnification against Centennial is not warranted, because the contract does not provide for indemnity. Moreover, since no finding of negligence against Centennial has yet been made (*cf. Haynes v Estate of Sol Goldman*, 62 AD3d 519, 521 [2009]), Winoker is also not entitled to summary judgment on its claim for common-law indemnification against Centennial, as such a finding would be premature at this time (*see e.g. Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [2006], *lv dismissed* 7 NY3d 864 [2006]).

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

ENTERED: JUNE 22, 2010



CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3099 In the Matter of the Account of Gertrude Ellen Craney Germans, as Executrix of the Estate of Wouter F. Germans, Deceased. Index 4361/98

Gertrude Ellen Craney Germans, Appellant.

Wouter F. Germans, Jr., Objectant-Respondent.

Seeger & Seeger, White Plains (William E. Seeger of counsel), for appellant.

Morris & McVeigh LLP, New York (Edward A. Reilly of counsel), for respondent.

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about April 15, 2009, which, to the extent appealed from, denied petitioner executrix's motion for summary judgment dismissing certain objections to her account of the estate, and granted the objectant summary judgment on objections 1(a), 1(c), 3(b), 4(a), 5(a), 8(a) and 8(c), unanimously affirmed, without costs.

Contrary to the executrix's argument, the negotiations between herself and the objectant in 2001 and 2002, as reflected in written correspondence between them, did not give rise to a binding agreement regarding the treatment of certain assets for estate accounting purposes. The tenor of the letters, and

particularly of those of counsel for the objectant, established that the compromises discussed would be contingent upon an agreement as to a final accounting, with all rights reserved in the meanwhile, rather than demonstrating "mutual assent" to resolve the treatment of specified assets separately from the remainder of the estate accounting issues (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). Thus, there was no binding stipulation of settlement between the parties.

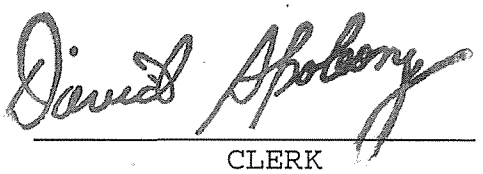
As to the specific objections, while the executrix included the 1987 Volvo as an asset of the estate and charged the cost of repairs to the estate, she admitted at deposition that she made personal use of the vehicle. Thus, there was no clear and definite waiver of her right to the Volvo under EPTL 5-3.1 (*see Matter of Dito*, 218 AD2d 737 [1995]). The documents transferring the deed to the Amsterdam apartment and a formal opinion of Dutch counsel submitted by the objectant indicate that the executrix had no record interest in the apartment, and she submitted no evidence to raise an issue of fact as to her ownership interest. The shares of the Enterprise Group of Funds of MONY Equities Corporation were solely in the decedent's name and therefore belonged to the estate. Moreover, the executrix's distribution of the shares to herself for purposes of educating the decedent's

and her son was improper, since the purported agreement that she claims provided for this distribution was not, as discussed, a binding agreement. Interest was properly imposed on the distribution that the executrix received from F&W Management Company, a business asset that was part of the estate, while failing to make an equal distribution to the objectant (*see Matter of Ricca*, 55 AD3d 838, 840 [2008]).

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

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

ENTERED: JUNE 22, 2010



CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3100 In re IDS Property Casualty Insurance Co., Petitioner-Appellant, -against- Charles Wynter, Respondent-Respondent. Index 104916/09

DeCicco, Gibbons & McNamara, P.C., New York (Phillip A. DeCicco and Daniel E. DeCicco of counsel), for appellant.

Robert P. Sharron & Associates, P.C., New York (Robert P. Sharron of counsel), for respondent.

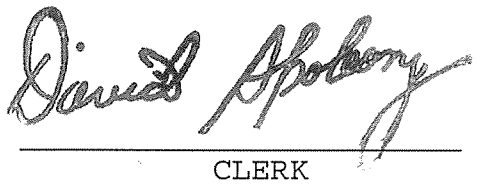
Order, Supreme Court, New York County (Leslie S. Lowenstein, Special Referee), entered on or about February 26, 2010, which denied petitioner's application to stay arbitration of respondent's uninsured motorist claim, unanimously affirmed, without costs.

The record establishes that, at the time of the accident respondent was a passenger in an uninsured motor vehicle. He and the driver of the vehicle, a fellow employee, were on their way to a store where the driver intended to carry out a personal errand unrelated to work. Since respondent and the driver were not acting within the scope of their employment, workers'

compensation, if it is a remedy, is not respondent's exclusive remedy (*see* Workers' Compensation Law § 29[6]; *Macchirole v Giamboi*, 97 NY2d 147, 150 [2001]).

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

ENTERED: JUNE 22, 2010



CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3102 The People of the State of New York, Ind. 10359/87
Respondent,

-against-

Anthony Rampino,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

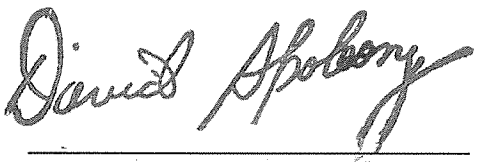
Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about May 11, 2009, which denied defendant's motion to be resentenced pursuant to the Drug Law Reform Act of 2004 (L 2004, ch 738), unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the application. In its decision, the court relied on the applicable standard, and we reject defendant's arguments to the contrary. The court properly considered appropriate criteria, including the amount of drugs involved in this case, defendant's history of drug dealing, his extensive involvement with organized crime, and his poor

institutional record (*see e.g. People v Jones*, 50 AD3d 282, [2008]; *People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]), and it did not base its decision on materially inaccurate or unreliable information. Defendant's age and medical condition do not warrant a different result.

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

ENTERED: JUNE 22, 2010



CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3106N Jaime Perez, an infant by his Mother and Natural Guardian Nancy Torres et al., Plaintiffs-Appellants, -against- The City of New York, Defendant-Respondent. Index 13084/04

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 20, 2009, which, in an action for personal injuries against the City of New York, denied plaintiffs' motion to restore the action to active status and for leave to amend the summons and complaint so as to substitute the New York City Department of Education as the only defendant, unanimously affirmed, without costs.

The motion court correctly held that it was without jurisdiction to entertain the motion when the action had already been dismissed by order of this Court precisely because plaintiff sued the City instead of the Department (41 AD3d 378 [2007], *lv denied* 10 NY3d 708 [2008]). In any event, we reject plaintiff's present argument that the circumstances, including the naming of

the Department as well the City in the notice of claim, show that the naming of only the City in the summons was a nonprejudicial misnomer that is correctable under CPLR 305(c).

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

ENTERED: JUNE 22, 2010

CLERK

Gonzales, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3107N-
3107NA-
3107NB-
3107NC Janulyn McKanic, Index 602360/05
Plaintiff-Appellant,

-against-

Amigos del Museo del Barrio,
Defendant-Respondent.

Janulyn McKanic, appellant pro se.

Meier Franzino & Scher, LLP, New York (Davida S. Scher of counsel), for respondent.

Order, Supreme Court, New York County (Martin Schulman, J.), entered December 4, 2008, which dismissed the complaint upon plaintiff's failure to comply with a prior order of the same court and Justice, entered October 7, 2008, directing her to execute authorizations for the release of certain federal tax returns within 20 days of the date of the order, unanimously affirmed, with costs. Order, same court and Justice, entered October 7, 2008, which granted defendant's motion to compel plaintiff to provide said authorizations, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered November 24, 2008, which declined to sign an order to show cause, unanimously dismissed, without costs, as taken from a nonappealable paper. Order, same court and Justice, entered

December 8, 2008, which denied as moot plaintiff's motion for a protective order, unanimously affirmed, without costs.

The court properly dismissed the complaint after plaintiff failed to comply with its order compelling her to execute authorizations for the IRS to permit defendant to review her tax returns. Plaintiff sought, inter alia, lost wages in this employment discrimination action, and agreed to execute the necessary authorizations because defendant was unable to obtain her salary history either from her or from her purported former employers. However, she failed to execute the authorizations. The court properly granted the ensuing motion to compel since defendant established that the information was indispensable to the litigation and unavailable from other sources (*see Nanbar Realty Corp. v Pater Realty Co.*, 242 AD2d 208, 209-210 [1997]). Defendant also demonstrated that it had no interest in plaintiff's tax returns other than to verify her salary history and that it would limit its examination of the returns to relevant material (*see id.*).

Furthermore, the order compelling plaintiff to execute the authorizations expressly stated that if it were not complied with in 20 days, the complaint would be dismissed, and thus became absolute when plaintiff failed to comply within the stated time period (*see Santiago v City of New York*, 71 AD3d 468 [2010]).

Plaintiff's willful, deliberate, contemptuous and bad faith failure to comply with her discovery obligations would have justified dismissal of the complaint in any event (*see Kihl v Pfeffer*, 94 NY2d 118 [1999]; *Jones v Green*, 34 AD3d 260 [2006]).

In light of the foregoing, the court properly denied as moot plaintiff's motion for a protective order.

The denial of an order declining to sign an order to show cause is not appealable (*see M&J Trimming v Kew Mgt. Corp.*, 254 AD2d 21 [1998]).

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

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

ENTERED: JUNE 22, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2932N
M-1804 Samaad Bishop, Index 252102/08
Petitioner-Appellant,

-against-

Stevenson Commons Assocs., L.P., et al.,
Respondents-Respondents,

Danny M. Weinheim, et al.,
Respondents.

Samaad Bishop, appellant pro se.

Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for Stevenson Commons Associates, L.P. and Grenadier Realty Corp., respondents.

Agulnick & Gogel, LLC, New York (William A. Gogel of counsel), for Midtown Moving & Storage, Inc., respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered June 11, 2009, which, inter alia, denied petitioner's application for pre-action disclosure pursuant to CPLR 3102(c), unanimously modified, on the law and in the exercise of discretion, to direct respondents to preserve any and all surveillance videotapes, digital tapes, electronic images, and computer files of the removal, moving and storage of petitioner's property on November 26, 2008, between the hours of 7 a.m. and 7 p.m., and otherwise affirmed, without costs.

When petitioner was evicted from his apartment, his furniture and belongings were seized and moved from his former

residence to respondent Midtown's storage facility. Petitioner claims that when he retrieved his property from storage about a month after the eviction, a number of items were damaged and broken, and three items were missing. In his application for pre-action discovery, petitioner sought, inter alia, the names and addresses of "all individuals, servants, employees, managers and subcontractors who participated, supervised, drafted inventory sheets, and moved, transferred and stored [p]etitioner's personal property and furnishings."

Pre-action discovery "is not permissible as a fishing expedition to ascertain whether a cause of action exists" (*Liberty Imports v Bourguet*, 146 AD2d 535, 536 [1989]) and is only available where a petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong (*id.* at 536). Generally, the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court (*Matter of Peters v Sotheby's Inc.*, 34 AD3d 29 [2006], *lv denied* 8 NY3d 809 [2007]).

Here, no reason exists to alter the court's discretionary determination to deny discovery of the names and addresses. The lower court concluded that this information was not required in order for petitioner to frame a complaint. Petitioner argues

that he needs the names of the individual employees in the event they committed the tort of conversion. However, petitioner cannot use pre-action discovery to determine whether he might have additional causes of action or alternative theories of liability arising out of this incident (*see Matter of Uddin v New York City Tr. Auth.*, 27 AD3d 265 [2006]). Petitioner's conversion claim rests largely on speculation that the employees might have taken his property. Moreover, petitioner does not explain why he cannot commence the action against Midtown and determine, in the course of discovery, whether any intentional torts might have been committed by the individual employees.

As this Court noted in *Belco Petroleum Corp. v AIG Oil RIG, Inc.* (179 AD2d 516, 517 [1992]), when considering a pre-action discovery request, "a sensitive balance must be struck between the intrusiveness of the discovery device as against the merits, or lack thereof, of the claim." Here, the court below struck the appropriate balance in denying discovery of the names and addresses. The court, however, should have ordered preservation of any and all videotapes relevant to the removal, moving and storage of petitioner's property on the day of the move (*see Western Inv. LLC v Georgeson Shareholder Sec. Corp.*, 43 AD3d 333 [2007]).

M-1084 - Bishop v Stevenson Commons Assocs., L.P., et al.

Motion insofar as it seeks to enlarge record granted and insofar as it seeks sanctions denied.

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3108 The People of the State of New York, Ind. 5467/07
Respondent,

-against-

Kelly Bucala,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cahill Gordon & Reindel LLP, New York (Philip V. Tisne of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at dismissal motion; Gregory Carro, J. at jury trial and sentencing), rendered July 17, 2007, convicting defendant of grand larceny in the second degree and criminal possession of stolen property in the third degree, and sentencing her to a term of 5 years' probation with restitution in the amount of $30,000, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The only rational explanation for the long chain of circumstantial evidence is that defendant intentionally participated in the theft (*see e.g. People v Bierenbaum*, 301 AD2d 119, 131-140 [2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]).

The challenged portion of the People's summation drew reasonable inferences from the evidence and was responsive to the defense summation (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]).

Defendant was not deprived of her right to testify before the grand jury. The record supports the motion court's finding that the People accorded defendant a reasonable opportunity to testify, and that her failure to do so resulted from her attorney's lack of cooperation in scheduling an appearance (*see People v Patterson*, 189 AD2d 733 [1993], *lv denied* 81 NY2d 975 [1993]).

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3109 Ruben Collazo, et al., Index 305183/09
Plaintiffs-Respondents,

-against-

MTA-New York City Transit, et al.,
Defendants,

U-Haul Co. of Arizona,
Defendant-Appellant.

Bryan Cave LLP, New York (Daniel P. Waxman of counsel), for appellant.

Helen F. Dalton & Associates P.C., Forest Hills (Natia Shalolashvili of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 12, 2009, which, in an action for personal injuries sustained when a bus in which plaintiffs were passengers was involved in a collision with a truck rented by defendant Cancel from defendant U-Haul Co. of Arizona (U-Haul), denied U-Haul's motion to dismiss the complaint, unanimously affirmed, without costs.

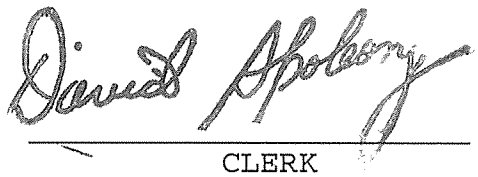
The motion was properly denied because while the Federal Transportation Equity Act of 2005 (49 USC § 30106) (Graves Amendment) bars negligence claims against car-rental companies based solely on a theory of vicarious liability (*see Hernandez v Sanchez*, 40 AD3d 446, 447 [2007]), here, the complaint alleges, inter alia, negligent maintenance of U-Haul's truck. Such claim

is not barred by the Graves Amendment since the statute does not absolve leasing companies of their own negligence (*see Novovic v Greyhound Lines, Inc.*, 2008 WL 5000228, *3, 2008 US Dist LEXIS 94176, *7-9 [ED NY 2008]).

We have considered U-Haul's remaining arguments and find them unavailing.

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

ENTERED: JUNE 22, 2010



CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3110-
3110A-
3110B Highbridge Advisory Council Index 7460/06
Family Services, Inc.,
Plaintiff-Respondent,

-against-

Childcraft Education Corp., et al.,
Defendants-Appellants.

Patricia Bellamy, et al.,
Defendants.

- - - -

Roura & Melamed,
Non-Party Respondent.

Orrick, Herrington & Sutcliffe LLP, New York (Richard A. Jacobsen of counsel), for Childcraft Education Corp., School Specialty, Inc, and Sportime, L.L.C., appellants.

Stillman, Friedman & Shechtman, P.C., New York (Michael J. Grudberg of counsel), for Mitch Bonder, appellant.

The Cochran Firm, New York (Rudyard F. Whyte of counsel), for respondent.

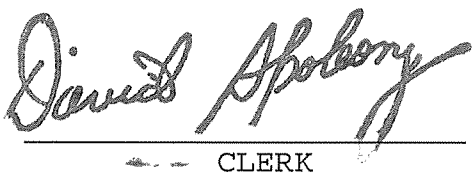
Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered December 29, 2009, which denied the motion of defendants Childcraft Education, School Specialty and Sportime (collectively, Childcraft) for summary judgment dismissing the complaint against them and as to their counterclaims, and order, same court and Justice, entered November 4, 2009, which denied defendant Bonder's motion for summary judgment dismissing the complaint against him and for sanctions, unanimously affirmed,

without costs. Appeal from pre-settled order, same court and Justice, entered October 28, 2009, unanimously dismissed, without costs, as premature.

In this claim for rescission of contract, there were issues of fact as to allegedly fraudulent conduct with respect to the backdating of purchase orders in connection with plaintiff's purchase of certain educational materials from defendants (*see Saint James' Episcopal Church v F.O.C.U.S. Found.*, 47 AD3d 1058 [2008]). In light of the disposition concerning the complaint, the Childcraft counterclaims are so interwoven that independent disposition is not appropriate at this time.

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

ENTERED: JUNE 22, 2010



CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3111 In re Carol Anne Marie L., etc.,
And Another,

Dependent Children Under The Age
of Eighteen Years, etc.,

Melissa L.,
Respondent-Appellant.

- - - -

3112 In re Matthew Raymond L., etc.,

A Dependent Child Under The Age
of Eighteen Years, etc.,

Geraldo P.,
Respondent-Appellant,

Saint Dominic's Home, et al.,
Petitioners-Respondents.

Steven N. Feinman, White Plains, for Melissa L., appellant.

Dora M. Lassinger, East Rockaway, for Geraldo P., appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for Saint Dominic's Home, respondent.

Michael S. Bromberg, Sag Harbor, Law Guardian.

Orders, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about June 1, 2009, which, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children, and respondent father's parental rights to the child Matthew L., and committed the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for

the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent father permanently neglected Matthew was supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]); respondent is not the father of the child Carol L. The record demonstrates that the agency made diligent efforts to encourage and strengthen the parental relationship including providing the father with referrals to programs for drug rehabilitation and parenting skills and scheduling regular visitation. Despite these efforts, the father did not complete a drug treatment program and failed to remain drug free (*see Matter of Tiffany R.*, 7 AD3d 297 [2004]). He also missed approximately one quarter of his scheduled visits with Matthew (*see Matter of Angel P.*, 44 AD3d 448 [2007]). Although the father insists that he has taken steps to address his substance abuse problem, such efforts, by themselves, are not sufficient to defeat a finding of permanent neglect *(see Matter of Shane Anthony P.,* 307 AD2d 297 [2003], *lv denied* 100 NY2d 513 [2003]).

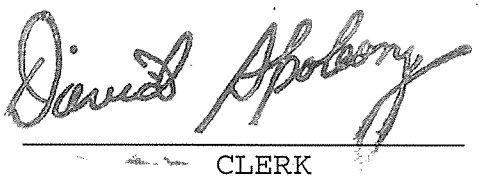
The finding that the mother permanently neglected the children was likewise supported by clear and convincing evidence. The agency referred her to drug rehabilitation, anger management and parenting skills programs, all of which she failed to complete. Nor did she visit the children on a sustained and

regular basis.

A preponderance of the evidence supports the determination that the termination of respondents' parental rights to facilitate the adoptive process was in the best interests of the children. The children have lived with their foster mother since their placement and have developed a loving relationship with her; she has tended to their special needs and wants to adopt them. The circumstances presented do not warrant a suspended judgment *(see Matter of Maryline A.*, 22 AD3d 227 [2005]).

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

ENTERED: JUNE 22, 2010



CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3113-
3114 Tristan Smith, etc., et al., Index 6172/06
Plaintiffs-Appellants,

-against-

The New York City Housing Authority,
Defendant-Respondent.

Finz & Finz, P.C., Mineola (Jay L. Feigenbaum of counsel), for appellants.

Landman Corsi Ballaine & Ford P.C., New York (Christopher G. Fretel of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered May 15, 2009, which, insofar as appealed from as limited by the briefs, in this action alleging injuries resulting from exposure to lead paint, granted defendant's motion for summary judgment dismissing the complaint, and order, same court and Justice, entered on or about September 14, 2009, which, insofar as appealable, denied plaintiffs' motion to renew, unanimously affirmed, without costs.

Plaintiffs resided in the subject apartment shortly after the infant plaintiff's birth in July 2003 and until September 2003. At that point, plaintiffs moved out of the country, but returned to the apartment in October 2004. Approximately one and a half months later, the infant plaintiff was discovered to have a blood lead level of 17 ug/dl. The authorized tenant of the

apartment was the infant plaintiff's maternal aunt, who had been living there since 1998 with her children, the youngest of which turned seven in March 2004.

The motion court properly granted defendant's motion for summary judgment dismissing the complaint. Regarding the first period of residency in 2003, defendant made a prima facie showing that the infant's high blood lead level was not caused by lead exposure during that period. The affidavit of the pediatric neurologist submitted by defendant, stated that in light of the fact that during the first period of residency the infant plaintiff was not yet able to crawl, it can be concluded within a reasonable degree of medical certainty that the infant plaintiff's lead level in November 2004 was not the result of exposure to lead-based paint in the apartment. The neurologist also opined that certain findings regarding the infant plaintiff's physical condition were the result of a congenital syndrome.

Plaintiffs' submission of the affidavit of an expert in the field of environmental geochemistry, was insufficient to raise a triable issue of fact as to causation. The expert's opinion that airborne lead dust caused the infant's high blood lead level 14 months after the first period of residency was speculative and

"devoid of analysis or reference to scientific data" (*Abalola v Flower Hosp.*, 44 AD3d 522, 522 [2007]). The expert's affidavit was also insufficient to rebut the opinion of the pediatric neurologist that certain findings as to the infant were congenital in nature (*see Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 50-51 [2008]).

To the extent that causation could be shown in the second period of residency in 2004, plaintiffs failed to rebut defendant's prima facie showing that defendant did not have notice of a child under seven residing at the apartment during that period. The record shows that the aunt and her children were the apartment's lawful occupants, and that her yearly affidavits of income and window guard surveys failed to identify plaintiffs as residing within the apartment. Plaintiffs failed to point to any evidence showing that defendant had notice of a child under seven living at the apartment from October 2004 to November 2004.

To the extent plaintiffs challenge the court's denial of their motion to renew, the record shows that such denial was appropriate. The issue of causation was raised by defendant on the underlying summary judgment motion, and plaintiffs failed to otherwise demonstrate a reasonable justification for the failure to present new evidence, including the expert affidavit of a

neuropsychologist, at the time of the original motion (*see* CPLR 2221[e]).

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

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3115 In re Bernard Cylich, et al., Index 260294/09
Petitioners,

-against-

Riverbay Corporation,
Respondent.

Wilson Jacobson, P.C., White Plains (Leroy Wilson, Jr. of counsel), for petitioners.

Smith Buss & Jacobs, LLP, Yonkers (Jeffrey D. Buss of counsel), for respondent.

Proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Norma Ruiz, J.], entered March 2, 2010), challenging respondent's determination that petitioners were not qualified candidates for election to respondent's board of directors, unanimously dismissed, without costs, on the ground that two persons elected to the board of directors as a result of petitioners' disqualification are necessary parties without whose presence the action should not proceed.

Regardless of whether the proceeding was improperly transferred pursuant to article 78, the Court retains jurisdiction in the interest of judicial economy (*see e.g. Matter of Whyte v Horn*, 38 AD3d 362 [2007]).

Petitioners are resident shareholders of respondent, a

residential cooperative corporation, which houses about 55,000 people. After being disqualified as candidates in the 2009 election for five members of the board of directors, they commenced the instant proceeding seeking, among other things, an order declaring the swearing in of two other individuals to be null and void, prohibiting those individuals from taking action as members of the board, and declaring that petitioners have the right to be seated as directors.

Petitioners, however, failed to notify the five people who were elected to the Board, as required by Business Corporation Law § 619, including the two individuals who were elected as a result of petitioners' disqualification. Since the interests of those two directors may be inequitably affected by a judgment in favor of petitioners, they are necessary parties to this proceeding (*see Matter of Wood v Castine*, 66 AD3d 1326, 1328 [2009]; CPLR 1001[a]), and those individuals can no longer be joined, absent their consent, because the statute of limitations has run (*see* CPLR 217). Furthermore, joinder cannot be excused since, although petitioners have no other effective remedy if the proceeding is dismissed, the prejudice that could accrue to the individuals not joined is substantial, and petitioners had ample opportunity to avoid this result by taking steps to notify and join those individuals after respondent served its answer

pleading the failure to join necessary parties as a defense requiring dismissal (*see Matter of Lodge v D'Aliso,* 2 AD3d 525, 526 [2003], *lv denied* 2 NY3d 702 [2004]). Nor does it appear that any other effective judgment could be rendered in the absence of the necessary parties, or that a protective provision could avoid prejudice to them (CPLR 1001[b]). Accordingly, dismissal is required due to the failure to join necessary parties (*see Matter of Uranian Phalanstery 1st N.Y. Gnostic Lyceum Temple,* 155 AD2d 302, 303 [1989]; *Christ v Lake Erie Distribs., Inc.,* 51 Misc 2d 811, 814-816 [1966], *mod on other grounds* 28 AD2d 817 [1967], *affd* 28 AD2d 825 [1967]).

Were we to address the merits of the petition, we would find that petitioners have not made a clear showing of impropriety that would warrant interference by the court in the internal affairs of the corporation (*see Nyitray v New York Athletic Club of City of N.Y.,* 195 AD2d 291 [1993]). The board properly appointed an Election Committee comprised of resident shareholders and one or more directors to supervise the annual election by shareholders, in compliance with the by-laws that have been in effect since 1980 (*see* Business Corporation Law § 712; Ennico, West's McKinney's Forms Business Corporation Law § 5:40, at 549-551). The board's additional determination to accept the Election Committee's recommendation that petitioner

Cylich be disqualified for having engaged in improper electioneering was supported by substantial evidence in the record and was reached in accordance with the corporation's by-laws and rules.

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3116 The People of the State of New York, Ind. 449C/05
Respondent,

-against-

Robert L. Merritt,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered February 4, 2008, 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.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges in question were not pretextual, a credibility determination that is entitled to great

deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3119 Agnes Hurley, Index 108299/06
Plaintiff-Respondent,

-against-

Related Management Company, et al.,
Defendants-Appellants.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for Related Management Company and The Battery Park City Authority, appellants.

Richard W. Babinecz, New York (Helman R. Brook of counsel), for Consolidated Edison Company of New York, Inc., appellant.

Buckheit & Whelan, P.C., Suffern (Frank A. Whelan of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 2, 2009, which denied Related Management Company and Battery Park City Authority's motion and Consolidated Edison's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, the motion granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendants Related Management Company and Battery Park City Authority dismissing the complaint.

At issue on this appeal is whether sidewalk metal grating is part of the "sidewalk" for purposes of Administrative Code of the City of New York § 7-210, which requires owners of real property to maintain abutting sidewalks in a reasonably safe condition.

Although sidewalk grates are generally intended for the use of pedestrians, "sections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]).

Plaintiff's testimony establishes that she fell as a result of an alleged slippery condition of a sidewalk grate and it is undisputed that defendant Consolidated Edison Company of New York ("Con Edison") owns the grate and vault it covers.

New York City Department of Transportation Highway Rule 34 (RCNY § 2-07), which governs the maintenance and repair of sidewalk grates, places maintenance and repair responsibilities on the owners of covers or gratings (*see Cruz v New York City Tr. Auth.*, 19 AD3d 130 [2005]). Indeed, 34 RCNY § 2-07(b)(1) states that "[t]he owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware" (*id.* at 130-131). Further, 34 RCNY § 2-07(b)(2) requires that "[t]he owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating."

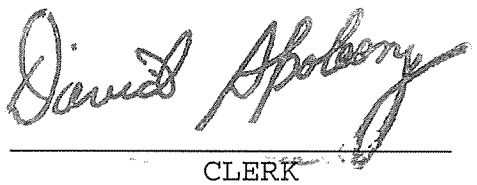
Therefore, we find that § 7-210 of the Administrative Code of the City of New York does not impose liability upon a property owner for failure to maintain a sidewalk grate in a reasonably safe condition. Defendants Related Management and Battery Park City Authority have "established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not have exclusive access to, or the ability to exercise control over, the grate on which . . . plaintiff allegedly [slipped] and fell" (*Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 560 [2009]).

However, Con Edison has not established its entitlement to summary judgment. There is no evidence that the inspection conducted by a Con Edison employee included checking the subject grate to determine whether it became slippery upon becoming wet despite the utility being notified prior to plaintiff's alleged accident that there was a slippery condition. We find that this leaves a question of fact as to whether the inspection conducted by Con Edison was sufficient to satisfy its duty of care to maintain and repair sidewalk vault covers and grates.

We have reviewed the parties' remaining arguments, and find them without merit.

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

ENTERED: JUNE 22, 2010



CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3120 Sinclair & Company LLC, Index 602684/09
Plaintiff-Respondent,

-against-

Pursuit Investment Management LLC,
Defendant-Appellant.

Liddle & Robinson, LLP, New York (Ethan A. Brecher of counsel), for appellant.

Dorsey & Whitney LLP, New York (Christopher G. Karagheuzoff of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered January 11, 2010, which denied defendant's motion to stay the action and compel arbitration, unanimously affirmed, with costs.

Plaintiff, a registered broker/dealer and member of the Financial Industry Regulatory Authority (FINRA), describes itself as "a referral agent for investments and or loans to its clients." Plaintiff alleges that it entered into a "Referral Agreement" with defendant, an investment fund manager, pursuant to which plaintiff introduced prospective investors to defendant, and that defendant breached the agreement by failing to make required payments for "Referred Investments." Defendant seeks to compel arbitration, claiming to be plaintiff's "customer" within the meaning of FINRA Rule 12200, which requires arbitration of

disputes between FINRA members and its customers arising in connection with the members' business activities, unless, as provided in FINRA Rule 12100(I), the customer is a broker or dealer, which defendant is not. We reject the "argu[ment] that by negative inference [the FINRA] definition means a "'customer'" is everyone who is not a broker or dealer" (*Fleet Boston Robertson Stephens, Inc. v Innovex, Inc.*, 264 F3d 770, 772 [8th Cir 2001]), qualify the word "customer" to mean "one involved in a business relationship with [a FINRA] member that is related directly to securities investment or brokerage services" (*id.*), and find that plaintiff's customer referral services were not sufficiently investment-related to make defendant its customer for purposes of the FINRA rule requiring arbitration (*cf. id.* [company receiving financial advice and assistance on a merger not a customer]; *Financial Network Inv. Corp. v Becker*, 305 AD2d 187, 188-189 [1st Dept 2003] [while Rule does not require sale of a traditional security, it does require a business relationship that relates directly to investment services]). In view of the foregoing, we need not address plaintiff's other arguments.

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3121-
3121A Ramon Brayan, an Infant by His Mother and Natural Guardian Orquedia del Carmen Brito, et al., Plaintiffs-Respondents,

-against-

520 West 158 Street Housing Development Fund Corporations, Defendant-Appellant.

Index 117234/05

José Luis Torres, White Plains, for appellant.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 2, 2009, which denied defendant's motion to vacate a default judgment, unanimously affirmed, without costs. Order, same court and Justice, entered August 6, 2009, which, insofar as appealed from as limited by the briefs, reinstated a previously vacated default judgment and award of damages, unanimously modified, on the law, to vacate the damages award and remand for a further inquest on damages, and otherwise affirmed, without costs.

While defendant demonstrated a potentially meritorious defense to plaintiff's action, it failed to show a reasonable excuse for its failure to answer the complaint (*see Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [2007]). The

record makes clear that defendant received the summons and complaint that the Secretary of State mailed to the address on file; the signature of the corporation's president appears on the postal return receipt (*see Crespo v Kynda Cab Corp.*, 299 AD2d 295 [2002]).

As the record does not demonstrate that defendant received notice of the inquest, defendant must be given "a full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages" (*Ruzal v Mohammad*, 283 AD2d 318, 319 [2001] [internal quotation marks and citation omitted]).

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3125 Joaquin Martorel, Index 13220/05
Plaintiff-Respondent,

-against-

Tower Gardens, Inc., et al.,
Defendants,

Wilkinson Hi-Rise, LLC,
Defendant-Appellant.

Bivona & Cohen, P.C., New York (Ian H. Kaufman of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 24, 2009, which, insofar as appealed from as limited by the briefs, denied defendant Wilkinson High-Rise LLC's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured when his arm became entangled in defendant Tower Gardens' uncovered trash compactor. Before the January 2005 accident, defendant IDC Systems, followed by Wilkinson beginning in 2002, serviced the compactor on an "as called" basis. Wilkinson failed to establish prima facie that neither it nor IDC created or exacerbated the dangerous condition

of the missing ram cover (*see Cumbo v Dormitory Auth. of State of N.Y.*, 71 AD3d 1513, 1514-1515 [2010]; *Mastroddi v WDG Dutchess Assoc. Ltd. Partnership*, 52 AD3d 341 [2008]; *Prenderville v International Service Systems*, 10 AD3d 334, 337 [2004]). Nor did Wilkinson establish prima facie that there was no consolidation or merger of itself and IDC or that Wilkinson was not a mere continuation of IDC (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]; *Kretzmer v Fireside Prods. Corp.*, 24 AD3d 158 [2005]). We disregard the legal opinions offered by Wilkinson's expert engineer as to plaintiff's lack of detrimental reliance, the legal relationship between IDC and Wilkinson, and whether IDC or Wilkinson created or exacerbated a dangerous condition (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 68-69 [2002]). In any event, the motion court correctly found that plaintiff's offering of, inter alia, an asset purchase agreement between IDC's parent corporation and Wilkinson and an affidavit by his own expert engineer raised issues of fact as to both the "successor-in-interest" issue and Wilkinson's negligence in servicing the compactor.

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

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3126N Aerolineas Galapagos, S.A., etc., Index 101035/08
Plaintiff-Appellant,

-against-

Sundowner Alexandria, LLC, etc.,
Defendant-Respondent,

Ryan International, Inc., etc., et al.,
Defendants.

Squire, Sanders & Dempsey LLP, New York (Steven Skulnik of counsel) and Squire, Sanders & Dempsey, LLP, Miami, Fl (Pedro J. Martinez-Fraga of the Bar of the State of Florida, admitted pro hac vice, of counsel), for appellant.

Todd & Levi, LLP, New York (Jill Levi of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 12, 2010, which denied plaintiff's motion to amend its complaint to, inter alia, reassert previously dismissed causes of action for fraudulent inducement, negligent misrepresentation and tortious interference with contract and to reassert claims against previously dismissed parties, unanimously affirmed, with costs.

The proposed amendment was palpably insufficient as a matter of law (*see Thompson v Cooper*, 24 AD3d 203, 205 [2005]). The claim for fraudulent inducement lacked merit, as the purportedly new evidence did not support the claim that, at the time it entered into the subject agreements, Sundowner did not intend to

comply with its obligations, and all of the tort claims were merely duplicative, seeking the identical damages as the breach of contract claim (*see Town House Stock LLC v Coby Hous. Corp.*, 36 AD3d 509 [2007]). In addition, the parties to the agreements dealt at arm's length, so the close relationship required to support the negligent misrepresentation claim was lacking (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Bostany v Trump Org. LLC*, __ AD3d __, 2010 NY Slip Op 4029 [2010]). Since the proposed claims against Sundowner were insufficient, they were also insufficient as to AerCap and Ryan, rendering it unnecessary to determine whether they and Sundowner had either an agency or alter ego relationship; we note, however, that the alter ego claim was unsupported (*see Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC*, 71 AD3d 537 [2010]). It is also unnecessary to determine whether the claims were barred by the merger clauses.

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

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3127N Miriam Martinez, Index 7104/01
Plaintiff-Appellant,

-against-

Abbie Fields, M.D., et al.,
Defendants-Respondents.

Nathan L. Dembin & Assoc. PC, New York (Kenneth J. Gorman of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (Patrick J. Brennan of counsel), for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered November 21, 2008, which granted defendants' motion to strike plaintiff's amended bill of particulars, unanimously affirmed, without costs.

The motion court properly struck the amended bill of particulars alleging a failure to diagnose and treat plaintiff's cervical cancer because this claim was not asserted in the complaint, which alleged a failure to diagnose and treat plaintiff's urinary and kidney disease. Although the new claim was not time barred due to the doctrine of continuous treatment (*see* CPLR 214-a; *Porubic v Oberlander*, 274 AD2d 316 [2000]), and plaintiff served her amended bill of particulars two days prior to filing the note of issue (*see* CPLR 3042[b]), an amended bill

of particulars cannot allege a theory or claim not originally asserted in the complaint (*see Behren v Warren Gorham & Lamont, Inc.*, 24 AD3d 132 [2005]).

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

ENTERED: JUNE 22, 2010

CLERK

Tom, J.P., Mazzarelli, Sweeny, Freedman, Abdus-Salaam, JJ.

3128N-
3128NA
M-2354 Benjamin L. Anderson, a shareholder of Livonia, Avon & Lakeville Railroad Corporation,
Plaintiff-Appellant,

-against-

Carl P. Belke, et al.,
Defendants-Respondents.

- - - - -

Benjamin L. Anderson, a shareholder of Livonia, Avon & Lakeville Railroad Corporation,
Plaintiff-Appellant,

-against-

Eugene H. Blabey II, et al.,
Defendants-Respondents.

Index 600126/09
602210/08

Benjamin L. Anderson, appellant pro se.

Harter Secrest & Emery LLP, Rochester (A. Paul Britton of counsel), for respondents.

Orders, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered July 27, 2009, which, in shareholder derivative actions, granted defendants' motions pursuant to CPLR 510(3) to change venue to Livingston County, unanimously affirmed, with costs.

Venue was properly changed to Livingston County, where the subject corporation is headquartered, plaintiff's claims arose, and all relevant documents are located, and where or near where

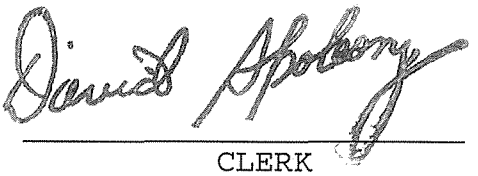
all parties, except plaintiff, reside (*see Bohlen Indus. of N. Am. v Flint Oil & Gas*, 95 AD2d 753 [1983]). Further, Livingston Supreme Court has already determined two substantially similar actions among these parties.

M-2354 Anderson v Belke, et al.

Motion to strike defendants' appendix and for other relief denied.

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

ENTERED: JUNE 22, 2010



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
James M. Catterson
Rolando T. Acosta
Leland G. DeGrasse
Sheila Abdus-Salaam, JJ.

Index 116779/06
2091

Dustin Dibble,
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Michael D. Stallman, J.), entered April 13, 2009, after a jury trial, in favor of plaintiff, in which defendant was found to be 65% liable.

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

Smiley & Smiley, LLP, New York (Andrew J. Smiley of counsel), for respondent.

CATTERSON, J.

In this personal injury action arising out of an accident on the subway tracks at the Union Square station, we examine whether expert testimony as to stopping distances is sufficient to establish negligence. The jury found the defendant liable on the basis of a mathematical formula that used a purported average reaction time as a factor in calculating whether the defendant's train operator could have stopped the train to avoid running over an intoxicated 22-year old.

The issue before this Court, therefore, is whether such a unit of time-distance measurement may be the sole basis for establishing what amounts to a standard of care in these types of cases. We find that a reaction time that is seconds or fractions of a second longer than the purported average cannot, as a matter of law, constitute the difference between reasonable and unreasonable conduct, or proof of negligence.

The plaintiff, Dustin Dibble commenced this action after he was hit by a subway train at the Union Square station on April 23, 2006 at about 1:30 A.M. The accident resulted in, among other things, the amputation of the lower half of his right leg. It is uncontested that he was intoxicated at the time of the accident and remembers nothing of the accident itself, only that he woke up in the hospital.

The train operator, Michael Moore, died before trial, and his deposition transcript was read into evidence. At the time of the accident, Moore had worked on the N subway line for eight years. He testified that, on the night in question, as he was coming into the Union Square station, he saw a dark object at the beginning of the station. He stated, "It looked like garbage... Maybe some material left by some of the track workers." It was dark in color and just looked like a "mass" or a "lump". The object was to the left of the rails, almost under the platform, about a foot and a half above the road bed. He testified that he was about three car lengths away at that point, and that he slowed up. He did not stop the train, and did not want to slow up too much. Then, when he was one car length away, he "saw the debris move," and he put the train into emergency.

When asked about what he was trained to do regarding debris on the roadbed, he responded that he was supposed to stop if it was something that would interfere with the train, like a tree or a piece of a fallen wall. He testified that there was a trip cock underneath each car of the train, and if it was hit by debris, the train was put into emergency, and automatically stopped. The operator could also put the train into emergency manually to stop it quickly.

In Moore's career, he had put a train into emergency two or

three times, including once so as to avoid hitting a dog. He had once stopped a train when he saw a man lying on the tracks bleeding, but had time on that occasion to stop normally, and did not put the train into emergency.

When asked if there was a reason he did not stop the train when he first saw the debris, he responded that, if he stopped whenever he saw debris on the tracks, he would have to stop the train every five minutes. He estimated that the time that elapsed between when he first saw the "mass" and when he stopped the train was about four seconds. He was not sure how far the train traveled after he stopped it. He could not tell if he had run over the object, but knew that he had stopped at a point past where he had first seen the debris.

After the train stopped, Moore called the control center to have the power turned off. He saw the plaintiff lying partially on the left running rail between the first and second cars. When asked if plaintiff was in the same location as he had been in before the train hit him, Moore responded that he definitely was not, that he was about a car length further into the station than when Moore had first observed the object he described variously as a mass, a lump or debris.

Moore was questioned at his deposition about a statement he made about three hours after the incident to a Transit Authority

motor instructor, in which he said, "I thought I saw garbage on the track. Subsequently, I saw movement between the running rails and placed the train into emergency." When asked if that statement refreshed his memory as to whether plaintiff was between the rails or to the left of the left rail, Moore responded that perhaps the instructor had not understood what he was saying. "I told him. . . that he was on the left, he was almost under the platform when I *first* saw him" (emphasis added).

The plaintiff called Nicholas Bellizzi, a licensed professional engineer with a transportation background. He was recognized as an expert in subway accident analysis and safety. He testified that, in his opinion, if Moore had put the train into emergency when he first saw what he described as the mass or the debris, the train could have stopped before striking plaintiff. He based his opinion on a series of calculations that produced different stopping distances utilizing Moore's estimated speed of between 20-24 mph at the time of the incident and Moore's approximation of the distance between the train and the object he described as debris when he first saw it (three car lengths away). Each stopping distance comprised a braking distance and the distance traveled before the brakes were applied, that is during the reaction time which in each calculation was fixed at what Bellizzi claimed was the "average"

of one second.

On cross-examination, Bellizzi conceded that Moore had not testified that he had seen *a person* at three car lengths away, but only that he saw something, and that he did not discern that it was a person until it moved, at which time he was only one car length away. Bellizzi acknowledged that Moore would not have been able to stop the train from that distance without hitting plaintiff. Bellizzi also acknowledged that he had never driven a train, and that his opinion relied heavily on measurements that were only estimates.

Alphus Robb, a NYCTA employee since 1957, also testified on the plaintiff's behalf. He was recognized as an expert in the field of train operations. He testified that operators are taught never to pass anything unless you can identify what it is, because, "[y]ou may injury [*sic*] it, harm it or damage the train. [But] [i]f brakes are applied in an emergency, you may have people thrown about the train."

On cross-examination, Robb acknowledged that he had no training as an engineer, and had two incidents of hitting people on the tracks when he was a motorman. He acknowledged that Moore had testified that the debris he had seen was in the roadbed, not on the tracks.

James Harris, who worked for the NYCTA and had been a train

operator for 11 years, and a trainer of train operators for 14 years, from 1993 to 2007, testified for the defense. He stated that there is always a lot of debris on the roadbed especially in the station areas. He testified that operators are told that, if they see anything that would come into contact with the train or that would trip the train or impede the train from moving safely, they are to stop the train, but that if the debris is off to the side where they do not believe that it would hit the trip cock, they could operate normally through the area.

The defense also proferred the testimony of Dr. Mark Marpet, an engineer who disagreed with the plaintiff's expert's testimony ascribing the average one-second reaction time to the train operator in this case. Marpet explained that reaction time involved three phases during which 1) an object is perceived and identified, 2) an analysis is conducted as to what should be done about it, and 3) the decision is acted upon. He opined that, in this case, Moore's analysis could have been slowed by the fact that the plaintiff was wearing dark clothing on a dark subway roadbed. Marpet also testified that reaction time not only varies from individual to individual but that it can vary for any one individual at different times.

At the close of the evidence, both sides moved for directed verdicts. The court denied the motions. After less than one day

of deliberations, the jury reached a verdict finding that both plaintiff and defendant were negligent, attributing fault 65% to defendant and 35% to plaintiff. It awarded the plaintiff $1 million for past pain and suffering, $1 million for future pain and suffering over 50 years, and $1.5 million for future medical payments. The defendant moved to set aside the verdict as inconsistent with the weight of the evidence, and contended that the percentages were against the weight of the evidence and the amounts awarded excessive. Despite counsel's request for time to make a written motion, the court denied the motion, and stated that there was no basis in law or fact to reduce or set aside the verdict. This was error.

Initially, we note that "[a] jury's verdict should not be lightly overturned." See Pavlou v. City of New York, 21 A.D.3d 74, 76, 797 N.Y.S.2d 478, 480 (1st Dept. 2005), lv. dismissed, 5 N.Y.3d 878, 808 N.Y.S.2d 138, 842 N.E.2d 24 (2005). If there is a question of fact and "it would not be utterly irrational for a jury to reach the result it has determined upon . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence." Soto v. New York City Tr. Auth., 6 N.Y.3d 487, 492, 813 N.Y.S.2d 701, 704, 846 N.E.2d 1211, 1214 (2006) (internal quotation marks and citation omitted). In this case, the question of fact was whether Moore could have avoided

hitting the plaintiff. For the reasons that follow, it is clear that the jury's determination that the accident could have been avoided was based on nothing more than a series of estimated stopping distances that incorporated purported average reaction time. We agree with the defendant's assertion that the plaintiff's case was based entirely on impermissible speculation, and that the verdict was thus based on insufficient evidence, as a matter of law.

The Court of Appeals has held that "a train operator may be found negligent if he or she sees a person on the tracks 'from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person.'" Soto, 6 N.Y.3d at 493, 813 N.Y.S.2d at 705; quoting Coleman v. New York City Tr. Auth., 37 N.Y.2d 137, 140, 371 N.Y.S.2d 663, 665, 332 N.E.2d 850, 851 (1975).

In this case, as in others of its type, an expert witness testified about calculations based on speed and distance so that the jury could determine whether, under the circumstances, it was physically possible for Moore to stop the train without striking the plaintiff. As a threshold matter, however, it should be noted that none of the variables utilized by the plaintiff's expert to calculate possible stopping distances were established conclusively at trial. All were estimates or approximations. It

was Moore at his deposition who estimated his speed to be between 20 - 24 mph as he approached the station. His conductor stated that the train might have been traveling at 25 mph. Further, it was solely Moore's estimate that he was *about* three car lengths away when he first saw debris to the left, almost under the platform at the beginning of the station. Moore further stated that the cars were 75 feet in length; in fact, as Bellizzi subsequently acknowledged, the cars on the subject train were just 60 feet long. Moore was the sole witness as to what exactly was visible as the train approached the station; he was also the sole witness as to how far away he was when he saw what he described as the debris moving.

The one undisputed fact is that Dibble was found with his severed foot beside him 40 feet into the station, that is, 40 feet from the location, the beginning of the station, where Moore testified he first saw the debris. There was no evidence presented to indicate that the plaintiff was struck at the beginning of the station and then dragged for 40 feet. Indeed that scenario was roundly rejected. There was no blood evidence except in the location where Dibble was found, and he had no injuries consistent with being dragged or pushed by the train from the beginning of the station. This strongly suggests that the debris that Moore first saw was not, in fact, the plaintiff

whom he struck 40 feet further along.[1]

Nevertheless, the trial proceeded with the plaintiff's expert, Bellizzi, presenting a number of scenarios, all of which showed that Moore would have avoided striking the plaintiff had he put the train into emergency when he first saw the debris, "about three car lengths away." In the first scenario, Bellizzi posited that Moore was 265 feet away from plaintiff (3 car lengths at 75 feet per car plus 40 feet in from the beginning of station). Then, in order to calculate the stopping distance at 24 mph, he testified that, the first factor to consider was the distance traveled during the "reaction" time, or as he stated, without foundation, "during that one second" before the brake is applied. At 24 mph, this would have resulted in the train traveling a distance of 35.2 feet. Then, using the Transit Authority's chart for emergency brake stopping distances, he showed that at 24 mph, the train would travel another 167 feet

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[1] Moore's testimony that he "saw the debris move" when he was a car length away does not appear to be factually possible. Upon review of the record, it would appear more likely that Moore saw the debris to the side at the beginning of the station, and then subsequently saw another object, the plaintiff, between the running rails. This scenario would explain the apparent inconsistencies between Moore's testimony, the undisputed fact that Dibble was found 40 feet into the station, and Moore's statement just hours after the accident that he saw the plaintiff between the running rails. Unfortunately, there was no real inquiry, as to this scenario, either at deposition or at trial.

after braking bringing the total stopping distance to 202.2 feet, and thus well within the 265 available before reaching the plaintiff.

The record reflects that Bellizzi next applied the same formula to the same speed, but substituted car lengths of 60 feet to conclude that Moore would have had 220 feet available before reaching the plaintiff, so he still could have stopped without hitting him. Again, in this scenario, Bellizzi used the purported average reaction time of one second.

He then applied the formula to a speed of 20 mph and found that one second of reaction time would add 29.3 feet to the braking distance of 121 feet for a total stopping distance of 150.3 feet. Hence, Bellizzi testified, with 265 feet available, Moore would have stopped with 112 (*sic*) feet to spare. Moreover, Bellizzi opined that at this speed, the train operator could have stopped before hitting the plaintiff even if he had needed four seconds of reaction time (4 x 29.3). On the other hand, with 220 feet available, Bellizzi opined that Moore could have taken two seconds in reaction time and still stopped before striking the plaintiff.

Bellizzi, however, was not asked to apply, and did not apply, a four second reaction time to his original scenario where the train was traveling at 24 mph. In such scenario, Moore would

have traveled approximately 141 feet (4 x 35.2) before he applied the brake, and a further 167 feet braking distance for a total stopping distance of approximately 308 feet, whereupon he would have unavoidably hit the plaintiff.

Such a scenario, of course, makes perfectly clear that Moore's failure to exercise reasonable care could be established only by arbitrarily imposing upon Moore the purported average reaction time of one second. In other words, in determining that the defendant's train operator failed to exercise reasonable care because he could have stopped, the jury improperly equated negligence with possession of a motor skill that is essentially a reflex action. Moreover, in this case, the motor skill that determines the reaction time in any individual, and which is measured in seconds and fractions of a second, was assumed to be the purported average of just one second with no variability for identification, analysis and decision.

In Mirjah v. New York City Tr. Auth. (48 A.D.3d 764, 853 N.Y.S.2d 148 (2d Dept. 2008)), the Second Department rejected the utilization of an average reaction time as a constant in a similar case. The Court rejected a report by the same expert witness, Bellizzi, which concluded that the train operator in that case could have stopped the train before striking the plaintiff. The Second Department observed that,

> "given the close tolerances described, a contrary inference is clearly warranted. For example, even accepting all of Bellizzi's data, an increase in [the train operator's] reaction time of just over one-third of a second, or an increase in the speed of the train of just over one mile per hour, would result in the train still striking the defendant [*sic*]." 48 A.D.3d at 766, 853 N.Y.S.2d at 150.

In our view, the court simply did not go far enough. As the defendants in this case assert, the use of an average reaction time of one second implicitly renders negligent any train operator with a longer than average reaction time.

More egregiously, the record does not reflect that the plaintiff's expert provided any foundation or evidentiary support for his observation that the average reaction time of a train operator is one second. Much less was it established as the average reaction time for non-negligent train operators.

Bellizzi acknowledged that, in this case as in the cases of hundreds of other plaintiffs for whom he has testified, he uses one second for a train operator's reaction time even though he has never seen or conducted a study of reaction times of train operators. Indeed, when asked on direct how he arrived at the one second reaction time, Bellizzi replied:

> "Well, there are many, many, many studies for automobile drivers. I myself have never seen a reaction time study for a train operator, I know of none... [But reaction times for automobile drivers] [t]hey've pretty much all come to the conclusion it's about a second for an auto driver under normal circumstances."

The paucity of research on train operator reaction times notwithstanding, on cross-examination, Bellizzi testified to *choosing* one second because "that's a reasonable average reaction time" of train operators. He defended the choice by stating that this was not a "complex situation," that there was only one reaction required, that is throwing the brake, and that "there [was] no reason to think that Moore had a reaction time slower than average."

Even were we to accept arguendo that an average reaction time for a train operator is indeed one second, the necessary corollary to Bellizzi's speculation is that there is no reason to assume that Moore's reaction time was the purported average. On the contrary, it is self-evident that if the average reaction time is deemed to be one second for train operators, then a number of all train operators will have a reaction time of less than one second, and correspondingly a number of all train operators a reaction time of more than one second. Moreover, as Dr. Marpet testified, those in the 85th percentile will have a reaction time of two and a quarter seconds.

Nothing in the record indicates where Moore might be found along that spectrum. But if, for example, Moore had been in the 85th percentile, two and a quarter seconds of reaction time and

car lengths of 60 feet would have resulted in the plaintiff being struck even if Moore had put the train into emergency when he first saw the debris. Further, as Marpet testified, and Bellizzi conceded, reaction time also may be affected on any particular occasion by factors such as age and vision and other variables such as lighting or weather or time of day.

It is troubling that, aside from one suggestion made by Dr. Marpet that the plaintiff's dark clothing could have hampered Moore's analysis of the situation and thus increased his reaction time, no other attempt was made to apply any of the above mentioned factors or ranges to the train operator in this case. Had the effort been made, it would have become apparent to the jury that there was insufficient evidence to determine whether Moore could have stopped without striking the plaintiff.

For the foregoing reasons, we also reject the plaintiff's contention that expert Bellizzi merely provided scientific corroboration for Moore's concession that he could have stopped the train before hitting the plaintiff had he put the train into emergency when he first saw the debris. Moore's own speculation, in any event, was not an acknowledgment of negligence since it was made in the context of testimony as to Moore's belief that what he first saw was debris and not a person.

Accordingly, the judgment of the Supreme Court, New York

County (Michael D. Stallman, J.), entered April 13, 2009, after a jury trial, in favor of plaintiff in which defendant was found to be 65% liable should be reversed, on the law, and the complaint dismissed without costs.

All concur.

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

ENTERED: JUNE 22, 2010

CLERK