SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 24, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2111N Joyce Henderson, Index 15851/06
Plaintiff-Respondent,

-against-

Manhattan and Bronx Surface Transit
Operating Authority, et al.,
Defendants-Appellants,

City of New York, et al.,
Defendants.

Wallace D. Gossett, Brooklyn (Lawrence Heisler and Lawrence A. Silver of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered on or about February 6, 2009, which denied defendants-appellants' motion to vacate an order, same court and Justice, entered June 20, 2007, granting plaintiff's motion to strike their answer unless they fully complied with certain discovery demands within 60 days after service of the order and paid a $1000 penalty to plaintiff, affirmed, without costs.

Given the five-day extension under CPLR 2103(b)(2), defendants-appellants' August 29, 2007 submissions were timely (*see e.g. Penn v American Airlines*, 192 AD2d 385 [1993]). However, defendants-appellants did not "fully comply" with the order, as required therein, as their submission of discovery responses mere days before the court-ordered deadline frustrated the purpose of the order, to have discovery completed within a certain time frame; they failed to produce a witness by the court-ordered deposition deadline; and they had not paid the monetary penalty. Defendants-appellants failed to proffer reasonable excuses for their delays and noncompliance. Their conduct, in conjunction with their failure to comply with the November 9, 2006 and March 15, 2007 discovery orders despite plaintiff's repeated demands, constituted willful, contumacious, and bad faith behavior warranting the striking of their answer (*see Vlahos v 422 E. 14th St. Assoc., LLC*, 60 AD3d 402 [2009]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [2004]).

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

McGUIRE, J. (dissenting)

I agree with the majority that, contrary to the motion court's determination, the five-day extension under CPLR 2103(b)(2) is applicable, rendering timely the discovery submissions of defendants Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority ("defendants"). I disagree, however, with the majority's conclusion that defendants' submission of discovery responses "mere days before the court-ordered deadline" warrants the striking of the answer.

By order dated June 18, 2007, the court granted plaintiff's motion to strike defendants' answer based on their failure to comply with prior discovery orders "unless within 60 days after the date of service of [the] order the defendant [*sic*] fully complies with the previous court orders and/or discovery/disclosure demands . . ." Thus, defendants were required to provide by the deadline certain documents that were listed in a "statement of facts" annexed to the order. Defendants also were required to provide a copy of Williams's personnel file to the court for an in camera inspection within the 60-day deadline and to produce both Williams and nonparty Livingston Bryant, an investigator employed by defendant New York City Transit Authority who had spoken with plaintiff after the accident that is the subject of this litigation, for examinations

before trial on or before September 1, 2007. The order also imposed a sanction on defendants for their failure to comply with prior discovery orders, requiring them to pay $1,000 to plaintiff "as a monetary penalty for having to make two motions to compel this discovery." The court's order, however, did *not* specify a deadline for payment of the $1,000.

Plaintiff served the order with notice of entry by mail on June 27, 2007, giving defendants 60 days plus 5 additional days (or until August 31, 2007) to comply. By letter dated August 29, 2007, defendants submitted documents to plaintiff in compliance with the court's conditional order. One day earlier, on August 28, 2007, Williams's personnel file was mailed to the court for in camera inspection. In addition, defendants scheduled Williams's deposition for August 31, 2007.

By letter dated August 30, 2007, plaintiff's counsel acknowledged receipt of the discovery, claimed that defendants failed to comply with the order and declined to attend Williams's deposition. Williams appeared for his deposition on August 31st, as scheduled, but plaintiff's counsel did not appear. Thereafter, plaintiff's counsel continually refused to appear for Williams's deposition, taking the position that the answer was stricken based on the terms of the conditional order. Defendants assert that in addition to trying to complete Williams's deposition, they attempted to pay the $1,000 sanction but

plaintiff's counsel failed to provide a W-9 form that was required to process the payment.

The motion court found that defendants "failed to fully comply with the spirit and letter of [its] prior order," stating that "[b]y mailing the bus operator's file for in camera inspection just three days before the expiration of the September 1st court-ordered deadline for conducting the deposition of said bus operator, defendant [*sic*] virtually insured that the court-ordered deposition would not take place since said documents would not be available to plaintiff for use at said deposition." The court also cited defendants' failure to produce Livingston Bryant for a deposition on or before September 1, 2007 and the failure to pay the court-ordered monetary penalty of $1,000 as the basis for its conclusion that defendants' answer should be stricken.

The issue presented here is not whether defendants failed to comply with the prior orders -- defendants admit they did not and for that inexcusable failure they properly were sanctioned. Rather, the issue is whether defendants failed to comply with the conditional order. Noncompliance with that order has not been established. The conditional order did not require defendants to produce Williams's personnel file for inspection prior to the 60-day deadline. I agree that mailing the file to the court on August 28 violated the spirit of the conditional order. But it

did not violate the letter of the order. Absent an actual violation of the terms of such a conditional order, no violation should be found. To conclude otherwise is contrary to the public policy of this State favoring resolution of actions on the merits (*Corsini v U-Haul Intl.*, 212 AD2d 288, 291 [1995], *lv dismissed in part and denied in part* 87 NY2d 964 [1996]) and the principle that "a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious" (*Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [2002]).

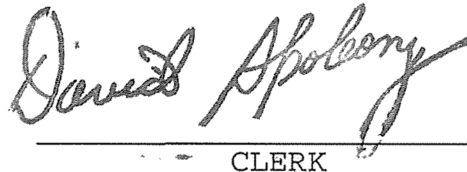
Nor can a violation of the conditional order be found on account of the fact that defendants did not pay the $1,000 sanction before August 31, 2007. The court found that defendants' assertion that plaintiff's counsel thwarted their effort to pay the sanction was "disingenuous" and "not supported by any ancillary proof." Whether the court was correct need not be discussed. The dispositive fact is that regardless of what the court may have intended, the conditional order did not require defendants to pay the sanction within the 60-day deadline.

Nor does defendants' ostensible failure to produce Livingston Bryant for a deposition support striking the answer. Critically, plaintiff never relied on this alleged failure in moving to strike the answer. Indeed, the court acknowledged that

"neither party comments in their submissions as to whether such deposition was held or waived." The unfairness of effectively holding defendants liable on this ground, even though plaintiff did not rely on it (and, of course, defendants did not have any occasion to address it), is manifest.

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

ENTERED: JUNE 24, 2010



CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2165& M-164 Milton Moracho, Index 103377/07
Plaintiff-Respondent,

-against-

Open Door Family Medical Center, Inc., etc.,
Defendant-Appellant-Respondent,

Primary Care Development Corporation,
Defendant,

Scully Construction Corp., et al.,
Defendants-Appellants.

Mauro Goldberg & Lilling LLP, Great Neck (Matthew W. Naparty of counsel), for appellant-respondent.

White Fleischner & Fino, LLP, New York (Jason Steinberg of counsel), for appellants.

Gregory J. Cannata & Associates, New York (Gregory J. Cannata of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 4, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim against defendant Open Door and the Scully defendants (Scully), and denied Open Door's cross motion for summary judgment dismissing the Labor Law § 240(1) claim and Scully's cross motion for summary judgment dismissing the §§ 240(1) and 241(6) claims, unanimously modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff, an employee of nonparty Asbestos Corporation of

America (ACA), was injured when he fell through an open skylight on the roof of the building owned by Open Door, and landed on the floor below. The building, which had previously been a furniture warehouse and showroom, was undergoing a gut renovation so as to be refit as a medical space. Scully was the general contractor on the job. The asbestos abatement work on the roof was done pursuant to a contract between Open Door and ACA.

The motion court erred in granting summary judgment to plaintiff on his Labor Law § 240(1) claim. The motion and the cross motions for summary judgment on that claim must all be denied because of the conflicting testimony in the record as to whether a safety vest was available to plaintiff, whether he was aware of the expectation that he would "tie off" the vest, and, if so, whether "he chose for no good reason not to do so" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *Tonaj v ABC Carpet Co., Inc.*, 43 AD3d 337 [2007]).

Scully argues that it cannot be liable under § 240(1) or § 241(6) because it lacked authority or control over the asbestos contractor (ACA) and the asbestos abatement work on the roof. However, as general contractor, Scully was contractually responsible for preventing accidents at the site and for taking reasonable precautions to prevent injury to employees on the job (*see Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 340-341 [2007]). Furthermore, although the asbestos abatement contract

was between Open Door and ACA, Scully selected ACA, provided ACA with access to the roof, and received daily reports from ACA. Scully's reliance on *Campoverde v Liberty, LLC* (37 AD3d 275 [2007]) is misplaced, as that case involved unusual circumstances in which the City of New York's Department of Environmental Protection evacuated a building after the September 11, 2001 terrorist attack in order to perform decontamination work, and did not allow the owner on the premises. Even accepting Scully's argument that only ACA personnel were permitted on the roof during the asbestos abatement project, there is no proof that Scully was prevented from accessing the site before the asbestos removal (*see Perez v Society of N.Y. Hosp.*, 225 AD2d 467 [1996]) or that it could not have erected safety devices below the roof skylight (outside of the asbestos abatement area) that would have prevented plaintiff from being injured.

M-164 ***Milton Moracho v Open Door Family Med. Ctr., Inc., et al.***

Motion to strike reply brief denied.

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

ENTERED: JUNE 24, 2010

CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1512 Donna S. Fisk, et al., Index 110879/03
Plaintiffs-Respondents,

-against-

City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for appellant.

Hopkins & Kopilow, Garden City (Michael T. Hopkins of counsel), for respondent.

Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered June 11, 2008, awarding, after a jury trial, the principal sums of $500,000 for pain and suffering and $18,000 for past medical expenses to plaintiff Donna Fisk, and $45,000 for loss of consortium to plaintiff William Fisk, and bringing up for review an order, same court and Justice, rendered on or about October 30, 2007, which, insofar as appealed from, as limited by the briefs, denied defendants' motion to set aside the verdict as to liability, unanimously reversed, on the law and the facts, without costs, the judgment vacated as to liability and the matter remanded for a new trial on that issue, and, in the event plaintiff prevails on the issue of liability, damages as found by the jury, affirmed.

Donna Fisk was injured on City property when she fell while attempting to negotiate her way around a forklift that was

blocking egress from the temporary office where she volunteered her services. She decided to climb over the forks that extended across the pathway approximately four inches above the ground even though her mobility was significantly limited by the effects of childhood polio on her right leg.

The jury returned a verdict finding the City negligent, that its negligence proximately caused Ms. Fisk's injuries and that Ms. Fisk was negligent but that her negligence was not a proximate cause of her injuries. The City interposed a motion to set aside the verdict as against the weight of the evidence, that the trial court denied (CPLR 4404[a]).

As this Court has noted, "[T]he question of whether a jury verdict is against the weight of the evidence . . . is essentially a discretionary and factual determination" (*Yalkut v City of New York*, 162 AD2d 185, 188 [1990]) and "great respect must be accorded to the trial court's professional judgment" informed by its observation of the witnesses (*id.*). Only where the jury's resolution of a factual issue is clearly at variance with the proffered testimony (*see Nicastro v Park*, 113 AD2d 129, 134 [1985]) does the failure to set aside the verdict and direct a new trial constitute an abuse of discretion (*id.* at 136-137).

Despite her limited mobility, Ms. Fisk attempted to negotiate an obstacle in her path. She was in no danger and confronted no exigent circumstances that required her to leave

the vicinity of the trailer being used as a temporary office. Her intent was to confront someone taking photographs in an area where photography was prohibited.

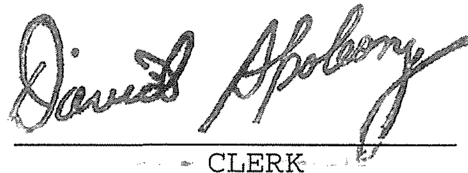
Usually, "[t]he issue of whether a defendant's negligence was a proximate cause of an accident [injuries] is separate and distinct from the negligence determination. A defendant may act negligently without that negligence constituting a proximate cause of the accident [injuries]." (*Ohdan v City of New York*, 268 AD2d 86, 89 [2000], *appeal dismissed, lv denied* 95 NY2d 885, 769 [2000]), and where it is possible to reconcile the jury verdict with a fair interpretation of the evidence (*Nicastro*, 113 AD2d at 135), the verdict should be sustained (*see Rubin v Pecoraro*, 141 AD2d 525, 526 [1988]). Here, however, "the issues of negligence and proximate cause are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Kovit v Estate of Hallums*, 261 AD2d 442, 443 [1999]; *see also McCollin v New York City Hous. Auth.*, 307 AD2d 875, 876 [2003]). The evidence affords no valid line of reasoning and permissible inferences that would lead a rational trier of fact to conclude that the negligence attributed to Ms. Fisk by the jury was not a proximate cause of the injuries she sustained (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Thus, the jury's findings are irreconcilable, and Supreme Court improvidently exercised its discretion in denying

the City's CPLR 4404(a) motion (*cf. Nicastro*, 113 AD2d at 137).

The above notwithstanding, we find that the jury's award of damages here does not deviate materially from what would be reasonable compensation. On remand, should plaintiff prevail on the issue of liability, the award would be reduced to the extent of any finding of liability against plaintiff.

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

ENTERED: JUNE 24, 2010



CLERK

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

2419 Duane Clemmer, Index 13918/06
Plaintiff-Appellant,

-against-

Drah Cab Corp., et al.,
Defendants-Respondents.

Greenstein & Milbauer, LLP, New York (Andrew W. Bokar of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 20, 2008, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), affirmed, without costs.

The failure of defendants' medical experts to discuss plaintiff's medical records indicating bulging or herniated discs does not require denial of defendants' motion (*DeJesus v Paulino*, 61 AD3d 605, 607 [2009]; *Shumway v Bungeroth*, 58 AD3d 431 [2009]), since, contrary to plaintiff's contention, defendants' neurologist detailed the specific objective tests he used in his personal examination of plaintiff, which revealed full range of motion, and their radiologist found on review of plaintiff's MRI films no evidence of disc bulging or herniation (*DeJesus* at 607).

In opposition to defendants' motion, plaintiff submitted the

sworn affirmation of Dr. Pervaiz Qureshi, the unsworn report and records of his chiropractor, Dr. Trager, unsworn MRI reports of Dr. Robert Scott Schepp, his deposition testimony and his own affidavit. Dr. Qureshi, who examined plaintiff more than two years after the accident, found limitations in plaintiff's range of motion. He reviewed the unsworn reports of Dr. Trager and Dr. Schapp and, in language that tracked Insurance Law § 5102(d), found plaintiff to have suffered a serious injury which was causally related to this accident. Dr. Trager examined plaintiff approximately one week after the accident and his report found range of motion limitations in plaintiff's spine. However, the report was unsworn and therefore inadmissible (*see Petinrin v Levering*, 17 AD3d 173 [2005]). Also unsworn and therefore inadmissible were the MRI reports of Dr. Schepp which found herniations and disc bulges.

While "evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment," such evidence cannot "form the sole basis for the court's determination" (*Largotta v Recife Realty Co.*, 254 AD2d 225 [1998], quoting *Wertheimer v New York Prop. Ins. Underwriting Assn.*, 85 AD2d 540, 541 [1981]). To the extent plaintiff's Dr. Qureshi's conclusions are based on the unsworn chiropractic report and the unsworn MRI reports, those conclusions are inadmissible, because defendants' experts did not submit those unsworn reports with their own

reports or expressly rely on them in reaching their own conclusions (*Hernandez v Almanzar*, 32 AD3d 360, 361 [2006]).

Plaintiff argues that our decision in *Rivera v Super Star Leasing, Inc.* (57 AD3d 288 [2008]) permits the use of those unsworn reports for purposes of opposing a motion for summary judgment. In *Rivera*, plaintiff's expert incorporated into his affirmation in support of his conclusion that plaintiff sustained a serious injury several unsworn reports of other doctors who examined plaintiff closer in time to the accident. We found that "these unsworn reports were not the only evidence submitted by plaintiff in opposition to the motion, and may be considered to deny a motion for summary judgment" (citing *Largotta v Recife Realty Co.*, 254 AD2d at 225).

Although the dissent contends that the facts of *Rivera* are "essentially indistinguishable from the present case," the facts here compel a different result. As here, the MRI reports submitted by plaintiff in *Rivera* were unsworn; unlike here, those MRI reports were referred to by both defendants' and plaintiff's experts in their affirmations and hence, were properly before the court (*see Thompson v Abbasi*, 15 AD3d 95, 97 [2005]; *Brown v Achy*, 9 AD3d 30, 32 [2004]). Moreover, the *Rivera* MRI of the plaintiff's spine was sufficient to establish the existence of disc bulges and herniations as both defendant's and plaintiff's physicians acknowledged those conditions, differing only as to

the cause (*see Toure v Avis Rent-A-Car*, 98 NY2d 345 [2002].

In this case, defendants did not rely on or make reference to plaintiff's MRI reports but rather submitted their own sworn MRI report which found no herniations or disc bulges. Nor did defendants' physicians refer to plaintiff's physician's unsworn report. While it is true that plaintiff's expert in *Rivera* relied on several unsworn reports of other doctors who examined plaintiff, unlike here, the MRI report provided other contemporaneous evidence in admissible form, bringing it within the requirements of *Largotta*.

The dissent argues that plaintiff's doctor's review of plaintiff's MRI films constitutes the additional evidence needed to bring this case within the parameters of *Rivera*. However, he simply states he is "in agreement" with the results of Dr. Schepp's unsworn and therefore inadmissible report containing Dr. Schepp's interpretation of the films. This bootstrapping process should not be used to bring inadmissible evidence before the motion court. Significantly, Dr. Qureshi makes no reference to defendants' sworn MRI report interpreting those films, which found no evidence of disc bulge, protrusion or herniation.

Moreover, we note that Dr. Qureshi's examination was conducted only after defendants moved to dismiss the complaint. His report merely states that "if the history is correct, there is a casual relationship between the injuries and the accident."

The only way he could arrive at that conclusion would be to rely on the unsworn report of Dr. Trager. In the absence of any objective medical basis for the conclusion causally relating plaintiff's injuries to the accident, such "conclusory assertions tailored to meet statutory requirements" are insufficient to defeat defendant's motion (*Shaw v Looking Glass Assoc., LP*, 8 AD3d 100, 103 [2004]; *see also Navedo v Jaime*, 32 AD3d 788 [2006]).

Thus, plaintiff failed to submit admissible contemporaneous evidence of the extent and duration of the alleged limitations in his spine (*see Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [2009]). Plaintiff's examining physician's quantitative range of motion assessment more than two years after the accident is too remote in time to warrant the inference that the limitations were caused by the accident (*see Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669 [2007]).

Defendants met their initial burden of showing prima facie that plaintiff did not sustain a 90/180-day injury by submitting plaintiff's affidavit in which he said he returned to work 2½ months - i.e., less than 90 days - after the accident. In opposition, plaintiff submitted no competent objective medical proof or other evidence to raise an issue of fact (*see Beaubrun v New York City Tr. Auth.*, 9 AD3d 258, 259 [2004]).

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

RENWICK, J. (dissenting)

I disagree with the majority's conclusion that the order granting defendants' motion for summary judgment dismissing the complaint should be affirmed. Specifically, in finding that plaintiff failed to meet her burden of raising a triable issue on serious injury, the majority incorrectly distinguishes our precedent in *Rivera v Super Star Leasing, Inc.* (57 AD3d 288 [2008]), which stands for the proposition that a plaintiff can rely upon unsworn reports of a treating physician to raise an issue of fact on serious injury as long as such evidence is not the only evidence submitted in opposition to the motion for summary judgment. Accordingly, I respectfully dissent.

On May 29, 2005, plaintiff was the passenger of a vehicle involved in a motor vehicle accident with a vehicle owned and operated by defendants. Plaintiff commenced this action against defendants seeking to recover damages; plaintiff alleged that he sustained injuries to the cervical and lumbar portions of his spine. Defendants moved for summary judgment dismissing the complaint in its entirety, arguing that plaintiff did not sustain a "serious injury" under Insurance Law § 5102(d). Supreme Court granted the motion and dismissed the action.

I agree with the majority to the extent it finds that defendants met their burden of establishing prima facie that plaintiff did not sustain permanent consequential or significant

limitations of his spine by submitting the affirmations of several doctors who, upon examining plaintiff and performing objective tests, similarly concluded that plaintiff's injuries were resolved (*see e.g. Charley v Goss*, 54 AD3d 569, 570-571 [2008], *affd* 12 NY3d 750 [2009]; *Figueroa v Castillo*, 34 AD3d 353 [2006]). Likewise, I agree that defendants also established that plaintiffs had no 90/180-day injury by submitting plaintiff's affidavit in which he said he returned to work 2½ months - i.e. less than 90 days - after the accident (*see Lloyd v Green*, 45 AD3d 373 [2007]; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669 [2007]).

The burden then shifted to plaintiff to raise a triable issue of fact that he sustained a serious injury (*see Licari v Elliot*, 57 NY2d 230, 235 [1982]; *accord Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). In opposition to the motion, plaintiff submitted an affidavit from Dr. Pervaiz Qureshi, who examined him on March 6, 2008, almost three years after the accident. The physical examination revealed significant limitations of use of plaintiff's spine. Dr. Qureshi reviewed the medical report prepared by plaintiff's treating chiropractor, Dr. Donald Trager, who had examined plaintiff on June 5, 2005, within a week of the accident, and found significant limitations of use of his spine. Dr. Qureshi also reviewed the MRIs taken of plaintiff on August 9 and August 15, 2005, and agreed with the MRI reports indicating,

respectively, herniations and bulges of the cervical spine, as well as bulges of the lumbar spine. Based upon his recent physical examination and review of the medical reports and MRIs, Dr. Qureshi concluded that plaintiff sustained permanent consequential and significant limitations of use of his spine and that such serious injury was causally related to the automobile accident.

Supreme Court found that plaintiff's evidence was insufficient to raise a triable issue of fact that he had suffered permanent consequential or significant limitations of use of his spine. Initially, the court determined that the MRI reports submitted by plaintiff "though unsworn, were of the diagnostic studies relied upon by defendants' expert for his radiologic[al] assessment, and, as such, are properly before the court." The court, however, determined that "[t]he [unsworn] report of the chiropractor is not properly before the court and cannot be considered." Disregarding such unsworn report, the court found the record devoid of any admissible contemporaneous evidence of the extent of plaintiff's limitations of use of his spine. As a result, the court found that "[t]he examining physician's quantification of spinal limitations, more than two and one half years after the accident, is too remote in time to raise an issue of fact as to whether the limitations were caused by the accident."

Based on existing case law in this Department, I conclude that Supreme Court erred in finding, in effect, that the examining physician's sworn opinion that plaintiff suffered a serious injury was deficient because of the expert's reliance upon the unsworn report of plaintiff's chiropractor to establish the contemporaneous limitations of use of his spine. It is well established that "'evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment provided that this evidence does not form the sole basis for the court's determination'" (*Largotta v Recife Realty Co.*, 254 AD2d 225, 225-226 [1998] quoting *Wertheimer v New York Prop. Ins. Underwriting Assn.*, 85 AD2d 540, 541 [1981]). This principle applies with equal force to unsworn medical reports submitted to rebut a defendant's showing of lack of serious injury (*see e.g. Hammett v Diaz-Frias*, 49 AD3d 285 [2008]; *cf. Henkin v Fast Times Taxi*, 307 AD2d 814 [2003] [unsworn reports are insufficient if they are the only evidence in opposition]).

This Court's holding in *Rivera v Super Star Leasing, Inc.* (57 AD3d 288 [2008]), illustrates the point. In *Rivera*, this Court found that the plaintiff raised a triable issue of fact on serious injury based upon the sworn report of a physician who conducted a recent examination of the plaintiff and found significant limitations of use of his spine. In rendering his sworn opinion that the plaintiff had suffered a serious injury

(i.e. permanent consequential and significant limitations of use of his spine), the examining physician relied upon several unsworn reports including that of the treating physician who conducted a contemporaneous examination of the plaintiff and found significant limitations of use of his spine. This Court found that these unsworn reports were properly considered to deny a motion for summary judgment because they "were not the only evidence submitted by plaintiff in opposition to the motion" (*id.*).

The facts of *Rivera* are essentially indistinguishable from the present case. Here, as in *Rivera*, the examining physician, who conducted the recent examination and rendered a sworn opinion that plaintiff suffered a serious injury, relied upon the unsworn report of the treating physician, whose contemporaneous examination of plaintiff also revealed significant limitations of use of plaintiff's spine. Since, as in *Rivera*, the unsworn contemporaneous report was not the only evidence submitted by plaintiff in opposition to the motion, this evidence should have been considered by the court below in determining whether plaintiff had raised a triable issue of fact on serious injury, i.e. a permanent consequential or significant limitations of use of his spine.

The majority's attempt to distinguish *Rivera* is not persuasive. The majority asserts that *Rivera* is distinguishable

because there the unsworn MRI reports relied upon by the examining physician, who rendered an opinion of serious injury, were properly before the court since the defendant's medical experts also made reference to them. In contrast, in this case, defendant's medical experts did not rely upon plaintiff's MRI reports. The majority finds this factual distinction to be dispositive because they contend that defendant's reliance on plaintiff's MRI reports in *Rivera* provided "the other" contemporaneous medical evidence in admissible form, albeit concededly only insofar as establishing the existence of disc bulges and herniations in plaintiff's spine.

The factual distinction the majority draws between *Rivera* and this case is analytically insignificant. The majority overlooks the crucial fact that, in this case, the examining physician himself reviewed the actual MRI films. He did not rely on any unsworn MRI reports. Rather, after his own review of the MRI films, he concluded that they established disc bulges and herniations in plaintiff's spine. Thus, it was based upon his own MRI findings, his physical examination of plaintiff, and his review of the treating physician's report that the examining physician concluded that plaintiff sustained a serious injury (*cf. Byong Yol Yi v Canela*, 70 AD3d 584 [2010] ["The affirmed report of plaintiff's doctor was admissible, even though it relied in part on the unsworn reports of another doctor who read

plaintiff's MRIs"] citing *Rivera*, 57 AD3d 288; *see also Pommells v Perez*, 4 NY3d 566, 577 n5 [2005] ["Though the MRI reports were unsworn, the various medical opinions relying on those MRI reports are sworn and thus competent evidence" [citation omitted]).

Contrary to the majority's contention, it remains that *Rivera* and this case are indistinguishable with respect to the central fact that in both cases the plaintiff relied upon the unsworn report of the treating physician to establish contemporaneous spine limitations. Nevertheless, as this Court explicitly held in *Rivera*, "[T]o the extent the expert incorporated into his affirmation several unsworn reports of other doctors who examined plaintiff, these unsworn reports were not the only evidence submitted by plaintiff in opposition to the motion, and may be considered to deny a motion for summary judgment" (*Rivera* at 288).

The majority makes no attempt to address the significance of the fact that plaintiff's expert (Dr. Qureshi) actually reviewed the MRI films and thus made an independent determination that they revealed bulges and herniations in plaintiff's spine. Instead, the majority completely mischaracterizes Dr. Qureshi's statements by alleging that plaintiff's expert did not conduct his own independent review of the MRIs but rather simply stated that "'he [was] in agreement' with the results of Dr. Schepp's

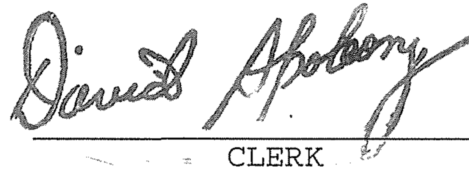
[treating physician] unsworn . . . report." This "bootstrapping" allegation, however, is unsupported by the evidence. In actuality, in his affidavit, Dr. Qureshi states, "[A]*fter a review of Mr. Clemmer's MRI films*, I am in agreement with the above noted results [indicating disk bulges and herniations of plaintiff's spine]" [emphasis added]). Thus, there is no basis to dispute the fact that plaintiff's expert rendered an opinion of serious injury based upon *his own MRI findings*, his physical examination of plaintiff and his review of the treating physician's reports.

In short, by submitting evidence that demonstrated recent and contemporaneous limitations in his spine *(see Valentin v Pomilla*, 59 AD3d 184, 184-185 [2009]; *Thompson v Abbasi*, 15 AD3d 95, 98 [2005]), plaintiff raised a triable issue of fact as to serious injury, and defendants' motion for summary judgment should have been denied with regard to the claims of "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." I agree, however, with Supreme Court to the extent it dismissed the 90/180-day claim, since plaintiff submitted no medical evidence to substantiate his claim that his injuries precluded him from engaging in substantially all his customary daily activities for 90 of the first 180 days after the accident (*see Dembele v Cambisaca*, 59 AD3d 352, 353 [2009]).

For the foregoing reasons, I would modify the order of Supreme Court to the extent it granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). I would reinstate the complaint only as to the claims of "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system."

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

ENTERED: JUNE 24, 2010



CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2793 Fabrizio Manganiello, Index 105175/08
Plaintiff-Appellant,

-against-

Donna Lipman, etc.,
Defendant-Respondent.

Lombardi & Salerno PLLC, New York (Dino J. Lombardi of counsel), for appellant.

Salamon, Gruber, Blaymore & Strenger, P.C., Roslyn Heights (Anthony F. Prisco of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered March 23, 2009, which, insofar as appealed from, as limited by the briefs, granted defendant's cross motion for summary judgment dismissing the complaint and denied plaintiff's motion for summary judgment on his claims for partition and use and occupancy, unanimously modified, on the law, to the extent that defendant's cross-motion is denied as to plaintiff's claim for partition, the claim is reinstated, plaintiff's motion for summary judgment on that claim is granted, the matter remanded for further proceedings to include an accounting, and otherwise affirmed, without costs.

The judgment of divorce does not bar this action for partition of the parties' condominium, which was gifted to the couple during their marriage by defendant's parents. Because the parties did not apprise the matrimonial court that they owned

marital property, the judgment and underlying orders do not explicitly address the disposition of the condominium, and there is no basis to infer from the generalized property division language of the pleadings in the divorce action that the condominium was left solely to defendant, particularly since plaintiff's name remains on the deed (*see e.g. Ehrgott v Buzerak*, 49 AD3d 681, 682-683 [2008]).

Pursuant to both the common law and statute, a party, jointly owning property with another, may as a matter of right, seek physical partition of the property or partition and sale when he or she no longer wishes to jointly use or own the property (*Chew v Sheldon*, 214 NY 344, 348 [1915]; *Chiang v Chiang*, 137 AD2d 371, 373 [1988]; *Ferguson v McLoughlin*, 184 AD2d 294, 294 [1992], *appeal dismissed* 80 NY2d 972 [1992]; *Ripp v Ripp*, 38 AD2d 65, 68 [1971], *affd* 32 NY2d 755 [1973]). The right to seek partition however, is not absolute and may be precluded where the equities so demand (*Graffeo v Paciello*, 46 AD3d 613, 614 [2007], *lv dismissed* 10 NY3d 891 [2008]; *Ripp* at 68), or where partition would result in prejudice (*Ferguson* at 294; *Ranninger v Pevsner*, 306 AD2d 20, 20 [2003]; *Piccirillo v Friedman*, 244 AD2d 469, 469-470 [1997]).

Plaintiff, by demonstrating his ownership, his right to possession of the subject condominium, and that physical partition alone could not be made without great prejudice,

established his prima facie entitlement to summary judgment on his claim for partition and sale of the instant property (*see* RPAPL 901[1]; *Graffeo* at 614-615; *Donlon v Diamico*, 33 AD3d 841, 842 [2006]). Defendant, by merely averring that plaintiff never contributed to the purchase of the premises, that she has solely contributed to the property's maintenance and upkeep since defendant's departure from the same, and that she has continuously occupied the condominium since that time, fails to controvert plaintiff's ownership interest (*see Barol v Barol*, 95 AD2d 942, 943 [1983]) and fails to establish that the equities favor dismissal of the action (*Ferguson* at 294-295 [equities did not warrant denial of partition action when defense was nothing more than the adverse consequences which would befall defendant if partition was ordered]; *Bufogle v Greek*, 152 AD2d 527, 528 [1989] [that proponent of partition did not contribute to purchase of property or to its carrying costs was not a valid defense to partition action]). Thus, plaintiff's motion for summary judgment is granted and defendant's cross-motion for the same relief is denied.

To the extent that defendant contends that since plaintiff's voluntary departure from the premises she has solely contributed to its maintenance and upkeep, she rebuts the presumption that incident to partition, plaintiff is entitled to an equal share of

the net proceeds upon sale (*Lancy v Siewert*, 26 AD3d 194, 194 [2006]). The parties' equitable share of the net proceeds is not amenable to resolution by summary judgment (*id.*) and instead should be resolved at a hearing before the trial court, where upon the evidence, the trial court can adjust the equities and distribute the proceeds accordingly (*McVicker v Sarma*, 163 AD2d 721, 722 [1990]). For the foregoing reason, plaintiff is also entitled to an accounting (*Tedesco v Tedesco*, 269 AD2d 660, 661 [2000], *lv dismissed* 95 NY2d 791 [2000]; *Deitz v Deitz*, 245 AD3d 638, 639 [1997]).

Plaintiff failed to demonstrate his ouster from the premises to support his claim for use and occupancy (*see Cohen v Cohen*, 297 AD2d 201 [2002]). 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 24, 2010

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2961 Leon Casper, Index 600419/06
Plaintiff-Appellant,

-against-

Cushman & Wakefield,
Defendant-Respondent.

Nesenoff & Miltenberg, LLP, New York (Philip A. Byler of counsel), for appellant.

Clifton Budd & DeMaria, LLP, New York (Kristin M. Burke of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered October 13, 2009, which granted defendant's motion for summary judgment, dismissed the complaint and awarded defendant reasonable legal fees, costs and expenses, unanimously affirmed, without costs.

In this action alleging breach of contract, unjust enrichment and quantum meruit with respect to real estate commissions, defendant submitted sufficient evidence to support its motion for summary judgment. In opposition, plaintiff failed to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [2006]). Plaintiff's arguments consisted of "mere conclusions, expressions of hope or unsubstantiated allegations" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

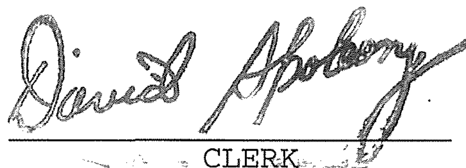
The record establishes that the written Independent Contractor Agreement (ICA) remained in effect until plaintiff's termination in 2002 (*see North Am. Hyperbaric Ctr. v City of New York*, 198 AD2d 148 [1993], *lv denied* 83 NY2d 758 [1994]), and thus the parties were governed by its terms. Plaintiff was estopped from contending that the ICA had expired after one year since he asserted in his complaint, interrogatory responses and deposition that the ICA was in effect until his termination (*see Nestor v Britt*, 270 AD2d 192, 193 ([2000]). Plaintiff also failed to satisfy his burden as to defendant's alleged waiver of the ICA arbitration provision, particularly since the ICA required that such waiver be "in writing and duly executed" by defendant.

Given the foregoing, and the fact that the arbitration clause mandated that plaintiff's sole recourse for any commission dispute was binding arbitration which he never pursued, the court properly dismissed the complaint (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP,* 6 NY3d 371, 374 [2006]; *Arrowhead Golf Club, LLC v Bryan Cave, LLP*, 59 AD3d 347 [2009]). Moreover, the existence of the ICA here precluded recovery on plaintiff's quasi contract claims (*see De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 22 AD3d 404, 405 [2005]).

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

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

ENTERED: JUNE 24, 2010



CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3129 The People of the State of New York, Ind. 5026/07
Respondent,

-against-

John Jefferson,
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 (Craig A. Ascher of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered June 22, 2009, convicting defendant, after a jury trial, of aggravated criminal contempt (10 counts) and stalking in the second degree, and sentencing him to an aggregate term of 22 to 44 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved (*see People v Carncross*, 14 NY3d 319, 324-325 [2010]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Although defendant was serving a prison sentence when he sent threatening letters to the victim, the evidence supports the conclusion that the victim reasonably feared defendant would physically injure her, either by acting through an accomplice, or

by securing some type of release from custody. Among other things, some of the letters implied that defendant expected to be out of custody in the near future.

The court properly exercised its discretion in denying defense counsel's request for a CPL article 730 competency examination, which was made for the first time at sentencing. Nothing in the record casts doubt on defendant's competency (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 881 [1995]). On the contrary, throughout the trial defendant demonstrated his understanding of the charges and his ability to assist in his defense (*see People v Russell*, 74 NY2d 901 [1989]). While defendant's outburst during the sentencing proceeding was highly abusive and offensive, it did not suggest that he was mentally incompetent.

We perceive no basis for reducing the sentence, which, we note is deemed an aggregate term of 10 to 20 years by operation of law.

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

ENTERED: JUNE 24, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3130 In re Tyrone G.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about September 24, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of public lewdness, and placed him on probation for a period of 9 months, unanimously affirmed, without costs.

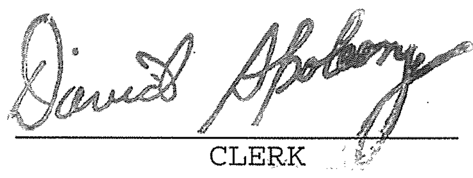
The evidence established the "lewd manner" element of public lewdness (Penal Law § 245.00). Appellant did not merely expose his private parts, but did so in the offensive manner at which the statute is aimed (*see People v McNamara*, 78 NY2d 626, 631 [1991]). Appellant exposed himself to a teacher's assistant, and then did so again, this time calling out her name and behaving in a manner likely to ensure that she directed her attention to his exposed condition (*see Matter of Jeffrey V.*, 185 AD2d 241 [1992];

see also People v Sullivan, 87 Misc 2d 254 [App Term, 2d Dept 1976]).

For the same reasons, we reject appellant's related challenge to the jurisdictional sufficiency of the allegations in the petition.

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

ENTERED: JUNE 24, 2010



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Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3131 Emel McDowell, Petitioner-Appellant, Index 402714/08

-against-

New York City Department of Corrections, Respondent-Respondent.

Emel McDowell, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered January 9, 2009, denying the petition to annul respondent's determination that petitioner was not entitled to jail-time credit for the period from April 2, 1991 to June 27, 1991, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

On April 2, 1991, while in custody awaiting trial on a charge of second-degree murder, petitioner pleaded guilty to third-degree criminal possession of a weapon and received a sentence that he completed on June 27, 1991. Subsequently, petitioner was convicted, after a jury trial, of second-degree murder and received a sentence of from 22 years to life. Petitioner contends that respondent improperly determined the amount of time he spent in custody before he began serving the sentence for murder, i.e., the amount of time that must be credited against that sentence pursuant to Penal Law § 70.30(3),

by omitting the period from April 2, 1991 to June 27, 1991. However, the statute provides that the jail-time credit for a given charge "shall not include any time that is credited against the term or maximum term of any previously imposed sentence." Thus, in determining the amount of time petitioner was in custody before the murder sentence was commenced, respondent correctly excluded the period during which petitioner was serving the sentence that had been imposed for the weapon conviction (*see Matter of Kalamis v Smith*, 42 NY2d 191, 199-200 [1977]).

We have considered petitioner's remaining contentions and find them without merit.

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

ENTERED: JUNE 24, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3135 The People of the State of New York, Ind. 2573/06
Respondent,

-against-

Jose Ortiz,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered March 5, 2008, as amended May 29, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 5 years, unanimously affirmed.

The court properly exercised its discretion when it permitted an undercover officer to testify anonymously, identifying himself only by his shield number. The People's showing of an overriding interest justifying closure of the courtroom also satisfied the People's burden, under *People v Waver* (3 NY3d 748 [2004]), of establishing a need for anonymity. The officer articulated particular concerns for his safety as a result of his continuing undercover operations. These included

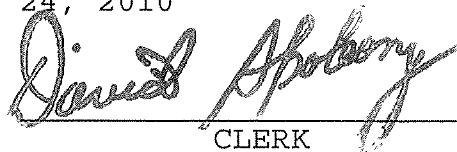
investigations into large-scale drug trafficking that was likely to be connected to the Bronx, notwithstanding the officer's current assignment in Queens. While defendant argues that testifying under a shield number enhanced the officer's credibility and suggested to the jury that defendant was dangerous, he rejected the court's offer to provide a suitable curative instruction that would have minimized any such prejudice. To the extent defendant is also claiming that the court's ruling unconstitutionally impaired his ability to cross-examine the officer, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see United States v Rangel*, 534 F2d 147, 148 [9th Cir 1976], *cert denied* 429 US 854 [1976]).

Defendant's unelaborated objections failed to preserve his present challenge to the chain of custody of the drugs, and we decline to review it in the interest of justice. As an alternative holding, we reject this claim, since the evidence provides a reasonable assurance of the identity and unchanged condition of the drugs (*see People v Julian*, 41 NY2d 340 [1977]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 24, 2010



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Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3136 In re Isidro A.-M.,
Petitioner-Appellant,

-against-

Mirta A.,
Respondent-Respondent,

Minerva F.,
Respondent.

Isidro A.-M., appellant pro se.

Anne Reiniger, New York, for Mirta A., respondent.

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

Order, Family Court, New York County (Ivy I. Cook, Referee), entered on or about December 24, 2008, which denied petitioner's application that he be provided with a copy of a forensic report to prepare for the custody trial, unanimously modified, on the facts, to permit petitioner to take notes of the report while he reviews it under court supervision, and otherwise affirmed, without costs.

Although the subject order is not appealable as of right (Family Court Act § 1112), leave to appeal is hereby granted (*see Matter of John A. v Bridget M.*, 36 AD3d 433 [2007]).

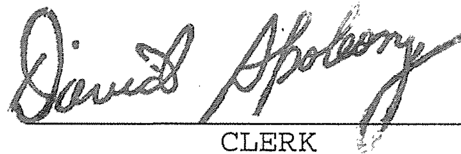
Family Court did not improvidently exercise its discretion in denying the pro se petitioner's request for a copy of the forensic report, since he was permitted to review it in court.

Thus, contrary to petitioner's contention, he was not denied access to the information (*see* Family Court Act § 166; *Matter of Morrissey v Morrissey*, 225 AD2d 779 [1996]).

However, petitioner should be permitted to take notes during the in court review because he is proceeding pro se and opposing counsels have unfettered access to the report. As this issue is likely to arise again, we note the better practice in most cases would be to give counsel and pro se litigants access to the forensic report under the same conditions.

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

ENTERED: JUNE 24, 2010



CLERK

Saxe, J.P., Friedman, Moskowitz, Richter, JJ.

3138-
3138A Robert L. Geltzer, etc., Index 104349/08
Plaintiff-Appellant,

-against-

Ronald Saffner, Esq., et al.,
Defendants-Respondents.

Andrew Lavoott Bluestone, New York, for appellant.

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for Ronald Saffner, respondent.

Hinshaw & Culberton LLP, New York (Richard Supple of counsel), for Taub and Marder, Taub & Marder and Elliot H. Taub, respondents.

Appeal from order, Supreme Court, New York County (Richard F. Braun, J.), entered July 21, 2009, which granted defendant Ronald Saffner's motion to dismiss the complaint as against him, deemed appeal from judgment, same court and Justice, entered August 3, 2009 (CPLR 5501[a]), and, so considered, said judgment unanimously affirmed, without costs. Order, same court and Justice, entered July 21, 2009, which granted the motion of the Taub and Marder defendants to dismiss the complaint as against them, unanimously affirmed, without costs.

Defendants established as a matter of law that none of their alleged negligent acts or omissions proximately caused the dismissal of plaintiff's underlying personal injury action and

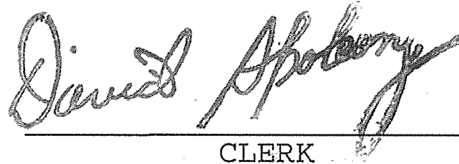
any damages attendant thereto (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 67 [2002]).

Moreover, as the trial court noted, the dismissal occurred when the plaintiffs, then pro se, in the underlying action chose not to pick a jury. Thus, it would be sheer speculation whether the plaintiffs there would have lost their case because of defendants' alleged deficient representation.

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

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

ENTERED: JUNE 24, 2010



CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3139-
3140-
3141-
3142

Eugeniusz Minorczyk, et al., Index 102928/04
Plaintiffs-Appellants-Respondents, 591124/05

-against-

Dormitory Authority of the
State of New York, et al.,
Defendants-Appellants-Respondents,

Liro Engineering and Construction
Management P.C.,
Defendant-Respondent.

- - - - - - -

City of New York,
Third-Party Plaintiff-
Appellant-Respondent,

-against-

Inter Connection Electric, Inc.,
Third-Party Defendant-Respondent.

Seligson, Rothman & Rothman, New York (Martin S. Rothman of counsel), for Eugeniusz Minorczyk and Barbara Minorczyk, appellants-respondents.

Landman Corsi Ballaine & Ford, P.C., New York (William G. Ballaine of counsel), for Dormitory Authority of the State of New York, appellant-respondent.

Schnader Harrison Segal & Lewis LLP, New York (Bruce M. Strikowsky of counsel), for The City of New York, appellant-respondent.

Raven & Kolbe, LLP, New York (Michael T. Gleason of counsel), for Liro Engineering and Construction Management P.C., respondent.

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered May 20, 2009, upon a jury verdict, awarding damages to plaintiffs, vacating the finding of liability against defendant Liro Engineering and Construction Management,

dismissing the City of New York's claims for contractual and common law indemnification against third-party defendant Inter Connection Electric, and denying the City's motion for summary judgment on its claim against Inter Connection Electric for breach of its contract to procure insurance, unanimously modified, on the law and the facts, the verdict against Liro reinstated and the City's claim for contractual indemnification granted, the matter remanded for further proceedings, and otherwise affirmed, without costs. Appeals from amended order, same court and Justice, entered April 30, 2008, unanimously dismissed, without costs, as subsumed in the appeals from the judgment.

Liro was "the eyes, ears and voice of the owner," with complete supervisory authority over the project and specific duties with regard to safety, rendering it a statutory agent of the owner for purposes of Labor Law 241(6) (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]).

Because the Labor Law § 200 and common-law negligence claims were based not on the injured plaintiff's employer's methods or materials but on a dangerous condition on the site, it was not necessary to show that Liro or the City exercised supervisory control over the manner of performance of the injury-producing work; the only issue was whether they had notice of the condition

(*see Seda v Epstein*, 72 AD3d 455 [2010]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [2009]). The jury finding that Liro and the City had notice of the icy condition on the roof of the building where the injured plaintiff slipped and fell was based on sufficient evidence, consisting of meteorological records of a heavy snowfall ending three days before the fall, Liro's records, and the testimony of the Dormitory Authority's on-site project manager, and was not against the weight of the evidence. Despite the City's actual negligence, it was not precluded by General Obligations Law § 5-322.1 from obtaining partial contractual indemnification pursuant to the Inter Connection contract, i.e., indemnification for Inter Connection's negligence only, since the contract specifically barred indemnification of the City for its own negligence (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Corp.*, 89 NY2d 786, 795 [1997]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JUNE 24, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3143-
3143A The People of the State of New York, Respondent, Ind. 6263/97 7409/01

-against-

Robert Caldwell,
Defendant-Appellant.

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

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

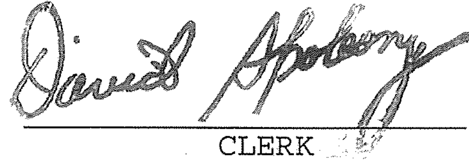
Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 24, 2008, convicting defendant, upon his pleas of guilty, of attempted robbery in the second degree and bail jumping the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 12 years to life, unanimously affirmed.

Defendant's challenge to the constitutionality of his persistent violent felony offender adjudication is without merit

(*see Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Leon*, 10 NY3d 122, 126 [2008], *cert denied* 554 US __, 128 S Ct 2976 [2008]).

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

ENTERED: JUNE 24, 2010



CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3144 The People of the State of New York, Ind. 1018/08
Respondent,

-against-

David Cruz,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 22, 2008, convicting defendant, after a jury trial, of two counts of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to concurrent terms of 3 years, unanimously affirmed.

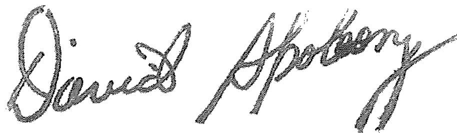
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. In addition to an officer's testimony about having observed defendant engaging in an apparent drug transaction, the evidence of defendant's intent to sell included his possession of

25 methadone pills and $340 (*see People v Daley*, 281 AD2d 244 [2001], *lv denied* 96 NY2d 827 [2001]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 24, 2010



CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3145 In re The City of New York, et al., Index 407245/07
Petitioners-Appellants,

-against-

District Council 37 AFSCME, et al.,
Respondents-Respondents.

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

Mary J. O'Connell, New York (Dena Klein of counsel), for respondents.

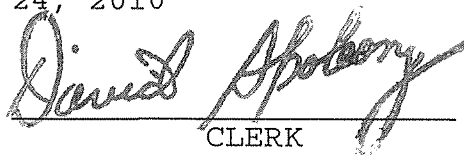
Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 20, 2009, confirming an arbitration award which, insofar as challenged, directed petitioners (the City) to pay certain grievants employed as a Public Health Advisors (PHAs) by the New York City Department of Health and Mental Hygiene $1,800 for each year since the filing of the grievance, denied the City's application to vacate the arbitration award, and dismissed the petition, unanimously affirmed, without costs.

The City argues that any monetary remedy for out-of-title work must be the difference in pay between existing titles covered under the parties' collective bargaining agreement, and not some "new term" of compensation "created" by the arbitrator in excess of her powers under the collective bargaining agreement and contrary to the public policy that compensation be

negotiated. Whatever arbitral precedent there might be for such a limitation on the arbitrator's remedy-fashioning powers under collective bargaining agreements like this one, it plainly can have no application where, as here, there is no dispute that the hybrid out-of-title duties performed by the PHAs do not match the job specifications of any other existing titles. Surely, given such circumstance, an arbitrator's powers are not limited, as the City appears to argue, to a cease and desist order. Absent a plain and express contractual limitation to the contrary in the collective bargaining agreement, the arbitrator properly directed the parties to negotiate; when the negotiations reached an impasse, the arbitrator properly invited the parties to submit proof of the value of the out-of-title services performed, including their last best offers; and, on that basis, fashioned fitting and necessary relief (*see* Civil Service Law § 100[1][d]; *County of Rockland v Rockland County Unit of Rockland County Local of Civ. Serv. Empls. Assn.*, 74 AD2d 812 [1980], *affd* 53 NY2d 741 [1981]; *Matter of North Carolina Cent. School Dist. [North Colonie Teachers Assn.]*, 60 AD2d 496, 498 [1978], *affd* 46 NY2d 965 [1979]).

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

ENTERED: JUNE 24, 2010



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Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3148-
3149 GUS Consulting GMBH, etc., et al., Index 106539/01
Plaintiffs-Appellants,

-against-

Chadbourne & Parke LLP,
Defendant-Respondent.

Sullivan & Worchester LLP, New York (Barry S. Pollack and Laura Steinberg of counsel), for appellants.

Flemming Zulack Williamson Zauderer LLP (Mark C. Zauderer of counsel), for respondent.

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 21, 2010, dismissing the complaint in this legal malpractice action, pursuant to an order, same court and Justice, entered January 14, 2010, which, inter alia, granted defendant's motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs, Creditanstalt Investment Bank AG and its affiliates (collectively, CAIB), allege that, due to Chadbourne's negligent failure to warn them in 1998 of possible criminal consequences of their use of a simple partnership structure (SP Structure) to invest in the Russian natural gas company, Gazprom, they continued using that investment structure, until, in 1999, their Russian offices were raided by Russian tax police. The

Russian tax authorities then engaged in a prolonged investigation, allegedly focused on the legality of the structure of the investments. As a result of the threat of criminal prosecutions, CAIB chose in early 2000 to cease all business in Russia until the six-year statute of limitations had run, and then to acquire another corporation in order to re-establish its presence there.

The complaint alleges that the SP Structure was illegal under Russian law, specifically Decree No. 529, and that the Russian tax police undertook an investigation because the SP Structure was illegal. However, the contention that the SP Structure was illegal under Russian law was rejected in an arbitration brought against plaintiff CIS Emerging Find Limited (CISEF) in which CISEF asserted that its contract with the claimant was void because it was part of the SP Structure that was illegal under Decree No. 529. Since the issue was actually and necessarily decided in the arbitration, in which CISEF had a full and fair opportunity to litigate the issue, CISEF and the other plaintiffs, who are admittedly in privity with it, are precluded from relitigating it herein (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Active Media Servs., Inc. v Grant Prideco, Inc.*, 35 AD3d 165 [2006]). Thus, to the extent the complaint is based on allegations that Chadbourne negligently advised plaintiffs that the SP Structure was legal, although

risky, under Russian law, the malpractice claim is foreclosed.

Summary judgment dismissing the entire legal malpractice action was correctly granted because CAIB failed to present evidence in admissible form sufficient to raise a triable issue of fact as to proximate cause, which requires a showing that Chadbourne's alleged failure to warn it of potential criminal consequences of its use of the SP Structure proximately caused reasonably ascertainable damages (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424-425 [2007]). CAIB submitted no admissible evidence to dispute Chadbourne's showing that the 1999 tax police raid was precipitated by a terminated employee in an effort to delay CAIB's discovery of his theft of 100,000,000 shares of Gazprom stock. Further, the shares of Gazprom stock that were "arrested" by Russian authorities following the 1999 raids were eventually released to CAIB, and no formal criminal prosecution was ever commenced against CAIB or any of its affiliates or officers. CAIB's claim that, had Chadbourne properly advised it of potential criminal exposure, it would have changed or ceased its use of the SP Structure and then would have been able to maintain its presence in Russia and grow its business there over the next six years, while the Russian

economy rebounded, is too speculative to support a legal malpractice claim (*see AmBase Corp.*, 8 NY3d at 434; *Zarin v Reid & Priest*, 184 AD2d 385, 387-388 [1992]).

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

ENTERED: JUNE 24, 2010

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JUN 24 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David Friedman
Eugene Nardelli
James M. Catterson, JJ.

2119
Index 107666/07

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In re Stahl York Avenue Company LLC,
Petitioner-Appellant,

-against-

The City of New York, et al.,
Respondents-Respondents.
\- - - - - -
The Municipal Art Society of New York,
Amicus Curiae.

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Petitioner appeals from an order of the Supreme Court, New York County (Emily Jane Goodman, J.), entered on or about September 24, 2008, which denied the petition seeking to annul the City Council's approval of the Landmarks Preservation Commission's designation of two twentieth century tenement buildings as New York City historic landmarks, and dismissed the proceeding brought pursuant to CPLR article 78.

Macht, Shapiro, Arato & Isserles LLP, New York (Alexandra A.E. Shapiro and Marc E. Isserles of counsel), Latham & Watkins LLP, New York (James E. Brandt and Sarah M. Lightdale of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Paul D. Selver and Jeffrey L. Braun of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman, Leonard Koerner and Virginia Waters of counsel), for respondents.

Vicki Been, New York, for amicus curiae.

NARDELLI, J.

At issue is the propriety of the City Council's recent designation of landmark status to two buildings which in 1990 the Board of Estimate (the Council's predecessor in matters of landmark designation) had chosen not to declare landmarks. Inasmuch as we conclude that the Council acted rationally, we affirm the dismissal of the article 78 petition brought by the property owner.

On April 24, 1990, the New York City Landmarks Preservation Commission (LPC) designated a full block of tenement buildings bounded on the east and west by York Avenue and First Avenue, and on the north and south by East 65th and East 64th Streets, commonly known as the First Avenue Estate, as a historic landmark. The Estate is composed of 15 buildings which were built at the turn of the twentieth century as "light-court model tenements" intended to be alternatives to the dark and unventilated tenements of the time, but only the designation of two buildings facing York Avenue is at issue in this proceeding. The buildings are six stories tall, and are configured so that courtyards, stairways, hallways, and apartments receive maximum exposure to light and air.

The Estate is the oldest existing project of the City and Suburban Homes Company (C&SHC), a privately financed company

which built low cost housing to address the early twentieth century living conditions of the working poor. Its historical importance was noted in a report prepared by LPC's research department, which stated that the Estate is considered to be "an important achievement in the social housing movement, bracketed in time between . . . English-inspired low density developments . . . and . . . post-World War I projects [such] as the Co-ops." The original portions of the Estate were built in stages between 1900-01 and 1905-06. The remainder of the block was purchased by C&SHC in 1913, and the two buildings at issue were then erected in the same style and mode as the tenements that were previously built.

When the LPC designated the Estate as a landmark in 1990, it also designated a similar C&SHC light-court tenement development as a landmark. This was the York Avenue Estate, which was built between 1901 and 1913, and is composed of 14 tenement buildings bounded by York Avenue and FDR Drive, and by East 78th and East 79th Streets. The two estates are the only existing full-block light-court tenement developments in the country.

On August 21, 1990, at its last meeting, the now defunct Board of Estimate (BOE), which had review powers of LPC actions, voted 6-5 to approve the LPC's designation of most of the First Avenue Estate as a landmark, but excluded from designation the

two buildings facing York Avenue. At the same meeting the BOE voted 6-5 to approve landmark designation for the York Avenue Estate, but excluded from designation four buildings located at the eastern end of that development.

The BOE's modifications of the LPC's designations of both estates were challenged in article 78 proceedings filed in Supreme Court. The actions were consolidated, and the BOE filed papers in which it stated that the modifications were made as a compromise to allow new development which would provide tax revenues to the City.

By order dated July 17, 1991, the Supreme Court (Charles E. Ramos, J.) dismissed the petitions and affirmed the BOE modifications. Only the York Avenue Estate matter was appealed. This Court reversed the dismissal, overturned the BOE modification, and reestablished the LPC designation of the entire block of the York Avenue Estate as a historic landmark (*see Matter of 400 E. 64/65th St. Block Assn. v City of New York*, 183 AD2d 531 [1992], *lv denied* 81 NY2d 736 [1992]) (*Kalikow* decision). The Court observed that LPC had designated the entire block as a landmark site, rather than some of the individual buildings:

> "The position that a part of the complex should be considered worthy of designation as a landmark for its historical, architectural, cultural and aesthetic value and part should not is inherently inconsistent. The failure of the Board of Estimate to advance any reason for removing four of the 14 buildings in the complex from the designated landmark site does not render the action any less arbitrary when viewed in the context of the administrative record" (183 AD2d at 533).

In 2004 petitioner obtained alteration permits from the Department of Buildings to undertake work on certain exterior features of the York Avenue properties, the value of which had appreciably increased. The permits, which involve window replacement and exterior facade renovations, including removal of parapets and stuccoing, have been renewed on annual basis.

On September 8, 2004, Community Board No. 8 adopted a resolution in favor of amending the designation of the First Avenue Estate landmark site to include the two buildings facing York Avenue, and, on October 10, 2006, LPC calendared the amendment for hearing. At a public meeting held on November 21, 2006, LPC unanimously approved the amendment.

Also on November 21, 2006, the LPC issued a designation report regarding the properties, describing their similarities to the other buildings contained in First Avenue Estate, and stating that their inclusion in the Estate enhanced public understanding of C&SHC's work, since the Estate now encompassed "the earliest

and latest examples of the light-court model tenements that characterized the company's urban development projects." Attached as an addendum to the 2006 designation report was a copy of the original 1990 designation report setting forth, inter alia, the history of C&SHC, the genesis and development of First Avenue Estate, and the Estate's influence on subsequent low-cost housing initiatives.

Following the LPC's approval of the amendment, it was forwarded to the City Planning Commission, which issued a January 10, 2007 report stating that the amendment did not conflict with any existing zoning or redevelopment plans. A noticed public hearing was held before the City Council[1] on February 1, 2007, at which the Council voted 47-0 to affirm the amendment, and the two buildings were designated as historic landmarks.

In this article 78 proceeding petitioner alleged that the LPC's and City Council's actions were arbitrary and capricious; that the BOE's prior exclusion of the buildings from landmark status was binding on the LPC and the City Council; that the City Council had failed to explain its departure from BOE's decision

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[1]After the United States Supreme Court found the structure of the BOE to be unconstitutional in *Board of Estimate of City of New York v Morris* (489 US 688 [1989]), the New York City Charter was revised and the City Council assumed the BOE's role in reviewing LPC landmark designations (Administrative Code of the City of New York § 25-303[g][2]) (Landmarks Law).

not to designate the two buildings as landmarks; and that both the developmental history of the buildings and the recent alteration work performed on their facades rendered them unworthy of landmark designation.

Supreme Court rejected petitioner's argument that the two buildings, which were purportedly designed by a less well-known architect (Philip Ohm) than were the other 13 buildings (which were designed by James Ware), should not be included in the First Avenue Estate's designation. Landmark status, the court held, is not limited to structures designed by noted architects or having special architectural distinction. To the contrary, all that was required for designation was the LPC's determination that the buildings met the legislative definition of a landmark, i.e., were an "improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city, state or nation" (Administrative Code of the City of NY §25-302[n]). The court also observed that the last two buildings were designed in the same fashion as the others, with arched passages which led to a central courtyard and four corner entrances.

The court further rejected petitioner's argument that the LPC's designation report failed to take into account that the

"facelift" work performed on the buildings after issuance in 2004 of DOB's alteration permit eliminated any visual homogeneity between the buildings and the rest of the Estate. The court found that at the time the designation report was issued and the buildings were designated as landmarks, only some of the alteration work had been performed, but it observed that even if all of the alteration work had been completed, the buildings' "architectural significance is not solely in their facade or . . . detail, but in the site plan, the light courts, the size and the general design of the Buildings which has not been changed." As a whole, the court found, the buildings were still "easily recognizable as part of the First Avenue Estate complex," and the alteration of their facades did not change their historical and cultural significance.

Before this Court petitioner argues that the City Council's approval of the LPC's designation of the buildings as historic landmarks was arbitrary and capricious, because the Council failed to explain its reasons for deviating from the contrary 1990 decision of the BOE declining to approve landmark designation for these two buildings. It further argues that the principles underlying the doctrine of stare decisis are applicable in administrative as well as judicial contexts, and

contends that the recent designation is barred because of BOE's prior determination.

Initially, we note that the decision to make landmark designations is administrative, rather than quasi-judicial in nature (*Matter of Gilbert v Board of Estimate of City of N.Y.*, 177 AD2d 252 [1991], *lv denied* 80 NY2d 751 [1992]). Thus, our review is limited to a determination of whether the LPC's designation of the buildings had a rational basis or, if, as petitioner contends, it was arbitrary and capricious (*see Matter of Society for Ethical Culture in City of N.Y. v Spatt*, 68 AD2d 112, 116 [1979], *affd* 51 NY2d 449 [1980]). Moreover, in assessing rationality, we accord significant deference to the expertise of the LPC (*Teachers Ins. & Annuity Assn. of Am. v City of New York*, 185 AD2d 207 [1992], *affd* 82 NY2d 35 [1993]).

Petitioner relies predominantly on the decision in *Matter of Charles A. Field Delivery Serv. (Roberts)*, 66 NY2d 516 [1985] for its contention that the City Council was required to offer articulable grounds for its departure from BOE's precedent to exclude the remaining two buildings from landmark status. *Field* involved a company which operated a delivery service for a medical laboratory, and involved a determination by the Unemployment Insurance Appeal Board that drivers with whom the respondent contracted were actually independent contractors

rather than, as the Board had ruled on two prior occasions (in decisions upheld by the Court of Appeals), employees. The Court of Appeals held that the facts underlying the Board's third decision were very similar to those underlying its two earlier decisions, and hence it was required to explain why a different result had been reached. In pertinent part the decision stated, "[A]n administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious" (*id.* at 518). The Court stated that where an agency has not given a reason for its departure from precedent, a reviewing court will be unable to determine whether the change in interpretation was done for valid reasons, and a vacatur of the agency's determination was required (*id.* at 520). The Court did, however, observe:

> "Stare decisis is no more an inexorable command for administrative agencies than it is for courts. They are, therefore, free, like courts, to correct a prior erroneous interpretation of the law by modifying or overruling a past decision. They are, likewise, free, like courts, to determine how disputed facts are to be decided, judging credibility and drawing such inference as they find reasonable in order to resolve contested questions of fact, and it is not within the power of the courts to impose factual consistency" (*id.* at 518-519 [internal citations omitted]).

Thus, even where there has been a reversal of a prior administrative decision, it will be upheld if the proffered reasons for the reversal or modification find rational support.

The record compiled during the proceedings contains testimony before the City Council Subcommittee on Landmarks stating that the BOE's 1990 decision to exclude the buildings from landmark designation was a "bad backroom deal," and was an "inappropriate politically motivated action" made under "intense political pressure from a powerful real estate developer." Additionally, when introducing the amendment to the full City Council, the Speaker of the Council described the BOE's decision to exclude the buildings from landmark designation as a bad decision based upon improper considerations which had nothing to do with the buildings' historical or cultural significance.

It is not this Court's function to inquire into the nature of the "political deal," bad or otherwise, which led to the Council's determination to reverse the BOE's decision and grant landmark status. Rather, our review is limited to determining whether the Council's administrative determination was rational, i.e., whether it had a sufficient basis for concluding that the prior determination should not be followed. In this regard the record demonstrates that there was a prior finding in 1990 that the First Avenue Estate needed to be protected in its entirety as

a socio-historic monument in the history of urban housing, and that but for the existence of a political compromise at the time, the entire district would have been designated a landmark. That the determination was not appealed does not now preclude the LPC and the City Council from revisiting the issue.

The LPC is statutorily authorized to amend any prior designation of a landmark (*see* Administrative Code §25-303[c]), and as a reviewing agency, the BOE and/or City Council may reconsider its prior landmark determinations in light of an LPC redesignation. In *Matter of Gilbert*, the LPC had included a particular block within the landmark designation of the South Street Seaport Historic District, and the BOE modified the designation in 1977 to exclude that block. Ten years later, the LPC again designated the block as an historic landmark, and this time the BOE approved the designation. The Supreme Court rejected an article 78 challenge to the redesignation, and this Court affirmed, holding, in pertinent part, "[s]ince the [earlier] determination was not quasi-judicial, the doctrines of stare decisis, collateral estoppel and res judicata would not be applicable" (177 AD2d at 253).

Petitioner also argues that Supreme Court erred by invoking this Court's *Kalikow* decision as a post hoc justification for the City Council's approval of landmark status for the buildings.

Yet, the administrative record shows that during the January 31, 2007 hearing before the City Council's Committee on Land Use, the Chairperson stated that there had been litigation in the wake of the BOE's 1990 decision to exclude buildings in the York Avenue and First Avenue Estates from landmark designation, and that the petitioners in the York Avenue Estate matter had successfully appealed the denial of article 78 relief. Hence, the Chairperson explained, in the instant matter, "[T]here is legal precedent, I think . . . on the resident's [i.e., respondent's] behalf." Thus, the record compiled during administrative proceedings does indicate that the *Kalikow* decision was at least a minor consideration in the City Council's approval of the buildings' landmark designation, and not simply an afterthought in Supreme Court's decision.

Consequently, inasmuch as the City Council was free to revisit the issue, and since the record provides a rationale for the Council's departure from the prior BOE administrative determination, the only remaining issues are petitioner's contentions that the buildings themselves are not worthy of landmark status. It contends that the Estate is without architectural distinction, and that there is a larger and better example of C&SHC's full-block light-court tenements which has already been given landmark status - the York Avenue Estate. The

Landmarks Law, petitioner argues, only authorizes LPC to designate structures which have a "special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristic of the city, state or nation" (Administrative Code §25-302[n]). It also contends that when designating the buildings as historic landmarks, the LPC could not rely upon reasoning that the First Avenue Estate is significant as one of only two full-block light-court tenement developments, since the Estate was designated as a landmark even without inclusion of the buildings following the BOE's 1990 action denying the buildings landmark status.

Petitioner's argument overlooks that in 1990 the LPC had determined that the entire First Avenue Estate, not just some of the buildings individually, was a landmark site, and that but for the modification by the BOE, the entire block would have had landmark status since 1990. The rationale underlying the *Kalikow* decision - the importance of the York Avenue Estate as a whole - applies equally to the First Avenue Estate. It is one of only two full block light-court tenement developments in the country.

The designation of the buildings is thus based upon historical and cultural, rather than just architectural, grounds. The LPC is clearly authorized to designate as landmarks structures with special historical interest or value which are

reflective of the "development, heritage, or cultural characteristics of the city" (*see* Administrative Code § 25-302[n]; *Matter of Russo v Beckelman*, 204 AD2d 160, 162 [1994], *lv denied* 85 NY2d 802 [1995]). As this Court stated in *Society for Ethical Culture in City of N.Y.*, "[i]f the preservation of landmarks were limited to only that which has extraordinary distinction or enjoys popular appeal, much of what is rare and precious in our architectural and historical heritage would soon disappear (68 AD2d at 177).

Petitioner's argument that since the buildings were the last to be constructed in the First Avenue Estate and were designed by a lesser-known architect, they have no landmark value, is also unavailing. C&SHC's original master plan could not actually envision a full-block development when work on the First Avenue Estate commenced, since it did not own the entire property. Even its own property, as the record shows, was built in stages. The last parcels (on which the two buildings at issue were built) became available within 15 years after the first buildings were constructed, however, and C&SHC then completed its construction of a full block of light-court tenements, all of which remain standing today. Additionally, even though more than one

architect worked on the design of the Estate, the record clearly indicates that all construction was based upon similar plans and designs.

Finally, petitioner argues that its alteration work to the buildings' facades lessened the visual homogeneity between the buildings and the rest of First Avenue Estate, and LPC failed to address this factor when designating the buildings as landmarks. To the extent Supreme Court found that despite the alteration work, the buildings are recognizable as part of the First Avenue Estate, petitioner claims the court erred by considering matters outside the administrative record.

The record indicates that when the buildings were designated as landmarks by the LPC on November 21, 2006, little of the authorized alteration work had actually been performed on their facades. At the present time, however, it appears that a substantial amount of the alteration work has been performed. The landmark designation should be assessed based upon the buildings' condition at the time of designation, and the fact that petitioner, after designation, performed authorized alterations to the buildings' facades does not render such designation invalid. Moreover, as discussed, the buildings' landmark status is based upon their historical and cultural significance. Petitioner's alteration work did not change the

buildings' footprints, layouts, courtyards, entrances, or accessibility to light and air, all of which are defining characteristics of the First Avenue Estate.

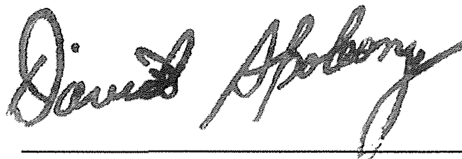
In sum, the LPC and City Council were fully within their authority to revisit the issue of whether the buildings should be accorded landmark status, their determination to do so was not irrational, and the two buildings clearly have a historical significance that justifies their designation as landmarks.

Accordingly, the order of the Supreme Court, New York County (Emily Jane Goodman, J.), entered on or about September 24, 2008, which denied the petition seeking to annul the City Council's approval of the Landmarks Preservation Commission's designation of two twentieth century tenement buildings as New York City historic landmarks, and dismissed the proceeding brought pursuant to CPLR article 78, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 24, 2010



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