SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 4, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, DeGrasse, Abdus-Salaam, JJ.

2679 The People of the State of New York, Respondent, Ind. 435/07

-against-

Roscoe George,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered December 7, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds and criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of 2 years, unanimously affirmed.

The court properly exercised its discretion when it granted the People's application, made before it had rendered any decision, to reopen a suppression hearing for the purpose of recalling a detective to elicit material evidence on the issue of

probable cause (*see People v Cestalano*, 40 AD3d 238 [2007], *lv denied* 9 NY3d 921 [2007]). Regardless of whether the additional testimony represented a change in the People's strategy, there was no prejudice to defendant, who was in the same position as if the People had presented all their evidence in one session.

The court properly denied defendant's application made pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant did not produce "evidence sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred" (*Johnson v California*, 545 US 162, 170 [2005]), and thus failed to make a prima facie showing of racial discrimination in the People's exercise of their peremptory challenges. The record lacks sufficient information about the racial composition of the available panel to support a finding that the People excluded a disproportionate number of black panelists, or that there was a disparity between the rate at which the People challenged black panelists and the percentage of blacks in the panel (*see People v Pratt*, 291 AD2d 210 [2002], *lv denied* 98 NY2d 654 [2002]; *see also Jones v West*, 555 F3d 90, 98-100 [2d Cir 2009]). Defendant's additional argument that characteristics of one or more of the challenged panelists also give rise to an inference of discrimination is unpreserved and without merit.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MAY 4, 2010

CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2680 New Bridgeland Warehouses, LLC, Index 117328/08
Plaintiff-Respondent,

-against-

Home Depot U.S.A., Inc.,
Defendant-Appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (John P. Belardo of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Deborah E. Riegel of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about July 6, 2009, which denied defendant's motion to dismiss the complaint on the ground of forum non conveniens, unanimously reversed, on the law and the facts, with costs, the motion granted, and the complaint dismissed, on condition that defendant waive any jurisdictional and statute of limitations defenses in New Jersey, provided that such action is commenced in New Jersey within ninety days of the date of this order.

Both parties are residents of Delaware; defendant's principal place of business is located in Georgia. The property on which defendant proposed to construct a building is located in New Jersey, the governmental approvals required by the lease on the property are those of various government agencies in New Jersey, and the witnesses to the dispute will be primarily New

Jersey witnesses. Under these circumstances, that plaintiff's signatory maintains its headquarters in New York and that the lease was executed here are insufficient to create a "factual connection between New York and the dispute" (*see Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176 [2004]; *Avery v Pfizer, Inc.*, 68 AD3d 633 [2009]).

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

ENTERED: MAY 4, 2010

CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2681-
2682-
2683 Founders Insurance Company Limited, Index 600523/07
Petitioner,

-against-

Everest National Insurance
Company, etc., et al.,
Respondents-Appellants,

U.S. Bank, N.A.,
Stakeholder.

- - - -

Great American Insurance Company,
Non-Party Respondent.

Budd Larner, P.C., New York (Joseph J. Schiavone of counsel), for appellants.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Mark S. Gamell of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered June 6, 2008, which, inter alia, granted respondents' motion to resettle and clarify an order, same court and Justice, entered November 29, 2007, to the extent of directing petitioner to post an undertaking in the amount of $500,000, unanimously affirmed, with costs. Appeal from judgment, same court and Justice, entered November 19, 2008, awarding respondents $269,730.42 in attorney's fees and costs, unanimously dismissed, without costs.

In the instant special proceeding against respondents and US Bank, N.A., as stakeholder and trustee, petitioner sought a preliminary injunction to enjoin respondents from drawing down on a $32,000,000 trust account created for their benefit under the parties' reinsurance agreement pending the outcome of the arbitration of a dispute between the parties concerning the agreement. Following a hearing, petitioner's motion for a preliminary injunction was granted, and ultimately petitioner filed an undertaking in the amount of $1.6 million, as required by the court as a condition for the granting of the preliminary injunction. Nonparty respondent Great American Insurance Company was the surety on the undertaking and received $1.6 million in cash collateral as security therefor. By order entered June 28, 2007, this Court reversed the order of Supreme Court granting the preliminary injunction (41 AD3d 350 [2007]).

On or about October 1, 2007, petitioner moved in Supreme Court for an order reducing the amount of the undertaking from $1.6 million to $500,000, or, in the alternative, to an amount bearing some rational relationship to the potential economic harm to which respondents were exposed during the period in which the injunction was in effect. Respondents moved pursuant to CPLR 6315 for an order fixing $658,813.16 against the undertaking as the amount of damages it suffered as a result of the erroneously

granted preliminary injunction. Respondents' damages consisted of lost interest income incurred as a result of their inability to draw and use trust funds as they became due and attorney's fees and costs incurred in working to overturn the preliminary injunction. During oral argument before Justice Lowe on the motion on November 16, 2007, the court stated, "I grant your application in part and that is to vacate the undertaking, the undertaking which I initially ordered." The court then awarded respondents damages in the amount of $389,282.74 for lost income and referred the issue of the amount of attorney's fees and costs to a referee to hear and report. The transcript of the hearing was so-ordered and entered on November 29, 2007. Respondents took no appeal from that order.

On November 27, 2007, petitioner's attorneys contacted Great American and requested the return of the cash collateral, since the undertaking had been vacated. Great American reviewed a copy of the transcript and directed that petitioner return the original undertaking to it so that it could proceed with the cancellation and return of collateral. On December 4, 2007, petitioner's attorney presented the so-ordered transcript of November 16, 2007 to the clerk of the court, and the clerk reviewed it and returned the original undertaking to petitioner's counsel. The clerk then entered into the clerk minutes that the

undertaking had been returned as per order of Justice Lowe filed on November 29, 2007. Petitioner's attorneys presented Great American with the original undertaking, and on December 7, 2007, Great American transferred back to petitioner the $1.6 million of cash collateral it had held for the undertaking.

On March 25, 2008, respondents contacted Great American and demanded disbursement from the undertaking of the amount of damages that were fixed by the court for lost interest income as a result of the erroneously granted preliminary injunction. Upon learning that the undertaking had been cancelled, respondents moved in Supreme Court for an order resettling and clarifying the order of November 29, 2009; directing nonparty Great American to make immediate payment of $389,282.74 to respondents; directing that an undertaking in the amount of at least $269,530.42 remain in place; and holding petitioner and its counsel in contempt for violating the court's order. The court granted the motion, insofar as is pertinent herein, to the extent of directing petitioner to post an undertaking in the amount of $500,000. During oral argument on the motion, the court admitted that, although it stated on the record at the November 16, 2007 hearing that the undertaking was vacated, that was a misstatement and not the court's intention. However, since it had stated that it was vacating the undertaking, the court declined to impose sanctions

on those who took action based on its words. Recognizing that respondents were not protected against claims for damages arising out of the erroneously granted preliminary injunction, the court directed petitioner to post a new undertaking in the amount of $500,000. To date petitioner has not posted that undertaking.

Not having taken a timely appeal from the November 29, 2007 order, respondents have limited the scope of their appeal to the issue whether the court, in its June 6, 2008 order directing petitioner to post an undertaking in the amount of $500,000 and not directing Great American to make immediate payment of the amount assessed as respondents' lost interest income, failed to adequately remedy the consequences of its ill considered statement that it was vacating the undertaking.

Great American fulfilled its obligation as surety. It was not a party to the action between petitioner and respondents; it lacked knowledge of the nuances of the case; and it was not present in court when the court directed that the undertaking be vacated. Great American released to petitioner the collateral it had held as security for the undertaking, relying in good faith upon the so-ordered transcript of November 16, 2007 that contained the clear statement that the undertaking was vacated, the clerk of the court's interpretation of the transcript, and the clerk's return of the original undertaking to petitioner.

Under the circumstances, Great American cannot be held liable on the undertaking for respondents' damages. Moreover, the court could not have granted the resettlement relief respondents requested, i.e., reinstatement of Great American's undertaking, because, Great American having released all its collateral, reinstatement would have affected a substantial right of Great American (CPLR 5019[a]; *see e.g. Solomon v City of New York*, 127 AD2d 827 [1987], *lv dismissed* 69 NY2d 985 [1987]; *United States v Martinez*, 613 F2d 473 [1980]).

Respondents are not aggrieved by the judgment entered November 19, 2008 awarding them $269,730.42 in attorney's fees and costs incurred as a result of the erroneous granting of the preliminary injunction and have raised no issue on appeal with regard to that judgment. Nor does the judgment bring up for review the order of November 29, 2007, since the order vacating the undertaking as the security against which the award of damages could be satisfied does not "necessarily affect[] the final judgment" fixing the amount of damages (CPLR 5501[a][1]; *Cinerama Inc. v Equitable Life Assur. Socy. of U.S.*, 38 AD2d 698 [1972]).

We have considered respondents' remaining arguments and find them without merit.

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

ENTERED: MAY 4, 2010

CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2684 In re Geneva B.,
Petitioner-Appellant,

-against-

Administration for Children's Services, et al.,
Respondents-Respondents.

Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for Administration for Children's Services, respondent.

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

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about March 31, 2009, which, following a hearing, dismissed appellant's petition for custody of her grandchildren, unanimously affirmed, without costs.

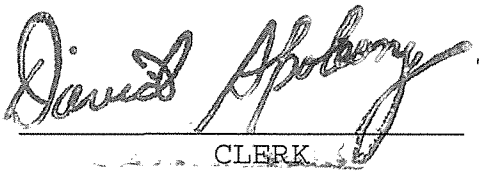
A grandparent has no preemptive statutory or constitutional right to custody surpassing that of persons who might be selected by the agency as suitable adoptive parents (*see Matter of Luz Maria V.*, 23 AD3d 192, 194 [2005], *lv denied*, 6 NY3d 710 [2006]; *Matter of Peter L.*, 59 NY2d 513, 520 [1983]).

Here, the children have lived with the non-kinship foster mother for eight of their eleven years. By all accounts, they are happy, loved and thriving in that home. The foster mother

has indicated a willingness to permit the children to maintain contact with their biological family. It is not in the best interests of the children to disrupt their lives after so many years. A grandparent's custody petition may be dismissed where the children have been in the same foster home for many years, the home is appropriate, the children have bonded with the foster parent and wish to remain (*see Matter of Amber B.*, 50 AD3d 1028, 1029 [2008]).

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

ENTERED: MAY 4, 2010



CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2685 Laurence Apel, Index 109477/07
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani, Jr. of counsel), for appellant.

Kazmierczuk & McGrath, Forest Hills (John P. McGrath of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered October 13, 2009, which granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff was injured during efforts to move a barge containing materials for the Williamsburg Bridge reconstruction project from the Manhattan to the Brooklyn side of the bridge. Moving the barge required that its 80-foot-long rod anchors, known as spuds, be raised from the river bed by a crane and that a three-foot-long, 125-pound steel "keeper pin" be inserted into the "toggle hole" in each spud to hold the spud upright. As plaintiff and a coworker were inserting a pin into the hole of one spud, the crane dropped the spud; the pin came up "like a seesaw," "snapping" plaintiff's left arm and "hurling" him across

the deck of the barge.

There can be no question that "the harm to plaintiff was the direct consequence of the application of the force of gravity to the [spud]" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]), i.e., that the risk to be guarded against "arose from the force of the very heavy object's unchecked, or insufficiently checked, descent" (*id.* at 603), and that an adequate safety device had not been used to guard against that risk.

Defendant's contention that plaintiff may have been the sole proximate cause of his injuries is without merit (*see Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252-253 [2008]).

M-1524 ***Laurence Apel v City of New York***

Motion seeking leave for stay pending appeal denied.

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

ENTERED: MAY 4, 2010

CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2686 Portia A. Hinton, Index 14126/07
Plaintiff-Respondent,

-against-

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

"John Doe,"
Defendant.

[And A Third-Party Action]

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for appellants.

Krentsel & Guzman, LLP, New York (Adam J. Roth of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 6, 2009, which, in an action for personal injuries sustained when plaintiff fell four feet off the edge of the loading side of a loading dock, denied motions for summary judgment by defendants premises owner and lessee, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter a judgment dismissing the complaint and all cross claims as against defendants City of New York, Department of Parks and Recreation of the City of New York, New York Yankees, and New York Yankees Partnership.

Defendants made a prima facie showing that they were under

no duty of care requiring installation of a guardrail or other safety measures designed to prevent a fall like this, by submitting their employees' deposition testimony that no prior accidents like this had occurred, and an expert's affidavit that neither the then-applicable New York City Building Code nor OSHA regulations required that guardrails be erected at the loading side of loading docks. In opposition, plaintiff failed to adduce evidence tending to show that the loading dock was in violation of any code, rule or ordinance, or inherently dangerous (*see Broodie Gibco Enters.*, 67 AD3d 418, 418 [2009], citing *Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [2009]). Her expert's affidavit was conclusory on the issue of inherent danger, and her reliance on the installation of a yellow swing gate after the accident is unavailing because "evidence of subsequent repairs is not discoverable or admissible in a negligence case" (*Hualde v Otis El. Co.*, 235 AD2d 269, 270 [1997] [internal quotation marks omitted]). Administrative Code former §§ 27-127 and § 27-128, "which merely require that the owner of a building maintain and be responsible for its safe condition, do not impose liability in the absence of a breach of some specific safety provision of the Administrative Code" (*Plung v Cohen*, 250 AD2d 430, 431 [1998]; *see also Dixon v Nur-Hom Realty Corp.*, 254 AD2d 66, 67 [1998]). Moreover, the OSHA safety standards cited by plaintiff's expert

do not apply because they are limited to the safety practices of employers *(Kocurek v Home Depot*, 286 AD2d 577 [2001]).

The motion court's denial of the premises owner's motion for summary judgment as untimely was error because the motion contained the same arguments as the lessee's pending, timely motion (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [2006]).

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

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

ENTERED: MAY 4, 2010

CLERK

Gonzalez, P.J., Tom, DeGrasse, Abdus-Salaam, JJ.

2690 The People of the State of New York, Ind. 4259/06
Respondent,

-against-

Andre Hamilton,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered September 11, 2008, convicting defendant, after a jury trial, of assault in the first and second degrees and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 13 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 identification and credibility, including its evaluation of the inability of one of the shooting victims to identify defendant, and the claim that the other shooting victim's aunt improperly influenced his identification of defendant.

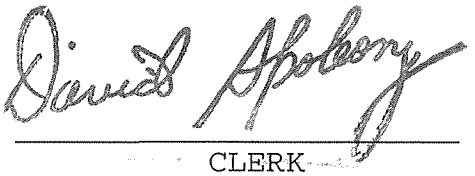
The court properly exercised its discretion in permitting

limited testimony that the complainant in the second of the two incidents involved in this case had previously observed defendant engaged in a dispute with her son. Merely having a dispute with another person is not a crime, and "mere speculation that a jury might discern something sinister about a defendant's behavior does not render that behavior an 'uncharged crime'" (*People v Flores*, 210 AD2d 1, 2 [1994], *lv denied* 84 NY2d 1031 [1995]). This evidence was not unduly prejudicial, and it was probative of the witness's ability to accurately identify defendant, an issue that defense counsel refused to concede.

Defendant did not preserve his claim that the court should have given the jury a limiting instruction regarding the evidence of the prior dispute, or his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MAY 4, 2010



CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2691 Duvaugh Jones, an Infant by his Mother and Natural Guardian, Shinillis Cline, et al., Plaintiffs-Respondents,

-against-

636 Holding Corp., et al., Defendants-Appellants.

Index 13377/02

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Gregory A. Cascino of counsel), for appellants.

Gentile & Associates, New York (Laura Gentile of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered October 8, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification (*see Phoenix Four v Albertini*, 245 AD2d 166 [1997]). In this action for personal injury resulting from a courtyard shooting, the "new" evidence presented on the follow-up motion for summary relief, consisting of an affidavit from a forensic pathologist, was clearly available to the movants earlier, and thus "should be rejected for failure to show due

diligence in attempting to obtain the statement before the submission of the prior motion" (*Taub v Art Students League of N.Y.*, 63 AD3d 630, 631 [2009]).

Even considering the substance of this later motion, defendants failed to establish entitlement to judgment on the issue of liability. Defendants contend that the court should have credited the opinion of their expert witness that despite the infant plaintiff's deposition account of what happened, the forensic evidence precluded the possibility he could have been shot by any intruders on their property. However, plaintiffs produced, in opposition to the motion, an affidavit from their own forensic pathologist disputing the conclusion offered by defendants' expert.

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

ENTERED: MAY 4, 2010

CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2692 In re The New York Foundation for Senior Citizens, Guardian Services, Inc., Petitioner-Respondent, Index 400358/08

Elizabeth B., an Alleged Incapacitated Person, Respondent-Appellant.

- - - -

North Town Phase II Associates, Non-Party Respondent.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Karen Gomes Andreasian of counsel), for appellant.

Morris K. Mitrani, P.C., New York (Morris K. Mitrani of counsel), for New York Foundation for Senior Citizens, Guardian Services, Inc., respondent.

Gutman, Mintz, Baker & Sonnenfeldt, P.C., New Hyde Park (Arianna Gonzalez-Abreu of counsel), for North Town Phase II Associates, respondent.

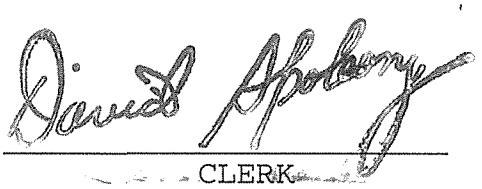
Order, Supreme Court, New York County (Shlomo Hagler, J.), entered September 29, 2009, which denied petitioner's motion for a stay of eviction and authorized it to relocate respondent to a shelter, unanimously affirmed, without costs.

Contrary to respondent Elizabeth B.'s contention, the court attempted to develop a plan consistent with her lack of cooperation when it appointed Mental Health Legal Service counsel to act as go-between for the parties in applying for Social Security benefits for respondent and finding her appropriate

alternative housing (*see* Mental Hygiene Law § 81.15; § 81.22[a][9]). Nevertheless, no alternative housing was found. Although petitioner did not specify all the programs it reviewed and the reasons it rejected them, it explained that the absence of immediate housing alternatives was due to respondent's financial situation and age. Moreover, the court directed petitioner to ensure that respondent's health needs were taken care of while she was in the shelter and to continue to look for suitable alternative housing for her.

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

ENTERED: MAY 4, 2010



CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2693 NTL Capital, LLC, assignee of Wells Fargo Bank of Minnesota National Association, Plaintiff-Respondent, Index 113748/07

-against-

Right Track Recording, LLC, et al., Defendants-Appellants,

Sound on Sound Recording, Inc., Defendant.

Stein Riso Mantell, LLP, New York (David Henry Sculnick of counsel), for Right Track Recording, LLC, appellant.

Proskauer Rose LLP, New York (Steven E. Obus and Matthew J. Morris of counsel), for Legacy Recording Studios, appellant.

Kazlow & Kazlow, New York (Stuart L. Sanders of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered February 9, 2009, which denied the motion of defendants Right Track Recording, LLC and Legacy Recording Studio to dismiss the complaint as against them, unanimously modified, on the law, to dismiss the second, fourth, fifth, sixth and seventh causes of action against Legacy, and otherwise affirmed, without costs.

Contrary to Right Track's contention, plaintiff, as assignee of the equipment lease entered into between Wells Fargo Bank and Right Track, has standing to bring this action to enforce the terms of the lease. Pursuant to the settlement agreement between

Wells Fargo and Right Track, the lease and its terms remain in full force and effect because Right Track failed to pay the settlement amount. Accordingly, pursuant to the terms of the lease, Wells Fargo was entitled to assign the lease to plaintiff, and plaintiff was entitled to enforce its rights thereunder. Although Wells Fargo filed a proof of claim in Right Track's bankruptcy proceeding setting forth as its unsecured, nonpriority claim the amount due under the settlement agreement, plaintiff is seeking to enforce its rights under the lease, not under the settlement agreement, and it may seek the full amount due under the lease. Contrary to Right Track's assertion, plaintiff was not required to comply with the notice provisions in the settlement agreement. Nor is there any indication that it was required to provide notice of default under the terms of the lease.

The first cause of action, as amplified by plaintiff's opposition papers, sufficiently pleads a breach of the lease against Legacy, based on the doctrine of de facto merger (*see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [2001]). The motion court also correctly determined that Legacy may be a mere continuation of Right Track and thus may be held responsible for Right Track's preexisting liabilities. Contrary to Legacy's contention, the documentary evidence does not conclusively

establish that Right Track is still in existence (*compare Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). In any event, plaintiff sufficiently pleaded the mere continuation exception to the rule against successor liability by showing that Legacy has acquired Right Track's business location, employees, management and good will (*see Societe Anonyme Dauphitex v Schoenfelder Corp.*, 2007 WL 3253592, *5-6, 2007 US Dist LEXIS 81496, *14-16 [SD NY 2007]).

Plaintiff concedes that its second cause of action, alleging estoppel, should be dismissed as against Legacy. The third cause of action, for unjust enrichment, is supported by sufficient factual allegations. There being no lease between plaintiff and Legacy, plaintiff is not precluded from alleging unjust enrichment as against Legacy (*see Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149 [2009]).

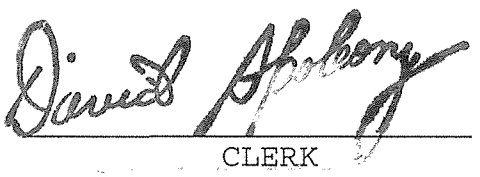
The fourth cause of action, for conversion, is duplicative of the breach of contract cause of action (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 306 [2003]; *Wolf v National Council of Young Israel*, 264 AD2d 416, 416-417 [1999]).

The sixth cause of action, alleging a violation of Debtor and Creditor Law § 276, is not pleaded with sufficient particularity (*see* CPLR 3016[b]; *Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 [2000]). The fifth and seventh

causes of action, alleging violations of Debtor and Creditor Law § 273 and § 274, respectively, contain only legal conclusions and no specific factual allegations (*see Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380, 381 [2002], *lv denied* 98 NY2d 603 [2002]). In any event, the documentary evidence refutes these claims as a matter of law. It indicates that Legacy's first-priority, secured claim far exceeds the value of Right Track's foreclosed-upon assets and dwarfs plaintiff's unsecured claim. Thus, there would have been no property available to satisfy plaintiff's claims even if there had been no fraudulent conveyance (*see Marine Midland Bank v Murkoff*, 120 AD2d 122, 133 [1986], *appeal dismissed* 69 NY2d 875 [1987]; *Miller v Forge Mench Partnership Ltd.*, 2005 WL 267551, *5, 2005 US Dist LEXIS 1524, *14-18 [SD NY 2005]).

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

ENTERED: MAY 4, 2010



CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2694 The People of the State of New York, Ind. 1267/08
Respondent,

-against-

Jose Abreu,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Daniel K. Shin of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 10, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 1 year, 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. We do not find the police testimony to be implausible or materially inconsistent.

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

ENTERED: MAY 4 2010

CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2695 The People of the State of New York, Ind. 2474/08
Respondent,

-against-

Raymond Bennett,
Defendant-Appellant.

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

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

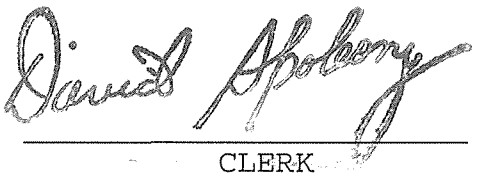
Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered November 18, 2008, convicting defendant, after a jury trial, of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The record, taken as a whole (*see People v Providence*, 2 NY3d 579, 583 [2004]), demonstrates that defendant made a knowing and intelligent waiver of his right to counsel, and that the court's warnings of the risks of self-representation were

sufficient in light of all the surrounding circumstances, including defendant's criminal history.

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

ENTERED: MAY 4, 2010



CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2696 Juana Rivera, Index 29382/02
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Helen F. Dalton & Associates, P.C., Forest Hills (Roman Avshalumov of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

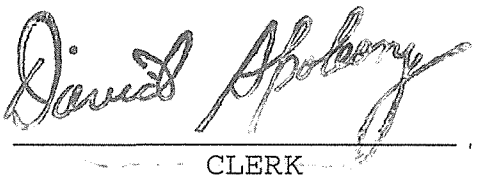
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 13, 2009, which, in an action for personal injuries, insofar as appealed from as limited by the briefs, granted defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, defendant's cross motion denied, and the matter remanded for further proceedings.

Defendant's cross motion for summary judgment, which was made in response to a motion by plaintiff characterized by the motion court as one to restore the action to the calendar, should have been denied as untimely, as defendant failed to show good cause for making the cross motion more than 120 days after the filing of the note of issue (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). At least where, as here, the 120-

day time limit had expired before the case was struck from the calendar, we reject defendant's argument that the 120-day limit does not apply to cases that have been struck from the calendar. We note *Brill's* express prohibition against consideration of unexcused, untimely motions no matter how meritorious or nonprejudicial (*id.* at 653, especially n 4; *see Perini Corp. v City of New York*, 16 AD3d 37, 39-40 [2005]).

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

ENTERED: MAY 4, 2010



CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2697 S.J. Fuel Co., Inc., Index 601609/08
Plaintiff-Appellant,

-against-

The New York City Housing Authority, etc.,
Defendant-Respondent.

Feinstein & Nisnewitz, P.C., Bayside (Neil H. Angel of counsel), for appellant.

Sonya M. Kaloyanides, New York (Rosanne R. Pisem of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 24, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Contrary to plaintiff's contention, neither prior dealings among the parties nor actual knowledge by defendant of plaintiff's claims and alleged damages relieved plaintiff of the obligation to serve a timely and sufficiently detailed notice of claim (*Promo-Pro Ltd. v Lehrer McGovern Bovis*, 306 AD2d 221 [2003], *lv denied* 100 NY2d 628 [2003]). Nor did defendant's alleged breach of the contract estop it from relying on plaintiff's failure to comply with the notice of claim provisions, since the breach, even if it occurred, did not

prevent plaintiff from complying with those provisions (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20 [1998]). In light of the foregoing, we do not reach the statute of limitations issue.

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

ENTERED: MAY 4, 2010

CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2698-
2698A The People of the State of New York, Ind. 5809/04
Respondent, 49/05

-against-

Yuseiph Sidberry, also known as
Yuseiph Wiggins,
Defendant-Appellant.

Richard M. Greenberg, Offices of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Arlene R. Silverman and Carol Berkman, JJ. at pleas; Carol Berkman, J. at sentence), rendered on or about July 20, 2005,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgments are appealed from be and the same are hereby affirmed.

ENTERED: MAY 4, 2010

CLERK

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

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2699N-
2699NA Cheri L. Dorr, et al., Index 105451/06
Plaintiffs-Appellants, 102219/06

-against-

London Terrace Towers Owners, Inc., et al.,
Defendants-Respondents,

Westfair Restoration Services, Inc., et al.,
Defendants.

- - - - -

Peter Kaufmann, et al.,
Plaintiffs-Appellants,

-against-

London Terrace Towers Owners, Inc., et al.,
Defendants-Respondents,

Westfair Restoration Services, Inc., et al.,
Defendants.

Guy Keith Vann, P.C., New York (William D. Fireman of counsel), for appellants.

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered February 25, 2009, which, in actions for property damages by shareholders/tenants against a cooperative and various persons and entities associated with the cooperative, inter alia, denied plaintiffs' motion to strike defendants-respondents' (herein the coop) answer on condition that the coop provide

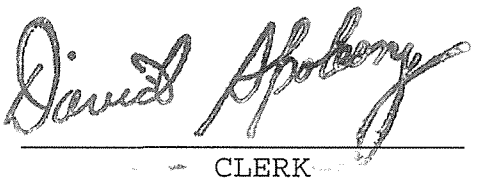
certain disclosure, with leave to plaintiffs to file a "notice of default" striking the coop's answer in the event such disclosure was not provided, and order, same court and Justice, entered September 24, 2009, which, inter alia, granted the coop's motion to vacate plaintiffs' notice of default, unanimously affirmed, with costs.

In three separately commenced actions (two of which have been consolidated and all of which have been joined for discovery purposes), involving numerous demands for disclosure by the coop and numerous stipulations extending the coop's time to provide disclosure, the coop's tardiness in responding to some of the demands was not clearly willful, contumacious or the result of bad faith (*see Gradaille v City of New York*, 52 AD3d 279 [2008]). Indeed, as noted by the motion court, some demands were complex, and others vague and confusing, such that even the motion court, which actively supervised disclosure throughout, could not always ascertain what was being sought. Nor is there reason to disturb the motion court's finding that the coop timely mailed responses compliant with the conditional order, and that the reason plaintiffs did not receive the responses on time was because the

coop's attorney inadvertently mailed them to the wrong address. We have considered plaintiffs' other arguments and find them unavailing.

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

ENTERED: MAY 4, 2010



CLERK

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2700 Allen Simon, et al., Index 305788/09
Plaintiffs-Appellants,

-against-

Sol M. Usher, et al.,
Defendants-Respondents.

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York (Rhonda E. Kay of counsel), for appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for Sol M. Usher, Sol M. Usher, M.D., P.C., F.A.C.S., Maxwell M. Chait, Hartsdale Medical Group, P.C., and White Plains Hospital Center, respondents.

Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Sheldon Alter, Mid-Westchester Medical Associates, LLP, The Westchester Medical Group, P.C. and Marianne Monahan, respondents.

Order, Supreme Court, Bronx County (Maryann Briganti-Hughes, J.), entered October 27, 2009, which, in a medical malpractice action, granted the motion of defendants Usher, Chait, Hartsdale Medical Group, P.C. and White Plains Hospital Center to change venue from Bronx County to Westchester County, unanimously reversed, on the law, without costs, and the motion denied.

Although the moving defendants made a timely demand for a change of venue, their motion for such relief was untimely. A defendant "may move to change the place of trial within fifteen

days after service of the demand," unless the plaintiff consents to the change of venue within five days of service of the demand (CPLR 511[b]). Here, the motion for a change of venue, made 20 days after service of the demand, must be rejected as untimely (*see Singh v Becher*, 249 AD2d 154 [1998]). Contrary to moving defendants' claim, they were not entitled to the five-day extension in CPLR 2103(b)(2) for time periods measured from service by mail (*see Thompson v Cuadrado*, 277 AD2d 151 [2000]). Furthermore, the failure of the remaining defendants to serve a demand to change venue with or prior to their answer was fatal to their request to change venue (*see Kurfis v Shore Towers Condominium*, 48 AD3d 300 [2008]; CPLR 511[a]).

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

ENTERED: MAY 4, 2010

CLERK

Tom, J.P., Catterson, Freedman, Manzanet-Daniels, JJ.

1230N In re Robert M. Morgenthau, Index 401693/08
District Attorney, New York County,
Petitioner-Respondent,

The New York State Commission on
Judicial Conduct, etc.,
Respondent,

Hon. W.,
Respondent-Appellant.

- - - -

Robert H. Tembeckjian, in his capacity
as Administrator of the New York State
Commission on Judicial Conduct,
Intervenor-Respondent.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Kevin J. Plunkett of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for District Attorney, respondent.

Edward Lindner, New York, for Robert H. Tembeckjian respondent.

Order Supreme Court, New York County (Nicholas Figueroa, J.), entered on or about October 10, 2008, which, inter alia, granted the petitioner's motion to quash the administrative subpoena signed by Referee James C. Moore, unanimously affirmed, without costs.

This action arises out of an order issued pursuant CPLR 2304 quashing the administrative subpoena issued by the New York State Commission on Judicial Conduct to then New York County District Attorney, Robert M. Morgenthau.

The undisputed facts are that on September 30, 2005, the Commission, on its own motion and own complaint pursuant to Judiciary Law § 44(2), initiated an investigation of Justice W. and notified him of the allegations by a letter dated December 6, 2005. The complaint alleged certain improprieties with regard to various statements made by Justice W. outside of the courtroom. Between October 20, 2006 and September 19, 2007, the Commission authorized investigations of four additional complaints against Justice W., one of which was the result of a letter submitted by then Chief Assistant District Attorney, James M. Kindler, and three which arose from the already existing investigation. According to intervenor-respondent Robert H. Tembeckjian, Administrator of the Commission and prosecutor of the case, "[a]ll of the new complaints alleged misconduct by [Justice W.] toward the Office of the District Attorney or individual Assistant District Attorneys or in cases being prosecuted by the District Attorney's Office."

The investigations led to three formal written complaints, pursuant to Judiciary Law § 44(4), which consisted of five charges: (1) that Justice W. made inappropriate personal and political comments from the bench; (2) that Justice W. failed to report misconduct of another judge; (3) that Justice W. improperly interfered with an application for a judicial

appointment; (4) that Justice W. improperly failed to recuse himself from cases where his impartiality may be questioned; and (5) that Justice W. improperly accepted a jury verdict in the prosecutor's absence. In answers to the complaints, Justice W. asserted that Tembeckjian's conduct in proceeding against him was "politically motivated."

The Commission appointed James C. Moore as a Referee to conduct a hearing on the complaints. On or about January 28, 2008, Justice W.'s counsel presented a prospective witness list which included, among others, Tembeckjian himself, Tembeckjian's wife, the District Attorney and Kindler. By letter dated February 12, 2008, Tembeckjian informed the Referee that he objected to these witnesses, and asked the Referee to deny the subpoenas or require Justice W. to make an offer of proof. A hearing was held on February 14, 2008. As to the District Attorney's testimony, Justice W. argued that the District Attorney had personally caused the charges to be brought against him for "purely political reasons" because he had supported former Justice Leslie Crocker Snyder's candidacy for New York County District Attorney. The Referee issued a subpoena for Kindler, and following Kindler's testimony issued a subpoena for the District Attorney.

By letter dated July 2, 2008, Chief Assistant District

Attorney Daniel J. Castleman asked the Referee to withdraw the subpoena, pursuant to CPLR 2304. He noted that the District Attorney was not a witness to any of the alleged misconduct, and had no relevant testimony to offer. The Referee declined to withdraw the subpoena.

On or about July 15, 2008, the District Attorney commenced the instant proceeding pursuant to CPLR 2304, applicable to petitions for quashing a subpoena where a referee rather than a judge signs the subpoena. He submitted a verified petition in which he asserted that he did not refer the investigation of Justice W. to the Commission; that he was not the complainant in the case; that he had never appeared before Justice W., and that he had "no first-hand knowledge of any of the matters that appear to be under review." The court signed an order to show cause whereby the District Attorney sought to seal the proceedings and quash the subpoena.

Subsequently, following argument, the court quashed the subpoena. The court found,

> "Aside from the referee's conjecture, there is nothing to support the notion that petitioner was a witness to the alleged misconduct, or that his testimony would assist the Commission in deciding the alleged misconduct or that he possessed knowledge "relevant to the complaint" under investigation. Judiciary Law § 44(4). The issuance of subpoenas is further restricted to persons possessing knowledge or evidence "relevant or material to the subject of the hearing." Judiciary

Law § 43(2).

> "At most, the evidence before the Commission permits the inference that petitioner, through members of his staff, who were actual witnesses, lent his support to the reporting of the misconduct to the Commission. This conclusion is buttressed by respondent's [Justice W.'s] offer during the instant motion of four exhibits…, which consist of internal memos to petitioner from prosecutors in his office, detailing instances of alleged misconduct.
>
> "In each of the four exhibits the source and purported witness is a prosecutor in petitioner's office. The content of the allegations set forth in these exhibits establishes that petitioner, although informed, did not witness the alleged misconduct. Consequently, his testimony, if called, would not be relevant or material to the Commission's determinations of misconduct. Moreover, the testimony of each of the complainants is available to the Commission.
>
> "Respondent's counsel suggests that petitioner's testimony would establish his bias and hostile motives. But such impeachment presumes a witness with relevant or material testimony on which he could be cross examined. Here there is none. Therefore, bias, of a non-witness, is immaterial to the adjudication of the alleged misconduct."

On appeal, Justice W. argues that the court erred in quashing the subpoena because the Referee found Kindler's testimony persuasive as to the likelihood that the District Attorney had relevant information. Further, he asserts that the Referee's decision should not be disturbed absent a showing that it was arbitrary and capricious, and that the issue of relevance could be resolved "in a matter of minutes" in testimony under oath.

For the reasons set forth below, we disagree, and affirm Supreme Court's order. As a threshold matter, the cases cited by Justice W. for the proposition that a referee's determination may only be overturned if it is arbitrary and capricious do not stand for that proposition, and do not involve subpoenas, but simply set forth the standard for certain article 78 proceedings (*see e.g., Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]).

The standard for determining the validity of a subpoena is relevancy and materiality of potential testimony: Judiciary Law § 42(1) gives the Commission the power to conduct hearings and subpoena witnesses to be examined under oath concerning "evidence that it may deem relevant or material."

Judiciary Law § 43(2) authorizes a referee to subpoena witnesses for examination under oath, but it too must be regarding evidence that the referee deems "relevant or material to the subject of the hearing." Pursuant to 22 NYCRR 7000.6 (e), the referee is charged with granting "reasonable requests for subpoenas," but 22 NYCR 7000.6(i)(2) states that, "[a]t the hearing, the testimony of witnesses may be taken . . . relevant to the formal written complaint." Consistent with these provisions, Judiciary Law § 44(4) provides that the Commission

"may take the testimony of witnesses . . . relevant to the complaint."

The Court of Appeals has recognized that the "materiality and relevancy requirements were included in section 42 of the Judiciary Law to prevent investigatory fishing expeditions" (*Matter of New York State Comm. on Jud. Conduct v Doe*, 61 NY2d 56, 60 [1984]). Where a subpoena is challenged in a motion to quash asserting lack of relevancy, it is incumbent upon the issuer to come forward with a factual basis establishing the relevancy to the subject matter of the investigation (*see Matter of New York City Dept. of Investigation v Passannante*, 148 AD2d 101, 104 [1989]). It is simply not enough that the proponent merely hopes or suspects that relevant information will develop (*Matter of Temporary Comm. of Investigation of State of N.Y. v French*, 68 AD2d 681, 691 [1979]; *see also People v Gissendanner*, 48 NY2d 543, 551 [1979] [a subpoena duces tecum should not be issued "to ascertain the existence of evidence"]). The relevancy question turns on whether the expected evidence will help to prove or disprove the subject matter of the investigation or inquiry.

Where the proponent of the subpoena fails to establish a factual basis that shows the relevancy to the subject matter of the investigation, the referee issuing the subpoena has exceeded

his or her power under Judiciary Law § 43(2) and § 44(4), and the subpoena must be quashed (*see Sonsini v Memorial Hosp. for Cancer & Diseases*, 262 AD2d 185, 187 [1999] [subpoena properly quashed where defendant was "unable to show the nonparty's testimony was necessary"]).

Here, respondent has failed show that any testimony that the District Attorney could offer would be relevant or material to the subject matter of the charges, that is, Justice W.'s alleged misconduct. On the contrary, the record clearly indicates that the District Attorney's involvement was limited to permitting the Administrator to conduct interviews with certain members of his staff who might have information pertinent to an investigation of alleged judicial misconduct. The District Attorney asserts, and the Administrator concurs, that the District Attorney was neither the complainant nor the source of the information leading to the investigation.

The subject of the investigation demonstrates, at best, that the District Attorney allowed the Commission to approach possible witnesses on his staff and then kept himself informed as to the developments in the investigation. There is absolutely no indication in the record that the District Attorney witnessed any alleged misconduct nor had any factual information other than that provided by his staff.

Even were we to accept as true Justice W.'s contentions that the District Attorney had a political bias against him, and that he referred the complaints to the Commission himself, neither of these are relevant to the issue of Justice W.'s guilt or innocence of the misconduct charged. Even the amount and type of support the District Attorney may have provided to his staff in the matter has no bearing on the issue of Justice W.'s guilt or innocence. Hence, we find that the Referee applied an entirely erroneous standard when he stated he found a subpoena should issue because Kindler's testimony was "enough to raise some question as to whether the District Attorney was involved in this *in any fashion*" (emphasis added). Subpoenaing the District Attorney with the mere hope of developing relevant testimony once on the stand is precisely the kind of investigatory fishing expedition that the law forbids (*see Matter of New York State Comm. on Jud. Conduct v Doe*, 61 NY2d at 60).

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

ENTERED: MAY 4, 2010

CLERK

McGuire, J.P., Renwick, Richter, Manzanet-Daniels, JJ.

1552 Manuel Reis, et al., Index 108539/04
Plaintiffs-Respondents,

-against-

Volvo Cars of North America, Inc., et al.,
Defendants,

Volvo Cars of North America, LLC, et al.,
Defendants-Appellants.

[And A Third-Party Action]

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen J. Donahue of counsel), for appellants.

Kreindler & Kreindler LLP, New York (Noah Kushlefsky of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about March 4, 2009, which, to the extent appealed from, denied the motion of defendants-appellants Volvo Cars of North America, LLC, Volvo Car Corporation and Ford Motor Company for summary judgment dismissing the complaint, modified, on the law, plaintiffs' failure to warn claims dismissed, and otherwise affirmed, without costs.

On May 24, 2002, plaintiff Manuel Reis arrived at the home of Americo Silva and observed Silva near a 1987 Volvo station wagon. Silva asked Reis if he wanted to see the engine running and Reis said "yes." Reis stood in front of the vehicle with the

hood open. Silva, who was beside the car, reached into the driver's side open window and turned the ignition key while the manual transmission was in first gear. Though Silva did not apply the clutch pedal, he recalled that the parking brake was "on."[1] When the car started, it lurched forward and crushed Reis's left leg. The vehicle was not equipped with a starter interlock, a device that prevents a manual transmission automobile from starting if it is in gear and the clutch pedal is not depressed. Plaintiffs brought claims against defendants-appellants sounding in strict liability and negligence alleging a design defect and failure to warn.

Summary judgment was properly denied on the design defect claims. In support of their motion, defendants-appellants failed to submit an affidavit from an engineer or automotive expert attesting to the vehicle's safety. Instead, they merely presented evidence that they had not received any prior complaints about injuries or damage due to the lack of a starter interlock, and that, from the date Silva's Volvo was manufactured

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[1] An inspection of the car four years later by an employee of defendant-appellant Volvo Cars of North America, LLC revealed that the parking brake was at the limit of its effective operation and in need of adjustment. Whether or not the parking brake was on, fully engaged or in working order on the day of the accident was neither the focus of the motion court's decision nor the parties' arguments on appeal.

up until the date of the accident, there existed no statutes or regulations requiring the use of starter interlocks on manual transmission vehicles.

Regardless of whether this sparse evidence satisfies defendants-appellants' prima facie burden in moving for summary judgment, the affidavit of plaintiffs' expert raised a triable issue of fact as to whether, in the absence of a starter interlock, the vehicle was "not reasonably safe" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983]). Plaintiffs' expert, Thomas J. Feaheny, is an automotive engineering consultant and former vice president for vehicle research at Ford Motor Company. He was instrumental in Ford's decision to begin installing starter interlock devices in their manual transmission vehicles. Feaheny explained that starter interlocks were included in Ford and Chevrolet manual transmission automobiles as early as the 1970s and were widely used by U.S. and foreign automobile makers in 1987, when Silva's Volvo was manufactured.[2]

Feaheny stated that a starter interlock could have easily and inexpensively been installed on the subject automobile and that a manual transmission vehicle without such a device is

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[2] In an interrogatory response, plaintiffs identified over a dozen vehicle models, made by Chevrolet, Toyota, Nissan and GMC, that were manufactured with starter interlocks before 1987.

unreasonably dangerous. He concluded that if a starter interlock had been installed on Silva's Volvo, the instant accident would most likely not have occurred. Contrary to defendants-appellants' position, the expert's failure to employ the phrase "reasonable degree of scientific certainty" does not render his affidavit invalid as a matter of law (*see John v City of New York*, 235 AD2d 210 [1997]).

Whether Silva's method of starting the car by turning the key while he was beside the vehicle was a reasonably foreseeable use of the automobile is a question for the trier of fact. "A manufacturer who sells a product in a defective condition is liable for injury which results to another when the product is used for its intended purpose or for an unintended but reasonably foreseeable purpose" (*Lugo v LJN Toys, Ltd.*, 75 NY2d 850, 852 [1990]). Defendants-appellants presented no evidence, expert or otherwise, showing that Silva's method of starting the vehicle, even if an unintended use, was not a foreseeable one. A jury could reasonably conclude that it was foreseeable that a car owner might turn on the ignition while standing outside the car, especially if someone else was examining the engine, and that this act was not the sole or superseding cause of the accident (*see Valentin v Bretting, Mfg., Co.*, 278 AD2d 230 [2000]).

The failure to warn claims should have been dismissed

because there is no evidence that any such failure was a proximate cause of the injury. In *Sosna v American Home Prods.* (298 AD2d 158 [2002]), this Court held that a plaintiff asserting a failure to warn claim must adduce proof "that the user of the product would have read and heeded a warning had one been given" (298 AD2d at 158). Here, there is no proof in the record that Silva would have read and heeded a warning about the risk of the car's lurching forward if it is started while in gear and without depressing the clutch pedal. To the contrary, Silva testified at his deposition that an owner's manual came with the vehicle, but he did not need to read it because he understood how cars operated. Thus, any purported absence of a warning in the owner's manual was not a substantial factor in bringing about the injury (*see Guadalupe v Drackett Prods. Co.*, 253 AD2d 378 [1998]).

The dissent does not address this Court's decisions in *Sosna* and *Guadalupe*, but instead relies on a number of cases which we find distinguishable. For example, in *Johnson v Johnson Chem. Co.* (183 AD2d 64 [1992]), although the plaintiff admitted that she did not read the warning label on a can of insecticide, the Second Department affirmed denial of the manufacturer's motion for summary judgment focusing on the fact that the warning may not have been prominently displayed. Likewise, the other cases

cited by the dissent (*see e.g. Humphrey v Diamant Boart, Inc.*, 556 F Supp2d 167 [ED NY 2008]) all involve questions of fact as to the conspicuousness, prominence and/or placement of the warnings.

Here, however, it is immaterial how prominent or conspicuous any warning in the owner's manual might have been because it is undisputed that Silva did not read the manual and would not have been likely to read it because he was familiar with how cars operated. Silva's admission that he did not read the manual severs the causal connection between the alleged failure to warn and the accident (*see Sosna,* 298 AD2d at 158, *Guadalupe,* 253 AD2d at 378).

Plaintiffs' suggestion on appeal that a warning label should have been placed on the dashboard or gear shift, and that such a warning would have prevented the accident, is based on speculation. The complaint does not contain any allegation that a warning should have been in the vehicle itself. Nor does the deposition testimony, or plaintiff's expert affidavit, support such a claim or even explain where such a warning label should have been. Plaintiffs also point to no evidence in the record that other potential vehicle safety hazards are typically warned against by the use of interior labeling as opposed to the inclusion of such information in the owner's manual. Moreover,

there is no evidence that Silva would have read and heeded a warning if it had been located in the car itself. Since Silva started the car from outside, it is hard to imagine how a warning on the dashboard or gear shift would have prevented the accident.

Defendant-appellant Ford was not entitled to summary judgment because while it did show that it had no role in the design and manufacture of the subject car, it presented no evidence on the nature of its acquisition of Volvo in 1999, and whether it had taken on any contractual or other liabilities.

All concur except Manzanet-Daniels, J. who concurs in part and dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (concurring in part and dissenting in part)

I agree with the majority that defendants' motion for summary judgment on the design defect claim was properly denied; however, I cannot agree that plaintiff's failure to warn claim should be dismissed.

A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known, and of the danger of unintended uses of a product provided those uses are reasonably foreseeable (*see Liriano v Hobart Corp.*, 92 NY2d 232 [1998]). The Court of Appeals has described the standard for evaluating failure-to-warn liability as "intensely fact-specific, including but not limited to such issues as feasibility and difficulty of issuing warnings in the circumstances; obviousness of the risk from actual use of the product; knowledge of the particular product user; and proximate cause" (*id.* at 243).

The majority rejects the failure to warn claim because it credits defendants' argument that they cannot be liable for failing to include a warning in the instruction manual since Silva, the vehicle owner, admitted that he never read the manual, and because both Silva and plaintiff were allegedly "familiar" with manual transmission vehicles. These assertions overstate the import of the deposition testimony. Furthermore, a failure

to warn claim is not automatically precluded by a product user's failure to read a warning or instruction manual.

The deposition testimony did not establish that either the vehicle owner Silva, or the injured plaintiff were aware of the specific danger that defendants should have warned against, i.e., the fact that the vehicle could lurch forward (which it did - causing grave injury necessitating amputation of plaintiff's leg) if started while the vehicle was in gear. Silva merely testified that when he learned how to drive a car with a manual transmission, many years ago in Portugal, he became aware that the car could "jump" forward if it stalled.[1] Plaintiff (who, prior to the accident, was not even aware that the Volvo was a manual transmission vehicle) testified that he was familiar with how to operate stick shift vehicles and had driven them in Portugal, from where he, too, had emigrated many years previous. The last time plaintiff had owned and operated a stick shift vehicle had been in 1974 in Portugal. He testified that he was aware that a vehicle with a standard transmission could lurch

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[1]In fact, Silva testified that he had a "habit" of leaving the car in first gear. He had been taught by his father and brother to leave a car in reverse if he was parked on a downhill, and in first gear if he was parked uphill, with the parking brake, to keep himself steady on the incline. Significantly, although this was his habit, Silva had evidently never had the experience of a car with manual transmission lurching forward when it was started in first gear with the parking brake on.

forward "a couple of inches" if it wasn't given enough gas or if it stalled. At no time during their depositions were they asked whether, nor did they ever testify that, they were aware of the specific danger of starting an engine in a parked vehicle while the vehicle is in gear and the clutch not engaged.

A product user's admitted failure to read the manufacturer's warnings "does not necessarily sever the causal connection between the alleged inadequacy of those warnings, on the one hand, and the occurrence of the accident, on the other," and a plaintiff ought not be deprived of recovery for this reason alone (*Johnson v Johnson Chem. Co.*, 183 AD2d 64, 71 [1992] [plaintiff's admission that she failed to read warning on can of roach spray, which warned users that all flames, pilot lights and burners were to be turned off prior to use, did not defeat plaintiff's right to recover on a theory of failure to warn]; *German v Morales*, 24 AD3d 246 [2005]; *see also Humphrey v Diamant Boart, Inc.*, 556 F Supp2d 167, 181 [ED NY 2008] [plaintiff's admission that he did not read the warning label or operating instructions on equipment not dispositive under New York law in connection with failure to warn claim]).

As the appellate court in *Johnson* explained,

> "It is perhaps difficult to see how a consumer who admittedly does not read the labels on the products which he or she uses

> can reasonably claim to have been injured *because* the text of such a label did not give a sufficient warning.
>
> "This argument loses its persuasive force, however, once it is understood that the intensity of the language used in the text of a warning is only one of the factors to be considered in deciding whether such warning is adequate. A second factor to be considered is the prominence with which such language is displayed. . . . A consumer such as [the plaintiff] who, by her own admission, tends to ignore one sort of label, might pay heed to a different, more prominent or more dramatic label. The reasonableness of her behavior is for the jury to decide."

(*Johnson* at 70; *see Humphrey*, 556 F Supp2d at 181 ["a plaintiff may be able to argue that the warnings, in addition to being substantively inadequate, were insufficiently conspicuous or prominent and, thus, be able to overcome his or her failure to read them"]; *Anderson v Hedstrom Corp.*, 76 F Supp2d 422, 443 [SD NY 1999] ["(T)he location and conspicuousness of the warnings (whether that be based on label or letter size, color, or other attributes of conspicuousness), and the role those factors played in the plaintiff's failure to read them, as well as the content and clarity of those warnings, are disputed issues . . . and the plaintiff's failure to read the warnings should not, in and of itself, prevent the 'failure to warn' claim from going before the jury"].)

The owners' manual at issue, while it discusses the

procedures for starting the vehicle, contains no warnings whatsoever concerning this particular hazard. Furthermore, plaintiff was not the vehicle owner and was not in a position to read the owners' manual. Thus, the rationale for barring a product owner or plaintiff from recovery due to the failure to read the warnings supplied is even less compelling (*see Anderson v Hedstrom Corp.*, 76 F Supp2d 422, 443 [SD NY 1999] [rejecting argument that plaintiff's failure to read warnings accompanying trampoline precluded his failure to warn claim, observing that a "jury could also reasonably conclude that the placement of such a warning in the middle of an *owner*'s manual, rather than (for example) in bold letters on the trampoline itself, was insufficient to alert a *user* to the danger, either because there was no notice on the trampoline about the existence of such a manual or warning, or simply because the manufacturer, by putting it in a more obvious place, might have employed 'other, more effective means of communicating its warning'"] [emphasis in original]).

In sum, I cannot agree with the majority that the vehicle owner's failure to read the manual severed the causal connection between plaintiff's failure to warn claim and his injuries. There is a presumption under New York law that a user would have heeded warnings if they had been provided, and that the injury

would not have occurred (*see id.*). This presumption can be rebutted by proof that an adequate warning would have been futile since plaintiff would not have read it; however, the burden is on the manufacturer to prove that, even if adequately warned, the plaintiff would not have read the warnings and his behavior would have remained unchanged (*see Liriano v Hobart Corp.*, 170 F3d 264, 271-72 [2d Cir. 1999] ["it is up to the defendant to bring in evidence tending to rebut the strong inference, arising from the accident, that the defendant's negligence was in fact a but-for cause of the plaintiff's injury. This shifting of the onus procedendi has long been established in New York"]).

I would hold that at this stage, defendant manufacturer has failed to overcome this burden and that an issue of triable fact exists regarding whether the "warnings" contained in the owner's manual were sufficient to warn the user of the danger of the car lurching forward.

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

ENTERED: MAY 4, 2010

CLERK

Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2037-
2037A Peter Cooke-Zwiebach, et al., Index 104181/06
Plaintiffs-Respondents,

-against-

Robert I. Oziel,
Defendant,

Robert W. Seavey, et al.,
Defendants-Appellants.

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

Hubbell & Associates LLC, New York (Richard A. Hubell of counsel), for respondents.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 16, 2008, awarding plaintiffs the aggregate sum of $600,532.16, and order, same court (Walter Tolub, J.), entered August 26, 2008, which struck defendants' answer and set the matter down for inquest, unanimously reversed, on the law, the facts and in the exercise of discretion, with costs, and the answer reinstated, on condition that defendants-appellants, within 30 days of the date of this order, post a bond in the amount of the judgment; by such date as Supreme Court shall direct, pay plaintiffs' reasonable costs, including legal fees incurred in connection with this appeal, to be determined after a hearing; and within 60 days of the date hereof, provide

discovery as heretofore directed by Supreme Court.

This action alleging fraud and conversion arises out of the misconduct of defendant Oziel while a member of the now-dissolved defendant law firm (*see Matter of Oziel*, 66 AD3d 145 [2009]). The complaint alleges no indiscretion by individual defendants Seavey and Vogel, who contend that the failure to comply with court-ordered discovery was attributable to Oziel's intransigence. Although represented by the same counsel, defendants argue that it is inappropriate to impose a sanction on one party for another's failure to comply with discovery, even where the parties are interrelated (*see Mermelstein v Kalker*, 294 AD2d 413 #32 [2002]; *Magee v City of New York*, 242 AD2d 239 [1997]; *Di Giantomaso v Kreger Truck Renting Co.*, 34 AD2d 964 [1970]; *see also Feingold v Walworth Bros.*, 238 NY 446, 451 [1924]).

Whether Seavey and Vogel are culpable for plaintiffs' loss and whether they are liable for the damages sustained as a result of Oziel's wrongdoing are separate questions, but culpability and liability are both imposed by virtue of the law of partnership (*see Clients' Sec. Fund of State of N.Y. v Grandeau*, 72 NY2d 62, 67 [1988]; *United States Trust Co. of N.Y. v Bamco 18*, 183 AD2d 549 [1992]). The answer herein does not advance any individual defenses. However, in the interest of affording an opportunity

to assert such individual defenses as may be available and to obtain separate counsel should they be so advised, we exercise our discretion to permit defendants to proceed upon compliance with the conditions stated.

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

ENTERED: MAY 4, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2057 In re Amirah Nicole A., and Others,

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

Tamika R.,
Respondent-Appellant,

Sabre A.,
Respondent,

Seamen's Society of Children and
Families, et al.,
Petitioners-Respondents.

Anne Reiniger, New York, for appellant.

John R. Eyerman, New York, for Seamen's Society of Children and Families respondent.

Tamara A. Steckler, New York (Judith Harris of counsel), Law Guardian.

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about March 26, 2009, which denied respondent mother's motion to vacate orders of disposition, entered on or about December 12, 2008, which, upon her default, terminated her parental rights to the subject children upon findings of permanent neglect, and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, affirmed, without costs.

CPLR 5015, governing vacatur of orders granted on default, applies to hearings in Family Court, such as fact-finding and dispositional hearings (*Matter of Geraldine Rose W.*, 196 AD2d 313, 316-317 [1994], *lv dismissed* 84 NY2d 967 [1994]; *Matter of Male Jones*, 128 AD2d 403, 404 [1987]). To vacate an order issued on default, upon failure to appear at either a fact-finding or dispositional hearing, the movant on such a motion must establish both a reasonable excuse for the default and a meritorious defense to the allegations asserted (*id.* at 404; *Matter of Calvin S.*, 47 AD3d 491, 491 [2008]; *Matter of Kristen Simone* V., 30 AD3d 174, 174-175 [2006]; Matter *of Ashley Marie M.*, 287 AD2d 333, 333 [2001]; *Matter of Derrick T.*, 261 AD2d 108, 109 [1999]; *Matter of Danielle R.*, 239 AD2d 305, 305 [1997]; *Matter of Male J.*, 214 AD2d 417, 417 [1995]). Whether movant has in fact made the requisite showing is left to the sound discretion of the Family Court *(Matter of Calvin S.* at 491). Unsubstantiated claims or excuses should be summarily rejected *(Matter of Derrick T.*, 261 AD2d at 109).

In support of her motion to vacate the orders issued upon her default, respondent submitted an affidavit explaining that she was ill "[t]hroughout September and October 2008." She also provided medical documentation showing that she was seen by medical doctors on September 29, 2008 and on October 22, 2008.

However, respondent never indicates that her illness actually prevented her from attending the fact-finding and dispositional hearings. More importantly, respondent's medical documentation is silent as to her medical condition on the date of the hearings, thus failing to evince that she was in fact ill on that date. Accordingly respondent fails to substantiate her claim that illness prevented her from attending the hearings and for this reason alone she fails to establish a reasonable excuse for her default (*Matter of Menesha B.*, 306 AD2d 22, 22 [2003]; *Matter of Monica Irene C.*, 262 AD2d 69, 70 [1999]; *Matter of Danielle R.* at 305 ; *Matter of Male J.* at 417; *Matter of Jones*, 128 AD2d 403, 404 [1987]).

Additionally, respondent fails to establish a reasonable excuse for her default because she failed to apprise counsel of her nonappearance prior to the hearings and fails to explain the reason for such failure in her motion to vacate her default (*Matter of Ciara Lee C.*, 67 AD3d 437, 437 [2009]; (*Matter of Laura Mariela R.*, 302 AD2d 300, 301 [2003]; *Matter of Ashley Marie M.* at 333-334).

Since respondent fails to proffer a reasonable excuse for her default, we need not determine whether she proffered a meritorious defense to the allegations.

We respectfully disagree with the dissent's position because

whether this was respondent's first failure to appear or whether petitioners had previously been granted several adjournments is wholly irrelevant to respondent's burden. Moreover, there is no evidence that the Family Court's decision was in any way influenced by its mistaken belief that respondent had a history of nonappearance.

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

I respectfully dissent. Appellant mother's motion to vacate her default at the fact-finding and dispositional hearings should have been granted. Appellant mother established both a reasonable excuse for the default and a meritorious defense to the action seeking to terminate her parental rights. In an affidavit in support of her motion to vacate, appellant mother averred that she was absent on the date of the scheduled hearing because she was experiencing a medical crisis involving her endocrine system, as well as gastrointestinal distress and neurological indicators. She furnished medical documentation, which showed that she first went to the doctor on September 29, 2008. When her symptoms did not abate, on October 22, 2008, she went to the emergency room at Jamaica Hospital. She was referred to both a neurologist and an endocrinologist. Appellant mother averred that her symptoms had been present throughout September and October 2008. At the time of her motion, in December 2008, her symptoms were under control but she was still undergoing tests to determine the exact medical cause of her illness.

Significantly, the mother's absence was a one-time occurrence, not part of a pattern of absences or unexplained latenesses. The record indicates that the mother was present in court on July 4, 2007, January 3 and March 17, 2008, and only

failed to appear on September 10, 2008. Indeed, the matter had been adjourned several times at the request of petitioner agency, which was experiencing difficulty securing the appearance of the caseworker. The record reflects that the Family Court adjourned the matter twice, to January 3, 2008 and to March 17, 2008 (dates on which the mother was present), at the request of petitioner agency. Although appellant neglected to contact the court, agency or her attorney to alert them that she was unable to appear on September 10, 2008, the record supports her explanation that her home phone had been disconnected and that she had limited and at times no cell phone minutes. Appellant's attorney's request for an adjournment was denied and the Family Court proceeded with the fact-finding and dispositional hearings over his objection.

One consideration that cannot be ignored, and which no doubt counted heavily against appellant mother, was the Family Court's erroneous finding that appellant was not present on five prior court dates. This finding is contradicted by the record, which clearly shows that the mother was present in court on July 24, 2007, January 3, 2008 and March 17, 2008. The May 27 and July 30, 2008 proceedings were attorney conferences at which the mother's appearance was not required. The court's reliance on this erroneous finding was no doubt prejudicial to appellant

mother in determining whether a reasonable excuse existed sufficient to excuse her default.

The court accommodated petitioner agency's multiple requests for adjournment, yet afforded appellant mother, whose parental rights were at stake, no similar consideration. Under the circumstances, this constituted an abuse of discretion.

Appellant also demonstrated a meritorious defense. The record does not establish that appellant was noncompliant with her service plan for a period of one year or more, or for 15 out of the most recent 22 months following the date the children came into the agency's care, as required by section 384-b[7][a] of the Social Services Law. Appellant was in compliance with her service plan from January 2006 through June 2006, at which time the children were trial-discharged to her. While the extent of appellant's compliance with mental health services between July 2006 and January 2007 is unclear, this period still falls short of the statutory requirement. Furthermore, the progress notes introduced into evidence by the agency span the period from October 2005 through October 2006 only. No notes were introduced for the two months preceding the filing of the petition on January 5, 2007. The entries following the August 29, 2006 conference indicate that appellant was participating in mental health services and appeared to be "much improved." She

acknowledged that she had suffered a prolonged anxiety attack and breakdown that led to her consequent hospitalization. Appellant was reported to receive "weekly individual psychotherapy and administration of a psychotropic medication regimen."

It has often been remarked that "[t]he general rule with respect to opening defaults in civil actions is not to be applied as rigorously in actions or proceedings involving the custody, care and support of children" (*Matter of Precyse T.*, 13 AD3d 1113, 1113-14 [2004] [internal quotation marks and citations omitted]). Appellant mother merely requested that the court give her an opportunity to present her case on the merits. This was the least the court could have done, considering the parent-child relationship at stake. I would accordingly reverse to grant the motion to vacate appellant's default, vacate the underlying orders of disposition, and remand the matter to the Family Court for de novo fact-finding and dispositional hearings.

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2580N In re Elrac, Inc., etc., Index No. 260539/08
Petitioner-Respondent,

-against-

Birtis Exum,
Respondent-Appellant.

Richard M. Kass, New York, for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (Michael F. Ingham of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered March 11, 2009, granting the petition of Elrac, Inc., for a permanent stay of arbitration, unanimously reversed, on the law, without costs, and the petition denied.

Where respondent, operating a motor vehicle owned by petitioner, who was his employer, was in an accident with an uninsured motorist, the court erred in granting the petition to stay arbitration of his uninsured motorist claim against petitioner. Petitioner argues that since the accident occurred in the regular course of respondent's employment, the exclusivity provisions of the Workers' Compensation Law preclude respondent from arbitrating a claim against his employer, who was self-insured (*see* Workers' Compensation Law § 11). Notably, although petitioner is self-insured, it is required to provide uninsured

motorist benefits pursuant to Insurance Law § 3420[f][1] (*see Matter of Allstate Insur. Co. v Shaw*, 52 NY2d 818 [1980]; *Matter of New York City Tr. Auth. [Thom]*, 70 AD2d 158 [1979], *affd* 52 NY2d 1032 [1981]). It follows that the right to obtain uninsured motorist protection from a self-insurer is no less than the corresponding right under a policy issued by an insurer (*see Matter of Country-Wide Insur. Co. [Manning]*, 96 AD2d 471, 472 [1983], *affd* 62 NY2d 748 [1984]). Given the public policy of this State requiring insurance against injury caused by an uninsured motorist (*see Matter of State Farm Mut. Auto. Ins. Co. v Amato*, 72 NY2d 288, 292 [1988]), we find that a self-insured employer is required to provide mandatory uninsured motorist benefits to employees and that the Workers' Compensation Law does not preclude the employee from filing such a claim against the employer. Accordingly, the petition to stay arbitration should be denied.

Furthermore, we reject the petition as untimely, as it was filed thirteen months after petitioner received respondent's

notice of intention to arbitrate, long after expiration of the twenty-day time limitation of CPLR 7503[c].

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2701 The People of the State of New York, Ind. 5750/07
Respondent,

-against-

Anthony Brunson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered October 24, 2009, as amended November 10, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 4 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a handgun recovered from his apartment. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The People established by clear and convincing evidence that defendant voluntarily consented to the search (*see generally People v Gonzalez*, 39 NY2d 122, 128-131 [1976]). Defendant, an experienced recidivist, was cooperative with the police and signed several documents giving

his express consent. The fact that he negotiated the conditions of the search provided further evidence that he knew he had the right to refuse consent, and voluntarily chose to waive it.

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2702-
2703 Jeffrey Cooper, O.D., Index 100708/09
Plaintiff-Appellant,

-against-

Number 535 Park Avenue,
Defendant-Respondent.

Pryor Cashman LLP, New York (Eric D. Sherman of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Deborah Riegel of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered July 17, 2009, granting defendant's motion to dismiss the complaint pursuant to CPLR 3211 and declaring that plaintiff did not validly exercise an option to renew the subject lease, unanimously reversed, on the law, with costs, the motion denied, the declaration vacated, and the matter remanded for service of an answer and for further proceedings. Appeal from order, same court and Justice, entered May 5, 2009, upon a stipulation dated April 23, 2009, which denied plaintiff's motion to consolidate this action with a holdover proceeding in Civil Court, unanimously dismissed, without costs, as taken from a nonappealable paper.

We need not decide whether the documentary evidence

conclusively establishes that plaintiff failed to renew the lease in compliance with its terms (*see American Realty Co. v 64 B Venture*, 176 AD2d 226, 227 [1991], *lv denied* 79 NY2d 756 [1992]). Plaintiff's allegations that any deficiencies in the notice were inadvertent and that he has made significant improvements in the premises and accumulated 30 years of goodwill in his optometry practice are sufficient to warrant consideration of equitable relief to avoid a forfeiture (*see J. N. A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d 392 [1977]; *see also Blumenthal v 162 E. 80th Tenants*, 88 AD2d 871 [1982]).

No appeal lies from an order entered on consent (*Matter of Tyshawn Jaraind C.*, 33 AD2d 488 [2006]). Plaintiff's remedy is a motion to set aside the stipulation (*Hopkins v Hopkins*, 97 AD2d 457 [1983]).

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2705 In re Lionel E.,
Petitioner-Respondent,

-against-

Shaquana R. B.,
Respondent-Appellant.

George E. Reed, Jr., White Plains, for appellant.

Ahmed & Yau, LLP, New York (Cindy S. Yau of counsel), for respondent.

Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about March 10, 2009, which, after a trial, awarded custody of the subject child to petitioner, unanimously affirmed, without costs.

We reject respondent's argument that the matter was effectively decided at an inquest that should not have been conducted. Petitioner was awarded custody of the child after an inquest, respondent's default on the original trial date was vacated and a full trial was subsequently conducted six months later. While the court could not have been oblivious to petitioner's physical and legal custody of the child during this interim period, the court's final decision after the full trial was grounded mainly in other properly considered circumstances, including the parties' respective home environments, behavior

toward each other and the child, parenting skills with particular reference to the child's special needs, care of the child over his lifetime, willingness and ability to foster a relationship between the child and the other party, work schedules, and schooling options (*see Eschbach v Eschbach*, 56 NY2d 167, 171, 172, 173 [1982]). There is no indication in the record that the court's final decision significantly relied on petitioner's testimony at the inquest, or was based in significant part on credibility determinations drawn from the circumstances of respondent's default.

The court did not deprive respondent of her right to counsel by permitting her to represent herself at trial. Before permitting respondent to proceed pro se, the court repeatedly asked her if she was certain she wanted to do so, and advised her of her right to either assigned counsel or counsel of her own choosing. In addition, the court advised respondent that she would be responsible for presenting her case, and that the court would not conduct the examination of witnesses for her, and respondent indicated she understood. We are satisfied that respondent made the decision to represent herself knowingly, intelligently, and voluntarily (*see Matter of Hassig v Hassig*, 34 AD3d 1089 [2006]).

We also reject respondent's argument that the court erred by

not appointing a law guardian. Such an appointment was not necessary to the resolution of the custody issue where the court had an extremely detailed forensic report as well as home studies performed by a social worker (*see Dana-Sitzer v Sitzer*, 48 AD3d 354 [2008]; *compare Matter of Amato v Amato*, 51 AD3d 1123, 1124 [2008]).

We have considered respondent's other arguments and find them unavailing.

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2706 Marc Kurman, Index 602086/09
Plaintiff-Appellant,

-against-

Robert Schnapp,
Defendant-Respondent.

Daniel L. Ackman, New York, for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jonathan Harwood of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 2, 2009, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the motion insofar as it sought to dismiss the causes of action for violation of Judiciary Law § 487 and breach of fiduciary duty, and otherwise affirmed, without costs.

Plaintiff stated a cause of action under Judiciary Law § 487 by alleging that defendant deceived or attempted to deceive the court with a fictitious letter addressed to him from the former licensing director of the City's Taxi and Limousine Commission (TLC) that stated, inter alia, that plaintiff was under a lifetime ban on owning any licenses with the TLC (*see Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]). Plaintiff further sufficiently alleged specific damages that could not have

occurred in the absence of defendant's conduct (*see id.* at 15). The 2008 affidavit by the TLC's former licensing director offered by defendant in support of his motion fails to demonstrate conclusively that plaintiff has no cause of action (*see Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]).

Plaintiff's breach of fiduciary duty cause of action is not duplicative of his legal malpractice cause of action, since it is premised on separate facts that support a different theory (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 58 AD3d 1, 9-10 [2008]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [2004]. As alleged, plaintiff's breach of fiduciary duty claim arose in December 2006, when defendant commenced his litigation activities against plaintiff in the Westchester County Supreme Court action, and continued through defendant's 2007 disqualification from representing the Queens Medallion Leasing Inc. defendants, and thereafter. In contrast, plaintiff's legal malpractice claim is based upon defendant's alleged 2005 and 2006 "communications with the TLC that may have left the impression that [defendant] was still representing [plaintiff] at that time."

Any cause of action for legal malpractice by plaintiff against defendant was time-barred after 2002, since the allegation that defendant may have left TLC with the impression

that he was still representing plaintiff in 2005 and 2006 does not establish a continuing attorney-client relationship between plaintiff and defendant after 1999 (*see* CPLR 214).

However, plaintiff stated a cause of action for breach of fiduciary duty because an attorney is prohibited from representing parties whose interests are adverse to his or her former client in matters that are substantially related (*see Solow v Grace & Co.*, 83 NY2d 303, 308 [1994]; *Greene v Greene*, 47 NY2d 447, 453 [1979]).

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2707 Millennium Partners, L.P., Index 600357/09
Plaintiff-Respondent,

-against-

Armand Lindenbaum,
Defendant-Appellant.

Jones Hirsch Connors & Bull, P.C., New York (Alan M. Gelb of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 23, 2009, which denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

In this action alleging breach of fiduciary duty and seeking forfeiture of defendant's consulting fee and commission, there are issues of fact as to whether the consulting agreement was extinguished by the agreement naming defendant as co-broker (*see generally Water St. Dev. Corp. v City of New York*, 220 AD2d 289, 290 [1995], *lv denied* 88 NY2d 809 [1996]); the documentary evidence is inconclusive and defendant does not contest the existence of a fiduciary relationship. There are also issues of fact as to whether defendant breached his fiduciary duty by allegedly obtaining a $1.2 million commission without plaintiff's knowledge, despite his promise to minimize its lease renewal

costs.

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

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2709 The People of the State of New York, Ind. 5929/05
Respondent,

-against-

Gabriel Cabrera,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered October 12, 2007, convicting defendant, after a jury trial, of murder in the second degree, criminal possession of a weapon in the second degree, and five counts of tampering with physical evidence, and sentencing him, as a second felony offender, to an aggregate term of 27 years to life, unanimously affirmed.

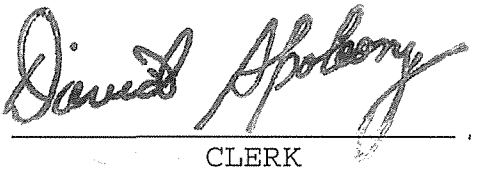
We need not determine whether the court properly charged the jury on accessorial liability (Penal Law § 20.00). Even assuming the court erred, where there are two grounds on which the jury could have reached its verdict, and one but not the other of those grounds lacks support in the evidence, it is presumed that the jury reached its determination upon the factually sufficient

ground (*see People v Giordano*, 87 NY2d 441, 451 [1995]; *People v Hinckson*, 266 AD2d 404 [1999], *lv denied* 95 NY2d 798 [2000]).

Defendant's claim that the accomplice liability instruction improperly amended the indictment, and all of his constitutional claims, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MAY 4, 2010



CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2710 The People of the State of New York, Ind. 3437/07
Respondent,

-against-

Jamila Murray,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Micki A. Scherer, J.), rendered on or about November 16, 2007, unanimously affirmed.

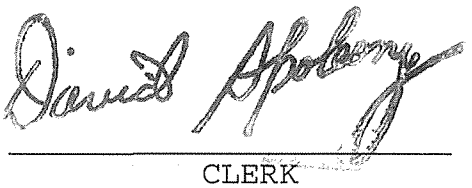
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 4, 2010



CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2711-
2711A Matty Gal-Ed, et al., Index 106882/06
Plaintiffs-Appellants,

-against-

153rd Street Associates, LLC, et al.,
Defendants-Respondents,

Marino Gerazounis & Jaffe
Associates, Inc., et al.,
Defendants.

Poltorak PC, Brooklyn (Elie C. Poltorak of counsel), for appellants.

Mauro Goldberg & Lilling LLP, Great Neck (Matthew W. Naparty of counsel), for 153rd Street Associates, LLC, The Dermot Company, Inc., Kajima Construction Services, Inc. and VJB Construction Corp., respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for H. Thomas O'Hara Architect, PLLC., respondent.

Zetlin & DeChiara LLP, New York (Jeffrey T. Yick of counsel), for Desimone Consulting Engineers, PLLC., respondent.

Appeal from order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered May 20, 2008, which granted the motion by defendant O'Hara Architect and the cross motion by defendant DeSimone Consulting Engineers to dismiss the complaint for failure to comply with discovery demands, deemed to be an appeal from the subsequent judgment, entered May 29, 2008, dismissing the complaint as to defendants 153 Associates, Ohara, Kajima

Construction, VJB Construction and DeSimone, and as so considered, unanimously affirmed, with costs. Order, same court and Justice, entered October 29, 2009, which, to the extent appealed from, denied plaintiffs' motion to renew and to vacate the prior dismissal order, unanimously affirmed, without costs.

The May 2008 order resulted from a motion and cross motion by O'Hara and DeSimone, which was contested by plaintiffs, and thus was directly appealable by those two defendants (*Figiel v Met Food*, 48 AD3d 330 [2008]). At the hearing on the motion, four other defendants (153rd Street, Dermot, Kajima and VJB) joined therein, but plaintiffs did not appear, and thus the dismissal of the complaint as against those four defendants was granted on default, requiring plaintiffs' motion to vacate that order (CPLR 5015). In order to vacate that dismissal on default, plaintiffs had to demonstrate both a reasonable excuse for their failure to appear and a meritorious cause of action (*Grippi v Balkan Sewer & Water Main Serv.*, 66 AD3d 837 [2009]), which they failed to do in other than a conclusory fashion (*see DeRosario v New York City Health & Hosps. Corp.*, 22 AD3d 270 [2005]).

The striking of the complaint for willful failure to comply with discovery deadlines (CPLR 3126) -- e.g., the July 11, 2007 Preliminary Conference order, the November 27, 2007 stipulation and the court's February 13, 2008 directive -- as well as

defendants' and the court's repeated efforts to obtain discovery, was appropriate. Plaintiffs' willfulness was further evidenced by their failure to provide any proof in support of their claim, as well as by the year-long pattern of offering untenable excuses for their noncompliance (*Goldstein v CIBC World Mkts. Corp.*, 30 AD3d 217 [2006]).

Evidence offered regarding plaintiffs' counsel's medical condition as of early March of 2008, offered in support of that aspect of their motion seeking renewal, was not based on new facts not offered on the prior motion, nor would it have changed the court's prior determination that plaintiffs had engaged in an extensive pattern of noncompliance with discovery demands (*see O'Connell v Post*, 27 AD3d 631 [2006]).

M-1647 ***Matty Gal-Ed, et al. v 153rd St. Assoc., LLC., et al.***

Motion seeking to strike brief and for other related relief granted to the extent of striking references in the brief to matters dehors the record.

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

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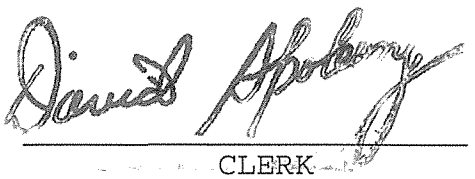

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2712 Joshua Weinberg, Index 100880/06
Plaintiff-Appellant,

-against-

Okapi Taxi, Inc., et al.,
Defendants-Respondents.

Simon, Eisenberg & Baum, LLP, New York (Carol L. Abrams of counsel), for appellant.

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

Order, Supreme Court, New York County (Paul Wooten, J.), entered March 6, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to rebut defendants' prima facie showing that there was no "permanent consequential limitation" or "significant limitation" of use of his ankle (Insurance Law § 5102[d]). Plaintiff's orthopedist consistently reported a full range of motion of the ankle. Plaintiff claims limitations as to prolonged standing, walking, kneeling, or sitting, but he sets forth no objective basis for comparing these limitations "to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). Nor does he address the degenerative

changes noted in the x-ray report from the emergency room or the opinion of defendants' expert that plaintiff's injuries pre-dated the accident (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). Plaintiff also submitted no objective medical proof that he could not perform substantially all his daily activities for 90 of the first 180 days following the accident (*see Rossi v Alhassan*, 48 AD3d 270 [2008]). His claimed inability to work for more than 90 days is not dispositive of the existence of a 90/180 category injury (*Uddin v Cooper*, 32 AD3d 270, 271 [2006], *lv denied* 8 NY3d 808 [2007]).

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2714 The People of the State of New York, Ind. 2145/07
Respondent,

-against-

Anderson Carter,
Defendant-Appellant.

Steven N. Feinman, White Plains, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered November 25, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning credibility. The evidence established that defendant was not an agent of the buyer (*see generally People v Herring*, 83 NY2d 780 [1994]), but instead

was a participant in a drug-selling operation, acting as a steerer, salesperson and screener.

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Freedman, Catterson, McGuire, Román, JJ.

2718 Abdulla Ahmed, Index 110049/08
Plaintiff-Appellant,

-against-

C.D. Kobsons, Inc.,
Defendant-Respondent.

Leon Brickman, Neponsit, for appellant.

Barry S. Schwartz, New York, for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about September 11, 2009, which, in an action by a commercial tenant against his landlord seeking, inter alia, a declaratory judgment that tenant is entitled to renew the subject lease, denied tenant's motion to remove and consolidate a holdover proceeding that landlord had commenced in Civil Court, but stayed issuance of any Civil Court warrant of eviction pending further order of Supreme Court, unanimously affirmed, with costs.

Landlord refused to renew the lease based on a lease clause conditioning renewal on tenant's not being delinquent in the payment of rent or otherwise in material breach of the lease. Tenant then brought this declaratory judgment action to resolve his right to renew the lease, and sought a preliminary injunction staying expiration of the lease pending the action. That motion

was denied, the court finding that tenant was continuously late in paying rent and materially in breach of other provisions of the lease, and rejecting tenant's argument that landlord could not refuse renewal on account of the claimed lease violations without having previously served a notice to cure those violations (67 AD3d 467 [2009], *affg* 24 Misc 3d 1208[A], 2009 NY Slip Op 51307[U] [2009]). Landlord then commenced a holdover proceeding in Civil Court, which was promptly scheduled for trial. On the eve of trial, tenant moved to consolidate the holdover proceeding with this action.

Supreme Court denied the motion to consolidate, commenting that the instant action was still in its initial stages and, moreover, as it had already determined on tenant's prior motion for injunctive relief, appears to lack merit, and that Civil Court is better suited to resolve the matter "quickly and efficiently." This was a proper exercise of discretion. "Even where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter" (*Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 [2003]).

Our disposition of this appeal does not affect Civil Court's jurisdiction to entertain tenant's second affirmative defense.

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2719N Billy Davis, Index 15154/03
Plaintiff,

-against-

T.F.D. Bus Company, et al.,
Defendants.

- - - -

The Law Office of Todd J. Krouner,
Nonparty Petitioner-Appellant,

-against-

Barton Barton & Plotkin LLP,
Nonparty Respondent.

The Law Office of Todd J. Krouner, Pleasantville (Todd J. Krouner of counsel), for appellant.

Barton Barton & Plotkin, LLP, New York (Roger E. Barton of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 6, 2009, which, to the extent appealed from, awarded petitioner 0% of the net attorney fees arising out of the underlying personal injury action, unanimously reversed, on the facts, without costs, and petitioner awarded 10% of the net attorney fees.

The record does not support the court's finding that petitioner law firm is not entitled in quantum meruit to any portion of the net attorney fees earned in the settlement of the personal injury action (*see generally Lai Ling Cheng v Modansky*

Leasing Co., 73 NY2d 454 [1989]; *Pearl v Metropolitan Transp. Auth.*, 156 AD2d 281 [1989]). It demonstrates that for 22 months petitioner had sole responsibility for the personal injury case, and that during that time the associate who brought the personal injury matter to the firm attended court appearances, assembled records, filed a bankruptcy claim, discussed settlement and corresponded with appropriate parties, and counseled the injured plaintiff with respect to his medically recommended spinal surgery. While the 5% share of the net attorney fees awarded by the court to the associate was predicated upon an agreement with the previous firm, nonparty respondent Barton Barton & Plotkin, LLP, the associate's testimony and the documents in the case file establish that he spent a significant amount of time on the matter while at petitioner law firm. The court's finding that the firm was not entitled to a share of the net attorney fee in part because its principal apparently did little work on the case would seem to ignore the firm's operating structure. We note, however, that the record reflects that petitioner's work on the case, in contrast to that of the Barton firm, was but a small percentage of the total legal work performed on the case, and we fix petitioner's award accordingly.

Assuming without deciding that petitioner's argument that the Barton firm committed ethical violations and should forfeit

its right to attorney fees is properly before this Court, we reject it on the merits.

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

ENTERED: MAY 4, 2010

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2720N Sullivan & Worcester LLP, Index 111249/09
Petitioner-Appellant,

-against-

Ziad Takieddine,
Respondent-Respondent.

Sullivan & Worcester LLP, New York (Mitchell C. Stein of counsel), for appellant.

Siller Wilk LLP, New York (Eric B. LaMons of counsel), for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 5, 2009, which, in an action for unpaid attorneys' fees, denied petitioner law firm's application to attach in aid of arbitration respondent former client's interest in the action that petitioner had first been retained to represent respondent wherein respondent sought, inter alia, the return of a down payment on an airplane, but enjoined respondent from assigning his interest in that action, unanimously affirmed, with costs.

The denial of an attachment was a provident exercise of the court's discretion, as there was no showing that a potential arbitration award may be rendered ineffectual without an attachment (*see Matter of H.I.G. Capital Mgt. v Ligator*, 233 AD2d 270 [1996]). Petitioner's papers contain no details as to

respondent's financial condition, nor is there any assertion that respondent "will secrete, dissipate or otherwise squander his assets" before the arbitration award is rendered (*Costikyan v Jacobson*, 280 AD2d 272, 272 [2001]). There is also no evidence or allegation contradicting respondent's sworn statement that he has never had any judgments rendered against him, and that he is financially solvent and stable.

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

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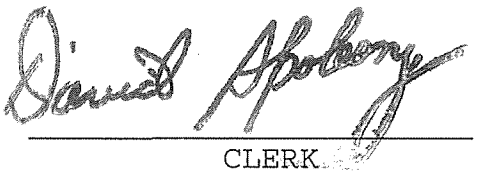

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