SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 20, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1709 Greenberg, Trager & Herbst, LLP, Index 603426/07
590569/08
Plaintiff-Appellant,

-against-

HSBC Bank USA,
Defendant,

Citibank, N.A.,
Defendant-Respondent.

[And A Third-Party Action]

- - - -

1710 Greenberg, Trager & Herbst, LLP,
Plaintiff-Appellant,

-against-

HSBC Bank USA,
Defendant-Respondent,

Citibank, N.A.,
Defendant.

[And A Third-Party Action]

Greenberg, Trager & Herbst, LLP, New York (Kalvin Kamien of counsel), for appellant.

Zeichner Ellman & Krause LLP, New York (Barry J. Glickman of counsel), for Citibank, N.A., respondent.

Michael R. Mendola, Buffalo for HSBC Bank USA, respondent.

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered April 24, 2008 and April 28, 2008, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The motion court correctly found that the administrative return of the mis-routed check was not a dishonor triggering the running of HSBC's time to notify plaintiff depositor, so when the bank later learned the check was counterfeit, it properly revoked its provisional settlement and charged the amount against plaintiff's account since the item had not been finally settled (*see* UCC § 4-212[1]). The court properly relied on HSBC's explanation, which was responsive to plaintiff's opposition papers (*see Galdamez v Biordi Constr. Corp.*, 50 AD3d 357 [2008]), that the "insufficient funds" designation on the computer-generated backing affixed to the returned imaged check bearing a "sent wrong" notation was merely a default setting that did not accurately reflect the reason for the return. Even if, arguendo, an HSBC employee misrepresented that the check had cleared, plaintiff's reliance on such representation in wiring funds to an offshore account, causing it to suffer damages when unable to recover such funds, does not give rise to a claim against the bank for negligent misrepresentation absent a fiduciary relationship, which does not exist between a bank and its

customer (*see Dobroshi v Bank of Am., N.A.*, 65 AD3d 882 [2009]). If, as plaintiff maintains, principles of estoppel should govern the allocation of loss, then it was in the best position to guard against the risk of a counterfeit check by knowing its "client," its client's purported debtor and the recipient of the wire transfer. Instead, it expended scant effort at researching any of them, and engaged in the subject transaction pursuant to the client's exhortation to act "ASAP" and that time was of the essence, despite never having received its requested confirmation that the transaction was indeed legitimate.

The court also properly relied on the uncontroverted explanation by Citibank that its personnel who reviewed the routing were not in a position to discern whether the check was counterfeit, so even though that same day they returned a number of checks with the same face amount, there was at that time no reason for Citibank to notify HSBC.

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

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

ENTERED: MAY 20, 2010

CLERK

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

2839 The People of the State of New York, Ind. 1633/06
Respondent,

-against-

Manuel Picon,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered September 18, 2007, convicting defendant, after a jury trial, of attempted criminal sexual act in the first degree and two counts of sexual abuse in the first degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

The court properly permitted the People to introduce a recording of the victim's 911 call, since it was sufficiently prompt under the circumstances to qualify under the prompt outcry exception to the hearsay rule (*see People v McDaniel*, 81 NY2d 10 [1993]; *People v Archbold*, 40 AD3d 403 [2007], *lv denied* 9 NY3d 872 [2007]; *People v Vanterpool*, 214 AD2d 429 [1995], *lv denied* 86 NY2d 875 [1995]).

By failing to object, or by failing to elaborate on his

general objections, defendant failed to preserve any of his remaining evidentiary claims or his challenges to the People's summation, and the record does not support defendant's assertion that in certain instances objections would have been futile (*compare People v Mezon*, 80 NY2d 155, 161 [1992]). We decline to review any of these claims in the interest of justice. As an alternative holding, we find no basis for reversal. Although the quantity of prompt outcry evidence may have been excessive, its extent was not so egregious as to deprive defendant of a fair trial.

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

ENTERED: MAY 20, 2010

CLERK

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

2840 In re Hafiz Z. Hussain, Petitioner, Index 402597/08

-against-

Shaun Donovan, as Commissioner of the New York City Department of Housing Preservation and Development, et al., Respondents.

Thomas J. Hillgardner, Jamaica, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondents.

Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated June 27, 2008, terminating petitioner's Section 8 housing subsidy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Marylin G. Diamond, J.], entered June 26, 2009), dismissed, without costs.

HPD's determination was supported by substantial evidence showing that petitioner violated HPD's policy requiring truthful and complete reporting of family composition on the subject application and recertification forms (*see Matter of Gerena v Donovan*, 51 AD3d 502 [2008]). There exists no basis to disturb

the hearing officer's credibility determinations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty imposed was not so disproportionate to the offense as to be shocking to one's sense of fairness (*see Matter of Alarape*, 51 AD3d at 502).

We have considered petitioner's remaining arguments, including that he was afforded ineffective assistance of counsel, and find them unavailing.

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

ENTERED: MAY 20, 2010

CLERK

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

2841 In re Dashawn W., And Others,

Children Under Eighteen Years of Age, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Antoine N.,
Respondent-Respondent,

Ronnelle B.,
Respondent.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellant.

Elisa Barnes, New York, for Antoine N., respondent

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

Order of fact-finding, Family Court, New York County (Sara P. Schechter, J.), entered on or about February 28, 2008, which, insofar as appealed from, dismissed the charge of severe abuse against respondent father as to the child Jayquan N., unanimously reversed, on the law, without costs, and the matter remanded for further proceedings to determine whether the agency exercised diligent efforts or whether such efforts should be excused.

The court believed that *People v Suarez* (6 NY3d 202 [2005]), a criminal case that noted that conduct evincing a depraved indifference to human life generally cannot occur in a one-on-one

situation, constrained it from making a finding of severe abuse pursuant to Family Court Act § 1051 because there was insufficient evidence to determine whether the father's conduct - causing his five-month-old baby to sustain, on separate occasions, a fractured clavicle and four to seven broken ribs - evinced a depraved indifference to the life of the child. However, the definition of severe abuse set forth in Social Services Law § 384-b(8)(a) encompasses conduct which is either intentional or reckless, unlike Penal Law §§ 125.25[1] and [2], which, pursuant to *Suarez,* are almost always mutually exclusive. In any event, *Suarez* recognized that in cases involving abused children, conduct evincing depraved indifference to human life may be present in a one-on-one situation (6 NY3d at 213).

Clear and convincing evidence established that the baby sustained the serious physical injuries while in the care of the father, and the parents failed to provide an adequate explanation. Additionally, the court was entitled to draw the strongest negative inference against the father based on his failure to testify in the proceedings (*see Matter of Dante M. v Denise J.*, 87 NY2d 73, 79-80 [1995]). The father's conduct directed at the infant was sufficient to demonstrate depraved indifference to the child's life (*see People v Goodridge*, 251 AD2d 85 [1998]).

However, due to the court's misinterpretation of *Suarez*, it never reached the issue of whether the agency exercised diligent efforts to strengthen the parental relationship (*see* Social Services Law § 384-b[8][a][i], [iv]). The matter should be remanded for further proceedings to determine if the agency exerted such efforts or whether such efforts are excused, since a finding of severe abuse is admissible in a subsequent proceeding to terminate parental rights (*see Matter of Leon K.*, 69 AD3d 856, 857 [2010]).

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

ENTERED: MAY 20, 2010

CLERK

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

2842 In re Takia B.,

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

Antoine N., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

Elisa Barnes, New York, for Antoine N., appellant.

Neal D. Futerfas, White Plains, for Ronnelle B., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about June 18, 2009, bringing up for review an order of the same court and judge, entered on or about February 9, 2009, which granted a motion for summary judgment of the Administration for Children's Services ("ACS") finding that the parents had derivatively neglected the subject child, unanimously affirmed, without costs.

Proof of abuse of neglect of one child may, in appropriate circumstances, be sufficient to sustain a finding of abuse or

neglect of a second child (*see Matter of Kadiatou B.*, 52 AD3d 388, 389 [2008], *lv denied* 12 NY3d 701 [2009]). Here, the court properly relied on findings made a few months earlier that the parents neglected and abused their other children, including the fact that their five-month-old son sustained four broken ribs and a fractured clavicle, which the parents did not adequately explain, and the father's admitted beating of his five-year-old son. ACS demonstrated that his conduct was sufficiently proximate in time that it could reasonably be concluded that the condition still exists currently (*see Matter of Cruz*, 121 AD2d 901, 902-903 [1986]).

The parents failed to present evidence sufficient to raise a triable issue of fact concerning an amelioration of the conditions that led to the original finding (*see Matter of Tradale CC. v Tiffany DD.*, 52 AD3d 900, 901 [2008]).

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

ENTERED: MAY 20, 2010

CLERK

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

2843 The Travelers Indemnity Company, Index 603601/02
Plaintiff-Respondent,

-against-

Orange and Rockland Utilities, Inc.,
Defendant-Appellant,

John Doe Corporations 1-100,
Defendants.

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2844 The Travelers Indemnity Company, Index 603601/02
Plaintiff-Appellant,

-against-

Orange and Rockland Utilities, Inc.,
Defendant-Respondent,

John Doe Corporations 1-100,
Defendants.

Dickstein Shapiro LLP, New York (David L. Elkind of counsel) and Dickstein Shapiro LLP, Washington, DC (Selena J. Linde of the Bar of the State of Maryland, admitted pro hac vice, of counsel), for Orange and Rockland Utilities, Inc., appellant/respondent.

Steptoe & Johnson LLP, Washington, D.C., (Roger E. Warin of Bar of the District of Columbia, admitted pro hac vice) and Clyde & Co US LLP, New York (Daren S. McNally of counsel), for The Travelers Indemnity Company, respondent/appellant.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 19, 2009, which granted defendant insured's motion for partial summary judgment on the issue of late notice and denied plaintiff insurer's motion for partial summary judgment, unanimously reversed, on the law, without costs, defendant's

motion denied, and plaintiff's motion granted to declare denial of coverage on the basis of untimely notice. Order (same court, Justice and entry date), which granted plaintiff's motion for partial summary judgment to exclude certain coverage based on the pollution exclusion in the policy, unanimously modified, on the law, the motion denied as to the 1970 policy and sites other than Nyack, and otherwise affirmed, without costs.

Defendant did not give timely notice under the policy, which is a requirement for coverage (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [2002]). Defendant's ongoing contacts with environmental regulators about the Nyack site dated back to 1981, and there was even a site inspection by the Environmental Protection Agency in 1985, yet defendant never provided any notice to its insurer of these contacts or the questions they raised until 1995. Defendant's argument that it never had actual notice of any pollution was insufficient. The many reports, including internal reports of a likelihood of contamination at the subject site, as well as inquiries from regulators, placed it on notice. Its willful failure to investigate negates any lack of awareness of an occurrence of pollution (*see Technicon Elecs. Corp. of N.Y. v American Home Assur. Co.*, 74 NY2d 66, 75 [1989]). The court mistakenly held defendant to the much more lenient standard for the timing of

notice applicable in excess insurance cases. The standard with regard to a primary liability policy, such as involved here, is simply awareness of a reasonable possibility that the policy will be implicated (*Paramount*, 293 AD2d at 239-240).

Similarly, the court erred in holding that plaintiff waived its right to disclaim for late notice simply as a result of the passage of time. Contrary to the court's assumption, Insurance Law § 3420 applies only to claims for death and bodily injury (*Fairmont Funding v Utica Mut. Ins. Co.*, 264 AD2d 581, 582 [1999]), and not to pollution insurance.

Between 1971 and 1982, a provision of the Insurance Law then in effect (former § 46) excluded liability coverage for pollution other than claims based on "sudden and accidental" discharges. The court properly applied that exclusion for all policies issued during that period (*see Maryland Cas. Co. v Continental Cas. Co.*, 332 F3d 145, 159-160 [2d Cir 2003]). We do not find persuasive defendant's argument that plaintiff waived the "benefit" of the statute by issuing policies in contravention of its terms. Section 46 did not confer any benefit or right on insurers, but rather was intended to impose a penalty on polluters like the insured herein. The court correctly concluded that defendant failed to meet its burden of establishing that the pollution complained of was caused by "sudden and accidental" discharges

(*Borg-Warner Corp. v Insurance Co. of N. Am.*, 174 AD2d 24, 31 [1992], *lv denied* 80 NY2d 753 [1992]). While its longtime employee testified that there were many accidental spills during routine operations, this was not sufficiently definite as to quantity, nature or effect of these spills to prove they fell outside the exclusion.

However, the court erred in applying the § 46 exclusion to the policy issued in 1970, prior to enactment of the short-lived statute, since a contract generally incorporates the state of the law in existence at the time of its formation (*see People ex rel. Platt v Wemple*, 117 NY 136, 148-149 [1889], *appeal dismissed* 140 US 694 [1890]). It also erred in granting plaintiff summary declaratory relief as to other sites,[1] in light of plaintiff's concession that the court's ruling on the issue of the statutory pollution exclusion be limited to the Nyack site.

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

ENTERED: MAY 20, 2010

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[1]Seven are enumerated in the court's order and plaintiff's show cause order, although only six of them are listed in the complaint.

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

2845 Jesus Pacheco, Index 21309/03
Plaintiff,

-against-

Kew Garden Hills Apartment Owners, Inc.,
Defendant-Respondent,

H.A.R. Construction, Inc.,
Defendant,

Headson Construction, Inc.,
Defendant-Appellant.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for appellant.

Brody, O'Connor & O'Connor, Northport (Joseph P. Minasi of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 16, 2009, which, to the extent appealed from, denied defendant Headson Construction, Inc.'s motion for summary judgment dismissing plaintiff's Labor Law § 240(1) and § 241(6) claims as against it, unanimously affirmed, without costs.

Contrary to Headson's argument, the evidence does not demonstrate conclusively that plaintiff's injuries did not arise out of work delegated to Headson by the general contractor, thereby eliminating Headson's liability under Labor Law § 240(1)

and § 241(6) as the general contractor's agent (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *see also Carter v Vollmer Assoc.*, 196 AD2d 754 [1993]; *Davis v Lenox School*, 151 AD2d 230 [1989]). Therefore, Headson's argument that it did not direct, control or supervise the work of the general contractor's employees is unavailing because its contract authorized it to supervise and control the work delegated to it (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [2010]), and its argument that Industrial Code (12 NYCRR) § 23-5.1(h) is inapplicable because Headson was not responsible for the scaffold from which plaintiff fell is unavailing because its contract required it to furnish the scaffolding necessary to the performance of its work.

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

ENTERED: MAY 20, 2010

CLERK

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

2846 The People of the State of New York, Ind. 6279/06
Respondent,

-against-

Robert Johnson,
Defendant-Appellant.

- - - -

2847 The People of the State of New York, Ind. 6279/06
Respondent,

-against-

David Natt,
Defendant-Appellant.

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

Steven Banks, The Legal Aid Society, New York (Ellen Dille of counsel), for David Natt, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered February 27, 2008, convicting defendant Johnson, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 3 years, unanimously affirmed. Judgment, same date, court and Justice, convicting defendant Natt, after a jury trial, of criminal possession of a controlled substance in third degree, and sentencing him, as a second felony drug offender, to a term

of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 8 years, and otherwise affirmed.

The court properly denied defendants' applications pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the peremptory challenges in question were not pretextual, a credibility determination that is entitled to great deference (*see People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]). "[W]here the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire" (*Thaler v Haynes*, __US__, 130 S Ct 1171, 1174 [2010]). We conclude that the prosecutor's explanations were demeanor-based, and were not mischaracterizations of the panelists' responses. Tone or inflection of voice, hesitation, facial expressions, shrugs, gestures and the like can render equivocal what appears, in print, to be an unequivocal statement. The prosecutor's use of the term "interaction," although late in the *Batson* colloquy, clarified that the explanations for the challenges were based on demeanor, and the court's explicit reliance on its "observations" demonstrated that it understood the explanations to be demeanor-

based, and credited them.

The court properly rejected defendants' challenges for cause to two prospective jurors. As to each panelist, the colloquy, read as a whole, establishes that the panelist gave a sufficient assurance of his or her ability to set aside any predispositions and render an impartial verdict (*see People v Chambers*, 97 NY2d 417 [2002]). Accordingly, the seating of one of these panelists as a juror did not deprive defendants of their right to an impartial jury.

As to each defendant, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Although we may consider defendants' acquittals on other counts, and the acquittals of the other jointly tried codefendants, we do not find that any of these acquittals warrants a contrary conclusion (*see People v Rayam*, 94 NY2d 557, 563 n [2000]). In particular, the evidence of Natt's possession of drugs with intent to sell included testimony from the arresting officer that he saw Natt accept money from a purchaser who immediately obtained drugs from Johnson. In addition, Natt possessed drugs packaged identically to those recovered from the buyer, as well as a large amount of cash.

Natt's acquittal of the sale charge is a relevant factor but, under the principles articulated in *Rayam* and *People v Tucker* (55 NY2d 1, 7 [1981]), it does not make the evidence of the sale disappear (*see People v Freeman*, 298 AD2d 311 [2002], *lv denied* 99 NY2d 582 [2003]).

We find Natt's sentence excessive to the extent indicated.

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

ENTERED: MAY 20, 2010

CLERK

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

2848-
2848A Angela Leonardi, Index 23425/05
Plaintiff-Appellant,

-against-

Arlene Cruz,
Defendant-Respondent,

Susan Shkeli, et al.,
Defendants.

Goidel & Siegel, LLP, New York (Andrew B. Siegel of counsel), for appellant.

O'Connor, McGuinness, Conte, Doyle & Oleson, White Plains (Tracey A. Stewart of counsel), for respondent.

Order, Supreme Court, Bronx County (Maryann Brigantti-Hughes, J.), entered October 2, 2008, which, to the extent appealed from, granted that part of defendant Cruz's cross motion for summary judgment dismissing the complaint as against her on the ground that plaintiff failed to sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the cross motion denied and the complaint reinstated as against Cruz. Appeal from order, same court and Justice, entered April 21, 2009, which, upon renewal and reargument, adhered to its prior determination, unanimously dismissed, without costs, as academic.

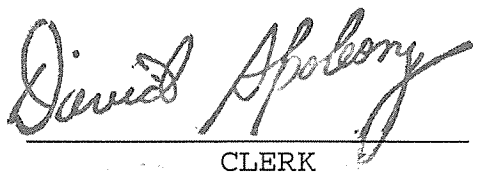
The record establishes that plaintiff sufficiently preserved

her argument that Cruz's cross motion for summary judgment was untimely by raising the issue in her opposition to the cross motion. It is undisputed that Cruz's cross motion was made after the expiration of the 120-day period set forth in CPLR 3212(a) and Cruz did not provide an excuse for the delay in bringing the motion. Accordingly, since plaintiff moved for summary judgment only on the issue of liability, that part of Cruz's cross motion for summary judgment on the issue of serious injury was untimely (*see Covert v Samuel*, 53 AD3d 1147, 1148 [2008]). Furthermore, although "[a] cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [2006], *appeal dismissed* 9 NY3d 862 [2007] [internal quotation marks and citations omitted]), the issues of liability and serious injury are not so intertwined or nearly identical (*see Covert*, 53 AD3d at 1148).

In view of the foregoing, we need not consider plaintiff's arguments with respect to the merits of the cross motion.

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

ENTERED: MAY 20, 2010



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

2851-
2851A The Board of Managers of the Chelsea 19 Condominium, et al., Plaintiffs-Appellants, Index 105347/08

-against-

Chelsea 19 Associates, et al., Defendants-Respondents.

Finder Novick Kerrigan LLP, New York (Thomas P. Kerrigan of counsel), for appellants.

Michael A. Haskel, Mineola, for Chelsea 19 Associates and Donald Zweibon, respondents.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Lee J. Sacket of counsel), for George Schwarz, respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered March 19, 2009, which, in an action by a condominium and certain of the its unit owners against the condominium's sponsor, its principal and its architect, granted the sponsor defendants' motion to dismiss the complaint as against them and sua sponte dismissed the complaint as against the architect, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 9, 2009, which, to the extent appealed, denied plaintiffs' motion to renew, unanimously dismissed as academic, without costs.

The motion court correctly held that the individual unit

owners lack standing to seek damages for injury to the building's common elements (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 50 AD3d 503, 504 [2008]). We otherwise affirm the result, albeit not for the motion court's reasons (*see Fenton v Consolidated Edison Co. of N.Y.*, 165 AD2d 121, 125 [1991], *lv denied* 78 NY2d 856 [1991]). The contract claims, which are based on the architect's description of the building's condition included in the offering plan and incorporated in the purchase agreements, are flatly contradicted by the "as is" clause and related disclaimer provisions in those documents (*see Rivietz v Wolohojian*, 38 AD3d 301 [2007]); those provisions are not undermined by the general statement in those documents that the building was in "good" condition. All of the fraud and related tort claims arise from the same provisions said to have been breached and seek the same damages, and thus merely duplicate the insufficient contract claims (*see Moustakis v Christie's, Inc.*, 68 AD3d 637, 637 [2009]; *Esbe Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398-399 [2008]). Moreover, plaintiffs are foreclosed from establishing reliance by the specific disclaimers (*see Citibank v Plapinger*, 66 NY2d 90, 94-95 [1985]), and by their undertaking to conduct their own

investigation (*see Parker East 67th Assoc. v Ministers, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y.*, 301 AD2d 453, 454 [2003], *lv denied* 100 NY2d 502 [2003]). Absent a confidential or fiduciary relationship, defendants did not have a duty of disclosure (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [2006]), and common-law fraud may not be asserted against a condominium sponsor based on omissions from the offering plan (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]). The claim for negligent performance of contract is not cognizable (*see City of New York v 611 W. 152nd St.*, 273 AD2d 125, 126 [2000]). The claims for wrongful transfers of development rights, sounding in conversion, unjust enrichment and breach of fiduciary duty, are subject to a three-year limitations period and therefore untimely (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44-45 [1995]; *Lambert v Sklar*, 30 AD2d 564, 566 [2006]; *Kaufman v Cohen*, 307 AD2d 113, 118 [2003]). This is so with respect to the fiduciary breach claim regardless of whether it is based on allegations of actual fraud (*see Kaufman v Cohen*, at 119), as there is no viable fraud claim based on affirmative misrepresentation (*see Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 404 [2008]). The claims against the architect largely mirror the insufficient claims against the sponsor and its

principal; to the extent the claims against the architect sound in professional negligence, they are untimely (*see IFD Constr. Corp. v Corddry Carpenter Dietz & Zack*, 253 AD2d 89, 91-92 [1999]). In view of the foregoing, it is unnecessary to address whether the board was authorized to commence this action, and, accordingly, we dismiss the appeal from the order denying renewal.

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

ENTERED: MAY 20, 2010

CLERK

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

2852 The People of the State of New York, Ind. 1078/07
Respondent,

-against-

Terrence Heyward,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered on or about October 30, 2008, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: MAY 20, 2010

CLERK

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

2855 Gary Don, et al., Index 105584/06
Plaintiffs-Respondents,

-against-

Baruch Singer, et al.,
Defendants,

855 Realty Owner LLC,
Nonparty Appellant.

Tarter Krinsky & Drogin LLP, New York (Edward R. Finkelstein of counsel), for appellant.

Zell, Goldberg & Co., New York (Jeffrey E. Michels of counsel), for respondents.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 27, 2009, which granted plaintiffs' motion to extend the notice of pendency filed against the subject properties, and denied appellant's cross motion to vacate and cancel the notice of pendency, unanimously affirmed, with costs.

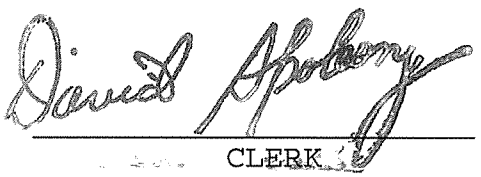
In view of the remedial goal of CPLR article 65 *(see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313 [1984]) and the viability of the claims for a constructive trust (*see Klein v Gutman*, 12 AD3d 348 [2004]), the notice of pendency was properly extended. Since the complaint sought the placement of the subject properties in a constructive trust in order to protect plaintiffs' alleged ownership interest therein, this action

affects the "title to, or the possession, use or enjoyment of real property" (*see Peterson v Kelly*, 173 AD2d 688, 689 [1991]; *compare Yonaty v Glauber*, 40 AD3d 1193, 1195 [2007]).

We have considered appellant's remaining claims, including those related to the court's prior order of May 30, 2007, and find them unavailing.

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

ENTERED: MAY 20, 2010



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Andrias, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

1901-
1901A-
1901B Pat Roddy, Index 113659/02
Plaintiff-Appellant,

-against-

Nederlander Producing Company
of America, Inc., et al.,
Defendants-Respondents,

Moya Doherty, et al.,
Defendants.

[And A Third-Party Action]

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Jonny Kool of counsel), for appellant.

Law Offices of Charles J. Siegel, New York (Robert S. Cypher, Jr., of counsel), for Nederlander Producing Company of America, Inc. and The Gershwin Theatre, respondents.

Hoey, King, Toker & Epstein, New York (Robert O. Pritchard of counsel), for Abhann Productions, Inc., respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered December 10, 2008, which denied renewal and reargument of a prior order, same court and Justice, entered on or about July 22, 2008, granting defendants-respondents' motion to dismiss the complaint and all cross claims as against them, and adhered to the original decision, unanimously affirmed, without costs. Appeal from the July 22, 2008 order unanimously dismissed, without costs, as superseded by the appeal from the order entered

December 10, 2008. Appeal from an unfiled judgment, same court and Justice, dated October 3, 2008, unanimously dismissed, without costs.

Plaintiff dancer commenced this action seeking damages for personal injuries against his employer, Abhann Productions, Inc. (Abhann), which was later dismissed as a defendant under the Workers' Compensation Law, as well as against the owners of the theater, respondents The Gershwin Theater and Nederlander Producing Company of America, Inc. (collectively Gershwin). According to the complaint, plaintiff was injured when, while performing, he fell "due to the slipperiness of the stage and the presence and formation of excess moisture and/or liquid upon the stage emanating from or otherwise caused by the dry ice machine being used . . . to create 'fog.'" In his bill of particulars, plaintiff similarly alleged that he was injured when he leapt and landed on a "portion of stage which had been rendered un-safe and slippery due to excessive liquid and moisture thereupon caused by the dry ice machine operated by Defendants."

In *Roddy v Nederlander Producing Co. of Am., Inc.* (44 AD3d 556 [2007]) (*Roddy I*), we granted conditional summary judgment to Gershwin on its contractual indemnification claim against Abhann, finding that Gershwin established its prima facie case "by demonstrating, through deposition testimony and other evidence,

that the fogger machines and floor that caused plaintiff's injury were under the exclusive control of Abhann, and that Abhann had directed every aspect of the work through which plaintiff was injured." We also found that "[i]n light of the unrebutted prima facie demonstration that Gershwin was not negligent in the occurrence of the accident, General Obligations Law § 5-322.1 is inapplicable." Based on this determination, Gershwin moved to dismiss the complaint under theories of res judicata, collateral estoppel and the law of the case.

As distinguished from issue preclusion and claim preclusion, the law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment (*see Matter of McGrath v Gold*, 36 NY2d 406, 413 [1975]), and is the applicable doctrine (*see People v Evans*, 94 NY2d 499, 502 [2000] [res judicata and collateral estoppel "generally deal with preclusion after judgment," i.e., after a claim or issue has been adjudicated "in a prior action"]). Under the doctrine, parties or their privies are "preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179 [2007]; *see Matter of Atlantic Mut. Ins. Co. v Lauria*, 291 AD2d 492 [2002]). Absent a showing

of subsequent evidence or change of law, "[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court" *(J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 AD3d 809, 809 [2007]; *see Seaman v Wyckoff Hgts. Med. Ctr., Inc.*, 51 AD3d 1002 [2008] *lv denied* 11 NY3d 716 [2009]; *Sharp v Stavisky*, 242 AD2d 447 [1997] *lv dismissed* 91 NY2d 956 [1998]).

Here, plaintiff had a full and fair opportunity to address the issues decided adversely to his interests in *Roddy I*.

First, plaintiff was served with the indemnification motion. Although it is true that the moving papers state that the motion was addressed to Gershwin's indemnification claims against Abhann, not to the dismissal of the complaint, the issue of Gershwin's negligence was nevertheless apparent, with Gershwin citing the deposition testimony of both plaintiff and his wife, who was an associate producer of the show, that plaintiff was injured when he slipped on moisture that had been left on the floor of the stage by malfunctioning fog machines; that both the machines and the portable floor on which plaintiff slipped were the property of and under the exclusive control of the producers, who had brought them in for this production; and that there had been numerous complaints, of which the producers were aware,

about recurring problems with the machines and slippery conditions on the floor. If plaintiff was dissatisfied with the adequacy of Abhann's response to Gershwin's proof that Gershwin was not negligent, it was incumbent on plaintiff to submit opposition to the motion sufficient to raise a material issue of fact as to Gershwin's negligence. Yet, plaintiff never sought to participate in the indemnification motion, electing instead to sit on his hands despite his material interest in the determination as to whether Gershwin was negligent or not.

Second, when Gershwin appealed from the denial of the indemnification motion, plaintiff was served with a notice of appeal, the record and the briefs and could have participated in the appeal as a respondent (CPLR 5511). Again, plaintiff elected not to participate, even though the issue of Gershwin's negligence was apparent from the record and plaintiff had a material interest in the determination of that issue.

As the motion court observed, these circumstances demonstrate that plaintiff made a tactical choice not to participate in the underlying motion and in *Roddy I*, despite both notice and a right to do so. Accordingly, plaintiff had a full and fair opportunity to litigate.

Contrary to plaintiff's arguments, our finding in *Roddy I* that Gershwin was not negligent was not merely obiter dictum. In

granting conditional indemnity, the issue of Gershwin's negligence was necessarily involved in a determination on the merits and became the law of the case *(Scofield v Trustees of Union Coll.*, 288 AD2d 807 [2001]).

Nor has plaintiff presented competent subsequent evidence demonstrating Gershwin's negligence. As stated above, both the complaint and bill of particulars attributed the cause of the accident to moisture and liquid emanating from the dry ice machines. Plaintiff and his wife similarly testified at their depositions that water was coming from the smoke and dry ice machines. It was not until after a note of issue was filed and our decision in *Roddy I* that plaintiff for the first time served his expert disclosure under CPLR 3101(d) in support of the theory that Gershwin was negligent in failing to properly operate the theater's air conditioning system. Plaintiff could not defeat Gershwin's motion by raising this new theory of liability (*see People v Grasso,* 54 AD3d 180, 212-213 [2008]; *Mathew v Mishra*, 41 AD3d 1230, 1231 [2007]).

Further, while annexing his CPLR 3101(d) disclosure to his opposition to Gershwin's summary judgment motion, plaintiff did not produce an affidavit from the expert until he made his motion to renew and reargue. Even if we were to consider that belated submission, the expert's affidavit provided no empirical data to

support the basis for his conclusions, which were speculative, conclusory, and lacking in probative value (*see Diaz v New York Downtown Hosp.* 99 NY2d 542 [2002]; *Itzkowitz v King Kullen Grocery Co.*, 22 AD3d 636, 637-638 [2005]). In particular, the expert provided no specific measurements of the temperature and humidity level of the theater on the night of plaintiff's accident, or of the air conditioning and fogger settings. Moreover, there is no evidence of specific requests to Gershwin to increase or decrease the air conditioning due to the use of the fog machine.

We have considered plaintiff's other arguments and they are unavailing.

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

ENTERED: MAY 20, 2010

CLERK

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

2418 In re Sasha B.,

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

Erica B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Anne Reiniger, New York for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

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

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about June 22, 2009, which, upon a fact-finding determination that respondent mother neglected the subject child, inter alia, placed the child in the custody of the Commissioner of Social Services pending the completion of the next permanency hearing, affirmed insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed as moot, without costs.

The placement has been rendered moot as the date scheduled for the next permanency hearing has passed (*see Matter of Taisha R.*, 14 AD3d 410 [2005]).

The finding that respondent neglected the child was supported by a preponderance of the evidence (*see* Family Court Act § 1012[f][i][B]; § 1046[b][I]), which showed that on their way home from school respondent exited the subway train and left her child, who was asleep, alone on the train (*see Matter of Joyce A-M. [Yvette A.]*, 68 AD3d 417 [2009]). The child later found her way back to school, where she told a staff person that she had been left on the train and did not know where her mother was. School personnel called the mother and, when no answer was received, the grandmother, who picked the child up from school. Respondent's claim that her actions were inadvertent is undermined by the fact that she made no attempt to seek assistance. The court also properly found that respondent exposed the child to an imminent risk of harm based on the child's statement — which was corroborated by respondent's statements to the caseworker (*see e.g. Matter of R./B. Children*, 256 AD2d 96 [1998]) — that respondent had left her alone on the train twice before, and by the reasonable inference, based on the fact the child returned to school, that she was unable to navigate her way home.

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

ANDRIAS, J. (dissenting)

There is nothing in this record supporting the Family Court's finding that respondent mother neglected her child as that term is defined in the statute and has been interpreted by the Court of Appeals.

In determining whether the mother placed the child's physical, mental or emotional condition in "imminent danger of becoming impaired as a result of the failure . . . to exercise a minimum degree of care" (Family Ct Act § 1012[f][i]), the Family Court was required to "focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior"; the imminent danger "must be near or impending, not merely possible" (*Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). On the record before us, while one may argue that it is undesirable parental behavior to create a situation, inadvertently or not, that leads to an 11½ year old traveling the subway on her own, the facts at most support a finding that future harm was merely possible, not that it was near or impending (*see Matter of Anna F.*, 56 AD3d 1197 [2008]). Accordingly, because I do not believe that the presentment agency met its burden of establishing neglect based on inadequate guardianship by a preponderance of the evidence, I would reverse and vacate the finding of neglect.

A report of an oral transmission by a shelter worker stated that on the afternoon of November 12, 2008, the mother got off the "D" train at 59th Street thinking that her daughter was right behind her. When she looked back and saw that the child was not there, the mother, instead of immediately reporting the child missing, returned to the Bronx Shelter where they lived and called the police. During that report, the source received word that the child had returned to her school in Queens. The mother called the child's grandmother, who lived in Queens, and asked her to pick up the child.

The mother explained to the caseworker that the child was sleeping next to her as they took the train back from the child's school. She nudged the child to wake her up, telling her that their stop was approaching. After the mother got off, she turned around to see if the child was behind her and saw the door close and the child still sitting on the train.

The child told the caseworker that she was on the train with her mother coming from school. She fell asleep and when she woke up she did not see her mother. The child got off the train and went back to her school. When the school could not reach her mother, it called her grandmother who picked her up. When asked if this had happened before, the child told the caseworker that she "lost her mother two times prior to this incident in the

train station." The case worker did not ask the child if there were any occasions, other than going to school, where she traveled the subway alone.

The Family Court, drawing the strongest negative inference possible from the mother's failure to appear and testify, found, based on the child's statements that she had been left on the train at least two times before, that the mother was exposing the child to imminent risk of harm, that there was a likelihood that the child on the date in question was left on the train and that while the child went back to school there was no showing she knew how to get home or that she was old enough to travel on her own.

"[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d at 368 [citation omitted]). Not all objectionable parental behavior falls within the legal definition of neglect (*see Matter of William EE.*, 157 AD2d 974 [1990]). Here, the mother made an extraordinary effort, given her limited means, to provide proper supervision by taking her 11½-

year old daughter to and from their shelter in the Bronx to her school in Queens, each and every school day. As to the November 12, 2008 incident, the mother told the caseworker that she nudged the child at the stop and did not realize that the child was not behind her until after she exited. Although the mother, perhaps out of fear or panic, did not report the incident immediately, she did notify the police when she returned to the shelter in the Bronx. The child was able to successfully navigate the subway back to her school in Queens and there is no evidence that the child was physically endangered or traumatized by the incident. Indeed, the child told the caseworker that she felt safe living with her mother.

The majority's reliance on *Matter of Joyce A-M (Yvette A)*, (68 AD3d 417 [2009]) is misplaced. In *Joyce A-M* we held, "The finding of neglect is supported by a preponderance of the evidence showing that respondent failed to timely pick up the children from day care, necessitating police involvement to ensure their safety, and had been found guilty of neglect in prior, separate proceedings" (*id.* at 418). However, in *Joyce A-M* the children were four and two respectively, making the imminent danger apparent. Here, the child was 11½ and safely made her way back to her school. Further, in *Joyce A-M* there was also a prior order finding the mother neglected one of the children through

drug abuse. Here, there was no prior finding of neglect; only the unsubstantiated allegations of the child to a social worker concerning two prior incidents.

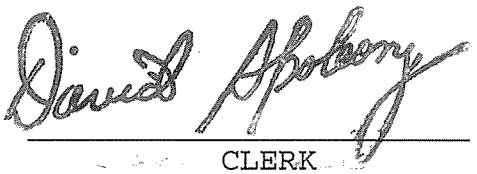
In that regard, "[a] child's unsworn out-of-court statements relating to abuse or neglect are admissible at a fact-finding hearing, but a finding of abuse or neglect can only be based on those statements if they are sufficiently corroborated" (*Matter of Kayla F.*, 39 AD3d 983, 984 [2007]). Although such statements may be corroborated by "[a]ny other evidence tending to support [their] reliability" (Family Ct Act § 1046[a][vi]), there is a "threshold of reliability that the evidence must meet" *(Matter of Zachariah VV.*, 262 AD2d 719, 720 [1999], *lv denied* 94 NY2d 756 [1999]). Here, the caseworker testified that the child told her that she had lost her mother twice before. She did not provide any details as to how the child came to lose her mother, the length of the separation, what steps the mother took to find the child or how the child and her mother were reunited. There was no independent corroboration of those incidents and, given the general nature of the child's statement, the mere fact that the November 12, 2008 incident involved the child being left behind on the subway did not provide sufficient corroboration of the

prior incidents to support a finding of neglect (*see Matter of Peter G.*, 6 AD3d 201, 204 [2004] *appeal dismissed* 3 NY3d 655 [2004]). "While Family Court could draw a strong inference against the [mother] due to [her] failure to testify, that inference cannot establish corroboration where it otherwise does not exist" (*Matter of Kayla F.*, 39 AD3d at 985 [citation omitted]).

Accordingly, while I do not condone the mother's conduct, I would vacate the finding of neglect.

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

ENTERED: MAY 20, 2010



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

2561
[M-1427] The People of the State of New York, Ind. 5066/07
Respondent,

-against-

Laron Vinson,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (John Vang 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 (Charles J. Tejada, J.), rendered October 15, 2008, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously modified, as a matter of discretion in the interest of justice, to reduce defendant's prison sentence to a term of 3½ years, and otherwise affirmed.

At the plea, defendant was repeatedly advised by the court that if he complied with all of the conditions of the plea agreement he would be allowed to replead to a D felony and be sentenced to a prison term of 1½ years instead of getting a prison term of 3½ years. However, when defendant violated the conditions of the plea, the court sentenced him to a prison term

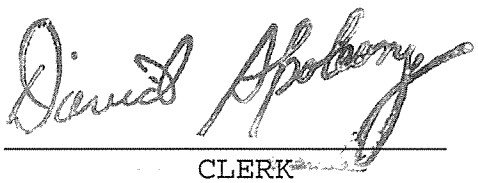
of 4 years.

Under these circumstances, we are of the opinion that defendant is entitled, as a matter of essential fairness, to specific performance of the plea bargain and a reduction of the prison term to 3½ years. An objective reading of the plea bargain can leave no doubt that defendant's relied on a 3½-year term and this understanding should be honored (*see People v Jones*, 75 AD2d 734 [1980]).

We have considered and rejected defendant's ineffective assistance of counsel argument.

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

ENTERED: MAY 20, 2010



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Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2623 [M-1427] Celia Clark, Plaintiff-Appellant, Index 105237/08

-against-

Morelli Ratner PC, et al., Defendants-Respondents.

The Harman Firm, P.C., New York (Walker G. Harman of counsel), for appellant.

Morelli Ratner PC, New York (David Ratner of counsel), for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 20, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Although the court erred to the extent it found that federal standards for recovery are applied in determining employment discrimination claims under the New York City Human Rights Law and in failing to conduct an independent analysis under that law (*see Williams v New York City Hous. Auth.*, 61 AD3d 62 [2009], *lv denied* 13 NY3d 702 [2009]), summary dismissal was nonetheless warranted.

With respect to the claim of racially motivated firing, defendants' evidence regarding plaintiff's insubordination and unprofessional conduct was sufficient to establish a legitimate,

nondiscriminatory explanation for her termination, and plaintiff did not offer sufficient evidence in rebuttal to show that defendants' actions in this regard were false, contrived or pretextual *(see Koester v New York Blood Ctr.*, 55 AD3d 447 [2008]; *Stewart v Schulte Roth & Zabel LLP*, 44 AD3d 354 [2007], *lv denied* 10 NY3d 707 [2008]).

The claim of retaliatory firing based on plaintiff's complaints of harassment by defendants' former client was properly dismissed, as plaintiff failed to rebut defendants' showing of termination for a legitimate, nondiscriminatory reason (*see Dunn v Astoria Fed. Sav. & Loan Assn.*, 51 AD3d 474 [2008], *lv denied* 11 NY3d 705 [2008]).

Plaintiff's hostile work environment claim was properly dismissed because plaintiff did not establish that the firm failed to take remedial action (*see Matter of Town of Lumberland v New York State Div. of Human Rights*, 229 AD2d 631, 636 [1996]), and did not raise valid factual issues regarding the efficacy of that action.

Plaintiff's contention that the prediscovery summary judgment motion should have been denied as premature is unavailing, in view of her attorney's concession in open court that discovery was unnecessary.

M-1427 *Clark v Morelli Ratner PC, et al.*

Motion to enlarge the record on appeal granted.

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

ENTERED: MAY 20, 2010

CLERK

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

2820 The People of the State of New York, Ind. 79/06
Respondent,

-against-

Michael Hughes,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

Order, Supreme Court, Bronx County (Steven L. Barrett, J.), entered on or about March 11, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level two adjudication. The information provided by the People was sufficiently reliable (*see* Correction Law § 168-n[3]; *People v Mingo*, 12 NY3d 563, 572-574, 576-577 [2009]; *People v Hines*, 24 AD3d 524 [2005], *lv denied* 6 NY3d 712 [2006]), and it supported a reasonable inference that one or more

of the children depicted in defendant's pornographic materials was under 10 years old. Therefore, the court properly assessed the applicable points.

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

ENTERED: MAY 20, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2823 The People of the State of New York, ex rel. Douglas Latta, Petitioner-Appellant, Ind. 3782/07

-against-

Robert M. Morgenthau, District Attorney, New York County, et al., Respondents-Respondents.

Douglas Latta, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Olivia Sohmer of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Michael Melkonian, J.), entered on or about September 28, 2009, denying and dismissing the petition for a writ of habeas corpus, unanimously affirmed, without costs.

The court erred in dismissing the petition as a collateral attack on the speedy trial decision of the court handling the criminal case. While "[h]abeas corpus does not lie to determine whether the right to a speedy trial has been denied in a pending criminal action" (*People ex rel. Harrison v Greco*, 38 NY2d 1025, 1025 [1976]), where the relief sought by petitioner is release pursuant to CPL 30.30(2)(a), such a claim is cognizable on a habeas corpus petition, since a defendant seeking release under the statute has no other way to appeal an adverse ruling other

than to seek a writ of habeas corpus (*see People ex rel. Chakwin v Warden, N.Y. City Correctional Facility, Rikers Is.*, 63 NY2d 120, 125 [1984]).

However, petitioner's claim fails on the merits, since all adjournments prior to the ruling on this petition were excludable under CPL 30.30(4)(a) as delays attributable to motion practice (*People v Worley*, 66 NY2d 523, 527 [1985]), including the time that the pretrial motions were under consideration by the court (*see People v Reid*, 214 AD2d 396 [1995]; *People v Douglas*, 209 AD2d 161, 162 [1994], *lv denied* 85 NY2d 908 [1995]). Contrary to petitioner's contention, the time the court took to decide the relevant motions was not excessive in light of the number of parties involved and the complexity of the motions.

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

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

ENTERED: MAY 20, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2824 Jerome Barner, Index 20143/03
Plaintiff-Appellant,

-against-

Humaira Shahid,
Defendant-Respondent.

Phillips, Krantz & Associates, LLP, New York (Heath T. Buzin of counsel), for appellant.

Law Offices of Kenneth L. Aron, New York (Kenneth L. Aron of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 27, 2009, which granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established prima facie, through the submission of affirmations of medical experts who examined plaintiff and who reviewed plaintiff's MRI films, that the injury to plaintiff's left knee was not the result of the motor vehicle accident on January 29, 2003 and that, in any event, it was not "serious" within the meaning of Insurance Law § 5102(d). In opposition, plaintiff failed to submit objective medical evidence in admissible form sufficient to raise a triable issue of fact (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [2003]).

Plaintiff alleges that he suffered a torn meniscus in his left knee, for which he underwent arthroscopic surgery, as a result of the accident. However, he failed to raise an issue of fact whether the torn meniscus was causally related to the accident (*see Gibbs v Hee Hong*, 63 AD3d 559 [2009]). The unsigned and unsworn report of a physician who performed an initial examination of plaintiff on January 30, 2003, the day after the accident, as well as the unsworn narrative report of plaintiff's orthopedic surgeon, Laxmidhar Diwan, based on his examination of plaintiff on March 20, 2003, and Dr. Diwan's unsworn operative report dated March 25, 2003, were properly rejected by the motion court because they were not in admissible form. In addition, plaintiff never submitted to the court a copy of the unsworn report of the MRI performed on his left knee two days after the accident, which allegedly showed a torn meniscus, and the court properly rejected Dr. Diwan's findings with respect to the MRI report because Dr. Diwan did not state that he personally viewed the films, rather than simply relying on the unsworn reports (*see Thompson v Abbasi*, 15 AD3d 95, 97 [2005]). Without the MRI report, it is unknown whether plaintiff's radiologist linked the torn meniscus to the accident. Moreover, nowhere in any of plaintiff's submissions does he address the fact that defendant's radiologist determined that the changes in

plaintiff's left knee were the result of a longstanding preexisting degenerative condition (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]; *Valentin v Pomilla*, 59 AD3d 184, 186 [2009]).

The only proof in admissible form offered by plaintiff is the sworn report of Dr. Diwan dated June 1, 2009, based upon his examination of plaintiff 6½ years after the accident. In the report, Dr. Diwan failed to state whether plaintiff's injury was permanent, failed to identify any limitations in plaintiff's functions and compare those limitations to normal functions, and simply stated that plaintiff had difficulty in the activities of daily living, without identifying those difficulties or offering any objective medical findings to support that statement. In addition, Dr. Diwan's statement that plaintiff had not worked since the accident conflicted with plaintiff's deposition testimony that within four months of the accident he had returned to work as a barber and that at the time of the deposition, three years after the accident, he was working in construction, finishing drywall. Finally, plaintiff failed sufficiently to explain his cessation of medical treatment seven months after the accident to raise an issue of fact as to the seriousness of his injury. His statement that he stopped the treatment because the facility where he was receiving physical therapy closed was

contradicted by Dr. Diwan's statement that plaintiff stopped the treatment because he appeared to have reached the maximum level of medical benefit and maximum improvement (*see Pommells*, 4 NY3d at 571; *Charley v Goss*, 54 AD3d 569, 570 [2008], *affd* 12 NY3d 750 [2009]).

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

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

ENTERED: MAY 20, 2010

CLERK

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

2825 In re Accounting of The Public Administrator of the County of New York, as Administrator c.t.a. of the Estate of Abraham Rad, also known as Abraham Farin Rad, Deceased.

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Nahid Rad, Objectant-Appellant, File No. 1737/92

-against-

Public Administrator of the County of New York, Petitioner-Respondent.

Nahid Rad, appellant pro se.

Peter S. Schram, P.C., New York (Staci A. Graber of counsel), for respondent.

Order, Surrogate's Court, New York County (Renee Roth, S.), entered on or about October 30, 2008, which dismissed Nahid Rad's objections to the accounting of the administrator c.t.a. for the estate of Abraham Rad, unanimously affirmed, without costs.

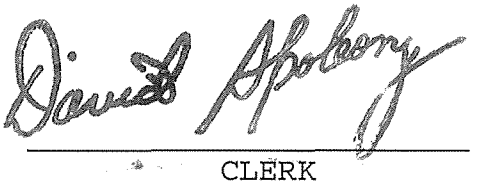
Respondent's contention that this appeal should be dismissed as moot is unavailing. However, objectant improperly raises many arguments for the first time on appeal (*see e.g. Matter of Rad*, 38 AD3d 388, 389 [2007]), such as whether decedent's leasehold interest in 558 Seventh Avenue passed by operation of law to Trust A, whether she was improperly removed as limited administrator of the leasehold, whether Surrogate's Court erred

in appointing respondent Public Administrator to administer the estate, whether there were sufficient assets under the international will to pay for the leasehold's expenses, and whether the sale of the leasehold to nonparty Tap Tap LLC in 1996 was invalid because Tap Tap was not formed until 1997. We decline to consider these unpreserved arguments (*see id.*).

Objectant did preserve her argument that respondent should not have sold the leasehold to Tap Tap due to a conflict of interest. However, as Surrogate's Court noted, all of objectant's objections to the sale are barred by res judicata (*see e.g. Matter of Rockefeller*, 44 AD3d 1170, 1172 [2007]). Objectant's argument that res judicata does not apply is unavailing.

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

ENTERED: MAY 20, 2010



CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2826 The People of the State of New York, Ind. 1210/08
Respondent,

-against-

Donald Orr,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip J. Morrow of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered December 22, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 3 years, unanimously affirmed.

Defendant argues that although his application under *Batson v Kentucky* (476 US 79 [1986]) applied to four panelists from the first round of jury selection as well as two panelists from the second, the prosecutor only gave reasons for peremptorily challenging the latter two. Defendant failed to preserve this claim (*see People v James*, 99 NY2d 264, 271 [2002]; *People v Dancy*, 44 AD3d 331, 331 [2007], *lv denied*, 9 NY3d 1005 [2007]), and we decline to review it in the interest of justice.

Regardless of whether defendant had included all six panelists in his *Batson* application, when the prosecutor only addressed two of them, it was incumbent on defendant to call this to the court's attention "at a time when the error complained of could readily have been corrected" (*People v Robinson*, 36 NY2d 224, 228 [1975]).

Defendant also failed to preserve his claim that the court, in ruling on the prosecutor's explanations for challenging the second-round panelists at issue, did not make a sufficient finding that it credited these explanations as nonpretextual, and we likewise decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, because the court expressly stated that the reasons were nonpretextual.

We reject defendant's claim that the prosecutor's stated reason for challenging one of these panelists was pretextual. The record supports the court's finding to the contrary, a credibility determination that is entitled to great deference (*see People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]).

The court properly denied defendant's subsequent *Batson* application relating to an additional peremptory challenge by the prosecutor. The court had already found the absence of discrimination, and 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]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 20, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2827 Frank Basile, et al., Index 103030/09
Plaintiffs-Respondents,

-against-

Shannon Mulholland, et al.,
Defendants-Appellants.

Peter M. Agulnick, P.C., New York (Peter M. Agulnick of counsel), for appellants.

The Law Offices of Neal Brickman, P.C., New York (Neal Brickman of counsel), for respondents.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 8, 2009, which denied defendants' motion to vacate a default judgment, unanimously affirmed, with costs.

Defendants adduce no competent evidence to support their assertion that the individual defendant had no interest in the corporate defendants for a four-month period of time that happened to coincide with commencement of the action, relieving her of responsibility for answering the complaint, and otherwise fail to show a reasonable excuse for their default (CPLR 5015[a][1]). CPLR 3215(g)(3) does not avail defendants, as the action is not one based on nonpayment of a contractual obligation. Nor does Limited Liability Company Law § 808(a) avail defendants, as plaintiff LLC's failure to obtain a certificate of authority to do business in New York before

initiating the action is not a fatal jurisdictional defect and such certificate has since been obtained (*cf. Tri-Terminal Corp. v CITC Indus.*, 78 AD2d 609 [1980]). We have considered defendants' other arguments and find them unavailing.

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

ENTERED: MAY 20, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2828 Nancy Cruz, Index 24402/06
Plaintiff-Respondent,

-against-

Bronx Lebanon Hospital Center,
Defendant-Appellant.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for appellant.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 13, 2009, which, inter alia, upon reargument and renewal, restored the case to the active calendar, unanimously affirmed, without costs.

Plaintiff commenced this action for personal injuries she allegedly sustained when she fell on defendant's premises. The complaint was subsequently dismissed pursuant to 22 NYCRR 202.27(b) based on substitute counsel's failure to appear at a pre-note status conference. Since no note of issue was filed in this case, plaintiff was only required to state a reasonable excuse for her failure to appear and to establish that her action has merit (*see Eugene Di Lorenzo, Inc. v Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; CPLR 5015[a]).

Here, plaintiff demonstrated that her failure to appear at

the scheduled conference was neither willful nor part of a pattern of dilatory behavior, but the result of inadvertent law office failure (*see Caso v Manmall, Inc.*, 68 AD3d 470 [2009]; *Travelers Ins. Co. v Abelow*, 14 AD3d 395 [2005]; *Harwood v Chaliha*, 291 AD2d 234 [2002]; CPLR 2005). Furthermore, plaintiff's affidavit was sufficient to establish a meritorious claim for purposes of her motion to restore. While the affidavit of merit may have been factually scant, this may be attributed to the small amount of discovery completed in this case (*see Feders v Lamprecht*, 43 AD3d 276 [2007]).

Contrary to defendant's contention, the motion court correctly styled plaintiff's motion as one to renew (*see Garner v Latimer*, 306 AD2d 209 [2003]; *Telep v Republic El. Corp.*, 267 AD2d 57, 58 [1999]), which may be granted in the court's discretion, in the interest of justice, even on facts that were known to the movant at the time of the original motion (*see Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [2007]). Indeed, "even if the vigorous requirements for renewal are not met, such relief may still be properly granted so as not to defeat substantial fairness" (*Garner*, 306 AD2d at 210 [internal quotation marks and citations omitted]).

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

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

ENTERED: MAY 20, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2830 The People of the State of New York, Ind. 5903/00
Respondent,

-against-

Dominique Murrell,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 20, 2009, resentencing defendant to concurrent terms of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at that time, and therefore had no reasonable expectation of finality in his illegal sentence. In *People v Williams* (14 NY3d 198 [2010]), the Court of Appeals concluded that double jeopardy principles prohibit the addition of PRS to the sentences of defendants who have been released after completing their terms of imprisonment. Although *Williams* did not involve persons still serving the prison portions of their sentences, it is clear from the Court's rationale that

there is no constitutional impediment to imposing PRS in that situation. The fact that this defendant was nearing the end of a long sentence does not warrant a different result.

We have considered and rejected defendant's due process argument. Defendant's statutory claims are similar to arguments that were rejected in *Williams*, or are otherwise without merit (*see People v Thomas*, 68 AD3d 514, 515 [2009]).

Finally, we note that we have already substantially reduced defendant's sentence on a prior appeal that did not involve any PRS issues (307 AD2d 821, 822 [2003], *lv denied* 1 NY3d 540 [2003]), and we perceive no basis for reducing the sentence any further.

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

ENTERED: MAY 20, 2010

CLERK

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

2831 Sandra Espinoza, etc., et al., Index 107747/07
Plaintiffs-Respondents,

-against-

Federated Department Stores, Inc., et al.,
Defendants-Respondents,

Mainco Services Company, et al.,
Defendants-Appellants.

Babchik & Young, LLP, White Plains (Matthew J. Rosen of counsel), for appellants.

Alexander J. Wulwick, New York, for Espinoza respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for Federated Department Stores, Inc. and Macy's East, Inc., respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 30, 2009, which denied the Mainco defendants' motion for summary judgment dismissing the complaint as against them and on their claims for contractual and common-law indemnification against defendants Federated Department Stores, Inc. and Macy's East, Inc. (Macy's), unanimously modified, on the law, to grant the part of the motion that sought summary judgment dismissing the complaint, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against the Mainco defendants and to sever said defendants'

cross claims against Macy's.

The infant plaintiff was injured when he tripped at the top of an escalator in a Macy's store and his arm got caught between the handrail and the handrail return guard. The Mainco defendants established prima facie that, even assuming a missing or defective handrail return guard, they were not negligent, because they did not create the condition, they had received no previous complaints about such a condition, and the records of the regular monthly preventive maintenance they performed three weeks before the accident indicated no problems (*see Parris v Port of N.Y. Auth.*, 47 AD3d 460 [2008]). The affidavits submitted by plaintiffs and Macy's in opposition, in which elevator experts stated that the handrail return guard was either missing or defective and opined that Mainco had been negligent in failing to observe that it was missing or in failing to correct the defect, were insufficient to raise an issue of fact because the experts' opinions were unsupported by any evidentiary foundation (*see Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]).

Since there has been no finding that negligence on Macy's part was a cause of the infant plaintiff's injuries, the Mainco defendants are not entitled to indemnification for costs and

attorney's fees by Macy's under either the common law (*see e.g. Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [2006], *lv dismissed* 7 NY3d 864 [2006]) or the indemnification provision of their contract.

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

ENTERED: MAY 20, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2833 Liskula Cohen, Index 105220/07
Plaintiff-Appellant,

-against-

Bread & Butter Entertainment LLC, etc.,
Defendant-Respondent,

Thomas Tardie, et al.,
Defendants.

Wagner Davis P.C., New York (Bonnie Reid Berkow of counsel), for appellant.

Gallet Dreyer & Berkey, LLP, New York (David S. Douglas of counsel), for respondent.

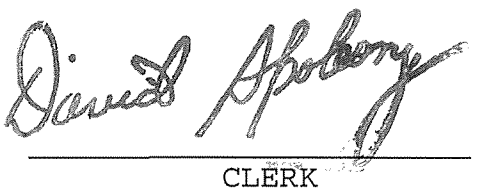
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 18, 2009, which, insofar as appealed from, granted defendant nightclub's motion for summary judgment dismissing as against it plaintiff's cause of action under the Dram Shop Act (General Obligations Law § 11-101), unanimously reversed, on the law, without costs, the motion denied, and such cause of action reinstated as against defendant nightclub.

Defendant's motion papers fail to satisfy its initial burden of negating the possibility that it served alcohol to a visibly intoxicated person (*see Darwish v City of New York*, 287 AD2d 407 [2001]). The affidavit of its floor manager, that plaintiff's

assailant exhibited no visible signs of intoxication when the manager observed him ordering and being served a drink at the bar earlier on the night of the altercation, does not mention a second drink that, the assailant testified, had been served to him at the bar that night. Merely because the manager observed the assailant being served the first drink does not rule out that the assailant was visibly intoxicated by the time he was served the second drink. We reject defendant's argument that the assailant's view of his own state of visible intoxication can serve to make out defendant's burden on summary judgment. Furthermore, we note that defendant failed to supply affidavits from bartenders who were working on the night in question. Accordingly, the burden never shifted to plaintiff to adduce evidence that defendant served alcohol to the assailant despite visible signs of intoxication (*see Duran v Poggio*, 244 AD2d 162 [1997]; *McGovern v Katonah*, 5 AD3d 239, 239 [2004]).

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

ENTERED: MAY 20, 2010



CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2835 Sharon Zamore, Index 601125/06
Plaintiff-Appellant,

-against-

Bar None Holding Company, LLC, et al.,
Defendants-Respondents.

Kramer & Pollack, LLP, Mineola (Joshua D. Pollack of counsel), for appellant.

White & McSpedon, P.C., New York (Tracey Lyn Jarzombek of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 15, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleged that she sustained personal injuries when she was assaulted with a glass thrown unexpectedly by a disorderly patron in defendants' bar as the patron was being escorted from the premises by defendants' security personnel.

With the exception of a specific violation of the Dram Shop Acts, the standard of care for a nightclub operator is no different from the standard of care for any premises operator (*D'Amico v Christie*, 71 NY2d 76 [1987]). "Inasmuch as the incident was attributable to the sudden, unexpected and unforeseeable act of plaintiff's assailant, its prevention was

beyond any duty defendant may have had as a landowner to its patrons" (*Lewis v Jemanda N.Y. Corp.*, 277 AD2d 134 [2000]). The court thus properly dismissed the negligent security claim.

Liability under the Dram Shop Acts (General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65) "requires a commercial sale of alcohol" (*D'Amico v Christie*, 71 NY2d at 84). The claims based upon violation of the Dram Shop Acts were also properly dismissed as there was no evidence that the assailant was served by an employee of the bar (as opposed to being handed a drink by another patron), that the assailant was visibly intoxicated at the time of the sale, or that the consumption of alcohol was the proximate cause of the assault (*see e.g. Catania v 124 In-To-Go, Corp.*, 287 AD2d 476 [2001], *lv dismissed*, 97 NY2d 699 [2002]).

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

ENTERED: MAY 20, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2836 The People of the State of New York, Ind. 3691/07
Respondent,

-against-

Roberto Young,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Daniel FitzGerald, J.), rendered on or about February 19, 2008, unanimously affirmed.

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

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

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

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

ENTERED: MAY 20, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2838
[M-1792] In re Keith Bond, Index 54681/08
Petitioner,

-against-

Hon. Rena Uviller, etc.,
Respondent.

Norman Steiner, New York for petitioner.

Andrew M. Cuomo, Attorney General, New York (Monica Connell of counsel), for respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Laura Millendorf of counsel), for District Attorney.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: MAY 20, 2010

CLERK