SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 28, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3253-
3254 In re Charmaine L.,
Petitioner-Appellant,

-against-

Kenneth D.,
Respondent-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Steven. N. Feinman, White Plains, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Heather L. Kalachman of counsel), Law Guardian.

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Order, Family Court, Bronx County (Sara P. Cooper, Referee), entered on or about April 30, 2009, which awarded custody of the parties' two infant children to respondent father, and denied the mother's petition for custody and relocation, unanimously affirmed, without costs.

Petitioner asserts that she should be granted custody of the children because she was their primary caretaker from 2002 to 2007. However, since that time, the children have lived with the respondent and his parents in a stable and loving home. The

evidence established that respondent is gainfully employed, and has adjusted his work schedule so he could be with the children in the evenings. He has been actively involved in their education, and was able to obtain special services in order to address their special problems.

By contrast, petitioner has blamed her lack of involvement in the children's lives on respondent, despite the fact that she failed to taken steps to inform herself about their educational and emotional difficulties by contacting their schools. Despite employment for part of the period, she failed to provide any financial support for the children, and defied a court order prohibiting contact between them and the father of one of her other children, due to his violent conduct toward her in the children's presence.

Petitioner also failed to demonstrate that relocation to Connecticut was in the best interests of the children (*see Matter of Friedman v Rome*, 46 AD3d 682 [2007]). She explained her relocation as a necessary change to a safer environment, even while admitting that the area where the children now reside is safe. The referee properly concluded that any benefits of relocation would not outweigh the harm resulting from disruption to the children's relationship with their father.

We have reviewed petitioner's other arguments and find them without merit.

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

ENTERED: SEPTEMBER 28, 2010

CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3255 The People of the State of New York, Respondent, Ind. 3313/06

-against-

Cecille Villacorta, Defendant-Appellant.

_____

Tacopina, Seigel & Turano, P.C., New York (Joseph Tacopina of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 6, 2009, convicting defendant, after a jury trial, of grand larceny in the third degree and 144 counts of falsifying business records in the first degree, and sentencing her to concurrent terms of 90 days, with 5 years' probation, a fine and community service, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). On the contrary, we find the evidence to be overwhelming. There was ample proof that defendant was not authorized to manipulate sales records, such as by recording fictional transactions, so as to benefit herself at her employer's expense. Furthermore, her

pattern of behavior demonstrated her fraudulent intent and awareness that her actions were unauthorized.

The court properly exercised its discretion in restricting, to matters relevant to the charges, defendant's discovery of her employer's computerized records (*see People v Gissendanner*, 48 NY2d 543, 547-551 [1979]). Defendant's subpoena duces tecum was overbroad. Although afforded an opportunity to make more targeted discovery requests, she failed to do so. Instead she requested an impermissibly open-ended fishing expedition into the company's records based on speculation that relevant information might be found. Defendant received extensive discovery as to relevant matters, and there is no reason to believe she was deprived of any exculpatory or impeaching evidence.

The record does not support defendant's claim that a defense witness was intimidated by the court and the prosecutor into declining to testify. The court simply, and correctly, advised the witness that if she admitted having engaged in the same kind of transactions that led to the charges against defendant, and if those transactions were not authorized by the employer, she could be prosecuted as well (*see People v Lee*, 58 NY2d 773 [1982]). The People properly refused to immunize the witness (*see People v Adams*, 53 NY2d 241, 247 [1981]), and the court properly assigned her an attorney. On advice of counsel, the witness indicated she would invoke her Fifth Amendment privilege as to potentially

incriminating matters, and defendant chose not to call her. We do not find any evidence of intimidation (*compare People v Shapiro*, 50 NY2d 747, 761-762 [1980]).

We have considered and rejected defendant's challenges to the court's evidentiary rulings and the prosecutor's summation. Defendant's repugnant verdict claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: SEPTEMBER 28, 2010

CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3256 The People of the State of New York, Ind. 586/07
Respondent,

-against-

Scott Liden,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Heather L. Holloway of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about April 25, 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: SEPTEMBER 28, 2010

CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3257 In re Vanessa B.,

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

Lebert Charles C.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Law Office of Jeremiah Quinlan, Hawthorne (Daniel Gartenstein of counsel), for respondent.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about July 8, 2009, which, after a fact-finding hearing, dismissed with prejudice respondent's paternity petition and found him entitled to neither notice of nor consent to the subject child's adoption, unanimously affirmed, without costs.

Respondent failed to meet any of the criteria that would entitle him to notice as a putative father in any adoption proceeding pertaining to this child (*see* Domestic Relations Law § 111-a; *cf. Matter of Norman Christian K.*, 37 AD3d 288 [2007]; *Matter of Robert Z.*, 199 AD2d 19 [1993]). Furthermore, he was not a person entitled to consent to the child's adoption (*see* Domestic Relations Law § 111[1][d]). Respondent admitted that he failed to provide financial support for the child, citing only

modest gifts and clothing. The court credited the testimony of petitioner's caseworker and rejected respondent's contradictory testimony, finding that the latter visited the child only twice in 2005-2006, five times in 2007-2008 while the child was under the care of petitioner, and thereafter inconsistently while she was in a foster home.

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

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

ENTERED: SEPTEMBER 28, 2010

CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3258 The People of the State of New York, Respondent, Ind. 2855/05

-against-

Anthony Caponigro, Defendant-Appellant.

_____

Steven R. Kartagener, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Budd G. Goodman, J. at suppression hearing; Bonnie G. Wittner, J. at jury trial and sentence), rendered February 28, 2006, convicting defendant of attempted assault in the first degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 6 years, unanimously affirmed.

The court properly denied defendant's suppression motion. At the scene of a shooting, the police spoke with bystanders who said the assailant drove away and provided a detailed description of the car. Another officer heard this information over the radio and saw defendant stopped at a red light in a car that precisely matched the description, around the corner from the crime scene. The distinctiveness of the car, viewed in light of

its close geographic and temporal proximity to the crime, made it very likely that it was the car involved in the shooting (*see e.g. People v Dearmas*, 48 AD3d 1226, 1227 [2008], *lv denied* 10 NY3d 839 [2008]). These factors, when combined with the violent nature of the crime and defendant's furtive and uncooperative behavior when the officer approached to make an inquiry, provided reasonable suspicion that defendant was involved in the shooting and posed a danger to the officer. Accordingly, the officer properly ordered defendant out of the car (*see generally People v Harrison*, 57 NY2d 470, 476 [1982]). As defendant opened the car door, the officer saw a firearm on the floor and lawfully arrested defendant. Defendant did not preserve his challenge to the reliability of the information provided by the unidentified bystanders, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Appice*, 1 AD3d 244 [2003], *lv denied* 1 NY3d 594 [2004]).

Defendant's challenge to certain evidence elicited at trial is unpreserved and we decline to review it 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: SEPTEMBER 28, 2010

CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3259 The People of the State of New York, Ind. 10567/98
Respondent,

-against-

Rafael Valentin,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

_____

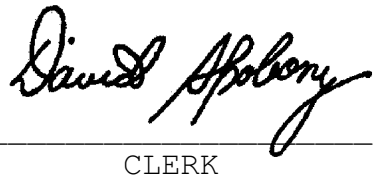
Order, Supreme Court, New York County (Daniel FitzGerald, J.), entered on or about October 31, 2008, which, adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]), given the seriousness of the underlying conduct [2009]). We have considered and rejected

defendant's argument that he poses a diminished threat of reoffense (*see People v Rodriguez*, 67 AD3d 596 [2009], *lv denied* 14 NY3d 706 [2010]).

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

ENTERED: SEPTEMBER 28, 2010



CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3260 James Nussbaum, et al., Index 101126/09
Plaintiffs-Appellants

-against-

150 West End Avenue Owners Corp.,
Defendant-Respondent,

Marc D. Angel, et al.,
Defendants.

_____

Joseph Deliso & Associates, Brooklyn (Joseph A. Deliso of counsel), for appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 20, 2009, which, in an action for personal injuries sustained when a glass shower door in a cooperative apartment shattered, granted defendant-respondent cooperative's motion pursuant to CPLR 3211(a)(1) to dismiss the complaint as against it, unanimously affirmed, without costs.

The clause in the proprietary lease placing "sole responsibility" for maintenance and repair of the unit's interior, "including interior walls, floors and ceilings, but excluding windows . . . [and] entrance and terrace doors," on the unit's lessee, definitively establishes that defendant coop, the building's owner, owed plaintiffs, one of the unit's lessees and her injured spouse, no duty of care with respect to the allegedly

defective shower door (*see Machado v Clinton Hous. Dev. Co., Inc.*, 20 AD3d 307 [2005]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [2006]). The coop's reservation of a right of reentry in the proprietary lease does not avail plaintiffs absent allegations that the shower door constituted a significant structural or design defect that violated a specific statutory provision (*see Boateng v Four Plus Corp.*, 22 AD3d 322 [2005]). 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: SEPTEMBER 28, 2010

CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3261 The People of the State of New York, Ind. 1913/08
Respondent,

-against-

Heath Edmead,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about January 21, 2009,

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 judgment so appealed from be and the same is hereby affirmed.

ENTERED: SEPTEMBER 28, 2010

CLERK

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

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3262 The People of the State of New York, Ind. 1408/08
Respondent,

-against-

Marlon Elliott, etc.,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about July 16, 2008,

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 judgment so appealed from be and the same is hereby affirmed.

ENTERED: SEPTEMBER 28, 2010

CLERK

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

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3263 Matthew Silberzweig, Index 105107/08
Petitioner-Respondent,

-against-

John J. Doherty, as Commissioner of the Department of Sanitation of the City of New York, et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellants.

Kirschner & Cohen, P.C., Great Neck (Allen Cohen of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered February 26, 2009, granting the petition to vacate and annul the determination of respondent Commissioner of the Department of Sanitation, dated March 7, 2008, which denied petitioner's request for reinstatement as a sanitation worker, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Given petitioner's alleged failure to contact respondent regarding his absence from work without authorization due to his arrest, his prior disciplinary record and his poor performance review, respondent's denial of petitioner's request for reinstatement after the criminal charges against him were

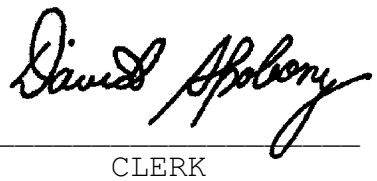
dismissed was rational, lawful and a provident exercise of discretion. The record does not conclusively establish that it was the policy of the Department of Sanitation to automatically reinstate former employees who were acquitted of all criminal charges against them. Indeed, pursuant to the Department of Citywide Administrative Services Personnel Rules and Regulations of the City of New York, an agency under the jurisdiction of the commissioner of citywide administrative services (which the department undisputedly is) has discretion in determining whether to reinstate a person who was dismissed from a permanent competitive position in the agency (*see* Personnel Rules and Regs of City of NY [55 RCNY] Appendix A, 6.2.6). Nothing in Civil Service Law § 75 or the Administrative Code of the City of New York § 16-106 says otherwise.

The court improperly relied on an Unemployment Insurance Appeal Board (UIAB) finding, since the finding was not part of the administrative record but was simply attached to petitioner's reply memorandum of law in this article 78 proceeding. Moreover, a UIAB finding lacks preclusive effect in a subsequent action or

proceeding (*see* Labor Law § 623[2]; *Matter of Strong v New York City Dept. of Educ.*, 62 AD3d 592 [2009], *lv denied* 14 NY3d 704 [2010]).

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

ENTERED: SEPTEMBER 28, 2010



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Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3265 The People of the State of New York, Ind. 2184/07
Respondent,

-against-

Livingston Clark,
Defendant-Appellant.

_____

Hughes Hubbard & Reed LLP, New York (Stephan E. Hornung of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 11, 2009, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

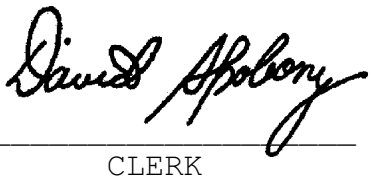
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The element of identity was established by a compelling chain of circumstantial evidence. The location where defendant left his palm print strongly indicated that he left it at the time of the burglary, rather than on another occasion (*see e.g. People v Texeira*, 32 AD3d 756 [2006], *lv denied* 7 NY3d 904 [2006]). Additional evidence

supported the conviction, including defendant's suspicious behavior at the scene several days before the crime, and his statements to the police that both evinced a consciousness of guilt and circumstantially linked him to the crime. Furthermore, there was ample evidence to establish defendant's unlawful entry into a building with intent to commit a crime.

The court's *Sandoval* ruling, which permitted only a very limited inquiry into defendant's extensive criminal background, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]).

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

ENTERED: SEPTEMBER 28, 2010



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Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3266 The People of the State of New York, Ind. 3013/78
Respondent,

-against-

Abdul Beyah also known as Donald Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

_____

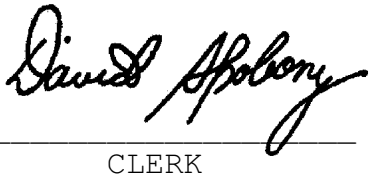
Order, Supreme Court, New York County (Daniel Conviser, J.), entered on or about April 9, 2009, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-c), unanimously affirmed, without costs.

Since defendant made no application to the hearing court for a downward departure from his presumptive risk level, that claim is unpreserved (*see People v Arps*, 65 AD3d 939 [2009]). In any event, we find no basis for such a departure. The fact that defendant, whose point score was well above the threshold for a level three offender, was 61 years old at the time of the adjudication did not warrant a downward departure, given his serious and violent criminal history, his unsatisfactory prison

record, and his parole violations (*see People v Harrison*, 74 AD3d 688 [2010]).

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

ENTERED: SEPTEMBER 28, 2010



CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3267N- Index 601685/07
3268N- 590660/07
3269N Casa de Meadows Inc. (Cayman Islands), et al.,
M-4157- Plaintiffs-Respondents,
M-4158
M-4182- -against-
M-4183

Faith F. Zaman, et al.,
Defendants-Appellants,

Eurofinch Limited, et al.,
Defendants.

[And a Third-Party Action]
- - - - -
Casa de Meadows Inc. (Cayman Islands), et al.,
Plaintiffs-Respondents,

-against-

Faith F. Zaman, et al.,
Defendants-Appellants,

Bel-Air Hotel Company, LLC, et al.,
Defendants.
- - -
Faith F. Zaman, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Penigran Muda Abdul Hakeem, et al.,
Third-Party Defendants,

Cedar Swamp Holdings, Inc.,
Third-Party Defendant-Respondent.
- - - - -
Casa de Meadows Inc. (Cayman Islands), et al.,
Plaintiffs-Respondents,

-against-

Faith F. Zaman, et al.,
Defendants-Appellants,

Eurofinch Limited, et al.,
Defendants.

[And a Third-Party Action]

Baker & Hostetler LLP, Washington, DC (Mark A. Cymrot of counsel), for appellants.

Covington & Burling LLP, New York (Linda C. Goldstein and Philip A. Irwin of counsel), for Casa De Meadows Inc., Amedeo Hotels Limited Partnership and Cedar Swamp Holdings, respondents.

Jones Day, New York (Geoffrey S. Stewart of counsel), for HRH Prince Jefri, respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered May 3, 2010, which denied defendants' motion to compel the James Mintz Group (Mintz) and Andrew B. Melnick to comply with subpoenas, unanimously modified, on the law and the facts and in the exercise of discretion, the motion granted to the extent of (1) requiring Mintz and Melnick to produce (a) documents prepared in the ordinary course of the New York Palace Hotel's business and video surveillance tapes that were turned over to Mintz, which plaintiffs have not already produced, (b) documents showing the identity of witnesses interviewed by Melnick, and (c) documents showing what Mintz found in Zaman's office, whether an inventory was made, and what happened to the materials, and (2) permitting Melnick to be deposed about these

topics and the collection and maintenance of electronic evidence from the Hotel, and otherwise affirmed, without costs.

Order, same court and J.H.O., entered June 15, 2010, which granted (1) plaintiffs' motion to dismiss the 5th and 12th through 17th counterclaims as against all plaintiffs and the 6th through 11th counterclaims as against plaintiff Duli Yang Teramat Mulia Paduka Seri Pengiran Digadong Sahibul Mal Pengiran Muda Haji Jefri Bolkiah (Prince Jefri) and (2) third-party defendants' motion to dismiss the third-party claims, unanimously modified, on the law, so much of the order dismissing the 5th counterclaim and 6th third-party claim stricken and replaced with a declaration that defendant Zaman is not entitled to indemnification under a June 1, 2004 letter she sent to the royal family of Princess Jefridah Mohammed Louis, so much of the order as dismissed the 13th counterclaim and the 2nd and 4th third-party claims stricken and replaced with a declaration that and defendants/third-party plaintiffs Zaman and Thomas Derbyshire are not entitled to indemnification under the Indemnity Agreements & Undertakings signed by Prince Jefri, third-party defendant Pengiran Muda Abdul Hakeem (Prince Hakeem) and third-party defendant Pengiran Muda Bahar (Prince Bahar), and otherwise affirmed, without costs.

Order, same court and J.H.O., entered July 1, 2010, which declined to approve a letter rogatory seeking documents from and

the deposition of the Brunei Investment Agency (BIA), placed limits on letters of request seeking documents from and the depositions of Richard Chalk, Lindsay Marr, Claire Kelly a/k/a Madame Salma, Christopher Grierson, David Sandy and Anna Dilnot, denied defendants' request for a forensic examination of the Hotel's computers to see if any documents had been deleted, and refused to order the Hotel to make its November 2006 backup tape available for review, unanimously modified, on the facts and in the exercise of discretion, the letter rogatory authorized to the extent of asking BIA for documents evidencing its prior written consent to Zaman's employment contract, Derbyshire's contract with Gilt Management LLC, the subleases that plaintiff Amedeo Hotels Limited Partnership or the Hotel granted to defendants Fitzjohn's Holdings Inc. and Eurofinch Limited, the charges on Zaman's and Derbyshire's credit cards that plaintiffs allege were unauthorized, and the purchase of plasma televisions by Golden Twist Ltd., and otherwise affirmed, without costs.

The court properly dismissed defendants' defamation claims. The allegations in the original complaint, filed in *Cedar Swamp Holdings, Inc. et al. v Zaman et al.* in the U.S. District Court for the Southern District of New York, that Zaman and Derbyshire "profess to be English barristers" and "are little more than confidence artists posing as English lawyers," were pertinent to the action. Therefore, they were protected by the judicial

proceedings privilege (*see e.g. Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163 [2007]). "Whether a statement is 'at all pertinent to the litigation' is determined by an 'extremely liberal' test," and "any doubts are to be resolved in favor of pertinence" (*id.* at 173, internal citations omitted).

Abusing the judicial proceedings privilege is the same as making impertinent statements (*see Youmans v Smith*, 153 NY 214, 220 [1897]). Since the complained-of statements were pertinent, the *Cedar Swamp* plaintiffs did not abuse the judicial proceedings privilege. Unlike *Halperin v Salvan* (117 AD2d 544 [1986]), this is not a case where the plaintiffs in the first lawsuit (the one in which the allegedly defamatory statements were made) failed to move forward with it (*see Lacher v Engel*, 33 AD3d 10, 14 [2006]), or where the first lawsuit was a "sham," brought "for the sole purpose of defaming [the] adversary" (*Sexter*, 38 AD3d at 172 n 5).

The exception to Civil Rights Law § 74 set forth in *Williams v Williams* (23 NY2d 592 [1969]) does not apply here. "*Williams* is inapplicable . . . in the absence of any allegation that the District Court action was brought maliciously and solely for the purpose of later defaming" defendants (*Branca v Mayesh*, 101 AD2d 872, 873 [1984], *affd* 63 NY2d 994 [1984]).

The court properly denied defendants' motion for leave to amend their claims. The statute of limitations for libel and

slander is one year (CPLR 215[3]). It starts to run on the date of publication, so "the fact that the libel may not have been discovered until later matters not" (*Fleischer v Institute for Research in Hypnosis*, 57 AD2d 535 [1977]). Plaintiffs' alleged delay in producing documents does not create an equitable estoppel (*compare Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007] with *General Stencils v Chiappa*, 18 NY2d 125 [1966]). Except for the October 2007 complaint to the UK Bar Council or the UK Bar Standards Board, which defendants mentioned in their prior pleading, the amended claims relate back to neither the prior pleading nor defendants' original pleading (*see Williams v Varig Brazilian Airlines*, 169 AD2d 434, 437 [1991], *lv denied* 78 NY2d 854 [1991]). The complaint to the Bar Standards Board was protected by the judicial proceedings privilege (*see Wiener v Weintraub*, 22 NY2d 330, 331-332 [1968]).

The court properly denied defendants' motion to add claims for prima facie tort. These claims are based on the same facts and circumstances as defendants' amended defamation claims (*see Curiano v Suozzi*, 63 NY2d 113, 118 [1984]). Defendants may not circumvent the judicial proceedings privilege by pleading prima facie tort (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]). Furthermore, claims based on the new statements added in the amended pleading are barred by the one-year statute of limitations for prima facie tort (*see Havell v Islam*, 292 AD2d

210 [2002]). Finally, defendants' allegation that plaintiffs and third-party defendant Cedar Swamp were motivated solely by disinterested malevolence is contrary to other allegations in their amended pleading (*see Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. LP*, 60 AD3d 434 [2009]).

The court properly denied defendants' claims for abuse of process. The elements of abuse of process are "(1) regularly issued process . . ., (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano*, 63 NY2d at 116). Defendants themselves allege that the Cedar Swamp plaintiffs' request for a temporary restraining order was *denied*. Therefore, process did not issue.

"[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused" (*id.*). Therefore, to the extent defendants' abuse of process claims are based on the institution of this action and a UK action in connection with Cedar Swamp, they fail to state a cause of action.

If process has a legitimate purpose, the allegation that it was misused does not suffice to state a claim for abuse of process (*see Roberts v Pollack*, 92 AD2d 440, 445 [1983]). The notices of pendency filed by plaintiffs and the freezing orders that they obtained in the UK had a legitimate purpose.

It is true that a claim for abuse of process can be based on the misuse of a subpoena (*see e.g. Board of Educ. Of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397 [1975]). However, defendants did not set forth *facts* indicating that plaintiffs used subpoenas for other than their proper purpose (*see Zeckendorf v Kerry H. Lutz, P.C.*, 282 AD2d 295 [2001]).

The court properly dismissed defendants' malicious prosecution claims. Regardless of whether defendants adequately alleged malice, the *Cedar Swamp* action did not end in their favor. The amended *Cedar Swamp* complaint contained 23 state-law claims and one federal claim. The federal court dismissed the federal claim on the merits but dismissed the state-law claims for lack of subject matter jurisdiction, without prejudice (*see Cedar Swamp Holdings, Inc. v Zaman*, 487 F Supp 2d 444, 453 n 62 [SD NY 2007]). A dismissal for lack of jurisdiction does not show lack of probable cause for the prior lawsuit (*see Heaney v Purdy*, 29 NY2d 157, 160 [1971]). *Zaman v Amedeo Holdings, Inc.* (2008 Del Ch LEXIS 60, 2008 WL 2168397) does not require a contrary result. The Delaware court merely required the Derbyshires to have succeeded "on the merits *or otherwise*" in the federal and UK proceedings (*id.*, LEXIS at *79, WL at *24 [emphasis added]). By contrast, New York law requires "an adjudication on the merits" in the previous action (*see Roberts*,

92 AD2d at 447).

The court properly dismissed defendants' injurious falsehood claims. The elements of injurious falsehood are "essentially identical to slander of title" (*Rosenbaum v City of New York*, 5 AD3d 154, 155 [2004]). "[T]he filing of a notice of pendency does not give rise to a cause of action for slander of title" because "a notice of pendency is an 'undeniably true statement'" (*35-45 May Assoc. v Mayloc Assoc.*, 162 AD2d 389-390 [1990]). The circumstances in *Plot Realty LLC v DeSilva* (45 AD3d 312 [2007]), as well as that complaint's detailed pleading of special damages, differ from the case at bar.

Contrary to defendants' assertion, the instant action is not one to enforce the consent order. Therefore, the motion court properly dismissed the indemnification claims arising out of the Indemnity Agreements & Undertakings signed by Princes Jefri, Bahar and Hakeem. However, the motion court should have made an appropriate declaration instead of dismissing the declaratory judgment claims (*see e.g. Daly v Becker*, 109 AD2d 651 [1985]).

The royal family of Princess Jefridah was not bound by the June 1, 2004 letter sent by Zaman because, by its terms, it was required to be signed, and Princess Jefridah did not sign it (*see Scheck v Francis*, 26 NY2d 466 [1970]). Again, with respect to the declaratory judgment claims, the motion court should have made an appropriate declaration instead of dismissing (*see Daly*,

supra).

The motion court was mistaken in saying that defendants failed to oppose Prince Jefri's motion to dismiss the 6th through 11th counterclaims. Prince Jefri's argument that collateral estoppel does not apply because he was not a party in the Delaware action is unavailing. Collateral estoppel is not limited to parties; it also applies to those in privity with the parties in the prior action (*see e.g. Buechel v Bain*, 97 NY2d 295, 303 [2001]). Nevertheless, the Delaware court's findings that Prince Jefri dominated his corporations does not preclude dismissal of the 6th through 11th counterclaims because "Evidence of domination alone does not suffice [to pierce the corporate veil] without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

The counterclaims allege that Prince Jefri has used his domination of Amedeo to transfer its assets to prevent satisfaction of any judgment entered against it in this case. However, "The corporate form may not be disregarded merely because the assets of the corporation . . . are insufficient to assure the recovery sought" by the person seeking to pierce the corporate veil (*Walkovszky v Carlton*, 18 NY2d 414, 419 [1966]).

Plaintiffs claim that defendants may not appeal the May 3 and July 1 orders because they failed to apply to the IAS court

for review of the Special Discovery Master's orders within five days after the orders were made (*see* CPLR 3104[d]). However, plaintiffs do not claim that any of the Special Master's decisions were entered, so CPLR 3104(d) is not a bar to these appeals.

Based on defendants' arguments on appeal, they no longer seek all the items they originally requested in the Mintz and Melnick subpoenas. The documents, video surveillance tapes and computer backup tapes that the Hotel prepared in the ordinary course of business and turned over to Mintz are discoverable (*see Stewart v Roosevelt Hosp.*, 22 AD2d 648 [1964]). However, the Hotel's counsel has stated that the backup tapes are in her custody, so defendants need not subpoena them from Mintz and Melnick.

In light of plaintiffs' allegation that Zaman removed or destroyed a laptop and documents from her office at the Hotel, defendants are entitled to discover what Mintz found in Zaman's office, whether an inventory was made, and what happened to the materials. Moreover, plaintiffs stated below that they would not object to discovery of Mintz regarding its document collection work, as opposed to its investigative work. They have also stated that they have no objection to production by Mintz concerning its collection and maintenance of electronic data on their behalf.

The identities of the witnesses whom Melnick interviewed are not privileged (*see Moore U.S.A. Inc. v Standard Register Co.*, 2000 US Dist LEXIS 9137, *15-16, 2000 WL 876884, *6 [WD NY]), and could lead to relevant information.

Given the dismissal of defendants' defamation and malicious prosecution claims, some of the information they seek (*e.g.*, the factual bases for Melnick's affidavits and plaintiffs' claims, *all* documents and testimony regarding Mintz's investigation, and the extent to which a complete investigation was conducted) is no longer "material and necessary" (CPLR 3101[a]). Furthermore, Melnick's affidavits were privileged even though they were prepared for lawsuits other than the current case (*see Corcoran v Peat, Marwick, Mitchell & Co.*, 151 AD2d 443, 445 [1989]; *see also Sands v News Am. Publ.*, 161 AD2d 30, 38 [1990]), and Prince Jefri did not waive privilege – at his deposition, he did not say that he depended on Mintz or Melnick.

The depositions of Chalk, Marr, Grierson and Madame Salma have already occurred. The IAS court's rulings with respect to Chalk, Marr and Madame Salma were not such an improvident exercise of discretion as to warrant reopening of these depositions. Defendants waived their objections to the Special Master's limitation of the Grierson letter of request by failing to make any arguments about it to the IAS court. In any event, the IAS court has indicated that it might allow a further

deposition of Grierson, and defendants have circulated revised letters of request for Grierson and Sandy.

We discuss the following issues because they may recur in the future with respect to letters of request. First, Prince Jefri waived the work product privilege by repeatedly saying he relied on his lawyers to investigate the facts and make sure the complaint was accurate (*see Kenford Co. v County of Erie*, 55 AD2d 466 [1977]). Second, to the extent some of the documents requested by defendants relate to their dismissed claims, they are not entitled to them. Third, the cross-examiner at trial will be "bound by the answers of the witness to questions on collateral matters inquired into solely to affect credibility" (Prince, Richardson on Evidence § 6-305 [Farrell 11th ed]), except for the witness's general reputation for truth and veracity (*see People v Pavao*, 59 NY2d 282, 289 [1983]).

Plaintiffs claim that certain transactions in which defendants engaged violated the consent order. However, the consent order says that certain transactions are permitted with BIA's prior written consent. Therefore, defendants should be permitted to ask BIA for documents evidencing its prior written consent to Zaman's employment contract, Derbyshire's contract with Gilt Management, the subleases that Amedeo or the Hotel granted to Fitzjohn's and Eurofinch, the charges on Zaman's and Derbyshire's credit cards that plaintiffs allege were

unauthorized, and the purchase of plasma televisions by Golden Twist. Of course, such discovery will be unnecessary if plaintiffs decide not to use the consent order.

Given defendants' refusal to bear the cost of restoring backup tapes and examining computers for deleted materials, their requests were properly denied (*cf. Waltzer v Tradescape & Co., L.L.C.*, 31 AD3d 302, 304 [2006]). This is without prejudice to any arguments the parties might make in a cost allocation proceeding that is apparently pending in Delaware.

We decline to consider defendants' request that this case be remanded to a different judge, absent a motion below and a concomitant record that would permit proper appellate review.

M-4157-
M-4158&
M-4182-
M-4183 Casa De Meadows, et al. v Zaman, et al.

Motions to supplement record and file documents under seal granted.

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

ENTERED: SEPTEMBER 28, 2010

CLERK

Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3270 [M-3473-M-3474
In re Kenneth Minor,
Petitioner,

-against-

Hon. Carol Berkman, et al.,
Respondents.

Ind. 3651/09

Gotlin & Jaffe, New York (Daniel J. Gotlin of counsel), for petitioner.

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

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: SEPTEMBER 28, 2010

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

2404 Paul Wesley, Index 24777/05
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

Hofmann & Associates, New York (Paul T. Hofmann of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Geoffrey Wright, J.), entered August 31, 2009, which denied plaintiff's motion for partial summary judgment, unanimously reversed, on the law and the facts, without costs, to grant the motion and direct entry of judgment in favor of plaintiff on liability based upon the unseaworthiness claim.

Plaintiff was a deckhand on the ferryboat Michael Cosgrove, owned and operated by defendant City. He was injured while lowering a ramp, called a "bridge," from the terminal dock to the back deck of the ferry. The ramp was connected to pulley systems, known as "chain falls." Each chain fall consisted of an upper pulley system, or block, and a lower block. One chain fall was connected to each lateral side of the ramp, with the chain

falls suspended from the overhead gallows beam by means of a single piece of wire rope. The accident occurred when, as plaintiff was lowering the ramp, the operating chain and the load chain in the pulley system became twisted around one another. As he was untwisting the chains, the lower block spun and struck plaintiff in the hand.

The motion court denied plaintiff's motion for partial summary judgment, finding that the competing experts' affidavits had raised an issue of fact as to whether the chain fall equipment was seaworthy and whether plaintiff was comparatively negligent. Specifically, the motion court noted that the experts disagreed as to whether defendant should have used antirotational wire rope to hang the chain falls. However, plaintiff's expert identified two "primary causes" of the spinning of the chain fall which injured plaintiff. In addition to the failure to use antirotational wire rope, he also opined that "it was a bad practice and a failure to use due care to suspend the system from one wire to begin with." This was not addressed by the defense expert or otherwise controverted by defendants, and accordingly plaintiff was entitled to judgment on liability based upon defendant's breach of its duty to furnish a seaworthy vessel and

appurtenances "reasonably fit for their intended use" (*Mitchell v Trawler Racer, Inc.*, 362 US 539, 550 [1960]; *see also Barlas v United States*, 279 F Supp 2d 201 [SD NY 2003]).

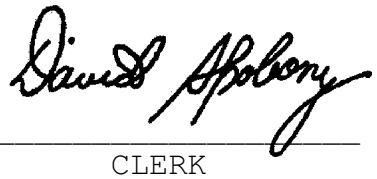
Nor did defendant raise any triable issue of comparative negligence. The record shows that plaintiff was performing his duties in an appropriate manner when he was injured. While defendant's expert noted that the accident would not have occurred but for the fact that the chain fall was bearing the weight of the bridge when plaintiff attempted to untwist it, the expert did not indicate that plaintiff acted unreasonably, and there is absolutely no evidence in this record that plaintiff should not have tried to untwist the wires while the chain fall was bearing weight. Defendant, in opposition to plaintiff's motion for summary judgment, submitted a "Troubleshooting Guide" for the chain fall system. The guide states that where the chain is twisted, the unit is not to be operated or serious damage will result. The guide's remedy for untwisting the chain does not caution against doing so while there is weight on the chains, and in fact, is silent on this issue. Moreover, defendant's own safety officer, when asked at his deposition whether there was any suggestion by him or anyone else that plaintiff did anything

wrong on the day of his accident, responded in the negative.

Accordingly, plaintiff is entitled to judgment in his favor on liability.

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

ENTERED: SEPTEMBER 28, 2010



CLERK

Andrias, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

2857 Frances Melendez, etc., al., Index 27225/01
Plaintiff-Appellant,

-against-

Parkchester Medical Services, P.C., et al.,
Defendants,

Montefiore Medical Center, et al.,
Defendants-Respondents.

_____

Robert G. Spevack, New York, for appellant.

Garson, DeCorato & Cohen, LLP, New York (Jason D. Turken of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 1, 2009, which granted the motion by the Montefiore defendants for summary judgment dismissing the complaint against them, unanimously affirmed, without costs.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In a medical malpractice action, this burden

is met by a medical expert's demonstration that the defendant's actions were a departure from the accepted standard of care in the medical community, and a proximate cause -- i.e., a substantial factor -- in bringing about the injury (*Sisko v New York Hosp.*, 231 AD2d 420, 422 [1996], *lv dismissed* 89 NY2d 982 [1997]; *see also Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456 [2008]). For this purpose, general allegations of medical malpractice that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a malpractice defendant's motion for summary dismissal (*Fileccia v Massapequa Gen. Hosp.*, 99 AD2d 796 [1984], *affd* 63 NY2d 639 [1984]).

Montefiore's submissions in support of its motion met the required prima facie showing to warrant judgment as a matter of law. In May 1997, plaintiff's decedent presented at Montefiore complaining only of hemorrhoids, without any recorded complaints as to abdominal pain or other colorectal problems. An anoscopy was performed, revealing no internal hemorrhoids, and the decedent was conservatively treated. Two years later, in June 1999, decedent again presented to Montefiore complaining of hemorrhoids and rectal bleeding for three days, and this time a 2½-centimeter thrombosed hemorrhoid was found and evacuated under anesthesia. On August 27, 1999, only after the decedent returned to Montefiore with new complaints of rectal bleeding, a 10-pound

weight loss and no hemorrhoids, was she referred for a colonoscopy and ultimately diagnosed with colon cancer. According to Montefiore's expert, the three-month gap between commencement of the decedent's treatment for a thrombosed hemorrhoid and her cancer diagnosis did not negatively impact on her subsequent treatment or chances for survival, inasmuch as "[w]ell differentiated colonic adenocarcinoma is a slow growing cancer and three months is insufficient time for Ms. Noboa's outcome to have been effected [*sic*] in any way."

In opposition, plaintiff failed to rebut this evidence. She argues that Montefiore failed to elicit the decedent's gastrointestinal history. But the absence of a notation in the hospital records indicating that the decedent was questioned about her pertinent prior medical history is not proof that she was not so questioned (*Krapivka v Maimonides Med. Ctr.*, 119 AD2d 801 [1986]; *see also Topel v Long Is. Jewish Med. Ctr.*, 55 NY2d 682, 684 [1981]). Plaintiff's assertion to that effect is speculative, particularly in light of the detailed, three-page medical history that was recorded during the decedent's initial intake.

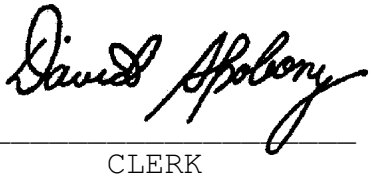
Plaintiff's reliance on the *Noseworthy* doctrine is misplaced. While a plaintiff in a wrongful death action "is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence"

(*Noseworthy v City of New York*, 298 NY 76, 80 [1948]), that doctrine can only be invoked where the plaintiff first makes a showing of facts from which negligence can be inferred (*Stankowski v Kim*, 286 AD2d 282, 284 [2001], *appeal dismissed* 97 NY2d 677 [2001]). Plaintiff has failed to provide such proof.

Plaintiff's expert asserted that Montefiore departed from the accepted standard of medical practice by improperly performing a rectal examination and an anoscopy, instead of a colonoscopy. However, until 1999, Montefiore was not actively treating the decedent for "colorectal problems" because hers was a straightforward case of hemorrhoids. Plaintiff's argument of insufficient examination based on an anoscopy, and that the cancerous polyps would likely have been detected and the decedent's course of treatment altered had Montefiore performed a colonoscopy, is unavailing.

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

ENTERED: SEPTEMBER 28, 2010



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