SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 30, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3058-
3058A-
3058B Rita Maria Sanchez de Hernandez, et al.,
Plaintiffs-Appellants,

-against-

Bank of Nova Scotia, etc.,
Defendant-Respondent.

Index 601518/06

_____

Hackerman Frankel P.C., Houston, TX (Richard Frankel of the Bar of the State of Texas, admitted pro hac vice of counsel), for appellants.

Sullivan & Cromwell LLP, New York (Philip L. Graham, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe, III), entered August 21, 2009, which granted defendant bank's (BNS) motion to dismiss plaintiff's complaint as barred by the statute of limitations, unanimously affirmed, with costs. Appeal from oral ruling, same court and Justice, rendered November 13, 2008, which denied plaintiffs leave to file an amended complaint, unanimously dismissed, without costs, as taken from a nonappealable paper. Appeal from order, same court and Justice,

entered on or about September 11, 2008, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss, for failure to state a cause of action, plaintiffs' claims for unjust enrichment and imposition of a constructive trust, unanimously dismissed, without costs, as untimely.

Plaintiffs are Mexican citizens who, along with other Mexican citizens, were shareholders in a financial company (herein GFI/Inverlat) that, in 1994, during the economic crisis in Mexico, was unable to collect on and repay loans, resulting in the need for additional capital to satisfy regulatory requirements. In December 1995, the Mexican government lent GFI/Inverlat 6.5 billion pesos (approximately US $857.5 million), taking in return 99.0349% of GFI/Inverlat's shares through the government agency Fondo Bancario de Proteccion al Ahorro (FOBAPROA), a trust created to support distressed financial institutions. At about the same time, BNS paid $175 million for 10% of GFI/Inverlat's stock and for bonds that could be converted into an additional 45% of the stock in the future. Ultimately, through a series of agreements, BNS acquired 91% of GFI/Inverlat's shares, leaving plaintiffs with 9% of the stock. The gravamen of plaintiffs' complaint, filed in May 2006, is that, pursuant to certain contractual undertakings referred to as

Guidelines, they were entitled to receive stock in GFI/Inverlat and that BNS breached the Guidelines by providing false information to the accounting firm that reported to the Mexican government in March 2000 with respect to the collection of troubled loans, causing the Mexican government to deliver less GFI/Inverlat stock to plaintiffs than BNS knew they were entitled to receive.

Plaintiffs' contract claim is barred by the six-year statute of limitations (CPLR 213[2]). Contrary to plaintiffs' argument, the limitations period did not begin to run in January 2004 when the Mexican government declared plaintiffs eligible to receive a 9% share, but in March 2000 when, as plaintiffs allege, BNS breached the Guidelines by providing the false information (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). "Knowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the Statute of Limitations running in a contract action" (*id.*, at 403 [internal quotation marks and brackets omitted]). No injustice appears, even accepting that plaintiffs did not know of the breach until after they were declared eligible for only 9% of the stock in 2004, as plaintiffs do not explain why they did not file a complaint at that time, which was well within the six-year period (*see id.*, at 404). Nor does it avail plaintiffs to argue that defendant,

after supplying false information in March 2000, continuously breached its obligations thereafter by "failing to supply accurate collections information" and "allowing the Government to act on that false information," without identifying a more recent, affirmative breach that occurred within the limitations period (*see Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80 [1980]). Plaintiffs' contention that the statute of limitations on their contract claim did not begin to run until "after July 31, 2000," at the end of the measuring period under the Guidelines for determining losses from troubled loans, is raised for the first time on appeal, and in any event unavailing. It appears that the formula utilized to determine plaintiffs' entitlement to purchase additional shares was "measured by GFI losses *covered by FOBAPROA*" (emphasis added), which covered losses only to December 31, 1999. As a result, at the time the accounting firm issued its final report in March 2000, the calculation of plaintiffs' entitlement to additional equity was not going to change, even if the results were not issued until on or after July 31, 2000.

The motion court's denial, during oral argument, of plaintiffs' motion for leave to amend, is not appealable. No appeal lies from a ruling (*Grisi v Shainswit*, 119 AD2d 418, 420 [1986]), and the transcript was not "so ordered" by the court

(CPLR 5512[a], 2219[a]; *see Nam Tai Elecs., Inc. v UBS PaineWebber Inc.*, 46 AD3d 486, 487 [2007]). Plaintiffs' September 21, 2009 appeal from the order that was entered on or about September 11, 2008 and served with notice of entry on or about October 17, 2008 is untimely (CPLR 5513[a]).

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro
_____
DEPUTY CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Román, JJ.

3244 St. Paul Fire and Marine Insurance Company as subsidiary of Chelsea 27th Street Apartments, LLC, etc., Plaintiffs-Appellants,

-against-

FD Sprinkler Inc., et al., Defendants-Respondents,

ADT Security Services, Inc., et al., Defendants.

Index 119021/06

Sheps Law Group, P.C., Melville (Robert C. Sheps of counsel), for appellants.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 9, 2009, which granted the motion by defendants FD Sprinkler and Woodworks Construction for summary judgment dismissing the complaint as against them on the ground that plaintiff's claims were barred by the antisubrogation rule, unanimously modified, on the law, to reinstate the complaint, except as to $52,323 sought against Woodworks, and otherwise affirmed, without costs.

In this subrogation action, St. Paul seeks to recover monies it paid on a claim filed by Chelsea 27th Street Apartments, its

named insured on a builder's risk insurance policy, for property damage caused by the unintended discharge of a sprinkler on or about December 24, 2003, at 800 Sixth Avenue in Manhattan, which premises were under construction. FD Sprinkler and Woodworks, respectively the sprinkler and drywall subcontractor, are alleged to have been responsible for the damages. St. Paul paid Chelsea a total of $714,438 on the subject claim, with $52,323 of said amount attributable to work performed by Woodworks.

The antisubrogation rule provides that an insurer has "no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]).

The subcontractors here are additional insureds on the policy, pursuant to a Special Provisions Endorsement that amended the Contractor's and Owner's Property Protection to include "All subcontractor's [*sic*] as Additional Insureds, ATIMA [as their interests may appear]." ATIMA thus provided the subcontractors with protection only to the extent of their property interest in the building under construction, to wit, the tools, labor and

material furnished or owned by the subcontractor (*see Paul Tishman Co. v Carney & Del Guidice*, 34 NY2d 941 [1974]); *Matter of Lurgi Metallurgie GmbH v Industrial Risk Insurers*, 262 AD2d 75 [1999], *lv denied* 93 NY2d 818 [1999]). The policy did not provide the subcontractors with coverage for any damage they may have caused to property in which they had no interest. The subcontractors' obligation to replace work damaged by them speaks to their potential liability and does not create an insurable interest in the entire building (*see Paul Tishman Co.*, 34 NY2d at 942-943). To the extent St. Paul seeks recovery of the $52,323 paid on the claim that is attributable to work performed by Woodworks, such recovery is barred by the antisubrogation rule. Inasmuch as St. Paul did not make any payments in connection with FD Sprinkler's work, the antisubrogation rule does not apply to this subcontractor.

The subcontactors, who are neither signatories nor parties to the main contract between the owner and the general contractor, cannot avail themselves of the waiver-of-subrogation

clause contained therein (*see Gulf Ins. Co. v Quality Bldg. Contr., Inc.*, 58 AD3d 595 [2009]).

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3271 The People of the State of New York, Ind. 3899/01
Respondent,

-against-

Joseph Bronaugh,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Herbert I. Altman, J. at plea; Ronald A. Zweibel, J. at sentence), rendered September 18, 2008, convicting defendant of attempted criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4 to 8 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes the plea's voluntariness. Defendant's belated claim of innocence, made for the first time after he had absconded and been returned for sentencing years after his plea, was contradicted by his plea allocution and by the evidence before the court on the plea

withdrawal motion. Defendant received a full opportunity to present his claims by written submissions, and no further inquiry was necessary under the circumstances.

Defendant's procedural challenges to his second felony offender adjudication are unpreserved (*see People v Samms*, 95 NY2d 52, 57 [2000]), and we decline to review them in the interest of justice. As an alternative holding, we find that a remand for resentencing is not warranted (*see People v Bouyea*, 64 NY2d 1140, 1142 [1985]).

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

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro
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DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3272 In re Julia C.,
Petitioner-Appellant,

-against-

Phoebe L., et al.,
Respondents-Respondents.

_____

Steven N. Feinman, White Plains for appellant.

Proskauer Rose LLP, New York (Jennifer L. Jones of counsel), Law Guardian.

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Order, Family Court, New York County (Karen I. Lupuloff, J.F.C.), entered on or about May 6, 2008, which, after a hearing, and to the extent appealed from, denied respondent mother's petition for sole custody of the child, and instead awarded sole custody to respondent Phoebe L., the paternal grandmother, unanimously affirmed, without costs.

The award of custody to the paternal grandmother was in the best interests of the child and was warranted by the totality of the circumstances (*see Eschbach v Eschbach*, 56 NY2d 167), including the social worker's testimony that the grandmother has been supportive, gave structure to the child's life, and provided a stable and loving home environment (*see e.g. Matter of Brenda J. v Nicole M.*, 59 AD3d 299 [2009]). Notwithstanding that

petitioner is a fit mother, she has not personally taken day-to-day care of the child (*see Melnitzky v Melnitzky*, 268 AD2d 378, 379 [2000]).

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3273 The People of the State of New York, Ind. 2894/06
Respondent,

-against-

Gregory Francis,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (William Mogulescu, J. at plea; Denis Boyle, J. at sentence), rendered on or about March 7, 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: SEPTEMBER 30, 2010

Elba Iris Castro

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3275 The People of the State of New York, Ind. 2952/08
Respondent,

-against-

Hector Sarcone,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Abgail Everett 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 (Lewis Bart Stone, J.), rendered on or about November 21, 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 30, 2010

Elba Iris Castro
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DEPUTY CLERK

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

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3276 The People of the State of New York, Ind. 2904/08
Respondent,

-against-

Joshua Lawyer,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. at dismissal motion; Margaret L. Clancy, J. at jury trial and sentence), rendered June 5, 2009, convicting defendant of assault in the first degree, criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court properly denied defendant's request for a justification charge, since there was no reasonable view of the evidence to support that defense, when viewed in the light most favorable to defendant and with due regard to defendant's right to assert inconsistent defenses. It was undisputed that

defendant shot the complainant in the back of the head. The complainant testified that defendant suddenly shot him from behind. While claiming he accidentally shot the complainant after disarming him, defendant unequivocally testified that the complainant was unarmed and retreating when the shots were fired. Hence, even if the jury credited portions of defendant's testimony, there was nothing in the evidence to support a finding that the shooting was intentional, but justified (*see e.g. People v Bennett*, 279 AD2d 585 [2001], *lv denied* 96 NY2d 797 [2001]). To find justification, the jury would have had to "speculate as to an alternative scenario that was not supported by any evidence" (*People v Bonilla*, 51 AD3d 585, 585 [2008], *lv denied*, 11 NY3d 734 [2008]).

We have considered and rejected defendant's remaining arguments, including those addressed to the prosecutor's instructions to the grand jury.

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro
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DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3278 The People of the State of New York, Ind. 3571/07
Respondent,

-against-

Samuel DeGannes,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered June 10, 2008, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 4 years, unanimously affirmed.

The court provided a meaningful response to a jury note (*see People v Santi*, 3 NY3d 234, 248-249 [2004]; *People v Malloy*, 55 NY2d 296 [1982]). When, due to lack of consent by defendant (*see* CPL 310.30), the court was unable to comply with the jury's request for a written definition of constructive possession, it properly exercised its discretion in giving an oral definition that was both legally correct and substantially similar to the instruction contained in the court's original charge. Even if

the response went beyond the precise terms of the jury's request, defendant was not prejudiced (*see People v Lourido*, 70 NY2d 428, 435 [1987]; *People v Mariera*, 219 AD2d 496 [1995], *lv denied* 87 NY2d 923 [1996]).

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro
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DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3279 The People of the State of New York, Docket 48220C/06
Respondent,

-against-

Jamel Nimmons,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered January 9, 2008, convicting defendant, after a jury trial, of criminal contempt in the second degree, and sentencing him to a term of 1 year, unanimously affirmed.

The court properly denied defendant's request for a missing witness instruction. The witness, whose friendship with the victim had ended long before the trial, was not in the People's control for purposes of a missing witness charge (*see People v Abelson*, 27 AD3d 301 [2006]). In any event, given the overwhelming evidence that defendant violated the order of protection, any error would have been harmless.

Defendant's remaining arguments are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro
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DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3280 In re Bryant Angel Malik J.,

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

Bryant J., Sr.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

_____

Wendy Abels, New York for appellant.

John R. Eyerman, New York for respondent.

Karen Freedman, New York (Doneth N. Gayle of counsel), Law Guardian.

_____

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about July 29, 2008, which, to the extent appealed from, in granting the petition to terminate the parental rights of the subject child's mother and to transfer custody and guardianship to petitioner and the Commissioner of Social Services for the purpose of adoption, denied appellant the opportunity to withhold consent to such adoption, unanimously affirmed, without costs.

Appellant's contention that he received ineffective assistance of counsel, based on his attorney's concession that he

was simply a "notice" father under Domestic Relations Law § 111-a, without pressing for a hearing specifically on his entitlement to withhold consent to the child's adoption under § 111, is unfounded. After investigating the facts and presumably discussing the matter with her client, counsel made a conscientious, strategic decision not to request a hearing on the issue of consent. This does not provide a basis for finding ineffective assistance of counsel *(see Matter of Matthew C.,* 227 AD2d 679, 682-683 [1996]). Evidence adduced at the hearing demonstrated, in any event, that any effort to establish that appellant was a "consent" father would have been unsuccessful. He never maintained substantial and continuous or repeated contact with the child as required by the statute. Appellant's incarceration did not absolve him of his responsibility for supporting the child and maintaining regular communications (*Matter of Baby Boy C.,* 13 AD3d 619 [2004]).

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3281 The People of the State of New York, Ind. 3920/04
Respondent,

-against-

Keith Johnson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 22, 2004, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 6 to 12 years, unanimously affirmed.

Given the circumstances, the court made an adequate inquiry into defendant's request for new counsel, made after commencement of trial and while defendant was refusing to appear in the courtroom. Counsel relayed this request to the court, and explained the reasons for his client's request. Those grounds fell far short of good cause for a midtrial change of attorneys. "Defendant's unjustified hostility toward his counsel and his

disagreements with counsel's tactics did not require substitution" (*People v Walton*, 14 AD3d 419, 420 [2005], *lv denied* 5 NY3d 796 [2005]). When defendant returned to the courtroom later in the trial, his main tactical disagreement with counsel had been resolved and defendant had no further complaints.

The portion of the prosecutor's summation that defendant challenges as distorting the evidence was permissible argument, since it sought to draw reasonable inferences from the record (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]); in any event, any error in this regard was harmless. Defendant's other challenge to the summation is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro
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DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3282 Carlos Quijano, Index 26035/98
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about June 4, 2009, which, in an action for personal injuries, denied a motion to substitute the Bronx County Public Administrator for the deceased plaintiff, and granted defendant's cross motion to dismiss the complaint for failure to timely substitute a representative for the deceased plaintiff, unanimously affirmed, without costs.

The motion to substitute, which was made in January 2009, 11 years after the alleged accident in January 1998 and almost 10 years after plaintiff's death in April 1999, was properly denied on the ground that it was not made within a reasonable time, as

required by CPLR 1021 (*see Washington v Min Chung Hwan*, 20 AD3d, 303, 305 [2005]; *Palmer v Selpan Elec. Co.*, 5 AD3d 248 [2004]).

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro
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DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3283 The People of the State of New York, SCI. 49337C/01
Respondent,

-against-

Miguel Malo,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Catherine M. Bartlett, J.), rendered October 24, 2005, convicting defendant, after a jury trial, of assault in the third degree and disorderly conduct, and sentencing him to an aggregate term of 3 years' probation, unanimously affirmed.

Defendant's challenges to the legal sufficiency of the evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence supports the conclusion that defendant acted recklessly, and that

he caused physical injury to the victim (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

Defendant's claim that the prosecutor improperly cross-examined him is without merit.

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro
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DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3284 The People of the State of New York, Respondent, Ind. 1301/06 4908/06 6000/06

-against-

Bobby Ferrell, Defendant-Appellant.

_____

Lawrence Schwartz, New York for appellant.

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

_____

Judgments, Supreme Court, New York County (Bruce Allen, J.), rendered October 14, 2008, convicting defendant, upon his pleas of guilty, of murder in the second degree, attempted murder in the second degree, robbery in the first degree and criminal sale of a controlled substance in or near school grounds, and sentencing him to an aggregate term of 15 years to life, unanimously affirmed.

At the plea colloquy, the court gave defendant all the information he needed to "knowingly, voluntarily and intelligently choose among alternative courses of action" (*People v Catu*, 4 NY3d 242, 245 [2005]; *see also Hill v Lockhart*, 472 US 52, 56 [1985]). The court made it clear that a plea of guilty to second-degree murder would subject defendant to being incarcerated for his entire life. Since the prison and

postrelease supervision terms for the nonhomicide convictions were lesser than, and concurrent with, the sentence of 15 years to life, they merged in that sentence by operation of Penal Law 70.35. As the court aptly stated, "[I]n effect, your sentence would be 15 to life." Therefore, under these circumstances, the court's failure to set forth the terms of the additional sentences at the time of the guilty pleas did not render any of the pleas involuntary (*cf. People v Carter*, 67 AD3d 603 [2009], *lv denied* 14 NY3d 886 [2010]).

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

ENTERED: SEPTEMBER 30, 2010

Elba Iris Castro

DEPUTY CLERK