SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 18, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8202 Rafael Braun, etc., Index 112408/09
Plaintiff-Respondent,

-against-

Blair S. Lewis, M.D., et al.,
Defendants-Appellants.

Martin Clearwater & Bell, LLP, New York (Barbara D. Goldberg of counsel), for appellants.

Duffy and Duffy, Uniondale (Mary Ellen Duffy of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered July 28, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint as time-barred, unanimously modified, on the law, to grant the motion as to the medical malpractice claim, and otherwise affirmed, without costs.

This action was commenced on August 31, 2009, more than 2½ years after plaintiff's decedent was last seen by defendant physician, and plaintiff failed to offer a viable basis for the possible application of the continuous treatment doctrine so as

to toll the limitations period. Defendant physician performed colonoscopies on plaintiff's decedent on February 10, 2006 and August 28, 2006, and there is no indication that the physician and the patient both explicitly anticipated further treatment by the physician for the same condition (*see Richardson v Orentreich*, 64 NY2d 896, 898 [1985]). Indeed, the exchange of correspondence in March 2007 establishes the contrary. In response to defendant's letter dated March 5, 2007, advising that it was time for the patient's "surveillance examination" and asking that the patient call to schedule the procedure, plaintiff wrote the following response:

> "Please be advised that your records are incorrect. My Wife, Bozena Braun [the decedent] is not due for 'surveillance examination,' as stated in your letter, since she had a colonoscopy on August 28, 2006, after which she ended up in the emergency room in L.I.J. [¶] In fact, to date we did not get a written report of the result of this test. We respectfully request that you send us a copy of the test results to the address below."

Therefore, plaintiff's malpractice claim is untimely (CPLR 214-a).

However, when evidence is submitted on a motion to dismiss, we look to whether plaintiff has a cause of action, rather than whether it is pleaded (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Although the complaint is framed in terms of

medical malpractice, plaintiff's allegations that defendant physician failed to communicate significant medical findings to decedent support a potentially meritorious claim for ordinary common-law negligence (*see Bennett v Long Is. Jewish Med. Ctr.*, 51 AD3d 959 [2d Dept 2008]; *see also Yaniv v Taub*, 256 AD2d 273, 274 [1st Dept 1998]). While defendant sent letters to plaintiff's primary care physician after each colonoscopy, there is nothing in the record indicating that he forwarded the pathology reports that were subsequently issued.

Because the statute of limitations for negligence claims had not expired at the time of death, the wrongful death claim is timely (*see* EPTL 5-4.1).

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

ENTERED: OCTOBER 18, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8282 The People of the State of New York, Ind. 4058/07
Appellant,

-against-

Equan Sanders,
Defendant-Respondent.

_____

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Elon Harpaz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 14, 2010, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, affirmed.

The court properly adjudicated defendant a second violent felony offender rather than a persistent violent felony offender. Defendant's resentencing at the behest of the Division of Parole for the purpose of imposing a period of PRS on one of defendant's prior violent felony convictions occurred after he committed the instant offense. In this situation, the resentencing date controls whether the conviction meets the sequentiality requirement for sentencing as a persistent violent felony

offender (*see People v Butler*, 88 AD3d 470 [1st Dept 2011], *lv denied* 18 NY3d 992 [2012]).

All concur except Gonzalez, P.J. and Sweeny, J. who concur in a separate memorandum by Sweeny, J. as follows:

SWEENY, J. (concurring)

I am constrained by this court's decision in *People v Butler* (88 AD3d 470 [1st Dept. 2011], *lv denied* 18 NY3d 992 [2012]) to affirm. I write separately to voice my concern that this issue is not fully resolved. *Butler* is at odds with the Second Department case of *People v Naughton* (93 Ad3d 809[2d Dept], *lv denied* 19 NY3d 865 [2012]). *Naughton* clearly holds, contrary to *Butler*, that it is irrelevant whether the defendant or the government brought the application for a resentence under *People v Sparber* (10 NY3d 457 [2008]) and that the original sentence date is always determinative as the predicate for persistent violent felony offender status.

It is apparent from these differing opinions that the decision in *People v Acevedo* (17 NY3d 297 [2011]) to which both *Butler* and *Naughton* refer, did not clarify this question. We look to the Court of Appeals for guidance on this crucial sentencing issue.

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

ENTERED: OCTOBER 18, 2012

CLERK

Andrias, J.P., Sweeny, Catterson, Manzanet-Daniels, JJ.

8177 Cynthia Jeffers, Index 303098/07
Plaintiff-Appellant,

-against-

Style Transit Inc., et al.,
Defendants-Respondents,

Transcare New York Inc., et al.,
Defendants.

Weiss & Rosenbloom, P.C., New York (Andrea K. Tessler of counsel), for appellant.

Jason Levine, New York, for respondents.

Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered on or about March 8, 2011, which granted defendants-respondents' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, with costs, and the motion denied.

Defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury to her right knee. An MRI of the knee taken less than three weeks after the accident showed that plaintiff had sustained "a linear tear of the posterior horn of the medial meniscus with a second small tear of the free edge of the body of the medial meniscus." Defendants' expert, Dr. Katzman, failed to address the positive findings on

the MRI, and indeed, does not appear to have reviewed any of the relevant medical records, including contemporaneous reports of diminished ranges of motion. Dr. Katzman failed to proffer any medical evidence that plaintiff's knee injuries were not caused by the accident, merely opining, in conclusory fashion, that she had a resolved knee sprain, in spite of the fact that Dr. Katzman himself observed signs of injury such as an antalgic gait. This was insufficient to meet defendants' burden (*see Patterson v Rivera*, 49 AD3d 337 [1st Dept 2008]; *Nix v Yang Gao Xiang*, 19 AD3d 227 [1st Dept 2005]).

Plaintiff's submissions, in any event, raise a triable issue of fact. Plaintiff submitted a certified copy of the Lenox Hill emergency department record; affirmed medical records of Dr. Robert Kutnick, plaintiff's primary care physician, detailing plaintiffs' complaints and post-accident treatment; an affirmation and MRI report of radiologist Dr. Jacob Lichy, interpreting plaintiff's right knee MRI studies; and the affirmed report of her treating orthopedist, Dr. Mark McMahon, who first examined plaintiff on August 1, 2007, approximately one week after the accident. Dr. McMahon found progressing reductions in range of motion and consistent positive McMurray tests, among other things, and recommended knee surgery, which plaintiff could not undergo due to a health condition unrelated to the accident.

Evaluations that Dr. McMahon conducted three years after the July 2007 accident revealed a 30% loss in range of motion, as measured by objective testing (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]; *Delgado v Papert Tr., Inc.*, 93 AD3d 457, 458 [1st Dept 2012]; *Mitchell v Calle*, 90 AD3d 584, 584 [1st Dept 2011]). Dr. McMahon also noted that plaintiff experienced buckling and occasional clicking of the knee, and that she had difficulty ascending and descending stairs, bending, and sitting for extended periods of time (*see Fuentes v Sanchez*, 91 AD3d 418, 419 [1st Dept 2012]). Further, he maintained that arthroscopic surgery would have been the best method to resolve the condition.

Defendants did not submit any evidence as to causation. In any event, Dr. McMahon's opinion that plaintiff's injuries were caused by the accident is sufficiently supported by plaintiff's claim that she was previously asymptomatic and a lack of records showing otherwise (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

Finally, defendants failed to meet their burden of establishing, prima facie, the absence of a 90/180-day injury. While plaintiff testified that she was confined to home for only two months, she also testified that she missed 11 months of work as a maternity ward nurse due to pain in her right knee. Dr. Katzman's examination postdated the requisite 180-day period, and

defendants submitted no evidence disproving that plaintiff was unable to work for 11 months due to a medically determined injury (*see Quinones v Ksieniewicz*, 80 AD3d 506, 506-507 [1st Dept 2011]).

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

ENTERED: OCTOBER 18, 2012

CLERK

Andrias, J.P., Sweeny, Catterson, Moskowitz, Manzanet-Daniels, JJ.

8184 The People of the State of New York, Respondent, Ind. 3959/01 5330/01

-against-

David Lance Paulin, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lindsey J. Ramistella of counsel), for respondent.

Order, Supreme Court, Bronx County (John P. Collins, J.), entered on or about September 29, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in finding that substantial justice dictates denial of defendant's motion (*see e.g. People v Gonzalez*, 29 AD3d 400 [2006], *lv dismissed* 7 NY3d 867 [2006]). Defendant's continued pattern of criminal activity while on parole and his poor prison disciplinary record demonstrate that he has little remorse for his actions. While on

parole, defendant was indicted for grand larceny and conspiracy, convicted of four new misdemeanor offenses, had his parole revoked three times and committed seven infractions while incarcerated (*see People v Paulin*, 17 NY3d 238 [2011]).

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8322 The People of the State of New York, Respondent, Ind. 8212/02 4317/03 2100/03

-against-

Corey Neely, also known as Corey Everette, Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about September 20, 2011, which denied defendant's renewed CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the defendant's motion (*see e.g. People v Gonzalez*, 29 AD3d 400 [2006], *lv denied*, 7 NY3d 867 [2006]). Defendant has demonstrated a

"chronic inability to control his behavior while at liberty" (*People v Correa*, 83 AD3d 555, 556 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]), committing numerous crimes while on parole and even while his resentencing application was pending.

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8323-
8324 In re Yajaira J.L.,
Petitioner-Respondent,

-against-

Robert Bruce Scott L.,
Respondent-Appellant.

Daniel R. Katz, New York, for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

Appeal from order, Family Court, Bronx County (Alma Cordova, J.), entered on or about August 6, 2010, which, after a fact-finding hearing, granted petitioner an order of protection for two years, unanimously dismissed as moot, without costs.

Because the order of protection has expired, this appeal is moot (*see Matter of Diallo v Diallo*, 68 AD3d 411 [1st Dept 2009], *lv dismissed* 14 NY3d 854 [2010]). Were we to reach the merits, we would find that a fair preponderance of the evidence (Family Ct Act § 832), including petitioner's testimony, supports the court's finding that respondent committed acts that constitute the family offenses of harassment and attempted assault (*see* Penal Law §§ 110.10/120.05; 240.25; 240.26[1], [3]), warranting

the issuance of an order of protection (*see* Family Ct Act § 812[1]). There is no basis to disturb the court's credibility determinations (*see Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]).

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8326-
8326A Index 106701/10

Jonathan Glynn,
Plaintiff-Appellant-Respondent,

-against-

177 West 26th St. Realty Corp.,
Defendant-Respondent-Appellant,

Elias Bochner,
Defendant.

_____

Jack L. Lester, New York, for appellant-respondent.

Smith & Shapiro, New York (Harry Shapiro of counsel), for respondent-appellant.

_____

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered October 12, 2011, to the extent appealed from as limited by the briefs, awarding defendant 177 West 26th St. Realty Corp. possession of eight loft units at the subject building, and denying defendant's motion for summary judgment to the extent it sought possession of Unit 501 and sought to dismiss the causes of action for breach of warranty of habitability as to Unit 501 and for restitution, unanimously modified, on the law, to dismiss the cause of action for restitution, and to grant possession of Unit 501 to defendant, and otherwise affirmed, without costs. Order, same court and Justice, entered September 8, 2011, which granted plaintiff leave

to amend the complaint to add a cause of action for constructive trust, unanimously reversed, on the law, without costs, and the motion denied.

Defendant established its entitlement to an ejectment and to the dismissal of the breach of warranty of habitability claim through affidavits, leases, and notices terminating the tenancies. Plaintiff failed to raise a triable issue of fact as to Unit 501.

The cause of action for restitution for the improvements plaintiff made to the units must be dismissed because the leases, which contain merger clauses, provide that any improvements to the units will become the landlord's property (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Plaintiff's motion for leave to amend the complaint to add a cause of action for constructive trust must be denied because plaintiff failed to show that the parties' business transaction

gave rise to a confidential or fiduciary relationship between them (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8330 The People of the State of New York, Ind. 2097/10
Respondent,

-against-

Angel DeJesus,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed 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 (Charles H. Solomon, J.), rendered on or about October 12, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: OCTOBER 18, 2012

CLERK

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

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

8331 Margaret Thomas, et al., Index 21275/04
Plaintiffs-Appellants-Respondents,

-against-

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

Gunhill Car Service,
Defendant.

Arnold E. DiJoseph III, New York, for appellants-respondents.

Michael A. Cardozo, Corporation Counsel, New York (Donna B. Morris of counsel), for The City of New York and New York City Police Department, respondents-appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Ahmad Aftab, respondent-appellant.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 25, 2010, which granted the motion of defendant Aftab and the cross motion of defendants the City of New York and New York City Police Department for summary judgment dismissing the complaint as to plaintiff Christal Berkeley, based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), and as to plaintiff Margaret Thomas only to the extent of dismissing her 90/180-day claim, unanimously modified, on the law, to grant the motion and cross motion for summary judgment dismissing Thomas's remaining serious injury claims, and otherwise affirmed, without costs.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law, and plaintiffs failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With respect to plaintiff Thomas, defendants submitted evidence showing that Thomas's left knee injuries preexisted the subject accident, were degenerative in nature, and could not be attributed to the accident (*see Pines v Lopez*, 88 AD3d 545, 545 [1st Dept 2011]). Although Thomas's treating physician found a limitation in the range of motion of her left knee seven years after the accident, he failed to explain why Thomas had full range of motion in her left knee shortly after the accident. Accordingly, the physician's report failed to raise an issue of fact as to Thomas's claims of serious injury to the left knee (*see Jno-Baptiste v Buckley*, 82 AD3d 578, 578-579 [1st Dept 2011]), including her claim that the accident aggravated a preexisting injury to the knee (*see also Suarez v Abe*, 4 AD3d 288 [1st Dept 2004]). Further, an orthopedic surgeon found that Thomas had full range of motion in her cervical spine *Mitrotti v Elia*, 91 AD3d 449, 449-450 [1st Dept 2012]), and there was no positive MRI report or other objective medical proof of injury to the spine (*see Madera v Gressey*, 84 AD3d 460, 460 [1st Dept 2011]).

With regard to plaintiff Berkeley, defendants submitted evidence showing that Berkeley's claimed right ankle injuries preexisted the accident, and that she had normal ranges of motion in the spine and knees. Although Berkeley's treating physician found minor limitations in the range of motion of her cervical and lumbar spines, Berkeley failed to submit any objective medical proof of these injuries, or of injury to her right ankle (*see Madera*, 84 AD3d at 460). Further, her physician found that she had not sustained any injury to the left knee, and that she had full range of motion in the right knee a few months after the accident. That her physician found limitations in the range of motion of her right knee seven years after the accident is insufficient to raise an issue of fact, since he failed to explain the loss in range of motion (*see Jno-Baptiste*, 82 AD3d at 578-579).

Defendants met their burden of showing that neither plaintiff sustained a serious injury to the head by submitting Thomas's testimony that no objective tests were performed on her head and that she was never treated for head injuries, and by submitting Berkeley's testimony that a doctor had never advised her that she had sustained a concussion. In light of plaintiffs' testimony, defendants were not obligated to present medical evidence on the issue, and plaintiffs failed to raise a triable

issue of fact in opposition.

Plaintiffs' 90/180-day claims were properly dismissed, since Thomas testified that she had returned to work on "limited light duty" within two weeks of the accident, and Berkeley testified that she had returned to work approximately 75 days after the accident (*see Martin v Portexit Corp.*, 98 AD3d 63, 68 [1st Dept 2012]; *see also Byong Yol Yi v Canela*, 70 AD3d 584, 585 [1st Dept 2010]).

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8332 Country-Wide Insurance Company, Index 101844/09
Plaintiff-Appellant,

-against-

Preferred Trucking Services Corp., et al.,
Defendants,

Filippo Gallina, et al.,
Defendants-Respondents.

Thomas Torto, New York, for appellant.

Alexander J. Wulwick, New York, for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about August 10, 2011, which, insofar as appealed from, granted the motion of defendants Filippo and Sherri Gallina for summary judgment to the extent of declaring that plaintiff's disclaimer of coverage for its insured defendant Preferred Trucking Services Corp. (Preferred) was untimely, and that plaintiff was obligated to indemnify Preferred up to the policy limit of $500,000, and denied plaintiff's cross motion for summary judgment declaring that it was not obligated to defend and indemnify Preferred in the underlying personal injury action, unanimously affirmed, without costs.

Plaintiff's disclaimer of coverage was untimely, since it came approximately four months after it learned of the ground for

the disclaimer (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]; *Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 84-85 [1st Dept 1994]). Plaintiff's argument that the disclaimer was timely because it had no basis for disclaiming coverage until it became apparent that the operator of the subject truck would not cooperate with the defense of the underlying personal injury action, is unavailing. Plaintiff's diligent conduct prior to the disclaimer, in attempting to secure the cooperation of both Preferred's owner and the operator of the truck, shows that plaintiff believed both had knowledge or information pertaining to the accident and the underlying litigation, and belies plaintiff's representation that its sole concern was with the testimony of the operator of the truck.

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8333 The People of the State of New York, Respondent, Ind. 3966/10

-against-

Christopher Padilla, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at plea; A. Kirke Bartley, J. at sentencing), rendered on or about March 30, 2011, 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: OCTOBER 18, 2012

CLERK

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

8334 Sivan Kinberg, Index 6493/04
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Sivan Kinberg, appellant pro se.

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 11, 2011, which granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped and fell on snow and ice as she descended the stairs after exiting the subway. Defendant submitted evidence, including testimony of its employees and certified climatological data, showing that a snowstorm was in progress at the time of plaintiff's fall. The duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the

storm has ended (*see Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [1st Dept 2005], *affd* 6 NY3d 734 [2005]).

Plaintiff's opposition failed to raise a triable issue of fact. Plaintiff asserts that there is a question concerning whether the storm was in progress at the time she slipped, based on her testimony and affidavit that it was not snowing when she exited the station. However, she failed to provide evidence of when the snow stopped falling, and thus, failed to demonstrate that a reasonable time elapsed from the cessation of the storm sufficient to impose a duty on defendant to remedy the condition. Nor did plaintiff provide evidence that defendant's snow removal efforts, if any, were negligently performed (*compare Pipero v New York City Tr. Auth.*, 69 AD3d 493 [1st Dept 2010]).

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

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8335 The People of the State of New York, Respondent, Ind. 5207/09

-against-

Andre Wise, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Michael J. Obus, J. at suppression hearing; Bruce Allen, J. at jury trial and sentencing), rendered August 4, 2010, convicting defendant of robbery in the second degree, and sentencing him, as a second felony offender, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. The officers saw an apparently injured man lying on the ground. Defendant ran away from this man while attempting to stuff something into his rear waistband, that one of the officers believed, based on his experience, was a deadly weapon. That defendant continued these actions after the police told him to stop tended to negate any innocent explanations. At this point, the police had reasonable suspicion upon which to draw their

weapons and forcibly detain defendant (*see People v Rivera,* 286 AD2d 235 [1st Dept 2001], *lv denied* 97 NY2d 760 [2002]). A bystander then told the police that defendant had assaulted the man lying on the ground.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). We reject defendant's challenge to the weight of the evidence supporting the physical injury element of second-degree robbery under Penal Law § 160.10(2)(a). The testimony of the victim, the officers and a bystander established that the victim had a swollen mouth, a bloody lip, and a bloody and bruised elbow, and that he temporarily lost consciousness.

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

ENTERED: OCTOBER 18, 2012

CLERK

Friedman, J.P., Freedman, Richter, Abdus-Salaam, JJ.

8336 Vandale Limited Partnership, Index 16108/07
Plaintiff-Respondent,

-against-

Liberty Chevrolet Inc., doing business as
Bronx Honda, doing business as Bronx Mazda,
Defendant-Appellant.

_____

Bernard Flaton, Garden City, for appellant.

_____

Order, Supreme Court, Bronx County (Diane Lebedeff, J.), entered August 26, 2011, which denied defendant tenant's motion for summary judgment dismissing the complaint and for sanctions and granted plaintiff landlord's cross motion for summary judgment dismissing the counterclaims, unanimously affirmed, with costs.

In this action to recover liquidated damages under a license/lease agreement for holding over past the noticed termination date, the motion court correctly found that landlord rightfully terminated tenant's use of its space pursuant to the parties' agreement which did not provide for termination only at the end of the month-to-month term. In any event tenant vacated the premises and possession of the premises is no longer an issue.

On its motion for summary judgment tenant failed to show

that the liquidated damages sought under the agreement's time of the essence holdover clause were unreasonably disproportionate to landlord's actual damages (*see Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120 [2006]). The lack of evidence of any alleged trespass or of any improper conduct in violation of Real Property Actions and Proceedings Law § 853 warrants dismissal of the counterclaims.

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

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8337 The People of the State of New York, Ind. 67039/07
Respondent,

-against-

Donald O'Toole,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Joseph Dawson, J.), rendered May 23, 2008, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to an aggregate term of 45 days, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. We do not find the victim's account of the incident to be

implausible. Moreover, her testimony was consistent with the officer's observations of the victim's demeanor, made shortly after the incident.

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8338 In re Lydia D.,
Petitioner-Respondent,

-against-

Thomas B.,
Respondent-Appellant.

Thomas B., Sag Harbor, appellant pro se.

Peter F. Edelman, New York, for respondent.

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about October 6, 2011, which referred respondent's motion to vacate three prior orders in this child support proceeding to the Judicial Hearing Officer that decided those orders, unanimously dismissed, without costs, as taken from a nonappealable paper.

The order appealed from is not an order of disposition and, therefore, is not appealable as of right (*see* Family Ct Act § 1112[a]). Since leave to appeal has not been granted, the appeal is dismissed (*see Forbes v Rivera*, 98 AD2d 640 [1st Dept 1983]).

Were we not dismissing the appeal, we would affirm. The order simply referred the motion to the Judicial Hearing Officer who previously reported on the matter and to whom respondent was to make the motion to vacate in the first instance (*see* CPLR 2217[a]; 2221[a]).

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8339 Luis Pindo, Index 109102/09
Plaintiff-Respondent,

-against-

Elicias Lenis,
Defendant-Appellant,

Carlos Ramales, et al.,
Defendants.

Martin, Fallon & Mullé, Huntington (Stephen P. Burke of counsel), for appellant.

Rosenblatt, Frasciello & Knipping-Diaz, LLC, New York (Giulio S. Frasciello of counsel), for respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered January 12, 2012, which, insofar as appealed from, denied defendant Elicias Lenis's motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

In response to defendant's prima facie showing that plaintiff did not sustain a serious injury, plaintiff proffered sufficient evidence to raise an issue of fact as to whether the alleged injuries to his cervical and lumbar spines were "significant" within the meaning of Insurance Law § 5102(d). Days after the accident, plaintiff's treating physician found

that his cervical and lumbar spine suffered limitations in range of motion in multiple planes, and that physician continued to find diminished ranges of motion at subsequent examinations. Such injuries, if proven, are significant enough to provide a basis for finding a serious injury under Insurance Law § 5102(d) (*see Garner v Tong*, 27 AD3d 401 [1st Dept 2006]; *Howard v King*, 307 AD2d 278 [2d Dept 2003]; *see also Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]; *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463 [1st Dept 2010]).

As for defendant's gap in treatment argument, plaintiff submitted an affidavit explaining that he attended extensive physical and rehabilitative therapy, until his insurer advised him that his no fault benefits had expired, and that he could no longer afford treatment. This Court has repeatedly found such an explanation adequate to raise an issue of fact (*see e.g. Serbia v Mudge*, 95 AD3d 786 [1st Dept 2012]; *Browne v Covington*, 82 AD3d 406 [1st Dept 2011]).

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

ENTERED: OCTOBER 18, 2012

CLERK

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

8340 In re Azmina Bhanji, etc., Index 650834/10
Petitioner-Appellant,

-against-

Abbas K. Baluch,
Respondent-Respondent,

John/Jane Doe Individuals, et al.,
Respondents.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for appellant.

Rosenbaum & Rosenbaum, P.C., New York (George David Rosenbaum of counsel), for respondent.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 18, 2011, which, after a framed issue hearing, denied the petition for dissolution of Flytime Tours & Travel, Inc., and dismissed the proceeding, unanimously affirmed, without costs.

In this special proceeding in which petitioner seeks, *inter alia*, the judicial dissolution of Flytime, a New York corporation organized in 1984, petitioner has failed to establish that she is the owner of a 50% interest in Flytime, as required by Business Corporation Law § 1104(a) (*see e.g. Artigas v Renewal Arts Realty Corp.*, 22 AD3d 327, 327–328 [1st Dept 2005]). There is no evidence to support petitioner's testimony that she and

respondent orally agreed that she would have a 50% interest in Flytime once the corporation was formed. While it is undisputed that Flytime did not issue any stock certificates, or have any shareholder agreement or organizational meeting, there is also no evidence, other than petitioner's conclusory testimony, that petitioner paid consideration for her purported stock interest (*see Matter of Heisler v Gingras*, 90 NY2d 682, 687 [1997]). Flytime's federal tax return for the year 2000, which indicated that she was a 50% owner of the corporation was insufficient, without more, to satisfy petitioner's burden, since corporate and personal tax returns, even when filed with government agencies, are "not in and of [themselves] determinative" (*Matter of Heisler*, 90 NY2d at 688). Notably, the federal tax return was inconsistent with the NYC tax return for that same year, which indicates that respondent owns 100% of the corporation. It is also noteworthy that petitioner declined to submit her own personal tax return for in camera review.

The remaining documents on which petitioner relies either do not indicate what percentage of the corporate shares she owns or

contradict her unequivocal testimony that she has owned a 50% share in Flytime since its inception. On the other hand, respondent presented documents and testimony in favor of a conclusion that he is the sole owner of the corporation.

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

ENTERED: OCTOBER 18, 2012

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7968- Index 603250/05
7968A Wathne Imports, Ltd.,
Plaintiff-Appellant,

-against-

PRL USA, Inc., et al.,
Defendants-Respondents.

_____

Manatt Phelps & Phillips LLP, New York (Thomas C. Morrison and Jeremy R. Lacks of counsel), for appellant.

Kelley Drye & Warren LLP, New York (John M. Callagy of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 6, 2012, reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered February 29, 2012, dismissed, without costs, as superseded by the appeal from the aforementioned order.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Leland G. DeGrasse
Rosalyn H. Richter
Sheila Abdus-Salaam, JJ.

7968-7968A
Index 603250/05

_____x

Wathne Imports, Ltd.,
Plaintiff-Appellant,

-against-

PRL USA, Inc., et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered March 6, 2012, which, insofar as appealed from, granted defendants' motion in limine to preclude plaintiff's expert from testifying as to a particular measure of damages for lost profits for sales of handbags bearing the "Polo Sport" trademark, and from the order of the same court and Justice, entered February 29, 2012, which granted, in effect, the same relief.

Manatt Phelps & Phillips LLP, New York (Thomas C. Morrison and Jeremy R. Lacks of counsel), and Phillips Nizer LLP, New York (Bruce J. Turkle, Stuart A. Summit and Chryssa V. Valletta of counsel), for appellant.

Kelley Drye & Warren LLP, New York (John M. Callagy, Robert I. Steiner and Damon W. Suden of counsel), for respondents.

SAXE, J.

Plaintiff Wathne Imports Ltd. is a privately held family business that has been a licensee of defendants PRL USA Inc., The Polo/Ralph Lauren Company L.P. and Polo Ralph Lauren Corporation (collectively, Polo) since 1984, manufacturing and selling products bearing Polo/Ralph Lauren brand trademarks, doing business under the name "Polo Ralph Lauren Handbag and Luggage Company." On November 23, 1999, Wathne and Polo entered into an amended license agreement under which Polo granted Wathne the exclusive license through December 31, 2007 to manufacture and sell handbags in the United States and Canada bearing the marks "Polo by Ralph Lauren," "Ralph (Polo Player Design) Lauren," "Ralph Lauren" (including "Collection" and "Blue Label"), "Polo Sport," "Lauren/Ralph Lauren" and "Polo Jeans Co." If Polo discontinued one of those trademarks, the agreement required it to provide Wathne with a replacement mark of "substantially equivalent market value." The amended license agreement also gave Wathne a non-exclusive right to sell the merchandise outside the U.S. and Canada with Polo's consent, which right Polo could terminate upon 180 days' written notice.

Wathne alleges that Polo breached the license agreement by, inter alia, discontinuing the use of the "Polo Sport" mark in 2001 without replacing it with a substantially equivalent mark.

In their in limine motion, defendants asked the trial court to preclude plaintiff's use of its expert at trial and to exclude any testimony and evidence regarding alleged lost profits from international sales. The court granted defendant's motion by precluding plaintiff from establishing its lost profits through the testimony and reports prepared by plaintiff's damages expert, to the extent the expert used Coach, Inc., as a comparable in calculating the growth rate that Wathne could have achieved in its handbag sales. The court also precluded plaintiff from relying on international sales in calculating its lost profits claim.

Plaintiff's designated damages expert was Glenn Newman, an experienced CPA who was a partner at ParenteBeard LLC and was accredited by the American Institute of Certified Public Accountants in certified financial forensics. At his deposition and in his expert report, Newman analyzed, inter alia, Wathne's damages arising from the discontinuance of the Polo Sport mark. To do so, he determined the average of the actual gross sales from Polo Sport handbags during the period 1998 to 2000, and then compared the available data from other companies selling handbags – specifically, Coach and J. Tod's s.p.a. – as benchmarks for determining the growth rate in the handbag industry since then. Newman explained that he used Coach's and J. Tod's figures

because no other companies publicly reported handbag sales. Newman concluded that sales of Polo Sport-branded handbags would have grown throughout the license period, noting that it was a period when people were buying more handbags, as shown by Coach's handbag sales, which had grown at a rate of 30% a year, a figure he verified by cross-checking against J. Tod's handbag sales during that period. Newman extrapolated that, had Polo not discontinued the Polo Sport brand in 2001, Wathne's revenues between 2001 and 2007 would have grown at a compounded annual growth rate of 25%, and using that growth rate, Newman projected that Polo Sport sales should have been $341.3 million between July 1, 2001 and December 31, 2007. He then calculated lost profits on Polo Sport sales of $82.6 million.

Although Newman stated in his expert report that Wathne and Coach had comparable distribution channels, he acknowledged during his deposition that Coach operated out of its own 259 retail stores, while Wathne sold to outlet stores and department stores and did not operate any retail stores of its own. He also acknowledged the sales projections Wathne made in February 1998 and April 2000, in which it stated that "the business continue[d] to decline in Polo Sport" during the preceding periods; according to Newman, market segmentation had affected Wathne's sales results. Newman explained that he took these factors into

account in forming his damage assessment.

In their in limine motion, defendants' expert asserted that Newman's damages estimate was grossly overstated, in view of Wathne's actual profits in the previous years, and suggested that the assumptions upon which Newman based his calculation were "aggressive and speculative." Defendants also retained an industry expert, Victor Lipko, who challenged Newman's premise by asserting that Coach's and Tod's handbags were not competitive with plaintiff's; however, Lipko acknowledged that he did not know of any publicly available information about products that were competitive with Polo Sport, explaining that he "was not asked to" look for that information.

The trial court held that, as a matter of law, it was incorrect for plaintiff's expert to use Coach, Inc. as a comparable in order to determine the prospective growth rate for sales of Polo Sport handbags, because the two brands were too dissimilar. The court remarked that sales by a Polo licensee could not be compared with sales by a "standalone" company such as Coach that sold its own product line. It then proposed an analysis of its own devising, not proposed by any expert: that plaintiff's expert should compare Polo Sport handbag sales with Polo's sales of its products bearing other trademarks over the same period. Although defendants' damages expert had admitted

that there was no other publicly available data on handbag sales during the relevant period, and defendants' industry expert had offered no alternative approach to establishing the industry growth rate during the period in question, the trial court stated that sales of Polo-branded products generally was the appropriate mechanism by which plaintiff's expert should calculate plaintiff's growth projections and ultimately its lost profits.

We reverse. The perceived flaws in plaintiff's expert's analysis are relevant to the weight a jury should give to the expert's report and testimony; they do not present sufficient grounds for ruling that analysis inadmissible. Newman's analysis and conclusions should be challenged through cross-examination; the jury must decide whether or not his methodology was appropriate. As the United States Supreme Court said in *Daubert v Merrell Dow Pharms., Inc.* (509 US 579, 596 [1993]), "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attaching shaky but admissible evidence."

It is true that a party may only recover damages for loss of future profits if it "demonstrate[s] with certainty that such damages have been caused by the breach . . ., the alleged loss must be capable of proof with reasonable certainty . . . not [] merely speculative, possible or imaginary . . . and the

particular damages [must have been] fairly within the contemplation of the parties" (*Kenford Co. v Erie County*, 67 NY2d 257, 261 [1986]). Of course, "New York law does not countenance damage awards based on [s]peculation or conjecture" (*Wolff & Munier, Inc. v Whiting-Turner Contr. Co.*, 946 F2d 1003, 1010 [2d Cir 1991] [internal quotation marks omitted]).

The Court in *Ashland Mgt. v Janien* (82 NY2d 395, 405-406 [1993]) explained that the evidence in *Kenford Co. v Erie County* was insufficient to satisfy the applicable standard because the claim of lost profits for managing a stadium required the court to accept too many speculative assumptions, namely, that "the stadium had been completed, opened and operated successfully for 20 years, [and] that it also attracted professional sporting events, concerts and conventions fully supported by the public." In contrast, the evidence in *Ashland* was sufficient because it "rest[ed] on the parties' carefully studied professional judgments of what they believed were realistic estimates of future assets to be managed by the use of [a particular growth model]" (82 NY2d at 406).

While both *Ashland* and *Kenford* were determinations made after trial, claims for lost profits have been dismissed by this Court upon a motion for summary judgment where the plaintiff's lost profits were said to arise from a "new business endeavor"

with no track record (*see Zink v Mark Goodson Prods.*, 261 AD2d 105, 106 [1st Dept 1999], *lv dismissed* 94 NY2d 858 [1999]), or a business in the "development stage" that "had never generated any revenue" (*see Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647, 647-648 [1st Dept 2009], *lv denied* 14 NY3d 737 [2010]).

A number of federal cases have explained that where lost profits are at issue, "'an expert's testimony should be excluded as speculative if it is based on unrealistic assumptions regarding' a party's future prospects" (*see Supply & Bldg. Co. v Estee Lauder Intl., Inc.*, 2001 WL 1602976, *4, 2001 US Dist LEXIS 20737, *13 [SD NY Dec 14, 2001]). In *Supply & Bldg. Co.*, the court precluded the plaintiff's expert's evidence regarding its claim of lost profits because the expert based his projections on a summary of orders prepared by the company's general manager, rather than on the orders themselves, assumed certain sales values based on the assurances of the plaintiff's principal rather than review of its records, and assumed that the plaintiff's operations had successfully started up on a particular date, based on plaintiff's representations, rather than accessible evidence to the contrary. The expert's report in *Compania Embotelladora del Pacifico, S.A. v Pepsi Cola Co.* (650 F Supp 2d 314, 321 [SD NY 2009]), was precluded because the court

found it to be “built upon one baseless, flawed assumption after another.”

However, a degree of uncertainty is to be expected in assessing lost profits (*Duane Jones Co. v Burke*, 306 NY 172, 192 [1954]). “When the existence of damage is certain, and the only uncertainty is as to its amount, the plaintiff will not be denied recovery of substantial damages,” although, of course, the plaintiff must show “a stable foundation for a reasonable estimate” of damages (*ESPN, Inc. v Office of Commr. of Baseball*, 76 F Supp 2d 416, 418 [SD NY 1999] [internal quotation marks omitted]; *Freund v Washington Sq. Press*, 34 NY2d 379, 383 [1974]). An estimate of lost profits incurred through a breach of contract “necessarily requires some improvisation, and the party who has caused the loss may not insist on theoretical perfection” (*Tractebel Energy Mktg., Inc. v AEP Power Mktg., Inc.*, 487 F3d 89, 111 [2d Cir 2007] [internal quotation marks omitted]). “[I]t is always the breaching party . . . who must shoulder the burden of the uncertainty regarding the amount of damages” (*Boyce v Soundview Tech. Group, Inc.*, 464 F3d 376, 392 [2d Cir 2006]).

Newman’s use of sales of Coach handbags in his methodology was not without foundation; therefore, his analysis should not have been dismissed as a matter of law. Contrary to the trial

court's conclusion, we view the rate of growth experienced in the fashion handbag market during the period in question as related to a calculation of plaintiff's lost profits. Newman's effort to anticipate the expected growth rate in sales of Polo Sport handbags may have contained an element of "improvisation." However, Newman did not equate the Polo Sport's with Coach's success or profit levels; he merely used Coach's handbag sales as a tool to evaluate how well that broad category of product sold during the relevant period. The validity of this approach may be challenged at trial, but by holding that it was incorrect as a matter of law, the trial court unduly interfered with the approximation that was required due to the lack of more exact comparables.

It was also error for the trial court to insist that plaintiff's expert re-calculate plaintiff's lost profits, replacing the Coach handbag figures with the figures for sales of Polo Sport's other products. There was no indication by any expert that those figures were more valid or more likely to produce an accurate result than the figures used by plaintiff's expert.

Furthermore, neither plaintiff's actual sales figures prior to the alleged breach nor plaintiff's modest sales projections made in 1998 and 2000 disprove or invalidate the growth rate

that, according to Newman, had developed since that time, as determined based on other companies' handbag sales.

Finally, plaintiff's expert should also be permitted to testify regarding international sales for purposes of the calculation of damages. Although plaintiff's right to conduct international sales required Polo's consent and could be terminated, the record provides a proper basis for inclusion of this category of sales in the estimate of lost profits as well, since plaintiff had, in fact, sold the trademarked handbags on the international market (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]).

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered March 6, 2012, which, insofar as appealed from, granted defendants' motion in limine to preclude plaintiff's expert from testifying as to a particular measure of damages for lost profits for sales of handbags bearing the "Polo Sport" trademark, should be reversed, on the law, without costs, and the motion denied. The appeal from so much of the order of

the same court and Justice, entered February 29, 2012, which granted, in effect, the same relief, should be dismissed, without costs, as superseded by the appeal from the aforementioned order.

All concur.

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

ENTERED: OCTOBER 18, 2012

CLERK