SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 5, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

1545 People of the State of New York, Respondent, Ind. 16635C/05

-against-

Naomi Waite,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Seth Marvin, J.), rendered May 17, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, and sentencing her to a term of 1 year, unanimously reversed, on the law, and the matter remanded for a new trial.

The single issue raised on this appeal is whether the pretrial ruling that allowed two undercover officers to identify themselves at trial solely by their shield numbers was reversible error. The trial court held that by waiving their right to a *Hinton* hearing (*see People v Hinton*, 31 NY2d 71 [1972], *cert denied* 410 US 911 [1973]) and agreeing to closure of the courtroom to the general public for the testimony of two

undercover officers on the condition that defendants' family members be allowed into the courtroom, defendant and her codefendant had necessarily conceded the grounds required for the undercover officers to testify anonymously. We conclude that it was error to treat defendant's conditional waiver of the constitutional right to a public trial as a concomitant waiver of the separate right to confront witnesses. Because under *People v Waver* (3 NY3d 748, 750 [2004]) we cannot find the error to be harmless, we reverse.

The right to examine a witness regarding his or her identity was discussed in *Smith v Illinois* (390 US 129 [1968]). "[W]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself" (*id.* at 131 [footnote omitted]). The prosecutor in the case, while objecting to questions of identity and residence, had given no reason for excusing the witness from answering them (*id.* at 134 [White, J., concurring]).

In *People v Stanard* (42 NY2d 74, 83 [1977]), the ruling of *Smith v Illinois* was applied where the People sought to shield a

witness's identity. The Court held that fear for a witness's personal safety was sufficient to shift the burden to the defendant to prove the necessity and materiality of the testimony (*id.* at 84-85). More recently, in *People v Waver* (3 NY3d 748, *supra*), the Court applied the *Stanard* approach in a buy-and-bust prosecution similar to the present case, where the undercover officer had been permitted to identify himself only by shield number. The Court reversed the conviction, explaining that the required sequential three-step inquiry had not been undertaken. The People have the initial burden to "come forward with some showing of why the witness should be excused from answering the question. Excuse may arise from a showing that the question will harass, annoy, humiliate or endanger the witness" (3 NY3d at 750, quoting *Stanard* at 84). The burden then shifts to the defense "to demonstrate the materiality of the requested information to the issue of guilt or innocence" (*id.*, quoting *Stanard* at 84). It is then the trial court's task to balance the defendant's right to cross-examination with the witness's interest in some degree of anonymity (*id.*).

The initial showing required for closure of the courtroom under *People v Hinton* (31 NY2d 71, 75 [1972]) is a demonstration that the undercover officers' safety and effectiveness would be compromised by leaving the courtroom open to the general public. Accordingly, a credible showing that the undercover officer would

be endangered by revealing his or her name in open court could not only successfully demonstrate a basis for limited closure (*see People v Ramos*, 90 NY2d 490 [1997], *cert denied sub nom Ayala v New York*, 522 US 1002 [1997]; *People v DeJesus*, 305 AD2d 170 [2003], *lv denied* 100 NY2d 619 [2003]), but could also demonstrate grounds for anonymous testimony under *People v Waver* (*supra*).

Indeed, this Court has held that a showing made by the People at a *Hinton* hearing may also establish the facts required by step one of the *Waver* protocol (*see People v Washington*, 40 AD3d 228 [2007], *lv denied* 9 NY3d 927 [2007]; *People v Smith*, 33 AD3d 462 [2006], *lv denied* 8 NY3d 849 [2007]). However, in those cases, such an evidentiary showing was made. Here there was no showing; there was merely a conditional waiver of a right to a trial completely open to the public.

Two distinct constitutional rights are at issue: One is the right to a public trial; the other is the right to confront witnesses testifying against the defendant. Since "[a] waiver, to be enforceable, must not only be voluntary but also knowing and intelligent" (*People v Seaberg*, 74 NY2d 1, 11 [1989]), defendant's conditional waiver of the right to a public trial should not have been construed to encompass, by implication, a waiver of the right to confront witnesses.

Nor is defendant's waiver, as a matter of law, necessarily a

concession that the People would otherwise have successfully established that the undercover officers would be endangered by providing their names. For instance, it may as easily have resulted from defendant's decision that the right to a public trial was not important to her. As long as there is any possibility other than a concession of facts, it cannot be said that the necessary facts were conceded as a matter of law.

"When the requirements of *Stanard* have not been met, a finding of harmless error is not warranted where, as here, the testimony of the anonymous witness is central to the People's case and defendant's ability to cross-examine the anonymous witness is purely speculative" (*People v Waver*, 3 NY3d at 750).

We therefore reverse and remand for a new trial.

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3814 The People of the State of New York, Ind. 5369/06
Respondent,

-against-

Everette Wilson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Gliner of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered January 26, 2007, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree and identity theft in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing evidence supports the court's finding that the arresting officer was justified in conducting a common-law inquiry. The officer, who was assigned to a subway station and was watching a surveillance video monitor, saw defendant engaged in furtive behavior at a MetroCard vending machine. The officer recognized this behavior, based upon her training and experience (*see People v Valentine*, 17 NY2d 128, 132 [1966]), as indicative of criminal activity involving credit cards. Viewed individually

and by an untrained observer, defendant's actions, including rapid purchases of multiple MetroCards with multiple credit cards, might not be suspicious, but when viewed collectively and in the light of the officer's expertise, they provided the officer with a founded suspicion of criminal activity warranting a level-two inquiry (*see People v De Bour*, 40 NY2d 210, 223 [1976]). Defendant's response to the officer's questions, and his production of an identification card and a credit card that clearly did not belong to him, provided probable cause for his arrest.

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

ENTERED: JUNE 5, 2008

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3815 In re Ormond Gilbert, Index 2382/02
Petitioner-Respondent,

-against-

Jerilyn Perine, as Commissioner of the New York City Department of Housing Preservation and Development, et al.,
Respondents-Appellants,

Rosedale Gardens, Inc.,
Respondent.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for appellants.

Legal Services NYC-Bronx, Bronx (Amy Hammersmith of counsel), for Ormond Gilbert, respondent.

Judgment (denominated an order), Supreme Court, Bronx County (Alan J. Saks, J.), entered January 12, 2006, which granted the petition to annul respondent's determination denying petitioner succession rights to his deceased mother's apartment and denied the municipal respondents' cross motion to dismiss the petition, unanimously reversed, on the law, without costs, the petition denied and the cross motion granted.

The Supreme Court erred in invoking the "relation back" doctrine to join Rosedale Gardens, Inc. as a necessary party respondent after the expiration of the applicable limitations period since petitioner's failure to name Rosedale Gardens in his

original complaint was due to a mistake of law and not of fact (*see Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 165 [2002]; *see also Buran v Coupal*, 87 NY2d 173, 181 [1995]).

While we would otherwise remand for consideration whether this proceeding should continue in the absence of Rosedale Gardens, pursuant to CPLR 1001(b) (*see Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 460 [2005]), in view of petitioner's failure to demonstrate why his name did not appear on his mother's income affidavit for the year preceding her death, respondents' denial of his succession application cannot be deemed arbitrary and capricious (*see Matter of Callwood v Cabrera*, 49 AD3d 394 [2008]; *Matter of Greichel v New York State Div. of Hous. & Community Renewal*, 39 AD3d 421 [2007]).

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3816 In re Anastasi & Associates, et al., Index 600557/07
Petitioners-Respondents,

-against-

Masaryk Towers Corporation,
Respondent-Appellant.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for appellant.

Zetlin & De Chiara LLP, New York (Raymond T. Mellon of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered August 3, 2007, confirming an arbitration award to petitioners in the principal amount of $214,073.02, unanimously affirmed, with costs.

The award was neither irrational nor contrary to public policy (*see Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). Respondent may not avoid payment for architectural services performed on its behalf by petitioners prior to the license suspension of one of the architects and without any evidence of misconduct on petitioners' part in connection with this project. The court appropriately declined to divest this special proceeding of

its summary nature by consolidating it with a pre-existing plenary action (*see Lun Far Co. v Aylesbury Assoc.*, 40 AD2d 794 [1972]).

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

ENTERED: JUNE 5, 2008

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3817 In re Dante Devon A.,

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

Confessor A.,
Respondent-Appellant,

-against-

The Children's Aid Society,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Steven Banks, The Legal Aid Society, New York (Judy Waksberg of counsel), and Proskauer Rose LLP, New York (Nathaniel M. Glasser of counsel), Law Guardian.

Order, Family Court, New York County (Jody Adams, J.), entered on or about June 13, 2007, which, to the extent appealed from, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and committed his custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supported the determination that the father permanently neglected the subject child by failing to plan for his future despite the agency's diligent

efforts to encourage and strengthen the parental relationship (*see* Social Services Law § 384-b[7][a]). The record shows that the father failed to adhere to the service plan, submit to drug testing, visit the child regularly, and obtain the necessary training to properly care for the child's medical condition. Notably, it was the failure to properly attend to the child's medical condition that prompted placement of the child in foster care (*see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]). An agency that demonstrates its diligence, but faces an uncooperative parent, is deemed to have fulfilled its duty (*see Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; *Matter of LeBron*, 140 AD2d 276, 278 [1988]).

The evidence at the dispositional hearing was preponderant that the best interests of the child would be served by terminating the father's parental rights so as to facilitate the child's adoption by his foster mother, who is also his paternal aunt, with whom he has lived half of his life (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has a good relationship with the other children in the home and the foster mother has properly cared for his medical condition, resulting in

the child making improvements both behaviorally and academically.

The circumstances presented do not warrant a suspended judgment.

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3818-
3818A Wilford Pinkney, Jr., Individually and as Limited Administrator of the Estate of Tammi Terrell, etc., et al., Plaintiffs-Appellants,

-against-

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

Index 23116/02

Coleman & Andrews, LLC, Bronx (Philip W. Coleman of counsel), for appellants.

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

Worth, Longworth & London, LLP, New York (John W. Burns of counsel), for P.O. Andre Williams, respondent.

Orders, Supreme Court, Bronx County (Janice L. Bowman, J.), entered May 3, 2007, which dismissed the complaint, unanimously affirmed, without costs.

In this wrongful death action, the court properly found the City not liable on the basis of respondeat superior inasmuch as defendant Williams was not acting within the scope of his employment as a police officer when he visited the decedent, a fellow police officer, at her apartment for personal reasons and spent the night with her as he had done numerous times before, and she used his off-duty weapon to commit suicide (*see Joseph v City of Buffalo*, 83 NY2d 141, 146 [1994]; *Maginniss v City of New York*, 216 AD2d 134 [1995], *lv denied* 87 NY2d 943 [1996]). Nor

was the City liable for negligent hiring, retention, training or supervision, given the absence of evidence that it knew or should have known of any propensity by Williams to safeguard his firearm in a negligent manner (*Coffey v City of New York*, 49 AD3d 449 [2008]; *see also Naegele v Archdiocese of N.Y.*, 39 AD3d 270 [2007], *lv denied* 9 NY3d 803 [2007]).

Nor did plaintiffs establish any failure by the City in properly training its police officers, which might amount to deliberate indifference to the constitutional rights of others under 42 USC § 1983 (*see City of Canton v Harris*, 489 US 378 [1989]).

With respect to the officer's personal liability, even if plaintiffs could show it was negligent for him to leave his unloaded weapon in the room, they failed to produce a scintilla of evidence in the record to suggest he should have anticipated the decedent would take her own life (*see McGuire v Triborough Bridge & Tunnel Auth.*, 305 AD2d 322, 323 [2003], *lv denied* 1 NY3d 510 [2004]).

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3819 The People of the State of New York, Ind. 19/01
Respondent,

-against-

William Adams,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (John E.H. Stackhouse, J. at jury trial; Gregory Carro, J. at sentence), rendered December 21, 2005, convicting defendant of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony offender, to concurrent terms of 4½ to 9 years, unanimously affirmed.

For the reasons stated in our decision on a prior appeal in this case (13 AD3d 316 [2004]), we conclude that the trial court properly exercised its discretion in denying defendant's request for an adjournment. We have considered and rejected defendant's constitutional claim in this regard.

The sentencing court erred by permitting defendant to represent himself at his ultimate sentencing proceeding, without making the proper inquiry to establish he understood the risks of

self-representation (*see People v Wardlaw*, 6 NY3d 556, 558 [2006]). However, denial of the right to counsel at a particular proceeding does not invariably require the remedy of repetition of the tainted proceeding, or any other remedy (*see id.* at 559). Here, the court indicated prior to sentencing that it intended to impose the minimum sentence permitted by law, and it ultimately did so. Furthermore, by the time defendant chose to go pro se, his counsel had already sufficiently litigated issues relating to defendant's second felony offender status, and those issues were meritless in any event. Therefore, the tainted proceeding had no adverse impact (*id.*), and a remand for resentencing would serve no useful purpose.

Defendant's challenges to the prosecutor's summation and the court's supplemental jury charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: JUNE 5, 2008

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3820-
3821-
3822-
3823-
3824-
3824A-
3824B James L. Melcher, Index 604047/03
Plaintiff-Appellant,

-against-

Apollo Medical Fund
Management L.L.C., et al.,
Defendants-Respondents.

Jeffrey A. Jannuzzo, New York, for appellant.

Greenberg Traurig LLP, New York (Leslie D. Corwin of counsel), for respondents.

Orders, Supreme Court, New York County (Herman Cahn, J.), entered August 23, September 20, November 19 (two orders) and December 12, 2007, which denied plaintiff's motions, respectively, to stay the trial and strike the note of issue, to strike the answer as a spoliation sanction and grant a default judgment, for recusal, to disqualify defendants' trial counsel, and to strike the answer for alleged deceit by defendant Fradd and his counsel, and order, same court and Justice, entered October 22, 2007, which granted defendants' motion to quash plaintiff's subpoenas of their attorneys, unanimously affirmed, without costs.

Order, same court and Justice, entered December 14, 2007, which denied plaintiff's motion to vacate an oral directive to clone the hard drives of his business and personal computers, unanimously reversed, on the law and the facts, without costs, and the motion granted.

The court properly declined to recuse itself based on its son's employment as a new associate in the corporate department of the large law firm representing defendants in this litigation (*see Faith Temple Church v Town of Brighton*, 348 F Supp 2d 18 [2004]). The court had presided over the litigation for three years, had decided numerous motions, and had directed the filing of a note of issue, distinguishing this case from another in which the court had granted a recusal motion when the case was still in its infancy.

Deceit warranting the striking of the answer was not conclusively demonstrated (*see 317 W. 87 Assoc. v Dannenberg*, 159 AD2d 245 [1990]). Whether the destruction of evidence was intentional or merely negligent presents an issue for the trier of fact (*see Taieb v Hilton Hotels Corp.*, 131 AD2d 257, 263 [1987], *appeal dismissed* 72 NY2d 1040 [1988]), and plaintiff failed to establish that without the evidence he would be unable to prove his case (*see Positive Influence Fashions, Inc. v Seneca Ins. Co.*, 43 AD3d 796 [2007]; *Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [2002]).

Plaintiff failed to carry his burden of demonstrating, so as to warrant the disqualification of defendants' trial counsel, either that defendant Fradd's counsel lied (*see* Code of Professional Responsibility DR 7-102 [12 NYCRR 1200.33]) or that the attorneys' proposed testimony was necessary, since it would have been offered for the collateral purpose of impeachment (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445 [1987]; *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 152-153 [1994], *affd* 87 NY2d 826 [1995]). Similarly, the trial subpoenas seeking information for impeachment were improper (*see Fazio v Federal Express Corp.*, 272 AD2d 259 [2000]); since there was no showing of a crime or fraud, assertion of the attorney-client privilege was not precluded (*see Matter of Grand Jury Subpoena*, 1 AD3d 172, 173 [2003]).

In view of the absence of proof that plaintiff intentionally destroyed or withheld evidence, his assistant's testimony that she searched his computers, and the adequate explanation for the non-production of two items of correspondence, the court improperly directed the cloning of plaintiff's computer hard drives (*see The Scotts Company LLC v Liberty Mut. Ins. Co.*, 2007 WL 1723509, 2007 US Dist LEXIS 43005 [SD Ohio 2007]; *Menke v Broward County School Bd.*, 916 So 2d 8, 11-12 [Fla App 2005]).

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: JUNE 5, 2008

Tom, J.P., Nardelli, Buckley, Renwick, JJ.

3825 Young Israel Co-Op City, et al., Index 6346/06
Plaintiffs-Respondents,

-against-

Guideone Mutual Insurance Company,
Defendant-Appellant.

Schnader Harrison Segal & Lewis LLP, New York (Carl J. Schaerf of counsel), for appellant.

Alpert & Kaufman, LLP, New York (Gary Slobin of counsel), for respondents.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered on or about January 2, 2008, which granted plaintiffs' motion for a declaration that defendant must defend and indemnify them in an underlying personal injury action, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the cross motion granted. The Clerk is directed to enter judgment accordingly.

The court improperly found that plaintiffs' 40-day delay in notifying defendant of the motor vehicle accident was reasonable as a matter of law (*see Pandora Indus. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 [1992]). Under the insurance policy at issue, which required "prompt notice" of any accident or loss, plaintiffs' timely forwarding of the claim letter was not

adequate notice (*see e.g. City of New York v Continental Cas. Co.*, 27 AD3d 28, 31 [2005]). Given that plaintiffs were allegedly negligent in this rear-end collision and that the underlying claimant was taken away from the accident by ambulance (*cf. Kelly v Nationwide Mut. Ins. Co.*, 174 AD2d 481 [1991]), plaintiffs failed to raise an issue of fact as to whether its delay in giving notice was reasonably founded upon a good-faith belief of nonliability (*see Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 241 [2002]).

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

ENTERED: JUNE 5, 2008

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3826 Bernice Bookhamer, et al., Plaintiffs-Appellants, Index 603008/05

-against-

I. Karten-Bermaha Textiles Co., L.L.C., et al., Defendants-Respondents.

Kaye Scholer LLP, New York (Julius Berman of counsel), for appellants.

Simon, Meyrowitz & Meyrowitz, P.C., New York (Bradley A. Alperin of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered April 5, 2007, which, to the extent appealed from, denied plaintiffs' motion for partial summary judgment, unanimously affirmed, with costs.

The limited liability company was formed in 1995 and owned equally by plaintiffs' decedent, Julia Karten, and her late husband, Isidore Karten. When Isidore died in 1999, he left his 50% interest to his son, defendant Harold Karten. Harold took over management of the company at that time. The widow Julia died in 2002, leaving her 50% interest in the residuary estate, to be shared equally by Harold and his two sisters (plaintiffs herein). Plaintiffs, the executors of their mother's estate, brought this action to recover distributions allegedly wrongfully withheld by their brother.

There are triable issues of fact as to whether Harold Karten, now controlling two-thirds of the company, was entitled to collect excess distributions as compensation for carrying out the daily operations of the business, and whether such compensation was fair and reasonable (*see* Limited Liability Company Law § 401[b], § 411[b],[e]). There are also unresolved questions of fact as to whether Harold breached his fiduciary obligation to his mother (the non-managing 50% owner) during her lifetime, and to her estate since her passing, to operate the company in good faith and fairness, to avoid self-dealing, and to make full disclosure of all material facts (*see Birnbaum v Birnbaum*, 73 NY2d 461 [1989]).

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3827-
3827A The Trustees of Princeton University,
Plaintiff-Respondent,

-against-

National Union Fire Insurance Co. of Pittsburgh, Pa.,
Defendant-Appellant,

American International Group, Inc.,
Defendant.

Index 650202/06

Cahill Gordon & Reindel LLP, New York (Edward P. Krugman of counsel), for appellant.

Anderson Kill & Olick, P.C., New York (William G. Passannante of counsel), for respondent.

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered September 10, 2007, awarding plaintiff recovery from defendant National Union Fire Insurance Co. of Pittsburgh, Pa. in the amount of $9,607,021.93, and bringing up for review orders, same court and Justice, entered April 23, 2007 and August 20, 2007, to the extent they denied defendants' motion to dismiss the causes of action for breach of contract and declaratory judgment, granted plaintiff's cross motion for summary judgment on said causes of action, and directed entry of judgment accordingly, and order, same court and Justice, entered February 20, 2008, which denied National Union's motion to vacate the judgment, unanimously affirmed, with costs.

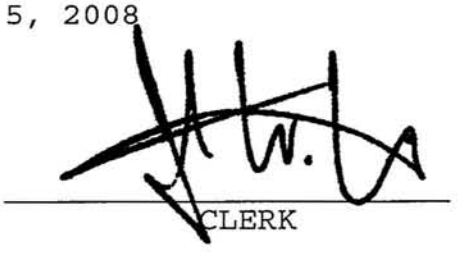
We reject National Union's contention that the subject insurance policy's $5 million sublimit for claims that seek equitable relief applies also to claims arising from the same underlying occurrence that seek legal relief based on tort and contract law principles, as it relies on a strained construction of the terms of the policy (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]; *242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103 [2006]). Similarly, we reject the contention that the policy's "insured versus insured" exclusion applies to claims brought against the insured entities by individual insureds acting in their individual capacities.

As the policy obligates National Union to advance all defense costs as they are incurred, subject to a right of recoupment of payment for noncovered costs after the underlying litigation is completed, the court had no obligation at this juncture to rule on the allocation of defense expenses.

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

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

ENTERED: JUNE 5, 2008



CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3830 1050 Tenants Corp., Index 108653/05
Plaintiff-Respondent,

-against-

Steven R. Lapidus, et al.,
Defendants-Appellants.

MW Moody LLC, New York (Mark Warren Moody of counsel), for appellants.

Gallet Dreyer & Berkey, LLP, New York (Jerry A. Weiss of counsel), for respondent.

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 25, 2007, awarding plaintiff legal fees and costs in the amount of $34,269.99, unanimously affirmed, with costs.

The Special Referee considered the relevant factors in determining reasonable attorney fees (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]), and his findings are supported by the record (*see Barrett v Toroyan*, 45 AD3d 301 [2007]). Time sheets of the non-testifying attorneys were properly admitted as business records; applicability of the hearsay exception was unchallenged. "Fees on fees" were properly awarded (*see Senfeld v I.S.T.A. Holding Co.*, 235 AD2d 345 [1997], *lv dismissed* 91 NY2d 956 [1998], *lv denied* 92 NY2d 818 [1998]; *cf. Sage Realty Corp. v Proskauer Rose*, 288 AD2d 14 [2001]).

We have considered defendants' other contentions and find them unavailing.

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

ENTERED: JUNE 5, 2008

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3831 The People of the State of New York, Respondent,

-against-

John Brown, Defendant-Appellant.

Ind. 2629/06

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

Robert M. Morgenthau, District Attorney, New York (Mark Dwyer of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered May 10, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second felony offender, to concurrent terms of 10 and 7 years, respectively, unanimously affirmed.

The court properly rejected defendant's peremptory challenge to a juror, made after both sides had accepted the juror and moved on to the exercise of challenges with respect to another group of jurors (*see People v Rincon*, 40 AD3d 538 [2007], *lv denied* 9 NY3d 880 [2007]; *People v Smith*, 278 AD2d 75, 76 [2000], *lv denied* 96 NY2d 763 [2001]).

The court properly exercised its discretion in questioning the jurors as a group, rather than individually, about whether

any of them had engaged in premature deliberations (*see People v Gonzalez*, 232 AD2d 204, 205 [1996], *lv denied* 89 NY2d 923 [1996]; *People v Almodovar*, 196 AD2d 718 [1993], *lv denied* 82 NY2d 890 [1993]). While there was evidence that a discharged juror had discussed the case with nonjurors, there was no reason to believe he had also discussed it with any of the remaining jurors. Under the circumstances, the court's collective inquiry of the jurors was reasonable.

The court's charge, viewed as a whole, properly instructed the jury that evidence of intoxication may negate any element of the crimes charged (*see* Penal Law § 15.25), including the knowledge and voluntariness elements of criminal possession of a weapon in the second and third degrees. There is no reasonable possibility that the charge misled the jury to believe that intoxication could only apply to the "intent to use the [firearm] unlawfully" (Penal Law § 265.03[1]) element of second-degree possession.

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3833 The People of the State of New York, Ind. 6264/06
Respondent,

-against-

Victor Rodriguez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 7, 2007, as amended June 20, 2007, convicting defendant, after a jury trial, of auto stripping in the second degree and possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). While each of defendant's actions, viewed in isolation, may have had an innocent explanation, his pattern of behavior supported the

conclusion that he intentionally aided his companion by acting as a lookout.

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

ENTERED: JUNE 5, 2008

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3834-
3835 The People of the State of New York, Ind. 905/04
Respondent,

-against-

Ronald Streeter,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J. at hearing; Robert H. Straus, J. at jury trial, sentence and resentence), rendered May 18, 2005, as amended May 9, 2006, convicting defendant of criminal possession of a controlled substance in the second degree and criminal possession of marijuana in the fourth degree, and sentencing him to an aggregate term of 4½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). We do not find the officer's account of the incident to be so implausible as to require us to reject his testimony.

Pursuant to the Drug Law Reform Act, the court reduced defendant's original sentence from 5 years to life to 4½ years, and we perceive no basis for a further reduction.

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3836-
3836A Alice Griffin, Index 116729/04
Plaintiff-Respondent-Appellant,

-against-

Starbucks Corporation,
Defendant-Appellant-Respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellant-respondent.

Weiser & Associates, New York (Martin J. Weiser of counsel), for respondent-appellant.

Orders, Supreme Court, New York County (Emily Jane Goodman, J.), entered August 17, 2006 and September 27, 2006, which, insofar as appealed from as limited by the briefs, granted defendant's motion to set aside the verdict awarding plaintiff $50,000 in past pain and suffering, $250,000 for future pain and suffering and $1,000 for medical expenses, to the extent of directing a new trial on the issue of damages for future pain and suffering only unless plaintiff stipulates to reduce the award for future pain and suffering from $250,000 to $150,000, unanimously modified, on the facts, to reduce the remittitur, to which plaintiff must stipulate within 30 days of service of a copy of this order, to $25,000, and otherwise affirmed, without costs.

Plaintiff was injured when, after ordering a cup of coffee, defendant's employee slid the cup across the counter toward

plaintiff causing it to fall over and spill on her left foot. The coffee was between 195 and 205 degrees and caused a second-degree burn, which resulted in permanent nerve damage, leading plaintiff to sometimes experience numbness and a burning sensation in her left foot.

The trial court properly concluded that the jury's finding that plaintiff's injuries were caused by the negligence of defendant's employee was based upon a fair interpretation of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). The court properly recognized that there was no basis upon which to disturb the jury's credibility determinations (*id.*), and we reject defendant's argument that plaintiff's actions following the accident were not consistent with that of someone who had hot coffee spilled on her.

Although the award of $50,000 for past pain and suffering was appropriate, the future pain and suffering award deviates materially from what would be reasonable compensation to the extent indicated (*see Beck v Woodward Affiliates*, 226 AD2d 328, 331 [1996]).

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Renwick, DeGrasse, JJ.

3838N Eugenia J. Fiala, et al., Index 601181/00
Plaintiffs-Respondents-Appellants,

-against-

Metropolitan Life Insurance Company, et al.,
Defendants-Appellants-Respondents.

Debevoise & Plimpton LLP, New York (Carl Micarelli of counsel), for appellants-respondents.

Lovell Stewart Halebian LLP, New York (Christopher Lovell of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Herman Cahn, J.), entered January 31, 2007, which, in an action arising out of the demutualization of defendant life insurance company, granted plaintiffs' motion for class action certification as to their claims under Insurance Law § 7312 and denied certification as to their claims for common-law fraud, unanimously modified, on the facts, to remove plaintiff Mark Smilow as a class representative, and otherwise affirmed, without costs.

The named plaintiffs clearly possess an "adequate understanding of the case" (*Rollin v Frankel & Co.*, 290 AD2d 368, 369 [2002]), and their attorneys clearly possess the requisite "competence, vigor, and experience" (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 24 [1991]). However, the presumed reliance of class representatives on their attorneys' expertise, and the avoidance of an appearance of impropriety, require that plaintiff

Mark Smilow, an associate at plaintiffs' co-lead counsel, be removed as a class representative, even though he has personally retained other counsel (*see Meachum v Outdoor World Corp.*, 171 Misc 2d 354, 371-372 [1996]). Certification of the common-law fraud claims was properly denied because class actions sounding in fraud require proof of reliance by each class member and a host of factors could have influenced a class member's individual decision to accept or reject the demutualization plan (*see Hazelhurst v Brita Prods. Co.*, 295 AD2d 240, 241-242 [2002]; *Katz v NVF Co.*, 100 AD2d 470, 473 [1984]). We have considered the parties' other arguments for affirmative relief and find them unavailing.

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

ENTERED: JUNE 5, 2008

CLERK

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3839N Ashlee Castro, an infant, by her Mother and Natural Guardian, Maritza Gonzalez, et al., Plaintiffs-Appellants,

-against-

New York Hospital Medical Center of Queens, et al., Defendants-Respondents.

Index 18318/07

Ressler & Ressler, New York (David Paul Horowitz and Bruce J. Ressler of counsel), for appellants.

Wagner, Doman & Leto, P.C., Mineola (Evelyn M. Evangelou of counsel), for respondents.

Order, Supreme Court, Bronx County (Maryann Briganti-Hughes, J.), entered on or about November 26, 2007, which granted defendants' motion pursuant to CPLR 510 and 511 to change venue from Bronx County to Queens County, unanimously affirmed, without costs.

Defendants met their initial burden of establishing that the venue chosen by plaintiffs in this medical malpractice action was improper (*see Hernandez v Seminatore*, 48 AD3d 260 [2008]). Defendants were located in Queens County, the alleged malpractice occurred in Queens County, and the medical records reflect that just weeks prior to the commencement of this action, plaintiffs lived at a Queens County address. This address did not match plaintiffs' purported Bronx address listed on the summons, which was misspelled and did not include a zip code. In opposition,

plaintiffs failed to provide supporting documentation establishing their residency in Bronx County (*see id.; Goldberg v Bierman*, 35 AD3d 807 [2006]). Furthermore, contrary to plaintiff's contention, the court was not required to conduct a hearing prior to deciding the subject motion (*compare Rivera v Jensen*, 307 AD2d 229, 230 [2003]).

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

ENTERED: JUNE 5, 2008

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 5, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
James M. Catterson
James M. McGuire, Justices.

The People of the State of New York,
Respondent,

Ind. 1165/06

-against-

3840
M-2605

Elliot Frost,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward McLaughlin, J.), rendered on or about September 29, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 14, 2008,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Motion seeking leave to withdraw appeal granted.

ENTER:

Clerk.

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3841 In re Jennifer Doyle, Index 100321/07
Petitioner-Appellant,

-against-

Judith A. Calogero, Commissioner of the New York State Division of Housing and Community Renewal, etc.,
Respondent,

The New York State Division of Housing and Community Renewal, etc.,
Respondent-Respondent.

Hughes Hubbard & Reed LLP, New York (Marshall B. Babson of counsel), for appellant.

Gary R. Connor, New York (Patrice Huss of counsel), for D.H.C.R., respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 16, 2007, which denied the petition seeking to annul respondents' luxury deregulation of petitioner's apartment, unanimously affirmed, without costs.

Petitioner urges that when determining household income for purposes of luxury deregulation (*see* Rent Stabilization Law [Administrative Code of City of NY] § 26-504.1), the agency should not have taken into consideration the income of her husband because he did not occupy the apartment during the two years preceding service of the income certification form, even though he did reside there at the time the form was served. However, this Court has previously upheld respondent's

interpretation of Bulletin 95-3, which provides that the operative date for considering whose income will be included when determining the total annual income of the occupants of a rent-stabilized apartment is the date when the income certification form is served on the tenant (*Matter of A.J. Clarke Real Estate Corp. v New York State Div. of Hous. & Community Renewal*, 307 AD2d 841 [2003]). That the application of this rule here will permit consideration of a new occupant's income as part of rent destabilization proceedings is not a basis for us to revisit the issue. Accordingly, respondents' determination was rationally based and was neither arbitrary and capricious nor an abuse of discretion (*see Matter of Plaza Mgt. Co. v City Rent Agency*, 48 AD2d 129 [1975], *affd* 37 NY2d 837 [1975]).

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

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

ENTERED: JUNE 5, 2008

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3842 In re Jose C.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), presentment agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about June 11, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of unauthorized use of a vehicle in the third degree, petit larceny, criminal possession of stolen property in the fifth degree, criminal mischief in the fourth degree and possession of burglar's tools, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously modified, on the law, to the extent of vacating the findings as to unauthorized use of a vehicle, larceny and possession of stolen property and dismissing those counts of the petition, and otherwise affirmed, without costs.

The evidence established that appellant and a companion were standing behind a car with an open trunk in the early morning hours, and closed the trunk as a police officer drove up. The

officer observed that the door lock and window had been broken, and that an ashtray full of change apparently had been removed from the car and deposited in a different car. The evidence also established that appellant and his companion possessed screwdrivers.

As the Presentment Agency concedes, since the vandalized car was not stolen, but was still at the location where the owner's brother had parked it, the evidence does not support the findings as to petit larceny and criminal possession of stolen property, which both related to the car. The evidence also was insufficient to establish unauthorized use of a vehicle in violation of Penal Law § 165.05(1). That crime requires "an exercise of dominion and control over the car, either mechanically or physically, to the exclusion of the owner's proprietary interest, even transitorily" (*People v Gray*, 154 AD2d 547, 547 [1989]). There was no evidence that appellant or his companion ever attempted to start the car, or had the means to do so. Neither appellant's presence near a vandalized car, nor the inference that he or his companion must have entered the car at some point to steal the ashtray and coins, established the requisite exercise of dominion and control (*id.; see also Matter of Javier F.*, 3 AD3d 493 [2004]; *Matter of Archangel O.*, 157 AD2d 729 [1990]; *Matter of Ruben P.*, 151 AD2d 485 [1989]). However, the court's findings as to the remaining charges were based on

legally sufficient evidence and were not against the weight of the evidence, as the evidence supported the inference that appellant committed criminal mischief by damaging the car and possessed a screwdriver that he used as a burglar's tool. Furthermore, the petition, as supplemented by the supporting deposition, was legally sufficient with respect to the criminal mischief and burglar's tools charges.

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

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

ENTERED: JUNE 5, 2008

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3843 The People of the State of New York ex rel. Victor Horrach, Petitioner-Appellant, Index 1269/06

-against-

Warden, Otis Bantum Correctional Center, et al., Respondents-Respondents.

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

Andrew M. Cuomo, Attorney General, New York (Hannah Stith Long of counsel), for respondents.

Order, Supreme Court, Bronx County (Caesar Cirigliano, J.), entered January 19, 2007, which denied petitioner's application for a writ of habeas corpus, unanimously affirmed, without costs.

Petitioner was arrested and charged with a parole violation when drugs were found in the locker that was assigned to him at a homeless shelter. A preliminary parole revocation hearing, at which petitioner did not raise any objection to the search of the locker, resulted in a finding of probable cause to believe that petitioner had violated the conditions of his parole by possessing a controlled substance. Petitioner then filed the instant habeas corpus proceeding alleging that the search of the locker was unlawfully conducted without his consent, a warrant, or particularized suspicion, and seeking, inter alia, to have the drugs recovered from the locker suppressed at the final

revocation hearing. Although the remedy of habeas corpus is no longer available as petitioner has been released from respondent Warden's custody (*People ex rel. Goldberg v Warden, Rikers Is. Correctional Facility*, 45 AD3d 356 [2007], *lv denied* __ NY3d __, 2008 NY Slip Op 66228 [March 13, 2008]), the proceeding is not moot because the question of whether petitioner was lawfully arrested affects the period of his post-release supervision (*cf. id.*). Accordingly, we deem the matter to be a proceeding seeking to compel respondent to hold a suppression hearing in connection with the final parole revocation hearing. So considered, we hold that petitioner is not entitled to a suppression hearing. Respondent's opposition establishes that Department of Homeless Services' procedures require that before a client is given a locker assignment, DHS staff must review with the client, and provide him or her with, a form acknowledging that the locker is "subject to inspection, at any time, by authorized personnel, pursuant to agency procedures." Accordingly, DHS clients can have no reasonable expectation of privacy in an assigned locker (*see People v Alston*, 16 AD3d 358 [2005], *lv denied* 4 NY3d 883 [2005]). We reject petitioner's argument that in order to show no such expectation, respondent had to submit a locker assignment form that was signed by petitioner, or otherwise demonstrate that

he affirmatively consented to searches of the locker. DHS's procedures require only that the form be reviewed with clients, and no claim is made by petitioner that it was not.

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

ENTERED: JUNE 5, 2008

CLERK

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3844 The People of the State of New York, Ind. 3725/03
Respondent,

-against-

Jermaine Cook,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Charles J. Tejada, J. at first jury trial and mistrial declaration; John Cataldo, J. at second jury trial and sentence), rendered October 17, 2005, convicting defendant of two counts of robbery in the first degree and two counts of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 22 years to life, unanimously affirmed.

At the first trial, the court properly exercised its discretion when it declared a mistrial. This action was based on manifest necessity, and double jeopardy did not bar retrial (*see Matter of Plummer v Rothwax*, 63 NY2d 243, 249-250 [1984]; *People v Michael*, 48 NY2d 1, 9 [1979]; CPL 280.10[3], 310.60[1][a]). The jury indicated that it was at an impasse after approximately 5 days of deliberations, which had been spread out over more than

10 days. While this was the first note stating the jury had reached an impasse, there had been two prior notes casting doubt on the jury's ability to reach a verdict, and the jury had been deliberating for an extensive period of time in a case that involved a relatively simple question of fact.

Under these circumstances, the court reasonably concluded that further deliberations would be futile (*see Plummer*, 63 NY2d at 250-253). Moreover, a juror could not assure the court that she could reach a fair and impartial verdict. The juror was scheduled to leave on an important trip on the day after the jury declared an impasse. While a juror's personal or financial inconvenience alone would be insufficient to establish the requisite manifest necessity (*Michael*, 48 NY2d at 9-10), here the juror was unable to declare her continued ability to deliberate fairly.

The court also properly considered alternatives to the mistrial (*see People v Ferguson*, 67 NY2d 383, 388 [1986]), such as an *Allen* charge, which it rejected given the length of deliberations at that time and the impending unavailability of the juror in question. The court also considered directing the juror to continue deliberating and miss the trip, but, as stated, this would have created uncertainty as to her ability to render a fair and impartial verdict. Suspension of deliberations until the juror returned from her trip was also impractical, especially

since another juror had a trip scheduled for the day after the first juror's return. Thus, the court properly found manifest necessity for a mistrial.

The hearing court properly denied defendant's motion to suppress his confession. The record supports the court's conclusions (4 Misc 3d 1007[A], 2004 NY Slip Op 50767[U] [2004]) that the police had sufficient probable cause to continue defendant's detention even after a witness failed to identify him in a lineup, and that the confession was voluntary.

The trial court properly denied defendant's request for a circumstantial evidence charge. Since defendant's admission of his guilt clearly constituted direct evidence, such a charge was not necessary (*see People v Guidice*, 83 NY2d 630, 636 [1994]). The fact that the court instructed the jury to consider the voluntariness of defendant's statement did not create an issue as to whether the statement was direct or circumstantial evidence, or change the case to one based on wholly circumstantial evidence (*compare People v Sanchez*, 61 NY2d 1022, 1023 [1984]).

Defendant's constitutional challenge to the procedure under which he was sentenced as a persistent violent felony offender is unpreserved and we decline to review it in the interest of

justice. As an alternative holding, we also reject it on the merits (*see Almendarez-Torres v United States*, 523 US 224 [1998]).

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

ENTERED: JUNE 5, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 5, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
James M. Catterson
James M. McGuire, Justices.

The People of the State of New York, Ind. 5825/05
Respondent,

-against- 3847

Mario Salgado,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about February 28, 2006,

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.

ENTER:

Clerk.

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

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3848-
3849 Joseph J. Cooke, et al., Index 601867/04
Plaintiffs-Respondents,

-against-

Richard J. Flanagan, et al.,
Defendants-Appellants.

Flanagan & Associates, PLLC, New York (Richard J. Flanagan of counsel), for appellants.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph J. Cooke of counsel), for respondents.

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered March 23, 2007, to the extent appealed from as limited by the briefs, awarding plaintiff Joseph J. Cooke the sum of $38,817.53, pursuant to an order, same court and Justice, entered March 13, 2007, which, inter alia, confirmed the report of Special Referee Howard Leventhal and denied defendants' motion to compel disclosure and to strike the affidavit of Richard Tobin, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The Special Referee conducted a full accounting in accordance with the parameters set by the order of reference, and

his findings are supported by the record (*see Baker v Kohler*, 28 AD3d 375 [2006], *lv denied* 7 NY3d 885 [2006]).

Defendants' remaining contentions are without merit.

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

ENTERED: JUNE 5, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 5, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
James M. Catterson
James M. McGuire, Justices.

The People of the State of New York, Ind. 2974/06
Respondent,

-against- 3853

George Borges,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered on or about August 9, 2007,

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.

ENTER:

Clerk.

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

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3854 In re Kevin O'Neill, Index 102034/06
Petitioner,

-against-

City of New York, et al.,
Respondents.

Watters & Svetkey, LLP, New York (Jonathan Svetkey of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

Determination of respondent Fire Department's Commissioner, dated October 13, 2005, terminating petitioner's employment as a firefighter, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [William A. Wetzel, J.], entered June 12, 2007), dismissed, without costs.

The penalty of termination for testing positive for marijuana during a random drug test under a zero tolerance policy in effect at the time of the decision does not shock the conscience (*see Trotta v Ward*, 77 NY2d 827 [1991]; *Matter of Kirk v City of New York*, 47 AD3d 406 [2008]; *Matter of McGovern v Safir*, 266 AD2d 107 [1999]). Although petitioner alleges that changes have been made to the Fire Department's policy regarding marijuana usage subsequent to petitioner's termination, we reject petitioner's claim that the changes should be retroactively

applied to his case (*see Matter of Solomon v Department of Bldgs. of City of N.Y.*, 46 AD3d 370, 372 [2007]).

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

ENTERED: JUNE 5, 2008

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3855 Robert Nagel, Index 3451/95
Plaintiff-Respondent,

-against-

Mette Nagel,
Defendant-Appellant.

King & King, LLP, Long Island City (Peter M. Kutil of counsel), for appellant.

Michael D. Karnes, Bronx, for respondent.

Order, Supreme Court, Bronx County (Ellen Gesmer, J.), entered August 29, 2007, which denied defendant's motion for summary judgment directing the sale of the parties' former marital residence and the payment to her of $100,000 from the proceeds of same, implicitly awarding plaintiff summary judgment on the issue, unanimously modified, on the law, to vacate the award of summary judgment to plaintiff, and otherwise affirmed, without costs, and the matter remanded for further proceedings consistent herewith.

At issue is whether the following provision of the oral stipulation incorporated in the parties' judgment of divorce imposes an obligation upon plaintiff to sell the marital

residence by the time of the emancipation of their youngest child:

> "[I]n the event the marital residence shall be sold no later than the emancipation of the parties' child and that Sophie, since the house is going to remain titled as it is today, in the event of the death of [defendant], the proceeds to which she is entitled under this agreement shall be - shall inure to the benefit of [defendant]'s heirs, distributors, or assignees, whoever she decides."

Agreeing with plaintiff, the motion court found that this provision, while "not the model of clarity," does not set a deadline for the sale of the residence, but provides only that if the residence is sold after defendant's death and before Sophie's emancipation, defendant's share will inure to the benefit of her heirs, rather than to the benefit of plaintiff. The court held that, even if the stipulation set a deadline, it would be superseded by a subsequent written agreement, which was incorporated in the judgment to clarify the stipulation and which includes no provision for the sale of the marital residence upon Sophie's emancipation. The court thus concluded that plaintiff is not required to sell the residence and that defendant is entitled to receive the $100,000 payment only when plaintiff chooses to do so.

While the court correctly denied defendant's motion for summary judgment, it incorrectly found that the stipulation is unambiguous, i.e., that plaintiff's is the only reasonable

interpretation of it (*see LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307-308 [2007]). Nor does the extrinsic evidence, which consists of each party's self-serving and cursory statement of the meaning of the stipulation, permit a determination of the parties' intent as a matter of law (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 2008 NY Slip Op 01647 [2008]; *Executive Off. Network v 666 Fifth Ave. Ltd. Partnership*, 294 AD2d 166 [2002]). We also note that the stipulation would not be superseded by the terms of the subsequent written agreement. The agreement incorporated by reference all terms and conditions of the stipulation not inconsistent with it, and the stipulation's purported establishment of a deadline for the sale of the residence is not inconsistent with anything in the written agreement.

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

ENTERED: JUNE 5, 2008

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3856 The People of the State of New York, Respondent, Ind. 2879/05

-against-

Michael Rodriguez, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered May 23, 2007, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 15 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. The People met their burden of establishing a valid consent search. The court had the unique opportunity to see and hear the witnesses, and there is no basis for disturbing its credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

After proceedings at which defendant was represented by new counsel, the court providently exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). During his plea allocution, defendant acknowledged that he understood the terms of his plea, understood that any decision on parole would be left

up to the parole authorities, and acknowledged that, aside from certain promises enumerated on the record, no other promise had induced his plea. As a result, defendant was not entitled to withdraw his plea on the basis of his uncorroborated assertion that his prior attorney had misinformed him he would actually be granted parole upon the expiration of his minimum term (*see People v Avery*, 18 AD3d 244 [2005], *lv denied* 5 NY3d 825 [2005]).

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

ENTERED: JUNE 5, 2008

CLERK

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3861N Peach Parking Corp., Index 103096/04
Plaintiff-Respondent,

-against-

346 West 40th Street, LLC,
Defendant,

The Hertz Corporation,
Defendant-Respondent,

Kinney System, Inc.,
Defendant-Appellant.

Meier, Franzino & Scher, LLP, New York (Steven K. Meier of counsel), for appellant.

Steven E. Stein, New York, for Peach Parking Corp., respondent.

Proskauer Rose LLP, New York (Jessica L. Freiheit of counsel), for The Hertz Corporation, respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered October 12, 2007, which granted plaintiff's motion to amend the complaint, granted defendant Hertz Corporation's motion to interpose a counterclaim and affirmative defense, and denied defendant Kinney System's motion for costs and fees, unanimously affirmed, without costs.

In this commercial landlord-tenant declaratory judgment action, the court did not improvidently exercise its discretion in granting plaintiff leave to amend its pleadings to add three additional causes of action -- against 346 West 40th Street and Kinney for reimbursement for costs of various repairs to the

leased premises after it was vacated by Hertz, and against Hertz for reimbursement for the repairs to the extent they were nonstructural and for unpaid rent. Leave was also appropriately granted to Hertz to interpose a counterclaim and the affirmative defense of constructive eviction. There was no showing of prejudice or surprise resulting from the delay in asserting these new claims (*see* CPLR 3025[b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Fahey v County of Ontario*, 44 NY2d 934 [1978]). Nor were the moving papers unreliable or insufficient to support the claims (*see Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1989]).

Costs and fees were properly denied. The imposition of costs in connection with such amendments is discretionary (*Continental Cas. Co. v R.S. Look, Inc.*, 212 AD2d 1064 [1995]; *see* Siegel, McKinney's CPLR Practice Commentaries C3025:13), and the court specifically found that the motions to amend were neither frivolous nor intended to harass Kinney (22 NYCRR 130-1.1).

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

ENTERED: JUNE 5, 2008

CLERK